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RIGHT TO COUNSEL VS. RIGHT TO A SPEEDY TRIAL: HOW THE PUBLIC DEFENDER CRISIS IS CAUSING A SIXTH AMENDMENT CONFLICT

Conor R. McCullough*

I. INTRODUCTION

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . and to have the Assistance of Counsel for his defense."¹ When written, the Framers probably did not envision a future clash between these two clauses. Yet, precisely such a collision seems imminent as the indigent defender system faces an unprecedented crisis in the United States.

To take just a few examples, what happens to an indigent defendant who is awaiting her constitutional right to counsel to be fulfilled but in the meantime is having his or her right to a speedy trial violated? Put differently, what happens when an indigent defendant seeks to have her right to a speedy trial fulfilled but is unable to secure representation because of an overworked indigent defender's office? Additionally, what are some possible solutions to rectifying this tension, and perhaps the indigent defender system generally?

There is ample scholarship on the rights to counsel and to a speedy trial individually, but little that discusses the relationship between them and the effect, if any, that they have on each other. Taking Missouri's public defender crisis as an entry point, this comment will survey the history of the right to counsel and speedy trial clauses in the Federal Constitution, meanwhile discerning what, if any, relationship exists between them. Part II raises some of the procedural issues that relate to the discussion, and Part III discusses the potential Sixth Amendment conflict the crisis may cause. Finally, Part IV proposes that the solution to the current indigent defender crisis may be found in mere adherence to holdings already handed down by the United States Supreme Court.

II. BACKGROUND

A. ORIGIN OF THE RIGHT TO COUNSEL AND RIGHT TO A SPEEDY TRIAL

An indigent's right to counsel dates back to nineteenth-century England.² In Britain, indigent defendants accused of felonies other than treason were not afforded counsel until 1836.³ While American jurisdictions initially followed the British rule, a shift toward the modern practice in the colonies began as far back as 1669,⁴ when they began to employ government-employed prosecutors.⁵ Because of their "familiarity with procedural niceties, the 'idiosyncrasies' of juries, and the personnel of the court,"⁶ American prosecutors enjoyed a significant advantage over *pro se* defendants, prompting courts to appoint attorneys to indigent clients

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¹ U.S. CONST. amend. VI.

² ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE* 3 (1992).

³ *Id.*

⁴ *Powell v. Alabama*, 287 U.S. 45, 64 (1932).

⁵ GARCIA, *supra* note 2, at 4.

⁶ *Id.* at 4.

because it was "essential to counter the prosecutor's advantage."⁷ Thus, after the colonies declared their independence, most states included the right to assistance of counsel in their constitutions.⁸

Initially, the right to "Assistance of Counsel for his defense" did not necessarily mean the right of indigent defendants to obtain appointed counsel.⁹ Rather, it meant that defendants, indigent or otherwise, had the right to secure counsel of their choice at their own expense.¹⁰ Only after Supreme Court intervention did the right to assistance of counsel connote that indigent defendants possessed the right to request counsel be appointed on their behalf.¹¹ However, this was a gradual process that lasted nearly two centuries,¹² coming to a head with the Supreme Court's decision in *Gideon v. Wainwright* in 1963.¹³

Much older than the right to counsel is the right to a speedy trial, the exemplar of "a rich historical lineage,"¹⁴ dating back to 1166 with the Assize of Clarendon.¹⁵ From then through the eighteenth century,¹⁶ "the defendant's right to speedy justice was deemed central to notions of fairness"¹⁷ in both England and the colonies. For example, the Virginia Declaration of Rights of 1776 codified the right to a speedy trial following independence,¹⁸ and several other states included such a provision in their state constitutions.¹⁹ Accordingly, the framers adopted the speedy trial clause into the United States Constitution.²⁰

While steeped in tradition, "the speedy trial clause receded into relative obscurity" in the new republic and was "overshadowed by other provisions of the Bill of Rights."²¹ In fact, the United States Supreme Court first addressed the speedy trial right in 1905 in *Beavers v. Haubert*, where the defendant contended that a waiver of jurisdiction violated his right to a speedy trial.²²

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ 372 U.S. 335 (1963).

¹⁴ GARCIA, *supra* note 2, at 159.

¹⁵ ASSIZE OF CLARENDON § 4 (1166), available at <http://avalon.law.yale.edu/medieval/assizecl.asp> ("And when a robber or murderer or thief or the receivers of them be arrested through the aforesaid oath, if the justices are not to come quite soon into the county where the arrests have been made, let the sheriffs send word by some intelligent man to one of the nearer justices that such men have been taken; and the justices shall send back word to the sheriffs where they wish to have the men brought before them; and the sheriffs shall bring them before the justices; and also they shall bring with them from the hundred and the vill where the arrests have been made two lawful men to carry the record of the county and hundred as to why the men were arrested, and there before the justices let them make their law.").

