AEQUITAS

Statutory and Constitutional Speedy Trial Rights in the Wake of the COVID-19 Pandemic: Wisconsin

Question Presented

1. State-level Speedy Trial Statutes (Wisconsin):
   a. Do public health crises/similar unusual circumstances that cause courts to close/delay indefinitely, toll the period dictated in states speedy trial statutes?
   b. Notwithstanding the tolling period, do such crises/similar circumstances have any effect on defendants' arguments of prejudice?

2. Constitutional Right to a Speedy Trial:
   a. Do public health crises/similar unusual circumstances that cause courts to close/delay indefinitely affect the right to a speedy trial? If so, how?

Short Answer/Research Points

Question 1a.

Some states (such as Washington, New York and Wisconsin) have said that because COVID-19 has resulted in a state of emergency being declared, their speedy trial obligations have been tolled. Other states (such as Virginia, Missouri, and Texas) have shut down court operations with some limited exceptions, which include doing what is necessary to ensure litigants constitutional and/or statutory right to a speedy trial are upheld. Wisconsin's Supreme Court issued its official response to the current COVID-19 crisis on March 22, announcing that jury trials scheduled between March 22 and May 22, 2020 would be rescheduled for a date after May 22, 2020 unless the order is subject to further modification or extension by future orders of the court.[1] After listing the extensive reasons why, the order states "[c]onsequently, the ends of justice served by temporarily suspending jury trials in the courts of this state outweigh the interest of the public and the defendant in a speedy trial under Wis. Stat. sec. 971.10(3)(a)."[2] The order does state that circuit courts or parties may file "EMERGENCY" motions with their court as soon as possible seeking exemption.

A second order which was also released on March 22, states that the courts of Wisconsin will remain open during the pandemic, but that all in-person proceedings in all appellate and circuit courts will be suspended through April 30, 2020 (subject to extension).[3] The order is subject to some listed exceptions, including jury trials, as they would be addressed by separate order (the one just detailed), proceedings necessary to protect the constitutional rights of criminal defendants and juveniles, and proceedings involving in-custody defendants, who are not being held on any basis other than the case-at-bar, which will presumptively proceed as timely scheduled. If it were not for the separate order pertaining to jury trials which tolls the speedy trial clock in no uncertain term, these exceptions would seem to encompass defendant's constitutional right to a speedy trial. Justice Rebecca Bradley's dissent to the jury trial order

[1] Order of the Supreme Court of Wisconsin, In re: The Matter of Jury Trials During the COVID-19 Pandemic (Mar. 22, 2020), https://www.wicourts.gov/news/docs/jurytrials1.pdf.

[2] *Id.*

[3] Order of the Supreme Court of Wisconsin, In re: The Matter of the Extension of Orders and Interim Rule Concerning Continuation of Jury Trials, Suspension of Statutory Deadlines for Non-Criminal Jury Trials, and Remote Hearings During the COVID-19 Pandemic (Mar. 22, 2020), https://www.wicourts.gov/news/docs/jurytrials2.pdf.

confirms my interpretation— “The court's order not only overrides the United States Constitution, it flouts the Wisconsin Constitution.”[4]

Question 1b.

The Sixth Amendment to the United States Constitution and Article 1, Section 7 of the Wisconsin Constitution, guarantee an accused the right to a speedy trial.[5] Wisconsin courts apply the same standard to enforce the state constitutional right to a speedy trial as federal courts use to enforce the Sixth Amendment right. That means that while the state and federal constitutional guarantees are independent, a person who claims their right to a speedy trial guaranteed under Wisconsin law has been infringed on will have the case assessed using a balancing test identical to the one in *Barker*. The factors weighed in that balancing test are the four “*Barker* factors”: 1) the length of the delay; 2) the reason for the delay; 3) whether the defendant demanded a speedy trial and when; and 4) the prejudice or harm brought to the defendant’s case as a result of the delay.[6] The Supreme Court in Barker stated that "[t]he length of the delay is to some extent a triggering mechanism" and that "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."[7] So the courts never get to the defendant’s specific argument about prejudice (*Barke*r factor 4) if the delay is not held to be presumptively prejudicial (*Barker* factor 1).

Prior to analyzing the factors as they’ve been interpreted by Wisconsin courts and as a result, having a better understanding for what constitutes prejudice under a speedy trial analysis, it’s important to note that no one factor is “either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.”[8]

Factor 1: The Length of the Delay

The Sixth Amendment doesn’t provide any guidance on the time allowed for a trial to be considered “speedy.” State statutes on the other hand sometimes do. The stage at which the improper delay is claimed determines which constitutional test a Wisconsin court will apply.[9] If the defendant is asserting that the State caused an improper delay in bringing charges, then a Fifth Amendment due process test applies.[10] On the other hand if the defendant claims that an improper delay occurred after charges were filed, then a Sixth Amendment test applies.[11] An arrest, indictment or other official accusation starts the relevant time period for Sixth Amendment analysis of a speedy-trial issue.[12] Wisconsin Statute § 971.10 serves as a mechanism by which a defendant can be discharged from custody or released from the conditions of his or her bond if the time limits are violated, but the statute plays no role in the constitutional speedy-trial analysis used by the Wisconsin courts to determine whether charges should be dismissed.[13] “Inmisdemeanor actions trial shall commence within 60 days from the date of the defendant’s initial appearance in court,” whereas “[t]he trial of a defendant charged with a felony shall commence within 90 days from the date trial is demanded by any party in writing or on record.”[14]

Wisconsin statutory law dictates that a court may not grant a “continuance….unless the court sets forth, in the record of

[4] *Id.*
[5] U.S. CONST. AMEND. VI; WIS. CONST. ART. I, § 7. Rights of accused.
[6] *Barker v. Wingo*, 407 U.S. 514, 530 (1972).
[7] *Id.*
[8] *Id.* at 533.
[9] § 14:1. In general, 9 Wis. Prac., Criminal Practice & Procedure § 14:1 (2d ed.)
[10] Id; *see also State v. Blanck*, 638 N.W.2d 910, 915 (Wis. Ct. App. 2001) (stating that the Sixth Amendment speedy-trial right cannot be violated by a prearrest delay in charging) (citing *State v. Rogers*, 70 Wis. 2d 160, 163 (1975).
[11] *See also Blanck*, 638 N.W.2d at 915 (citing U*.S. v. Marion*, 404 U.S. 307, 313 (1971)).
[12] *See State v. Borhegyi*, 222 Wis. 2d 506, 511–12 (Wis. Ct. App. 1998).
[13] WIS. STAT. ANN. § 971.10. Speedy trial.
[14] *Id.* at (1)-(2)(a).

the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of the continuance outweigh the best interests of the public and the defendant in a speedy trial."[15] The statute also lists factors that should be considered. The reason why this statute is relevant is because, as Justice Bradley's states in her dissent to the order postponing jury trials: "[t]he court [by passing the order] expressly refuses to follow statutory law…. Continuances are statutorily permissible, provided a circuit court considers multiple case-specific factors.[16] The broad sweep of the court's order precludes every circuit court in the state from exercising its discretionary power to weigh various statutory factors——including the interests of the victim——before granting a continuance. See Wis. Stat. § 971.10(3)(b)(3)."[17] The current order that blanketly tolls the speedy trial clock for defendants awaiting trial in Wisconsin, doesn't follow Wisconsin statutory law and if exceptions to the order aren't granted for those raising that their constitutional right to a speedy trial have been infringed by resultant delays, the order may be held unconstitutional. If that is the case, then the reasons for the delay in any given case will be analyzed pursuant to *Barker*.

