# Criminal Procedure -- The Potential Defendant's Right to a Speedy Trial

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stead of a weapon. Here it is difficult to insist that the exclusionary rule be applied.[52] Nevertheless, it is important that evidence other than weapons be excluded when discovered in this situation because "there may be strong incentive for [the police officer] to fabricate grounds for a frisk since evidence leading to a conviction may be obtained thereby. As a result, the reliability of the officer's testimony in these cases should be subject to considerable doubt."[53]

Police misuse of searches incident to arrests—after *Rabinowitz v. United States*[54] allowed the police great latitude in making such searches—became so great that it overshadowed the valid reasons for allowing warrantless incident searches and led to the limitations enunciated in *Chimel*.[55] It seems clear that unless the scope of the frisk is limited then the police will also misuse the frisk procedure. Restricting potential misuse by requiring the exclusion of all evidence, other than weapons, discovered during a frisk should have the salutary effect of maximizing individual freedom from official intrusion without sacrificing the effectiveness of the frisk as a protective device.

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## Criminal Procedure—The Potential Defendant's Right to a Speedy Trial

In recent years the long quiescent sixth amendment right to a speedy trial has undergone re-analysis by various federal and state courts.[1] The Supreme Court of North Carolina in a recent decision, *State v. Johnson*,[2]

[52] The police find the exclusionary rule particularly repulsive in these circumstances. As Professor Skolnick has pointed out, "the impact of the exclusionary rule, as the police view it, has not been to guarantee greater protection of the freedom of 'decent citizens' from unreasonable police zeal, but rather to complicate unnecessarily the task of detecting and apprehending criminals." J. Skolnick, JUSTICE WITHOUT TRIAL 227 (1966). Rather than alter his actions in response to the rule, the policeman often attempts "to infuse the character of legality—perhaps after the fact—into his actions." *Id.* 227.

[53] Comment, *Selective Detention and the Exclusionary Rule*, 34 U. CHI. L. REV. 158, 170 (1966). "While there are serious objections to barring evidence of crime discovered in a lawful search, the admissibility of evidence such as betting slips or narcotics found during a stop may encourage the misuse of the search power." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 50, at 186.

[54] 339 U.S. 56 (1950).

[55] Note, 78 YALE L.J., *supra* note 14, at 435-36.

[1] *See generally* U.S. CONST. amend. VI; Note, *Justice Overdue—Speedy Trial for the Potential Defendant*, 5 STAN. L. REV. 95 (1952); Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476 (1968).

[2] 275 N.C. 264, 167 S.E.2d 274, *rev'g* 3 N.C. App. 420, 165 S.E.2d 27 (1969).

revolutionized what had been the accepted constitutional criminal procedure in the state regarding the right to a speedy trial. North Carolina has moved from a position that was mildly castigated by the United States Supreme Court in *Klopfer v. North Carolina*[3] to one more far reaching than anything said in *Klopfer*. The North Carolina court has shifted from a position holding that a defendant has no general right to be tried at all[4] to the present stance suggesting that a defendant has a right to be arrested.

In *Johnson* the defendant alleged that his right to a speedy trial had been violated when he was not formally indicted and tried until four years after the alleged armed robbery had occurred. Seven days after the occurrence, the sheriff of Nash County went with a sworn warrant to a neighboring county jail where Johnson was being held on other robbery charges. Although he read the Nash County warrant to Johnson, the sheriff did not formally serve it because he felt that he did not have any jurisdiction outside his own county.[5] On that same day Johnson confessed to the Nash County robbery; about one month later he entered pleas of guilty to four other charges of armed robbery that had occurred in Edgecombe and Wilson Counties and received four concurrent sentences. Johnson remained in the North Carolina state prison without any action being taken in connection with the Nash County robbery until almost four years later when an indictment was returned and a detainer filed against him for this offense. At the then ensuing trial, the defendant moved that the case be dismissed because of the violation of his right to a speedy trial.

