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Hare and Hounds: The Fugitive Defendant's Constitutional Right to Be Pursued

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"HARE AND HOUNDS": THE FUGITIVE DEFENDANT'S CONSTITUTIONAL RIGHT TO BE PURSUED

*United States v. Diacolios**

*Bruce A. Green***

> A true fugitive, whose location is unknown, or who is successfully resisting government efforts to bring him into the jurisdiction, will not be able to obtain dismissal of an indictment. This is as it should be. Otherwise, the courts would be sanctioning the playing of games by fugitives.[1]
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> [W]henever an individual has been officially accused of a crime, not only is the government charged with the burden of bringing the accused swiftly to trial, but it is under an obligation to exercise due diligence in attempting to locate and apprehend the accused, even if he is a fugitive who is fleeing prosecution.[2]

INTRODUCTION

A criminal defendant has a constitutional right to a speedy trial. But what about a defendant who attempts to thwart the possibility of a speedy trial—or, indeed, of any trial—by concealing himself or fleeing the jurisdiction? If he is later apprehended, may the fugitive defendant complain that he was denied a speedy trial because the prosecution did not try diligently enough to catch him?

In early 1988, the Second Circuit said yes. It recognized a

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* 837 F.2d 79 (2d Cir. 1988) Before Altimari, Kearse, and Lasker, JJ.; opinion per Altimari. The author of this Article, while not participating in the *Diacolios* case in the district court, participated in preparing the government's brief on appeal and argued the case on behalf of the government in the Second Circuit.

** Associate Professor, Fordham University School of Law. I am grateful for the tireless research assistance provided by Alyssa Aiello, Fordham University class of 1991, as a fellow of the Stein Institute on Law and Ethics. In addition, I am grateful to Professors Marc Arkin, Dan Capra and Jim Kainen for their helpful comments on earlier drafts of this Article.

[1] United States v. Salzmann, 548 F.2d 395, 404 (2d Cir. 1976) (Feinberg, J., concurring) (footnote omitted).

[2] Rayborn v. Scully, 858 F.2d 84, 90 (2d Cir. 1988).

new constitutional "right" in criminal cases: the right of a fugitive defendant to be pursued diligently by the prosecution. The court did not recognize this right by name; instead, it announced a correlative prosecutorial duty "to exercise due diligence in attempting to locate and apprehend" a fugitive defendant.[3] According to the court in *United States v. Diacolios*,[4] this duty arose out of the sixth amendment right to a speedy trial. The *Diacolios* court intended that the government's duty of "due diligence" be legally enforceable; if the government did not make an adequate effort to find and apprehend a fugitive defendant, his indictment could be dismissed on the ground that pretrial delay amounted to a violation of the speedy trial clause.

This Article begins by tracing the creation of the fugitive defendant's right to be pursued. The *Diacolios* panel's establishment of this right represented a substantial extension of the Supreme Court decisions interpreting the speedy trial clause. Those decisions are described in Part I, which focuses particularly on cases in which the Supreme Court has determined the circumstances under which the prosecution has a responsibility to expedite a criminal trial. Most importantly, this section examines a case relied on by the Second Circuit in *Diacolios*,[5] *Smith v. Hooey*,[6] which established the prosecution's duty to try to secure the presence of an indicted defendant who is imprisoned in another jurisdiction.[7]

The *Diacolios* panel also departed sharply from the long-established principle that a fugitive defendant waives the right to a speedy trial and therefore has no remedy for pretrial delay which occurred during his flight. Part II describes the cases and statutes which reflect that principle. Although recent statutes and case law appear to have partially retreated from the traditional approach, only the *Diacolios* decision has explicitly determined that the prosecution has a legally enforceable obligation to pursue all fugitive defendants.

Although lacking a firm foundation in the decisions of the Supreme Court and courts outside the circuit, *Diacolios* was, in

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[3] *Id.*

[4] 837 F.2d 79 (2d Cir. 1988).

[5] *Diacolios*, 837 F.2d at 82.

[6] 393 U.S. 374 (1969).

[7] *Id.* at 383 (state "had a constitutional duty to make a diligent, good-faith effort" to bring defendant, who was incarcerated elsewhere, before the court for trial).

some senses, the logical culmination of prior Second Circuit case law. The question resolved in *Diacolios* had first arisen in the Second Circuit more than a decade earlier, when, in the aftermath of the Vietnam War, an innovative district judge initiated a review of cases pending against fugitive defendants who were charged with evading the military draft.[8] Part III discusses the Second Circuit's speedy trial decisions with regard to fugitive defendants prior to 1988, and in particular, it examines *United States v. Salzmann*.[9] In that case, the Second Circuit found that the prosecution had failed, as required by the court's then-existing speedy trial rules, to exercise "due diligence" to obtain an absent defendant's presence at trial on draft evasion charges.[10] *Salzmann* formed part of the basis for both the district court and circuit court opinions in *Diacolios*.

Part IV describes and analyzes the *Diacolios* decisions themselves. Among other things, it notes the failure of both the district court and the court of appeals to recognize, or at least, to acknowledge, the novelty of the proposition that they espoused. This, along with the brevity of the Second Circuit's opinion—a scant five pages—may explain why *Diacolios* has passed almost unnoticed by commentators as well as by courts outside the Second Circuit—even at a time when it is such an exceptional occurrence for a federal court decision to expand the constitutional rights of criminal defendants.

Part V considers the question that the *Diacolios* panel failed to ask itself: whether there is a legal basis for establishing what, in essence, is a constitutional right of fugitive defendants to be pursued. In particular, this section explores whether contemporary Supreme Court decisions applying the speedy trial clause warrant a departure from long-established legal doctrines which recognize that a fugitive may not complain of pretrial delay caused by his deliberate evasion of the court's process. It concludes that the rationale—and constitutional underpinnings—of the traditional view have not been eroded by the contemporary decisions.

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[8] *See* United States v. Salzmann, 417 F. Supp. 1139 (E.D.N.Y.) (Weinstein, J.), *aff'd*, 548 F.2d 395 (2d Cir. 1976); United States v. Lockwood, 382 F. Supp. 1111 (E.D.N.Y. 1974) (Weinstein, J.).

[9] 548 F.2d 395 (2d Cir. 1976).

[10] *Id.* at 403 (Government "did not exercise the due diligence required by our rules to obtain the presence of the defendant.").

As described in Part VI, the *Diacolios* opinion did not go unnoticed by the criminal defense bar. Later in 1988, relying on *Diacolios*, three other criminal defendants argued that the prosecution had failed to pursue them with sufficient vigor while they were evading prosecution.[11] These cases forced other Second Circuit panels to confront *Diacolios*, and these subsequent panels brought with them an air of skepticism toward the newfound prosecutorial "obligation to exercise due diligence" in pursuing fugitive defendants. While reaffirming the existence of this obligation—as they were constrained to do—the later panels rendered this obligation virtually meaningless. They did so by interpreting "due diligence" narrowly and, more important, by minimizing the legal significance of the prosecution's failure to meet its obligation of pursuit. Consequently, although fugitive defendants indicted in the Second Circuit now have a constitutional "right" to be pursued, few will succeed in securing the dismissal of criminal charges because of a violation of this right.

Like many ethical rules, the prosecutorial duty of "due diligence" is now largely unenforceable. The last part of this Article considers whether there should be, if not a legally enforceable obligation, at least an ethical obligation on the prosecution's part to pursue fugitive defendants. This Article concludes that, although justifications may be offered for such an ethical duty, these justifications are not particularly compelling. The prosecution should have discretion to decide whether, and how extensively, to pursue a fugitive defendant who is aware of the pending charges and fully able to appear in court.

I. THE SUPREME COURT'S VIEW OF THE SPEEDY TRIAL RIGHT

The sixth amendment promises that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . ."[12] The origins of this provision have been traced as far back as the Assize of Clarendon (1166) and the Magna Carta (1215).[13] Although its historic purpose is to protect arrested de-

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[11] Garcia Montalvo v. United States, 862 F.2d 425, 426 (2d Cir. 1988); United States v. Blanco, 861 F.2d 773, 777-79 (2d Cir. 1988); Rayborn v. Scully, 858 F.2d 84, 90 (2d Cir. 1988). *See also* United States v. Koskotas, 695 F. Supp. 96, 99 (S.D.N.Y. 1988).

[12] U.S. CONST. amend. VI.

[13] *See* Klopfer v. North Carolina, 386 U.S. 213, 223-25 (1967) (describing the roots of the speedy trial clause in English law). *See also* Petition of Provoo, 17 F.R.D. 183,

fendants from languishing in jail for long periods of time while awaiting trial,[14] the sixth amendment's contemporary function has been described more broadly by the Supreme Court:

> [T]his constitutional guarantee has universally been thought essential to protect at least three basic demands of criminal justice in the Anglo-American legal system: "[1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public accusation and [3] to limit the possibilities that long delay will impair the ability of an accused to defend himself."[15]

The sixth amendment is only one among a variety of legal guarantees which require that prosecutions proceed with dispatch. For example, statutes of limitations require an indictment to be filed within a specific period of time after a crime has been committed.[16] This provides some protection against the harms that may be caused by extensive preindictment delay, including the impairment of the putative defendant's ability to mount a defense as well as the anxiety that may flow from never knowing whether criminal charges will someday be brought.[17]

Of more recent vintage are rules and statutes that authorize trial judges to dismiss the prosecution when the trial is unduly delayed after the defendant has been arrested or formally charged. For example, Rule 48(b) of the Federal Rules of Criminal Procedure, adopted in 1944, grants the district court discretion to dismiss an indictment where "there is unnecessary delay

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196-97 (D. Md.), *aff'd*, 350 U.S. 857 (1955) (per curiam) (examining historical roots of the right to a speedy trial).

[14] The speedy trial clause was patterned on similar provisions adopted by the colonies such as the Virginia Declaration of Rights of 1776, which provided, "in all capital or criminal prosecutions a man hath a right . . . to a speedy trial . . . ." Va. Declaration of Rights § 8 (1776), *quoted in* Klopfer v. North Carolina, 386 U.S. 213, 225 (1967). The most relevant historical antecedent of these provisions was the English Habeas Corpus Act, 1679, 31 Car., ch. 2, which required that imprisoned defendants be indicted within a specific period of time and be brought to court within a specific period after a writ of habeas corpus was issued.

[15] *See* Smith v. Hooey, 393 U.S. 374, 377-78 (1969) (footnote omitted) (quoting United States v. Ewell, 383 U.S. 116, 120 (1966)).

[16] *See generally* W. LaFave & J. Israel, Criminal Procedure § 18.5(a), at 699-700 (1985).

[17] *See, e.g.*, Toussie v. United States, 397 U.S. 112, 114-15 (1970) (Statutes of limitations are "designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past."); Howgate v. United States, 7 App. D.C. 217, 244 (1895).

in bringing a defendant to trial . . . ."[18] In addition, the Speedy Trial Act,[19] which has largely supplanted Rule 48(b), requires a trial to take place within 70 days of indictment, subject to various permissible periods of delay.[20] In recent years, the applicability of these provisions has often made it unnecessary for a court to invoke the sixth amendment speedy trial clause to protect an individual from having to defend against stale charges.[21]

On the infrequent occasions that the Supreme Court has interpreted the sixth amendment speedy trial right,[22] it has held that (1) the guarantee applies in both state and federal proceedings;[23] (2) the sixth amendment right addresses only those pretrial delays that occur after a defendant has been arrested or charged with a crime;[24] and (3) dismissal of an indictment is the

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[18] FED. R. CRIM. P. 48(b) provides, in pertinent part, that: "If there is unnecessary delay in presenting the charge to a grand jury or . . . in bringing a defendant to trial, the court may dismiss the indictment . . . ." This rule was said to be "a restatement of the inherent power of the court to dismiss a case for want of prosecution." Notes of Advisory Committee on Rules, Note to Rule 48(b) (citing *Ex parte* Altman, 34 F. Supp. 106 (S.D. Cal. 1940)).

[19] 18 U.S.C. § 3161 et seq. (1982 & Supp. IV 1986).

[20] *See id.* at § 3161(c)(1). *See generally* W. LAFAVE & J. ISRAEL, *supra* note 16, § 18.3(b), at 692-94.

[21] Courts will look to statutory provisions first because of the general preference for avoiding constitutional questions and, more importantly, because the statutory provisions are both more specific than the speedy trial clause and more protective of the defendant's interest in obtaining a speedy trial.

[22] *See* United States v. Loud Hawk, 474 U.S. 302 (1986); United States v. MacDonald, 456 U.S. 1 (1982); Moore v. Arizona, 414 U.S. 25 (1973) (per curiam); Strunk v. United States, 412 U.S. 434 (1973); Barker v. Wingo, 407 U.S. 514 (1972); United States v. Marion, 404 U.S. 307, 313-22 (1971); Dickey v. Florida, 398 U.S. 30 (1970); Smith v. Hooey, 393 U.S. 374, 374-83 (1969); Klopfer v. North Carolina, 386 U.S. 213 (1967); United States v. Ewell, 383 U.S. 116, 120 (1966); Pollard v. United States, 352 U.S. 354, 361-62 (1957); United States v. Provoo, 350 U.S. 857 (mem.) (per curiam), *aff'g* Petition of Provoo, 17 F.R.D. 183 (1955); Beavers v. Haubert, 198 U.S. 77 (1905).

The speedy trial clause has been somewhat more frequently the subject of critical commentary. *See, e.g.*, Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525 (1975); Arkin, *Speedy Criminal Appeal: A Right Without a Remedy*, 74 MINN. L. REV. 437 (1990); Godbold, *Speedy Trial — Major Surgery for a National Ill*, 24 ALA. L. REV. 265 (1972); Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846 (1957); Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476 (1968); Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587 (1965).

[23] *See, e.g.*, Smith v. Hooey, 393 U.S. 374, 374-75 (1969); Klopfer v. North Carolina, 386 U.S. 213, 222-26 (1967).

[24] United States v. Marion, 404 U.S. 307, 313 (1971) ("the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes 'accused' "). The question whether the speedy trial clause applied to pre-arrest and pre-indictment delay was the subject of much of the speedy trial commentary prior to 1971.

exclusive remedy for a speedy trial violation.[25]

The Court has not attempted to give precise content to this sixth amendment right for two principal reasons. First, as the Court has noted, "a speedy trial" is a relative[26] and inexact term.[27] In addition, unlike most other procedural protections accorded criminal defendants, the speedy trial guarantee is a double-edged sword. Pretrial delay, the danger against which the right is designed to protect, often works to the advantage of a criminal defendant, particularly one who is at liberty while awaiting trial.[28] The passage of time may cause the government to lose evidence or even, in some cases, to lose interest in pursuing the case. Many defendants therefore welcome pretrial delay or even take steps to secure it. These considerations led the Court in *Barker v. Wingo*[29] to endorse an ad hoc "balancing test."[30] *Barker* requires a court to weigh "the conduct of both

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See, e.g., Widman, *The Right to a Speedy Trial: Pre-Indictment and Pre-Arrest Delay*, 7 AM. CRIM. L.Q. 248 (1969); Comment, *Pre-Arrest Delays and the Right to Speedy Arrest: Apologia Pro Vita* Ross, 11 ARIZ. L. REV. 770 (1969); Note, *Constitutional Limits on Pre-Arrest Delay*, 51 IOWA L. REV. 670 (1966); Note, *Pre-Arrest Delay: Evolving Due-Process Standards*, 43 N.Y.U. L. REV. 722 (1968); Note, *Justice Overdue — Speedy Trial for the Potential Defendant*, 5 STAN. L. REV. 95 (1952).

[25] Strunk v. United States, 412 U.S. 434, 440 (1973) ("In light of the policies which underlie the right to a speedy trial, dismissal must remain . . . the only possible remedy.") (citation omitted). This decision was cogently criticized by Anthony Amsterdam fifteen years ago and his criticisms remain apt. *See* Amsterdam, *supra* note 22, at 532-39. Professor Amsterdam argues that the dismissal of an indictment with prejudice is usually inappropriate when a speedy trial violation is called to the court's attention in advance of trial. Unless pretrial delay has occasioned the loss of evidence helpful to the accused or has otherwise impaired his defense, "the primary form of judicial relief against denial of a speedy trial should be to expedite the trial, not to abort it." *Id.* at 535. The absence of a less drastic remedy invariably affects how courts define the content of the speedy trial right: loathe to dismiss prosecutions, courts will refuse to find a violation except where pretrial delays are egregious. *Id.* at 525, 540-41. As a result, the speedy trial clause affords comparatively little protection from undue delay in criminal prosecutions. *Id.* at 526.

[26] *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 522 (1972) ("The right of a speedy trial is necessarily relative . . . and depends upon circumstances.") (quoting Beavers v. Haubert, 198 U.S. 77, 87 (1905)); Pollard v. United States, 352 U.S. 354, 361 (1957) ("Whether delay in completing a prosecution such as here occurred amounts to an unconstitutional deprivation of rights depends upon the circumstances.").

[27] *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 521-22 (1972) (characterizing speedy trial right as "vague," "amorphous" and "slippery," and noting that "[i]t is . . . impossible to determine with precision when the right has been denied.").

[28] *See id.* at 519-21.

[29] 407 U.S. 514 (1972).

[30] *Id.* at 530.

the prosecution and the defendant" to determine whether pretrial delay is constitutionally excessive.[31] In adopting this test, the Court rejected two alternative formulations: the first would have required all trials to be held within a specific period of time after arrest or indictment;[32] the second would have applied the right only to those defendants who had demanded a speedy trial, while finding that all others had waived the right.[33]

The *Barker* Court listed four factors relevant to the speedy trial calculus, while cautioning that the list was not exclusive.[34] The first factor, the length of the pretrial delay, was said to be "a triggering mechanism": unless the delay was long enough to be "presumptively prejudicial," no further inquiry was necessary.[35] The second factor was the reason for the delay:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.[36]

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[31] *Id.*

[32] *Id.* at 523, 529.

[33] *Id.* at 523-30. In Phillips v. United States, 201 F. 259, 262 (8th Cir. 1912), the Eighth Circuit became the first federal court of appeals to hold that the defendant could not complain of pretrial delay that elapsed prior to his "demand" for a trial. This rule was subsequently adopted by other federal courts, including the Second Circuit. *See, e.g.*, United States v. Maxwell, 383 F.2d 437 (2d Cir. 1967), *cert. denied*, 389 U.S. 1057 (1968).

[34] *Barker*, 407 U.S. at 530, 533. The *Barker* test closely tracked the standard that had previously been adopted by the Second Circuit in United States *ex rel.* Von Cseh v. Fay, 313 F.2d 620 (2d Cir. 1963). In that case, the court of appeals stated that determinations of speedy trial motions should be based on a consideration of four factors: "the length of delay, the reason for the delay, the prejudice to the defendant, and waiver by the defendant." *Id.* at 623. *Accord* Note, *The Right to a Speedy Criminal Trial*, *supra* note 22, at 861-63. This standard was applied several times by the court of appeals prior to the decision in *Barker*. *See, e.g.*, United States v. DeMasi, 445 F.2d 251, 255 (2d Cir. 1971); United States *ex rel.* Solomon v. Mancusi, 412 F.2d 88, 90 (2d Cir.), *cert. denied*, 396 U.S. 936 (1969); United States v. Simmons, 338 F.2d 804, 807 (2d Cir. 1964), *cert. denied*, 380 U.S. 983 (1965).

[35] *Barker*, 407 U.S. at 530.

[36] *Id.* at 531 (footnote omitted). *See also* Strunk v. United States, 412 U.S. 434, 436 (1973) ("Unintentional delays caused by overcrowded court dockets or understaffed prosecutors are among the factors to be weighed less heavily than intentional delay, calculated to hamper the defense, in determining whether the Sixth Amendment has been violated.").

The third factor was "whether and how" the defendant asserted his speedy trial right:[37] A defendant who knowingly failed to object to pretrial delay should rarely be able to prove that he was denied a speedy trial,[38] whereas a defendant who frequently and vociferously objected to delay should be assumed to have suffered a more serious deprivation.[39] The last factor was whether the defendant had been prejudiced by the delay, including, most importantly, whether the passage of time had impaired his defense.[40]

When fugitive defendants claim that the government failed to pursue them diligently enough and so must be blamed for delaying the trial, a court must determine how to apply the second factor in the *Barker* calculus—whether the government caused the pretrial delay and had no valid reason for doing so. Although the Court has never addressed this question in the context of a speedy trial claim brought by a fugitive defendant, it has considered a number of cases in which the prosecution's accountability for pretrial delay was at issue, including cases where it was argued that the prosecution had a duty to take affirmative measures to expedite the trial.

In several of the Court's cases, the prosecution's affirmative conduct was the cause of the pretrial delay. In such situations, the prosecution will be held accountable for the delay unless it had a good reason for acting as it did.[41] For example, the prosecution was held accountable for delay in one of the Court's earliest cases, *United States v. Provoo*,[42] which summarily affirmed a Maryland district court's dismissal of an indictment.[43] The defendant in *Provoo* had been imprisoned for five years while awaiting trial in an inappropriate venue. The government was found to have deliberately proceeded in the Southern District of

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[37] *Barker*, 407 U.S. at 531.

[38] *Id.* at 529, 532 ("[F]ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.").

[39] *Id.* at 531 ("The more serious the deprivation, the more likely a defendant is to complain.").

[40] *Id.* at 533.

[41] *See, e.g.*, Klopfer v. North Carolina, 386 U.S. 213, 214, 226 (1967) (the prosecution did not have a valid reason to indefinitely postpone criminal proceedings).

[42] 350 U.S. 857 (mem.) (per curiam), *aff'g* Petition of Provoo, 17 F.R.D. 183 (1955).

[43] The Supreme Court did not issue an opinion in *Provoo*, but the district court's opinion was later cited with approval in Dickey v. Florida, 398 U.S. 30, 43 (1970) (Brennan, J., concurring).