Unless the delay is presumptively prejudicial, courts need not consider the other *Barker* factors.[18] The Constitutional right to a speedy trial requires that the accused is tried as soon as orderly operations of court permits—the mere lapse of time does not establish that the right was denied.[19] Previously in *State v. Kwitek*, this court held that if a specific period of time is to be adopted in determining speedy trial issues it must be done by the legislature and that a court would not "fix such an arbitrary standard and base it upon judicial reasons."[20] However, a delay of nearly one year between preliminary examination and trial in a criminal case is considered presumptively prejudicial.[21] Additionally, the nature of the charge and case makes a difference, in a particular prosecution, as to whether further inquiry is required.[22]

15 *Id.* at (3)(a).
16 Supreme Court of Wisconsin, *supra* note 4 at 13.
17 *Id.*
18 *State v. Mullis*, 81 Wis.2d 454 (1978).
19 *Taylor v. State*, 55 Wis.2d 168 (1972).
20 53 Wis.2d 563, 571 (1972).
21 *Green v. State*, 75 Wis.2d 631 (1977).
22 *Scarbrough v. State*, 76 Wis.2d 87, 95 (Wis. 1977).

Example:

- “The delay of almost eighteen months was so excessive that it leads prima facie to the inquiry of whether there was a denial of speedy trial.”[23]

Factor 2: Reason for the Delay

- *Barker* tells us that deliberate attempts to delay a trial as a means of hampering the defense are weighed heavily against the State, whereas more neutral reasons such as negligence or overcrowded courts are weighed less heavily.[24] Valid reasons, such as a missing witness, according to Barker, should serve to justify appropriate delay.[25] As stated in *Hadley v. State,* an excusable delay is “of intrinsic importance to the case.”[26]
- Meanwhile, “[i]f the delay can be attributed to the actions of the defendant, he cannot be heard to claim that that period of time be considered in deciding whether he has been denied a speedy trial.”[27]

Examples:

- A delay of 22 months between arrest to the date of trial “necessitates that [the Court] examine the reasons for the delay…[but] a total of less than six [of those] months could be considered a delay attributable to the state ….[and six month] does not constitute a delay which is prejudicial. Therefore, there is no necessity for inquiring into the other factors that go into the balancing test.”[28]
- An 8-month delay caused entirely by an overcrowded felony docket, particularly those requiring jury trials, was not attributable to either prosecution or defense for purpose of determining whether defendant was denied right to speedy trial.[29]

Factor 3: Whether, When and How the Defendant Asserted Their Right to a Speedy Trial

While the State has the duty to bring defendants to trial, defendants bear the responsibility of asserting their right to a speedy trial.[30] Once a presumptively prejudicial delay has been found to exist, the court must then evaluate defendant’s diligence in asserting their right to a speedy trial.[31] Though a defendant's failure to demand a speedy trial will not constitute a waiver, their complete failure or delay in demanding a speedy trial will be weighed against them.[32] That is because a complete failure or delayed demand is deemed evidence that they were consciously avoiding trial.[33] There are of course exceptions to a perceived failure to assert weighing against a defendant. For example, failure to assert is not chargeable to a defendant if they believe based on a conversation that they had with their attorney, that the matter had been settled.[34]

23 *Hadley v. State*, 66 Wis.2d 350, 363 (1975).
24 *Barker*, 407 U.S. at 531.
25 *Id*.
26 *Hadley,* 66 Wis. 2d at 362.
27 *Norwood v. State*, 74 Wis. 2d 343, 354 (1976).
28 *Id.*
29 *Scarbrough*, 76 Wis.2d at 87.
30 *Kwitek*, 53 Wis.2d at 563.
31 *Hatcher v. State*, 83 Wis.2d 559 (1978).
32 *Id*; *see also* State v. Shears, 68 Wis.2d 217 (1975).
33 *Hipp v. State*, 75 Wis.2d 621 (1977).
34 *State v. Ziegenhagen*, 73 Wis.2d 656, 669 (1976).

Factor 4: Prejudice or Harm Brought to the Defendant's Case as a Result of the Delay
This factor focuses on the prejudice, if any, suffered by the defendant as a result of the delay. The common considerations when making this assessment include: 1) the oppressiveness of pretrial incarceration; 2) anxiety and concern of the accused; and 3) the possibility that the defense will be impaired as a result of the delay.[35]

1. The oppressiveness of pretrial incarceration only factors into the prejudice calculation if an individual was incarcerated prior to trial. If they were released on bond or failed to be arrested, then this subfactor is given no weight. Additionally, when an individual is incarcerated on another charge that carries with it more time than the delay in the case in question, pre-trial incarceration does not weigh in favor of the defendant's speedy trial motion.[36] Meanwhile, a delay of seven months, when a defendant was incarcerated, has been held to constitute prejudice asa result of oppressive pre-trial detention.[37]

Example:

- Failure of the state did not result in "oppressive pretrial incarceration" since defendant was confined in state prison during the entire period because of his conviction on a prior charge.[38]

2. Anxiety and concern exist in every criminal case and therefore alone, a defendant asserting they experience those feelings does not establish prejudice.[39]

3. Impairment of the accused's defense is the most important subfactor. Impairment of defense is present: 1) "if witnesses die or disappear during a delay," 2) "if defense witnesses are unable to recall accurately events of the distant past," or 3) if a defendant is "hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense."[40] It's true that it's not necessary that a defendant show prejudice in fact in order to establish a speedy trial violation.[41] However, the court in Leighton for example, stated in their analysis of this subfactor that of the witnesses the defense identified as having reduced memory as a result of the delay, he "fails to specifically identify whose memory was affected and how he was prejudiced by any failed recollections."[42]

