

1987

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Recommended Citation

Martha L. Wood, *Determination of Dismissal Sanctions Under the Speedy Trial Act of 1974*, 56 Fordham L. Rev. 509 (1987).

Available at: <https://ir.lawnet.fordham.edu/flr/vol56/iss3/9>

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DETERMINATION OF DISMISSAL SANCTIONS UNDER THE SPEEDY TRIAL ACT OF 1974

INTRODUCTION

The sixth amendment guarantees the right to a speedy trial.¹ The Speedy Trial Act of 1974 ("STA" or the "Act")² was introduced to ensure that the federal courts neither abridge nor dilute this constitutional guarantee.³ It also was designed to reduce the recidivism rate of persons released pretrial.⁴ Congress ultimately decided that the Act's purpose could best be effectuated by setting a specific number of days within which a defendant must be arraigned⁵ and brought to trial.⁶

A violation of the STA results in mandatory dismissal of the case or complaint.⁷ The judge, however, retains the discretion to dismiss the case with or without prejudice.⁸ The statute specifies three factors that

1. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI.

2. 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986).

3. Although the stated purpose of the STA does not expressly mention compliance with the sixth amendment as one of its goals, the legislative history clearly demonstrates that the Act was meant to address this concern as well. See 120 Cong. Rec. 41,774 (1974) (remarks of Rep. Conyers, ranking minority member of the House Subcommittee on Crime); 117 Cong. Rec. 3405 (1971) (remarks of Sen. Ervin, sponsor of S. 895, an early version of the STA); Frase, *The Speedy Trial Act of 1974*, 43 U. Chi. L. Rev. 667, 669 (1976).

4. The purpose of the STA, as stated in its introduction, is "[t]o assist in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial, and for other purposes." Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076, reprinted in 1974 U.S. Code Cong. & Admin. News 2407; see 117 Cong. Rec. 3405 (1971) (remarks of Sen. Ervin); 120 Cong. Rec. 41,774 (1974) (remarks of Rep. Conyers, ranking minority member of the House Subcommittee on Crime).

5. 18 U.S.C. § 3161(b) (1982) provides in relevant part that "[a]ny information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges . . ." *Id.*

6. 18 U.S.C. § 3161(c)(1) (1982) provides in relevant part that "[i]n any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date . . . of the information or indictment . . ." *Id.*

7. 18 U.S.C. § 3162(a) (1982). The statute excludes certain periods of delay from the time limit computations. Some examples of excludable periods are mental or physical examinations of the defendant, the filing of a pretrial motion, or the absence or unavailability of an essential witness at trial. 18 U.S.C. § 3161(h) (1982 & Supp. IV 1986). The Act also provides that any continuance that results in delay is excludable if it was granted by the trial judge based on his findings that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A) (1982). Inclusion in § 3161(h)(8) of the provision that "[n]o continuance . . . shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government," 18 U.S.C. § 3161(h)(8)(C) (Supp. IV 1986), further emphasizes the legislature's interest in curbing excessive court congestion and delays in the prosecutor's office.

8. 18 U.S.C. § 3162(a) (1982). A dismissal with prejudice is a final adjudication of

the court must consider in determining whether to dismiss the case with or without prejudice: the severity of the crime; the facts and circumstances of the STA violation; and the impact of reprosecution on the STA and on justice in general.⁹

Federal courts have interpreted these dismissal considerations in a variety of ways.¹⁰ Of the three, the second factor—facts and circumstances of the delay—represents the most critical and the most often contested element in a dismissal determination because it requires the trial judge to

the matter and bars a subsequent suit on the same cause of action, *see* Black's Law Dictionary 421 (5th ed. 1979); when a case is dismissed without prejudice, the complainant may sue again, *id.* An appellate court will review the trial judge's decision concerning the type of dismissal only on an abuse of discretion standard. *See* United States v. Fountain, Nos. 86-2622, 87-1465, slip op. at 4 (7th Cir. Feb. 22, 1988); United States v. Kramer, 827 F.2d 1174, 1179 (8th Cir. 1987). The *Kramer* court described the abuse of discretion standard applied in any STA case:

An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment.

Id.; *accord* *Fountain*, Nos. 86-2622, 87-1465, slip op. at 4; United States v. Russo, 741 F.2d 1264, 1266-67 (11th Cir. 1984) (*per curiam*). An appellate court may review the type of STA dismissal issued by the lower court *de novo* if the trial court has not addressed the issue. *See* United States v. Tunnessen, 763 F.2d 74, 79 (2d Cir. 1985) In such a case, the appellate court does not have to remand the decision to the district court. *Id.*

9. The statute reads in pertinent part:

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required . . . such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If the defendant is not brought to trial within the time limit required . . . the information or indictment shall be dismissed on motion of the defendant. . . . In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or *nolo contendere* shall constitute a waiver of the right to dismissal under this section.

18 U.S.C. § 3162(a) (1982); *see* United States v. Brown, 770 F.2d 241, 244 (1st Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986); United States v. Russo, 741 F.2d 1264, 1267 (11th Cir. 1984) (*per curiam*); United States v. Bittle, 699 F.2d 1201, 1208 (D.C. Cir. 1983).

10. *See, e.g.*, United States v. Taylor, 821 F.2d 1377, 1385 & n.11 (9th Cir. 1987) (government's indifference to the STA should be discouraged by dismissal with prejudice), *cert. granted*, 108 S. Ct. 747 (1988); United States v. Salgado-Hernandez, 790 F.2d 1265, 1268 (5th Cir.) (negligence by the government may weigh in favor of dismissal without prejudice as long as it is not a frequently occurring event), *cert. denied*, 107 S. Ct. 463 (1986); United States v. Brown, 770 F.2d 241, 244 (1st Cir. 1985) (delay due to court's misunderstanding of a previously unlitigated provision of the Act weighs in favor of a nonprejudicial dismissal), *cert. denied*, 474 U.S. 1064 (1986).

determine who caused the delay and why it occurred.¹¹ A controversy currently exists over whether and to what extent prosecutorial or judicial negligence in causing a delay warrants a dismissal of the charges or indictment with prejudice.¹²

This Note urges that the federal courts adopt a two-step method of analyzing STA dismissals. Under this test, courts would first determine the weight to be accorded each individual dismissal factor and then would weigh all three dismissal considerations together, giving more weight to the second factor when the other two are neutral so that the presence of prosecutorial or judicial culpability for the delay more likely will result in dismissal with prejudice.¹³ Part I of this Note explains the background of the speedy trial right and analyzes the pertinent legislative history of the STA. Part II looks at the interpretation and application of each of the individual dismissal considerations and reviews those factors considered in determining what type of dismissal each favors. Part III examines the controversy over the dismissal sanction considerations and proposes a test for dismissal that weighs prosecutorial or judicial culpability for delay as a factor in favor of dismissal with prejudice. This Note concludes that application of the two-part test that requires a dismissal with prejudice when the first and third factors do not demand a nonprejudicial dismissal and the second factor indicates that no affirmative justification for the delay exists best serves the purposes of the Speedy Trial Act.

I. BACKGROUND AND LEGISLATIVE HISTORY OF THE STA

The interpretation of any statute begins with the language of the act itself.¹⁴ When the language is clear, a court need not look further to de-

11. See *infra* notes 175-77 and accompanying text.

12. Some courts have indicated that when governmental or judicial neglect has caused the delay, the court should dismiss with prejudice. See, e.g., *United States v. Taylor*, 821 F.2d 1377, 1385 n.11 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 747; *United States v. Russo*, 741 F.2d 1264, 1267-68 (11th Cir. 1984) (per curiam); *United States v. Caparella*, 716 F.2d 976, 980 (2d Cir. 1983). Others, however, have held that a nonprejudicial dismissal is appropriate where bad faith has not contributed to the delay. See, e.g., *United States v. Fountain*, Nos. 86-2622, 87-1465, slip op. at 5-6 (7th Cir. Feb. 22, 1988); *United States v. Kramer*, 827 F.2d 1174, 1177-78 (8th Cir. 1987); *United States v. Melguizo*, 824 F.2d 370, 372 (5th Cir. 1987) (per curiam), *appeal filed*, 56 U.S.L.W. 3303 (U.S. Oct. 3, 1987) (No. 87-551); *United States v. McAfee*, 780 F.2d 143, 146 (1st Cir. 1985), *vacated and remanded on other grounds*, 107 S. Ct. 49 (1986); *United States v. Hawthorne*, 705 F.2d 258, 260-61 (7th Cir. 1983) (per curiam).

The Supreme Court recently has granted certiorari on *United States v. Taylor* to determine whether a delay to trial of fourteen days beyond the statutory time limit justified the prejudicial dismissal of a narcotics indictment. 821 F.2d 1377 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 747 (1988).

13. See *infra* notes 155-59 and accompanying text.

14. See *United States v. Turkette*, 452 U.S. 576, 580 (1981); *Lewis v. United States*, 445 U.S. 55, 60 (1980); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979).

termine the application of the statute.¹⁵ If the wording of the statute allows for more than one reasonable construction, however, the court may look to the legislative history to inform its interpretation.¹⁶ The language of the STA fails to provide any guidance on how courts should weigh any of the dismissal considerations.¹⁷ Furthermore, the phrasing of these considerations has produced a good deal of dispute among the circuits,¹⁸ and the language's ambiguity has caused several courts to turn to the legislative history for guidance.¹⁹ An examination of this history helps to illuminate exactly how Congress intended the courts to utilize these factors. The legislative history is more readily understood if viewed in the context of the background and development of the speedy trial right.

A. *The Speedy Trial Right*

Although the sixth amendment dates back nearly two hundred years,²⁰ the constitutional speedy trial right has evolved slowly,²¹ as the Supreme Court has reviewed very few sixth amendment speedy trial claims.²² The

15. See *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

16. See *United States v. Public Utilities Comm'n*, 345 U.S. 295, 315 (1953); *Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899).

17. See *United States v. Fountain*, Nos. 86-2622, 87-1465, slip op. at 4 (7th Cir. Feb. 22, 1988). See generally 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986).

18. See *infra* note 93 and accompanying text.

19. See, e.g., *United States v. Salgado-Hernandez*, 790 F.2d 1265, 1267 (5th Cir.), *cert. denied*, 107 S. Ct. 463 (1986); *United States v. McAfee*, 780 F.2d 143, 146 (1st Cir. 1985), *vacated and remanded on other grounds*, 107 S. Ct. 49 (1986); *United States v. Caparella*, 716 F.2d 976, 978-81 (2d Cir. 1983).

