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Court of Appeals of New York - People v. Romeo

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COURT OF APPEALS OF NEW YORK

People v. Romeo[1]
(decided Feb. 11, 2009)

While imprisoned in Canada, Anthony Romeo was extradited to the United States pursuant to the Canada–United States Extradition Treaty ("Treaty") and arraigned in a Suffolk County court nineteen years after the same court indicted him for murder.[2] He pleaded guilty to manslaughter in the first degree, and was sentenced to seven to twenty-one years imprisonment.[3] Romeo appealed his conviction claiming that his constitutional[4] and statutory[5] right to a speedy trial was violated by the lengthy duration of the indictment.[6] The Appellate Division, Second Department, agreed with Romeo, "reversed [his] conviction and dismissed the indictment . . . ."[7] Subsequently, the government appealed and the New York Court of Appeals applied a five factor speedy trial test that was espoused in *People v. Taranovich*[8] to evaluate whether an individual's constitutional right to a speedy trial has been violated.[9] Ultimately, the New York Court of Appeals concluded that the government's delay in prosecution violated Romeo's right to a speedy trial.[10]

Nearly one year after a fatal shooting at a Suffolk County residence in November 1985, ballistics evidence matched the murder

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[1] 904 N.E.2d 802 (N.Y. 2009).

[2] *Id.* at 805.

[3] *Id.*

[4] U.S. CONST. amend. VI, states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . ."

[5] N.Y. CRIM. PROC. LAW § 30.20 (1) (McKinney 2009) provides: "After a criminal action is commenced, the defendant is entitled to a speedy trial." *See also* N.Y. CIV. RIGHTS LAW § 12 (McKinney 2009) ("In all criminal prosecutions, the accused has a right to a speedy . . . trial.").

[6] *Romeo*, 904 N.E.2d at 805.

[7] *Id.*

[8] 335 N.E.2d 303, 306 (N.Y. 1975).

[9] *Romeo*, 904 N.E.2d at 805-06.

[10] *Id.* at 808.

weapon to a firearm belonging to Romeo.[11] In February 1987, Romeo was ordered by a Suffolk County court to provide a deoxyribonucleic acid ("DNA") sample for the authorities to compare with evidence from the murder.[12] However, two days before he was scheduled to surrender to authorities and provide the DNA sample, he fled to Canada where he subsequently killed a police officer who pulled him over for speeding.[13] Romeo then "reentered the United States" and was arrested "at Logan International Airport" in Boston.[14]

After his arrest, Romeo was held in federal custody without bail while he was arraigned on a Canadian warrant and awaited extradition to Canada.[15] While he was in custody, Suffolk County law enforcement authorities traveled to Boston to obtain a DNA sample from him.[16] The DNA sample matched physical evidence from the 1985 murder.[17] On March 27, 1987, "a Suffolk County grand jury indicted [Romeo] on two counts of murder in the second degree . . . ."[18] Following the indictment, Suffolk County prosecutors requested that he remain in the United States.[19] On April 1, Romeo invoked his constitutional right to a speedy trial and formally requested that he be immediately arraigned and tried.[20] On May 15, Canadian officials sent a letter to Suffolk County authorities stating that the Treaty allowed Romeo to be returned to the United States for his trial on the American murder indictment even after a conviction in Canada.[21] Although the tone of the letter was encouraging, it did not explicitly assure that Romeo's return would be expeditious.[22]

On May 29, Romeo "filed an order to show cause in Suffolk County court demanding a writ of habeas corpus . . . be produced for arraignment . . . ."[23] Under the belief—albeit mistaken—that he

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[11] *Id.* at 804.

[12] *Id.*

[13] *Id.*

[14] *Romeo*, 904 N.E.2d at 804.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* (citation omitted). At the time that the grand jury indicted Romeo, he was still in federal custody. *Romeo*, 904 N.E.2d at 804.

[19] *Id.* ("[T]he [government] filed a warrant to detain [Romeo] in the United States.").