<u>Barker Factors Potential Application to COVID-19 Case Facts:</u>
If an individual in Wisconsin who has been arrested, indicted or otherwise officially accused of a crime, is currently awaiting trial, they might be able to move to have their case dismissed on speedy trial grounds, but the likelihood that they are going to be successful in having a jury trial held in a timely manner in light of the current pandemic and particularly Wisconsin's related orders, is very unlikely. The first step will be to

[35] *Barker*, 407 U.S. at 532.
[36] *Watson v. State*, 64 Wis.2d 264 (1974).
[37] *Day v. State*, 61 Wis.2d 236, 247(1973).
[38] *Id*. at 266.
[39] *Ziegenhagen*, 73 Wis.2d at 663.
[40] *Scarbrough*, 76 Wis.2d at 90.
[41] *State v. Leighton*, 616 N.W.2d 126 (Wis. Ct. App. 2000).
[42] *Id.* at 137.

calculate whether 1 year has passed or is likely to pass prior to trial commencing. If, subtracting days that are attributable to the defendant, more than 1 year has passed, then the case will turn on a careful analysis of its specific facts under the remaining three Barker factors.

Delays pursuant to COVID-19 resulting in courts being temporarily shut down or severely limiting their dockets, will surely not be considered a deliberate attempt to delay a trial as a means of hampering the defense, which is the primary way that delay is held to weigh heavily against the State. While in many States a non-deliberate delay by the State will weigh against the State, it is not likely to be held against the State in light of the Wisconsin order explicitly citing reasons why a delay is in the best interest of all involved, and that speedy trial clocks have been tolled as a result. Similarly, continuances requested by defense counsel on behalf of their client (ex. fearing for their own safety, fearing for their clients safety, or because they don't want to hold a jury trial amidst COVID for fear that those deemed healthy enough to serve won't be an equitable representation of the defendant's community/peers, fearing that the jury will rush to judgement to avoid having to break quarantine to continue to meet, or fearing that witnesses won't be available to testify, etc.), will likely weigh against the defendant's claim of presumptively prejudicial delay.

Case law suggests that there is no clear rule as to when a defendant must assert their right to a speedy trial for their assertion to weigh in their favor, but it's safe to say that unless a defendant is asserting the right on the eve of trial, the third Barker factor will likely be held to weigh in their favor. This will likely be the case during COVID-19 as trials are largely not occurring (*i.e.* any speedy trial motions brought during this time will not occur on the eve of trial). Defense attorneys who are unable to file formal motions on behalf of their clients during this time, or who represent individuals who have yet to be indicted, should still write letters to the DA's office requesting that a charging decision be made expeditiously and/or pointing out that time ispassing and their client is aware and is/will be asserting their statutory and Constitutional right to a speedy trial.

The fourth *Barker* factor is generally determinative and is where the bulk of the analysis surrounding COVID-19 delays will occur. As stated below, the NY Defense bar believes it is prejudicial to continue to hold jury trials during the COVID-19 crisis. Wisconsin's Supreme Court order suspending jury trials and issuing a blanket waiver of the timeline attached to individuals' right to a speedy trial, also argues why the delay won't be held against the State or considered to damper individuals' defense.[43] Additionally, witnesses being unavailable would seem to be a bigger concern during the COVID crisis, as opposed to at a later date (though would-be witnesses who end up passing away due to COVID-19 might result in the defendant being prejudiced by the delay). To have this weigh in a defendant's, assert with specificity who the missing or hard to procure (or perhaps in the context of COVID-19, dead) witnesses are/were, how their testimony is/would have been relevant, and what efforts have been made to procure their testimony to date. Anxiety and concern associated with being incarcerated in close quarters during a pandemic is undoubtedly at an all-time high. [44] And while there is no case law to support the argument that increased prejudice is deemed to exist as a result, the argument will likely be made.

If COVID-19 tears through prisons and it is handled poorly, then prejudice will likely be easier to demonstrate (relative oppressive pretrial incarceration and anxiety and concern of the accused). Note also that in determining whether a defendant's pretrial incarceration is considered prejudicial, courts have considered the potential jail time (sentencing guidelines) associated with their charges. With COVID-19 and the increased danger prisons pose/potential exacerbation of other prejudices that weighs in the defendant's favor, criminal defendants who assert their right to a speedy trial has been denied are more likely to be successful if their charges are non-violent and carry the potential for limited jail time

[43] Supreme Court of Wisconsin, *supra* note 1.

[44] Ryan Lucas, *As COVID-19 Spreads, Calls Grow to Protect Inmates in Federal Prisons*, NAT'L PUB. RADIO (March 24, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/03/24/820618140/as-covid-19-spreads-calls-grow-to- protect-inmates-in-federal-prisons.

if held guilty.

While this analysis of Wisconsin case law suggests that the majority of criminal defendants will not experience increased success in moving to dismiss their cases due to their constitutional/statutory rights being infringed as a result of COVID-19 associated court closures/trial delays, criminal defendants that are incarcerated for petty crimes with no trial date likely to be set for the foreseeable future, might have strong resultant speedy trial claims. This prediction, coupled with public health considerations, supports the release of all criminal defendants on bail who have been arraigned/are being held for non-violent crimes. Massachusetts, South Carolina, Washington, Michigan and New Jersey have already taken some action to decrease their incarcerated population in response to the pandemic.

Question 2b.

There is "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months."[45] Previous tolling of the periods dictated in speedy trial statutes during national emergencies (9/11 and Katrina) with no finding that those closures weighing heavily against the government when analyzing the *Barker* factors, suggests that public health crises/similar unusual circumstances that cause courts to close/delay indefinitely affect the right to a speedy trial. However, Noah Feldman makes the textual argument in support of public health emergencies not being an acceptable reason for tolling constitutional speedy trials during pandemics, writing "[t]he Constitution says that habeas may not be suspended 'unless when in Cases of Rebellion or Invasion the public Safety may require it.' There's no mention of a public health hazard – a situation that was certainly imagined to the framers of the Constitution, who themselves encountered yellow fever and smallpox epidemics as a recurrent part of the 18th century life in North America." [46] However, the argument could be made, although weak, that the virus constitutes an "invasion" of sorts. The dissent to Wisconsin's Supreme Court order suspending jury trials includes a powerfully well written dissent arguing that public health crises tolling the delay used to demonstrate a defendant's right to a speedy trial has been infringed is unconstitutional.[47]

Wisconsin Courts COVID-19 Related Changes/Closures:

Wisconsin Supreme Court puts hold on jury trials, held in-person proceedings statewide in favor of phone and video appearances, WI. COURTS (Mar. 22, 2020), https://www.wicourts.gov/news/view.jsp?id=1216.