¹⁶ MAGNA CARTA para. 40 (1215), available at <http://avalon.law.yale.edu/medieval/magframe.asp> ("To no one will we sell, to no one we will refuse or delay, right or justice.").

¹⁷ GARCIA, *supra* note 2, at 159.

¹⁸ Va. Declaration of Rights § 8 (1776), available at http://avalon.law.yale.edu/18th_century/virginia.asp ("That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a *speedy trial* by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.") (*emphasis added*).

¹⁹ GARCIA, *supra* note 2, at 159.

²⁰ *Id.*

²¹ *Id.*

²² 198 U.S. 77, 84-85 (1905).

The Court denied this contention and classified the right as "relative" and quantified,²³ thus creating "the impression that speedy justice was not as important as other procedural rights accorded criminal defendants through the Bill of Rights."²⁴ This led lower courts to hold that the right to a speedy trial was "a privilege rather than a right . . . subordinate to the broader aims of public justice."²⁵

B. RIGHT TO COUNSEL

In 1932, the United States Supreme Court held that the right to counsel was a fundamental right that falls within the purview of the due process clause of the Fourteenth Amendment, thereby extending the right to counsel clause of the Sixth Amendment to the states.²⁶ In *Powell v. Alabama*, three defendants were charged with raping two girls.²⁷ Unable to secure assistance of counsel, the defendants were tried, convicted, and sentenced to death.²⁸ After the Alabama Supreme Court denied the defendants' motion for a new trial, the United States Supreme Court granted a writ of certiorari to review whether the defendants were denied right of counsel.²⁹ Upon hearing the case, the Court reversed and remanded, finding that the right to counsel had in fact been denied.³⁰

In reaching this conclusion, Justice Sutherland first addressed the issue of whether the right to counsel provision of the Sixth Amendment is extended to the states through the Due Process clause of the Fourteenth Amendment.³¹ The outcome of this query hinged on whether the right to counsel numbered among the "fundamental rights" that are extended to the states via the Fourteenth Amendment.³² The Supreme Court found that the right to counsel in capital cases was indeed a fundamental right by deducing that it is included in the notion of a hearing, and constitutes one of the "essential" ingredients "to the passing of an enforceable judgment."³³ After concluding that the right to counsel is part of the historical and practical notion of a hearing, the Court had little trouble connecting the dots and designating it a fundamental right.³⁴ Of course, the Supreme Court's holding on this matter was, at this time, limited to capital cases.³⁵

Ten years later, the right to counsel suffered a substantial setback in *Betts v. Brady*, a case where the Court decided not to extend the assistance of counsel right when the defendant did not face capital punishment.³⁶ In *Betts*, the defendant was indicted for robbery and asked for appointment of counsel because he could not afford one.³⁷ The Maryland Circuit

²³ *Id.* at 87; GARCIA, *supra* note 2, at 159.

²⁴ GARCIA, *supra* note 2, at 159.

²⁵ Francis H. Heller, *The Sixth Amendment to the Constitution of the United States* 61 (1951).

²⁶ *Powell v. Alabama*, 287 U.S. 45, 71, 73 (1932).

²⁷ *Id.* at 49.

²⁸ *Id.* at 50.

²⁹ *Id.*

³⁰ *Id.* at 71, 73.

³¹ *Id.* at 67-68.

³² *Id.* at 68.

³³ *Id.*

³⁴ *Id.* at 73.

³⁵ *Id.* at 71.

³⁶ 316 U.S. 455, 473 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963) (rejecting the idea that due process of the law does *not* require that in every case, regardless of circumstances, an indigent accused must be furnished counsel by the state).

³⁷ *Id.* at 456-57.

Court Judge denied Betts's request, "as it was not the practice in [that county] to appoint counsel for indigent defendants save in prosecutions for rape and murder."³⁸ Betts was convicted after proceeding pro se (although without waiving his right to counsel) and unsuccessfully appealed the conviction, based on denial of the right to counsel, to various levels of the Maryland court system.³⁹ Upon granting certiorari, the United States Supreme Court affirmed the lower court's holding and denied extension of the right to counsel in non-capital situations.⁴⁰

Justice Roberts, writing for the Court, came to his conclusion by adopting a narrow interpretation of *Powell*,⁴¹ deferring to state legislatures on the scope of the right,⁴² and ultimately concluding that the right to counsel is only a fundamental right in certain instances.⁴³ The Court, looking at the legislative history of the right to counsel in individual states, concluded that "in the great majority of the states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial."⁴⁴ The Court agreed with the lower court's analysis that if the right to counsel applied to all criminal cases, then a defendant would be able to request counsel in all matters, no matter how trivial – a holding the Court was unwilling to make.⁴⁵ Based on this analysis, combined with the limited application of *Powell*, the Court did not extend the right to counsel provision of the Sixth Amendment to the states through the Due Process clause of the Fourteenth Amendment, save in capital cases.⁴⁶