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Romeo*, 904 N.E.2d at 804-05.

would be promptly returned to the United States after the Canadian trial, the government argued that there would be no unusual delay in waiting to prosecute Romeo after his Canadian trial.[24] The Suffolk County court denied Romeo's petition, which allowed the government to defer its prosecution until after he was tried in Canada.[25] However, the court cautioned that any delay caused by allowing him to be first returned to Canada could violate his right to a speedy trial.[26] Despite this warning, the government chose to defer Romeo's prosecution.[27] Subsequently, Romeo was extradited to Canada where he was convicted of murder and sentenced to twenty-five years imprisonment.[28] Following his Canadian conviction, Suffolk County authorities never requested that he be extradited back to the United States to face the American murder charges.[29]

In 1999, twelve years after being indicted on the Suffolk County murder charge, Romeo moved to dismiss the indictment claiming that his constitutional[30] and statutory[31] right to a speedy trial were violated.[32] His motion was denied.[33] In 2005, "following amendments to the . . . Treaty that allowed for the 'borrowing' of defendant[s] from Canada," Romeo was extradited to the United States and arraigned.[34] In February 2006 Romeo pleaded guilty "to manslaughter in the first degree and was sentenced to a term of imprisonment of [seven] to [twenty-one] years to be served concurrently with [his] Canadian sentence."[35]

Romeo appealed and argued that his right to a speedy trial was violated by the nineteen-year delay after the initial indictment.[36] The Appellate Division, Second Department, considered the government's twelve-year delay from 1987 until Romeo filed a motion al-

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[24] *Id.* at 805.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Romeo*, 904 N.E.2d at 805.
[29] *Id.*
[30] *Id.*; U.S. CONST. amend. VI.
[31] *Romeo*, 904 N.E.2d at 805; N.Y. CRIM. PROC. LAW § 30.20 (1) (McKinney 2009); N.Y. CIV. RIGHTS LAW § 12 (McKinney 2009).
[32] *Romeo*, 904 N.E.2d at 805.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*

leging the constitutional violation in 1999 and reversed his conviction, because "the [government's] delay violated the defendant's right to a speedy trial."[37] The court reasoned that the delay was caused by the government's decision to defer prosecution until after Romeo was prosecuted in Canada and its subsequent failure to request extradition to the United States despite the uncertainty over whether the request would be granted.[38]

The New York Court of Appeals agreed to hear the governments appeal and subsequently affirmed the appellate division's decision.[39] In reaching its conclusion, the court applied a five factor speedy trial test, which includes the following: "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charges; (4) any extended period of pretrial incarceration; and (5) any impairment of defendant's defense."[40] No one factor is dispositive of whether a violation has occurred; each must be balanced in the context of the circumstances of the case.[41]

The court began its analysis with the first factor, a lengthy delay.[42] It stated that "the extent of the delay[] is of critical importance because 'all other factors being equal, the greater the delay the more probable it is that the accused will be harmed thereby.' "[43] However, the court recognized that no specific period of time creates a presumption of prejudice.[44] A lengthy delay triggers the examination of the other factors, itself becoming one of those factors.[45] Applying this analysis to Romeo's case, the court concluded that the "delay between the indictment and the filing of the speedy trial motion was an extraordinary period of [twelve] years," which was sufficient to trigger a rigorous examination of the remaining factors.[46]

The court also noted that the lengthy delay in Romeo's case

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[37] *Romeo*, 904 N.E.2d at 805.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 805-06 (citation omitted).

[41] *Id.* at 806.

[42] *Romeo*, 904 N.E.2d at 806.

[43] *Id.* (quoting People v. Taranovich, 335 N.E.2d 303, 306 (N.Y. 1975)).

[44] *Id. See also* Doggett v. United States, 505 U.S. 647, 651-52 (1992) ("Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay . . . .") (citation omitted).

[45] *Romeo*, 904 N.E.2d at 806.