- All state courts remain open and continue to operate, but trials that were scheduled to begin before May 22 will be rescheduled after that date. Judges, commissioners and clerks of circuit court are required to utilize email, teleconferencing, and video conferencing technology in lieu of in-person courtroom appearances through at least April 30th. This is subject to certain exceptions if remote technology is not practicable or adequate to address the matter.

Order of the Supreme Court of Wisconsin, In re: The Matter of the Extension of Orders and Interim Rule Concerning Continuation of Jury Trials, Suspension of Statutory Deadlines for Non-Criminal Jury Trials, and Remote Hearings During the COVID-10 Pandemic (Mar. 22, 2020), https://www.wicourts.gov/news/docs/jurytrials.pdf.

- The order relating to postponement of jury trials from March 22, 2020 through May 22, 2020 for a date after May 22nd. Note: The provision of this order shall be subject to further modification or extension by future orders of this court.
- Governor Evers has declared a public health emergency for the State of Wisconsin.
- Maintaining current court operations in the courts of this state, especially jury trials, presents substantial health risks to the public, to jurors, to witnesses, to law enforcement personnel, to litigants,

[45] *Barker*, 407 U.S. at 523.
[46] Noah Feldman, *Criminal Courts Can't Pause for Pandemics*, BLOOMBERG (March 16, 2020), https://www.bloomberg.com/opinion/articles/2020-03-16/supreme-court-work-can-be-done-remotely-but- criminal-cases-can-t.
[47] Supreme Court of Wisconsin, *supra* note 1.

to lawyers, to judges, and to court employees;

- Continuing to have jury trials would put members of the public, jurors, witnesses, law enforcement personnel, lawyers, judges, and court employees at an unacceptable level of risk to their health and for some at an unacceptable level of risk for the loss of their lives;
- Given the need to excuse jurors who are in high risk categories in order to protect them from exposure to this potentially deadly pandemic, the effect of such wide-ranging excusal from jury service could potentially raise challenges to the validity of a jury's verdict or result in a miscarriage of justice. The increasing potential for a juror to become ill with COVID-19 during a trial, which would require isolation of all other remaining jurors and other participants in the trial, also creates an unacceptable potential for mistrials;
- Those individuals who are healthy enough to serve on a jury would likely be distracted by, and anxious about, the physical environment of the trial and their deliberations. There is a substantial risk that jurors compelled to report for jury duty would not be able to "examine the evidence with care and caution," and to "[a]ct with judgment, reason, and prudence," as instructed by Wis. JI-Crim 140, or to "be very careful and deliberate in weighing the evidence," as instructed by Wis. JI-Crim 460. In addition, jurors may be so affected by their anxiety from being in contact with other jurors and court staff that they cut short their deliberations so that they can be dismissed and leave the courthouse;
- While this court cannot make findings as to particular cases (regarding whether their nature and complexity make it unreasonable to expect adequate preparation within the time periods established by Wis. Stat. § 971.10), the court finds that the nature of individual cases is a factor that is of greatly less significance than the global factors it has identified and found in this order;
- Victims will also be subject to increased risk of contracting COVID-19 if they attend a jury trial during the public health emergency and they may be unable to attend a jury trial during the COVID-19 public health emergency because they are in a high-risk health category, which outweighs the impact on victims of the temporary delay in jury trials as a result of this order;
- The risks identified above may be significantly mitigated by temporarily modifying court operations, including a temporary suspension of jury trials. Indeed, failing to temporarily suspend jury trials in the courts of this state would create an unacceptable risk of a miscarriage of justice;
- The health risks from the COVID-19 pandemic constitute good cause to implement temporary changes to court procedures, including the temporary suspension of jury trials;

- The delay in conducting a jury trial that results from the temporary suspension of jury trials provided in this order is not due to the actions of the government, but is due to factors beyond the government's control;
- Consequently, the ends of justice served by temporarily suspending jury trials in the courts of this state outweigh the interest of the public and the defendant in a speedy trial under Wis. Stat. sec. 971.10(3)(a).
- Circuit courts or parties may file a motion with their court seeking an exception to this order. The motion has to be filed as an "EMERGENCY" motion on its face, and shall be filed as soon as possible.
- NOTE: Justice Rebecca Bradley dissented to this order and is joined by Justice Daniel Kelly. Her dissent should be read in full, but I have included excerpts of it below.
  - "The Wisconsin Supreme Court suspends the constitutional rights of Wisconsin citizens, citing the exigency of a public health emergency. The Constitution does not countenance such an infringement…. Wisconsin's highest court says a public health emergency justifies a blanket 60 day suspension of a constitutional right…. Informed by the lessons of history, the Constitution was established to safeguard the rights of the people even under the most exigent circumstances."
  - Nothing in the Constitution permits the judiciary to limit the fundamental rights secured under the Sixth Amendment. "[T]here is only one instance in the Constitution where the government is expressly permitted to suspend a fundamental right[.]"[48] Article I. § 9, cl. 2 provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." If the framers had contemplated suspension of Sixth Amendment rights or any other liberties, they would have said so in the text."
  - "The court's order not only overrides the United States Constitution, it flouts the Wisconsin Constitution, which mandates: "In all criminal prosecutions, the accused shall enjoy the right… to a speedy public trial[.]"[49] While utterly ignoring the supreme law of the land, the court expressly refuses to follow statutory law….Continuances are statutorily permissible, provided a circuit court considers multiple case-specific factors.[50] The broad sweep of the court's order precludes every circuit court in the state from exercising its discretionary power to weigh various statutory factors——including the interests of the victim——before granting a continuance.[51]
  - If the people's constitutional rights may be suspended by the judicial branch in the name of a public health emergency, our freedom is in peril; our republic is lost.

Order of the Supreme Court of Wisconsin, In re: The Matter of Remote Hearings During the COVID-19 Pandemic (Mar. 22, 2020) https://www.wicourts.gov/news/docs/remotehearings.pdf.

- The order that states the courts of Wisconsin will remain open, but all in-person proceedings in all appellate and circuit courts are suspended from March 22,2020 through April 30, 2020.

[48] Mitchell F. Crusto, *State of Emergency: An Emergency Constitution Revisited,* 61 LOY. L. REV. 471, 504 & n.189 (2015); *see also* U.S. CONST. ART I., § 9, cl. 2.
[49] WIS. CONST. ART. I, § 7. Rights of the accused.
[50] *See* WIS. STAT. ANN. § 971.10(3). Speedy trial.
[51] *Id.* at (3)(b)(3).