In dissent, Justice Black (with whom Justices Douglas and Murphy concurred) viewed the issue differently. Black did not believe that an attorney would have to be appointed in all cases, only those where the defendant was denied the procedural safeguards provided by the Sixth Amendment.⁴⁷ Black wrote, "If this case had come to us from a federal court, it is clear that we should have to reverse it, because the Sixth Amendment makes the right to counsel in criminal cases inviolable by the federal government."⁴⁸ Justice Black went on to write that he believed the Sixth Amendment was made applicable to the states through the Fourteenth Amendment.⁴⁹

To fulfill his prophecy, Justice Black reconsidered the right to counsel in 1963, with the United States Supreme Court's decision in *Gideon v. Wainwright*.⁵⁰ In that case, Justice Black held that the Sixth Amendment's Right to Counsel provision was, contrary to the holding in *Betts*, a fundamental right and, as such, should be extended to the states in all criminal matters, through the Due Process Clause of the Fourteenth Amendment.⁵¹ In *Gideon*, the defendant was charged with breaking and entering with the intent to commit a misdemeanor – a felony under

³⁸ *Id.* at 457.

³⁹ *Id.* See generally Mark C. Milton, Comment, Why Fools Choose to be Fools: A Look at What Compels Indigent Criminal Defendants to Choose Self-Representation, 54 St. Louis U. L.J. 385 (2009) (discussing several pitfalls of proceeding pro se).

⁴⁰ *Betts*, 316 U.S. at 457-58, 473.

⁴¹ *Id.* at 473.

⁴² *Id.* at 471-72.

⁴³ *Id.* at 473.

⁴⁴ *Id.* at 471.

⁴⁵ *Id.* at 473.

⁴⁶ *Id.*

⁴⁷ *Id.* at 474.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 372 U.S. 335 (1963).

⁵¹ *Id.* at 344.

Florida law.⁵² Unable to hire an attorney, the defendant requested that the court appoint one for him, but the court denied his request, as it was Florida's policy to appoint counsel only in capital cases.⁵³ After being tried without representation and convicted of the offense, the defendant appealed his conviction.⁵⁴ The Florida Supreme Court denied relief, but the United States Supreme Court granted certiorari, desiring "[t]o give this problem another review."⁵⁵

Justice Black, writing for the Court, held that the right to counsel is a fundamental right that is applicable to the states through the Fourteenth Amendment.⁵⁶ The first premise that Black posited was an assumption from *Betts*: "that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment."⁵⁷ Here, the Court departed from its holding in *Betts*, noting, "We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights."⁵⁸ Black held that for the *Betts* court to pen such a holding was a "break with [the Court's] own well-considered precedents."⁵⁹ Interestingly, while the *Betts* Court relied on the states to support its position, only two states asked the Court in *Gideon* to leave *Betts* intact, while twenty-two states were in favor of overruling *Betts* as "an anachronism."⁶⁰

C. RIGHT TO A SPEEDY TRIAL

Just as the right to counsel proved a favorite of the Warren Court era, so too did the 1960s breathe new life into the speedy trial right. In *Klopfer v. North Carolina*, the United States Supreme Court confronted a defendant who had been indicted in February 1964 for criminal trespass after failing to leave a restaurant.⁶¹ Klopfer was tried in March of the same year, but the jury failed to reach a verdict and the judge declared a mistrial, continuing the case for the term.⁶² In April of the following year, the prosecutor informed Klopfer that he intended to enter an order of "nolle prosequi with leave" on his case.⁶³ Klopfer, through his attorney, opposed the entry of the order, but the court indicated that it would approve.⁶⁴ Despite this, the prosecutor did not make the nolle prosequi motion and instead filed a motion for continuance, which was granted.⁶⁵ In August 1965, Klopfer filed a motion expressing his desire to have the charges "permanently concluded . . . as soon as is reasonably possible" because his case was not on the trial calendar.⁶⁶ The trial judge considered the status of the case in the same month, and the prosecutor moved for another order of nolle prosequi with leave, which was granted despite

⁵² *Id.* at 336-37.

⁵³ *Id.* at 337.

⁵⁴ *Id.*

⁵⁵ *Id.* at 337-38.

⁵⁶ *Id.* at 342.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 344.

⁶⁰ *Id.* at 345.

⁶¹ 386 U.S. 213, 216-17 (1967).

⁶² *Id.* at 217-18.

⁶³ *Id.* This "unusual North Carolina criminal procedural device" discharges an accused from custody, but allows the prosecutor the discretion to reinstate proceedings against him at any time in the future. *Id.* at 214.