[46] *Id.*

required increased scrutiny of the second factor, the reason for the delay.[47] It found the government's decision to defer prosecution until after Romeo was tried in Canada and its failure to request his extradition to the United States as the reasons for the delay.[48] If Romeo's extradition had been requested and granted, the delay may have been diminished.[49] In making its determination, the court placed significant emphasis on the warning given by the trial court to the government that deferring prosecution risked a violation of Romeo's right to a speedy trial.[50] Furthermore, the court emphasized that despite Romeo's repeated requests to be arraigned before his extradition to Canada and claim of prejudice by the delay that already had occurred, the government still chose to defer his arraignment until after he was tried in Canada.[51]

The government argued that its decision to delay prosecution was justified because of the communications it received from Canadian authorities.[52] The court rejected this argument by noting that even if the government acted under a mistaken belief that Romeo could be extradited to the United States immediately following his Canadian trial, "the [government] still knew or should have known that there was no guarantee that [Romeo] would be brought back to Suffolk County in a timely manner."[53] Moreover, it reasoned that the Treaty gives Canadian authorities discretion in determining whether to grant extradition or wait until after the individual serves his term of imprisonment.[54] The government, "at the very minimum," is required to make the extradition request; instead, its lack of an attempt to extradite him or try him before his extradition to Canada risked violating his right to a speedy trial.[55] The court ended its analysis of the second factor by concluding that:

> The fact that a defendant is incarcerated outside of the state makes it incumbent upon the [government] to

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[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Romeo*, 904 N.E.2d at 806.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* at 806-07.
[55] *Romeo*, 904 N.E.2d at 807.

> make diligent, good faith efforts to secure his presence in the state for arraignment and trial. Where the defendant is incarcerated in another country, failing to make an extradition request has been one factor that courts have viewed as evidencing a lack of diligent efforts on the part of the prosecution in bringing [the] defendant to trial promptly.[56]

The government's obligation to request extradition is only relieved where the foreign jurisdiction has manifested an intent to deny the request.[57] However, the court noted that the record contained no indication that Canadian authorities would have denied an extradition request.[58] Thus, the government was not relieved of its obligation to make a good faith attempt to bring Romeo to trial by requesting extradition.[59]

The court then assessed the third factor, the nature of the underlying charges.[60] Although Romeo was charged with murder, the court emphasized that the serious nature of such a charge "*does not* trump a defendant's right to a speedy trial."[61] However, pointing to its opinion in *Taranovich*, the court noted that the nature of the offense may have a bearing on the reasonableness of the length of the prosecutor's delay in trying the case because of his desire to be thoroughly prepared for trial.[62] In this case, however, the government did not claim that the delay was due to a need for such preparation.[63] Instead, the court found that the delay was solely a result of Romeo's imprisonment in Canada.[64]

Next, the court determined that the fourth factor, the length of any pretrial incarceration, was not significant as applied to Romeo.[65]

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[56] *Id.* (citations omitted).

[57] *Id.* ("[W]here the foreign country demonstrates its clear intention to deny an extradition request, the [government is] under no obligation to make a futile gesture.").

[58] *Id.*

[59] *Id.*

[60] *Romeo*, 904 N.E.2d at 807.

[61] *Id.* (emphasis added).

[62] *Id. See also Taranovich*, 335 N.E.2d at 306 (noting that the "right to a speedy trial is [not] dependent upon what one is charged with").

[63] *Romeo*, 904 N.E.2d at 807.

[64] *Id.*

[65] *Id.*

Indeed, Romeo was initially incarcerated on the Canadian warrant and subsequently held only on the Canadian charges.[66] He was never held solely on the charges resulting from his conduct in Suffolk County, and he did not face any "additional incarceration from those charges" during his prosecution.[67]

Under the fifth factor, the impairment of the defense by the delay, the court found that it was "highly likely" that Romeo's defense was negatively affected.[68] The court explained that the impairment stems from his incarceration abroad, which made it arduous for Romeo to engage "in his own defense, confer with counsel and contact witnesses."[69] Additionally, Romeo claimed that he had psychiatric problems; therefore, he may have asserted a defense of mental defect, which would have required him to establish such defect at the time of the murder.[70] His incarceration in Canada, however, clearly affected his ability to plead or establish this affirmative defense.[71]