- The order is subject to exceptions:
    - jury trials (which will be addressed by separate order—provided above, cancelling such trials through May 22, 2020).
    - Proceedings necessary to protect the constitutional rights of criminal defendants and juveniles.
    - Proceedings involving in-custody defendants, who are not being held on any basis other than the case-at-bar, which will presumptively proceed as timely scheduled.
    - Other exceptions approved by the Chief Judge of the Judicial District, the Chief Judge of the Court of Appeals, or the Chief Justice of the Wisconsin Supreme Court, for the respective proceeding, as applicable.
    - The Supreme Court oral arguments scheduled on April 20, 2020.
- Some of these exceptions raise the question of whether defendant's constitutional right to a speedy trial would not be infringed after all, but that question was addressed and settled in the order that suspended jury trials.

Law Review Articles of Potential Interest:

- Patrick Ellard, *Learning from Katrina: Emphasizing the Right to a Speedy Trial to Protect Constitutional Guarantees in Disasters*, 44 AM. CRIM. L. REV. 1207 (2007), https://www.researchgate.net/publication/293699727_Learning_from_Katrina_Emphasizing_the_right_to_a_speedy_trial_to_protect_constitutional_guarantees_in_disasters.
- Mitchell F. Crusto, *State of Emergency: An Emergency Constitution Revisited*, 61 LOY. L. REV. 471 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2763667.

Some of the States Issuing Blanket Waivers of the Timelines Attached to Individuals' Right to a Speedy Trial:

- Washington State:
    - Order of the United States District Court of the Western District of Washington, In re: Court Operations Under the Exigent Circumstances Created by COVID-19 and Related Coronavirus (Mar. 6, 2020), https://www.wawd.uscourts.gov/sites/wawd/files/03-06-20General%20Order01-20.pdf.
        - "[T]he Court specifically finds that the ends of justice served by ordering the continuances outweigh the best intere sts of the public and any defendant's right to a speedy trial, pursuant to 18 U.S.C. §3161(h)(7(A)….[c]ase-by case exceptions to the continuances…may be ordered for non-jury matters at the discretion of the Court after consultation with counsel."
        - The Court will vacate or amend this General Order no later than March 31, 2020.
- New York
    - Order of the United States District Court for the Southern District of New York, In re: Coronavirus/COVID-19 Pandemic (Mar. 13, 2020), https://www.law360.com/articles/1253266/attachments/1.
        - "Effective March 16, 2020, all civil and criminal jury trials in the SDNY scheduled to begin before April 27, 2020, are continued pending further order of the Court."
        - "Nothing in this order is meant to affect jury trials that began prior to March 16, 2020, and have not yet concluded."
        - "The Court is cognizant of the right of criminal defendants to a speedy and public trial under the Sixth Amendment, and the particular application of that right in cases involving defendants who are detained pending trial. Any motion by a criminal defendant seeking an exception to this order in order to exercise that right should be directed to the District Judge assigned to the matter in the first instance; provided, however, that no such exception may be ordered without the approval of the Chief Judge after consultation with the assigned

judge."

- "Criminal matters before Magistrate Judges, such as initial appearances, arraignments, detention hearings, and the issuance of search warrants, shall continue to take place in the ordinary course."

- Matthew Russell Lee, *In SDNY As Trials Pushed Back Details,* INNER CITY PRESS (Mar. 13, 2020), http://www.innercitypress.com/sdny3exclusivejailclose031320.html.
    - This source suggests that an email was sent out to SDNY lawyers that states: "The running of speedy trial time will be suspended effective today due to the now-declared state of emergency and medical crisis."

Some of the States Handling COVID Response Differently (Language Suggesting Blanket Waivers are Not Being Considered and Acknowledging the Need to Continue to Uphold the Constitutional Rights of Litigants):

- Virginia:
    - Order of the Supreme Court of Virginia, In re: Order Declaring a Judicial Emergency in Response toCOVID-19 Emergency (Mar. 16, 2020), http://www.vacourts.gov/2020_0316_scv_order_declaration_of_judicial_emergency.pdf.
        - This order is in effect from Monday, March 16, 2020 through April 6, 2020.
        - Non-essential, non-emergency court proceedings in all circuit and district courts are suspended and all deadlines are tolled and extended for 21 days, absent an exception listed in the order applying.
            - "Continue all…. criminal matters, including jury trials, subject to a defendant's right to a speedy trial, with the exception of emergency matters, including but not limited to quarantine or isolation matters, arraignments, bail reviews, protective order cases, emergency child custody or protective cases, and civil commitment hearings. Judges may exercise their discretion with regard to proceeding with ongoing jury trials, and in cases where the defendant is incarcerated."
            - "For jury trials that cannot be continued, excuse or postpone jury service for jurors who are ill, caring for someone who is ill, or in a high-risk category as defined by the CDC."
        - The order references the Pandemic Influenza Bench Book for VA's Court System, which can be found here: http://www.vacourts.gov/programs/pfp/benchbook.pdf. The document references the speedy trial issue twice.
            - "Although the capacity to conduct jury trials will likely be impacted during a pandemic, the constitutional rights to a speedy trial and an impartial jury will require courts to continue to perform this function." (7-2)
            - "Reduce the number of jury trials scheduled by postponing civil and other jury trials where there is not a speedy trial issue." (7-2)
        - "Nothing in this Order shall preclude the chief district and chief circuit judges from implementing additional local policies as needed…. [T]o the extent possible, the courts and clerk's offices shall remain operational and provide essential services."
    - OFF. OF THE EXEC. SEC'Y, VA. COURTS, COVID-19 APPELLATE AND LOCAL COURT INFORMATION (2020), http://www.vacourts.gov/news/items/covid_19.pdf.
    - City of Suffolk Coronavirus (COVID-19) Updates, SUFFOLK VA., http://www.suffolkva.us/1399/Suffolk-Coronavirus-COVID-19-Updates (last visited Sep. 5, 2020).
        - "All…criminal matters including jury trials are continued until after April 3, 2020. Any defendant with a speedy trial concern should contact their attorney and the court for further direction."

- Missouri:
  - Order of the Supreme Court of Missouri, In re: Response to the Coronavirus Disease (COVID-19) Pandemic (Mar. 16, 2020), https://www.courts.mo.gov/page.jsp?id=151973.
    - "All in-person proceedings in all appellate and circuit courts – including all associate, family, juvenile, municipal and probate divisions." The suspension will last from Tuesday, March 17, 2020, through Friday, April 17, 2020, and may be extended by order of this Court as circumstances may want.
      - There are some exceptions listed—notably "proceedings necessary to protect the constitutional rights of criminal defendants and juveniles, including the right to a speedy trial, and the rights afforded under 544.676.3," "criminal jury trials…already in progress as of March 16, 2020," and 'other exceptions approved by the Chief Justice of this Court."
      - "The presiding judge of each circuit court and the chief judges of each appellate court are authorized to determine the manner in which the listed in-person exceptions are to be conducted….The judge presiding over proceedings has the discretion to exercise his or her discretion in excusing jurors or other individuals that cannot or should not appear as a result of risks associated with COVID-19."
    - "Despite the suspension of in-person court proceedings, Missouri courts still must continue to carry out the core, constitutional functions of the Missouri judiciary as prescribed by law and continue to uphold the constitutional rights of litigants seeking redress in any Missouri court. Each courthouse should work with local law enforcement and county agencies to ensure that, to the extent possible, courthouses remain accessible to carry out essential constitutional functions and time-sensitive proceedings."