⁶⁴ *Id.* at 217.

⁶⁵ *Id.* at 218.

⁶⁶ *Id.*

Klopfers objections.⁶⁷ Klopfers appealed the matter to the North Carolina Supreme Court, contending that the entry of the nolle prosequi with leave deprived him of his speedy trial right.⁶⁸ The North Carolina Supreme Court noted that the order of nolle prosequi with leave did not "permanently discharge the indictment," but still affirmed the lower court's order.⁶⁹ The United States Supreme Court granted certiorari, ultimately holding that the right to a speedy trial was a fundamental right and, as such, did indeed extend to the states through the Due Process Clause of the Fourteenth Amendment.⁷⁰

To reach this holding, Chief Justice Warren looked to the history of the right to a speedy trial.⁷¹ After examining the history of the clause's inclusion in the Sixth Amendment, Warren wrote, "The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution."⁷² The Court also compared the speedy trial right to its other recent holdings regarding Sixth Amendment issues, observing that "cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law."⁷³ By this reasoning, the Court had no problem in branding the speedy trial clause a fundamental right and extending it to the states through the Due Process Clause of the Fourteenth Amendment.⁷⁴

In 1972, the United States Supreme Court developed a balancing test in *Barker v. Wingo* to be used when determining whether a defendant's speedy trial right had been violated.⁷⁵ In that case, the defendant had been arrested for murder but had not been brought to trial for more than five years after the arrest.⁷⁶ The prosecution's strategy was to try the defendant's accomplice first so the accomplice's testimony, if convicted, could be used at Barker's trial.⁷⁷ However, the accomplice suffered six trials before he was finally convicted.⁷⁸ Shortly thereafter, a jury convicted Barker after further delays due to a witness's illness.⁷⁹ Following the conviction, Barker appealed the decision to the Kentucky Court of Appeals, but without success.⁸⁰ He then appealed the matter to the United States District Court for the Western District of Kentucky and the Sixth Circuit Court of Appeals.⁸¹ The Sixth Circuit held that Barker had waived his speedy trial right by failing to object to the continuances until three and a half years into the proceedings.⁸² The United States Supreme Court then granted certiorari to review the standard for speedy trial

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 218-19.

⁷⁰ *Id.* at 214, 223.

⁷¹ *Id.* at 223-26.

⁷² *Id.* at 226.

⁷³ *Id.* at 222.

⁷⁴ *Id.* at 222-23, 226.

⁷⁵ 407 U.S. 514, 530 (1972).

⁷⁶ *Id.* at 515, 518.

⁷⁷ *Id.* at 516.

⁷⁸ *Id.* at 516-17.

⁷⁹ *Id.* at 517-18.

⁸⁰ *Id.* at 518.

⁸¹ *Id.*

⁸² *Id.*

violation claims,⁸³ creating a four-factor balancing test⁸⁴ and holding that dismissal was the only available remedy when a speedy trial violation occurs.⁸⁵

The ad hoc test the Court developed in *Barker* revolved around four factors: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."⁸⁶ Justice Powell elaborated on each of the four factors.⁸⁷ The length of the delay must be presumptively prejudicial before an "inquiry into the other factors" is necessary, and must be relative to the severity of the crime and other circumstances of the particular case.⁸⁸ The reason-for-the-delay inquiry also considered what party caused the delay.⁸⁹ If the defendant caused the delay, then that weighed against the defendant, and vice-versa.⁹⁰ If the delay was caused by a non-party, such as over-crowded courts, then that would weigh against the government, but should not be given as much weight as an intentional delay.⁹¹ The third factor, that of assertion of the right, was linked to the length of the delay, as the longer the delay, the more likely it will be that the defendant asserts the right.⁹² Justice Powell noted that the "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."⁹³ Regarding prejudice to the defendant, the court aimed to address three issues: oppressive pretrial incarceration, "anxiety and concern of the accused," and the possibility of impairment to the defense.⁹⁴ Justice Powell concluded his analysis by saying that the Court "regard[s] none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant,"⁹⁵ leaving the test somewhat nebulous.

One year later in *Strunk v. United States*, the Supreme Court further clarified its holding in *Barker* that dismissal was the only remedy available when a defendant's speedy trial right was violated.⁹⁶ In that case, Strunk had been convicted of transporting a stolen vehicle across state lines, garnering him a five-year prison sentence.⁹⁷ Strunk appealed his conviction, arguing that there had been a ten-month delay between arrest and arraignment, a clear violation of his right to a speedy trial.⁹⁸ The appellate court agreed, but held "that the 'extreme' remedy of dismissal of the charges was not warranted," remanding the case to the trial court to reduce the sentence by 259 days – the length of the delay.⁹⁹ Strunk appealed this decision to the United States Supreme Court, which granted certiorari to review the "propriety of the remedy fashioned

⁸³ *Id.* at 515.