20. The right to a speedy trial is deeply embedded in English history. The earliest documentation of this right issued in 1166 from an English judicial assembly called the Assize of Clarendon. See *Klopfers v. North Carolina*, 386 U.S. 213, 223 (1967); S. Baxter, *Basic Documents of English History 18-20* (1968). The Magna Carta, in 1215, articulated the concept that defendants have a right to a speedy trial, stating that, "[t]o no one will we sell, to none will we deny or delay, right or justice." *Id.* at 27. This right was codified in 1679 in the Habeas Corpus Act and has remained constant throughout the course of English law. See *id.* at 150-51.

American jurisprudence rests on a foundation of English legal principles. See Hansen & Reed, *The Speedy Trial Act of 1974 in Constitutional Perspective*, 47 *Miss. L.J.* 365, 367-68 (1976). Many of the declarations of rights written by the newly formed states in 1776 included a speedy trial provision. See *Klopfers v. North Carolina*, 386 U.S. 213, 225 & n.21 (1967). This right was incorporated officially into federal law in 1789 in the Bill of Rights in the sixth amendment. See U.S. Const. amend. VI. For a general history of the ratification of the sixth amendment, see S. Rep. No. 87, 99th Cong., 1st Sess. 5-11 (1985).

21. See Hansen & Reed, *supra* note 20, at 369; Note, *The Speedy Trial Act: Conflict Among the Circuits*, 29 *Buffalo L. Rev.* 149, 149 (1980); Note, *Speedy Trial: A Constitutional Right in Search of Definition*, 61 *Geo. L.J.* 657, 659 (1973) [hereinafter *Constitutional Right*].

22. Most of the constitutional speedy trial claims that the Supreme Court has decided have been heard in the last thirty years. See, e.g., *Smith v. Hooey*, 393 U.S. 374 (1969); *Klopfers v. North Carolina*, 386 U.S. 213 (1967); *Pollard v. United States*, 352 U.S. 354 (1957). As of 1976, the Supreme Court had considered the sixth amendment speedy trial issue only twelve times. See Hansen & Reed, *supra* note 20, at 366 n.11.

elusive quality of this guarantee became apparent as early as 1905 when the Supreme Court stated that the speedy trial right was not absolute²³ and depended on the particular circumstances of the case balanced against the public interest involved.²⁴

The Court first articulated the test currently used to determine whether a sixth amendment speedy trial violation has occurred in *Barker v. Wingo*.²⁵ The *Barker* Court developed a four-pronged test that weighs the facts and circumstances of the case at hand against the government's interest in prosecution.²⁶ The four factors enumerated in *Barker* are: the length of the delay; the reasons for the delay; the extent to which the defendant has asserted his right to a speedy trial; and the resulting degree of prejudice to the defendant's rights.²⁷ The *Barker* Court referred to the length of delay as a "triggering mechanism;"²⁸ if the delay is not sufficiently long, a court need not inquire into the other factors of the test.²⁹

The *Barker* analysis of speedy trial violations has engendered a good deal of criticism.³⁰ The test proves problematic because it provides no specific limit to the length of delay,³¹ relies on the defendant to assert the right,³² and requires a detailed assessment of each supposed violation, thereby exacerbating the delay and adding to court backlog.³³ Both Congress³⁴ and commentators³⁵ have sharply criticized the *Barker* analysis for placing the burden to claim a speedy trial violation on the defendant because often it is in the defendant's best interest to remain silent and hope that the prosecutor will find it more difficult to prove his case after a lengthy delay.³⁶

23. See *Beavers v. Haubert*, 198 U.S. 77, 86-87 (1905).

24. See *id.*

25. 407 U.S. 514 (1972). The remedy for a sixth amendment speedy trial violation is dismissal with prejudice. See *Strunk v. United States*, 412 U.S. 434, 439-40 (1973). A sixth amendment speedy trial claim and a motion for dismissal under the STA are not mutually exclusive. See *infra* note 46.

26. 407 U.S. at 530.

27. *Id.*

28. *Id.*

29. See *id.* Length of delay is an arbitrary standard that depends on the specific circumstances of each case. Compare *United States v. Simmons*, 536 F.2d 827, 830-31 (9th Cir.) (six-month delay borderline; court will consider other factors), *cert. denied*, 429 U.S. 854 (1976) with *United States v. Otero-Hernandez*, 743 F.2d 857, 858 n.3 (11th Cir. 1984) (seven-month delay insufficient) and *United States v. Varella*, 692 F.2d 1352, 1359 (11th Cir.) (four-month delay not presumptively prejudicial so did not trigger the *Barker* test), *cert. denied*, 464 U.S. 838 (1983).

30. See Frase, *supra* note 3, at 668; Joseph, *Speedy Trial Rights in Application*, 48 *Fordham L. Rev.* 611, 634 (1980); Project, *The Speedy Trial Act: An Empirical Study*, 47 *Fordham L. Rev.* 713, 717 & n.31 (1979).

31. See *Barker v. Wingo*, 407 U.S. 514, 521, 530-31 (1972).

32. See *id.* at 531-32.

33. See *id.* at 530-32 (assessment of each of the four factors in detail).

34. See S. Rep. No. 1021, 93d Cong., 2d Sess. 15, *reprinted in* 120 *Cong. Rec.* 24,663-64 (1974).

35. See Frase, *supra* note 3, at 668; Project, *supra* note 30, at 717.

36. See *United States v. Fountain*, Nos. 86-2622, 87-1465, slip op. at 5 (7th Cir. Feb. 22, 1988).

The Supreme Court launched a direct attempt to accelerate federal criminal trials with the adoption of Federal Rule of Criminal Procedure 50(b) in 1972.³⁷ Its purpose was to encourage the federal courts to hasten their criminal trials, but, like the previously mentioned constitutional protection, it largely proved ineffective because it allowed each district to create its own plan for accelerated case disposition and to decide whether it wanted to include a sanction provision.³⁸

B. *Legislative History of the STA*

The failure of previous judicial attempts to ameliorate the problem drew congressional attention to the need for a speedy trial act.³⁹ Many states had already adopted their own versions of such an act.⁴⁰ Congress focused particularly on the barriers to winning a dismissal and on the lack of interest in accelerating the trial process on the part of judges, prosecutors, and defense attorneys, many of whom had come to rely on delay in order to deal with heavy caseloads.⁴¹ The rising crime rate in

37. Fed. R. Crim. P. 50(b).

38. See Project, *supra* note 30, at 719-20. The adoption of Rule 50(b) was not unanimous. Justice Douglas dissented from the adoption because he did not believe that the judiciary was as well-suited to making decisions among several policy options as the legislative branch. See Amendments to Federal Rules of Criminal Procedure, 406 U.S. 979, 982 (1972) (Douglas, J., dissenting).

During the 1974 House hearings on the STA, Professor Daniel Freed testified to the failure of Rule 50(b) based on a study on the Rule conducted at Yale Law School. See Rule 50(B): Response of the District Courts (report prepared for the criminal justice workshop at Yale Law School), *reprinted in Speedy Trial Act of 1974: Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773, H.R. 4807 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 261-333 (1974) [hereinafter *1974 House Hearings*]. The study found that most courts had established time limits to arraignment and trial that closely coincided with the length of time it had regularly taken cases to reach arraignment and trial before the rule had been adopted and that those districts with the lengthiest time to trial were the least likely to have sanctions included in their plans. See *id.* at 263-64. Rule 50(b) seemed to have no effect on the length of time required for case disposition other than to formally certify already dilatory procedures under the guise of speedy trial plans. *Id.* Rule 50(b) was amended in 1976 and the Advisory Committee Notes stated that Rule 50(b) plans gradually would be replaced by the STA as the Act was phased into effect. Fed. R. Crim. P. 50(b) Advisory Committee Notes.

Despite evidence of the Rule's ineffectiveness, the Judicial Conference of the United States opposed the STA in general because it believed that Rule 50(b) and individual circuit rules were sufficient to solve the speedy trial problem. *1974 House Hearings, supra* note 38, at 176-80. The Conference's preference for the Rule may have stemmed from the fact that the Conference originally drafted it. See *id.* at 176.

39. See Frase, *supra* note 3, at 669; Project, *supra* note 30, at 717-18.

40. See, e.g., Cal. Penal Code § 1382 (West 1982) (enacted 1872); Ill. Ann. Stat. Ch. 38, ¶ 103-5 (Smith-Hurd 1980) (enacted 1963); Nev. Rev. Stat. § 178.556 (1987) (enacted 1967); see also *Constitutional Right, supra* note 21, at 697-98. Congress sometimes referred to the state speedy trial acts during legislative debates. See S. Rep. No. 1021, 93d Cong., 2d Sess. 14-17, 21-22 (1974); 119 Cong. Rec. 3264 (1973) (remarks of Sen. Ervin).

41. See *1974 House Hearings, supra* note 38, at 158; S. Rep. No. 1021, 93d Cong., 2d Sess. 15, *reprinted in* 120 Cong. Rec. 24,663-64 (1974).

the 1960's,⁴² and the concomitant increase in the backlog in the federal courts,⁴³ heightened the legislature's interest in solving the speedy trial problem.⁴⁴ This concern over the failure of previous judicial attempts to cure the increasingly lengthy delays in federal criminal trials⁴⁵ culminated in the Speedy Trial Act of 1974.⁴⁶

While the Act itself does not specifically indicate how a judge should choose between dismissal with or without prejudice, a look at the history of the Act suggests an answer to this question. The Senate and House each patterned its original bill⁴⁷ after a set of speedy trial standards published by the American Bar Association in 1968 ("ABA Standards").⁴⁸ The ABA Standards spoke strongly in favor of dismissal with prejudice

42. See A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, 11 (1980).

43. See 117 Cong. Rec. 3405-06 (1971) (remarks of Sen. Ervin, sponsor of S. 895, an early version of the STA); Project, *supra* note 30, at 717; *Constitutional Right*, *supra* note 21, at 657.

44. See *supra* notes 42-43 and accompanying text. Congress also envisioned the STA as an alternative to a possible preventive detention bill that previously had been launched in Congress as an answer to the problem of the many criminal defendants who enjoyed lengthy periods of pretrial release and who were believed to be a danger to society. 115 Cong. Rec. 34,334-35 (1969) (remarks of Rep. Mikva, House sponsor of the original STA legislation) (opposing preventive detention, believing that it was probably unconstitutional, and hoping the STA would forestall further debate on it). When preventive detention legislation was introduced in Congress, even its sponsor, Senator Hruska, was not very enthusiastic about it: he even suggested that perhaps action on the issue should be delayed until the proposal underwent further evaluation. See 117 Cong. Rec. 15,074 (1971). Congress eventually passed a preventive detention act, see Bail Reform Act of 1984, 18 U.S.C. § 3142(e) (Supp. IV 1986), and the Supreme Court recently confirmed its constitutionality. See *United States v. Salerno*, 107 S. Ct. 2095 (1987). In an ironic twist, the Court's decision notes the STA as one of the defendant's protections that prevents this type of detention from being abused. See *id.* at 2101.