States Taking Action to Decrease Their Incarcerated Populations (Massachusetts, South Carolina, Washington, Michigan, and New Jersey):

- Deborah Becker, *So Far, More Than 300 Prisoners Released Due to COVID-19 Under Mass. High Court's Ruling*, WBUR NEWS (Apr. 14,2020), https://www.wbur.org/news/2020/04/14/inmates-jails-prisons-sjc-special-master-report.
  - State prisons and county jails in Mass. have released 367 prisoners after this month's state Supreme Judicial Court ruling on reducing incarceration because of the coronavirus.
  - Jails released 296 prisoners in the past week. During that time, county jails—which hold more than 6,700 people—tested 338 prisoners/staff with 116 people tested positive for COVID- 19.
  - Four prisoners' deaths linked to COVID-19 have been reported in Mass, and all of them involved inmates at the Mass Treatment Center in Bridgewater. It reported the first case of a prisoner testing positive with coronavirus on March 21.
- The Mass. ruling holding that some prisoners are eligible for release due to COVID-19 can be found here: https://www.mass.gov/files/documents/2020/04/03/12926.pdf.
  - As the health crisis has deepened, we have been forced to limit physical access to our court houses to address only "emergency matters that cannot be resolved through a videoconference or telephonic hearing, either because such a hearing is not practicable or because it would be inconsistent with the protections of constitutional rights," and have directed each trial court department to issue a standing order to determine what constitutes an emergency matter. Each trial court department subsequently has done so. We have emphasized, as well, that, "[i]n criminal cases, where appropriate, a defendant may ask the court for reconsideration of bail or conditions of release."
  - With respect to those individuals who are currently serving sentences of incarceration, absent a

finding of a constitutional violation, our superintendence power is limited. Those who have been serving sentences for less than sixty days may move to have their sentences revised or revoked under Mass. R. Crim. P. 29, as appearing in 474 Mass. 1503 (2016) (Rule 29). Where there is no constitutional violation, however, art. 30 of the Massachusetts Declaration of Rights precludes the judiciary from using its authority under Rule 29 to revise and revoke sentences in a manner that would usurp the authority of the executive branch.

- To afford relief to as many incarcerated individuals as possible, the DOC and the parole board are urged to work with the special master to expedite parole hearings, to expedite the issuance of parole permits to those who have been granted parole, to determine which individuals nearing completion of their sentences could be released on time served, and to identify other classes of inmates who might be able to be released by agreement of the parties, as well as expediting petitions for compassionate release…if the virus becomes widespread within correctional facilities in the Commonwealth, there could be questions of violations of the Eighth and Fourteenth Amendments to the United States Constitution and art. 26 of the Massachusetts Declaration of Rights.
- Experts warn that an outbreak in correctional institutions has broader implications for the Commonwealth's collective efforts to fight the pandemic. First, the DOC has limited capacity to offer the sort of specialized medical interventions necessary in a severe case of COVID-19. Thus, as seriously ill individuals are transferred from correctional institutions to outside hospitals, any outbreak in a correctional institution will further burden the broader health care system that is already at risk of being overwhelmed. Second, correctional, medical, and other staff enter and leave correctional institutions every day. Should there be a high concentration of cases, those workers risk bringing infections home to their families and broader communities.
- Other States that have taken similar actions:
  - The Chief Justice of the Supreme Court of South Carolina, for example, issued a memorandum to all judges and court staff directing that "[a]ny person charged with a non-capital crime shall be ordered released pending trial on his own recognizance without surety, unless an unreasonable danger to the community will result or the accused is an extreme flight risk."

- The Supreme Court of Washington issued an order that, among other measures, declares that the COVID-19 pandemic shall be presumed to be a "material change in circumstances" for the purposes of such motions for bail review if the individual has been identified as part of a vulnerable or at-risk population by the CDC, and that the pandemic may constitute a material change in circumstances and "new information" for all others seeking amendment of a prior bail order. The order designates as priority matters all motions for pretrial release and bail modification, as well as plea hearings and sentencing hearings that will result in the anticipated release of a defendant within thirty days of the hearing.
- The Chief Justice of the Supreme Court of Michigan issued an order and further guidance instructing judges to "take into careful consideration" the present state of the COVID-19 emergency in making pretrial release decisions, including setting bail and conditions of release or probation. The Chief Justice later issued a statement directing that judges should release "far more people on their own recognizance" and "should use probation and treatment programs as jail alternatives." The statement called on judges and sheriffs to "use the statutory authority they have to reduce and suspend jail sentences for people who do not pose a public safety risk," and urged that "law enforcement should only arrest people and take them to jail if they pose an immediate threat to people in the community."
- The Supreme Court of New Jersey ordered mediation in response to a petition from the State's Office of the Public Defender. The mediation resulted in a consent order that suspends or commutes county jail sentences for low-risk inmates in light of the public health crisis, unless a State or county prosecutor objects to the release of a particular individual. If there is such an objection, a judge or special master will hold a hearing to determine if release would pose a significant risk to the safety of the inmate or the public.