⁸⁴ *Id.* at 530.

⁸⁵ *Id.* at 522.

⁸⁶ *Id.* at 530.

⁸⁷ *Id.* at 530-33.

⁸⁸ *Id.* at 530-31.

⁸⁹ *Id.* at 531.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 532.

⁹⁴ *Id.*

⁹⁵ *Id.* at 533.

⁹⁶ 412 U.S. 434, 439-40 (1973).

⁹⁷ *Id.* at 434-35.

⁹⁸ See *id.* at 435-36.

⁹⁹ *Id.*

by the Court of Appeals"¹⁰⁰ and held that "dismissal must remain . . . 'the only possible remedy'" for deprivation of this constitutional right.¹⁰¹

In coming to this conclusion, Chief Justice Burger contrasted the speedy trial right with other Sixth Amendment guarantees.¹⁰² Whereas a violation for a non-public trial, a partial jury, and the right to counsel can "ordinarily be cured by . . . a new trial,"¹⁰³ granting a new trial to someone whose speedy trial right is violated would defeat the purpose of asserting the speedy trial violation and add to the prejudice that the *Barker* test is supposed to avoid.¹⁰⁴ Furthermore, Chief Justice Burger noted that while dismissal of the charges due to a speedy trial violation is severe, "such severe remedies are not unique in the application of constitutional standards."¹⁰⁵

In March 2009, the United States Supreme Court set the stage for future speedy trial claims in *Vermont v. Brillon* by holding that delays caused by assigned counsel could not be attributed to the state because such counsel were not, in fact, state actors.¹⁰⁶ There, the defendant was arrested for domestic assault and held without bail due to his "status as a habitual offender."¹⁰⁷ Though assigned a total of six attorneys – a combination of public defenders and contract attorneys – the defendant was ultimately convicted after three years.¹⁰⁸ On appeal, the Vermont Supreme Court reversed, concluding that the conviction (and charges) must be dismissed due to violation of Brillon's "Sixth Amendment right to a speedy trial."¹⁰⁹ In support of this decision, the Vermont Supreme Court "found that the three-year delay in bringing Brillon to trial was 'extreme' and weighed heavily in his favor,"¹¹⁰ and that much of the delay was attributable to the public defenders' failure to "move his case forward," which also weighed against the state, based on the *Barker* Test.¹¹¹ The state appealed this decision, and the United States Supreme Court granted certiorari to review whether delays potentially caused by court appointed attorneys were attributable to the state.¹¹²

The Court, in an opinion penned by Justice Ginsburg, found that delays attributed to court-appointed counsel weighed against the defendant and not against the state.¹¹³ This is because assigned counsel "act on behalf of their clients, and delays sought by counsel are ordinarily attributable to the defendants they represent."¹¹⁴ In dicta, Justice Ginsburg wrote that "the State may bear responsibility if there is 'a breakdown in the public defender system,'"¹¹⁵ noting that the record did not demonstrate such a breakdown.¹¹⁶ This is of particular import to the speedy trial/right to counsel discussion since delay stemming from the unavailability of a public defender to take on an indigent's case, coupled with severe financial stress, may very well constitute the type of breakdown to which Justice Ginsburg referred.

¹⁰⁰ *Id.* at 437.

¹⁰¹ *Id.* at 440 (quoting *Barker v. Wingo*, 407 U.S. 514, 522 (1972)).

¹⁰² *Id.* at 438–39.

¹⁰³ *Id.* at 439.

¹⁰⁴ See *id.* at 438–39.

¹⁰⁵ *Id.* at 439.

¹⁰⁶ 129 S. Ct. 1283, 1287 (2009).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1287–89.

¹⁰⁹ *Id.* at 1289.

¹¹⁰ *Id.*

¹¹¹ See *id.*

¹¹² *Id.* at 1287.

¹¹³ *Id.* at 1287, 1292.

¹¹⁴ *Id.* at 1287.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

D. MERGING RIGHT TO COUNSEL AND SPEEDY TRIAL ISSUES

While speedy trial and right to counsel cases are relatively common, less frequent are cases that deal with both issues. However, an appellate court in Maryland did just that in *Howell v. State*, a case in which an indigent defendant attempted to invoke both his right to counsel and his right to a speedy trial.¹¹⁷ Indicted for conspiracy to commit murder and second-degree murder, the defendant initially retained private counsel, but then stated that he wanted to be represented by a public defender.¹¹⁸ The local public defender's office found the defendant to be eligible for its services, but refused to represent him unless he agreed to a continuance, which he refused.¹¹⁹ After the court informed the defendant that the appointment of another public defender would require him to agree to a postponement, the defendant "expressly asserted that he wanted counsel to represent him, that he did not waive his right to counsel . . . and that he did not waive [his speedy trial right]."¹²⁰ The trial court then told the defendant that he could not exercise his right to counsel and his speedy trial right and "adamantly insisted that the accused make a choice between those two rights."¹²¹ Indignant, the defendant refused, eventually winning an appeal on his right to counsel claim.¹²²