45. See *supra* notes 25-38 and accompanying text.

46. 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986). While a motion under the STA can be brought concurrently with a sixth amendment speedy trial challenge, the STA and the constitutional analysis operate independently. See 18 U.S.C. § 3173 (1982). The STA provides that "[n]o provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution." *Id.*

Fundamental differences exist between the STA and the common law *Barker* test. For example, under *Barker*, the defendant must assert his speedy trial right and prove that the delay prejudiced him, see *Barker v. Wingo*, 407 U.S. 514, 532 (1972), while under the STA, the speedy trial time accumulates regardless of the defendant's actions and a violation mandates dismissal even if the delay has not prejudiced the defendant, see 18 U.S.C. § 3162(a) (1982). In addition, while the *Barker* test allows "overcrowded courts" and government negligence to weigh "less heavily" against dismissal, see 407 U.S. at 531, the STA will not even permit "ends of justice" continuances to be granted when the delay is the result of general court congestion or lack of diligent preparation by the government, see 18 U.S.C. § 3161 (h)(8)(C) (1982); *supra* note 40.

47. See S. 895, 92d Cong., 1st Sess. (1971), reprinted in *Speedy Trial: Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 228 (1971) [hereinafter *1971 Senate Hearings*]; H.R. 7107, 92d Cong., 1st Sess. (1971), reprinted in *1971 Senate Hearings*, *supra*, at 288.

48. See American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial (Approved Draft 1968) [hereinafter *ABA Standards*].

for all speedy trial violations,⁴⁹ stating that "the right to a speedy trial [was] largely meaningless" if the government were allowed to re-prosecute a case after a violation.⁵⁰ While both bills resembled the ABA Standards in language and structure,⁵¹ the Senate bill differed in that it mandated a dismissal with prejudice only if the defendant was not at fault for the delay.⁵²

Hearings held on the Senate bill in 1971,⁵³ however, resulted in an amended version, S. 754,⁵⁴ which deleted the "at fault" provision from the bill and inserted the provision that a violation would mandate a dismissal with prejudice.⁵⁵ Although S. 754 originally barred re-prosecution after a violation,⁵⁶ the bill finally passed by the Senate contained the provision that dismissal would be without prejudice until the seventh year after enactment, after which the Act would require courts to dismiss with prejudice, unless the government could prove "exceptional circumstances" for the delay.⁵⁷

Senate bill 754 subsequently was introduced in the House.⁵⁸ After hearings on the bill, the House Committee on the Judiciary drafted H.R. 17409, which closely resembled S. 754 but which, in sharp contrast, immediately imposed dismissal with prejudice for violations of the Act.⁵⁹

49. ABA Standards, *supra* note 48, at § 4.1 and Commentary at 40-41.

50. *Id.* at 41.

51. Compare H.R. 7107, 92d Cong., 1st Sess. (1971), reprinted in *1971 Senate Hearings*, *supra* note 47, at 288 and S. 895, 92d Cong., 1st Sess. (1971), reprinted in *1971 Senate Hearings*, *supra* note 47, at 228 with ABA Standards, *supra* note 48, §§ 1.1-2.3, 4.1.

52. Compare S. 895, 92d Cong., 1st Sess. (1971), reprinted in *1971 Senate Hearings*, *supra* note 47, at 228 with ABA Standards, *supra* note 48, at 4.1.

53. See *1971 Senate Hearings*, *supra* note 47, at 1-207.

54. See S. 754, 93d Cong., 2d Sess., reprinted in *1974 House Hearings*, *supra* note 38, at 5.

55. See S. 754, 93d Cong., 2d Sess., reprinted in *1974 House Hearings*, *supra* note 38, at 12-13. Then Assistant Attorney General William H. Rehnquist (at that time in the Office of Legal Counsel) had suggested in a letter at the 1971 Hearings that the "at fault" provision be removed because the imprecision of the term would result in the need for evidentiary hearings that could become burdensome to the court system. *1971 Senate Hearings*, *supra* note 47, at 255-56. When the STA finally was passed containing a discretionary dismissal provision, the Department of Justice, however, did not object to the district court holding evidentiary hearings to determine the nature of dismissal. Perhaps the inclusion of dismissal without prejudice as a sanction option made them more willing to compromise over the inclusion of the three dismissal considerations.

56. See S. 754, 93d Cong., 2d Sess., reprinted in *1974 House Hearings*, *supra* note 38, at 5.

57. See S. 754, 93d Cong., 2d Sess., reprinted in *1974 House Hearings*, *supra* note 38, at 13. Exceptional circumstances do not include court congestion, absence of adequate preparation, or unavailability of witnesses. *Id.* The change in the dismissal sanction was made at the request of Senators Hruska, ranking minority member of the Senate Judiciary Committee, and McClellan. See S. Rep. No. 1021, 93d Cong., 2d Sess. 2-3 (1974).

58. The bill was referred to the House on July 23, 1974. See 120 Cong. Rec. 24,657 (1974).

59. See H.R. Rep. No. 1508, 93d Cong., 2d Sess. 9, 37, reprinted in 1974 U.S. Code Cong. & Admin. News 7401, 7403, 7429-30. The House Committee believed that re-prosecution after dismissal without prejudice, even under exceptional circumstances,

Despite strong House support for mandatory dismissal with prejudice,⁶⁰ the final version of the bill actually passed by the House provided for a sanction choice of either prejudicial or nonprejudicial dismissal⁶¹ and a five year phase-in period before the sanctions would become effective.⁶² One Congressman stated that although the with prejudice sanction had many supporters,

in the interest of time, because of the lateness of the calendar year . . . and because of the Committee on the Judiciary's other activities, it is felt that because the Senate is awaiting this legislation, it would be far more prudent for all of us, regardless of our feelings . . . to accede to it in the interests of enacting speedy trial legislation.⁶³

Thus, the three factors that the Act required to be considered in determining the type of dismissal were added in a late amendment to the bill,⁶⁴ largely in response to objections from the Department of Justice⁶⁵ and several Congressmen,⁶⁶ and were adopted without significant discussion.⁶⁷ The Senate passed the identical bill on the same day as the House,⁶⁸ and it was enacted into law on January 3, 1975.⁶⁹

In 1979, just before the dismissal provisions were to become effective, Congress amended the STA⁷⁰ to delay their implementation for one more

would result in additional expenses, additional strain on the court system, and would render the STA ineffective. *Id.*

60. *See supra* notes 51, 59 and accompanying text.

61. Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076, 2079-80, *reprinted in* 1974 U.S. Code Cong. & Admin. News 2407, 2411-12 (codified as amended at 18 U.S.C. § 3162(a) (1982)).

62. *Id.* at 2413. It has been suggested that the STA's five year phase-in period was included specifically to allow the courts and prosecutors time to learn how to comply with the Act because of the severity of the remedy of dismissal with prejudice that Congress expected to be regularly applied to violations. *See* R. Misner, *Speedy Trial Federal and State Practice*, 299-300 (1983). One version of the proposed STA explicitly noted that a phase-in period was provided to "cushion" the impact of the mandatory dismissal sanction. *See* S. Rep. No. 1021, 93d Cong., 2d Sess. 21 (1974) (S. 754, the version in question, resembled the STA except that it provided for dismissal with prejudice unless exceptional circumstances were demonstrated).

63. 120 Cong. Rec. 41,794 (1974) (Rep. Conyers).

64. *See* 120 Cong. Rec. 41,778, 41,794 (1974) (remarks of Reps. Cohen, Co-chairman of the House Subcommittee on Crime, and Wiggins).

65. *See id.*; *see also infra* note 78 (describing Justice Department concerns). One commentator speculated that the possibility that President Ford might use a pocket veto if the Department's concerns were not addressed may have persuaded Congress to make the concessions. *See* Partridge, *supra* note 41, at 17.

66. The only real congressional dispute occurred over whether prejudice to the defendant should be included as one of the dismissal considerations. *See* 120 Cong. Rec. 41,773-94 (1974).

67. *See* 120 Cong. Rec. 41,794-96 (1974).

68. *See* S. 754, 93d Cong., 2d Sess., *reprinted in 1974 House Hearings, supra* note 38, at 5.

69. Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076, *reprinted in* 1974 U.S. Code Cong. & Admin. News 2407 (codified as amended at 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986)).

70. *See* 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986); 125 Cong. Rec. 21,578, 21,611 (1979).

year.⁷¹ The House Committee Report on the amendments to the Act expresses a strong congressional preference for dismissal with prejudice.⁷² "While the act does permit dismissal without prejudice, extensive use of this procedure could undermine the effectiveness of the act and prejudice defendants, and the committee intends and expects that use of dismissal without prejudice will be the exception and not the rule."⁷³ Thus, while the present statute permits dismissals with or without prejudice,⁷⁴ the history of the STA's enactment indicates strong support for imposition of the prejudice sanction.⁷⁵

Because the STA specifically provides for the availability of both sanctions, no presumption exists in favor of dismissal with prejudice.⁷⁶ The legislative history of the Act indicates that Congress explicitly adopted the three-factor test⁷⁷ as a concession to the Department of Justice, which had objected strongly to mandatory dismissal with prejudice as the only sanction for an STA violation.⁷⁸ Although many courts have

71. See 18 U.S.C. § 3163(c) (1982). The amendment did not alter the sanction provisions except for the implementation delay. See 18 U.S.C. § 3162(a) (1982).

72. The weight given to subsequent congressional pronouncements on the meaning or intent of a statute depends on the type of legislative body making the remarks. If it is a congressional committee, as in the present case, it is not clear how much weight it should be given. In a similar situation, however, the Supreme Court has said that when the same committee that had previously reported the bill on which the statute was based commented on it within five years of the act's passage, "[the Committee's statement is] virtually conclusive as to the significance of that Act." *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 329-30 (1942) (senate report five years after act's passage clarified the status of ownership of indian reservations); see also *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 & n.8, 667-68 (1980) (remarks of same committee 10 years later should not be "rejected out of hand"); *United States v. Clark*, 445 U.S. 23, 33 n.9 (1980) (little significance paid to congressional pronouncements 18 years later).