New York, where venue was doubtful, in order to gain a strategic advantage.[44] In contrast, in a more recent speedy trial decision, *United States v. Loud Hawk*,[45] the Court held that pretrial delay caused by the government's interlocutory appeal of a suppression order was justified because the appeal was taken in good faith and, indeed, proved meritorious.[46]

A different and more difficult question arises in cases where pretrial delay is not attributable to affirmative conduct by the prosecution. Where the impediments to a prompt trial are not initially imposed by the prosecution, will the prosecution nevertheless be blamed for failing to remove them? In some instances,

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[44] Petition of Provoo, 17 F.R.D. 183, 201 (D. Md.), *aff'd per curiam*, 350 U.S. 857 (1955). Provoo, a sergeant in the U.S. Army, was captured by the Japanese in May 1942 and held as a prisoner of war until August 1945, during which time he allegedly worked for the Japanese as an interpreter, guide, and advisor, and reported on the activities of other prisoners, providing information about secret codes as well as denouncing another prisoner of war who was then executed by the Japanese. Provoo was arrested by the army in August 1945 and held in custody until April 1946, when, having seemingly been exonerated, he was returned to the United States and, four months later, discharged. 17 F.R.D. at 185-87.

Provoo almost immediately reenlisted and, over the ensuing years, during which the FBI initiated a treason investigation, Provoo was confined for substantial periods of time on unrelated charges. In 1949, at a time when Provoo was confined at Fort Meade in Maryland, officials of the Army and the Department of Justice decided that Provoo would be released and charged as a civilian with treason, but that his release would take place in New York, which was considered a more hospitable venue for the prosecution. *Id.* at 187-92.

In September 1949, Provoo was transported from Fort Meade to Governor's Island, New York, where he was required to accept an undesirable discharge and then immediately arrested by the FBI. He was charged with treason in the Southern District of New York and held without bail. Trial did not begin until October 1952, despite the defendant's requests to be tried sooner. Provoo disintegrated emotionally during his confinement. He was convicted and sentenced to life imprisonment early the next year. *Id.* at 192-94.

Thereafter, Provoo sought a new trial on the basis of newly discovered information about his transfer from Fort Meade to New York. *Id.* at 194. Although the district court denied the motion in May 1954, the Second Circuit overturned Provoo's conviction three months later. While its decision was based on the erroneous admission of evidence of Provoo's homosexuality, the court also observed that venue in New York had been improper. United States v. Provoo, 215 F.2d 531, 538-39 (2d Cir. 1954).

Provoo was then indicted in the District of Maryland and transported there to be retried. 17 F.R.D. at 194-95. Finding that Provoo's mental health had deteriorated to the point where he could barely assist in his own defense, that defense witnesses had died, and that there had been unnecessary delays in indicting him and bringing him to trial, the district court held that Provoo had been denied his right to a speedy trial and therefore dismissed the indictment. *Id.* at 203.

[45] 474 U.S. 302 (1986).

[46] *Id.* at 316-17.

the prosecution will not be blamed. For example, in *Pollard v. United States*,[47] the Court found that the prosecutor was not to blame for a two-year delay between the imposition of an illegal sentence and a subsequent resentencing at which the defendant was treated more harshly. The five-Justice majority found that the delay was merely "accidental" and not the responsibility of the government.[48] Likewise, in *Loud Hawk*,[49] the Court held that pretrial delay caused by the defendants' interlocutory appeal from the denial of their motion to dismiss the indictment could not be counted in support of the speedy trial claim.[50]

In *Pollard* and *Loud Hawk*, the prosecution's failure to act was not unreasonable. In *Pollard*, for example, the prosecution was apparently unaware of the need for resentencing. And, in *Loud Hawk*, there was nothing the prosecution could have done to expedite the trial beyond opposing the defendants' interlocutory appeal. In other circumstances, however, there may be measures reasonably available to prosecutors to avert pretrial delay. The question is whether the prosecution must take such measures even though it did not cause the delay. At least in some cases, the answer is that the government must, indeed, do so.

In *Smith v. Hooey*,[51] the Court held that a Texas state prosecutor was to blame for pretrial delay occasioned by his failure to attempt to secure the presence of an indicted defendant who

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[47] 352 U.S. 354 (1957).

[48] *Id.* at 361-62. Pollard was convicted of unlawfully taking and embezzling a Treasury check, an offense which he committed during a two-week drinking spree. At the time of sentencing, Pollard was completing a state prison term, and the district judge, impressed by Pollard's recent participation in Alcoholics Anonymous, appeared to decide not to impose any additional punishment. After Pollard was taken from the courtroom, however, in response to the prosecutor's request for clarification, the judge imposed three years' probation to commence upon Pollard's release from state custody. Because of Pollard's absence from the courtroom, that sentence was invalid. *Id.* at 355-56.

Two years later, Pollard was arrested for violating probation. He was brought before the sentencing judge, who resentenced him on the original embezzlement charge to two years' imprisonment. In challenging this sentence, Pollard argued, among other things, that the sentencing delay violated his sixth amendment right to a speedy trial. *Id.* at 356-57, 361. The majority rejected this argument, distinguishing Pollard's situation from previous cases in which the delay was deliberately caused by the government. *Id.* at 362. In contrast, four dissenting justices blamed the government for its failure to take steps to have the original sentence corrected after being put on notice of the defect in that sentence. *Id.* at 368 (Warren, C.J., dissenting).

[49] 474 U.S. 302 (1986).

[50] *Id.* at 316-17.

[51] 393 U.S. 374 (1969).

was serving a federal prison sentence.[52] The Court rejected the argument that the prosecutor was not required to ask federal authorities to make Smith available for trial in Texas because a state court had no power to order Smith's production.[53] In the Supreme Court's view, this reasoning foundered on the reality that, upon request, the Bureau of Prisons would almost certainly have produced Smith in accordance with its normal procedure, even though it was not legally obliged to do so.[54] By simply and inexpensively obtaining a writ of habeas corpus *ad prosequendum* from the state court and forwarding the writ to federal prison authorities, the prosecution could almost have guaranteed Smith's prompt appearance at state criminal proceedings.[55]

The *Smith* Court drew an analogy between the prosecution's duty to try to secure the presence of an imprisoned defendant and the prosecution's duty under the confrontation clause to try to secure the presence of an imprisoned witness.[56] In *Barber v. Page*,[57] decided one year before *Smith v. Hooey*, the Court held that the prosecution could not introduce a transcript of testimony given at a previous proceeding in place of a witness's live testimony unless the prosecutor first "made a good-faith effort to obtain [the witness's] presence at trial."[58] Moreover, the state prosecutor's duty to undertake such an effort was

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[52] *Id.* at 382-83. Prior to the decision in *Smith*, this question had occasioned considerable critical discussion. *See, e.g.*, Schindler, *Interjurisdictional Conflict and the Right to a Speedy Trial*, 35 U. CIN. L. REV. 179 (1966); Walther, *Detainer Warrants and the Speedy Trial Provision*, 46 MARQ. L. REV. 423 (1963); Note, *Convicts—The Right to a Speedy Trial and the New Detainer Statutes*, 18 RUTGERS L. REV. 828 (1964); Note, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, 77 YALE L.J. 767 (1968). For commentary following the Court's decision, see Tuttle, *Catch 2254: Federal Jurisdiction and Interstate Detainers*, 32 U. PITT. L. REV. 489 (1971); Comment, *The Convict's Right to a Speedy Trial*, 61 J. CRIM. L., CRIMINOLOGY & POL. SCI. 352 (1970).

[53] *Smith*, 393 U.S. at 380. Smith was indicted in Texas in 1960 on a charge of theft. Immediately upon learning of the charge, he requested a speedy trial. Although Smith was promised a trial within two weeks after he appeared in court, the state took no steps to secure his appearance. For seven years, Smith wrote periodically to request a trial, but to no avail. Finally, he moved to dismiss the charges for want of prosecution, but the Texas Supreme Court denied relief on the basis of one of its earlier decisions, Cooper v. State, 400 S.W.2d 890 (Tex. 1966). 393 U.S. at 375-77.

[54] *Smith*, 393 U.S. at 381 & n.13.

[55] *Id.* at 380-81 & nn.11 & 13.

[56] *Id.* at 381-83.

[57] 390 U.S. 719 (1968).

[58] *Id.* at 724-25.

not excused by the fact that the witness was in federal prison.[59] Reliance on the state court's absence of authority to compel the witness's attendance was thought to be inappropriate in light of the "increased cooperation between the States themselves and between the States and Federal Government."[60] The *Smith* Court quoted at length from this decision[61] and then echoed its language, concluding that "[u]pon the petitioner's demand, Texas had a constitutional duty to make a diligent, good-faith effort to bring him before the Harris County court for trial."[62]

In a decision the following year, the Court relied on *Smith* but characterized its holding narrowly. The defendant in *Dickey v. Florida*,[63] while serving a federal prison sentence, had made repeated requests over a seven-year period to be tried on charges pending in Florida. By the time the state prosecutor arranged for Dickey's production, potential defense witnesses had died or could not be located.[64] The Court overturned Dickey's conviction, finding that "no valid reason for the delay existed; it was exclusively for the convenience of the State."[65] But, in the course of its opinion, it characterized the holding of *Smith*, on which it relied, as follows: "on demand a State ha[s] a duty to make a diligent and good-faith effort to secure the presence of the accused *from the custodial jurisdiction* and afford him a trial."[66] Under this formulation, the prosecution's affirmative duty to bring an absent defendant to trial would be quite limited. The *Smith* Court did not hold that the prosecution had

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[59] *Id.* at 724.

[60] *Id.* at 723.

[61] *Smith*, 393 U.S. at 381-83.

[62] *Id.* at 383.

[63] 398 U.S. 30 (1970).

[64] *Id.* at 32-36.

[65] *Id.* at 38. Three years later, in Moore v. Arizona, 414 U.S. 25 (1973), the Court considered yet another case in which the prosecution had delayed in obtaining the presence of a defendant who was imprisoned in another jurisdiction. Moore was not tried until almost three years after he was charged with murder in Arizona and 28 months after he first demanded to be brought from state prison in California to be tried on the charges. The Court found that the state court, in rejecting Moore's speedy trial claim, had misread *Barker v. Wingo* to require a showing that the defense was impaired before a defendant could prevail on such a claim. *Id.* at 25-26. The Court explained that prejudice was only one of several factors to be considered and that, in any event, impairment of the defense was only one possible prejudice contemplated by the speedy trial clause. *Id.* at 26-27. The Court remanded to the state court for its reconsideration of Moore's claim in light of *Smith v. Hooey*, *Barker v. Wingo* and *Dickey*. *Id.* at 28.

[66] 398 U.S. at 37 (emphasis added).

any duty with respect to absent defendants who were at liberty, but only that the prosecution must try to secure the presence of those who were imprisoned.[67]

Since deciding *Smith v. Hooey* and *Dickey v. Florida*, the Supreme Court has not had occasion to determine, in general, whether the prosecution's affirmative obligation to obtain a defendant's presence at trial goes beyond the issuance of writs for imprisoned defendants. Nor has the Court considered, in particular, whether steps must be taken to apprehend a defendant who is evading criminal charges. Justice Brennan alluded to this issue, however, in an extensive concurring opinion in *Dickey*. In his concurring opinion, which was designed "to point out certain of the major problems that courts must consider in defining the speedy-trial guarantee,"[68] Justice Brennan gave particular consideration to what might constitute valid reasons for pretrial delay.[69] Among other things, he noted that the speedy trial right might not apply where the defendant "has, or shares, responsibility" for pretrial delay, such as "when delay results from his being a fugitive from justice . . . ."[70] Thus, this jurist, known for strongly advocating the rights of criminal defendants, expressed doubt about the right of a fugitive defendant to complain about pretrial delay.

Against this background of Supreme Court precedent, including the narrowly construed holding of *Smith v. Hooey* and Justice Brennan's expression of skepticism, the Second Circuit would later be called on to decide whether to charge the government with an affirmative responsibility to pursue fugitive defendants in a diligent manner.

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[67] Under this formulation, the prosecution also would not have to secure the presence of incarcerated defendants who made no "demand" for trial. However, this limitation on the affirmative duty recognized in *Smith v. Hooey* was eliminated by the Court's rejection of the "demand-waiver" rule in Barker v. Wingo, 407 U.S. 514, 524-28 (1972). *But see* United States v. McConahy, 505 F.2d 770, 773 (7th Cir. 1974) ("In a sense the delay resulting from a defendant's imprisonment in another jurisdiction is attributable to him.").

[68] 398 U.S. at 41 (Brennan, J., concurring).

[69] *Id.* at 48, 51-52 (Brennan, J., concurring).

[70] *Id.* at 48 (Brennan, J., concurring).

II. THE SPEEDY TRIAL RIGHTS OF FUGITIVES: THE VIEW OUTSIDE THE SECOND CIRCUIT

A defendant's flight from prosecution has traditionally been viewed as wrongful conduct. At common law, a fugitive was treated quite harshly. If absent, a defendant could be convicted of the charges against him through the process of outlawry.[71] Moreover, he would be punished more severely than if he had been convicted after trial: If the absconding defendant failed to respond to summonses issued by five consecutive county courts, all his goods and chattels would be forfeited and he would be sentenced, in a misdemeanor case, to perpetual imprisonment, or, in a felony case, to death.[72]

In this country, the remedy of outlawry was never adopted by the federal courts and used only rarely by early state courts.[73] However, the deliberate refusal to answer criminal charges has been considered wrongful conduct that is subject to conventional sanctions. For example, a defendant who fails to appear in court after having been served with a summons may be punished for contempt of court,[74] while a defendant who absconds after having been released on bail may be punished for "bail jumping."[75] Moreover, criminal sanctions are not limited to those fugitive defendants who have defied a judicial order or received notice to appear in court. It is a federal crime to "move[] or travel[] in interstate or foreign commerce with intent . . . to avoid prosecution . . . ."[76] This statute applies even where the defendant flees before being formally charged with a crime.[77] Thus, a fugitive

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[71] *See* Rex v. Wilkes, 98 Eng. Rep. 327, 339 (K.B. 1770) (Mansfield, L.C.J.).

[72] *Id. See also* Green v. United States, 356 U.S. 165, 170-71 (1958); United States v. Lockwood, 382 F. Supp. 1111, 1117-18 (E.D.N.Y. 1974) (Weinstein, J.) (citing BLACKSTONE'S COMMENTARIES ON THE LAW, ch. XXIV, 886-88 (Gavit ed. 1941)).

[73] *See* United States v. Hall, 198 F.2d 726, 727-28 (2d Cir. 1952) ("[D]uring the nineteenth century [outlawry] was either abolished or fell into disuse . . . and of course today has only an historical interest.").

[74] *See, e.g.*, 18 U.S.C. § 401 (1988). *Cf. Green*, 356 U.S. at 188-89 (contempt-of-court statute extends to disobedience of surrender orders).

[75] 18 U.S.C. § 3146 (1986); *see also* 18 U.S.C. § 3150 (1966) *repealed by* Pub. L. No. 98-473, title II, § 203(a), 98 Stat. 1976 (1984).

[76] 18 U.S.C. § 1073 (1988). Interstate flight to avoid prosecution was initially made a federal crime by the Fugitive Felon Act of 1934. Pub. L. No. 233, 48 Stat. 782 (1934).

[77] United States v. Frank, 864 F.2d 992, 1007 (3d Cir. 1988) ("Congress did not intend section 1073 to apply only to flight to avoid formally pending . . . charges."); United States v. Bando, 244 F.2d 833, 842-43 (2d Cir.) (In construing section 1073, "[t]he words 'to avoid prosecution' [do not mean] 'to avoid a *pending* prosecution.'" (emphasis

defendant who acts evasively to avoid arrest and prosecution engages in conduct that is viewed as wrongful, and is thus subject to punishment.[78]

The moral premise of these criminal provisions—that an individual acts wrongfully, indeed criminally, by fleeing from prosecution—has also been a part of the procedural law governing the timing of criminal trials. Until the 1960s, legal protections against pretrial delay generally could not be invoked by a defendant whose absence from trial was caused by his own flight from the jurisdiction or by other efforts on his part to avoid arrest. This principle was not qualified by any duty on the part of the sovereign to pursue the defendant diligently.

This principle finds its clearest expression in the statutes of limitations which apply to criminal cases. While requiring that an indictment be returned within a specific time after the commission of a criminal offense, statutes of limitations in this country have excluded the period of pre-indictment delay when the defendant was a fugitive. For example, at the time of the adoption of the Bill of Rights, the federal statute of limitations adopted by the first Congress required noncapital offenses to be indicted within two years of the offense and capital offenses, other than murder or forgery, to be indicted within three years of the offense, "[p]rovided that nothing herein contained shall extend to any person or persons fleeing from justice."[79] Many

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in original)), *cert. denied*, 355 U.S. 844 (1957).

[78] There are only a handful of reported decisions in which defendants have been prosecuted under this statute. *See, e.g.*, United States v. Frank, 864 F.2d 992 (3d Cir. 1988); United States v. Bando, 244 F.2d 833 (2d Cir.), *cert. denied*, 355 U.S. 844 (1957). The primary purpose of section 1073 is to provide a jurisdictional basis for the Federal Bureau of Investigation to assist state authorities by apprehending fugitives from state prosecution. After a defendant is arrested under section 1073 for having fled from state prosecution, he is usually returned to the state for trial and the federal charge is dismissed. *See generally* United States v. Frank, 864 F.2d at 996-97.

[79] An Act for the Punishment of certain Crimes against the United States, ch. 9, § 32, 1 Stat. 112 (Apr. 30, 1790). *See. e.g*, United States v. White, 28 F. Cas. 550, 551 (C.C.D.C. 1836) (No. 16,675).

This limitation on the reach of the federal statute of limitations has continued until the present day and is now embodied in 18 U.S.C. § 3290 (1988), which provides: "No statute of limitations shall extend to any person fleeing from justice." In Jhirad v. Ferrandina, 486 F.2d 442, 444-45 (2d Cir. 1973), *cert. denied*, 429 U.S. 833 (1976), the Second Circuit acknowledged the reasonableness of this tolling provision:

> The phrase 'fleeing from justice' carries a common sense connotation that only those persons shall be denied the benefit of the statute of limitations who have absented themselves from the jurisdiction of the crime with the intent of es-

state statutes of limitations in the nineteenth century contained similarly worded provisions.[80]

Although proof of the prosecution's failed efforts to arrest the defendant might be useful to establish that the defendant had in fact fled from justice,[81] courts interpreting these exceptions to the statute of limitations did not condition their application on the government's demonstration that it had made suitable efforts to locate and apprehend the defendant.[82] Moreover, the tolling provisions applied not only when the defendant defied the court itself by jumping bail, but also when the defendant absconded before he could be arrested and brought before the court.[83] A defendant acted wrongfully by fleeing from prosecution and thereby forfeited or waived the right to an expeditious resolution of the criminal charges.[84]

Similarly, at least until the 1960s, fugitives were denied the benefit of state statutory provisions requiring a trial to be held within a specified period following indictment.[85] The prosecution

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caping prosecution. It does not appear to us to be unreasonable to provide for tolling of the statute of limitations when a person leaves the place of his alleged offense to avoid prosecution or arrest and for not tolling the statute when a person without such purpose of escaping punishment merely moves openly to another place of residence.

[80] *See, e.g.*, § 1666 Gantt's Digest (*quoted in* Lay v. State, 42 Ark. 105, 108 (1883)); Act of 1805 (*quoted in* State v. Foster, 7 La. Ann. 255, 256 (1852)); LA. REV. STAT. 986 (*quoted in* State v. Vines, 34 La. Ann. 1073, 1075 (1882)); MO. REV. STAT. 1879, § 1706 (*quoted in* State v. Harvell, 89 Mo. 588, 589, 1 S.W. 837, 838 (1886)).

Some states had even broader tolling provisions which applied whenever the defendant was absent from the state, regardless of whether the defendant intended by his absence to avoid arrest. *See, e.g.*, CAL. CRIM. PRAC. ACT § 99 (Wood's Dig. 278) (*quoted in* People v. Montejo, 18 Cal. 38, 40 (1861)).

[81] State v. Foster, 8 La. Ann. 290, 291-92 (1853) (governor's proclamation offering reward for defendant's apprehension was properly received in evidence to prove that defendant had fled from justice).

[82] In Howgate v. United States, 7 App. D.C. 271, 240-48 (1895), the court found that a fugitive defendant could not claim the benefit of the federal statute of limitations even though government officers not only failed to seek his arrest, but assisted his flight from the jurisdiction.

[83] *See, e.g.*, State v. Barton, 32 La. Ann. 278, 279 (1880).

[84] *See, e.g.*, Howgate v. United States, 7 App. D.C. at 245 ("[F]leeing from justice is itself a wrongful act, although perhaps not always a criminal one; and we fail to see the harshness of the law which holds a person to the just legal consequences of his own wrongful act.").

[85] *See, e.g.*, *Ex parte* Gere, 221 P. 689, 691 (Ca. Dist. Ct. App. 1923); State *ex rel.* Trester v. Leidigh, 53 Neb. 148, 150, 73 N.W. 545, 545-46 (1897); State v. Swain, 147 Or. 207, 213-14, 31 P.2d 745, 748 (1934); Commonwealth v. Hale, 13 Phila. 452, 453 (1879). *See also* State v. Arthur, 21 Iowa 322, 324 (1886).

would, of course, be required to show that the defendant had in fact been a fugitive during the period of pretrial delay, and to make this showing, the prosecution might offer proof of its unsuccessful efforts to locate the defendant. But once it was established that the defendant was fleeing or concealing himself, the prosecution did not have to make efforts to apprehend the defendant.[86]

For many years, courts interpreting the constitutional right to a speedy trial held that fugitive defendants may not complain of pretrial delay.[87] Courts gave two principal reasons why the speedy trial right was unavailable to a fugitive defendant: First, the defendant's flight was thought of as an implied waiver of the speedy trial right.[88] Second, the defendant's flight was viewed as a sufficient justification or excuse for pretrial delay.[89] Because

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It made sense that if fugitives were to be denied the benefits of statutes of limitations, they should also be denied the benefits of speedy trial statutes. Indeed, there is a stronger justification for delaying the start of trial on account of a defendant's flight than there is for delaying the filing of an indictment. An indictment can be filed in the defendant's absence, but a trial generally cannot start unless the defendant is there. Thus, a fugitive defendant's successful evasion would effectively preclude the commencement of trial.