The defendant in *Howell* succeeded in his appeal based on a right to counsel violation, and his case was remanded for a new trial.¹²³ The appellate court focused on the right to counsel claim, without really mentioning the defendant's concurrent insistence upon a speedy trial.¹²⁴ This is likely because the trial judge took the defendant's unwillingness to make a choice between the two rights as a waiver of the right to a speedy trial,¹²⁵ precluding the defendant from asserting a violation of that right on appeal. Had the defendant been able to preserve the speedy trial right for appeal, the appellate court, based on *Klopper v. North Carolina*, would have had no choice but to dismiss the charges. The defendant instead proceeded to trial *pro se*, preserving his right to counsel violation while forsaking his speedy trial right.¹²⁶ The question remains, of course, what will happen when both rights are appealable? Most likely, a court will focus on the right to counsel violation and remand for a new trial instead of making the unpopular decision to dismiss the case on speedy trial violation grounds.

E. THE PUBLIC DEFENDER SYSTEM IN MISSOURI

Following the United States Supreme Court's decision in *Gideon v. Wainwright*, indigent defendants in Missouri were represented by private attorneys who were appointed by the court and were unpaid.¹²⁷ In 1972, the Missouri legislature established a public defender commission, whereby a mixture of local public defenders and private, unpaid attorneys represented indigent defendants.¹²⁸ The Missouri General Assembly created the Office of State Public Defender in

¹¹⁷ 443 A.2d 103, 103, 104 (Md. 1982).

¹¹⁸ *Id.* at 104-05.

¹¹⁹ *Id.* at 105.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 107-08.

¹²³ *Id.* at 108.

¹²⁴ *Id.* at 104-08.

¹²⁵ *Id.* at 106.

¹²⁶ *Id.*

¹²⁷ *State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870, 875 (Mo. 2009).

¹²⁸ *Id.*

1982 in order to contract with local private attorneys in the defense of indigent defendants for a set fee.¹²⁹ In 1989, the current system was set in place when the public defender system was reorganized due to the rising cost of contracting counsel in indigent cases, thereby allowing the director of the public defender commission the authority to hire assistant public defenders and contract with private attorneys as needed.¹³⁰

In January 2006, a Missouri Senate committee found that, although the public defender's office's caseload had risen by more than 12,000, it had not hired any more staff in the previous six years.¹³¹ The number of felony convictions in Missouri has almost tripled during the last two decades,¹³² and nearly eighty percent of those charged with felonies are represented by a public defender.¹³³ Missouri's population grew by 9.3 percent in the 1990s, while its prison population increased by 184 percent.¹³⁴

On July 28, 2009, officials from the Missouri public defender system notified St. Louis County's Chief Judge and prosecutor that it had begun to take steps to refuse new criminal cases.¹³⁵ Counsel for the Missouri public defender's office stated that in June of the same year, their office was at 160 percent of its capacity.¹³⁶ A week before that notification, the public defender's office in Troy, Missouri, closed its doors to new cases through the end of the month.¹³⁷ The same happened at the public defender's office in Springfield, Missouri.¹³⁸ In Christian County, Missouri, the public defender's office attempted to refuse new cases, but the local judge did not allow it.¹³⁹ The office in Lincoln County, Missouri, threatened to turn away indigent defendants as well.¹⁴⁰

The general reason cited for the overworked public defender system in Missouri is lack of funding.¹⁴¹ In fact, according to the National Legal Aid and Defender Association,¹⁴² Missouri's per capita spending on indigent defense ranks forty-ninth in the nation.¹⁴³ The Missouri public defender's office employs 570 people and was expected to receive around \$34 million in 2010.¹⁴⁴ An estimate from that office says that an additional 125 lawyers, 90 secretaries, 109 investigators, and 130 legal assistants are needed, as well as more space – plus an additional \$21 million per year to pay these individuals – to remedy the current situation.¹⁴⁵

¹²⁹ *Id.* at 876.

¹³⁰ *Id.*; Mo. Rev. Stat. § 600.021 (2006).

¹³¹ *Pratte*, 298 S.W.3d at 877.

¹³² *Id.* at 876-77.

¹³³ *Id.* at 877.