73. H.R. Rep. No. 390, 96th Cong., 1st Sess. 8-9 (1979).

74. 18 U.S.C. § 3162(a) (1982).

75. See *supra* notes 51-59 and accompanying text.

76. See *United States v. Kramer*, 827 F.2d 1174, 1176 (8th Cir. 1987); *United States v. Salgado-Hernandez*, 790 F.2d 1265, 1267 (5th Cir.), *cert. denied*, 107 S. Ct. 463 (1986); *United States v. Brown*, 770 F.2d 241, 243-44 (1st Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986); *United States v. Russo*, 741 F.2d 1264, 1266-67 (11th Cir. 1984) (*per curiam*); *United States v. Caparella*, 716 F.2d 976, 979-80 (2d Cir. 1983). *But see United States v. Iaquina*, 515 F. Supp. 708, 712 (N.D. W. Va. 1981) (legislative history reveals that dismissal with prejudice is the rule and dismissal without prejudice is the exception), *rev'd on other grounds*, 674 F.2d 260 (4th Cir. 1982).

77. See *supra* note 64 and accompanying text.

78. The Department of Justice generally has been in the vanguard of opposition to dismissals with prejudice. The Department made its strong opposition to prejudicial dismissals clear to Congress in a 1974 letter in which the Attorney General stated that prejudicial dismissals would erode the public's confidence in the judicial system and would endanger the welfare of all citizens. 120 Cong. Rec. 41,619-20 (1974) (letter to Rep. Rodino, Chairman of the House Judiciary Committee, from Att'y Gen. William Saxbe). Several congressmen also objected to dismissals with prejudice. See H.R. Rep. No. 1508, 93d Cong., 2d Sess. 80-82, *reprinted in* 1974 U.S. Code Cong. & Admin. News 2456-58 (minority views of Reps. Hutchinson, McClory, Sandman, Dennis, Mayne, Butler, Lott, and Froehlich). They felt that Congress ought to find a more reasonable solution to the problem of speedy trial violations than dismissing complaints against possibly guilty individuals without proper adjudication of their charges. See *id.* One congressman

recognized that dismissal with prejudice gives the Act its strength,⁷⁹ some courts have argued that dismissals without prejudice may nonetheless remain an effective deterrent.⁸⁰ Given the unlikelihood that the government would be disadvantaged by reprosecution, however, dismissal without prejudice clearly offers a less compelling motivation to correct dilatory practices.⁸¹

The courts and prosecutors share jointly the responsibility of enforcement of the STA.⁸² A few courts have held that when the judiciary is solely responsible for the delay, dismissal without prejudice is appropriate.⁸³ The sanctions, however, will not operate effectively unless judges

voiced his concerns during the final debate over the bill, but apparently he was satisfied with the compromise that was reached over the dismissal considerations. *See* 120 Cong. Rec. 41,777-78, 41,794-95 (1974) (remarks of Rep. Dennis of Indiana).

79. *See, e.g.*, *United States v. Taylor*, 821 F.2d 1377, 1386 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 747 (1988); *United States v. Caparella*, 716 F.2d 976, 981 (2d Cir. 1983); *United States v. Jerve*, 630 F. Supp. 695, 698 (S.D.N.Y. 1986).

The danger that proper STA dismissal motions may be denied because of the futility of the nonprejudicial dismissal alternative, which usually results in a retrial, has become a reality in some jurisdictions. *See United States v. Janik*, 723 F.2d 537, 546 (7th Cir. 1983); *United States v. Bittle*, 699 F.2d 1201, 1207 (D.C. Cir. 1983); *United States v. Cameron*, 510 F. Supp. 645, 650-51 (D. Md. 1981).

80. *See, e.g.*, *United States v. Brown*, 770 F.2d 241, 243 (1st Cir. 1985) (grand jury may refuse to indict or defendant could receive a lighter sentence), *cert. denied*, 474 U.S. 1064 (1986); *United States v. Janik*, 723 F.2d 537, 546 (7th Cir. 1983) (reindictment may lead to an acquittal); *United States v. Veillette*, 654 F. Supp. 1260, 1264-65 (D. Me. 1987) (statute of limitations may bar reprosecution).

81. Throughout the STA's legislative history, convincing arguments were made in favor of dismissal with prejudice. Legislators and commentators have agreed from the STA's inception that the only way to motivate individuals in the criminal justice system to comply with the Act's provisions is for the Act to mandate a sufficiently compelling penalty for violations. *See 1971 Senate Hearings, supra* note 47, at 128 (prepared statement of Rep. Mikva); S. Rep. No. 1021, 93d Cong., 2d Sess. 16 (1974); Frase, *supra* note 10, at 708. The dismissal provision is meant not only to prevent delay, *see* 117 Cong. Rec. 3405-06 (1971) (statement of Sen. Ervin), but also to deter ineffective use of judicial resources. *See* S. Rep. No. 1021, 93d Cong., 2d Sess. 16 (1974). If all members of the judicial system worked to meet the Act's requirements, very few defendants would have their cases dismissed. *See id.*

82. *See, e.g.*, *United States v. McAfee*, 780 F.2d 143, 146 (1st Cir. 1985) (court system "has its own independent and undelegable responsibility to enforce the Act"), *vacated and remanded on other grounds*, 107 S. Ct. 49 (1986); *United States v. Osunde*, 638 F. Supp. 171, 175 (N.D. Cal. 1986) (government, as well as the court, must enforce the Act). The language of the STA, which states that no continuance shall be given because of general court congestion, might also give rise to the inference that the court is responsible as well as the government. *See* 18 U.S.C. § 3161(h)(8)(C) (1982 & Supp. IV 1986); *see also United States v. Angelini*, 553 F. Supp. 367, 370 (D. Mass. 1982) ("Act explicitly requires dismissal even when delay is attributable only to the court").

When one of the responsible parties is negligent in observing speedy trial limitations, the other party often bears the burden of ensuring that the STA is not violated. *See, e.g.*, *United States v. Kramer*, 827 F.2d 1174, 1180-81 (8th Cir. 1987) (Lay, C.J., dissenting); *United States v. Smith*, 588 F. Supp. 1403, 1405 (D. Haw. 1984).

83. *See Kramer*, 827 F.2d at 1178; *United States v. Carreon*, 626 F.2d 528, 533-34 & n.9 (7th Cir. 1980); *see also United States v. Buxton*, 630 F. Supp. 298, 300 (D. Vt. 1986) (court glosses over judiciary's negligence and dismisses without prejudice in part because of lack of prosecutorial culpability).

and prosecutors are held equally accountable for delays and are forced to choose between speedy trials and dismissals.⁸⁴

The legislative history of the STA clearly indicates that Congress intended the Act to eliminate dilatory practices that were causing lengthy delays in the criminal justice system.⁸⁵ It also indicates that the legislature believed that dismissal with prejudice offered the most, and possibly only, effective means to achieve this goal.⁸⁶ Although the final version of the STA provides for dismissal with and without prejudice,⁸⁷ this provision seems to be a last-minute concession to a few intransigent opponents, and not what the Act's proponents originally intended.⁸⁸ The statutory language determines what factors the courts should consider,⁸⁹ but because the statute is vague as to how these factors should be weighed, courts should favor a result that advances the legislature's purpose—here, dismissal with prejudice best furthers the goal of reducing trial delays.⁹⁰

II. EXAMINATION OF THE DISMISSAL CONSIDERATIONS

A proper STA dismissal analysis initially requires a separate evaluation of each individual factor, followed by a comparative weighing of all three together.⁹¹ Because the statute does not state explicitly how its three dismissal considerations are to be analyzed,⁹² many courts have developed their own tests for applying these factors.⁹³

84. See 119 Cong. Rec. 3264 (1973) (remarks of Sen. Ervin, sponsor of S. 754). Jurisdictions that have adopted speedy trial acts that provide only for sanctions for prosecutorial, and not for judicial delays, see, e.g., *Second Circuit Rules Regarding Prompt Disposition of Criminal Cases*, reprinted in 8 Crim. L. Rptr. 2251-52 (1971); N.Y. Crim. Proc. Law § 30.30 (McKinney 1982 & Supp. 1988), have not been effective in curbing court congestion, one of the greatest causes of delay. See 119 Cong. Rec. 3264 (1973) (remarks of Sen. Ervin). Although it was observed that strict application of the STA sanctions initially might lead to a number of dismissals with prejudice, see *id.*, if the number became too great, a resulting public outcry would motivate prosecutors, and perhaps some judges, to comply with the STA provisions. See *id.* The proponents of dismissals with prejudice point out that, not only would dismissals without prejudice fail to provide an adequate incentive to abide by the Act, see 1971 Senate Hearings, *supra* note 47, at 21 (testimony of Sen. Hart); Misner, *supra* note 62, at 300; *Constitutional Right*, *supra* note 21, at 700, but that it also would reward "delay with further delay" by allowing governmental re prosecution. See Misner, *supra* note 62, at 300.

85. See 117 Cong. Rec. 3405-06 (1971) (statement of Sen. Ervin); Project, *supra* note 30, at 717.

86. See *supra* notes 51-59 and accompanying text.

87. See 18 U.S.C. § 3162(a) (1982).

88. See *supra* notes 64-67 and accompanying text.

89. See *supra* notes 14-15 and accompanying text.

90. See *supra* note 16 and accompanying text.

91. See, e.g., *United States v. Melguizo*, 824 F.2d 370, 371-72 (5th Cir. 1987) (per curiam), *appeal filed*, 56 U.S.L.W. 3303 (U.S. Oct. 3, 1987) (No. 87-551); *United States v. Phillips*, 775 F.2d 1454, 1456 (11th Cir. 1985); *United States v. Brown*, 770 F.2d 241, 244-45 (1st Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986).

92. 18 U.S.C. § 3162(a) (1982).

93. See *United States v. Fountain*, Nos. 86-2622, 87-1465, slip op. at 4 (7th Cir. Feb. 22, 1988); see, e.g., *United States v. Kramer*, 827 F.2d 1174, 1177 (8th Cir. 1987) (court's

A. Factor One: Seriousness of the Charge

The first factor mentioned in the Act is the seriousness of the charge.⁹⁴ Since the STA considerations themselves do not indicate how the severity of the crime is to be judged,⁹⁵ the courts have developed their own *ad hoc* means of making this determination,⁹⁶ resulting in the lack of a uniform method for evaluating this factor.⁹⁷ In fact, rather than treating the seriousness of the crime as an independent consideration, various courts appear to use this factor primarily as an after-the-fact ratification of whatever dismissal the court has already decided on after weighing the other two factors.⁹⁸ Most of these court-developed tests thus suffer from subjectivity⁹⁹ and should be discarded in favor of a more uniform, objective standard of evaluation.

