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DETAINER WARRANTS AND THE SPEEDY TRIAL PROVISION

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When a crime has been committed, and the perpetrator has been imprisoned by another sovereign before he can be apprehended for the crime, it is common practice for the district attorney of the county of the crime to obtain a warrant, on information and belief, charging the commission of the crime, so that when the time for the prior imprisonment has expired, the prisoner can be released to the authorities of the state where the second crime was committed. There is usually a delay between the time the warrant is issued, and the trial for the crime, because of the intervening imprisonment. This delay can cause the issue to be raised whether the prisoner has been deprived of his right to a speedy trial under the constitutions of the state or the United States. A minority of jurisdictions have held that, given the proper facts, the delay may violate the prisoner's right to a speedy trial, even though the delay was caused by the intervening imprisonment.

RIGHT TO SPEEDY TRIAL

Such delay probably does not violate the Wisconsin speedy trial provision because the Wisconsin provision is somewhat unique. Article I, Section 7 of the Wisconsin Constitution provides:

> In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to comple the attendance of witnesses in his behalf; *and in prosecutions by indictment, or information, to a speedy public trial* by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

This provision apparently guarantees a speedy trial only to those indicted or informed against. If so, the prisoner against whom a detainer warrant has been filed, would not be protected by this provision.

This language of the Wisconsin Constitution is unlike the language of the speedy trial provision of the United States Constitution. The 6th amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . .

The right to a speedy trial under this provision has been construed to arise upon a formal complaint being lodged against the defendant

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in a criminal case.[1] Other states with constitutional provisions similar to the federal provision have also held that a party become an accused, entitled to a speedy trial, upon the filing of the complaint, even prior to arrest.[2] Of course, the 6th amendment, and the rights guaranteed therein are binding, as such, only upon federal courts.[3]

LACK OF SPEEDY TRIAL AS VIOLATION OF DUE PROCESS

Although the prisoner may not be entitled to the protection of the 6th amendment, or the Wisconsin speedy trial provision, nevertheless, failure to accord him a speedy trial may violate his rights to due process under the 14th amendment to the United States Constitution[4] and Article I, Section 8, of the Wisconsin Constitution.[5]

In *Betts v. Brady*[6] the United States Supreme Court held:

> The Sixth Amendment of the national Constitution applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth. Due process of law is secured against invasion by the federal Government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard fast rules the application of which in a given case may be to ignore the qualifying factors wherein disclosed.

The "special circumstances" theory of *Betts v. Brady* was overruled in *Gideon v. Wainright*[7] insofar as it applied to providing defendants with counsel in serious criminal cases.

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[1] Iva Ikuko Toguri D'Aguino v. United States, 192 F.2d 338 (9th Cir. 1951).
[2] Rost v. Municipal Court, 184 Cal. App. 2d 507, 7 Cal. Rptr 869 (1906); State v. Waites, 82 Ohio L. Abs. 356, 163 N.E. 2d 195 (1959) (detainer warrant filed); People v. Jordan, 45 C.2d 697, 290 P. 2d 484 (1955).
[3] Betts v. Brady, 316 U.S. 455 (1942).
[4] ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."
[5] "No person shall be held to answer for a criminal offense without due process of law . . ."
[6] Betts v. Brady, *supra* note 3, at 461-462.
[7] No. 155, October Term, 1962 (March 18, 1963).

The United States Supreme Court again intimated in *Hoag v. New Jersey*[8] that failure by a state to provide a defendant with a speedy trial may violate the due process clause of the 14th amendment. "Finally, in the circumstances shown by this record, we cannot hold that petitioner was denied a 'speedy trial' on the Yager indictment, whatever may be the reach of the Sixth Amendment under the provisions of the Fourteenth."

The Seventh[9] and Tenth[10] Circuits have intimated that lack of a speedy trial may violate due process. And an Indiana[11] and a Pennsylvania[12] federal district court have squarely held that failure to give a speedy trial can violate 14th amendment due process.

Thus there is substantial, recent, authority in the federal courts indicating that failure by a state to grant a defendant a speedy trial may, under the proper circumstances, violate due process.

UNTRIED DETAINERS AS VIOLATION OF DUE PROCESS

As stated in *Betts v. Brady*,[13] the question, in determining whether a prisoner has been deprived of liberty without due process of law, where trial of a charge for which a detainer warrant has been issued is delayed because of an intervening imprisonment, is whether an appraisal of the totality of facts in the case indicates that failure to give the prisoner a trial on the charge is a denial of fundamental fairness, shocking to the universal sense of justice.

Several factors must be considered in determining whether the prisoner's right to due process has been violated.