After analyzing the five *Taranovich* factors, the court concluded that the appellate division correctly applied them in making its determination.[72] Thus, the prejudice caused by the government's decision to defer prosecution until after Romeo's trial in Canada and its subsequent failure to request extradition "violated [Romeo's] constitutional right to a speedy trial."[73]

The United States Supreme Court has declared that "[t]he history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution."[74] In *Barker v. Wingo*,[75] the Court fashioned a four factor balancing test to determine whether a defendant's right to a speedy trial is violated.[76] The remedy for a violation of a criminal

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[66] *Id.*
[67] *Id.*
[68] *Romeo*, 904 N.E.2d at 807.
[69] *Id.* at 807-08.
[70] *Id.* at 808.
[71] *Id.*
[72] *Id.*
[73] *Romeo*, 904 N.E.2d at 808.
[74] Klopfer v. State, 386 U.S. 213, 226 (1967).
[75] 407 U.S. 514 (1972).
[76] *Id.* at 530.

defendant's speedy trial right is a "dismissal of the indictment."[77]

The first factor espoused by the *Barker* court is "[t]he length of the delay" in prosecution.[78] The Court identified this factor as analogous to a "triggering mechanism,"[79] because an evaluation of the other factors is not necessary until the delay is found to be "presumptively prejudicial."[80] In turn, the length of the delay must be evaluated in the midst of all of the circumstances of a case to determine whether prejudice is presumed.[81] For example, it would be reasonable to expect a greater delay for more serious or complex crimes than minor crimes because of the prosecutor's desire to be more fully prepared for his case.[82]

The second factor, closely related to the first, is the government's reason for the delay.[83] The Court emphasized that the weight given to this factor depends upon the specific reason the government provides for the delay.[84] For example, the factor "should be weighted heavily against the government" if it delays prosecution merely to handicap the defense, while neutral reasons, such as the overcrowding of court dockets or negligence, should be given less weight.[85] Lastly, delay may be entirely appropriate for valid reasons, "such as a missing witness."[86]

The third factor is whether, and if so, how, the defendant has claimed that his right to a speedy trial has been violated.[87] This factor is also heavily intertwined with the length of the delay and the amount of prejudice caused by the delay; for instance, the longer the delay and the stronger the prejudice, the more likely the defendant is to claim that his right to a speedy trial has been violated.[88] While a defendant does not waive his right to a speedy trial by failing to file a claim, the assertion by the defendant that the right has been violated

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[77] *Id.* at 522.

[78] *Id.* at 530.

[79] *Id.*

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

[81] *Id.* at 530-31.

[82] *Id.* at 531 ("[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.").

[83] *Id.*

[84] *Id.* ("[D]ifferent weights should be assigned to different reasons.").

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

[86] *Id.*

[87] *Id.*

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

"is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right."[89] Furthermore, the "failure to assert the right will make it difficult for a defendant to prove he was denied a speedy trial."[90]

Lastly, the prejudice suffered by the defendant must be balanced with the other factors.[91] According to the Court, "[p]rejudice . . . should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect."[92] The first two interests that the *Barker* court identified include "prevent[ing] oppressive pretrial incarceration" and "minimiz[ing the] anxiety and concern of the accused."[93] Lengthy pretrial incarceration can deprive the defendant of a job, time spent with family, and the ability to assist in his defense while at the same time encouraging "idleness" because of the lack of rehabilitative and recreational programs in prison.[94] These are serious consequences for an individual who has not even been tried, especially "those persons who are ultimately found to be innocent."[95] Moreover, even if the defendant is not incarcerated, his liberty is still restrained by the cloud of suspicion that is cast upon him by society.[96] The third and last interest the Court identified is "limit[ing] the possibility that the defense will be impaired."[97] This is the most serious interest, because the notion of fairness is violated if the defense cannot sufficiently prepare its case.[98] For example, a lengthy delay risks the unavailability of witnesses or the inability to recall events.[99]

The Court has also held that the government must make a "diligent, good-faith effort to" arrange for the defendant's presence at an arraignment and trial when he is incarcerated in a different state than the one where criminal charges are pending.[100] In *Smith v. Hooey*,

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[89] *Id.* at 531-32.