Some courts borrow the Federal Parole Commission's categorization,¹⁰⁰ which rates the severity of the offense on an eight-point scale.¹⁰¹ Because the objectivity and simplicity of this test provides a greater de-

own STA record part of determination of impact of re prosecution on the Act); *United States v. Salgado-Hernandez*, 790 F.2d 1265, 1267-68 (5th Cir.) (maximum possible statutory sentence considered in determining severity of crime), *cert. denied*, 107 S. Ct. 463 (1986); *United States v. Carreon*, 626 F.2d 528, 534 (7th Cir. 1980) (length of delay part of facts and circumstances analysis).

94. 18 U.S.C. § 3162(a) (1982).

95. *See* 18 U.S.C. § 3162(a) (1982).

96. *See, e.g.*, *United States v. Kramer*, 827 F.2d 1174, 1176-77 (8th Cir. 1987) (consideration of maximum statutory sentence of crime charged); *United States v. Salgado-Hernandez*, 790 F.2d 1265, 1268 (5th Cir.) (use of United States Parole Commission's severity scale), *cert. denied*, 107 S. Ct. 463 (1986); *United States v. Veillette*, 654 F. Supp. 1260, 1263 (D. Me. 1987) (consideration of whether crime involved violence).

97. *Compare* *United States v. Bittle*, 699 F.2d 1201, 1208 (D.C. Cir. 1983) (possession of stolen mail considered relatively serious) *and* *United States v. Simmons*, 786 F.2d 479, 485 (2d Cir. 1986) (drug charges involving a small amount of narcotics were said to be serious) *with* *United States v. Caparella*, 716 F.2d 976, 980 (2d Cir. 1983) (mail theft not viewed as serious) *and* *United States v. Angelini*, 553 F. Supp. 367, 370 (D. Mass. 1982) (drug charges involving a small amount of narcotics considered less severe so as to remain a neutral factor in the dismissal determination).

98. *See supra* note 97.

99. *See infra* notes 102-09 and accompanying text.

100. *See* 28 C.F.R. § 2.20 (1987). The Parole Commission was abolished by the Sentencing Reform Act of 1984. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1988, 2027 (1984) (codified at 18 U.S.C. §§ 3551-3559 (Supp. IV 1986)). This act was amended by The Sentencing Act of 1987, which provides that the sentencing guidelines promulgated by the 1974 Act are applicable only to conduct that occurred after November 1, 1987. *See* Sentencing Act of 1987, Pub. L. No. 100-182, 1988 U.S. Code Cong. & Admin. News (101 Stat.) 1266. These guidelines, however, might provide a reasonable alternate measure of severity. *See* United States Sentencing Commission, Federal Sentencing Guideline Manual (1987). The sentencing guidelines assign an offense level, on a scale of 1 to 43, to each federal offense according to the severity of the crime. *See id.* at 21-174. The use of these guidelines as a measure of severity of the crime would provide the same predictability and uniformity in the determination of this factor that the Parole Commission's guidelines have in the past. *See infra* note 101 and accompanying text.

101. *See, e.g.*, *United States v. Salgado-Hernandez*, 790 F.2d 1265, 1267-68 (5th Cir.), *cert. denied*, 107 S. Ct. 463 (1986); *United States v. Osunde*, 638 F. Supp. 171, 175 (N.D. Cal. 1986); *United States v. Smith*, 588 F. Supp. 1403, 1405 (D. Haw. 1984).

gree of uniformity and predictability than other methods, it offers a more accurate measure of the severity factor. It does not, however, solve the problem of deciding at what point on the scale a crime becomes more severe. A model that provides for comparative severity, however, at least allows courts to be consistent in evaluating which crimes should be considered more serious than others.

Other courts have considered the maximum possible statutory sentence for the crimes charged in determining the severity involved.¹⁰² They determine these sentences by aggregating the maximum number of years for each count of each crime with which the defendant is charged.¹⁰³ This test is arbitrary and, perhaps, not very realistic because, like the Parole Commission categorization, there exists no set number of sentencing years above which a crime becomes "more severe." Moreover, certain criminal activities can generate a great number of charges against a defendant which, under this aggregation test, would result in a higher severity level than realistically may be warranted by the actual crime committed.¹⁰⁴

Another test used to weigh the seriousness of a crime considers whether any violence was involved.¹⁰⁵ This test is appropriate since violence and the possible threat the defendant poses to society are relevant to determining the seriousness of the offense.¹⁰⁶ This test, like the others, however, includes no quantifiable means of comparing degrees of violence with degrees of severity—a major flaw.

One last test requires that when the charges are serious, they will weigh in favor of dismissal without prejudice unless the delay is correspondingly severe.¹⁰⁷ This hybrid test poses problems because it involves

102. See *United States v. Kramer*, 827 F.2d 1174, 1176 (8th Cir. 1987); *United States v. Peebles*, 811 F.2d 849, 850 (5th Cir. 1987) (per curiam); *United States v. Melguizo*, 824 F.2d 370, 371 (5th Cir. 1987) (per curiam), *appeal filed*, 56 U.S.L.W. 3303 (U.S. Oct. 3, 1987) (No. 87-551).

103. See cases cited *supra* note 102.

104. See, e.g., *Peebles*, 811 F.2d at 850 (one attempt to defraud an investor resulted in three counts of wire fraud); *United States v. Salgado-Hernandez*, 790 F.2d 1265, 1267-68 (5th Cir.) (indictment for transporting illegal aliens; separate count for each individual transported), *cert. denied*, 107 S. Ct. 463 (1986); *United States v. Simmons*, 786 F.2d 479, 480, 485 (2d Cir. 1986) (defendant with small amount of heroin charged with conspiracy to distribute, distribution, and possession with intent to distribute, each a separate count).

105. The court will consider the absence, as well as the presence, of violence. See, e.g., *United States v. Fountain*, Nos. 86-2622, 87-1465, slip op. at 5 (7th Cir. Feb. 22, 1988); *United States v. Osunde*, 638 F. Supp. 171, 175 (N.D. Cal. 1986); *United States v. Jones*, 602 F. Supp. 1045, 1050 (E.D. Pa. 1985).

106. The relationship between seriousness of offense and possible danger of defendant to society is likewise considered in determining sentences. See 4 Wharton's *Criminal Procedure* § 609, at 206-07 (C. Torcia 12th ed. 1976); cf. *United States v. Salerno*, 107 S. Ct. 2095, 2099 (1987) (Bail Reform Act of 1984 requires pretrial evaluation of dangerousness of defendant).

107. See *United States v. Salgado-Hernandez*, 790 F.2d 1265, 1268-69 (5th Cir.), *cert. denied*, 107 S. Ct. 463 (1986); *United States v. Simmons*, 786 F.2d 479, 485 (2d Cir. 1986); *United States v. Phillips*, 775 F.2d 1454, 1456 (11th Cir. 1985); *United States v. Carreon*, 626 F.2d 528, 533 (7th Cir. 1980).

a determination of two separate considerations without providing a basis for balancing the two factors.¹⁰⁸ It also creates difficulties because it compares length of delay—an objective factor—with seriousness of the crime—a subjective factor.¹⁰⁹ A court, therefore, hypothetically could dismiss a case without prejudice and justify its decision by finding the crime to be sufficiently severe to outweigh any length of delay.

The STA requires courts to consider the severity of the crime in making dismissal decisions.¹¹⁰ To use this factor meaningfully, courts must adopt an objective, uniform standard, such as the Parole Commission ratings, which correlates the actual seriousness of the crime to the weight it is given in the dismissal considerations.

B. *Factor Two: Circumstances Leading to Dismissal*

The STA mandates that in determining the type of dismissal appropriate in a particular case, the judge must look at the particular facts and circumstances that led to the dismissal.¹¹¹ Again, the Act does not state explicitly what considerations such a determination should involve. Therefore, many courts have developed their own set of criteria.¹¹² Irrespective of the test employed, however, the courts consistently have sought to determine the ultimate cause of the delay.¹¹³

Most cases discuss the length of the STA violation as part of the facts and circumstances leading to dismissal.¹¹⁴ The extent of the delay goes to the heart of the sixth amendment speedy trial right that the Act was designed to enforce.¹¹⁵ The statute, however, fails to articulate any guidelines¹¹⁶ as to how long the delay can last before it requires a dismissal with prejudice.¹¹⁷ This lack of guidance gives rise to the danger that

108. Length of delay is usually considered part of the second factor, facts and circumstances of the case. See *United States v. Taylor*, 821 F.2d 1377, 1385 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 747 (1988); *United States v. Stayton*, 791 F.2d 17, 21-22 (2d Cir. 1986); *United States v. Carreon*, 626 F.2d 528, 534 (7th Cir. 1980).

109. While the length of delay can be calculated specifically to a certain number of days, no concrete test of severity of crime has been developed. See *supra* note 97 and accompanying text.

110. See 18 U.S.C. § 3162(a) (1982).

111. *Id.*

112. See *infra* notes 114-33 and accompanying text.

113. See *infra* notes 114-34 and accompanying text.

114. See cases cited *supra* note 108.

115. See *supra* notes 1-4 and accompanying text.

116. See 18 U.S.C. § 3162(a) (1982).

117. Many delays do not exceed one month and are considered to be minimally prejudicial to the defendant. See, e.g., *United States v. Melguizo*, 824 F.2d 370, 372 (5th Cir. 1987) (per curiam) (nine day delay), *appeal filed*, 56 U.S.L.W. 3303 (U.S. Oct. 3, 1987) (No. 87-551); *United States v. Taylor*, 821 F.2d 1377, 1385 (9th Cir. 1987) (14 day delay), *cert. granted*, 108 S. Ct. 747 (1988); *United States v. Godoy*, 821 F.2d 1498, 1503 (11th Cir. 1987) (30 day delay). In one case, however, the court held a twenty-three month delay sufficiently significant to render the facts and circumstances in favor of dismissal with prejudice, regardless of the cause of the violation. See *United States v. Stayton*, 791 F.2d 17, 21-22 (2d Cir. 1986).

courts simply may subjectively characterize the length of delay according to the disposition they already favor after weighing the other factors.¹¹⁸

Another consideration often discussed by the courts is whether the defendant caused or contributed to the delay.¹¹⁹ Although the STA does not state that delays caused by the defendant are excluded from speedy trial computations,¹²⁰ many of the "excludable periods" under the Act involve possible dilatory tactics by the defendant or his attorney.¹²¹ Therefore, such tactics¹²² will not assist a defendant who purposefully tries to delay the process in order to secure a speedy trial dismissal.¹²³

While the statute imposes on the defendant no obligation to ensure that the government or court complies with the Act,¹²⁴ his silence on the matter while the delay is mounting may weigh in favor of dismissal without prejudice.¹²⁵ In some cases where the defendant has been more actively responsible for the violation than the government, courts have dismissed without prejudice, despite a lengthy delay.¹²⁶ The conclusion implicit in these holdings—that the defendant can either alert the prosecutor and the court to the running of the STA time limitations or face reprosecution—is especially problematic. Because the statute does not require that the defendant or his attorney¹²⁷ keep track of STA time

118. Compare *United States v. Carreon*, 626 F.2d 528, 534 (7th Cir. 1980) (one-year delay considered significant but not extreme) with *United States v. Veillette*, 654 F. Supp. 1260, 1264 (D. Me. 1987) (eight-month delay termed substantial).