First, it is not within the absolute power of a district attorney to have a prisoner returned from a federal prison for trial. While imprisoned in a federal penitentiary, the prisoner is in the custody of the United States. Whether he be released for trial in a state court has traditionally been considered to be a matter of comity, solely within the discretion of the United States Attorney General.[14] Although the attorney general may release the prisoner for trial, he need not.[15] However, he is usually willing to turn the prisoner over to the state authorities, upon request, on the condition that the prisoner is promptly returned to federal prison after the trial.

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[8] 356 U.S. 464 (1958).

[9] Sawyer v. Barczak, 229 F.2d 805, 812 (7th Cir. 1956), *cert. denied* 351 U.S. 966 (1956); See also Odell v. Burke, 281 F.2d 782 (7th Cir. 1960), *cert. denied* 364 U.S. 865 (1960), wherein the court held the allegations of the petition relating to the denial of a speedy trial were not *prima facie* sufficient to allege a denial of federal due process.

[10] Hastings v. McLeod, 261 F.2d 627 (10th Cir. 1958).

[11] United States v. Lane, 193 F. Supp. 395, 397 (N.D. Ind. 1961).

[12] United States v. Maroney, 194 F. Supp. 154 (W.D. Pa. 1961).

[13] *Supra* note 3.

[14] Pongi v. Fessenden, 258 U.S. 254 (1922).

[15] One may speculate whether due process requires him to release a prisoner to state authorities upon request.

The traditional view, adhered to in most of the jurisdictions which have considered the issue, is that failure to request custody of the United States Attorney General does not violate the right to a speedy trial, even though the request would be granted.[16] The rationale behind these decisions is that a delayed trial is the fault of the prisoner himself, for having committed a crime in another jurisdiction.

A more enlightened view has been adopted by the New York Court of Appeals, and by the Court of Appeals for the District of Columbia.

In *People v. Piscitello*[17] the New York Court of Appeals held:

> When the motion to dismiss for undue delay was made, even though subsequent in point of time to motions, addressed to the indictment, it should have been granted, absent any showing of good cause to the contrary by the prosecutor . . . Here there was no such showing. The fact that defendant, who had been taken into custody January 18, 1955, a date prior to the indictment, was being held in the Federal detention headquarters, New York County, awaiting disposition of certain Federal charges, affords neither explanation nor excuse, since he could have been produced in the State court upon request, provided only that he was returned to Federal custody.

In *Taylor v. United States*[18] the Court of Appeals for the District of Columbia held:

> The Government urges that the delay in bringing appellant to trial was his fault, since it was caused by his imprisonment in New York. We think his imprisonment there does not excuse the Government's long delay in bringing him to trial here, in the absence of a showing that the Government, at a reasonably early date, sought and was unable to obtain his return for trial.

Also relevant is *Rost v. Municipal Court.*[19] In that case a complaint was filed and the warrant of arrest issued January 11, 1960, although defendant wasn't arrested until June 1. The court held that by failing to arrest defendant for an unreasonably long length of time, the prosecution violated his right to a speedy trial.

> What is a reasonable time depends upon the circumstances of the case. There are many situations in which the lapse of much more than 140 days between complaint and arrest would not be unreasonable. However, without explanation the lapse of 140 days is on its very face unreasonable where the defendant is at all times available for service.

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[16] *In re* Schechtel, 103 Colo. 77, 82 P. 2d 762, 118 A.L.R. 1032 (1938); Application of Melton, 342 P. 2d 571 (Okla. Cr. 1959); State v. Larkin, 256 Minn. 314, 98 N.W. 2d 70 (1959).

[17] 7 N.Y. 2d 387, 165 N.E. 2d 849, 850 (1960).

[18] 238 F.2d 259, 261 (D.C. Cir. 1956).

[19] *Supra* note 2.

Of course, a prisoner is not "available for service." However, the principle is analogous, if the prisoner has been made available for trial by the United States Attorney General.

Secondly, consideration should be given to the effect given the detainer warrants by the imprisoning sovereignty. In *United States v. Maroney*[20] the court found a violation of due process upon this type of fact. There the court found that the existence of the charge had an adverse effect on the commutation of the prisoner's sentence on the conviction for which he had been imprisoned; that it had an adverse effect on any possible transfer to a minimum security prison; that it prevented his being sent to an institution more appropriate for youthful offenders; that it affected his work assignments; that it barred him from working outside the walls of the institution; and that it had an adverse effect on the possibility of parole. Because of these facts, the court found that failure to give the defendant a speedy trial on the pending charge violated due process.

It could be argued that prison policies are a matter for the imprisoning sovereign alone, and that if existence of detainer warrants deprives the prisoner of prison privileges, such deprivation is not chargeable to the authority which issued or sought the detainer warrant. It could also be argued that since prison privileges are not due a prisoner as a matter of right, that loss of these privileges cannot be the basis for a claimed lack of due process. Nonetheless, because the existence of the detainer warrant causes harsher prison policies to be operative upon the individual prisoner, and to deprive him of benefits which he otherwise would have, as a matter of grace, if not of right, the court in the *Maroney* case was persuaded to find a violation of due process.