[86] *See, e.g., Ex parte* Gere, 221 P. 689 (Ca. Dist. Ct. App. 1923). In *Gere* the court considered whether the prosecution had exercised reasonable diligence in its attempt to locate the defendant. But it apparently did so, not because it believed that the prosecution had a duty to pursue a fugitive defendant, but because the defendant had denied having tried to avoid arrest. Had the defendant in fact been living openly in the jurisdiction, as he claimed, then the prosecution would have been obliged to take reasonable measures to secure his presence at trial. Thus, the court found two independent grounds for denying the defendant's speedy trial claim. First, the defendant's own wrongdoing had contributed to the pretrial delay, because he had adopted fictitious names in order to avoid arrest. Second, the prosecution had, in any event, made adequate efforts to apprehend him. *Id.* at 692.

[87] *See, e.g.*, Morland v. United States, 193 F.2d 297 (10th Cir. 1951); Shepherd v. United States, 163 F.2d 974, 976 (8th Cir. 1947); Hart v. United States, 183 F. 368, 370 (6th Cir. 1910); Flagg v. State, 11 Ga. App. 37, 39, 74 S.E. 562, 562 (1912); Chelf v. State, 58 N.E.2d 353, 355 (Ind. 1944); State v. Swain, 147 Or. 207, 214, 31 P.2d 745, 748 (1934); Crookham v. State, 5 W. Va. 510, 514 (1871); State v. Reynolds, 28 Wis. 2d 350, 355, 137 N.E.2d 14, 16 (1965); State v. Keefe, 98 P. 122, 127 (Wyo. 1980).

[88] *See, e.g.*, Thornton v. State, 7 Ga. App. 752, 753, 67 S.E. 1055, 1056 (1910). *See also* Morland v. United States, 193 F.2d at 298; Shepherd v. United States, 163 F.2d at 976.

[89] *See, e.g.*, Shepherd v. United States, 163 F.2d at 976; State v. Swain, 31 P.2d at 748; State v. Reynolds, 28 Wis. 2d at 355, 137 N.W.2d at 16.

One court offered a third rationale when it held that a fugitive defendant could not invoke the speedy trial right because "only the time spent in custody, in one form or another, is considered" in determining whether the right has been violated. State v. Reynolds, 28 Wis. 2d at 355, 137 N.W.2d at 16. This view was premised on a narrow, and

the early decisions took the view that a defendant should not be afforded relief from pretrial delay that he deliberately caused, a fugitive defendant's speedy trial claim could be denied out of hand; it was unnecessary for a court to consider whether or not the prosecution had taken steps to apprehend the defendant.[90] Thus, until the late 1960s, there was never any suggestion in the case law that a fugitive defendant's inability to invoke the speedy trial right was somehow dependent on the government's exercise of "due diligence" in pursuit of him.

Two legal events apparently affected the lower courts' thinking, however, and led some of them to give consideration to the concept of prosecutorial "due diligence." The first event was the ABA's adoption of standards for speedy trials in 1968.[91] These standards became the model for court rules and legislation, including the federal Speedy Trial Act, which sought to give criminal defendants greater protection than was afforded by the sixth amendment right to a speedy trial.[92] The ABA standards provide that a trial must generally commence within a specific period of time following a defendant's arrest or indictment.[93] They also enumerate specific justifications for greater periods of delay.[94]

Both the ABA standards and the Speedy Trial Act address delay caused by the absence of a fugitive defendant. In the case of a fugitive defendant whose whereabouts are unknown, they preserve the traditional principle that the defendant may not complain about pretrial delay, regardless of whether the government has taken steps to locate him.[95] They depart from this

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now discarded, conception of the function of the speedy trial right: it presupposed that the right was designed only to protect the accused against a lengthy period of constraint while awaiting trial. So construed, the function of the speedy trial right would not be served by applying it to an individual who was at large during the course of pretrial delay.

[90] *See, e.g.*, Shepherd v. United States, 163 F.2d at 976; Thornton v. State, 7 Ga. App. at 753, 67 S.E.2d at 1056; State v. Swain, 31 P.2d at 748; State v. Reynolds, 28 Wis. 2d at 355, 137 N.W.2d at 16. *Compare* People v. Buckley, 116 Cal. 146, 47 P. 1009 (1897) (delay attributable to witness's absence justified only if government diligently seeks the witness).

[91] Standards Relating to Speedy Trial (1968).

[92] On the inadequacy of the speedy trial clause to remedy any but the most egregious pretrial delay, see Amsterdam, *supra* note 22.

[93] Standards Relating to Speedy Trial § 2.2 (1968).

[94] *Id.* at § 2.3.

[95] *See id.* § 2.3(e); Speedy Trial Act, 18 U.S.C. §§ 3161-3174, § 3161(h)(3)(B) (1985).

traditional approach, however, in the case of a fugitive defendant whose whereabouts are known but who cannot be arrested because he is beyond the court's process. In such a case, the fugitive defendant is treated much like an absent defendant who is not deliberately evading prosecution.[96] Like a defendant who is unaware that he has been charged, a fugitive defendant living openly outside the jurisdiction must be pursued. Pretrial delay is excused only if the fugitive defendant's presence cannot be obtained by "due diligence" or if efforts to obtain the defendant's presence are resisted.[97]

It is unclear why the ABA rules departed from settled authority. One possibility is that the drafters recognized the difficulty of determining whether an individual residing openly outside the jurisdiction is, in fact, a fugitive. In many cases, the defendant may simply be unaware of the charges. Therefore, if only to prove that the defendant is acting with the intent of avoiding trial, the prosecution ordinarily would have to make at least some effort to seek his presence. Another possible explanation is that the ABA drafters believed that when the defendant is living abroad at the time of indictment, it may be unfair to equate him with those who flee or conceal themselves to avoid prosecution. When the defendant's absence at the outset does not reflect wrongful conduct, it may be considered reasonable to put the burden on the prosecution to make some effort to compel his appearance, rather than to require the defendant to bring himself into the jurisdiction voluntarily.

The second event that apparently influenced some lower courts was the Supreme Court's decision in *Smith v. Hooey*[98] in 1969. The principle established in *Smith*, that a prosecutor has a

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This principle has also been preserved by most states which have adopted rules or statutes governing speedy criminal trials. Many states provide that the right to a speedy trial commences only after the defendant has been taken into custody. *See, e.g.*, FLA. R. CRIM. P. 3.191(a) (1989); ILL. REV. STAT. ch. 38, § 103-5(a) (1976); IND. R. CRIM. P. 4(A) (1974); KAN. STAT. ANN. 22-3402 (1981). Others provide that the right commences after charges have been filed but does not apply to an absent defendant who seeks to avoid prosecution. *See, e.g.*, ALASKA R. CRIM. P. 45(d)(4) (1981); COLO. REV. STAT. § 18-1-405(6)(d) (1963); LA. CODE CRIM. PROC. ANN. art. 579 (West 1972); MASS. R. CRIM. P. 36(b)(2)(B) (1981); MO. ANN. STAT. § 545.780(2) (Vernon 1982); N.Y. CRIM. PROC. § 30.30(4)(c) (McKinney 1981).

[96] Standards Relating to Speedy Trial § 2.3(e); 18 U.S.C. § 3161(h)(3)(B) (1985).

[97] *Id. See* note 137 *infra*.

[98] 393 U.S. 374 (1969).

constitutional duty of "due diligence" to secure the presence of a defendant who is incarcerated elsewhere in the country, could not easily be limited. Courts quickly recognized that, for other reasons, a defendant might have to rely on government intervention to secure his appearance in court. Although the prosecution in other situations might have to undertake more extensive or expensive efforts than simply obtaining a writ of habeas corpus, this alone was not considered a sufficient justification for circumscribing the prosecution's duty.[99]

Courts extending *Smith v. Hooey* have found that the government has a duty to seek the presence of a defendant who is incarcerated abroad, at least in cases in which the defendant is subject to extradition under treaty.[100] Like the understandings between states governing the rendition of incarcerated defendants,[101] extradition treaties provide a reasonable means of obtaining the defendant's presence, even if at somewhat greater

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[99] *Id.* at 380 n.11.

[100] *See, e.g.*, United States v. McConahy, 505 F.2d 770, 773 (7th Cir. 1974); Brown v. Parratt, 406 F. Supp. 1357, 1359 (D. Neb. 1975); United States v. Raffone, 405 F. Supp. 549, 550-51 (S.D. Fla. 1975). *See also* United States v. Walton, 814 F.2d 376, 379-80 (7th Cir. 1987) (interpreting Speedy Trial Act).

The Ninth Circuit has concluded, however, that where the defendant is not subject to an extradition treaty, the government is not required to engage in diplomatic negotiations to secure his return. *See* United States v. Saunders, 641 F.2d 659, 665 (9th Cir. 1980), *cert. denied*, 452 U.S. 918 (1981); United States v. Hooker, 607 F.2d 286, 286-89 (9th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980). In *Hooker* the court rejected the defendant's argument that the government should have negotiated for his return from Peru (after he was arrested there) so that he could be tried on narcotics charges pending in Washington. Because Peru did not provide for extradition in narcotics cases, Hooker's return could only have been secured through diplomatic negotiations. Relying on the Second Circuit's decision in *Salzmann*, the court held that because of the executive branch's exclusive competence in the field of foreign affairs, it would be improper "to adopt a rule . . . that would, in substance, require the Attorney General or his agents to embark on such negotiations, or require him to try to persuade the Department of State to do so." 607 F.2d at 289-90.

[101] The interstate extradition process is not really one of comity; the extradition clause of the United States Constitution, implemented by 18 U.S.C. § 3182 (1988), imposes an affirmative duty on all states to provide for interstate extradition. *See* U.S. CONST. art. IV, § 2, cl. 2 ("A person charged in any State . . . who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."). *See also* Appleyard v. Massachusetts, 203 U.S. 222, 227 (1906) (interpreting extradition clause). In addition, most states have adopted the Uniform Extradition Act (1926), which establishes extradition procedures ancillary to those provided for in the federal implementing statute. *See* Am. Jr. 2d Desk Book, Item No. 124 (table indicating which states have adopted the Uniform Extradition Act).

expense.[102] Courts have also found that the government must try to locate defendants who are ignorant of the charges against them and who, like prisoners, are therefore unable to appear in court of their own volition.[103] It might seem that a duty to try to apprehend fugitive defendants is similarly a logical extension of *Smith v. Hooey*.

In the years since the adoption of the ABA guidelines and the decision in *Smith v. Hooey*, some courts deciding the speedy trial claims of fugitive defendants have addressed the adequacy of the prosecution's efforts to apprehend the defendant.[104] It is

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[102] United States v. McConahy, 505 F.2d 770, 773 (7th Cir. 1974) ("There is no reason not to apply the rule of *Smith v. Hooey* when the defendant is incarcerated by a foreign government rather than the United States or one of its states . . . . [T]he additional expense is not a factor deserving of consideration . . . ."); United States v. Raffone, 405 F. Supp. 549, 550 (S.D. Fla. 1975) (rejecting government's "explanation [that] it 'seemed a better use of Government time and money to prosecute other cases, rather than devote the same to the extremely complex and costly business of extradicting a foreign felon.' ").

[103] *See, e.g.*, United States v. Bagga, 782 F.2d 1541, 1543, (11th Cir. 1986); United States v. Greene, 737 F.2d 572, 575-76 (6th Cir. 1984); United States v. Deleon, 710 F.2d 1218, 1221-22 (7th Cir. 1983); United States v. Anderson, 627 F.2d 161, 163 (8th Cir. 1980); United States v. Parish, 468 F.2d 1129, 1134-35 (D.C. Cir. 1972); United States v. McKinnon, No. 88-246-02 (E.D. Pa. filed June 6, 1989) (LEXIS, Genfed library, Dist file); United States v. Leary, 695 F. Supp. 1250, 1253 (D. Me. 1988); United States v. Alcantar-Lopez, 685 F. Supp. 181, 182 (N.D. Ill. 1988); United States v. Yancy, 660 F. Supp. 860, 862-63 (N.D. Ill. 1987); United States v. Agreda, 612 F. Supp. 153, 157-59 (E.D.N.Y. 1985); United States v. Judge, 425 F. Supp. 499, 501-02, 505 (D. Mass. 1976).

These decisions undertake little or no analysis but apparently view the duty to locate missing defendants as an obvious extension of *Smith v. Hooey*. For example, in *Deleon* the Seventh Circuit simply noted: "[T]he Government under the Sixth Amendment, has a 'constitutional duty to make a diligent good faith effort' to locate and apprehend a defendant and bring that defendant to trial." 710 F.2d at 1221 (citing, inter alia, Smith v. Hooey, 393 U.S. 374 (1969)).

[104] *See, e.g.*, United States v. Brock, 782 F.2d 1442, 1445-46 & n.5 (7th Cir. 1986) (Noting that "the government searched for Brock with due diligence" and finding that "the delay between Brock's indictment and his transfer to federal custody was due to his attempt to avoid arrest."); United States v. Weber, 479 F.2d 331, 332-33 (8th Cir. 1973) ("[T]he delay was directly caused by appellant himself . . . . There is nothing in this record to warrant a holding . . . that the government was dilatory in not making a diligent effort to locate and apprehend Weber."); United States v. Steinberg, 478 F. Supp. 29, 32-33 (N.D. Ill. 1979) ("[S]tate department officials, acting in good faith, made informal and indirect approaches to Rhodesia in their effort to obtain Steinberg's return to this jurisdiction. This was all they were obliged to do under the federal constitution and laws."); United States v. Tate, 336 F. Supp. 58, 60-61 (E.D. Pa. 1971) ("[W]e find that defendant was a fugitive and that reasonable efforts were made to locate him."). *See also* United States v. Terrack, 515 F.2d 558, 559 (9th Cir. 1975) (After detailing government's efforts to bring defendant to justice, the court concluded that defendant "cannot claim a violation of his Sixth Amendment rights by reason of delays of his own making.").

unclear, however, whether these courts believe that the prosecution is in fact under a duty of "due diligence."[105] Outside the Second Circuit, no court has expressly held that there is such a duty. Nor has any court other than the trial court in *Diacolios* actually found a violation of the speedy trial clause because of the government's failure to take adequate steps to apprehend a fugitive. Moreover, other courts have continued to reject speedy trial claims brought by fugitive defendants without considering the adequacy of the prosecution's efforts to apprehend them.[106] Some of these decisions have explicitly characterized a defendant's flight as a waiver of his speedy trial rights.[107] Others have

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[105] In some of these cases, the court's unexpressed legal premise seems to have been that the prosecution did have such a duty. *See, e.g.*, United States v. Steinberg, 478 F. Supp. at 33. However, there are at least three other possible reasons why a court would refer to the prosecution's efforts to find the defendant.

First, the court may have viewed the prosecution's diligence in pursuing the defendant as an alternative ground for denying the defendant's speedy trial motion; in other words, even if the defendant were not a fugitive, but simply an absent defendant, the prosecution could not be blamed for the delay in bringing him to justice because it made adequate efforts to locate him. *See, e.g.*, United States v. Tate, 336 F. Supp. at 60-61.

Second, the court may simply have assumed, for purposes of argument, that the due diligence standard applied, while finding that it was met. *See, e.g.*, United States v. Weber, 479 F.2d at 332-33 ("There is nothing in this record to warrant a holding, as suggested by appellant, that the government was dilatory in not making a diligent effort to locate and apprehend Weber . . . . In any event we have difficulty in adopting the rationale that an accused may purposefully obstruct justice by becoming a fugitive and then complain because of the lapse of time between the filing of the indictment and the date of the arrest.").

Finally, the court may have regarded the government's unsuccessful efforts to locate the defendant as relevant to establishing that the defendant was, in fact, a fugitive. *See, e.g.*, United States v. Terrack, 515 F.2d at 559.

[106] *See, e.g.*, United States v. Jones, 543 F.2d 1171, 1174 (5th Cir. 1976) (per curiam) (only issue considered is whether 13-month delay violated appellant's due process rights); United States v. Bey, 499 F.2d 194, 204 (3d Cir. 1974) (factors considered are "the length of and reason for the delay, the defendant's assertion of his right and the prejudice enuring to the defendant . . . ."); United States v. Cartano, 420 F.2d 362, 363-64 (1st Cir.) (no consideration of government's efforts to apprehend defendant), *cert. denied*, 397 U.S. 1054 (1970); Crowder v. United States, 383 A.2d 336, 339 & n.6 (D.C. 1978) (no consideration of government's efforts to apprehend defendant). *See also* United States v. Sandini, 888 F.2d 300, 311 n.7 (3d Cir. 1989) ("We find it ironical that Thomson [argues that defense counsel was ineffective in failing to raise a speedy trial claim], as by far the most substantial part of the delay between indictment and trial was attributable to the fact that Thomson was a fugitive until he was arrested . . . .").

[107] *See, e.g.*, United States v. DeTienne, 468 F.2d 151, 156 (7th Cir. 1972) (fugitive defendant "clearly waived his right to a speedy trial"), *cert. denied*, 410 U.S. 911 (1973); United States v. Judge, 425 F. Supp. 499, 502 (D. Mass. 1976) ("It is well established that where the defendant's unlawful flight or hiding out is the reason for the delay in his trial, he is held to have waived his right to a speedy trial.").

found that *Smith v. Hooey* is inapplicable to fugitive defendants because of the obvious difference between an incarcerated defendant, like the ones in *Smith* and *Dickey*, and a fugitive defendant who is aware of the charges and is willfully evading prosecution. In the latter case, the defendant *can* appear of his own volition, so the prosecution is not the only party capable of providing for a prompt trial.[108] Indeed, the defendant is in the best position to do so.

III. The Second Circuit Decisions Prior to *Diacolios*

Prior to the Supreme Court's decision in *Barker v. Wingo*,[109] the Second Circuit's approach to the speedy trial right was similar to that of most other federal courts. It frequently applied a balancing test, like that later adopted in *Barker*, to determine whether pretrial delay was constitutionally impermissible.[110] Among other things, the court reçognized the importance of assigning responsibility for pretrial delay, because the speedy trial clause provided no redress for "delay caused by or consented to by a defendant."[111] At the same time, anticipating the Supreme Court's decision in *Smith v. Hooey*,[112] the court recognized that a defendant could not be blamed for delay caused by his imprisonment by another sovereign, and that in such cases, the government had a responsibility to make reasonable efforts to obtain the incarcerated defendant's presence.[113] In addition, like most other courts, the Second Circuit took an expansive approach to waivers of the speedy trial right. It ap-

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[108] *See, e.g.*, United States v. Steinberg, 478 F. Supp. 29, 32-33 (N.D. Ill. 1979) (seven-year delay "was caused solely by" defendant's flight and unavailability, since he was aware of the pending charges, financially able to return from Rhodesia to answer them, and not under incarceration).

[109] 407 U.S. 514 (1972), discussed in notes 29-39 and accompanying text *supra*.

[110] *See* note 34 *supra*.

[111] United States v. Kabot, 295 F.2d 848, 853 (2d Cir. 1961) (defendant who did not move for a prompt hearing and who twice requested an adjournment of trial could not complain of delay absent a showing of prejudice). *See, e.g.*, United States v. Lustman, 258 F.2d 475, 477 (2d Cir.) (defendant cannot exploit a delay which is primarily attributable to his own acts), *cert. denied*, 358 U.S. 880 (1958).

[112] 393 U.S. 374 (1969).

[113] *See* United States v. Simmons, 338 F.2d 804 (2d Cir. 1964) (delay between indictment and arrest of defendant who had been in various state prisons was not the fault of the government, which had spent the period attempting to locate the defendant), *cert. denied*, 380 U.S. 983 (1965).

plied the "demand-waiver" rule[114] in order to ensure that the speedy trial right would be used only as a shield and not as a sword by criminal defendants.[115]

In 1971, four years before the adoption of the federal Speedy Trial Act, the Second Circuit took a more liberal approach to the speedy trial right by issuing detailed rules governing the expeditious resolution of criminal cases.[116] The Second Circuit's rules were inspired by, and largely patterned on, the standards recommended by the American Bar Association in 1968.[117] Like the ABA standards, the Second Circuit's rules proscribed specific periods of pretrial delay and required the dismissal of indictments when delay was unjustified, even if the defense was not impaired by the passage of time and the defendant had never made a "demand" for a prompt trial.[118] These court-enacted rules applied to offenses committed prior to July 1975, when the Speedy Trial Act took effect.[119] Over the past two decades, the judicial rules and the Speedy Trial Act have supplanted the sixth amendment speedy trial clause as the principal remedy for pretrial delay in federal criminal cases.[120]

The scope of a fugitive defendant's right to a speedy trial under both the Second Circuit rules and the sixth amendment became the subject of judicial consideration in the mid-1970s

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[114] *See* United States v. Maxwell, 383 F.2d 437, 441 n.2 (2d Cir. 1967) (defendants waived their sixth amendment right to a speedy trial by never making a demand), *cert. denied*, 389 U.S. 1043 (1968).

[115] *Id.* at 441.

[116] The Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, effective July 5, 1971, were announced in United States *ex rel.* Frizer v. McMann, 437 F.2d 1312, 1317 (2d Cir.) (en banc), *cert. denied*, 402 U.S. 1010 (1971). The rules were adopted pursuant to the court's supervisory authority over the administration of criminal cases and pursuant to 28 U.S.C. § 332. On the history of these rules, see United States v. Salzmann, 417 F. Supp. 1139, 1147-49 (E.D.N.Y.), *aff'd*, 548 F.2d 395 (2d Cir. 1976).

[117] For a comparison of the ABA Standards with the Second Circuit rules, see United States v. Salzmann, 417 F. Supp. at 1147-49 (government's four-year delay in obtaining presence of alleged draft evader living in Israel, who had not resisted government attempts to produce him, was a failure to exercise due diligence).

[118] *Id.* at 1148.

[119] 18 U.S.C. § 3161 et seq. (1985).