- For pretrial detainees, the petitioners contend that the risk of infection and death constitutes punishment prior to adjudication, which is not reasonably related to a legitimate government interest, and therefore is inconsistent with due process. For those who have been convicted and sentenced, the petitioners argue that due process protections are violated when the deprivations suffered are "qualitatively different from the punishment characteristically suffered by a person convicted of crime." *Vitek v. Jones*, 445 U.S. 480, 493 (1980).
- In making a determination whether release would not be appropriate, the judge should consider the totality of the circumstances, including (1) the risk of the individual's exposure to COVID-19 in custody; (2) whether the defendant, although not held in preventative detention pursuant to G. L. c. 276, § 58A, nonetheless would pose a safety risk to the victim and the victim's family members, witnesses, the community, or him- or herself if released; (3) whether the defendant is particularly vulnerable to COVID-19 due to a preexisting medical condition or advanced age; (4) for a defendant who is accused of violating a condition of probation, whether the alleged violation is a new criminal offense or a technical violation; and (5) the defendant's release plan.
- Following any arrest during the COVID-19 state of emergency, and until further order of this court, a judicial officer should consider the risk that an arrestee either may contract COVID-19 while detained, or may infect others in a correctional institution, as a factor in determining whether bail is needed as a means to assure the individual's appearance before the court. Given the high risk posed by COVID-19 for people who are more than sixty years of age or who suffer from a high-risk condition as defined by the CDC, the age and health of an arrestee should be factored into such a bail determination.
- Our broad power of superintendence over the courts does not grant us the authority to authorize courts to revise or revoke defendants' custodial sentences, to stay the execution of sentence, or to order their temporary release unless a defendant (1) has moved under Mass. R. Crim. P. 29, within sixty days after imposition of sentence or the issuance of a decision on all pending appeals, to revise or revoke his or her sentence, (2) has appealed the conviction or sentence and the appeal remains

pending, or (3) has moved for a new trial under Mass. R. Crim. P. 30.

Speedy Trial Concerns Raised in the News:

- Kara Berg, *COVID-19 shutdowns push jury trials back, threaten to violate speedy trial rights*, LANSING STATE J., (Apr. 16, 2020), https://www.lansingstatejournal.com/story/news/2020/04/09/expert-covid-19-shutdowns-could-cause-speedy-trial-rights-violations/2939595001/
- The Times Ed., Bd., *Editorial: The Wisdom and Peril of Closing Courthouses to the Public,* L.A. TIMES (March 25, 2020), https://www.latimes.com/opinion/story/2020-03-25/coronavirus-denies-public-court-access
    - The "public" part of [the speedy trial] protection is sometimes forgotten. It's not absolute, and the Constitution may require it to apply only to trials, not to status conferences, say, or bail hearings. It's an explicit right of the defendant, not necessarily of the public.
    - But public access to judicial court is an essential part of American liberty and cannot be cast aside lightly. The public has the right and obligation to monitor its criminal justice system.
    - The Los Angeles Superior Court is set to begin video coverage of some criminal and juvenile proceedings as soon as next week, but only a few courtrooms will be covered.
- Matt Reynolds, *How the coronavirus is upending the criminal justice system*, ABA J. (Mar. 19, 2020), https://www.abajournal.com/web/article/pandemic-upends-criminal-justice-system.
    - Stephen Munkelt, a criminal defense attorney in Nevada City, California, says many inmates in the system are pretrial detainees who have been arrested but not convicted, and cannot afford bail to get out"
    - "One of the greatest at-risk populations in an epidemic situation is people in prisons and jails. If a virus gets into that kind of institution, it's very hard to slow it down or get rid of it," Munkelt says, adding he would like to see officials immediately release nonviolent inmates.
    - Last week, Iranian officials released 70,000 prisoners in a bid to fight the coronavirus. On Tuesday, the judiciary in Iran announced it had temporarily freed more than 85,000 people.
    - "This disruption is going to create more avenues for pressure on those accused of a crime to plead guilty rather than going through the whole process to try and establish that they didn't commit a crime,"
- Ryan Lucas, *Federal Courts Scramble to Adapt to Disruptions From Coronavirus Pandemic*, NAT'L PUB. RADIO (Mar. 16, 2020), https://www.npr.org/2020/03/16/816501308/federal-courts-scramble-to-adapt-to-disruptions-from-coronavirus-pandemic.
    - The 94 district courts and 13 circuit courts are grappling with how to handle the crisis. Each is crafting its own response in coordination with state and local health officials.

- Kara Scannell et al., *'More Challenging Than 9/11': Pandemic tests American criminal justice*, CNN (Mar. 17, 2020), https://www.cnn.com/2020/03/17/politics/pandemic-tests-american-criminal-justice/index.html.
  - The judge overseeing the trial of a man charged in a NY sex trafficking ring postponed thetrial for at least 2 weeks midway through testimony after defense attorney Alan Nelson raised concerns that the jury will rush to judgement to avoid traveling to the courthouse as the coronavirus pandemic was multiplying in the city.
    - The National Association of Criminal Defense Lawyers joined in support of the defense lawyers and called the government's position (that the trial should continue) "dangerously obtuse."
  - Courts were temporarily closed after the 9/11 terrorist attacks but some lawyers say the unknowns about the virus and how long it will last brings unprecedented challenges.
    - After 9/11 some cases were dismissed early and prosecutors were forced to reach premature settlements in others.
  - A NY federal judge on Monday allowed a juror in a criminal trial to deliberate by video conferencing over the objections of prosecutors.
  - In 2001 and this month, federal judges have turned to public interest exceptions in federal statures to ensure that courthouse disruptions would not count against deadlines guaranteed by a defendant's right to quick justice.
    - In the aftermath of 9/11, the chief justice in the Southern District of NY issued a blanket order discounting the time lost in cases from the initial closure against the "speedy trial" clock.
    - Last week, Colleen McMahon made a similar judgement, excluding a time period through the end of next month.
- Clare Riva, *COVID-19 Endangers Not Just Public Health, but the Constitution*, CONST. ACCOUNTABILITY CTR. (Mar. 17, 2020),https://www.theusconstitution.org/blog/covid-19-endangers- not-just-public-health-but-the-constitution/.
  - Courts are supposed to balance the four Barker factors for each particular defendant in deciding whether their right to a speedy trial has been infringed, but most courts that have addressed the speedy trial right during the coronavirus crises have issued or requested blanket waivers of the timelines attached to individuals' rights
    - These broad proclamations fail to engage in the individualized speedy trial assessment that SCOTUS suggested the Constitution requires and that Congress passed legislation to protect.
- Jim Franco, *DA Soares Asks for Executive Order to Waive Speedy Trial During Pandemic*, SPOTLIGHTNEWS (Mar. 17, 2020), https://www.spotlightnews.com/news/crime/2020/03/17/da-soares-asks-for-executive- order-to-waive-speedy-trial-during-pandemic/.
  - There is precedent to such an order—Gov. George Pataki suspended the speedy trial requirements following 9/11. DA Soares argues that the current pandemic falls under the "exceptional circumstances."
- Melissa Chan, *'It Will Have Effects for Months and Years.' From Jury Duty to Trials, Coronavirus Is Wreaking Havoc on Courts*, TIME (Mar. 16, 2020), https://time.com/5803037/coronavirus-courts-jury- duty/.
  - On Monday, March 16th SCOTUS postponed oral arguments for the first time in over 100 years; the last time it did so was in 1918 in response to the Spanish flu epidemic.
  - Courts in several states, including NY, Washington State, Texas, Connecticut, Missouri, Florida, Arizona, Ohio and Virginia have suspended jury trials.
  - Michigan's Supreme Court issued an executive order on Monday, March 16th, granting trial judges the power to adjourn any civil and criminal matter if the defendant is not in custody and try to use videoconferencing if the defendant is in custody.
  - In a statement on March 12, Dallas County Judge Clay Jenkins said he was suspending civil jury trials, but not criminal ones, because the 'inability to guarantee a speedy trial could result in cases being dismissed.'