[90] *Barker*, 407 U.S. at 532.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Barker*, 407 U.S. at 533.

[96] *Id.*

[97] *Id.* at 532 (footnote omitted).

[98] *Id.* ("[T]he inability of a defendant adequately to prepare his case skews the fairness of the entire system.").

[99] *Id.*

[100] Smith v. Hooey, 393 U.S. 374, 383 (1969).

the Court examined the question of the state's obligation to pursue prosecution against a defendant facing state criminal charges when that defendant is imprisoned in another jurisdiction.[101] In that case, the defendant was indicted in Texas for theft while he was serving a sentence at a federal prison in Fort Leavenworth, Kansas.[102] After the State of Texas filed charges against him, the defendant "mailed a letter [from Kansas] to the Texas trial court requesting a speedy trial."[103] He was told that the trial would take place "within two weeks of any date . . . [in] which he could be present."[104] For the next six years the defendant continued to request, by letter, that "he be brought to trial."[105] However, the State of Texas took no action to secure the defendant's presence in order for the case to be tried.[106] Finally, the defendant filed a motion to dismiss the charges against him based on the government's neglect to prosecute.[107] He then commenced "a mandamus proceeding in the Supreme Court of Texas," requesting cause be shown why the charges against him "should not be dismissed."[108] The Supreme Court of Texas refused to issue the writ, and the defendant sought and was granted certiorari to the United States Supreme Court.[109]

The Court reaffirmed the three underlying interests of the right to a speedy trial and emphasized how they embody what the guarantee of the right to a speedy trial is intended to protect.[110] It noted that, at first glance, it seems an individual already serving time in prison cannot suffer "oppressive incarceration prior to trial."[111] However, that individual may nevertheless suffer as much oppression as an individual who is held pretrial without bail.[112] First, if the defendant was tried sooner, it is possible that he could receive a sentence to be served concurrently with the sentence he is already serv-

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101 *Id.* at 375.
102 *Id.*
103 *Id.*
104 *Id.* (internal quotations omitted) (footnote omitted).
105 *Smith*, 393 U.S. at 375.
106 *Id.*
107 *Id.*
108 *Id.*
109 *Id.* at 375-76.
110 *Smith*, 393 U.S. at 377-78.
111 *Id.* at 378 (internal quotations omitted).
112 *Id.*

ing.[113] This opportunity would be lost if there was a lengthy delay in prosecution.[114] Additionally, it is not uncommon for sentences already being served to be increased and the conditions the defendant faces in prison to be worsened when another criminal charge is brought against him.[115]

The *Smith* Court then examined the second interest and noted that while it may be argued that a defendant who is already imprisoned is less likely to be affected by anxiety and public stigma by awaiting prosecution, there may still be an oppressive effect on him.[116] The anxiety and fear can interfere with efforts to rehabilitate the defendant because he will have little incentive for "self-improvement."[117]

Lastly, the Court examined the third interest, the ability to assist in one's defense, and recognized that such a right generally remains unaffected because the defendant is already incarcerated.[118] However, the likelihood that this right is impaired is greatly increased when the defendant is incarcerated in a different state than the one where the charges are pending.[119] The defendant who is confined to a cell and located far away from the location of the pending charges may have great difficulty in conferring with and keeping track of witnesses.[120] Moreover, the already incarcerated defendant is "powerless to exert his own investigative efforts to mitigate the[] erosive effects of the passage of time," such as the disappearance of evidence and witnesses.[121]

The Court then noted that the State of Texas made no effort to request a writ of habeas corpus ad prosequendum[122] from the Federal Bureau of Prisons, which would have granted the defendant's re-

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[113] *Id.*

[114] *Id.* at 378.

[115] *Smith*, 393 U.S. at 378.

[116] *Id.* at 379.

[117] *Id.* (internal quotations omitted) (footnote omitted).

[118] *Id.*

[119] *Id.*

[120] *Smith*, 393 U.S. at 379-80.

[121] *Id.* at 380.