[120] Pursuant to 18 U.S.C. § 3165, district courts have adopted plans for disposing of cases in accordance with the Speedy Trial Act. *See, e.g.*, Salzmann, 417 F. Supp. at 1147 (referring to the Interim Plan of the United States District Court for the Eastern District of New York Under the Speedy Trial Act of 1974, adopted on September 29, 1975 (18 U.S.C. § 3161 et seq. (1985)).

when District Judge Jack B. Weinstein decided to clear his docket of selective service cases, some having lingered as long as eight years. Acting on his own initiative in September 1974 following the President's announcement of an amnesty program for draft evaders,[121] Judge Weinstein appointed Professor Louis Lusky of Columbia Law School to represent twenty-six unrepresented fugitive defendants whose draft evasion cases were pending before him in the Eastern District of New York.[122] Professor Lusky promptly moved to dismiss all twenty-six indictments *en masse* on the ground that the defendants had all been denied their sixth amendment right to a speedy trial.[123]

Invoking the language of *Smith v. Hooey*, Professor Lusky argued that the government had a duty to prosecute these cases with "due diligence" and that it had failed to proceed diligently in two respects. First, it had not asked other governments to deport or extradite fugitive defendants who were known to be living abroad.[124] Second, it had not used "all the investigative resources at its command" and had not summoned the defendants' relatives and friends before a grand jury to ascertain the whereabouts of those defendants who were in hiding.[125] Judge Weinstein denied the blanket speedy trial motion but granted leave to renew it, finding that under *Barker v. Wingo* the defendants' speedy trial claims had to be adjudicated individually.[126]

To facilitate individual determinations of the defendants' speedy trial claims, Judge Weinstein directed the government to deliver all the defendants' selective service files to Professor Lusky.[127] But the government successfully petitioned the Second Circuit for a writ of mandamus which directed Judge Weinstein

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[121] On September 16, 1974, the President issued a proclamation which provided that individuals charged with selective service violations who had not been convicted on the charges would be relieved of prosecution and punishment if they presented themselves to a United States Attorney before January 31, 1975, acknowledged allegiance to the United States, and satisfactorily completed alternative nonmilitary service under the auspices of the director of the selective service. *See* United States v. Lockwood, 382 F. Supp. 1111, 1113 (E.D.N.Y. 1974).

[122] United States v. Salzmann, 548 F.2d 395, 398 (2d Cir. 1976). *See* United States v. Weinstein, 511 F.2d 622, 624-25 (2d Cir. 1975); United States v. Lockwood, 382 F. Supp. 1111, 1112 (E.D.N.Y. 1974).

[123] United States v. Lockwood, 386 F. Supp. 734 (E.D.N.Y. 1974).

[124] *Id.* at 737.

[125] *Id.* at 738.

[126] *Id.* at 739.

[127] *Id.* at 740-41.

to vacate this discovery order.[128] In *United States v. Weinstein*,[129] the court of appeals found that the district judge had no authority to order the production of the selective service files except upon request of a party to the criminal proceedings. No party had made such a request, since no defendant had authorized Professor Lusky to represent him. The Second Circuit's opinion in *Weinstein* referred skeptically, if not disparagingly, to the fugitive defendants' potential speedy trial claims. Among other things,[130] the court of appeals opined that the denial of discovery would "not affect any defendant's constitutional right to a speedy trial, since each is a long-time fugitive who has not sought trial but, on the contrary, by fleeing the jurisdiction, has prevented his case from being brought promptly to trial."[131]

Afterwards, one of the twenty-six defendants, Sidney Salzmann, authorized Professor Lusky to represent him. Professor Lusky obtained Salzmann's selective service file and then moved on his behalf to dismiss the indictment on speedy trial grounds. The facts disclosed in his motion revealed that Salzmann's case differed markedly from the paradigmatic draft evasion case envisioned by the Second Circuit when it granted the government's mandamus petition.[132] Salzmann had not fled the country to avoid being brought to trial. A former rabbinical

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[128] United States v. Weinstein, 511 F.2d 622 (2d Cir). *cert. denied*, 422 U.S. 1042 (1975).

[129] *Id.*

[130] In its discussion of the facts of the case, the court implied that it was paradoxical to bring a speedy trial claim on behalf of a fugitive defendant: it noted that Professor Lusky planned to assert these claims "even though prompt trials had been rendered impossible by the defendants having fled the jurisdiction and their never having sought a trial." *Id.* at 626. Thereafter, the court placed the blame for pretrial delay squarely on the defendants: it determined that because "the delay here is attributable to defendants' flight," discovery of the selective service files was not warranted by FED. R. CRIM. P. 48(a), which authorizes a district court to dismiss an indictment on its own motion "if there is unnecessary delay in bringing a defendant to trial." *Id.* at 627-28. The court further found that the appointment of an attorney to represent a fugitive defendant without his consent or authorization was unsupported by "usage or custom" and, indeed, was contrary to "controlling precedent" which established that "[t]he flight of a defendant for the purpose of avoiding prosecution or punishment 'disentitles [him] to call upon the resources of the Court for determination of his claims.'" *Id.* at 628 (quoting Molinaro v. New Jersey, 396 U.S. 365, 366 (1970)). And the court concluded by observing that "[t]he administration of justice is not served by the court's unilateral effort to activate the defense of a criminal case in which prosecution has been frustrated by the defendant's flight from the jurisdiction." *Id.*

[131] *Id.* at 626.

[132] *See* note 130 *supra*.

student, Salzmann was already residing in Israel when he was directed to report for a preinduction physical examination in late 1970 and then for induction in early 1971. He promptly wrote to his draft board and told it that he could not afford to return to the United States and that he hoped to be permitted to make his permanent home in Israel and to serve in the Israeli Defense Forces.

Salzmann's letters implied that he would return to this country if his way were paid, but the draft board did not respond to Salzmann's correspondence. Instead, when he failed to report for induction, the draft board referred his case to the United States Attorney, who secured a two-count indictment for violating the Selective Service Act. Upon learning of the indictment, Salzmann wrote to the prosecutor that he was financially unable to return to answer the charges. He also explained that it was never his intention to evade military service, but that it was his life's goal to resettle in Israel.[133] The prosecution, however, made no offer to finance Salzmann's return to the United States, nor did it undertake any other effort to secure his presence at trial.

Judge Weinstein held that under these circumstances Salzmann had been deprived of his speedy trial rights under a variety of provisions, including the speedy trial clause of the sixth amendment. However, Judge Weinstein relied principally on the Second Circuit's speedy trial rules,[134] which generally required a criminal trial to commence within six months of indictment.[135] He acknowledged that the Second Circuit rules did not count periods of delay caused by the defendant's unavailability,[136] which was defined to include periods when the defendant's "location is known but his presence for trial cannot be obtained by due diligence."[137] But he found that this exception did

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[133] 417 F. Supp. at 1144-45.

[134] *Id.* at 1151-64.

[135] 2d Cir. Rules Regarding the Prompt Disposition of Criminal Cases, Rule 4.

[136] *Id.*

[137] *Id.* Rule 5(d). Rule 5(d) provided that in computing the time within which the government should be ready for trial, the following period should be excluded:

> (d) The period of delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent whenever his location is unknown and in addition he is attempting to avoid apprehension or prosecution or his location cannot be determined by due diligence. A defendant should be considered unavailable whenever his location is known but his presence for

not apply, because Salzmann's presence might have been obtained if the government had simply offered to pay for his travel to this country, as it routinely did for subpoenaed witnesses living abroad and as it had begun to do for overseas draftees:[138]

> The phrase "due diligence," if it is to have any meaningful content must at the very least embody the responsibility of the government to read its mail and respond intelligently. If the government has at its disposal a means of procuring a defendant's presence with a minimum expenditure of effort, and here the effort may only have entailed informing the defendant of an existing government program of travel assistance, then due diligence must require the government to make this effort. The government cannot complain of the defendant's continued unavailability when the government chooses not to employ means readily at its disposal to procure his presence.[139]

Although Judge Weinstein saw Salzmann's case as "part of a pattern," whereby the government had refused to make any serious effort to locate and apprehend fugitive defendants in selective service cases or to request their extradition by foreign nations,[140] he rested his decision on a narrow principle of seemingly limited applicability. At the heart of Judge Weinstein's decision was the recognition that Salzmann was not a fugitive in the traditional sense. He had never attempted to avoid prosecution.[141] Consequently, Judge Weinstein analogized to state court cases which held the prosecution accountable for pretrial delay "when the accused was 'unavailable' only because of the negligence of authorities in failing to pursue him, and not because of

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trial cannot be obtained by due diligence.

Rule 5(d) departed from the ABA standard on which it was modeled in one significant respect: The ABA standard provided that "A defendant should be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained or whenever the defendant resists being returned to the state for trial." Standards Relating to the Administration of Criminal Justice, 2d Edition, Tent. Draft Approved (1979) American Bar Association § 12-2.3(e).

The counterpart provision of the Speedy Trial Act is patterned on the ABA standard. It provides that "a defendant . . . shall be considered absent when his whereabouts are unknown, and in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence," and "a defendant . . . shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence *or he resists appearing at or being returned for trial.*" 18 U.S.C. § 3161(h)(3)(B) (1985).

[138] United States v. Salzmann, 417 F. Supp. at 1155.

[139] *Id.*

[140] *Id.* at 1156-61.

[141] *Id.* at 1165.

any deliberate evasion on the part of the accused."[142] And he characterized the duty of "due diligence" narrowly under such circumstances: "to inform a defendant claiming lack of sufficient funds to travel to the place of trial, that the United States will advance his costs of transportation."[143]

Judge Weinstein also found that Salzmann had been deprived of his sixth amendment right to a speedy trial.[144] Addressing the four factors identified by the Supreme Court in *Barker v. Wingo*, he first found that the four-year delay following Salzmann's indictment was substantial, then turned to the reasons for the delay. Significantly, he did not believe that the government's nonfeasance absolved Salzmann of an obligation to make himself available for trial. On the contrary, Judge Weinstein found that "Salzmann and the government shared responsibility" for the delay—Salzmann because he never made a serious effort to return to the United States, and the government because it never offered him transportation to the United States to stand trial.[145] Next, Judge Weinstein found that Salzmann's failure to assert his speedy trial rights did "not weigh heavily against him," because, as an unrepresented defendant, he had probably been "unaware of his right to a speedy trial or of the consequences of his failure to demand a trial promptly."[146] Finally, he found that, although Salzmann had not been incarcerated before trial, and had not shown that the delay affected his ability to defend himself, he had been prejudiced by the anxiety of living under indictment.[147]

The court of appeals affirmed Judge Weinstein's dismissal of the indictment only on the basis of the Second Circuit rules, expressly declining to decide the remaining issues raised by the

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[142] *Id.* at 1156 (citing People v. Serio, 13 Misc. 2d 973, 181 N.Y.S.2d 340 (Erie County Ct. 1958)).

[143] *Id.*

[144] *Id.* at 1165-71.

[145] *Id.* at 1165-66.

[146] *Id.* at 1167-68.

[147] *Id.* at 1168. Few courts have considered the anxiety created by pretrial delay to be enough, standing alone, to establish "prejudice"; more typically, a defendant must show some way in which his ability to defend against the government's charges has been impaired. *See, e.g.*, United States v. Wehling, 676 F.2d 1053, 1059 (5th Cir.) (pre-indictment delay of six years did not create an automatic presumption of prejudice), *reh'g denied*, 683 F.2d 1373 (5th Cir. 1982) . *See also* United States v. Hill, 622 F.2d 900, 910 (5th Cir. 1980) (anxiety inherent in any delay is insufficient to establish prejudice).

district court's decision.[148] The panel's decision was made easier because the government had ultimately softened its legal position almost to the point of throwing in the towel. In the district court, the government had lumped Salzmann together with the fugitive draft evaders and argued that "a fugitive defendant may [not] assert a claim that he has been deprived of his right to a speedy trial."[149] On appeal, however, the government recognized that Salzmann may not have been trying to avoid prosecution, but may have been more like the defendants in cases such as *Smith v. Hooey*[150] and *Dickey v. Florida*[151] who were not able to appear in court without government assistance. Thus, the government conceded that under the Second Circuit's speedy trial rules, its failure to offer Salzmann travel funds would have constituted a lack of "due diligence" if Salzmann were, in fact, impecunious.[152] The government argued simply that Salzmann's claims may not have been sincere, and it therefore asked the court of appeals to remand the case for a hearing concerning Salzmann's financial status.

The government's request was rejected in an opinion authored by Chief Judge Irving R. Kaufman, who had previously been a member of the panel that issued the writ of mandamus in *Weinstein*. The court determined that a remand was inappropriate in light of the government's concession: if Salzmann's good faith were in question, the government should have tested it after his indictment by offering to pay his way back to the United States.[153] Implicit in the government's duty of due diligence was a responsibility to take cost-free steps "to clarify an ambiguous situation," thereby obviating the later need for a "necessarily speculative *post hoc* hearing."[154]

While acknowledging that there was no need to do so, Chief Judge Kaufman concluded by briefly addressing the govern-

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[148] United States v. Salzmann, 548 F.2d at 399.

[149] Letter of Assistant United States Attorney Thomas Maher (Jan. 16, 1975), *quoted in* United States v. Salzmann, 417 F. Supp. at 1155-56. *See also* Letter of Assistant United States Attorney Thomas Maher (June 10, 1976), *quoted in* United States v. Salzmann, 417 F. Supp. at 1168 ("where [a] defendant was aware of the pending indictment, his decision to avoid trial constitutes a waiver of his right to a speedy trial").

[150] 393 U.S. 374 (1969).

[151] 398 U.S. 30 (1970).

[152] Salzmann, 548 F.2d at 399.

[153] *Id.*

[154] *Id.* at 401.

ment's failure to seek the extradition or deportation of selective service offenders.[155] He opined that "[w]here the American right to demand extradition is established by treaty, considerations of foreign policy might well be subordinated to speedy trial," but that the result might be different when an extradition treaty did not apply.[156] "[A] considered refusal" to seek extradition as a matter of comity would not necessarily be inconsistent with "due diligence," he found, and judicial review of the government's decision not to seek extradition would be "drastically limit[ed]" by the courts' "traditional deference to the judgment of the executive branch in matters of foreign policy."[157]

Judge Wilfred Feinberg, who also had been on the panel in *Weinstein*, wrote separately to criticize the government's failure to seek Salzmann's extradition, which he believed in itself demonstrated a lack of "due diligence" under the Second Circuit's speedy trial rules.[158] Judge Feinberg's conclusion was premised on his view that Salzmann was not really a fugitive, but just an absent defendant who had always made his residence known to the government.[159] In language quoted at the outset of this Article, Judge Feinberg stressed that a "true fugitive" could not successfully assert a speedy trial claim, because permitting him to do so "would be [to] sanction[] the playing of games by fugitives."[160] But, in Salzmann's case, the prosecution should at least have asked the State Department to request Israel's cooperation in obtaining Salzmann's return.[161] And even this might not have been enough. If the State Department made a foreign policy decision not to seek Salzmann's return, its "considered choice of inaction" might not insulate the government under the Second Circuit rules.[162]

One of the most striking aspects of *Salzmann* is the dis-

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[155] *Id.* at 402.

[156] *Id.*

[157] *Id.* at 402-03.

[158] *Id.* at 403-05 (Feinberg, J., concurring).

[159] *Id.* at 403-04 & n.2 (Feinberg, J., concurring).

[160] *Id.* at 404 (Feinberg, J., concurring). Judge Feinberg's idea of a "true fugitive" seems narrower than the commonly held view, which would include any defendant who acts to avoid arrest. *See* note 1 *supra*. Judge Feinberg's definition, while including those who conceal their whereabouts to avoid arrest, would apparently not include those who, to avoid arrest, leave the country but then do not hide their whereabouts abroad.

[161] *Id.*

[162] *Id.* at 404-05 & n.7.

tance between its grasp and its reach. What the case held, for all three judges who issued an opinion, was carefully tailored to address that, perhaps alone among the defendants whose draft evasion cases were pending in the district court, Salzmann appeared ready and willing to answer the charges but unable to do so. At the same time, however, these judges reached far beyond this unusual case, hoping to influence the disposition of the remaining selective service cases in which the defendants were "real fugitives" who had evaded not only the draft, but prosecution as well. The judges' temptation to reach is easily understood. By the mid-1960s, the selective service defendants were regarded by many not as "real criminals" but, in some sense, as victims of an unpopular war. The executive branch, by its initial decision not to extradite fugitive draft evaders, and by its subsequent proclamation of amnesty, seemed to be looking for a compromise whereby the defendants' conduct would be neither condoned nor punished. By fashioning a legal basis for dismissing the cases still pending after the war ended, these judges must have believed that they were promoting the conciliatory goals of the executive branch.

Less clear is whether the solicitude of the *Salzmann* judges was meant to extend beyond the selective service defendants, or whether, instead, in cases involving "real fugitives" accused of "real crimes," they would be more skeptical.[163] For more than a

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[163] In United States v. Estremera, 531 F.2d 1103, 1107-08 (2d Cir.), *cert. denied*, 425 U.S. 979 (1976), a case decided shortly before *Salzmann*, a panel of the Second Circuit was far less solicitous in applying the court-adopted speedy trial rules to a fugitive defendant. Defendant Estremera participated with three others in a Bronx bank robbery in February 1973, then became a fugitive six days later upon learning that one of his accomplices had been arrested. He was indicted the next month but did not appear at arraignment and the government did not discover his whereabouts until January 1974 when it was notified that Estremera had been arrested in Canada for auto theft. The government initially did not request his extradition because proceedings were brought in Canada to deport him, but an extradition request was made in October 1974, after Estremera successfully challenged his deportation order. Following his extradition, the district court rejected Estremera's challenge under speedy trial rules which had been adopted by the Southern District of New York, and the court of appeals affirmed. Estremera conceded that the government could not be charged for the delay when he was a fugitive prior to his arrest in Canada, but argued that afterwards the government did not make a diligent effort to secure his presence because it did not immediately request his extradition. The court of appeals disagreed, finding that the government had reasonably believed that Estremera was deportable and therefore relied on a procedure that would ordinarily have been quicker and simpler than extradition. The panel concluded:

> To permit appellant, who used every tactic at his command to remain outside

decade this question could not be answered, if only because, as one surmises from its reported decisions, the Second Circuit considered no case in which a fugitive defendant brought a speedy trial claim based on *Salzmann*.[164] As time passed, *Salzmann* might have increasingly appeared to be a judicial artifact — an interpretation of court-crafted speedy trial rules which no longer applied, in the context of draft evasion cases which, in an era of the volunteer army, were no longer prosecuted.[165] But as it turned out, *Salzmann* was to leave its imprint on the Second Circuit's view of the sixth amendment after all.

> the United States in order to prevent a speedy trial, to benefit from the government's mistaken reliance upon deportation procedures in lieu of initiating extradition proceedings, would be to pervert the [speedy trial rules] by rewarding a defendant for his own obstruction of a speedy trial.

531 F.2d at 1108.

Similarly, in United States v. Schreiber, 535 F. Supp. 1359 (S.D.N.Y. 1982), the defendant was indicted on fraud charges in March 1966, at a time when he was living in England. He learned of the indictment the following month but made no effort to return to answer the charges. Although the government learned of his whereabouts, it did not seek his extradition because it believed that Schreiber was not subject to extradition under this country's treaty with England. The government advised immigration authorities to arrest him if he entered the country and, around ten years later, apprised the American embassy in London of Schreiber's status. In 1981, after the embassy refused to renew his passport, Schreiber moved through counsel to dismiss the indictment on speedy trial grounds. Finding that Schreiber's testimony was needed to resolve disputed facts, District Judge Carter denied the motion without prejudice to its being renewed if Schreiber returned, which he then did. Following a hearing, Judge Carter denied the motion, finding both that the government had exercised "due diligence" to obtain Schreiber's presence, *id.* at 1364, and that "[t]he speedy trial requirements should not operate to reward a recalcitrant and reluctant defendant" such as Schreiber. *Id.* at 1363.

[164] The court did, however, consider the sufficiency of the government's efforts to locate an absent defendant who was not a fugitive. *See* United States v. Rodriguez-Restrepo, 680 F.2d 920 (2d Cir. 1982) (government made "considerable efforts" to locate absent defendant who was unaware of pending charges).

[165] *Salzmann* appears to have had little impact prior to the 1988 decision in *Diacolios*. *Salzmann* was not cited in any reported Second Circuit opinion regarding a defendant's right to a speedy trial, and insofar as it was noticed by courts outside the Second Circuit, it was generally cited only in passing. *See, e.g.*, United States v. Deleon, 710 F.2d 1218, 1222 n.4 (7th Cir. 1983); United States v. Steinberg, 478 F. Supp. 29, 32 (N.D. Ill. 1979). Moreover, one court explicitly rejected the Second Circuit's suggestion that there might be a duty to pursue fugitive defendants, finding that such a duty would be at odds with the "well-established" rule that a fugitive defendant waives the right to a speedy trial. United States v. Judge, 425 F. Supp. 499, 502 (D. Mass. 1976).

IV. THE DECISION IN *UNITED STATES V. DIACOLIOS*

A. *Factual Background*

In February 1984, a magistrate in the Southern District of New York issued a warrant for the arrest of Michael Diacolios for conspiring to defraud the government. According to the government's complaint, Diacolios and his brother, owners of a restaurant in northern Manhattan, filed federal and state income tax returns seeking refunds in the names of fictitious employees, then used the checks they received to buy food for their restaurant.[166]

Diacolios was not arrested on the warrant, for, as the government later discovered, he had returned to his native Greece. In late June, a five-count indictment was filed. Diacolios did not appear at arraignment the next month, but retained an attorney, Felix Gilroy, who entered a plea of not guilty on his behalf. In the months that followed, Gilroy filed motions and continued to appear for Diacolios before District Judge Abraham Sofaer, to whom the case was originally assigned.[167]

Both the district court and the prosecution gave thought to whether Diacolios could be brought back to the United States to be tried on the indictment. During a conference in August, in response to a suggestion that Diacolios was without funds, Judge Sofaer asked defense attorney Gilroy to ascertain whether his client would return if the government paid his way. The judge offered to try Diacolios immediately if he returned the following month, but Diacolios did not take the court up on its offer.[168] In March 1985, the prosecutor advised the court that Diacolios apparently was not subject to extradition from Greece. Defense attorney Gilroy asked that Diacolios be tried in absentia, but the court denied the motion, finding that Diacolios could not lawfully be tried unless he was present.[169]

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[166] United States v. Diacolios, 837 F.2d 79, 80 (2d Cir. 1988).

