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NOTE

THE CONSTITUTIONAL FLOOR DOCTRINE AND THE RIGHT TO A SPEEDY TRIAL

I. INTRODUCTION

Two warring themes consistently permeate our system of criminal justice: procedural protection of the accused and the search for the truth. To address the first, American courts created a due process model to ensure that criminal defendants are afforded fundamentally fair trials. This formula recognizes that greater stakes in criminal proceedings, including the loss of liberty and extreme social stigma, require the scales of justice be heavily tipped in favor of the accused. Counterbalancing the interest of the criminal defendant is the polar star in the sky of our judicial system: truth. Any effective criminal justice process must be designed in such a way as to convict the guilty and acquit the innocent. In short, the truth should generally prevail. While these competing themes are clearly often in conflict with one another, they do converge to support at least one conclusion: criminal defendants should have a meaningful right to a speedy trial. The speedy trial right aids the due process framework by preventing undue oppression of presumptively innocent defendants; at the same time, it also ensures more accuracy in juries' findings by indirectly mandating fresher evidence.

Unfortunately, the speedy trial right is now under attack in many jurisdictions because pragmatic judges are loath to address the pending crisis of crowded dockets. When faced with a dilemma of confronting a serious constitutional problem undercutting defendants' rights, judges too often elect to delay cases for years. In an effort to alleviate this problem, courts have developed constitutional doctrines designed to avoid the delays caused by rescheduling criminal trials. These doctrines have come to be known as the constitutional floor doctrine.


rights and the courts’ search for the truth or, in the alternative, eroding the speedy trial right for the sake of temporary expediency, many modern courts have consistently chosen the latter.

On May 2, 2003, the North Carolina Supreme Court elected to contribute to those judicial waves slowly eroding the fundamental right to a speedy trial. In State v. Spivey, the Court purported to apply the federally-mandated Barker v. Wingo speedy trial balancing test in an opinion holding that a 1,659-day pre-trial delay did not violate the right, guaranteed by both the United States and North Carolina Constitutions. As will be shown in this article, however, the Court did not apply the flexible Barker test, but rather applied a more rigid framework with precedential roots in pre-Barker North Carolina decisions. In light of the controlling authorities, the test articulated in Spivey is either an unconstitutional departure from superior precedent or an unconstitutional assertion of a lesser speedy trial right from Article I, § 18 of the North Carolina Constitution.

This article will begin with a quick description of the historical origins of the speedy trial right and the events marking its quiet evolution into a hallmark of our criminal justice system. It will then move into a discussion of the decisions articulating principles of new federalism which require that state courts defer to the federal interpretations of fundamental rights, before discussing of the controlling Supreme Court cases fashioning the test by which violations of the right are measured. Next, this article will showcase the critical differences between Spivey and Barker to demonstrate why North Carolina’s speedy trial test intrudes upon those principles of federalism. The article will then discuss why Spivey’s excessive restrictions on the right to a speedy trial undermine both central purposes of our criminal justice system: the protection of the accused and the search for the truth. Finally, this article will conclude with two suggestions for remedying this severe constitutional crisis: revival of the Speedy Trial Act or a judicial expansion of the speedy trial right based on the North Carolina Constitution.

5. U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”); N.C. Const. art. I, § 18 (“right and justice shall be administered without favor, denial, or delay”).
II. THE RIGHT FROM RUNNYMEDE

The venerable right to a speedy trial, owing its origins to the Magna Carta, is as old as our English legal heritage. In the midst of a civil war, English barons cornered King John on the meadows of Runnymede in 1215 and forced the desperate monarch to relinquish some powers of his throne. Affixing his seal to this "Great Charter," King John ceded that some rights are protected against the authority of the sovereign. By the terms of this historic parchment, even the king was subject to a rule of law. Of the many limitations on the power of the sovereign, the Magna Carta required that he respect the right of all "freemen" to a speedy disposition of trials. Over the course of the following centuries, this right took on increasing importance as the steady march of progress expanded that pool of "free" men.