¹³⁴ *Id.*

¹³⁵ Heather Ratcliffe, *Public defenders threaten to refuse St. Louis County cases*, St. Louis Post-Dispatch (July 29, 2010), http://www.stltoday.com/news/local/crime-and-courts/article_d97196ba-9930-58e4-91da-52c4d95bd46e.html.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² The National Legal Aid Defender Association is a non-profit association devoted to ensuring the delivery of legal access to the poor. For more information, see http://www.nlada.org/About/About_Home (last visited Oct. 4, 2011).

¹⁴³ Monica Davey, *Budget Woes Hit Defense Lawyers for the Indigent*, N.Y. TIMES (Sept. 9, 2010), <http://www.nytimes.com/2010/09/10/us/10defenders.html>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

III. PROCEDURAL ASPECTS RELATED TO THE DISCUSSION

A. WHEN DO THESE RIGHTS ATTACH?

Given the impending collapse of Missouri's public defender system, how are the rights to counsel and speedy trial implicated? The speedy trial right attaches at the time the defendant is either indicted or arrested.¹⁴⁶ Pre-arrest investigation does not trigger Sixth Amendment protections, although it may prejudice the defendant.¹⁴⁷ Similarly, the right to counsel attaches "at or after the time that judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" ¹⁴⁸

B. PROCEDURE OF CLOSING LOCAL PUBLIC DEFENDER OFFICES IN MISSOURI

Missouri's Public Defender system is divided into thirty-three district offices.¹⁴⁹ In December 2007, the Missouri Public Defender Commission enacted a rule setting forth protocol to follow when a particular office exceeded its caseload.¹⁵⁰ This rule provided that when a local public defender office was overburdened by its caseload, it could turn away certain types of indigent cases.¹⁵¹ The Missouri Supreme Court, in a December 2009 decision, held that a public defender's office could not turn away certain types of cases.¹⁵² Rather, the court held that "the rule authorizes the public defender to make the office unavailable for any appointments until the caseload falls below the commission's standard."¹⁵³ Every single office was over its capacity as of July 2009.¹⁵⁴

C. THE CONTINUANCE PROBLEM

One of the main problems facing indigent defendants is that their appointed attorneys frequently ask for a continuance in order to have the trial at a later date.¹⁵⁵ A "continuance" is a pre-trial motion to "postpone or delay the start of a trial (or hearing) to a later time."¹⁵⁶ While their motives may be pure, a motion for continuance from the defense essentially results in the waiver of the defendant's speedy trial rights in that any delay caused by the defense will weigh against them, based on the *Barker* test.¹⁵⁷

¹⁴⁶ United States v. Marion, 404 U.S. 307, 313 (1971).

¹⁴⁷ *Id.* at 321.

¹⁴⁸ Brewer v. Williams, 430 U.S. 387, 398 (1977) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)). FED. R. CRIM. P. 44(a) provides: "A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right."

¹⁴⁹ Map of Missouri Public Defender's Office's Districts, http://www.publicdefender.mo.gov/about/map_of_districts.htm (last accessed Oct. 4, 2011).

¹⁵⁰ MO. CODE REGS. ANN. tit. 18, § 10-4.010 (2007), *repealed by State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 970 (Mo. 2009) (en banc).

¹⁵¹ *Id.* § 10-4.010(2)(A).

¹⁵² *Pratte*, 298 S.W.3d at 883.

¹⁵³ *Id.* at 887.

¹⁵⁴ *Id.* at 880.

¹⁵⁵ See JAMES A. ADAMS & DANIEL D. BLINKA, PRETRIAL MOTIONS IN CRIMINAL PROSECUTIONS 1085 (4th ed. 2008) (listing some of the various reasons why a defense attorney may move for a continuance).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1086.

Of course, as Justice Powell notes in *Barker*, a continuance is often used as a legal tactic to benefit the accused: "Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade."¹⁵⁸ Thus, there is a tension between the defense attorney requesting a continuance for purposes of establishing an adequate case and keeping the fundamental constitutional rights of the defendant available.

IV. POTENTIAL FOR SIXTH AMENDMENT VIOLATIONS IN LIGHT OF THE CURRENT INDIGENT "CRISIS"

Since the right to a speedy trial attaches upon arrest, all of the pre-trial procedure that occurs should weigh against the state, according the *Barker* test. Additionally, the right to counsel attaches when the accused is formally charged with a crime. Yet, if a defendant qualifies for the appointment of a public defender, and the public defender's office is closed due to overwork, theoretically there could be a substantial amount of time between the moment when the speedy trial clock starts ticking and the time that a public defender is appointed. This is where the potential conflict between the speedy trial and right to counsel provisions of the Sixth Amendment threatens to occur, posing the question, "What happens when two fundamental rights are seemingly at odds with each other?" Does one take precedence over the other, or should both rights carry equal weight, demanding that both are ensured?