[167] *Id.* at 80-81.

[168] *Id.* at 81; Joint Appendix at 126-30, United States v. Diacolios, 837 F.2d 79 (2d Cir. 1988) (No. 87-1320) [hereinafter Diacolios App.].

[169] *Diacolios*, 837 F.2d at 81. The district court denied Diacolios's motion to be tried in absentia because Diacolios had never appeared in court to answer the charges against him. Under Second Circuit case law, a defendant cannot be tried in absentia unless the trial court is certain that he has been put on notice of the proceedings begun against him, and a court can be certain of that fact only after the defendant has appeared in open court to answer the indictment. *See* United States v. Tortora, 464 F.2d 1202, 1209

The constitutional implications of Diacolios's fugitive status also received some consideration from Judge Sofaer. At one point in the course of a pretrial conference, defense counsel referred to the *Salzmann* case. Although the decision in *Salzmann* was based on Second Circuit rules no longer in effect, Judge Sofaer took the comment to be an oral motion to dismiss the indictment on speedy trial grounds. The district judge denied the motion out of hand, deriding it as "nonsense," while noting, "It's okay with me if the Second Circuit wants to accept [it]."[170]

Diacolios's speedy trial claim would not have to await the appellate court to receive a warmer reception, however. In June 1985, after Judge Sofaer left the bench to join the U.S. Department of State, the case was reassigned to District Judge Charles S. Haight. In February 1986, Gilroy asked Judge Haight to dismiss the indictment under the speedy trial clause because of the government's purported failure to exercise "due diligence" to bring his client to trial.[171] Gilroy's principal argument, and the only one that Judge Haight took seriously, was that the government had a duty to seek diligently Diacolios's forcible return from Greece.[172] Although, as a Greek national, Diacolios was not subject to extradition by treaty,[173] Gilroy argued that the government should nevertheless have engaged in diplomatic negotiations to secure Diacolios's return.[174]

B. *The District Court's Decision*

Initially, Judge Haight analyzed Diacolios's claim under the four-factor balancing test of *Barker v. Wingo*.[175] In a prelimi-

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(2d Cir.), *cert. denied*, 409 U.S. 1063 (1972).

[170] Diacolios App., *supra* note 168, at 59.

[171] *Diacolios*, 837 F.2d at 81; Diacolios App., *supra* note 168, at 62, 64.

[172] United States v. Diacolios, No. 84 Cr. 436-CSH, slip op. at 11 (S.D.N.Y. Sept. 9, 1986). The court flatly rejected Diacolios's alternative argument that the government failed to offer him financial assistance so that he could return from Greece to answer the charges. It found that, on the contrary, the government had expressed its willingness to finance his return if he needed financial assistance, but that Diacolios had not taken the government up on its offer. *Id.* at 5-11.

[173] The extradition treaty between the United States and Greece provided that neither country "shall be bound to deliver up its own citizens." Extradition Treaty, Nov. 1, 1932, United States-Greece, art. VIII, 47 Stat. 2185, 2191, T.S. No. 855, *quoted in* United States v. Diacolios, 837 F.2d at 81.

[174] *See* United States v. Diacolios, No. 84 Cr. 436-CSH, slip op. at 11 (S.D.N.Y. Sept. 9, 1986).

[175] 407 U.S. 514 (1972).

nary opinion, he found that, although the length of pretrial delay was "presumptively prejudicial," two factors weighed against the claim: Diacolios did not promptly seek a speedy trial, but allowed twenty months to pass after indictment before filing his speedy trial motion. In addition, Diacolios failed to show that he had been prejudiced by the delay.[176]

Judge Haight then considered the remaining factor, "the reason for the delay." As a preliminary matter, what Judge Sofaer had dismissed as "nonsense," Judge Haight found to be "beyond cavil": "that the Government has a 'constitutional duty to make a diligent good faith effort' to bring the defendant before the court for trial."[177] He undertook no analysis in support of the proposition that the duty to seek diligently a defendant's presence at trial applies in the case of a fugitive defendant. He merely cited the Supreme Court's decision in *Smith v. Hooey*,[178] together with a Seventh Circuit decision, *United States v. Deleon*,[179] which had recognized that the duty applied when the defendant was unaware of the pending charges, and thus, like the incarcerated defendant in *Smith*, was unable to appear on his own.[180]

Judge Haight also took it as a given that the due diligence standard under the sixth amendment was coextensive with the standard enunciated in *Salzmann* a decade earlier with respect to the Second Circuit's then-existing speedy trial rules. He interpreted *Salzmann* to require that, under the due diligence standard, when a fugitive defendant residing abroad is not subject to extradition pursuant to treaty, the government must either request the defendant's surrender as an act of comity or make a "policy decision" not to do so.[181] Judge Haight found the record inadequate, however, to ascertain whether such a policy decision had been made. For this reason, he called for the government "to submit affidavits . . . setting forth in detail the facts sur-

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[176] United States v. Diacolios, No. 84 Cr. 436-CSH, slip op. at 3-4 (S.D.N.Y. Sept. 9, 1986).

[177] *Id.* at 4-5.

[178] 393 U.S. 374 (1969).

[179] 710 F.2d 1218 (7th Cir. 1983).

[180] *Id.* at 1223 (accepting as true Deleon's allegation that he "was totally unaware of any charges pending against him until his arrest").

[181] United States v. Diacolios, No. 84 Cr. 436-CSH, slip op. at 11-14 (S.D.N.Y. Sept. 8, 1986).

rounding any and all policy decisions made by the Government not to request Greece to surrender Diacolios despite his status as unextraditable."[182]

Based on affidavits later submitted by the government, Judge Haight ultimately issued an opinion dismissing the indictment because of what he perceived to be the government's failure to exercise due diligence in seeking Diacolios's return for trial.[183] His opinion acknowledged that since at least 1953 the State Department's general policy was not to request surrender as an act of comity, but found "the record . . . devoid of any indication that the Government consciously decided to apply the 'general' rule in this case."[184] In response to the government's unchallenged representation that no European country permitted extradition of its nationals as a matter of comity, Judge Haight agreed that the government is not required to do "that which is futile," but found that an extradition request would not necessarily have been futile in this case.[185] Parsing the government's affidavits exceedingly finely, Judge Haight found that the government had established only that extradition was unavailable in 1986 when it filed its affidavits, and not in 1984 when Diacolios was indicted.[186] Accordingly, Judge Haight found that the prosecution's failure to request Diacolios's surrender was not the product of choice, but of inertia.

Unlike the district court opinion in *Salzmann*, where Judge Weinstein found that the defendant "shared responsibility" for the pretrial delay, Judge Haight apparently thought the government bore exclusive responsibility for the failure to bring Diacolios to trial. Despite his earlier recognition that Diacolios had refused to return to this country on his own and had spurned the chance to have his return financed by the government, Judge Haight now made no mention of Diacolios's own complicity in delaying the trial. Indeed, in contrast to *Salzmann*, the defendant unquestionably was able to appear for trial if he chose to do so. Also conspicuously absent from Judge Haight's final opinion was any reference to *Barker*'s balancing

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[182] *Id.* at 13-14.

[183] United States v. Diacolios, No. 84 Cr. 436-CSH, slip op. at 1-2 (S.D.N.Y. June 17, 1987), *rev'd*, 837 F.2d 79 (2d Cir. 1988).

[184] *Id.* at 2.

[185] *Id.* at 3.

[186] *Id.*

test. Although he earlier had found that two factors—Diacolios's belated assertion of the speedy trial right and the absence of prejudice to the defense—weighed against the claim, Judge Haight made no effort to explain why the government's failure to make a "policy decision" not to extradite Diacolios now sufficed to tip the scales the other way. This too contrasted with *Salzmann*, where Judge Weinstein found that pretrial delay was constitutionally impermissible because *all* the *Barker* factors either weighed against the government or carried no weight. Thus, Judge Haight seemed to have replaced *Barker*'s balancing test with an inelastic rule: a fugitive defendant's right to a speedy trial is violated whenever there is an appreciable period during which the government fails diligently to seek his presence at trial.

C. *The Government's Arguments on Appeal*

The government's position on appeal contrasted sharply with the half-hearted stance it had adopted in *Salzmann* years earlier. The government forcefully contended in *Diacolios* that Judge Haight was wrong to blame the government for failing to secure the defendant's appearance at trial. Its principal assertion was that, as a matter of law, any delay "caused by [a defendant's] own voluntary decision to become and remain a fugitive cannot be charged to the Government."[187] While acknowledging that decisions such as *Smith v. Hooey* established "a duty to make a diligent effort to locate and secure the presence of a criminal defendant who cannot appear *of his own volition* because he is imprisoned, . . . because he is unaware of the pending charges, . . . or because he lacks financial resources," the government argued that it had no duty to "take steps to compel the appearance of a defendant who is able to appear in court voluntarily but *refuses* to do so."[188]

The government also presented two alternative arguments. First, it asserted that even if there were a duty to seek the extradition of a fugitive defendant who was at liberty in a foreign country, that duty existed only when the defendant was subject to extradition by treaty; in a case such as *Diacolios*, where the

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[187] Brief for Appellant at 16, United States v. Diacolios, 837 F.2d 79 (2d Cir. 1988) (No. 87-1320).

[188] *Id.* at 17-18.

established mechanism for extradition did not apply to the particular defendant, the judiciary was not entitled to inquire into the adequacy of the executive's reasons for declining to seek the defendant's extradition as an act of comity.[189] Second, the government contended that even if there were generally an obligation either to seek a fugitive defendant's extradition outside the relevant treaty or to show a valid reason for not doing so, the government had met that obligation by showing valid reasons for not requesting Diacolios's extradition: To begin with, such a request would have been futile, and the government should not have to take futile measures. Moreover, for at least a quarter of a century, the State Department's general policy was not to request extradition as a matter of comity. Even if such request might have been granted, the government was entitled to follow its policy "and was not obliged, as a matter of 'due diligence,' to consider whether to make an exception in Diacolios's particular case."[190]

D. *The Second Circuit's Decision*

The Second Circuit's decision in *United States v. Diacolios*[191] was less than exhaustive. Circuit Judge Frank X. Altimari penned the opinion for a panel which included Circuit Judge Amalya Kearse and District Judge Morris E. Lasker. Judge Altimari's opinion described the factual background of the case in approximately two pages,[192] then dispatched the legal issues in roughly the same length.[193]

Judge Altimari did not acknowledge the government's principal argument, that the fugitive defendant is wholly to blame for any pretrial delay during the period when he is absent from the jurisdiction. Instead, the court took it as a given that the government would be responsible for the delay unless it made a satisfactory effort to apprehend the defendant.[194] In the opening paragraph of his legal discussion, Judge Altimari wrote simply:

> As the district court recognized, the issue to be decided in the instant

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[189] *Id.* at 21.
[190] *Id.* at 22.
[191] 837 F.2d 79 (2d Cir. 1988).
[192] *Id.* at 80-82.
[193] *Id.* at 82-84.
[194] *Id.* at 82.

> case is whether the government satisfied its "constitutional duty to make a diligent good faith effort" to bring Diacolios to trial without unnecessary delay. *See Smith v. Hooey*, 393 U.S. 374, 383 (1969).[195]

Thus, the Second Circuit became the first court of appeals to expressly hold that the government had a duty under the sixth amendment to pursue a fugitive defendant. The court of appeals relied on the lower court opinion, which itself had contained no reasoning and only inapposite citations.[196] In addition, the court cited to *Smith v. Hooey*, implying that the duty to make a diligent effort to bring a fugitive defendant to trial followed directly from the Supreme Court's decision in that case. Yet, *Smith* only established a prosecutor's duty to make an effort to obtain the presence of an incarcerated defendant who had insisted upon being tried promptly, but could not appear in court on his own. It surely does not follow—much less follow *directly*—that prosecutors have a duty to seek the presence of a defendant who is at liberty and willfully evading prosecution.[197]

The *Diacolios* panel reserved the remainder of its discussion for an "examin[ation of] the government's duty to exercise due diligence in a situation where, as in this case, the defendant is a fugitive residing in a foreign country, and no right of extradition exists under the treaty with that country to secure his return."[198] In interpreting the scope of the prosecutor's duty of due diligence, the court parted company with the district judge. It observed that, at least since 1953, this country has had a policy of not asking European countries to extradite individuals "as an act of comity," outside the applicable extradition treaty.[199] This policy, in the court's view, is a "considered" one.[200] The reason behind it is simple: Like the United States, European countries do not permit extradition as an act of comity, so any such request would be futile.[201]

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[195] *Id.*

[196] *See* notes 177-80 and accompanying text *supra*.

[197] *See, e.g.*, United States v. Steinberg, 478 F. Supp. 29, 32 (N.D. Ill. 1979) (unlike defendant who was incarcerated abroad, defendant who took asylum in Rhodesia could not complain of seven-year delay in bringing him to trial).

[198] *Diacolios*, 837 F.2d at 82.

[199] *Id.* at 83.

[200] *Id.*

[201] *Id.* As the court noted, this country's unwillingness to honor similar requests from other countries makes it particularly unlikely that a European country would honor this country's request.

Unlike Judge Haight, the court did not believe that in every case the prosecution has a duty to decide whether to depart from the government's general policy. All the prosecution has to do is to ascertain that the policy applies to the particular defendant:

> While it is true that United States policy does not "preclude requests for surrender not based on the extradition treaty," . . . we think that compelling the government to consider making such an exception in every case would vitiate the policy and render meaningless "our traditional deference to the judgment of the executive department in matters of foreign policy." . . . Indeed, we are aware of no case that holds that a formal request for extradition must be made before due diligence can be found to have existed . . . . Due diligence surely does not require the government to pursue that which is futile . . . .
>
> Given the deference we must give to a coordinate branch of government, particularly the executive branch in matters of foreign policy, we therefore hold that the speedy trial clause does not prevent the government from adhering to its general policy not to seek extradition as a matter of comity.[202]

In a case such as *Diacolios*, in which the defendant is known to be residing abroad and therefore beyond this country's judicial process, the executive is entitled to rely on its general policy not to seek extradition as a matter of "comity." Except in the unlikely event that the State Department someday abandons its longstanding policy, no extradition requests need be made where the extradition treaty is inapplicable.[203]

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[202] *Id.* at 83-84 (citations omitted).

[203] While finding that the government had acted with due diligence, notwithstanding its failure to seek the defendant's extradition, the panel seemed to take an expansive view of "due diligence" in cases where the defendant was known to be residing abroad. *Id.* For example, in specifying that the prosecutor's duty to pursue fugitive defendants will accommodate legitimate foreign policy considerations, the decision seemed to suggest that other considerations, such as an interest in conserving investigative resources, would not justify inaction. The panel also left open the possibility that even some foreign policy decisions would be considered inadequate to justify a refusal to seek the defendant's extradition. Its view seemed to be that, as a matter of due diligence, the government is obliged to seek the extradition of all those defendants who are subject to extradition under a treaty, and its opinion seemed carefully phrased to avoid any assurance that, out of deference to the executive's judgment in matters of foreign policy, the court would uphold a "considered refusal" to seek extradition where a treaty did apply. *Id.* The court thus left open the possibility that a prosecutor's duty under the sixth amendment would override the executive's discretion in such cases.

As a consequence, even though *Diacolios* established that a considered refusal to seek a defendant's extradition would generally be upheld, the decision was not especially deferential to the executive's foreign affairs authority. On the contrary, in certain re-

Given that the *Diacolios* panel ultimately ruled *against* the defendant, it is striking that the court would reach so far as to announce a prosecutorial duty to pursue fugitive defendants with due diligence. The court was certainly not compelled to decide whether or not such a duty existed. It might have stated, more cautiously, that there is no need to consider whether prosecutors must pursue fugitives with due diligence because, assuming for argument's sake that there is such an obligation, it was met in Diacolios's case. Such a cautious approach would have been consistent with the traditional judicial reluctance to decide constitutional questions which have no impact on the outcome of a case.[204] On the other hand, because the government prevailed in *Diacolios*, the court could interpret the speedy trial clause without risking reversal by the Supreme Court. The court might have hoped that by the time the Supreme Court could

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spects *Diacolios* significantly trenches on executive discretion. The State Department must now be cognizant that if it declines to seek extradition on the basis of considerations of foreign policy, its decision may later be scrutinized by a court which will require public disclosure of the government's reasoning. The possibility of public disclosure will influence the State Department's decision making in cases where it is legitimately reluctant to expose the reasoning behind its refusal to request extradition. Moreover, even before the State Department is ever called on to justify its decision, a refusal to seek a defendant's extradition will now be invested with a meaning which it might not previously have had; the decision will presumptively reflect a foreign policy judgment, and not simply a determination about the appropriate allocation of resources.

The *Salzmann* case can be used to illustrate the potential impact of the Second Circuit's new rule. Suppose that during the Vietnam War the government had made a considered decision not to extradite draft evaders. That decision may have reflected a judgment that this country's standing in the world community would be diminished by efforts to extradite draft evaders, in part because this country would appear to lack compassion, and in part because such efforts would engender conflict with countries which harbored American draft evaders out of opposition to this country's involvement in Vietnam. Suppose, further, that the government had determined that it could not publicly acknowledge its extradition policy, because to do so might (a) encourage an increase in draft evasion; and (b) lead to resentment or hostility from supporters of this country's military involvement and thereby engender additional domestic strife. Prior to *Diacolios*, the government could avoid officially acknowledging a policy like the one which it apparently had pursued during the Vietnam War. After *Diacolios*, it could not do so. As a consequence of *Diacolios*, the government might conclude that, despite legitimate countervailing foreign policy concerns, it should seek the extradition of draft evaders rather than risk the disclosure of its reasons for not doing so. One might easily doubt whether this encroachment on executive decision making is adequately justified by the benefits which would accrue to fugitive defendants themselves, who would be provided a speedy, albeit unwanted, trial.

[204] *See generally* Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).

address the question, the prosecutorial duty to pursue fugitive defendants would be accepted by appellate courts outside the Second Circuit.[205] What the *Diacolios* panel undoubtedly did not anticipate, however, was that its opinion would be treated roughly by future panels of the Second Circuit itself.

V. THE SECOND CIRCUIT'S UNJUSTIFIED REJECTION OF PRIOR PRECEDENT

Until recently, courts had invoked either of two legal principles to justify categorically rejecting speedy trial claims brought by fugitive defendants: that a fugitive defendant waives the right to a speedy trial and that a fugitive defendant is solely responsible for pretrial delay during the period of his flight. In *Diacolios*, however, the Second Circuit tacitly abandoned these legal principles in favor of an expansive interpretation of the speedy trial clause. It held that a fugitive defendant may seek relief for pretrial delay. Moreover, the defendant may hold the prosecution partially responsible for that delay if the prosecution did not diligently attempt to apprehend him. The effect of the Second Circuit's ruling is to make the constitutional right to a speedy trial more extensive than the federal Speedy Trial Act and similar state legislation. Legislative enactments uniformly deny protection to fugitive defendants whose whereabouts are unknown without regard to whether the prosecution has attempted to apprehend them. In contrast, the Second Circuit requires the prosecution to pursue not only those fugitive defendants who are known to be residing in a particular spot outside the jurisdiction but also those who have concealed their whereabouts.

Why did the Second Circuit depart from prior precedent in order to pronounce that the prosecution has a duty under the sixth amendment to attempt to apprehend fugitive defendants? One possibility is that the court concluded that the basis for the

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[205] Of course, even a clear consensus among the lower courts will not guarantee that the Supreme Court will adopt a particular principle of law. *See, e.g.*, McNally v. United States, 483 U.S. 350 (1987) (rejecting the uniform view of federal courts of appeals that the federal mail fraud statute, 18 U.S.C. § 1341, applies to schemes to defraud the citizenry of honest government). A clear consensus might, however, ensure that a principle of law at least receives—in the words of Justice Harlan—a "respectful burial." *See* Gideon v. Wainwright, 372 U.S. 335, 349 (1963) (Harlan, J., concurring).

traditional approach had been eroded by more recent decisions under the speedy trial clause. However, the likelihood that this was the conclusion is somewhat diminished by the fact that the *Diacolios* panel never acknowledged that it had rejected the traditional view of the speedy trial clause much less attempted to justify its rejection of that view. Moreover, a review of the earlier decisions in light of more recent Supreme Court precedent reveals no compelling reason to reject the traditional view.

A. *Flight as a "Waiver"*

Courts traditionally have denied fugitive defendants the benefit of the speedy trial right for two principal reasons. The first rationale, which regarded the defendant's deliberate absence from the jurisdiction as a "waiver" of the speedy trial right, was applicable throughout the federal courts prior to the Supreme Court's rejection of the "demand-waiver doctrine" in *Barker v. Wingo*.[206] Under the prevailing view, a defendant waived the right to a speedy trial by engaging in any affirmative course of conduct which demonstrated his acquiescence to pretrial delay.[207] Some courts, taking an especially expansive view of waivers, found that a defendant also relinquished the right by inaction, that is, merely by failing to insist on a prompt trial.[208] As one court explained:

> The right of the accused to a discharge for failure of the prosecution to give him a speedy trial is a personal one to him and may be waived. He must assert the right if he wishes its protection and if he does not make a demand for trial or resist a continuance of the case, or if he goes to trial without objection that the time limit has passed, or fails to make some kind of effort to secure a speedy trial, he will not ordinarily be in a position to demand dismissal because of delay in prosecution . . . .[209]

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[206] 407 U.S. 514, 528 (1972).

[207] *See, e.g.*, Morland v. United States, 193 F.2d 297, 298 (10th Cir. 1951); Shepherd v. United States, 163 F.2d 974, 976 (8th Cir. 1947); Pietch v. United States, 110 F.2d 817 (10th Cir. 1940); Phillips v. United States, 201 F. 259 (8th Cir. 1912); Daniels v. State, 68 Okla. Crim. 324, 327, 98 P.2d 68, 70 (1940).

[208] *See, e.g.*, State v. Kopelow, 126 Me. 384, 386, 138 A. 625, 626 (1927).