The North Carolina court, construing the right to speedy trial contained in the sixth amendment to the United States Constitution,[6] re-

[3] 386 U.S. 213 (1967).

[4] State v. Klopfer, 266 N.C. 349, 350, 145 S.E.2d 909, 910 (1966), *rev'd*, 386 U.S. 213 (1967).

[5] N.C. GEN. STAT. § 15-42 (1965) would seem to indicate that the sheriff could have served the warrant:

> When a felony is committed in any county in this State, and upon the commission of the felony, the person or persons charged therewith flees or flee the county, the sheriff of the county in which the crime was committed, and/or his bonded deputy or deputies, either with or without process, is hereby given authority to pursue the person or persons so charged, whether in sight or not, and apprehend and arrest him or them anywhere in the State.

*See also* N.C. GEN. STAT § 15-22 (1965).

[6] In Klopfer v. North Carolina, 386 U.S. 213 (1967), the Supreme Court held that the sixth amendment right to a speedy trial was made applicable to the states through the due process clause of the fourteenth amendment.

versed the conviction. It held that when there has been an atypical delay, deliberately and unnecessarily caused by the prosecution, and when the length of the delay has created a reasonable possibility of prejudice, the defendant has been denied his right to a speedy trial.[7] The court specifically held that the same consideration must be given the potential defendant as the formally accused whose trial has been unduly postponed.[8] In order to apply this right to a potential defendant, the court treated the problem of the unserved warrant as if there had been no warrant at all.

Courts have universally held that every "accused" has a right to a speedy trial.[9] This right applies to those persons in jail,[10] those out on bond,[11] those incarcerated in the state's prison for another offense,[12] and those serving a prison sentence imposed by another jurisdiction.[13] However, most courts have refused to apply the right to a speedy trial to the pre-indictment stage. They have held instead that the right attaches only when a formal complaint is lodged against the defendant[14] or when prosecution is begun.[15] Most courts also have held that delay before the commencement of prosecution is controlled exclusively by the applicable statute of limitations,[16] but North Carolina is one of a few

[7] 275 N.C. at 277, 167 S.E.2d at 283.

[8] *Id.* at 272, 167 S.E.2d at 279.

[9] *E.g.*, Jacobson v. Winter, 91 Idaho 11, 14, 415 P.2d 297, 300 (1966); State v. Hollars, 266 N.C. 45, 51, 145 S.E.2d 309, 313 (1965); *see* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . .").

[10] Petition of Provoo, 17 F.R.D. 183 (D. Md.), *aff'd sub. nom.* United States v. Provoo, 350 U.S. 857 (1955) (per curiam).

[11] Hicks v. People, 148 Colo. 26, 364 P.2d 877 (1961); People v. Den Uyl, 320 Mich. 477, 31 N.W.2d 699 (1948).

[12] People v. Prosser, 309 N.Y. 353, 130 N.E.2d 891 (1955). See Note, *Convicts—The Right to a Speedy Trial and The New Detainer Statutes*, 18 RUTGERS L. REV. 828 (1964).

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

[14] Hoopengarner v. United States, 270 F.2d 465, 469 (6th Cir. 1959); Iva Ikuko Toguri D'Aquino v. United States, 192 F.2d 338, 350 (9th Cir. 1951); People v. Aguirre, 181 Cal. App. 2d 577, —, 5 Cal. Rptr. 477, 479 (Dist. Ct. App. 1960); State v. Le Vien, 44 N.J. 323, 328, 209 A.2d 97, 100 (1965); State v. Jestes, — Wash. 2d —. —, 448 P.2d 917, 920 (1968). *But see* Lucas v. United States, 363 F.2d 500, 502 (9th Cir. 1966) (right normally attaches when complaint filed but in cases of special circumstances may attach earlier).