[122] *See* Leslie W. Abramson, *The Interstate Agreement of Detainers: Narrowing its Availability and Applications*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 7 (1995) ("A writ of habeas corpus ad prosequendum is a court order demanding that an inmate be produced to face criminal charges.").

quest.[123] In fact, the state made no effort to bring the defendant to justice at all, except for learning that he was serving time in federal prison.[124] The fact that federal authorities had discretion to release the defendant into the custody of the state made no difference.[125] Indeed, " 'the possibility of a refusal is not the equivalent of asking and receiving a rebuff.' "[126] Thus, the Court concluded that the state "ha[s] a constitutional duty to make a diligent, good-faith effort to bring" a defendant before the court for trial when a speedy trial is demanded.[127]

Several circuit courts of appeals have applied the holding in *Hooey* to defendants who are incarcerated in another country.[128] For example, in *United States v. Corona-Verbera*, the Seventh Circuit Court of Appeals addressed the question of whether a defendant's right to a speedy trial is violated when there is an eight-year delay between arrest and indictment.[129] After being indicted for "drug crimes" in May 1990, "a warrant was issued for [Corona-Verbera's] arrest."[130] In August 2001, a federal grand jury returned an indictment against him that superceded another indictment returned in 1995.[131] He "was arrested in Mexico pursuant to a provisional arrest warrant on January 23, 2003," and Mexico granted the United States' extradition request in March of that year.[132] Corona-Verbera first appeared in court in 2004, and after requesting several continuances, he filed a motion alleging that his right to a speedy trial had been violated.[133] His motion was denied and he was subsequently found guilty after his trial in 2006.[134] His sentence was credited with time

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[123] *Smith*, 393 U.S. at 380-81.

[124] *Id.* at 381.

[125] *Id.* at 382.

[126] *Id.* (quoting Barber v. Page, 381 F.2d 479, 481 (10th Cir. 1966) (Aldrich, J., dissenting)).

[127] *Id.* at 383.

[128] *See, e.g.*, United States v. Corona-Verbera, 509 F.3d 1105, 1114 (9th Cir. 2007) (holding an "eight-year delay between indictment and arrest . . . presumptively prejudicial"); United States v. Blanco, 861 F.2d 773, 778 (2d Cir. 1988) ("[T]he government has a constitutional duty to make a diligent, good faith effort to bring a defendant to trial promptly.") (citations omitted).

[129] *Corona-Verbera*, 509 F.3d at 1114.

[130] *Id.* at 1111.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 1112.

[134] *Corona-Verbera*, 509 F.3d at 1112.

he spent incarcerated in Mexico.[135]

The Seventh Circuit began its speedy trial analysis by emphasizing that once the defendant requests a trial, the government is obligated to " 'make a diligent, good faith effort to' " secure the defendant's presence for trial.[136] The court then weighed the *Barker* factors and determined "that the near[] eight-year delay between [the defendant's] indictment and arrest [was] presumptively prejudicial and sufficient to trigger inquiry into the other three factors."[137] Next, it adopted the approach taken by the Second Circuit that when the government, in good faith, believes that a request for extradition would be futile, it is under no obligation to exercise due diligence in making such a request.[138] In support of its case, the government offered evidence that Mexico extradited very few, if any, Mexican citizens on narcotics charges prior to 2002.[139] Thus, any efforts to extradite the defendant prior to that period "would have been futile."[140] The court found that the government did exercise due diligence when it entered the defendant's name in the National Crime Information Center ("NCIC") database in 1990 and when it updated the NCIC database and border computer system to note that the 1995 indictment was returned.[141] Moreover, in an attempt to help locate the defendant and execute the arrest warrant "the government contacted Unsolved Mysteries and America's Most Wanted."[142] Unsolved Mysteries ran a segment on the defendant "twenty times between 1991 and 1997, and at least once in Mexico in 2000 or 2001," while America's Most Wanted aired a segment in 1996.[143] After an agent received a tip in 2002 of Corona-Verbera's location, he "was extradited in 2003."[144]

Moreover, the court recognized that the defendant only claimed a violation of his speedy trial right after he requested eight

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[135] *Id.*

[136] *Id.* at 1114 (quoting United States v. Sandoval, 990 F.2d 481, 484 (9th Cir. 1993)).