[209] *Shepherd*, 163 F.2d at 976. *But see, e.g.*, United States v. Chase, 135 F. Supp. 230, 231 (N.D. Ill. 1955) (application of the demand-waiver rule should be limited to cases where the defendant takes "action in avoidance or delay of trial more positive than mere silence or inaction"); Fulton v. State, 178 Ark, 841, 845, 12 S.W.2d 777, 778 (1929) (defendants imprisoned on other charges, "who have had no opportunity to demand a

It naturally followed that the speedy trial right was waived by a fugitive defendant who not only failed to demand a prompt trial, but affirmatively fled or hid himself to avoid being brought to justice.[210] Indeed, cases involving fugitive defendants rested on a comparatively narrow construction of implied waivers.[211]

Although the Supreme Court in *Barker v. Wingo* construed speedy trial waivers more narrowly than had the lower courts,[212] its narrow construction was entirely consistent with the view that, by fleeing from justice, a defendant relinquished his right to a speedy trial. Thus, an examination of this traditional rationale in light of the Supreme Court's contemporary decisions demonstrates that it is still valid.

The *Barker* Court rejected the doctrine that a defendant waived his speedy trial right simply by failing to demand a speedy trial. The Court found that because a defendant had no affirmative responsibility to demand that his trial commence, it was improper to infer, merely from the defendant's silence, that he had knowingly and voluntarily relinquished his right to a speedy trial.[213] This was not a particularly generous view of the defendant's right to a speedy trial, however. As the Court acknowledged, its determination was consistent with the contemporary view of waivers of constitutional rights.[214] Nothing in *Barker* suggested that a defendant's speedy trial right only could be waived expressly.[215] It simply established that more is required to support a finding of implied waiver than mere silence

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trial, should not be regarded as having waived this valuable right"); Thornton v. State, 7 Ga. App. 752, 67 S.E. 1055 (1910).

[210] *Shepherd*, 163 F.2d at 976. *See also Thornton*, 7 Ga. App. at 753, 67 S.E.2d at 1056 ("If [the defendant] should absent himself from the court . . . or should do any other act affirmatively showing an intention not to insist upon his demand [for trial], a waiver would be implied.").

[211] *See Chase*, 135 F. Supp. at 231.

[212] *See* notes 29-40 and accompanying text *supra*.

[213] 407 U.S. at 526.

[214] *Id.* at 529.

[215] Lower court decisions following *Barker* have uniformly adhered to the view that the speedy trial right may be waived by a defendant's conduct. *See, e.g.*, Saiz v. District Court in and for the Tenth Jud. Dist., 189 Colo. 555, 542 P.2d 1293, 1295 (1975) (en banc) ("The right to a speedy trial may be waived"); State *ex rel.* Sheppard v. Duval, 287 So. 2d 370, 372 (Fla. Dist. Ct. App. 1973) ("the right to a speedy trial is a personal right that may be waived by the conduct of defendant . . ."); People v. Panarella, 50 A.D.2d 304, 306, 377 N.Y.S.2d 709, 711 (1975) ("There need be no express or explicit waiver of the right to a speedy trial.").

or passive acquiescence in the face of the loss of a procedural protection. The defendant must engage in affirmative conduct which demonstrates an awareness of the right and that it has been voluntarily relinquished.[216]

The *Barker* Court's determination does not require more solicitous treatment of fugitive defendants. In assessing whether a defendant's conduct reflects the voluntary relinquishment of the right to a speedy trial, there is a big difference between a defendant's mere silence and an affirmative attempt to evade prosecution by concealment or by flight from the jurisdiction. A defendant's mere silence in the face of pretrial delay may be said to be "insolubly ambiguous."[217] While it may reflect a defendant's knowing and voluntary decision to forego a speedy trial, it is just as likely to reflect either (a) an unawareness that he has a right to a speedy trial and that, by making a demand, a speedy trial may be secured, or (b) an inability to make the necessary demand. In contrast, a defendant's flight speaks volumes about his understanding and desires: an indicted defendant who knowingly evades arrest and prosecution must be aware that he is entitled to be tried on the indictment, but that as a consequence of his conduct, the trial will be delayed; indeed, that is the precise reason for fleeing.

Unlike the demand-waiver doctrine, the traditional notion that a defendant waived his speedy trial right by fleeing from justice is entirely consistent with the contemporary view of waivers.[218] A criminal defendant may waive procedural rights by deeds no less than by words.[219] Courts have found that the conduct constitutes a waiver of a procedural right especially when the defendant's acts are calculated to frustrate the invocation of

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[216] *See, e.g.*, Glasser v. United States, 315 U.S. 60, 70 (1942).

[217] *Cf.* Doyle v. Ohio, 426 U.S. 610, 617 (1976) (Given the nature of *Miranda* warnings, "every post-arrest silence is insolubly ambiguous. . . .")

[218] On the general issue of waivers of constitutional rights in the criminal context, see Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761 (1989); Tigar, *The Supreme Court 1969 Term, Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1 (1970); Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977).

[219] *See, e.g.*, North Carolina v. Butler, 441 U.S. 369, 373 (1979) (Although "mere silence is not enough" to establish a waiver of *Miranda* rights, this "does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights.").

that right. For example, a defendant who prevents a witness from testifying at trial implicitly waives the right of confrontation. Consequently, the prosecution may introduce the witness's out-of-court statements which otherwise would be barred by the confrontation clause.[220] Flight from prosecution in particular has been viewed as conduct by which a defendant may relinquish procedural protections. For example, a defendant who flees after trial has frequently been held to waive the right to appeal.[221]

Settled case law under the confrontation clause provides especially compelling support for the traditional view of flight as a waiver. While a defendant's sixth amendment right of confrontation entitles him to be present at trial, a defendant waives that right and may be tried in absentia if he willfully fails to appear at trial.[222] Thus, in *Taylor v. United States*,[223] the Supreme Court rejected a defendant's claim that his flight after the start

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[220] *See, e.g.*, United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982); United States v. Thevis, 665 F.2d 616, 630 (5th Cir. 1982); United States v. Papadakis, 572 F. Supp. 1519, 1526 (S.D.N.Y. 1983) (Weinfeld, J.); Republica v. Arnold, 3 Yeates 263 (Pa. 1801).

[221] *See, e.g.*, Hurt v. State, 72 Okla. Crim. 318, 115 P.2d 919 (1941); Jones v. Jones, 134 P. 528, 531 (Wash. 1913); Commonwealth v. Andrews, 97 Mass. 543, 544 (1867).

In some jurisdictions, including in federal court, a fugitive defendant's appeal has not been dismissed on a theory of waiver, but on a theory of nonmutuality or potential mootness: since the judgment could not be enforced against the defendant in the event his appeal fails, it is inappropriate to hear it. *See, e.g.*, Molinaro v. United States, 396 U.S. 365 (1970); Allen v. Georgia, 166 U.S. 138 (1897); Smith v. United States, 94 U.S. 97, 97 (1876); United States v. Persico, 853 F.2d 134 (2d Cir.), *cert. denied*, 108 S. Ct. 1995 (1988); City of Holton v. Mannix, 6 Kan. App. 105, 106, 49 P. 679, 679-80 (1897); Thompson v. State, 8 Okl. Crim. 393, 394, 127 P. 872, 873 (1912). For example, in *United States v. Persico*, the Second Circuit provided the following justifications for its refusal to consider claims raised on appeal by a fugitive defendant:

> First, a decision respecting a fugitive is effectively unenforceable because the fugitive is beyond the control of the court. A corollary to this consideration is that the defendant who flees during the pendency of an appeal has "arrogated to himself the right not to respond to an unfavorable decision." Second, loss of appellate review is appropriate because a fugitive flouts the judicial process by escaping. Third, a rule of dismissal has the salutary effects of discouraging escape and promoting the efficient operation of appellate courts. Fourth, the delay occasioned by the period of a defendant's flight can prejudice the prosecution should a new trial be ordered after a successful appeal.

853 F.2d at 137 (citations omitted) (quoting United States v. Puzzanghera, 820 F.2d 25, 27 (1st Cir.), *cert. denied*, 484 U.S. 900 (1987)).

[222] *See, e.g.*, Taylor v. United States, 414 U.S. 17 (1973) (per curiam); Diaz v. United States, 223 U.S. 442, 455 (1912); Cureton v. United States, 396 F.2d 671 (D.C. Cir. 1968); Falk v. United States, 15 App. D.C. 446, 454-61 (1899).

[223] 414 U.S. 17 (1973) (per curiam).

of trial was not an effective waiver because he had never been warned by the trial court that he had a right to be present and that, by voluntarily failing to appear, he would be giving up that right.[224] The Court found it "wholly incredible to suggest" that the defendant "entertained any doubts about his right to be present at the trial" and "equally incredible" that he " 'would not know that as a consequence [of his flight] the trial would continue in his absence.' "[225]

A fugitive defendant's waiver of the confrontation right is well recognized in the Second Circuit, which has repeatedly upheld trials conducted in absentia.[226] If the defendant's absence from trial is deliberate, and not caused simply by his unawareness of the trial date, then he has waived his right to be present, and the trial may commence in his absence.[227] Moreover, once it has demonstrated that the defendant's absence from trial is deliberate, not inadvertent, the prosecution is under no obligation to search for the defendant, and the trial may proceed immediately in his absence.[228]

If a defendant's flight is a waiver of the right of confrontation, there is no reason why it should not, under comparable circumstances, be a waiver of the speedy trial right.[229] It does not take an expansive conception of implied waivers to recognize that, by his conduct, the fugitive defendant voluntarily relinquishes his right to a speedy trial.

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[224] *Id.* at 19-20.

[225] *Id.* at 20 (quoting the court of appeals opinion, 478 F.2d 681, 691 (1st Cir. 1973)).

[226] *See, e.g.*, United States v. Fontanez, 878 F.2d 33, 35 (2d Cir. 1989); United States v. Hernandez, 873 F.2d 516, 518 (2d Cir. 1989); United States v. Sanchez, 790 F.2d 245, 249-50 (2d Cir.), *cert. denied*, 479 U.S. 989 (1986); United States v. Pastor, 557 F.2d 930, 933 (2d Cir. 1977); United States v. Tortora, 464 F.2d 1202 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972).

[227] *See, e.g.*, United States v. Hernandez, 873 F.2d at 517-18; United States v. Sanchez, 790 F.2d at 249; United States v. Beltran-Nunez, 716 F.2d 287, 288 (5th Cir. 1983); United States v. Benavides, 596 F.2d 137, 139 (5th Cir. 1959); Smith v. Kelly, 664 F. Supp. 131, 134 (S.D.N.Y. 1987).

[228] *See, e.g.*, United States v. Hernandez, 873 F.2d at 516 (one-day adjournment of trial); United States v. Sanchez, 790 F.2d at 248 (no adjournment); United States v. Lochan, 674 F.2d 960, 963 (1st Cir. 1982) (several-hour adjournment); United States v. Peterson, 524 F.2d 167, 183 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976) (no adjournment); Phillips v. United States, 334 F.2d 589, 591 (9th Cir. 1964), *cert. denied*, 379 U.S. 1002 (1965) (weekend adjournment).

[229] Indeed, the Supreme Court drew an analogy between the confrontation and speedy trial rights in Smith v. Hooey, 393 U.S. at 382-83. *See* notes 56-62 and accompanying text *supra*.

Moreover, the application of the waiver doctrine to fugitive defendants has a sound prudential basis. As both the criminal laws and various procedural laws establish, it is wrongful conduct for a defendant to conceal himself, to flee the jurisdiction, or take similar action designed to forestall the trial. Courts typically eschew procedural rules that encourage individuals to act wrongfully by allowing them to profit from their wrongdoing. For example, in *United States v. Bryan*, [230] the Supreme Court noted:

> [P]ersons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery. A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase.[231]

In particular, because flight to avoid prosecution is recognized to be wrongful conduct, the law generally discourages defendants from becoming fugitives. The law imposes penalties upon those who flee and eliminates, insofar as possible, the benefits to be gained from flight. For instance, becoming a fugitive is often defined as a crime. Depending on when one becomes a fugitive, the defendant's flight also may lead to the tolling of the statute of limitations or to the dismissal of his appeal.[232]

Against this background, it is difficult to fathom the *Diacolios* panel's decision to treat an indictment as "an invitation to a game of hare and hounds" in which a fugitive defendant may be tried only if the prosecution has chased him with sufficient vigor. From the perspective of the administration of criminal justice, it makes no sense to hold out to fugitive defendants the possibility that, if the prosecution failed to pursue them diligently enough, the charges against them might be dismissed. Such a ruling *encourages* defendants to become fugitives.[233]

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[230] 339 U.S. 323 (1950).

[231] *Id.* at 331. *See also* United States v. Rylander, 460 U.S. 752, 762 (1983) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)).

[232] *See, e.g.*, United States v. Persico, 853 F.2d 134, 137 (2d Cir.) ("[A] policy of declining to consider former fugitives' claims [on appeal] will tend to discourage escape and promote the orderly operation of the judicial processes within which defendants should press their claims."), *cert. denied*, 486 U.S. 1022 (1988).

[233] There are always liabilities to becoming a fugitive, including possible criminal

B. *The Fugitive Defendant's Responsibility for Delay*

The second traditional rationale for denying fugitive defendants the protection of the speedy trial clause was that a defendant may not complain of delay for which he has any responsibility and that, by evading arrest, a fugitive defendant becomes responsible for the delay of trial. Prior to the Supreme Court's decision in *Barker v. Wingo*, lower courts generally held that the sixth amendment right to a speedy trial addressed only those pretrial delays for which the defendant was not responsible. As the Seventh Circuit stated four decades ago, if the defendant's "own action delays the trial, he is precluded from invoking this right."[234] This rule was often applied in cases in which the trial was delayed because of defense motions or other conduct by the defendant in the course of pretrial litigation.[235] It was deemed equally applicable in a case where the defendant's flight made him unavailable for trial.[236] In some cases, courts ex-

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liability for evading prosecution, as well as the risk that, if the defendant ultimately faces prosecution on the pending charges, his flight will be viewed as evidence of "consciousness of guilt." *See generally* Note, *Rule 403 and the Admissibility of Evidence of Flight in Criminal Trials*, 65 VA. L. REV. 597 (1979). At the same time, however, becoming a fugitive has various attractions. It is possible, for example, that the fugitive defendant will never be found and tried or that, by the time he is, the prosecution's proof will have greatly weakened. The *Diacolios* decision enhances the attraction of flight. If, because of limits on investigative resources, because of neglect, or for some other reason, the prosecution fails to pursue the defendant rigorously enough, the fugitive defendant may win a dismissal of the charges before the case ever goes to trial.

[234] United States *ex rel.* Hanson v. Ragen, 166 F.2d 608, 610 (7th Cir.), *cert. denied*, 334 U.S. 849 (1948). *Accord* People v. Meisenhelter, 381 Ill. 378, 385, 45 N.E.2d 678, 682 (1942).

[235] *See, e.g.*, United States v. Peterson, 435 F.2d 192, 193-94 (7th Cir. 1970) (delay attributable to defendant's requests for new counsel and to defense motions); United States v. Graham, 289 F.2d 352, 354 (7th Cir. 1961) (delay attributable to defense motions and to defendant's unsuccessful appeal of pretrial ruling); *Meisenhelter*, 381 Ill. at 386, 45 N.E.2d at 682-83 (delay attributable to defendants' requests for continuances). *See also In re* Rappaport, 558 F.2d 87, 91 (2d Cir. 1977); United States v. Deegan, 279 F. Supp. 53, 58-59 (S.D.N.Y. 1967).

[236] *See, e.g.*, Shepherd v. United States, 163 F.2d 974, 976 (8th Cir. 1947) ("Delays which have been caused by the accused himself can not, of course, be complained of by him. . . . [A]n accused who becomes a fugitive from justice can not demand discharge for delay when the delay is the result of his own conduct."); *Ex Parte* Gere, 64 Cal. App. 418, 422, 221 P. 689, 691 (1923) ("It is conceded that the constitutional guarantee of a speedy trial . . . do[es] not operate in favor of a fugitive from justice. It must also be true that the law on this subject should not be permitted to work to the advantage of one whose arrest has been delayed because of his own wrong. In other words, one whose dissimulation, falsity, and deceit have been a contributory factor in the matter of his apprehension is in no position to claim" the benefits of the speedy trial right.); Swain v.

plained that a defendant who sought to avoid apprehension should not profit from his own wrongdoing,[237] but courts did not have to perceive the defendant to be morally culpable to hold that he could not complain of pretrial delay. Even if the fugitive defendant's flight was thought to be morally neutral, this conduct on his part was still the primary cause of pretrial delay, and therefore it precluded him from invoking the speedy trial right.

This reasoning is partially eroded by the balancing standard of *Barker v. Wingo*. Under that standard the defendant's responsibility for pretrial delay would be a substantial factor weighing against a speedy trial claim, but not an absolute bar to such a claim. A defendant who was severely prejudiced by lengthy pretrial delay might, in theory, be entitled to prevail even if he was responsible for the delay. On the other hand, *Barker v. Wingo* does not in any way address, much less undermine, the traditional view that pretrial delay is the responsibility of a fugitive defendant, not the prosecution.

In holding that the government shares responsibility for pretrial delay when it fails to pursue diligently a fugitive defendant, the Second Circuit relied on *Smith v. Hooey*. As discussed previously, the Supreme Court held in *Smith* that a state prosecutor has a duty to diligently request the presence of an indicted defendant who is in federal prison and who demands to be tried immediately in state court. While this holding clearly would not apply in the case of a fugitive defendant, the court of appeals apparently read *Smith* to stand for a broader principle: that the prosecution has a duty to seek diligently the presence of *any* absent defendant, including one who has deliberately absented himself or concealed himself to avoid prosecution. In other words, the prosecution must make a diligent effort, regardless of its cost or likelihood of success, to remove *all* impediments to a speedy trial, including those which the defendant established

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Swain, 147 Or. 207, 214, 31 P.2d 745, 748 (1934) ("Delays, due to the defendant's fault, as, for instance, his absence from the state in order to escape trial, afford no basis for dismissal of the charge."); State v. Reynolds, 28 Wis. 2d at 355, 137 N.W.2d at 16 ("Appellant cannot complain that he was not tried with sufficient haste when his own conduct [in fleeing the state] prevented the judicial wheels from turning."). *See also* Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587, 1598-99 (1965), *cited in* Dickey v. Florida, 398 U.S. 30, 48 n.13 (1970) (Brennan, J., concurring).

[237] *See, e.g., Ex parte* Gere, 64 Cal. App. 418, 422-23, 221 P. 689, 691 (1923).

and could easily remove.

Nothing in *Smith* supports such a broad reading. The general principle underlying the prosecution's duty to act affirmatively in that case seems to be that the prosecution should take cost-free and almost inevitably successful steps to remove impediments to a speedy trial that the defendant cannot remove. The *Smith* Court's emphasis on the defendant's repeated requests to be tried and his inability to obtain a prompt trial on his own suggested that, had the defendant been able to appear of his own volition, the prosecution would not have had a duty to seek his presence. Likewise, by its observations that a request for the defendant's presence would be little more than a ministerial act and that such a request would almost invariably be granted, the *Smith* Court made it clear that the prosecution would not necessarily be required to undertake efforts which were costly or unlikely to succeed.

The *Smith* Court's reasoning clearly would not apply in the case of a fugitive defendant. Unlike an incarcerated defendant, a fugitive defendant can obtain a prompt trial on his own and without much cost simply by surrendering to the authorities. Further, unlike an incarcerated defendant, a fugitive defendant cannot easily be brought to trial by the state. On the contrary, the pursuit of a fugitive defendant, particularly one who is in hiding, is likely to be expensive and, in many cases, unavailing. Thus, the Second Circuit's unelucidated conclusion that the holding or reasoning of *Smith v. Hooey* applied in cases involving fugitive defendants was just plain wrong.

VI. The Subsequent Second Circuit Decisions

In late 1988, on the heels of *Diacolios*, three Second Circuit cases raised the question whether the prosecution had taken sufficient steps to bring a fugitive defendant to justice. These cases came before different judges from those who had decided *Diacolios*. All three decisions rejected the defendants' claims. While reaffirming that the sixth amendment required prosecutors to exercise "due diligence" in pursuing fugitive defendants, the later panels seemed doubtful whether a fugitive defendant ought to be permitted a remedy for the prosecution's breach of this duty. The panels' skepticism translated into opinions which substantially limited the potential reach of *Diacolios*. The subsequent opinions interpreted "due diligence" undemandingly.

Moreover, these opinions made clear that even when the prosecution demonstrably fails to exercise due diligence in pursuing a fugitive defendant, that failure alone will be far from enough to warrant dismissing an indictment under the speedy trial clause.

A. *The Half-Hearted Reaffirmation of "Due Diligence"*

The first two opinions after *Diacolios* were both written by Judge Lawrence Pierce for a panel that included fellow Circuit Judges James L. Oakes and Thomas Meskill. This panel was duty-bound to follow *Diacolios*.[238] Thus, the panel took as a premise that the government has "an obligation to exercise due diligence in attempting to locate and apprehend the accused, even if he is a fugitive who is fleeing from prosecution."[239] The court determined that this obligation applied when the fugitive defendant was in hiding, no less than when the defendant, as in *Diacolios*, was living openly outside the jurisdiction.[240] The court

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[238] *See, e.g.*, United States v. Fatico, 603 F.2d 1053, 1058 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980) (court of appeals will not overturn prior decision unless issue is considered en banc).

[239] Rayborn v. Scully, 858 F.2d 84, 90 (2d Cir. 1988). In support of this obligation, the panel cited not only *Diacolios*, but also United States v. Deleon, 710 F.2d 1218, 1221 (7th Cir. 1983), and United States v. Bagga, 782 F.2d 1541, 1543 (11th Cir. 1986). 858 F.2d at 90. These cases were inapposite, since in both cases, the defendant was unaware of the pending charges, and thus was not deliberately avoiding prosecution. In *Deleon*, the defendant was referred to as a "fugitive" but the court made clear that it used the term to include anyone who was outside the jurisdiction at the time charges were filed. 710 F.2d at 1222 & n.5. In *Bagga* the defendant only challenged the period of delay before he learned of the indictment. 782 F.2d at 1542.