[15] Harlow v. United States, 301 F.2d 361, 366 (5th Cir. 1962); Foley v. United States. 290 F.2d 562, 565 (8th Cir. 1961); Hernandez v. Wainwright, 296 F. Supp. 591, 594 (M.D. Fla. 1969); State v. Burrell, 102 Ariz. 136, 137, 426 P.2d 633, 634 (1967); State v. Caffey, 438 S.W.2d 167, 171 (Mo. 1969). Generally in these cases the courts considered the prosecution begun when the indictment was filed.

[16] United States v. Panczko, 367 F.2d 737, 739 (7th Cir. 1966); Nickens v. United States, 323 F.2d 808, 809 (D.C. Cir. 1963); Harlow v. United States, 301

states[17] that has no statute of limitations for securing an indictment on a felony charge.

*Johnson* has gone much further than *Klopfer* by advancing the right to a speedy trial to a point even prior to the grand jury indictment. *Klopfer* dealt with the "cloud of an unliquidated criminal charge";[18] *Johnson* considered delay before there was any formal charge at all. The United States Supreme Court in *Klopfer* required the states to apply federal standards to the right of a speedy trial, but the North Carolina Supreme Court has joined a few other jurisdictions[19] in adhering to a new and enlarged sixth amendment standard. The North Carolina court extended the federal framework of right to speedy trial, which in the past was only applicable to the formally accused, to encompass also the potential defendant.

A majority of courts have adhered to the demand doctrine,[20] which requires that the right to a speedy trial is waived if the defendant does not demand trial. Courts have rationalized this doctrine by labeling speedy trial "a personal right which may be waived by action inconsistent with assertion of that right."[21] *Klopfer* in no way disturbed the law as to the requirement of demand. But the court in *Johnson* reasoned that the demand doctrine is inapplicable to the potential defendant;[22] since he has no formal knowledge of the pending charge, a court cannot realistically require him to demand a speedy trial.

The right to speedy trial has been said to serve three purposes:

> This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern

F.2d 361, 366 (5th Cir. 1962). *But see* Ross v. United States, 349 F.2d 210, 215 (D.C. Cir. 1965); Petition of Provoo, 17 F.R.D. 183, 203 (D. Md. 1955).

[17] South Carolina and Wyoming have no statute of limitations. Kentucky, Maryland, North Carolina, Ohio, Virginia and West Virginia have no limitation for bringing indictments for felonies. See N.C. GEN. STAT. § 15-1 (1965) for a statute of limitations on misdemeanors.

[18] Klopfer v. North Carolina, 386 U.S. 213, 227 (1967) (concurring opinion).

[19] People v. Hryciuk, 36 Ill. 2d. 500, 224 N.E.2d 250 (1967); Bell v. Mississippi, — Miss. —, 220 So. 2d 287 (1969); cases cited notes 35, 37, 38 & 39 *infra*; *see* Wilson v. United States, 335 F.2d 982, 984 (1963) (Bazelon, J., dissenting); *cf.* Petition of Provoo, 17 F.R.D. 183 (D. Md.), *aff'd sub. nom.* United States v. Provoo, 350 U.S. 857 (1955) (per curiam); Rost v. Municipal Ct., 184 Cal. App. 2d 507, 7 Cal. Rptr. 869 (1960).

[20] *E.g.*, United States v. Lustman, 258 F.2d 475, 478 (2d Cir. 1958); United States v. McIntyre, 271 F. Supp. 991, 1001 (S.D.N.Y. 1967); State v. Hollars, 266 N.C. 45, 52, 145 S.E.2d 309, 314 (1965). *But see* People v. Prosser, 309 N.Y. 353, 358, 130 N.E.2d 891, 895 (1955).

[21] Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587, 1602 (1965) [hereinafter cited as *Lagging Right to Speedy Trial*].

[22] 275 N.C. at 272, 167 S.E.2d at 280.

> accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.[23]

The first two have no relevance to the situation of the potential defendant. However, the third purpose is pertinent: The potential defendant is even more susceptible to the hazards of a long-delayed trial than is one formally accused. The latter is aware that prosecution is impending and will seek out witnesses in his behalf; on the other hand, the potential defendant "who is oblivious to the fact that the police have focused suspicion upon him . . . has no reason to marshall his evidence or even fix in his mind the events of the time in question."[24]

One factor often considered[25] in determining if a defendant has been denied his right to a speedy trial is whether he has been prejudiced by the delay. There are two basic types of prejudice that can result from a denial of speedy trial—prejudice to the ability of the defendant to receive a fair trial and prejudice to the defendant in such ancillary post-trial matters as sentencing[26] and parole. In *Johnson* the court focused on prejudice in these post-trial matters. A defendant, like Johnson, who is already serving a sentence for another offense faces a great likelihood of prejudice in ancillary matters if his trial is delayed. In its opinion the North Carolina court disclosed a strong probability of prejudice as far as sentencing is concerned:

> Had this case been tried during the fall of 1963 the record suggests (1) that defendant would have plead guilty in Nash just as he had done in Edgecombe, and Wilson, and (2) that Judge Fountain, who had imposed concurrent sentences for the . . . [other] crimes . . . would have permitted the Nash County sentence to run concurrently with the others.[27]

In a recent decision, *Lawrence v. Blackwell*,[28] a federal district court also recognized the problem of ancillary prejudice likely to result from the state's delaying indictment on other charges when the defendant is already serving a sentence. *Smith v. Hooey*[29] was interpreted by that

[23] United States v. Ewell, 383 U.S. 116, 120 (1966).
[24] *Lagging Right to Speedy Trial* 1613.
[25] State v. Lowry, 263 N.C. 536, 542, 139 S.E.2d 870, 875 (1965).
[26] In North Carolina a sentence imposed runs concurrently as a matter of law with other sentences already in force unless the sentencing judge orders to the contrary. State v. Efrid, 271 N.C. 731, 157 S.E.2d 538, 540 (1967) (per curiam). *See* N.C. GEN. STAT. § 15-6.2 (1965).
[27] 275 N.C. at 275, 167 S.E.2d at 282.
[28] 298 F. Supp. 708 (N.D. Ga. 1969).
[29] 393 U.S. 374 (1969). The Supreme Court extended the right to speedy

court as requiring that no additional restrictions be imposed upon a prisoner who has had a detainer filed against him if the state filing the detainer has not made a diligent, good faith effort to bring him to trial within a reasonable time after the filing.[30] The court recognized that prisoners with detainers filed against them suffer more restrictions than their fellow inmates: The detainers have the effect of limiting their eligibility for parole,[31] of causing them to live in more restricted quarters, and often of preventing them from taking part in a work release program.

Because the court in *Johnson* found prejudice to the defendant in sentencing and parole rights, it was unnecessary for it to reach and discuss prejudice in the trial of the case itself—such as the inability of a defendant to reconstruct an alibi.[32] In recent years other courts that have applied the right to speedy trial to the potential defendant[33] have had to wrestle with this problem. Quite likely North Carolina courts in the future will face it when they are presented with speedy trial cases that, unlike *Johnson,* do not disclose post-trial prejudice.

The issue of prejudice at the trial stage involves a dual problem: the quantum of prejudice that must be shown and the placement of the burden of proof. Although several courts have dealt with the problem, "[i]t is quite clear that no uniform test has yet been devised which has gained universal acceptance."[34] One view is that an accused, claiming that he was denied a speedy trial when he was a potential defendant, must show

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trial to encompass those persons already serving a prison sentence in another jurisdiction. The Court was unclear as to the remedy that must be provided such a defendant.

[30] Lawrence v. Blackwell, 298 F. Supp. 708, 714 (N.D. Ga. 1969). If the state were required to attempt to secure the prisoner for speedy trial in its jurisdiction as soon as it had probable cause to arrest and it had discovered his whereabouts, much of this ancillary prejudice could be eliminated. Certainly if a defendant is incarcerated in the same jurisdiction as the one seeking to try him, the state would have no difficulty in providing the defendant with a speedy trial.

[31] It was pointed out in *Johnson* that the defendant was prejudiced with regard to his parole rights by the filing of the detainer against him. 275 N.C. at 274, 167 S.E.2d at 281.