V. POTENTIAL SOLUTIONS

Most would agree that the best solution to this matter is to put the criminal justice system in a position where the speedy trial right and the right to counsel would never conflict. The most elementary way to accomplish this would be to increase the funding of public defender offices that are overworked in order for them to hire more attorneys. Unfortunately, this plea will probably fall on deaf ears. Public defenders are funded by the state (at least in Missouri), and taxpayers fund the state. In recent years, taxpayers have not been willing to increase funding for indigent defense – which has led to the current crisis – and, especially in such grim economic times, it seems unlikely that taxpayers will suddenly have a change of heart.

Part of the problem lies in the strain between ensuring that constitutional rights are preserved but not wanting to help defendants who are likely guilty of crimes to have a competent defense. I would wager that most people would agree that constitutional rights should be vigorously enforced, yet at the same time would be reluctant to help potentially guilty (poor!) defendants. So, it is fair to say that increasing indigent defense funding will not happen without some form of intervention.

Since this is likely the case – that taxpayers will probably not increase indigent defense funding, thereby making a Sixth Amendment conflict all the more likely – perhaps a more drastic action would serve as the impetus to solve the public defender crisis. Rather than wait for rights-indifferent voters to come around, courts should hold fast to the holdings set forth in *Barker* and *Klopfert* – using the remedy of dismissal to free defendants whose rights are being trampled.

Considering that the speedy trial right attaches at arrest or indictment and that the right to counsel attaches shortly thereafter, courts should be more liberal in dismissing cases based on speedy trial violations. If indigent defendants who are likely guilty go free because there were not enough public defenders available to represent them, the tax-paying community might have a change of heart on the issue. Funding would be increased for indigent defender programs, and the potential Sixth Amendment conflict would be allayed.

¹⁵⁸ See *Barker v. Wingo*, 407 U.S. 517, 521 (1972).

This solution is not, admittedly, without its flaws. First, defense attorneys must exercise much more discretion when moving for continuances because, in doing so, they seriously put at risk their client's fundamental right to a speedy trial. Admittedly, a continuance will be necessary under certain circumstances, but the current practice of routinely asking for a continuance must be eradicated.

The second flaw is that for courts to dismiss a case based on a speedy trial violation, the defendant must first assert that the right has been violated. Typically, the indigent defendant does not have the wherewithal to do so. Normally, their attorney would assert the right, but if the defendant had an attorney, their right to counsel would not be violated (and typically the attorney would ask for a continuance rather than try the case without at least a semblance of preparation, forfeiting the speedy trial right along with it). Thus, for this plan to be effective there must be a process by which the indigent defendant is made aware of how to assert the speedy trial right concurrently with the right to counsel, while proceeding *pro se*, without waiving the right to an attorney. It would require a non-counsel entity informing the indigent defendant of precisely what steps to take and when to take them.

Two potential solutions come to mind. First, law enforcement could give arrested or indicted individuals a pamphlet listing their fundamental rights under the criminal justice system. While it looks good on paper, considerations such as literacy and language barriers, not to mention financial limitations, would limit the pamphlet method. The other option would be simply to include mention of the speedy trial right in the *Miranda* warning. Of course, the purpose of the *Miranda* warning is to inform "a criminal suspect in police custody . . . of certain constitutional rights before [he is] interrogated."¹⁵⁹ Strictly speaking, therefore, information about the speedy trial clause is not an appropriate addition to the *Miranda* warning. However, because it would be as simple as including the phrase "you have the right to a speedy trial" before or after informing the arrestee that he has the right to an attorney (and because the *Miranda* warning is court-made law), then the rationale for opposing such an addition seems insubstantial. Furthermore, the speedy trial clock starts ticking at the moment of arrest or indictment, so a defendant should be made aware of all of his fundamental rights at the moment those rights become assertable.¹⁶⁰

VI. CONCLUSION

The cause of the indigent defendant is not a popular one. To the average citizen, the poor defendant is guilty upon arrest and deserves to go to jail. But, by depriving indigent defendants of their Sixth Amendment rights, taxpayers are inadvertently creating a criminal justice system that only serves the wealthy. Of course no one wants to help potential criminals roam free, but releasing defendants remains the only recourse for ensuring that constitutional rights remain intact, save hiring more defense attorneys. The American public cannot have it both ways. If the people are unwilling to move, the judiciary must step in. If not, what's to stop other fundamental rights from being disregarded as well?

¹⁵⁹ BLACK'S LAW DICTIONARY 1087 (9th ed. 2009).

¹⁶⁰ If courts and/or lawmakers are unwilling to add a speedy trial clause to the *Miranda* requirements, then perhaps one could turn to Hollywood to effect change. It is likely that the average citizen is familiar with the *Miranda* warning not because of any formal learning or personal experience, but rather due to the fact that they saw it on television.