In addition, the *Rayborn* panel noted parenthetically that in Smith v. Hooey, 393 U.S. 374, 383 (1969), the Court "established that [the] government has [an] affirmative obligation to locate and apprehend a known suspect." 858 F.2d at 90. As noted previously, this is a vastly overstated reading of the holding in *Smith v. Hooey*. *See* text accompanying note 197 *supra*. That case did not involve a suspect who was at large and who therefore had to be "locate[d] and apprehend[ed]." It involved a defendant who was in prison in another jurisdiction. The case established that the prosecution has a duty to arrange to bring an imprisoned defendant to court to answer pending charges. It did not speak to the question of a defendant who was at liberty, and it certainly did not speak to the question of a defendant who was in flight.

[240] Unlike the defendant in *Diacolios*, the defendant in *Rayborn v. Scully* had gone into hiding to avoid prosecution on various state and federal charges. The constitutionally imposed obligation to pursue a defendant such as Rayborn is more exacting than the similar duty imposed by the ABA guidelines, by the old Second Circuit rules, and by the Speedy Trial Act, none of which would require the prosecution to try to apprehend a fugitive defendant who had concealed his whereabouts. Under these speedy trial provisions, the period of pretrial delay during which a fugitive defendant's whereabouts are unknown would be excused even if the prosecution failed to pursue him. *See* Speedy

also determined that this obligation arose out of the sixth amendment and, therefore, applied to both state and federal prosecutors.[241]

Trial Act, 18 U.S.C. §§ 3161-3174, § 3161(h)(3)(A) & (B) (1982 & Supp. III 1985); Standards Relating to Speedy Trial § 2.3(e) (1968); 2d Cir. Rules Regarding the Prompt Disposition of Criminal Cases, Rule 5. The obligation recognized in *Diacolios* seems somewhat anomalous, since the speedy trial guidelines and legislation were thought to provide greater protection to defendants than did the speedy trial clause.

The distinction drawn by the ABA guidelines and federal legislation between hidden fugitives and those who have surfaced in a foreign country appears to be designed to take into account that it is considerably more costly to pursue a fugitive whose whereabouts are unknown than to extradite one who is known to be living abroad and that efforts to apprehend a fugitive who is attempting to conceal his whereabouts are less likely to succeed. *See* text accompanying notes 94-98 *supra*. It might have been argued in *Rayborn* that the speedy trial right also embraces this distinction because the cost of bringing a defendant to trial bears directly on the reasonableness of pretrial delay. *See, e.g.*, United States v. Banks, 370 F.2d 141, 144 (4th Cir. 1966) ("Incarceration elsewhere, then, is not an excuse for inaction over a substantial period of months, but it does have an immediate bearing upon the reasonableness of the interval between the charge and trial. The greater the difficulty and cost of obtaining temporary custody of the defendant, the longer the interval retains its reasonableness."); *cf.* Faretta v. California, 422 U.S. 806, 845 (1975) (Burger, C.J., dissenting) ("Society has the right to expect that, when courts find new rights implied in the Constitution, their potential effect upon the resources of our criminal justice system will be considered.").

The *Rayborn* panel never considered whether the duty recognized in *Diacolios* should apply only to fugitives whose whereabouts were known. Instead, the court took it as a given that the duty of "due diligence" applied in all cases of fugitive defendants. This approach was not without justification, since the pragmatic distinction recognized by the ABA rules and the Speedy Trial Act may have no constitutional basis. A defendant who remains within the jurisdiction but conceals his whereabouts is no more of a "fugitive," and no more morally culpable, than one who leaves the country to avoid arrest and then turns up in a foreign jurisdiction. In each case, the defendant is seeking to avoid apprehension. *Cf.* Jhirad v. Ferrandina, 536 F.2d 478 (2d Cir.) (there is no meaningful distinction between those who flee their jurisdiction and those who, already outside, decline to return), *cert. denied*, 429 U.S. 833 (1976); *Matter of* Assarsson, 538 F. Supp. 1055 (D. Minn.), *aff'd*, 687 F.2d 1157 (8th Cir. 1982); United States v. Greene, 146 F. 803 (S.D. Ga. 1906), *aff'd*, 154 F. 401 (5th Cir.), *cert. denied*, 207 U.S. 596 (1907). From the perspective of the individual defendants, it is therefore hard to see why they should be treated differently. Moreover, it might be thought that considerations of cost are simply irrelevant to whether the prosecution has a duty to bring a defendant to trial or, if relevant, that financial considerations relate only to the extent of the duty. *See* Smith v. Hooey, 393 U.S. at 380 n.11; United States v. Fox, 3 Mont. 512 (1880); State v. Sims, 1 Tenn. 253 (1807).

[241] *See Rayborn*, 858 F.2d at 90 ("The determination whether a state has made sufficient efforts to satisfy the 'due diligence' requirement is a fact-specific one. [A] defendant's status as a fugitive will not relieve the state of its sixth amendment obligations . . . .").

The opinion in *Diacolios* had made no effort to explain *why* fugitive defendants had to be pursued. An argument might therefore have been made by the state in *Rayborn* that this prosecutorial duty was adopted by the Second Circuit in *Diacolios* pursuant to

At the same time, however, Judge Pierce's opinions were far from receptive to the fugitive defendants' claims. The first opinion, *Rayborn v. Scully*,[242] contrasted sharply with the district court and appellate court opinions in *Diacolios*, which ignored the fugitive defendant's own complicity in delaying the trial. The *Rayborn* decision made clear from the start that the defendant's flight was the principal cause of delay, and that his speedy trial claim was therefore unsupportable: "Rayborn's evident lack of serious interest in a speedy prosecution of the charges against him, as shown by his fugitivity, . . . militate[s] against finding that he suffered a deprivation of his sixth amendment right."[243]

Likewise, Judge Pierce's opinion in *United States v. Blanco*[244] struck a note that was distinctly at odds with the tone of *Diacolios*. The opinion observed that: "Coming from a former fugitive, Blanco's claim that her right to a speedy trial was denied carries almost no weight."[245] In support of this view, the court quoted the passage in Chief Judge Feinberg's concurrence in *Salzmann* that appears at the outset of this Article, to the effect that allowing a fugitive to invoke the speedy trial right "would be sanctioning the playing of games by fugitives."[246]

It was in the context of this skepticism that the later panels addressed two questions left uncertain by *Diacolios*: First, what is the scope of the prosecutor's duty of "due diligence"? And, second, what are the consequences of the prosecutor's failure to pursue a fugitive defendant with due diligence?

B. *The Scope of "Due Diligence"*

How far must the prosecution go to satisfy its obligation of

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its supervisory authority, just as the Second Circuit had previously enacted speedy trial rules which imposed a similar duty on prosecutors. If so, the duty would not burden state prosecutors since the Second Circuit does not have supervisory authority over the state courts. In holding that state prosecutors *do* have to exercise "due diligence," just like their federal counterparts, the *Rayborn* panel made clear that the source of the duty was not the court's supervisory authority but the speedy trial clause, which *is* binding on the states. *See* note 23 and accompanying text *supra*.

[242] 858 F.2d 84 (2d Cir. 1988).

[243] *Id.* at 89.

[244] 861 F.2d 773 (2d Cir. 1988).

[245] *Id.* at 780.

[246] *Id.* (quoting United States v. Salzmann, 548 F.2d 395, 404 (2d Cir. 1976) (Feinberg, C.J., concurring)).

"due diligence"? Must it do everything in its power to apprehend fugitive defendants? If so, the prosecutorial obligation would be extraordinarily onerous. As illustrated by the invasion of Panama and subsequent capture of its fugitive defendant, Gen. Manuel Noriega, in December 1989, there are virtually no limits to the prosecution's reach when it has a sufficiently compelling desire to apprehend a fugitive.[247] Of course, in the absence of a legal obligation to pursue fugitives, the prosecution would rarely go the limit. It would adopt different measures from case to case depending on, among other things, the seriousness of the criminal charges, the cost of seeking the defendant,[248] and the likelihood that the defendant's presence would successfully be obtained.[249] After *Diacolios*, however, it was far from certain that, based on considerations such as these, the prosecution could properly refrain from adopting available measures to apprehend fugitive defendants, except insofar as those measures would be "futile."[250]

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[247] Noriega was indicted on drug-trafficking charges by two federal grand juries in Florida in February 1988. One of the principal justifications provided by the government for the invasion of Panama was to bring Noriega to justice. *See* 25 Weekly Compilation of Presidential Documents 1974-76 (Dec. 20, 1989).

Although the invasion of a Panama is an extreme example, the federal government has often gone to considerable expense to capture fugitive defendants. For example, the history of the nineteenth-century West is replete with stories of the lengths to which marshals and Texas rangers went to "bring them in alive—or dead." G. SHIRLEY, LAW WEST OF FORT SMITH 41 (1968) (quoting Judge Isaac C. Parker of the Western District of Arkansas). *See, e.g., id.* at 54-56; W. GARD, FRONTIER JUSTICE 226-29 (1949); *see also* T. DIMSDALE, THE VIGILANTES OF MONTANA, OR POPULAR JUSTICE IN THE ROCKY MOUNTAINS (1866); G. SHIRLEY, WEST OF HELL'S KITCHEN (1978).

[248] The extradition of a fugitive defendant is both complicated and time-consuming. In general, the prosecutor must not only prepare her own affidavit, which identifies the crimes charged and summarizes the facts of the case, but also submit affidavits from witnesses in order to establish that a crime was committed by the defendant. The material must be reviewed by the Department of Justice and the State Department before it is submitted to the appropriate United States embassy for formal presentation to the foreign government. *See generally* Snow, *International Extradition*, 22 TRIAL 56-58 (Sept. 1986); United States Department of Justice, Office of International Affairs, Procedure for Requesting International Extradition §§ 9-15.000 - 9-15.170 (Feb. 22, 1988).

[249] Defendants may have an opportunity to resist extradition. In the United States, for example, defendants may challenge the sufficiency of the evidence and defend against extradition on a variety of other grounds as well. *See generally* Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441 (1988).

[250] *Diacolios*, 837 F.2d at 83-84.

An expansive approach to "due diligence" was suggested by the doctrinal origins of the duty announced in *Diacolios*. The duty to seek fugitive defendants was derived from the duty to obtain the presence of incarcerated defendants, which in turn was derived by

The Second Circuit decisions after *Diacolios* made clear that the duty imposed by the sixth amendment was considerably less demanding than prosecutors might originally have feared. In the first case, *Rayborn v. Scully*,[251] the defendant was charged by New York State with murder in 1971, but not tried and convicted until seven years later. On appeal, Rayborn's principal argument was that the district judge had erred in holding him responsible for the first four-and-a-half years of delay.[252] During that period Rayborn had been a fugitive seeking to avoid prosecution not only on the New York State murder charges, but also on a Philadelphia homicide charge on which he had jumped bail, as well as on a narcotics charge in the Southern District of New York on which he had failed to appear.

The New York authorities had made virtually no independent attempt to apprehend Rayborn but, rather, had relied on the efforts of Pennsylvania authorities. The opening foray occurred in October 1971 when New York authorities learned that Rayborn had been arrested in Philadelphia. New York police officers were dispatched to Pennsylvania, warrant in hand, but arrived there only to discover that Rayborn had already been released. The police filed the warrant in Pennsylvania state court, then went home empty-handed. Nothing more was done until almost three years later when, upon learning that Rayborn had been arrested in Philadelphia again, the Manhattan District Attorney's office obtained an extradition warrant. So much time

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the Supreme Court in *Smith v. Hooey*, from the duty to seek the presence of absent witnesses before using their prior testimony at a criminal trial. *See* text accompanying notes 56-62 *supra*. In general, courts have required the prosecution to go to considerable lengths to seek absent witnesses. *See, e.g.*, Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968); United States v. Rivera, 859 F.2d 1204, 1206-09 (4th Cir. 1988); United States v. Rothbart, 653 F.2d 462 (10th Cir. 1981); United States v. Vasquez-Ramirez, 629 F.2d 1295 (9th Cir. 1980); United States v. Mann, 653 F.2d 361 (1st Cir. 1978); Government of the Canal Zone v. P. (Pinto), 590 F.2d 1344, 1352 (5th Cir. 1979); Poe v. Turner, 490 F.2d 329, 331-32 (10th Cir. 1974); Webber v. United States, 395 F.2d 397, 399 (10th Cir. 1968); United States v. Potamitis, 564 F. Supp. 1484 (S.D.N.Y. 1983) (Weinfeld, J.); Martin, *Former Testimony Exception in the Proposed Federal Rules*, 57 IOWA L. REV. 547 (1972); Comment, *Evidence—Hearsay Exception—Requirements for Unavailability of Witness in Criminal Case Under the Federal Rules of Evidence*, 29 RUTGERS L. REV. 133 (1975).

[251] 858 F.2d 84 (2d Cir. 1988).

[252] Rayborn had petitioned the district court for a writ of habeas corpus, arguing that he had been deprived of a speedy trial as required by the sixth amendment. District Judge Robert J. Ward, applying *Barker*'s four-part analysis, denied the petition. *Id.* at 89.

had elapsed, however, that by the time the Governor of Pennsylvania ordered Rayborn's extradition he had already been released on bail by the state court. Finally, in April 1976, Rayborn was arrested again in Philadelphia. This time, he was required to answer in turn the charges pending in Pennsylvania, in the Southern District of New York, and finally in New York State.

The *Rayborn* panel found that the New York State authorities had done enough to satisfy the demands of the speedy trial clause. To begin with, the court observed that the state's "law enforcement officials are not expected to make heroic efforts to apprehend a defendant who is purposefully avoiding apprehension or who has fled to parts unknown."[253] This implied that less would be expected from the prosecution in the case of a fugitive defendant than in the case of an absent defendant who was simply unaware of the charges—and certainly less than in the case of an absent witness. In addition, the panel noted that:

> [A] state is perfectly entitled to rely in good faith upon the efforts of another jurisdiction when a suspect for whom an arrest warrant has been issued evades arrest in the first state and absconds to that other jurisdiction. Such reliance, if reasonable and grounded in the belief that the helping jurisdiction is in fact conducting a proper investigation, must be permitted, because to hold otherwise would be to establish a rule that states must conduct a "nationwide manhunt" for defendants who flee their jurisdiction.[254]

Considered in this light, the prosecution's efforts to apprehend Rayborn, while "not abundant," were nevertheless deemed adequate to establish that the state had "acted with sufficient diligence to satisfy its obligations under the sixth amendment."[255]

Similarly, in *United States v. Blanco*,[256] the court found

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[253] *Id.* at 90.

[254] *Id.* at 91.

[255] *Id.* at 90-91.

Rayborn did not address the problem facing state or local prosecutors when a fugitive defendant absconds to a state where the authorities, perhaps because of conflicting demands on their investigative resources, are unwilling to make "proper" efforts to find the defendant. If, for example, the Philadelphia authorities had declined to pursue Rayborn, would the New York State police have been obliged to go to Philadelphia and look for Rayborn themselves or would it have been enough that they made a good faith request for assistance? *Rayborn* suggests that a request for assistance by another jurisdiction does not discharge the prosecution's responsibility when the other jurisdiction is known to be indolent but offers no guidance about what more must be done.

[256] 861 F.2d 773 (2d Cir. 1988).

that "due diligence" was satisfied, notwithstanding the limited nature of the prosecution's efforts to apprehend the defendant. Blanco, a Colombian citizen, was living in Colombia at the time of her indictment in April 1975 on narcotics charges. From then until her arrest in February 1985, Blanco was aware of the pending charges, but made no effort to answer them. For most of that period, federal agents kept track of her whereabouts in Colombia through an informant. In May 1984 she was spotted in California by a DEA agent but, to avoid jeopardizing another investigation and to protect an informant, she was not immediately arrested. Thereafter, Blanco remained in the United States using a false name and false passports.

Blanco's principal argument was that the government should have sought her return to the United States by requesting her extradition from Colombia, by trying to seize her there, or by trying to lure her back to this country. The panel disagreed, finding that an extradition request was unnecessary because such a request would have been futile[257] and "due diligence" did not require the government to take futile steps.[258] Similarly, the court found that the government had no duty to try to seize Blanco. Although the government has occasionally attempted to kidnap defendants from foreign countries,[259] it was not obligated to undertake such an act, which without Colombia's consent or acquiescence would have violated international law.[260] Finally, without addressing whether the government had a constitutional duty to do so, the court noted that the government did in fact try to use an informant to lure Blanco back to this country.[261]

Blanco further argued that the government breached its duty by waiting nine months to arrest her after she was spotted in California. In rejecting this argument, the panel made clear that the considerations of foreign policy identified in *Diacolios* were not the only ones that would justifiably limit the govern-

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[257] Prior to 1982, this country's treaty with Colombia did not require Colombia to extradite its own citizens. Although a new treaty in 1982 required Colombia to surrender drug smugglers to the United States, the President of Colombia announced that he would not enforce it. *Id.* at 778.

[258] *Id.*

[259] *See, e.g.*, United States v. Yunis, 859 F.2d 953 (D.C. Cir. 1988).

[260] 861 F.2d at 779.

[261] *Id.*

ment's efforts to apprehend a fugitive defendant. Legitimate law enforcement considerations might also provide a justification. The court cited an earlier decision in which the unsealing of an indictment after the statute of limitations expired was found to be justified because unsealing the indictment earlier would have interfered with the authorities' efforts to arrest a codefendant.[262] According to the *Blanco* court, the need to avoid the possibility that Blanco's arrest might have jeopardized both an informant's life and the success of an ongoing investigation "constitute[d] at least as sufficient a justification for delaying an arrest as avoiding the flight of a co-defendant."[263]

Finally, in *Garcia Montalvo v. United States*,[264] an entirely different Second Circuit panel issued a per curiam opinion finding that the government had met its obligation of due diligence.[265] Garcia was indicted on narcotics charges in 1974 but not brought to trial until eight years later. During the first seven years, Garcia was imprisoned or living as a fugitive in Venezuela. The government filed a warrant for his arrest with the Venezuelan authorities but did not request his extradition, since this country's treaty with Venezuela did not provide for the extradition of narcotics offenders. In 1981, Garcia went to Brazil, where he was arrested. The United States government filed a detainer with the Brazilian authorities, who returned Garcia to this country the following year. The court of appeals found that since Garcia was not subject to extradition under the treaty, the government's filing of a warrant with Venezuelan authorities "satisfied [its] constitutional duty to make a good-faith effort to return Garcia from Venezuela."[266]

Taken together, these decisions are notable in two principal respects. First, they establish that the prosecution's failure to

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[262] *Id.* (citing United States v. Muse, 633 F.2d 1041, 1044 (2d Cir. 1980)).

[263] *Id.*

The court also rejected Blanco's claim that, like the defendant in United States v. Salzmann, 548 F.2d 395 (2d Cir. 1976), she was not a fugitive because the government had been aware of her address in Colombia. The *Blanco* court pointed out that, unlike Salzmann, Blanco knew of her indictment but neither communicated with the government nor suggested that she would be willing to return to this country to stand trial. 816 F.2d at 780.

[264] 862 F.2d 425 (2d Cir. 1988).

[265] This panel was comprised of Circuit Judges Van Graafeiland, Winter, and Mahoney.

[266] 862 F.2d at 426.

take otherwise reasonable steps to apprehend a fugitive defendant may be justified by a variety of countervailing government interests. In particular, the prosecution's obligation of due diligence may be limited by law enforcement considerations as well as foreign policy considerations. Second, these decisions establish that even when there is no reason not to pursue a fugitive defendant, "due diligence" requires little more than a token effort to find and apprehend the defendant, except in the unusual case when the fugitive defendant's whereabouts are known and the fugitive is subject to immediate capture or extradition by treaty. The court's narrow construction of "due diligence" in the more common situation of defendants who are in hiding or in flight is justified by the difficulties encountered in ferreting out fugitive defendants. Those defendants who are actively concealing their whereabouts are invariably harder to find than defendants who are simply unaware of the charges; indeed, in some cases, defendants in flight might never be located. It seems fair to require the prosecution to take whatever steps are reasonably likely to lead to the discovery of individuals who are not actively avoiding the judicial process. However, in the case of a fugitive, since there may be no steps that are reasonably likely to lead to the defendant's apprehension, only some modest effort should be required.

C. *The Significance of a Failure of "Due Diligence"*

The most important question addressed by the decisions after *Diacolios* was, what is the legal significance of the prosecution's failure to pursue a fugitive defendant diligently? Perhaps because it ultimately denied the defendant's speedy trial claim, the *Diacolios* panel never commented on Judge Haight's apparent view that a showing of prosecutorial nonfeasance would suffice in itself to establish a speedy trial claim brought by a fugitive defendant. There was, for example, no recognition in the *Diacolios* opinion that under the *Barker* standard, the government's responsibility for pretrial delay would be just one of several relevant considerations to be weighed in determining whether the defendant's constitutional right to a speedy trial had been abridged. The legal discussion in *Diacolios* focused entirely on the issue of due diligence and made no reference whatsoever to the balancing test of *Barker*.

In *Rayborn*, however, the court of appeals made clear that

the prosecution's failure to exercise due diligence will not necessarily suffice to establish a speedy trial claim. It employed the *Barker* analysis and emphasized that no single *Barker* factor is dispositive, but that "courts still must engage in a sensitive balancing process whereby the conduct of *both* the prosecution and the defendant are weighed."[267] Accordingly, in all three decisions after *Diacolios*, the Second Circuit applied the *Barker* balancing test.[268]

Moreover, under the *Barker* analysis, as interpreted in these decisions, a fugitive defendant's speedy trial claim will almost invariably fail, even if the prosecution has neglected to pursue the defendant with "due diligence." This is true for two reasons. First, even if the prosecution has not met its obligation, the second *Barker* factor—the reason for pretrial delay—will not weigh in the defendant's favor. It will be neutral. That is because, despite its nonfeasance, the prosecution will not be solely responsible for the pretrial delay; the defendant will share responsibility because his flight will have contributed to the delay.[269]

In addition, the last two *Barker* factors will almost invariably weigh against the fugitive defendant. The third factor—whether the defendant asserted the right to a speedy trial—will always weigh against a defendant who is avoiding

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[267] *Rayborn*, 858 F.2d at 89 (emphasis in original).