119. See, e.g., *United States v. Fountain*, Nos. 86-2622, 87-1465, slip op. at 5 (7th Cir. Feb. 22, 1988); *United States v. Miranda*, No. 86-5266, slip op. at 1197 (11th Cir. Jan. 15, 1988); *United States v. McAfee*, 780 F.2d 143, 146 (1st Cir. 1985); *United States v. Carreon*, 626 F.2d 528, 534 (7th Cir. 1980). This type of analysis may derive from sixth amendment speedy trial cases, where any delay attributable to the defendant "make[s] it difficult for [him] to prove that he was denied a speedy trial." *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

120. See 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986).

121. See 18 U.S.C. § 3161(h) (1982 & Supp. IV 1986).

122. See *id.*; *supra* note 7.

123. See *United States v. Fountain*, Nos. 86-2622, 87-1465, slip op. at 5 (7th Cir. Feb. 22, 1988) ("A defendant who waits passively while the time runs has less claim to dismissal with prejudice than does a defendant who demands, but does not receive, prompt attention.").

124. See 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986).

125. See *Fountain*, Nos. 86-2622, 87-1465, slip op. at 5; *United States v. Torbit*, No. 87-5082, slip op. at 6 (4th Cir. Jan. 28, 1988); *United States v. Miranda*, No. 86-5266, slip op. at 1197 (11th Cir. Jan. 15, 1988); *United States v. Carreon*, 626 F.2d 528, 534 (7th Cir. 1980); *United States v. Buxton*, 630 F. Supp. 298, 300 (D. Vt. 1986).

126. See *United States v. Peeples*, 811 F.2d 849, 851 (5th Cir. 1987) (*per curiam*); *United States v. McAfee*, 780 F.2d 143, 146 (1st Cir. 1985), *vacated and remanded on other grounds*, 107 S. Ct. 49 (1986).

127. See 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986). The Act provides for sanctions against either the defense attorney or the prosecutor only if they intentionally or knowingly *cause* certain improper delays. See 18 U.S.C. § 3162(b) (1982). This section reads in pertinent part:

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without

elapsed, courts should not punish the defendant for his failure to bring the court's or prosecutor's attention to the Act.¹²⁸

A third issue that some courts have considered when analyzing the facts and circumstances of the delay is whether a particular court demonstrates a history of speedy trial violations.¹²⁹ Where a jurisdiction frequently or regularly has missed STA deadlines, governmental or judicial oversight might not be excusable.¹³⁰ This consideration is certainly appropriate as prosecutorial delay is one of the problems the STA was designed to cure.¹³¹ Some courts, however, look to their own STA records and those of the prosecution in their jurisdictions in determining whether either of them have a regular history of STA violations.¹³² Absent such a finding, these courts are more likely to forgive a speedy trial violation and dismiss a case without prejudice.¹³³ Courts must be cautious not to rest their decisions solely upon this factor. Paramount consideration must be given to the facts and circumstances that led to dismissal of the particular defendant's case.¹³⁴ Any history of STA viola-

merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney . . .

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid . . . in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed \$250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

Id.

128. Reliance on the defendant to alert the court or prosecutors's office to an impending speedy trial violation was one of the weaknesses of constitutional speedy trial adjudication that legislators sought to avoid when framing the STA. *See supra* note 34.

129. *See, e.g.,* *United States v. Kramer*, 827 F.2d 1174, 1177 (8th Cir. 1987); *United States v. Melguizo*, 824 F.2d 370, 372 (5th Cir. 1987) (per curiam), *appeal filed*, 56 U.S.L.W. 3303 (U.S. Oct. 3, 1987) (No. 87-551); *United States v. Buxton*, 630 F. Supp. 298, 300 (D. Vt. 1986).

130. *See United States v. Fountain*, Nos. 86-2622, 87-1465, slip op. at 7 (7th Cir. Feb. 22, 1988); *Melguizo*, 824 F.2d at 372; *United States v. Salgado-Hernandez*, 790 F.2d 1265, 1268 (5th Cir.), *cert. denied*, 107 S. Ct. 463 (1986).

131. *See* 119 Cong. Rec. 3405-06, 3264 (1973) (remarks of Sen. Ervin); 117 Cong. Rec. 3405-06 (1971) (same).

132. *See United States v. Kramer*, 827 F.2d 1174, 1177 (8th Cir. 1987); *United States v. Veillette*, 654 F. Supp. 1260, 1264 (D. Me. 1987); *United States v. Buxton*, 630 F. Supp. 298, 300 (D. Vt. 1986).

133. *See Kramer*, 827 F.2d at 1177; *Veillette*, 654 F. Supp. at 1264; *Buxton*, 630 F. Supp. at 300.

134. *See* 18 U.S.C. § 3162(a) (1982).

tions, therefore, should be considered as a tool for assessing the cause of the delay, not as an end in itself.

The second factor represents the most critical¹³⁵ of the three dismissal considerations, and courts, therefore, should be especially discriminating about which approaches to the analysis of this factor they adopt. Certainly, length of delay is appropriate in determining how egregiously the STA has been violated.¹³⁶ Those issues, however, that have been considered improperly, such as a court's prior history of STA violations, should be excluded from the analysis because this factor was designed to be a fact-specific inquiry into the roots of the delay in the case at hand.¹³⁷ Similarly, since the statute does not place a duty on the defendant to monitor the running of the STA,¹³⁸ a failure to do so should not be used as a consideration against the defendant in weighing this factor.

C. *Factor Three: Impact of Reprosecution on the Act and on the Administration of Justice*

The third factor to be considered in determining the type of dismissal warranted after an STA violation is the impact of reprosecution on the Act and on the administration of justice.¹³⁹ In discussing the impact on the STA, many opinions refer back to the second factor to determine whether the government or court caused the delay.¹⁴⁰ If either of these parties is at fault, the court must then consider whether dismissing the case without prejudice would weaken the Act and work against what Congress intended it to accomplish.¹⁴¹

The impact of reprosecution on the administration of justice presents a somewhat nebulous concept, and various courts have interpreted it differently. Some have read this factor to require an evaluation of the severity of the charge and whether a dismissal with prejudice would undermine seriously the deterrence of crime in general.¹⁴² Others have

135. See *infra* text accompanying notes 149-51.

136. See, e.g., *United States v. Godoy*, 821 F.2d 1498, 1506 n.2 (11th Cir. 1987); *United States v. Stayton*, 791 F.2d 17, 21 (2d Cir. 1986); *United States v. Veillette*, 654 F. Supp. 1260, 1264 (D. Me. 1987).

137. See 18 U.S.C. § 3162(a) (1982); cf. *McCleskey v. Kemp*, 107 S. Ct. 1756, 1781 (1987) (case-by-case approach is required by courts when reviewing death penalty challenges; statistical evaluations of "local conditions" are more appropriately considered by legislatures).

138. See *id.*; *supra* note 124 and accompanying text.

139. See 18 U.S.C. § 3162(a) (1982).

140. See, e.g., *United States v. Salgado-Hernandez*, 790 F.2d 1265, 1268 (5th Cir.), *cert. denied*, 107 S. Ct. 463 (1986); *United States v. Caparella*, 716 F.2d 976, 980-81 (2d Cir. 1983); see also 18 U.S.C. 3162(a) (1982).

141. See *Salgado-Hernandez*, 790 F.2d at 1268 (court acknowledged in dictum that it would be in the best interest of the Act to curb administrative neglect by dismissing with prejudice); *Caparella*, 716 F.2d at 981 (violations of the Act's time limits must be viewed as having a serious, negative impact on the administration of the STA or it will be rendered largely ineffective); see also 18 U.S.C. 3162(a) (1982).

142. See *United States v. Fountain*, Nos. 86-2622, 87-1465, slip op. at 5 (7th Cir. Feb. 22, 1988); *United States v. Godoy*, 821 F.2d 1498, 1506 (11th Cir. 1987); *United States v.*

included prejudice to the defendant in considering the impact on the administration of justice.¹⁴³

An evaluation of the impact of reprosecution on the Act generally results in a determination that a dismissal without prejudice would weaken the STA.¹⁴⁴ Conversely, a nonprejudicial dismissal usually is viewed as strengthening the administration of justice.¹⁴⁵ A dismissal with prejudice, however, should not be regarded as always having a negative impact on the judicial system, since protecting the constitutional rights of defendants forms an integral part of this process.¹⁴⁶

Once a court has decided which type of dismissal each individual dismissal consideration favors, it must next compare all three factors and determine whether together they weigh in favor of dismissal with or without prejudice.

One court indicated that when the impact on the Act weighs in favor of dismissal with prejudice and the impact on the administration of justice weighs in favor of a nonprejudicial dismissal, "[t]he near neutrality of [these] factors requires a closer look at the facts and circumstances surrounding the delay."¹⁴⁷

III. COMPARATIVE WEIGHT OF THE DISMISSAL CONSIDERATIONS

Although it is generally agreed that there is no presumption in favor of a dismissal with prejudice,¹⁴⁸ a test may be developed that targets certain

Caparella, 716 F.2d 976, 981 (2d Cir. 1983); *United States v. Buxton*, 630 F. Supp. 298, 302 (D. Vt. 1986).