[137] *Id.*

[138] *Id. See also Blanco*, 861 F.2d at 778 ("Due diligence does not require the government to pursue goals that are futile.") (citation omitted).

[139] *Corona-Verbera*, 509 F.3d at 1114-15.

[140] *Id.* at 1115.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Corona-Verbera*, 509 F.3d at 1115.

continuances.[145] The court found that the eight requests did not weigh in favor of either the government or dismissal of the indictment.[146] It then noted that if the government pursues a defendant with due diligence, the defendant must "show 'specific prejudice to his defense.' "[147] The court concluded that Corona-Verbera did not prove actual prejudice, and thus weighted the factors in favor of the government because they pursued the defendant with due diligence.[148]

In New York, the right to a speedy trial is guaranteed not by the state constitution, but by statute.[149] In *People v. Taranovich*, the New York Court of Appeals fashioned a five-factor test for determining whether a speedy trial violation has occurred.[150] The five factors include: "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether . . . there has been an extended period of pretrial incarceration; and (5) whether . . . there is any indication that the defense has been impaired by reason of the delay."[151] No factor or combination of factors is completely determinative of whether a violation has in fact occurred.[152] Prior to this test, the court evaluated a speedy trial claim under only two factors, the length of the delay and the reason for the delay.[153]

The court noted that the first factor, the length of delay, is perhaps the most important factor because the greater the delay the more likely the defendant is prejudiced if all of the other factors are given equal weight.[154] However, there is no per se time period after "which a criminal prosecution may not be pursued."[155] Under the second factor, the court noted that a mistake, such as a clerical error, is not sufficient on its own to warrant a finding of a violation.[156] Under the third factor, it stated that a more serious charge could warrant

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145 *Id.* at 1116.
146 *Id.*
147 *Id.* (quoting *Doggett*, 505 U.S. at 656).
148 *Id.*
149 *Taranovich*, 335 N.E.3d at 305.
150 *Id.* at 306.
151 *Id.*
152 *Id.* at 305.
153 *Id.* at 307 (Wachtler, J., dissenting).
154 *Taranovich*, 335 N.E.2d at 306.
155 *Id.* (citation omitted).
156 *Id.*

an expectation of a lengthier time period in between indictment and trial because of the prosecutor's desire to prepare for trial in a greater fashion.[157] The court placed great significance on the fourth factor because the right to a speedy trial is intended as a safeguard against lengthy pretrial incarceration.[158] Defendants can be severely disadvantaged by prolonged pretrial incarceration because it can hamper their ability to participate and assist in their defense.[159] Lastly, under the fifth factor, the court noted that while defendants need not show they were prejudiced by the delay, the reasonableness of a period of time may depend upon the likelihood that an acquittal would have been affected.[160] However, prejudice will be presumed without any proof where the delay is great enough.[161]

The federal and New York standards make it clear that an incarcerated defendant located in a different jurisdiction is not to be stripped away of his right to claim a speedy trial violation.[162] Even while the defendant is serving a sentence for a conviction in a foreign country, the government has an obligation to make reasonable efforts to bring him to trial on the pending charges.[163] Furthermore, when determining whether a delay is reasonable, the court may take into account the nature of the underlying charges and the amount of prejudice the defense has suffered.[164]

However, the two standards have one fundamental difference: whether the court should consider any declarations by the defendant demanding a right to a speedy trial in making its speedy trial violation analysis.[165] While a defendant is not deemed to have waived his right to a speedy trial by failing to make a demand, federal courts give "strong evidentiary weight" to how frequently, if at all, a defendant asserts his right to a speedy trial.[166] On the other hand, New

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157 *Id.*

158 *Id.* ("Historically, this factor has been considered significant because the speedy trial guarantee affords the accused a safeguard against prolonged imprisonment prior to the commencement . . . of his trial.") (citation omitted).

159 *Taranovich*, 335 N.E.2d at 306.

160 *Id.* at 306-7.