The speedy trial right eventually migrated to America with the first ships of English settlers and, without much controversy, snuck among those guarantees forming the hallmarks of our criminal justice system. Before the Revolutionary War, American colonists heralded the Magna Carta and its provisions as natural law, inalienable by any act of the king or Parliament. Even after disagreement over this principle compelled the American colonies to divorce themselves from the British Empire, the speedy trial right attached itself to the emerging American legal system. George Mason borrowed the speedy trial guarantee from the Magna Carta while authoring the Virginia Declaration of Rights in the early stages of the American Revolution. Almost fourteen years later, James Madison proposed the speedy trial right among a "Bill of Rights," a list of amendments designed to quell concerns about the expansive power of the new post-Articles govern-

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9. Id.
10. Klopfer, 386 U.S. at 223 (quoting the Magna Carta, "We will sell to no man, we will not deny or defer to any man either justice or right") (emphasis added).
11. Id. at 225-26.
12. Id.
13. See Turner supra note 7, at 34-36.
14. VA. DECLARATION OF RIGHTS § 8 (1776) ("That in all capital or criminal prosecutions a man hath a right . . . to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land or the judgment of his peers."); Klopfer, 386 U.S. at 225.
When Madison's proposals passed Congress and survived ratification, the right to a speedy trial was memorialized as constitutional doctrine in the Sixth Amendment.

While the speedy trial prescription applied originally only to the federal government, the Supreme Court in 1967 held that the speedy trial right, "one of the most basic rights preserved by our Constitution," is encompassed in the Fourteenth Amendment's Due Process Clause and therefore also is binding on the states.

In the proceeding years after the American Revolution, the Speedy Trial Clause generated few waves in constitutional litigation. In the rare speedy trial claim crashing the shores of the High Court, Justices had refused to fashion a test for determining whether the right had been violated. With no formal test and very little guidance, widely disparate standards were applied depending simply upon the judge of record or the state seal emblazoned on the wall behind him. This state of constitutional disarray compelled Justice Brennan to note in 1970 a pressing need to finally "trace [the] . . . contours" of the right.

### III. A Higher Authority

In 1972, a unanimous United States Supreme Court finally resolved to refine the boundaries of the speedy trial right in *Barker v. Wingo*. Declining to intrude into the legislature's rule-making function by setting inflexible deadlines, the Court instead fashioned a flexible, four-part balancing test for determinations of whether the right has been violated. The four factors to be considered include the length of the delay, the government's reason for the delay, the defendant's responsibility to assert the right, and resulting prejudice to

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16. U.S. Const. amend. VI.
17. See generally *Barron v. Baltimore*, 32 U.S. 243 (1833) (holding, in the pre-Fourteenth Amendment era, that the Bill of Rights prescribes only federal state action infringing upon the rights granted in those amendments).
23. *Id.* at 529-30.
24. *Id.* at 530-33.
the defendant.\textsuperscript{25} According to the Court, these four considerations lack any "talismanic qualities" and are therefore neither "necessary [nor] sufficient condition[s] to the finding of a deprivation of the right."\textsuperscript{26}

In \textit{Barker}, the Supreme Court exercised its role as final arbiter of those rights guaranteed by the United States Constitution and its Amendments. While the Bill of Rights originally vested in the people protection from only the federal government,\textsuperscript{27} the passage of the Fourteenth Amendment provided, the Supreme Court surmised, provided sufficient justification to grant the people the same safeguards against the states.\textsuperscript{28} Ultimately, the Court found that the "fundamental rights" in the first eight amendments are incorporated to the states as Due Process guarantees.\textsuperscript{29} The speedy trial right stands among such "fundamental rights."\textsuperscript{30}

The question then remains to what extent may state courts deviate from the test articulated in \textit{Barker}. While a sizeable contingent of the Supreme Court at one time believed that the states were amenable only to those "fundamental" parts of fundamental rights,\textsuperscript{31} the Court ultimately decided the best approach was identical application at both state and federal levels.\textsuperscript{32} According to Justice Goldberg, anything less would allow "watered-down, subjective version[s] of the individual guarantees of the Bill of Rights" and would grant states "greater latitude than the Federal Government to abridge concededly fundamental liberties protected by the Constitution."\textsuperscript{33}