[32] Johnson's counsel raised the possibility of this type of prejudice toward his client at both the superior court trial and at the appellate level, but the supreme court did not discuss the issue. Record at 22-23, State v. Johnson, 3 N.C. App. 420 (1969); Brief for Appellant at 6-7, State v. Johnson, 3 N.C. App. 420 (1969).

[33] Most of the cases dealing with the potential defendant have been narcotics cases where undercover agents had operated in an area for several months and then indicted at one time all of those persons from whom they had made illicit purchases. See cases cited notes 35, 37, 38 & 39 *infra.*

[34] State v. Rountree, 106 N.J. Super. 135, —, 254 A.2d 337, 344 (Middlesex County Ct. 1969).

actual prejudice.[35] Courts holding the defendant to a showing of actual prejudice are in reality saying that the right to speedy trial rarely attaches to the potential defendant; it is almost impossible for a defendant to prove actual prejudice if he cannot remember his activities on the date of the offense. Although the North Carolina court did not have to reach this issue, it indicated that a showing of actual prejudice probably would not be required.[36]

In *Ross v. United States*[37] the Court of Appeals for the District of Columbia held that the defendant's inability to reconstruct his whereabouts on the date of the alleged offense was sufficient to show prejudice and that the prosecution's inability to show good cause for delaying the indictment must result in a determination that the defendant's right to a speedy trial was denied. Thus a showing of the *possibility* of prejudice was adequate; the burden was placed on the defendant to prove possible prejudice, but on the state to show that the delay was necessary.[38]

In *State v. Rountree*[39] a New Jersey county court reached what seems to be the most workable and desirable solution to the problem of prejudice and the burden of proof. The court recognized that a purposeful delay, caused by the use of undercover agents in the detection of narcotics offenses, must be accepted to some extent in the interest of effective prosecution. The court found that only when the delay reaches such proportions that the ability to conduct a defense is materially affected is there presumptively a violation of the guarantee of the right to a speedy trial.[40] The initial burden, therefore, should be on the accused to demonstrate a plausible claim of inability to remember the events of the day of the offense and to show that he has consequently been prejudiced. This burden should be one of a "preponderance of the probabilities, that is, something beyond a mere assertion of an inability to recall or reconstruct."[41]

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[35] United States v. Curry, 278 F. Supp. 508, 513 (N.D. Ill. 1967).

[36] State v. Johnson, 275 N.C. 264, 276-77, 167 S.E.2d 274, 283 (1969).

[37] 349 F.2d 210, 215-16 (D.C. Cir. 1965).

[38] But in a decision following *Ross*, Powell v. United States, 352 F.2d 705, 708 (D.C. Cir. 1965), the court stated that the burden of proof was on the defendant to establish both that there was no legitimate reason for the delay and that he was prejudiced by it.

[39] 106 N.J. Super. 135, 254 A.2d 337 (Middlesex County Ct. 1969).

[40] *Id.* at —, 254 A.2d at 345.

[41] *Id.* When a defendant cannot remember his whereabouts on the date of the offense, the court should take into account the length of delay in determining whether a showing of inability to reconstruct the events demonstrates a probability of prejudice.

Although this quantum of proof is greater than the reasonable possibility of prejudice referred to in *Ross v. United States*,[42] it nonetheless seems warranted. Otherwise all that would be necessary for a defendant to establish a prima facie showing of prejudice would be merely to assert that he did not remember where he was or what he was doing on the date of the alleged offense. But if the accused should make a showing of prejudice by a preponderance of the probabilities, under *Rountree* the burden of proof shifts to the prosecution to show that the pre-arrest delay was necessary.[43] This procedure seems wiser than leaving the burden on the defendant to show that the delay was unnecessary. It is the state that has caused the delay; therefore, the state should be in a better position to show why it delayed.