Third for consideration is the effect postponement of the trial will have on the fairness of the trial when it is ultimately held. This was the type of fact which influenced the court in *United States v. Lane*.[21] In that case the court held that the disappearance and unavailability of exhibits and witnesses, coupled with the natural likelihood that the memory of witnesses who were available would be faltering, operated to deprive the defendant of due process.

A fourth factor to be considered is the personal effect delay will have on the defendant. It is generally held that a defendant has a right to be free from the oppressive effect of holding criminal prosecutions suspended over him for an indefinite time.[22] Thus, in *United States v. Maroney*[23] an additional factor which persuaded the court to find a violation of due process was that the delay was upsetting

[20] *Supra* note 12.
[21] *Supra* note 11.
[22] See 14 AM. JUR., *Criminal Law* §134 (1938).
[23] *Supra* note 12.

emotionally to the defendant, and the delay required him to spend money to protect his rights.

Policy Considerations

Apart from the constitutional questions involved, there are strong policy reasons for requiring a trial or dismissal of charges contained in detainer warrants.

If a future conviction on the charge would be constitutionally questionable, it would be in the interests of good law enforcement to require district attorneys to try prisoners made available by the imprisoning sovereignty.

Further, it would seem to be poor penology to allow prison privileges, in effect at least, if not by law, to rest in the hands of the prosecuting officer of another sovereignty, especially where the detainer warrant has been issued on mere suspicion. As the Ohio court stated in *State v. Milner*:[24]

> The exercise of such control over a form of installment punishment, compounded by detainers, is a usurpation of the power of the court, of the jury, and of the parole board to determine guilt and punishment.

The Wisconsin legislature has recognized the potential unfairness of pending detainers by enacting the Prompt Disposition of *Intra*state Detainers Act.[25] That statute requires the trial, or the dismissal, of Wisconsin detainers filed against a Wisconsin prisoner.

At the instance of the Parole and Probation Compact Administrator's Association and the Council of State Governments a "Joint Committee on Detainers" has been organized with representation from that body, and from the National Association of Attorneys General, the ABA Section on Criminal Law, the National Conference of Commissioners on Uniform State Laws, and the American Correctional Association. This group has formulated a model statute on *intra*state detainers,[26] and has recommended an *inter*state compact which it is now studying to authorize mandatory disposition of detainers.[27] The Commissioner's Prefatory note to the model *intra*state detainer act[28] indicates the need for a method of disposing of detainers "to the end that valid charges will be ripened into trials, whereas detainers merely lodged on suspicion or less will be dismissed. Competent authorities estimate that as many as 50% of warrants now lodged against prisoners are never intended to be prosecuted."

Thus, there has been a trend in recent years to attempt to solve

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[24] 60 Ohio Op. 2d 206, 149 N.E. 2d 189, 191 (1958).
[25] Wis Stat. §955.22 (1961).
[26] Uniform Mandatory Disposition of Detainer Act, 9B U.L.A. (Supp. 1962).
[27] See 9B U.L.A. (Supp. 1962).
[28] *Supra* note 26.

the problems created by detainer warrants, and to attempt to achieve justice in this area.

STATE *ex rel* FREDENBERG v. EBERLEIN

Petitioner, Marvin G. Fredenberg, was a prisoner in a federal penitentiary in Sandstone, Minnesota. Several detainer warrants had been filed against him for crimes allegedly committed in Wisconsin. Petitioner sought to be tried in Wisconsin on the charges for which the warrants had been issued, or in the alternative, sought dismissal of the warrants. He petitioned the Wisconsin Supreme Court, *in pro per,* for a writ of mandamus, naming the district attorney of the county where the crimes allegedly had been committed as defendant. November 21, 1962, the Supreme Court issued an alternative writ of mandamus, without opinion, compelling the district attorney:

> . . . to take such steps as may be available to obtain the return of petitioner to Wisconsin for trial on said charges; or, in the alternative, to apply to the proper court for the dismissal of same, or, in the alternative, to show cause before this court why neither should be done.[29]

December 11, 1962, the defendant district attorney made the following return to the writ:

> That acting upon the advice and counsel of the Attorney General your respondent states that he will within twenty (20) days after this Return take all necessary steps and procedures to secure the limited custody of the petitioner for the purpose of returning him to Shawano County for trial for the offenses alleged to have occurred in Shawano County.[30]

The petitioner was returned to Shawano County, convicted of the offense, and returned to the federal prison.

Because the defendant district attorney sought and obtained the return of the prisoner there was no need for further factual determination upon which a violation of due process could be predicted. The action of the Wisconsin Supreme Court, however, is precedent which may be valuable in cases involving less cooperative district attorneys.

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[29] State ex rel Fredenberg v. Eberlein, No. St. 40, 1962 Term, Wisconsin Supreme Court.
[30] *Id.*