143. See *United States v. Torbit*, No. 87-5082, slip op. at 6 (4th Cir. Jan. 28, 1988); *United States v. Kramer*, 827 F.2d 1174, 1178 (8th Cir. 1987); *United States v. Rubin*, 733 F.2d 837, 841 (11th Cir. 1984). Some courts have considered whether the defendant was incarcerated during the delay when determining prejudice. See *United States v. Hawthorne*, 705 F.2d 258, 260 (7th Cir. 1983) (per curiam) (reprosecution less likely to prejudice defendant not in custody during the delay). *But see United States v. Veillette*, 654 F. Supp. 1260, 1265 (D. Me. 1987) (defendant's incarceration weighed in favor of dismissal without prejudice because Act was better served by removing dangerous criminals from society).

144. See, e.g., *United States v. Salgado-Hernandez*, 790 F.2d 1265, 1268 (5th Cir.), cert. denied, 107 S. Ct. 463 (1986); *United States v. Taylor*, 821 F.2d 1377, 1385-86 (9th Cir. 1987), cert. granted, 108 S. Ct. 747 (1988); *United States v. Caparella*, 716 F.2d 976, 981 (2d Cir. 1983).

145. See, e.g., *United States v. Fountain*, Nos. 86-2622, 87-1465, slip op. at 5 (7th Cir. Feb. 22, 1988); *United States v. Godoy*, 821 F.2d 1498, 1506 (11th Cir. 1987); *Caparella*, 716 F.2d at 981; *United States v. Buxton*, 630 F. Supp. 298, 302 (D. Vt. 1986).

146. See *supra* note 3 and accompanying text; cf. Stacy & Dayton, *Rethinking Harmless Constitutional Error*, 88 Colum. L. Rev. 79, 89 (1988) (procedures necessary to protect certain constitutional rights should be followed "not because [they] enhance the accuracy of the ultimate finding of guilt or innocence, but because they foster other goals or values").

147. *United States v. Russo*, 741 F.2d 1264, 1267 (11th Cir. 1984) (per curiam). See also *United States v. Godoy*, 821 F.2d 1498, 1506 (11th Cir. 1987) (emphasizing that *Russo* court did not say that the two concerns always would neutralize each other, since that would render the factor useless as part of the dismissal considerations).

148. See *supra* notes 76-78 and accompanying text.

factors that, when present, would routinely favor a certain type of dismissal. It is especially important to develop a test for weighing the second factor of the dismissal considerations—facts and circumstances of the case—since it is pivotal to a determination of the dismissal type.¹⁴⁹ This factor is particularly critical because it focuses on the very purpose of the STA, which is to accelerate criminal trials by providing an incentive for the government and the judiciary to comply with the Act's time limitations.¹⁵⁰ In addition, this factor has occasioned a good deal of controversy among the circuits.¹⁵¹

The Eleventh Circuit, in *United States v. Russo*,¹⁵² developed a test that appropriately weighs the second factor. Barring a sufficient explanation for the delay,¹⁵³ the test considers prosecutorial or judicial culpability for the violation as militating in favor of dismissal with prejudice.¹⁵⁴ It weighs the STA's three factors in two steps. First, it looks at the severity of the crime and the impact of reprosecution to decide if they overwhelmingly favor dismissal without prejudice.¹⁵⁵ If these factors "militate in favor of reprosecution, mere negligence or inadvertence [would] not automatically call for dismissal with prejudice."¹⁵⁶ Where the first and third factors are neutral, however, and therefore do not weigh heavily in favor of a nonprejudicial dismissal,¹⁵⁷ the court must look at the facts and circumstances of the case to see if an affirmative justification for the delay exists.¹⁵⁸ Absent such a justification, it should dismiss the case with prejudice.¹⁵⁹

This test accommodates any combination of factors that might arise in an STA dismissal determination. For example, if any two factors weigh definitively in favor of dismissal without prejudice, the court need not give any special consideration to whether the second factor requires a prejudicial dismissal. If only one of the factors mandates a nonprejudicial dismissal, however, the second factor is determinative of the outcome since it offers the best indication of whether the Act's intent and require-

149. See *infra* note 150 and accompanying text.

150. See *supra* notes 3-6 and accompanying text.

151. See *infra* notes 174-89 and accompanying text.

152. 741 F.2d 1264 (11th Cir. 1984) (per curiam).

153. See *infra* notes 161-65 and accompanying text.

154. See *infra* notes 174-77, 182-84 and accompanying text. Even before it developed the *Russo* test, the Eleventh Circuit recognized the importance of the Act and stated that "the integrity of [the] legislative mandate must be guarded with zealous attention." *United States v. Rubin*, 733 F.2d 837, 841 (11th Cir. 1984).

155. See *United States v. Russo*, 741 F.2d 1264, 1267 (11th Cir. 1984) (per curiam).

156. *Id.*

157. *Id.*

158. *Id.*

159. See *id.* In *Russo*, the court found a lack of affirmative justification where the maximum excludable time had been exceeded because of miscalculations of the STA time allowances by the government. The court found the government's explanation that it misunderstood the application of the Act, which had recently taken effect, insufficient because the violated provision was very clearly stated in the Act. *Id.*

ments¹⁶⁰ are being met.

An affirmative justification must rise above simple negligence and must be based on exceptional circumstances.¹⁶¹ *Russo* does not define a sufficient excuse beyond a simple assertion that "mere lack of improper motive is not . . . sufficient."¹⁶² The underlying rationale of the *Russo* decision appears to be that, in keeping with the spirit of the Act, unless extenuating circumstances exist, the government's or court's culpability for delay weighs in favor of dismissal with prejudice.¹⁶³

Acceptable justification, however, should be limited to exceptional circumstances that could not have been planned for, or even anticipated. For example, delay caused by government or court conduct resulting from a court's misunderstanding of a previously unlitigated provision of the Act should constitute acceptable affirmative justification.¹⁶⁴ Once the statutory language is clarified, however, no other court should be able to exculpate itself by claiming that the provision is ambiguous.¹⁶⁵ Affirmative justification should not include those practices and procedures the Act specifically was meant to cure.¹⁶⁶

160. See *supra* notes 1-4 and accompanying text. An application of this test to *United States v. Taylor*, 821 F.2d 1377 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 747 (1988), for example, should result in dismissal with prejudice. In *Taylor*, the defendant was arrested for narcotics possession with intent to sell and held in custody for fourteen days longer than the seventy days allowed to trial. *Id.* at 1378-79. The delay was caused by indifference to the time limits of the STA by those in charge of transporting prisoners between jurisdictions. *Id.* at 1385. Although narcotics charges may be considered serious and weigh in favor of dismissal without prejudice, the second two factors favor a prejudicial dismissal because the government is at fault for the delay and justice would be ill served by re-prosecuting a man who had already been incarcerated for eighty-four days prior to trial. *Id.* at 1385-86.

161. See *Russo*, 741 F.2d at 1267. Although only the Eleventh Circuit has explicitly used the *Russo* test, some courts have developed their own criteria for determining what circumstances would justify governmental or prosecutorial delay and therefore allow dismissal without prejudice. See *United States v. May*, 819 F.2d 531, 533 (5th Cir. 1987) (government must offer some reason for the delay); *infra* note 164 and accompanying text.

162. *United States v. Russo*, 741 F.2d 1265, 1267 (11th Cir. 1984) (*per curiam*).

163. See *id.* The *Russo* test refers to delay caused by the government but does not mention that occasioned by the courts. It is not clear whether this omission was intended. The test should be applied to courts as well, however, since it loses half of its strength if it addresses only half of the problem. One subsequent Eleventh Circuit court may have interpreted the test as applicable only to the government since it dismissed a case without prejudice where the court, but not the government, was clearly at fault. See *United States v. Phillips*, 775 F.2d 1454, 1456 (11th Cir. 1985).

164. See *United States v. Godoy*, 821 F.2d 1498, 1505-06 (11th Cir. 1987); *United States v. Brown*, 770 F.2d 241, 244-45 (1st Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986); *United States v. Tunnessen*, 763 F.2d 74, 79-80 (2d Cir. 1985); *United States v. Carthers*, 613 F. Supp. 185, 187 (S.D.N.Y. 1985).

165. See *Brown*, 770 F.2d at 245.

166. Although courts have not defined what sort of explanations for governmental or judicial delay are acceptable, it is clear that delays caused by those very practices that made the Act necessary in the first place are unexcusable. See, e.g., *United States v. McAfee*, 780 F.2d 143, 146 (1st Cir. 1985) (delay caused by administrative confusion over court docket not acceptable), *vacated and remanded on other grounds*, 107 S. Ct. 49 (1986); *United States v. Caparella*, 716 F.2d 976, 980 (2d Cir. 1983) (government over-

The test advocated here achieves a result that closely resembles what Congress intended when it drafted the STA.¹⁶⁷ Two of the problems the STA was created to eradicate, prosecutorial delay and court congestion,¹⁶⁸ would be more effectively combatted by the *Russo* test's likely response to them—dismissal with prejudice.¹⁶⁹ Even if this test did lead to a greater number of dismissals with prejudice than currently exist,¹⁷⁰ it would be in accord with the traditional criminal law principle that it is better to let a few guilty individuals go free than to increase the risk of incarcerating an innocent one.¹⁷¹ Although the STA does not determine guilt or innocence,¹⁷² it is more in keeping with criminal law philosophy to err on the side of dismissal with prejudice than unfairly to abuse a defendant's constitutional rights by reprosecution after a speedy trial violation.¹⁷³

Not all courts, however, agree with the *Russo* court's view of how the various factors should be balanced. Disagreement centers especially on treatment of the second factor and the weighing of judicial or prosecutorial responsibility for delay.¹⁷⁴ The major source of contention seems to be whether government or court culpability should be weighed differently if the violation was caused by purposeful delay rather than negligent inattention to the Act.¹⁷⁵ Some courts have argued that when the government or judiciary is at fault, the facts and circumstances of the case weigh in favor of dismissal with prejudice,¹⁷⁶ even if the fault

sight not sufficient excuse); *United States v. Jones*, 602 F. Supp. 1045, 1050 (E.D. Pa. 1985) (administrative neglect in transmitting court order insufficient).

167. See *supra* notes 47-59 and accompanying text.

168. See *supra* note 43 and accompanying text.

169. *United States v. Russo*, 741 F.2d 1264, 1267 (11th Cir. 1984) (per curiam).

170. There appears to be little danger that this test would lead to an abuse of the discretion provided for in the statute. Subsequent Eleventh Circuit decisions have shown that such a test will not lead invariably to a result of dismissal with prejudice. See *United States v. Miranda*, No. 86-5266, slip op. at 1197-98 (11th Cir. Jan. 15, 1988); *United States v. Phillips*, 775 F.2d 1454, 1456 (11th Cir. 1985); *United States v. Godoy*, 821 F.2d 1498, 1506-07 (11th Cir. 1987).