- Richard A. Oppel Jr. & Serge F. Kovaleski, *Justice is Blind. What if She Also Has theCoronavirus?*, N.Y. TIMES (Mar. 12, 2020), https://www.nytimes.com/2020/03/12/us/coronavirus-police-jails-courthouses.html.
    - In New Hampshire all criminal cases in the state Superior Court were canceled for 30 days and juries were ordered not to report.
    - Federal courthouses remain open in Seattle and Tacoma, but all other proceedings that require lawyers, jurors or anyone else to show up to a courtroom have been suspended.
    - If too many people in high-risk categories were excused or unable to participate in jury duty, it could raise civil rights concerns about whether juries would be adequately representative.

Statutes

Wisconsin's Speedy Trial Guarantee:

WIS. CONST. ART. I, § 7. Rights of the Accused.
In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

§ 14:1. IN GENERAL, 9 WIS. PRAC., CRIMINAL PRACTICE & PROCEDURE § 14:1 (2d ed.)
The constitutional test applied by Wisconsin courts to determine whether a defendant has been denied a "speedy trial" depends on the stage at which the improper delay is claimed to have occurred. If the defendant asserts that the State improperly delayed bringing charges against him or her, then a Fifth Amendment due process test applies. If the defendant claims that an improper delay occurred after charges have been filed, then a Sixth Amendment test applies. In Wisconsin, charges are considered to have been brought once a complaint has been filed. The remedy under both of these tests is dismissal of the charges with prejudice.

There is also a statutory right to a speedy trial once charges have been brought. However, Wis. St. § 971.10 plays no role in the constitutional speedy-trial analysis used by the Wisconsin courts to determine whether charges should be dismissed. The statute is merely a mechanism by which a defendant can be discharged from custody or released from the conditions of his or her bond if the time limits are violated.

WIS. STAT. ANN. § 971.10. Speedy Trial
(1) In misdemeanor actions trial shall commence within 60 days from the date of the defendant's initial appearance in court.
(2)(a) The trial of a defendant charged with a felony shall commence within 90 days from the date trial is demanded by any party in writing or on the record. If the demand is made in writing, a copy shall be served upon the opposing party. The demand may not be made until after the filing of the information or indictment.
(b) If the court is unable to schedule a trial pursuant to par. (a), the court shall request assignment of another judge pursuant to s. 751.03.
(3)(a) A court may grant a continuance in a case, upon its own motion or the motion of any party, if the ends of justice served by taking action outweigh the best interest of the public and the defendant in a speedy trial. A continuance shall not be granted under this paragraph unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of the continuance outweigh the best interests of the public and the defendant in a speedy trial.
(b) The factors, among others, which the court shall consider in determining whether to grant a continuance under par. (a) are:
1. Whether the failure to grant the continuance in the proceeding would be likely to make a continuation of the proceeding impossible or result in a miscarriage of justice.
2. Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.
3. The interests of the victim, as defined in s. 950.02 (4).
(c) No continuance under par. (a) may be granted because of general congestion of the court's calendar or the lack of diligent preparation or the failure to obtain available witnesses on the part of the state.
(4) Every defendant not tried in accordance with this section shall be discharged from custody but the obligations of the bond or other conditions of release of a defendant shall continue until modified or until the bond is released or the conditions removed.

WIS. STAT. ANN. § 950.02. Definitions
(4)(a) “Victim” means any of the following:
1. A person against whom a crime has been committed.
2. If the person specified in subd. 1. is a child, a parent, guardian or legal custodian of the child.
3. If a person specified in subd. 1. is physically or emotionally unable to exercise the rights granted under s. 950.04 or article I, section 9m, of the Wisconsin constitution, a person designated by the person specified in subd. 1. or a family member of the person specified in subd. 1.
4. If a person specified in subd. 1. is deceased, any of the following:
a. A family member of the person who is deceased.
b. A person who resided with the person who is deceased.
5. If a person specified in subd. 1. has been adjudicated incompetent in this state, the guardian of the person appointed for him or her.
(b) “Victim” does not include the person charged with or alleged to have committed the crime. (4g) “Victim advocate” has the meaning given in s. 905.045(1)(e).
(4m) “Victim and witness office” means an organization or program that provides services for which the county receives reimbursement under this chapter.

Case Law

AEQUITAS

- *Barker v. Wingo*, 407 U.S. 514 (1972).
  - The seminal SCOTUS decision discussing the right to a speedy trial. Justice Powell wrote that the right contemplates that "all accused persons be treated to decent and fair procedures," and protects three main interests: the prevention of oppressive pretrial incarceration, minimization of anxiety and concern of the accused; and the limitation of the possibility that the defense will be impaired. Barker sets out a balancing test, directing the consideration of the length of the delay, the reason for the delay, the defendant's assertion of his or her right and prejudice to the defendant.
- *Vitek v. Jones*, 445 U.S. 480 (1980).
- *State v. Blanck*, 638 N.W.2d 910 (Wis. Ct. App. 2001).
- *State v. Rogers*, 70 Wis. 2d 160 (1975).
- *U.S. v. Marion*, 404 U.S. 307 (1971).
- *State v. Borhegyi*, 222 Wis. 2d 506 (Wis. Ct. App. 1998).
- *State v. Mullis*, 81 Wis.2d 454 (1978).
- *Taylor v. State*, 55 Wis.2d 168 (1972).
- *State v. Kwitek*, 193 N.W.2d 682 (1972).
- *Green v. State*, 75 Wis.2d 631 (1977).
- *Scarbrough v. State*, 76 Wis.2d 87 (1977).
- *Hadley v. State*, 66 Wis.2d 350 (1975).
- *Dickey v. Florida*, 404 U.S. 307 (1970).
- *Norwood v. State*, 74 Wis. 2d 343 (1976).
- *Hatcher v. State*, 83 Wis.2d 559 (1978).
- *State v. Shears*, 68 Wis.2d 217 (1975).
- *Hipp v. State*, 75 Wis.2d 621 (1977).
- *State v. Ziegenhagen*, 73 Wis.2d 656 (1976).
- *Watson v. State*, 64 Wis.2d 264 (1974).
- *Day v. State*, 61 Wis.2d 236 (1973).

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