This conclusion was clearly correct, since the Supreme Court's decision in *Barker* made clear that no one factor will establish a speedy trial claim. *See* notes 29-40 and accompanying text *supra*. Indeed, even before *Barker* the law was clear that the prosecution's responsibility for pretrial delay was not reason enough for dismissing the indictment under the speedy trial clause. In *Smith v. Hooey* and *Dickey v. Florida*, both cases in which the Supreme Court found that the prosecutor had failed to diligently seek the appearance of imprisoned defendants, that nonfeasance alone did not justify dismissing their indictments. In *Smith*, the Court's remand was interpreted to permit the state court to make an independent determination whether the defendant had been prejudiced by the pretrial delay and, if he had not been, to deny relief. *See* Smith v. Hooey, 393 U.S. at 383-84 (separate opinion of Harlan, J.); *id.* at 384 (White, J., concurring). In *Dickey*, the Court found that the defendant had clearly been prejudiced by the lengthy pretrial delay and implied that, if the harmfulness of the delay had not been apparent, fact-finding on this issue would have been necessary. 398 U.S. at 38.

[268] *See* Garcia Montelvo, 862 F.2d at 426; *Blanco*, 861 F.2d at 777; *Rayborn*, 858 F.2d at 89.

[269] *See Blanco*, 861 F.2d at 778 ("Blanco must bear the responsibility for the lengthy delay between her indictment and trial."); *Rayborn*, 858 F.2d at 89 (the court must balance "the conduct of *both* the prosecution and the defendant"). *Cf.* United States v. Sanchez, No. S 84 Cr. 625 (S.D.N.Y. Jan. 27, 1989) (LEXIS, Genfed library, Dist. file) (fugitive defendant has "primary responsibility" for pretrial delay). *See also* United States v. Wells, 893 F.2d 535 (2d Cir. 1990) (Speedy Trial Act).

prosecution, since a defendant who is in hiding will not be in a position to seek a speedy trial. Thus, in *Blanco*, the court noted that this factor did "not help [Blanco's] case," since she did not seek a speedy trial during the period prior to her arrest.[270] The court's observation was consistent not only with *Barker*,[271] but also with post-*Barker* cases that hold that a defendant's failure to assert her right to a speedy trial, while not a waiver of that right, is nevertheless a factor weighing heavily against the defendant's claim.[272]

Similarly, the final *Barker* factor—whether the defendant was prejudiced by the delay—will generally weigh against the fugitive defendant. A defendant who was in hiding cannot plausibly complain about the anxiety of living under indictment. Moreover, it will be difficult for a fugitive defendant to demonstrate that her ability to wage a defense was significantly impaired by the passage of time.[273] Ordinarily, it will be fair to assume that the prosecution's case was impaired as much as, or more than, the defendant's case.[274] In *Blanco*, for example, the court found that the defendant had failed to make a specific showing that her defense had been impaired. Her unsubstantiated allegation of prejudice was considered insufficient, since the delay could as easily have helped her defense as hurt it.[275] Moreover, the court noted: "We are not likely to be easily persuaded by the complaint of [a defendant] that she was prejudiced by delay when [she] caused the delay."[276]

The result is that the "right to be diligently pursued" is almost, if not quite, a right without a remedy. Even if the fugitive defendant can show that the prosecution failed to seek him with "due diligence," he will rarely be able to show, in addition, that the pretrial delay impaired his ability to defend himself to so great an extent that, under the *Barker* test, the balance tips in favor of dismissing his indictment. Given the emasculation of

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[270] *Blanco*, 861 F.2d at 778.

[271] 407 U.S. 514, at 532 ("We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.").

[272] *See, e.g.*, Morris v. Wyrick, 516 F.2d 1387, 1390-91 (8th Cir. 1975); Matranga v. United States, 392 F. Supp. 249, 253 (D.S.C. 1975).

[273] *See Sanchez*, No. S 84 Cr. 625 at 7.

[274] *See id.*

[275] *Blanco*, 861 F.2d at 780.

[276] *Id.*

Diacolios by subsequent panels, it is scarcely surprising that the decision has been all but ignored outside the Second Circuit.

VII. THE "DUTY OF DUE DILIGENCE" AS A RULE OF ETHICS

The Second Circuit panel in *Diacolios* was clearly wrong to believe that the sixth amendment requires the prosecution to diligently pursue fugitive defendants. There was no justification for departing from settled precedent which holds that a fugitive defendant waives the right to a speedy trial. Indeed, to endow fugitive defendants with a legally enforceable "right" to be diligently pursued seems almost absurd. It is little wonder that the *Diacolios* court stated the applicable legal principle in the language of "duty" rather than of "right," notwithstanding that it was the defendant's *right* to a speedy trial that was at issue in the case.[277]

If it makes no sense to enforce a prosecutorial obligation to pursue fugitive defendants, there is still a question that remains: do prosecutors have an *ethical* responsibility to try to bring fugitive defendants to trial? Courts have not shied away from imposing ethical obligations on federal prosecutors in instances in which the Constitution and federal legislation are silent.[278] It is

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[277] *Diacolios* and its progeny may have escaped attention, in part, because, on quick reading, the "obligation to exercise due diligence in attempting to locate and apprehend [a fugitive defendant]," Rayborn v. Scully, 858 F.2d at 90, seems so perfectly consistent with the prosecution's duty of "due diligence" (1) to seek a defendant who is unaware of the pending charges, *see* note 103 and accompanying text *supra*, (2) to offer transportation to an indigent defendant who is outside the jurisdiction, *see* text accompanying notes 148-54 *supra* (discussing *Salzmann*), and (3) to try to obtain the presence of an incarcerated defendant. *See* text accompanying notes 51-62 *supra* (discussing *Smith v. Hooey*).

It is important to keep in mind, however, that "duties" imposed on the government by the Bill of Rights generally reflect correlative "rights" of individuals, and vice versa. This is particularly true in the context of criminal proceedings: rights and duties are almost invariably opposite sides of the same coin. For example, the government's duty of due diligence in the three situations listed above might fairly be recharacterized as (1) a defendant's right to be apprised of pending charges; (2) an indigent defendant's right to be transported to criminal proceedings in a distant venue; and (3) an incarcerated defendant's right to be brought to trial. Whether characterized as "duties" or as "rights," these aspects of the speedy trial right seem just and reasonable. But the same cannot be said of the obligation imposed by *Diacolios*. In essence, the Second Circuit held that a defendant who flees has a constitutional right to be pursued — indeed, not just to be pursued, but to be pursued *diligently*. When restated from the perspective of the individual defendant's "right," the *Diacolios* court's decision seems silly.

[278] *See, e.g.*, United States v. Hammad, 846 F.2d 854 (2d Cir.) (prosecutor may not

worth considering, therefore, whether an obligation to pursue fugitive defendants should be assumed by prosecutors as a matter of self-governance[279] or, indeed, whether the courts should impose such an obligation pursuant to their supervisory authority.

At first glance, one might imagine that the obligation of "due diligence" recognized in *Diacolios* has strong ethical underpinnings. This is true for a number of reasons, not least of which is that the duty of "due diligence"—like the related concept of prosecutorial "good faith"[280]—surely *sounds* like an ethical duty. Moreover, one thing that this duty shares with many ethical duties is that, as interpreted in the cases following *Diacolios*, the duty of "due diligence" is largely unenforceable. As well, one might ordinarily expect that a decision such as *Diacolios* that is so lacking in support in the law would, at the very least, be firmly rooted in a shared societal sense of fairness or morality—particularly at a time when the trend in the federal courts is not to recognize new constitutional rights, but to cut back on the procedural protections afforded to criminal defendants by the Warren and Burger Courts.[281]

At the same time, however, an obligation to pursue fugitive defendants would be quite different in character from most ethical rules. This duty is unlike the affirmative duties imposed on the prosecution in other situations in order to protect a defendant's right to a speedy trial: the duty to give notice of charges to an otherwise uninformed defendant, to provide resources to a defendant who otherwise could not afford to come to trial, or to perform the essentially ministerial act of obtaining an incarcer-

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send informant to contact represented individual who is target of grand jury investigation), *revised*, 855 F.2d 36 (2d Cir. 1988) (discussed in Green, *A Prosecutor's Communications With Represented Suspects and Defendants: What Are the Limits?*, 24 CRIM. L. BULL. 283 (1988)); United States v. Iorizzo, 786 F.2d 52, 59 (2d Cir. 1986) (duty to call defense lawyer's conflict of interest to the trial judge's attention before trial and to seek defense counsel's disqualification) (discussed in Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 AM. J. CRIM. L. 323, 345-49 (1989)[hereinafter Green, *Her Brother's Keeper*]).

[279] *See generally* Green, *Her Brother's Keeper*, *supra* note 278, at 354 & n.108 (arguing that prosecutors should issue guidelines to govern the filing of disqualification motions).

[280] *See, e.g.*, Green, *"Package" Plea Bargaining and the Prosecutor's Duty of Good Faith*, 25 CRIM. L. BULL. 507 (1989).

[281] *See* McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. COLO. L. REV. 741, 745-46 (1988).

ated defendant from another jurisdiction. This is a duty to allocate investigative resources in a manner which is as likely as not to prove unavailing, for the benefit of an individual who would rather that the prosecution *not* investigate.

It would be unusual to suppose that the prosecution has some ethical duty to undertake investigations and to go to particular lengths to discover the whereabouts of all fugitive defendants. As a general rule, the prosecution has unreviewable discretion to decide how to allocate its investigative resources. Few would suggest that the prosecution has an obligation to investigate all crimes, that a criminal investigation must be pursued at any particular length, or that, in seeking to procure evidence of criminal activity, the prosecution has an obligation to undertake any particular investigative steps.[282] Indeed, few would even suggest that, after it obtains probable cause to believe that an individual committed a crime, the prosecution has an obligation to bring criminal charges.[283] The prosecution enjoys virtually unfettered discretion in deciding how to allocate investigative and prosecutorial resources.[284] It makes sense that this is so. Government resources in general, and prosecutorial resources in particular, are finite.[285] Ordinarily, the prosecution is

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[282] There may be a limited exception when it comes to seeking out exculpatory evidence. For example, it has been said that "a prosecutor may not intentionally avoid the pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused." ABA Standards for Criminal Justice 3-3.11(c). But as a general matter, there is no generally recognized duty on the part of the prosecution to make an affirmative effort to locate evidence helpful to the accused, much less to look for inculpatory evidence. *See* Green, *The Ethical Prosecutor and the Adversary System*, 24 CRIM. L. BULL. 126, 128-30 (1988).

[283] A minority view was expressed by Judge Miner of the Second Circuit in an article which argued that a prosecutor's decision not to prosecute someone who is guilty of a crime invades the province of the jury and creates a public perception of unfairness. *See* Miner, *The Consequences of Federalizing Criminal Law*, 4 CRIM. JUST. 16, 19 (1989).

[284] The prosecution may not make charging decisions for discriminatory or vindictive reasons. *See, e.g.*, Oyler v. Boles, 368 U.S. 448 (1962).

[285] In a world of finite resources, the ruling in *Diacolios* could have a substantial impact, if it were to be taken seriously. The prosecution would be required to redirect resources from other areas in order to finance the pursuit of fugitive defendants in all cases. This could mean, if prosecutorial resources remain at a fixed level, that funds must be taken away from other law enforcement ventures, such as investigations of unsolved crimes. If, on the other hand, resources for law enforcement are increased to accommodate the need to pursue fugitive defendants, funds will have to be taken away from other government programs. From the point of view of costs and benefits, the undeniable cost of the *Diacolios* decision is hard to justify given that the duty of "due diligence" provides no corresponding benefit to the fugitive defendants themselves. A diligent search,

in the best position to decide how to use its resources.

However unusual it may seem, an ethical duty to pursue fugitive defendants might be justified on several grounds. The first, which can be quickly discounted, is that prosecutors have a moral obligation to relieve fugitive defendants of the adverse consequences of their flight. To be sure, this proposition is not wholly farfetched. On occasion, prosecutors do have a duty to take steps to protect defendants who make procedural errors. For example, when a defendant chooses to be represented by an attorney who has a potential conflict of interest, the prosecutor has an obligation to alert the court, so that the court can ensure that the decision is a voluntary and intelligent one.[286] What makes the defendant's decision to become a fugitive different, however, is that it is not just potentially unwise—it is wrongful. It makes no sense that prosecutors should be empowered to prosecute defendants for unlawfully fleeing from prosecution and, at the same time, owe fugitive defendants an obligation to relieve them of any adverse procedural consequences of their flight.

A second possible justification for an ethical duty to pursue fugitive defendants arises out of the public interest in the expeditious resolution of criminal cases. This is, to some extent, a judicial interest. Bluntly put, judges want to clear their dockets. That, in part, was what led Judge Weinstein to appoint Professor Lusky to represent Salzmann and the other fugitive draft evaders after the Vietnam War. If, in a case like *Salzmann*, the defendant is not pursued, the case will remain on the court's docket forever.[287] More importantly, there is a public interest in finality. In a variety of contexts,[288] including cases decided under the speedy trial clause,[289] courts have recognized the importance of achieving a final resolution of criminal cases. This interest is obviously undermined when a trial is delayed because of the

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if unsuccessful, leaves the fugitive defendant exactly where he is. A successful search puts him in a position he does not want to be in—a position no better than he would be in if he came out of hiding on his own.

[286] *See generally* Green, *Her Brother's Keeper*, *supra* note 278, at 344-45.

[287] This problem is not particularly compelling. Courts can deal with it by moving fugitive cases to a separate docket, such as a "fugitive suspense calendar," which can then be ignored.

[288] *See, e.g.*, Morris v. Slappy, 461 U.S. 1, 14-15 (1982) (in deciding whether to order retrial, court should consider public interest in reaching final resolution of criminal case).

[289] *See, e.g.*, *Barker*, 407 U.S. at 519-21.

prosecution's failure to try to apprehend a fugitive defendant. The problem is that this is only one among a number of competing public interests, including the interest in preserving limited prosecutorial resources. The prosecution has a responsibility to mediate between those various public interests and to determine how they can best be served. It is not invariably the case that the appropriate resolution will entail a diligent effort to locate and arrest the defendant.

A final possible reason to recognize an ethical duty diligently to pursue fugitive defendants is that, in the absence of such a duty, the prosecution might decline to seek the defendant for inappropriate reasons. For example, the prosecution might seek to gain an evidentiary advantage from the defendant's flight or from the ensuing pretrial delay.[290] Or, the prosecution might decide not to pursue the defendant so as to turn the defendant's flight into a form of punishment—a de facto, self-imposed exile from the jurisdiction.[291]

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[290] One possible evidentiary advantage that might accrue to the prosecution from a defendant's continued flight is that the defendant's flight may be introduced as evidence of his "consciousness of guilt." This benefit would seem too small, however, to inspire a prosecutor to let a fugitive defendant remain at liberty. Indeed, the apparent benefit may be entirely illusory. The value of evidence of flight would not correspond to the length of the defendant's fugitivity. Even if the defendant is quickly captured, his flight will support an inference that he believed himself to be guilty of a crime. Therefore, the interest in acquiring evidence of "consciousness of guilt" would not lead a prosecutor to give up the chase.

More significantly, in some cases, evidence that would otherwise have been available to the defense may be lost if the defendant is not quickly captured. It is conceivable that the prosecution will decline to pursue a fugitive defendant for some period of time in the hope that exculpatory evidence will disappear in the interval. This seems unlikely, however, since the passage of time is more likely to hurt the prosecution than the defense which, after all, has no obligation to call witnesses or present evidence, but need only, and in many cases does only, put the government to its proof. In deciding whether to pursue a fugitive defendant, a prosecutor would rarely be able to anticipate confidently that the passage of time will cause more prejudice to the defense than to the prosecution.

[291] The prosecutor might hope that some kind of "rough justice" would emerge out of the stalemate in which the defendant is never captured and tried but, at the same time, is unable to remain openly in the jurisdiction. The defendant is "punished" in such a case, because he is essentially exiled, albeit by his own choice. At the same time, the prosecution is spared the expense and risk of trial. In a case like *Diacolios*, this might seem like an eminently fair result from the prosecutor's perspective, since, had he been convicted, the defendant probably would have received a light sentence and might well have been sentenced to probation. Presumably, from the defendant's perspective, this would also have seemed like a desirable result, since, although giving up the chance to live in the United States, he avoided the expense of trial and the risk of a prison sentence.

In most cases, however, when the prosecution decides not to pursue a fugitive defendant, its decision will reflect nothing more than a judgment about how best to allocate limited resources, without regard to the impact—positive or negative—of the defendant's flight upon the defendant. The adoption of a duty, in all cases, to pursue fugitive defendants seems like an unnecessarily burdensome and intrusive way of responding to the possibility that in some small number of cases, the prosecution will fail to pursue the defendant because of an impermissible motivation, and not because of a rational consideration of such factors as the importance of the case,[292] the availability of

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From a court's point of view, however, this informal resolution of the criminal case might appear to be unethical. To borrow from Lewis Carroll, this is punishment first and (if the fugitive defendant is caught) trial afterwards, or (if he is never caught) no trial at all. It may be argued that this offends the principle that punishment should not be imposed in the absence of a criminal conviction. *See, e.g.*, Martin v. Strasburg, 689 F.2d 365, 372 (2d Cir. 1982) (punishment by incarceration must "follow, rather than precede, adjudications of guilt"), *rev'd on other grounds sub nom.* Schall, Comm'r of New York City Dep't of Juvenile Justice v. Martin, 467 U.S. 253 (1984).

One possible answer to this argument might be that the principle that defendants should not be punished in the absence of a conviction applies only to the courts in the exercise of their sentencing power, and not to the prosecution in achieving an informal resolution of criminal cases. In our criminal justice system, a prosecutor is accorded vast discretion to work out an informal resolution of criminal charges, with the consent of the defendant, rather than to press a case to judgment. For example, a prosecutor can agree to drop charges in exchange for the defendant's payment of restitution to the victim, in exchange for the defendant's consent to be deported, or in exchange for the defendant's satisfaction of other conditions which are, to some degree, punitive. Or, with the defendant's consent, a case can be "adjourned in contemplation of dismissal"; if the defendant does not commit another crime within a specified period of time, the charges will be dropped. *See, e.g.*, N.Y. CRIM. PROC. LAW § 170.55 (McKinney 1982). The decision to let a fugitive defendant remain in self-imposed exile, rather than to try to apprehend or extradite him, is arguably comparable to these other informal means of resolving criminal charges.

One important difference, however, is that the generally accepted means of resolving a criminal case without a judicial judgment generally entail a formal agreement between the prosecution and a counselled defendant that is approved by the court before it dismisses the charges. In contrast, when a fugitive defendant is deliberately not pursued, the "rough justice" that results is not the product of an express agreement. It may not be understood by the defendant to be a resolution of any kind, and if it is, it often will not be the product of a counselled decision by the defendant. Moreover, the prosecutor is in no way bound; even after the defendant has "suffered enough" from the anxiety of the pending charges and the deprivations attendant to flight, he may be arrested, tried, and sentenced—thus receiving, in effect, double punishment. Because of the absence of procedural protections, courts might reasonably refuse to sanction the de facto exile of fugitive defendants.

[292] It is most likely that prosecutors will deliberately forego pursuing fugitive defendants in cases in which the defendants are charged with crimes that are not of "high

investigative resources, and the likelihood that the defendant can be apprehended. The more appropriate response would be to give guidance as to the proper and improper factors that may enter into the prosecution's decision whether, and at what length, to pursue a fugitive defendant.

In sum, an ethical duty diligently to pursue fugitive defendants seems no more justified than a constitutional right of fugitive defendants to be pursued. For the most part, decisions about whether and how far to pursue a fugitive defendant should remain within the discretion of the prosecution.

CONCLUSION

In 1988, a panel of the Second Circuit, almost offhandedly, issued a novel, and expansive, interpretation of the sixth amendment speedy trial clause. The court's decision in *United States v. Diacolios* found that implicit in the sixth amendment was a new constitutional right of potentially significant consequence to prosecutors and criminal defendants: the right of fugitive defendants to be pursued diligently. In discovering this right, the panel was not writing on a blank slate, but, rather, erasing many years of decisions which held that a fugitive defendant waived the right to a speedy trial.

Only a few months later, apparently recognizing the *Diacolios* decision to be an unsound and unwarranted departure from the prior law, different panels of the Second Circuit did unto *Diacolios* what *Diacolios* had done unto the prior cases. While nominally reaffirming the constitutionally imposed "obligation to exercise due diligence in attempting to locate and apprehend" fugitive defendants, the court made it clear that fugitive defendants will rarely, if ever, be provided a remedy for the prosecution's failure to carry out this obligation. As a conse-

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priority" for prosecution. This was true, for example, in *Salzmann*, where, as both the district court and circuit court noted disapprovingly, the government had acted discriminatorily by deciding that draft evaders, as a class, would not be extradited. 548 F.2d at 402; 417 F. Supp. at 1157. Similarly, in *Diacolios* the panel may have inferred that the prosecutor had no genuine interest in extraditing the defendant because the crime charged was not particularly serious and the government's proof was not particularly strong. The weakness of the evidence against Diacolios was suggested by the fact that on February 18, 1986, an order of *nolle prosequi* was filed as to his brother, Vasilios Diacolios, with whom Michael Diacolios had been jointly charged. Brief for Defendant-Appellee at 8, United States v. Diacolios, 837 F.2d 79 (2d Cir. 1988).

quence, the prosecutorial duty recognized in *Diacolios* will function, at most, as an ethical obligation, not a legally enforceable one. Yet, even as an ethical obligation, the duty to pursue vigorously all fugitive defendants is hard to justify. The decision whether to give chase to particular defendants who have taken flight, and the decision when to give up the chase, ought to be made by the prosecution on a case-by-case basis, with regard not only for the public interest in speedily resolving criminal cases, but also for the public interest in the sound allocation of limited investigative and prosecutorial resources.