171. Justice Harlan's concurrence in *In re Winship*, where the Court reaffirmed the principle that the standard of proof beyond a reasonable doubt is required in a criminal trial, stated that "[i]n a criminal case . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty." 397 U.S. 358, 372 (1970) (Harlan, J., concurring). See also 4 W. Blackstone, Commentaries 1027 (Chase ed. 1878) ("[I]t is better that ten guilty persons escape, than that one innocent suffer.").

172. The STA is only concerned with whether the statutory time limitations have been met, not with the merits of the underlying action. See 18 U.S.C. § 3162(a) (1982).

173. Cf. *Stacy & Dayton*, *supra* note 146, at 88 (preservation of constitutional rights outweighs the risk of erroneous fact-finding).

174. See *infra* notes 175-91.

175. See *United States v. Kramer*, 827 F.2d 1174, 1177 (8th Cir. 1987); *United States v. Taylor*, 821 F.2d 1377, 1385 & n.11 (9th Cir. 1987), cert. granted, 108 S. Ct. 747 (1988); *United States v. Caparella*, 716 F.2d 976, 980 (2d Cir. 1983).

176. See, e.g., *Taylor*, 821 F.2d at 1385-86 & n.11; *Caparella*, 716 F.2d at 980; *United States v. Angelini*, 553 F. Supp. 367, 370 (D. Mass. 1982).

amounted only to negligence.¹⁷⁷

Other courts, however, contend that as long as the delay is not intentional or designed to seek a tactical advantage, the culpability of the government or judiciary should not favor dismissal with prejudice.¹⁷⁸ Some of the panels in these circuits suggest that if the delay results simply from negligent inattention to the Act's limitations, the facts and circumstances of the case should militate in favor of dismissal without prejudice.¹⁷⁹ This argument proves problematic because very few delays are, or can be proven to be, deliberate.¹⁸⁰ Without the threat of the prejudicial dismissal sanction, the offending parties have no motivation to mend their negligent practices.¹⁸¹

Courts on both sides of this issue have offered arguments as to what effect the cause of delay should have on the weighing of this factor in the dismissal considerations.¹⁸² Adoption of a "sheer negligence" exception would severly erode the STA because it would eliminate any incentive for the government or court to comply with the statutory time limitations.¹⁸³ One of the effects of the STA should be to induce the government and the

177. See, e.g., *Taylor*, 821 F.2d at 1385-86 & n.11; *Caparella*, 716 F.2d at 980; *Angelini*, 553 F. Supp. at 370. The courts that espouse this position probably would be amenable to the *Russo* test since it too is based on the concept that mere negligence does not necessarily justify an STA delay. See *United States v. Russo*, 741 F.2d 1264, 1267 (11th Cir. 1984) (per curiam).

178. See *United States v. Kramer*, 827 F.2d 1174, 1177-78 (8th Cir. 1987); *United States v. Melguizo*, 824 F.2d 370, 372 (5th Cir. 1987) (per curiam), *appeal filed*, 56 U.S.L.W. 3303 (U.S. Oct. 3, 1987) (No. 87-551); *United States v. Hawthorne*, 705 F.2d 258, 261 (7th Cir. 1983) (per curiam); *United States v. Carreon*, 626 F.2d 528, 534 (7th Cir. 1980).

179. See *United States v. Fountain*, Nos. 86-2622, 87-1465, slip op. at 5 (7th Cir. Feb. 22, 1988); *United States v. Torbit*, No. 87-5082, slip op. at 6 (4th Cir. Jan. 28, 1988); *United States v. Melguizo*, 824 F.2d 370, 372 (5th Cir. 1987) (per curiam); *United States v. Janik*, 723 F.2d 537, 546 (7th Cir. 1983); *United States v. Carreon*, 626 F.2d 528, 533-34 (7th Cir. 1980).

180. In at least twelve instances, the federal courts of appeals have found the delay to be unintentional, see *United States v. Fountain*, Nos. 86-2622, 87-1465, slip op. at 5 (7th Cir. Feb. 22, 1988); *United States v. Torbit*, No. 87-5082, slip op. at 6 (4th Cir. Jan. 28, 1988); *United States v. Miranda*, No. 86-5266, slip op. at 1197 (11th Cir. Jan. 15, 1988); *United States v. Godoy*, 821 F.2d 1498, 1505 (11th Cir. 1987); *United States v. Peeples*, 811 F.2d 849, 851 (5th Cir. 1987) (per curiam); *United States v. Salgado-Hernandez*, 790 F.2d 1265, 1268 (5th Cir.), *cert. denied*, 107 S. Ct. 463 (1986); *United States v. Simmons*, 786 F.2d 479, 486 (2d Cir. 1986); *United States v. Brown*, 770 F.2d 241, 244 (1st Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986); *United States v. Russo*, 741 F.2d 1264, 1267 (11th Cir. 1984) (per curiam); *United States v. Rubin*, 733 F.2d 837, 840 (11th Cir. 1984); *United States v. Janik*, 723 F.2d 537, 546 (7th Cir. 1983); *United States v. Caparella*, 716 F.2d 976, 980 (2d Cir. 1983), while it appears only two have found bad faith on the part of the government, see *United States v. Taylor*, 821 F.2d 1377, 1385-86 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 747 (1988); *United States v. Hastings*, No. 87-0058-F (D. Mass. July 22, 1987) (LEXIS, Genfed library, Dist file).

181. See *United States v. Osunde*, 638 F. Supp. 171, 175 (N.D. Cal. 1986); *United States v. Jervey*, 630 F. Supp. 695, 698 (S.D.N.Y. 1986).

182. See *infra* notes 183-90 and accompanying text.

183. See, e.g., *United States v. Taylor*, 821 F.2d 1377, 1385-86 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 747 (1988); *Jervey*, 630 F. Supp. at 698.

courts to change their policies and procedures to comply with the statutory requirements of the Act and the sixth amendment.¹⁸⁴ This can be accomplished only if they have the incentive provided by dismissal with prejudice.¹⁸⁵

Two opinions suggest that a delay caused by the prosecutor's or court's negligence should not result in a dismissal with prejudice because such a dismissal lacks "prophylactic"¹⁸⁶ effect because the acts that occurred are not of the type likely to be repeated.¹⁸⁷ Negligent violations, however, are not necessarily incidental or unusual, but often are chronic¹⁸⁸ and the result of deeply ingrained dilatory practices of both the prosecutor's office and the court system.¹⁸⁹ The *Russo* test offers a good solution to the problem of distinguishing between chronic delays that need permanent redress and those delays that are caused by exceptional circumstances and are not likely to be repeated.¹⁹⁰ Because the *Russo* test usually weighs prosecutorial or judicial delay in favor of dismissal with prejudice, it should provide motivation to amend dilatory procedures. Because it allows dismissal without prejudice when an extenuating reason for the violation exists,¹⁹¹ it does not unfairly punish justifiable delays.

CONCLUSION

The Speedy Trial Act can function effectively only if courts take it upon themselves to dismiss cases with prejudice when appropriate. Evidence that the STA was intended primarily to curb speedy trial right abuses caused by court congestion and certain dilatory practices and procedures of the prosecutor's office permeates the legislative history. The history also shows that Congress recognized that neither the judiciary nor the government would have incentive to change their procedures to comply with the STA time limits unless the Act provided for the sanction of dismissal with prejudice.

184. See *United States v. Fountain*, Nos. 86-2622, 87-1465, slip op. at 7 (7th Cir. Feb. 22, 1988); *United States v. Okuda*, No. 87-00995 (D. Hawaii Aug. 11, 1987) (LEXIS, Genfed library, Dist file); *United States v. Van Brandy*, 563 F. Supp. 438, 441 (S.D. Cal. 1983), *aff'd*, 726 F.2d 548 (9th Cir.), *cert. denied*, 469 U.S. 839 (1984).

185. See *supra* notes 81, 84, 181 and accompanying text.

186. See *United States v. Kramer*, 827 F.2d 1174, 1178 (8th Cir. 1987); *United States v. Melguizo*, 824 F.2d 370, 372-73 (5th Cir. 1987) (per curiam), *appeal filed*, 56 U.S.L.W. 3303 (U.S. Oct. 3, 1987) (No. 87-551).

187. *Kramer*, 827 F.2d at 1178; *Melguizo*, 824 F.2d at 372-73.

188. See, e.g., *United States v. Fountain*, Nos. 86-2622, 87-1465, slip op. at 7 (7th Cir. Feb. 22, 1988); *United States v. Okuda*, No. 87-00995 (D. Hawaii Aug. 11, 1987) (LEXIS, Genfed library, Dist file); *United States v. Jervey*, 630 F. Supp. 695, 698 (S.D.N.Y. 1986).

189. See *Fountain*, Nos. 86-2622, 87-1465, slip op. at 7; *United States v. Taylor*, 821 F.2d 1377, 1385-86 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 747 (1988); *United States v. Okuda*, No. 87-00995 (D. Hawaii Aug. 11, 1987) (LEXIS, Genfed library, Dist file); *United States v. Jones*, 602 F. Supp. 1045, 1051 & n.8 (E.D. Pa. 1985).

190. See *United States v. Russo*, 741 F.2d 1264, 1267 (11th Cir. 1984) (per curiam).

191. See *supra* notes 162-65 and accompanying text.

In addition, the Act offers the sanction of dismissal without prejudice, primarily included in the legislation to appease the Justice Department. This sanction is appropriate in circumstances where the severity of the crime is great, the length of the delay is short, and reprosecution of the defendant would not have a negative impact on the administration of justice. Where, however, the other factors do not weigh heavily in favor of a nonprejudicial dismissal and the government or court is at fault for the delay, a sanction of dismissal with prejudice ought to be imposed, regardless of whether inattention or inadvertence caused the delay.

There may, of course, be exceptional circumstances under which the government or court's responsibility for the delay may not justify a dismissal with prejudice. Therefore, a test, such as the one used by the *Russo* court, that allows the responsible party to demonstrate an "affirmative justification" for the delay seems most consistent with the statutory goals.

Universal implementation of the *Russo* test would enable the STA to correct those problems that it was intended to address, without overreaching its bounds or releasing those defendants who rightly should be reprosecuted. Moreover, uniformity among the federal courts would provide for a more effective application of the STA, which would ensure that all defendants have access to their sixth amendment speedy trial right.

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