161 *Id.*

162 *See Hooey*, 393 U.S. at 383; *Romeo*, 904 N.E.2d at 808.

163 *Hooey*, 393 U.S. at 383; *Romeo*, 904 N.E.2d at 807.

164 *Barker*, 407 U.S. at 530; *Romeo*, 904 N.E.2d at 806-07.

165 *See Barker*, 407 U.S. at 530; *Romeo*, 904 N.E.2d at 806-07.

166 *Barker*, 407 U.S. at 531-32.

York courts do not consider how many times a defendant makes the assertion for a speedy trial.[167]

A defendant should not be required to request a speedy trial before asserting his rights because it is the duty of the government to provide a speedy trial.[168] Considering defendants' zeal in asserting their right ignores the practical realities that many incarcerated defendants already face. Defendants incarcerated in foreign jurisdictions may be subject to extremely limited access to counsel or may be denied access altogether.[169] They may also have a limited or nonexistent right to communicate with those outside of the foreign prison, or may have limited access to legal materials that would allow them to assert their rights in the American jurisdiction.[170] Indeed, courts have already recognized these potential pitfalls, declaring that "[c]learly there can be no waiver of the right to speedy trial where the defendant . . . is powerless to assert his right because of imprisonment, ignorance and lack of legal advice."[171] Furthermore, there may also be a greater likelihood that the defendant is unaware of the pending charges against him in the American jurisdiction.[172] Finally, any assertion by the defendant of his right to a speedy trial may be fruitless if he is in a jurisdiction that does not have an extradition agreement with the United States.[173]

The New York standard, therefore, offers greater protection to the accused who are already serving a sentence for a conviction in a

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[167] *See Taranovich*, 335 N.E.2d at 306.

[168] *See* Shafer v. State, 183 N.E. 774, 775 (Ohio Ct. App. 1932), *overruled by* State v. Doyle, 228 N.E.2d 863, 867 (Ohio 1967) (holding that a defendant is not required to have requested a speedy trial before claiming a violation of that right).

[169] Shan-san Wu, *The Atkins Zone*, NAT'L GEOGRAPHIC ADVENTURE MAG., Dec. 2003/Jan. 2004, *available at* http://www.nationalgeographic.com/adventure/0312/exclusive.html (noting that "[a]ccess to legal counsel during interrogation and trial is not guaranteed" in Saudi Arabia and that "it is extremely difficult to contact people who are in Chinese jails").

[170] *Id.*

[171] *See* United States v. Reed, 285 F. Supp. 738, 741 (D.D.C. 1968) (footnote omitted). *See also* Coleman v. United States, 442 F.2d 150, 156-57 (D.C. Cir. 1971) (finding that the lower court erred by finding a waiver of the right where there was "no basis for assuming that [the defendant] had either the ability or the information on which to make an intelligent and voluntary waiver of his right to a speedy trial") (footnotes omitted).

[172] *See* Taylor v. United States, 238 F.2d 259, 261 (D.C. Cir. 1956) (finding that there can be no waiver of the right to a speedy trial where the defendant did not "kn[o]w he was indicted and entitled to a trial").

[173] Wu, *supra* note 169 (noting that India and China do not have "prisoner transfer agreement[s]" with the United States).

foreign jurisdiction. Under speedy trial jurisprudence, the burden is upon the government to bring an accused individual to justice.[174] This burden is especially important where a defendant is being held in a foreign jurisdiction, because the government is required to make diligent and reasonable efforts to produce him for trial in the American jurisdiction.[175] In the context of these strong burdens upon the government, it is inappropriate to give weight to whether the defendant has demanded a speedy trial. Lastly, the "failure to assert the right" should not "make it difficult for a defendant to prove that he was denied a speedy trial."[176] The circumstances a defendant faces in a foreign prison may hinder his ability to assert his rights, which should not be weighed against him.

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[174] *Barker*, 407 U.S. at 529 ("[T]he rule we announce today . . . places the primary burden on the courts and the prosecutors to assure that cases are brought to trial.").

[175] *Hooey*, 393 U.S. at 383.

[176] *Barker*, 407 U.S. at 532.