A further analysis of the approach in *Rountree* seems to indicate that, as an alternative to proving necessary delay, the state should be allowed to rebut the defendant's showing of prejudice. For instance, most narcotics cases involve the uncorroborated testimony of the undercover agent that he has made a "buy," and it would be virtually impossible for the prosecution to rebut the showing of prejudice although it might win its case on establishing necessary delay. In *Johnson*, an armed robbery case, the state's evidence consisted of a confession and an eye-witness identification. Such evidence alone, absent a showing of ancillary post-trial prejudice, should be sufficient to try the defendant over his assertion that he was prejudiced because he could not remember his whereabouts on the date of the offense.

The most intriguing question raised by applying the right to speedy trial to the potential defendant is determining at what precise point this right attaches. The court in *Johnson* provided no clear answer. The defendant was apprehended almost immediately after the crime was committed; he confessed and implicated another person in the armed robbery. The state claimed that it did not indict Johnson immediately because it was looking for the other person and felt that Johnson would not testify against his accomplice if he himself had already been tried and sentenced

[42] 349 F.2d 210 (D.C. Cir. 1965).

[43] State v. Rountree, 106 N.J. Super. 135, —, 254 A.2d 337, 345 (Middlesex County Ct. 1969). The court in *Johnson* also recognized that certain reasonable delays on the part of the prosecution were justified, but it never made clear what would be reasonable. Delay caused by the state's identifying or locating a co-defendant hopefully would be sufficient to constitute a reasonable delay. In narcotics cases evidence of a reasonable delay might consist of a showing up until the time of the indictment the undercover agent was making initial "buys" from new sellers or was making contacts with suppliers.

for the offense. Over four years later the state gave up its effort to apprehend the accomplice and proceeded to indict Johnson. At some point in this sequence of events the right to speedy trial attached.

If the right to speedy trial attaches at the moment the prosecution acquires probable cause to arrest, the state would be required to make public the fact of its investigation, perhaps a still ongoing one, by taking the defendant into custody and warning him of his rights. In many cases the prosecution's chances of gathering sufficient evidence to convince a jury beyond a reasonable doubt of the defendant's guilt would be lessened. The state's ability to protect society from criminals would be greatly burdened. Such a concept of the right to speedy trial runs contrary to the generally accepted latitude allowed the police by the courts regarding the time when they must press charges. "Law enforcement officers have a right to wait in the hope that they may strengthen their case by ferreting out further evidence or discovering and identifying confederates and collaborators."[44]

The court in *Johnson* recognized these problems and pointed out that the state could delay "to protect and promote further responsible police investigation"[45] and indict when the "case against a suspect is complete and the testimony to convict him is at hand."[46] This statement would seem to indicate that even if the right to speedy trial attaches at the moment of acquiring probable cause, the state would be justified in a delay based on the need for further investigation. However, the court raised further problems when it set forth this guideline for reasonable delay by the prosecution. Such a rule necessarily requires a great deal of hindsight. It is impossible for the prosecution to determine the precise moment at which it has enough evidence to convict. A determination of guilt is left up to the members of the jury, and it is never clear just what evidence will convince them beyond a reasonable doubt of the defendant's guilt. In addition, how will the prosecution ever determine that its case is complete, that it has all the evidence it will ever obtain, or that it will be unable to find the evidence it had been hoping to find?[47] In the future, the prosecution will have to balance the desirability of postponing formal charges in order further to investigate against the possibility that

[44] Carlo v. United States, 286 F.2d 841, 846 (2d Cir.), *cert. denied*, 366 U.S. 944 (1961).

[45] 275 N.C. at 273, 167 S.E.2d at 280.

[46] *Id.*

[47] In *Johnson* the court found that a four-year delay while attempting to find a collaborator was unreasonable. *Id.*

such delay might later be declared unreasonable and thus void the prosecution's efforts altogether.

The court also stated that the state has the "duty . . . to file formal charges when their case against a suspect is complete."[48] This duty is tantamount to a duty to arrest. If the state has this duty, then it would seem to follow that the defendant has the correlated right to be arrested. This constitutional doctrine is one that the United States Supreme Court itself has declined to adopt.[49]

If the right to a speedy trial and the right to be arrested attach at the point of the prosecution's acquiring probable cause, all that the defendant needs to show is prejudice to his defense resulting from the state's delay in arrest. If he can make such a showing and the state is unable to show necessity for the delay, then the defendant is entitled to the remedy of dismissal of his case.[50] This remedy has normally been reserved only for those who have been denied a speedy trial after they have been indicted.

Having both the right to a speedy trial and the right to be arrested attach at the moment of probable cause creates a new problematic situation. This new possibility is the specter of an evidentiary exclusionary rule for the enforcement of sixth amendment rights,[51] something never fashioned or declared by any court in this country. Such a possibility would occur, for example, in a case where the state delayed arrest for six months after it had acquired probable cause, and at the trial the defendant could not show that this delay prejudiced his own defense on the merits but could show that the interval between probable cause and actual arrest was a "fruitful" period for the state in the gathering of evidence. If in fact the defendant's rights had been violated because he was not

[48] 275 N.C. at 273, 167 S.E.2d at 280.

[49] Hoffa v. United States, 385 U.S. 293 (1966).

> Nothing . . . in any . . . case that has come to our attention, even remotely suggests this novel and paradoxical constitutional doctrine, and we decline to adopt it now. There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall short of the amount necessary to support a criminal conviction.

*Id.* at 310.

[50] State v. Johnson, 275 N.C. 264, 277, 167 S.E.2d 274, 283 (1969).

[51] The exclusionary rule has been applied to the states in cases involving fourth and fifth amendment rights. Mapp v. Ohio, 367 U.S. 643 (1961) (illegal search and seizure); Brown v. Mississippi, 297 U.S. 278 (1936) (coerced confession).

arrested earlier, why would he not be entitled to have excluded from use against him any evidence acquired by the state during the delay? Taken to its logical conclusion, such a new interpretation of the sixth amendment leads to an illogical result because the right to a speedy trial as a shield for the defendant's protection will have become a sword for his escape.[52]

By extending the right to a speedy trial to the period before indictment, the North Carolina court has opened "a Pandora's box of nice distinctions":[53] problems of proof, the precise point at which the right attaches, and the possibility of an exclusionary rule. But at least North Carolina has faced the problem of the potential defendant's right to a speedy trial. Other courts have availed themselves of the protective cloak provided by statutes of limitations[54] to avoid resolution of this problem. Such a cloak will have to be shed in the future, for a statute of limitations merely puts a maximum limit on the time for indictment; only the sixth amendment right to a speedy trial can put the minimum limit on it. North Carolina, in this area among the legal pioneers, has taken its first, and therefore the most difficult, step in recognizing that a potential defendant has, just as a defendant already under indictment, a basic right to a speedy trial.

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## Domestic Relations—Evidence—Testimony by One Spouse against the Other of Adultery Excluded under North Carolina Law

At common law neither husband nor wife was a competent witness in any action to which the other spouse was a party.[1] Except in criminal cases, this rule of disqualification has been largely overturned by statute or by judicial decision in American jurisdictions.[2] In North Caro-

[52] State v. Patton, 260 N.C. 359, 364, 132 S.E.2d 891, 894 (1969); Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 853 (1957).

[53] *Lagging Right to Speedy Trial* 1617.

[54] *See generally* Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630 (1954).

[1] C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 66 (1954) [hereinafter cited as MCCORMICK]; D. STANSBURY, THE NORTH CAROLINA LAW OF EVIDENCE § 58 (2d ed. 1963) [hereinafter cited as STANSBURY].

[2] Note, *Competency of One Spouse to Testify Against The Other in Criminal Cases Where The Testimony Does Not Relate to Confidential Communications: Modern Trend*, 38 VA. L. REV. 359-60 (1952). Both husband and wife are fully competent to testify either for or against their respective spouses in civil cases in the majority of jurisdictions. MCCORMICK § 66.