The framework adopted by the Supreme Court for assessing violations of fundamental constitutional rights has been clarified as a "con-
stitutional floor” for states. As long as states buttress their decisions on “adequate and independent state grounds,” they may provide criminal defendants greater protection than the federal courts. They may not, however, use those same independent grounds to deprive their citizens of the minimum federal guarantee. The classic example of this constitutional floor doctrine is *Pruneyard Shopping Center v. Robins*, in which the United States Supreme Court upheld the California Supreme Court’s interpretation of their state constitution as converting malls into public forums, after the High Court had recognized in *Lloyd Corp. v. Tanner* that the Federal Constitution does not require that malls be treated as public forums.

Applying this doctrine to speedy trial jurisprudence, the North Carolina Supreme Court could hold that our state’s speedy trial guarantee, Article I, § 18 of the North Carolina Constitution, provides greater protection than *Barker*. The Court, however, could not avoid *Barker* by holding that our state constitution confers a lesser right. In sum, the North Carolina Supreme Court cannot construe its state constitution’s speedy trial right as less protective than the United States Supreme Court decisions articulating that right.

IV. Along Came A Spivey

The latest chapter in North Carolina speedy trial constitutional doctrine began on October 17, 1994, when police officers were dispatched to a Lumberton, North Carolina housing project. After arriving on the scene, they found Jermaine Morris lying dead with eleven bullets lodged in his torso. The very next day, a nervous Henry Bernard Spivey, Jr. threw open the doors of the Lumberton Police Department and confessed his involvement in Morris’ death. Spivey was

36. See U.S. Const. art. § 2; see also Barry Latzer, *Towards the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. Crim. Law & Criminology 63, 64 n.2 (1996). While states are free to interpret their constitutional provisions as less protective of individual rights than the federal government, the Supremacy Clause prohibits enforcement of less protective state laws when the defendant is entitled to broader federal protection.
40. See *id.* Spivey informed the police that he and the victim, Jermaine Morris, had been arguing over a female, Samantha Fields, when an angered Morris struck Spivey
immediately led away to a prison cell. There he spent the next four and a half years of his life still waiting for trial. If he had scratched a mark in the wall for each day spent in that span, those scratches would have numbered 1,659 when he entered a guilty plea on May 3, 1999.41

On November 27, 1995, after about thirteen months of pretrial incarceration, Henry Spivey, Jr. submitted to the judge a handwritten pro se “Motion Requesting a Prompt and Speedy Trial” which objected to all further continuances to which his lawyer may acquiesce.42 Spivey’s attorney objected and the judge refused to consider the motion. Roughly twenty-three months later, on August 8, 1997, Spivey’s attorney filed a motion to dismiss for lack of a speedy trial.43 Judge Jack Thompson set a special hearing for the matter and, after hearing arguments, denied the motion in open court.44

With the prospects of a trial looming, Spivey cut short his status as a pretrial detainee by pleading guilty to a lesser offense, second-degree murder.45 The predicate plea agreement reserved for Spivey the right to appeal Judge Thompson’s denial of his motion to dismiss.46 Henry Spivey, Jr. availed himself of this provision, but to little effect in the North Carolina appellate courts.47 The Court of Appeals, over the dissent of Judge Timmons-Goodson, affirmed the lower court’s decision.48

When the case reached the North Carolina Supreme Court, the Court, by a margin of five to two, affirmed the denial of Spivey’s motion.49 Writing for the majority, Justice Wainwright first noted the controlling authorities: the Sixth Amendment of the U.S. Constitution and Article I, § 18 of the North Carolina Constitution.50 Both, he added, are to be interpreted through the lens of the Barker v. Wingo balancing test.51 The length of the delay, the reason for the delay, the defendant’s assertion of the right, and the prejudice to the defendant “are related factors and must be considered together with any such

41. Id. at 119, 579 S.E.2d at 257 (Brady, J., dissenting).
42. Id at 115, 579 S.E.2d at 253.
43. Id.
44. Id. at 116, 579 S.E.2d at 253.
45. Id.
46. Id.
47. Id.
49. Spivey, 357 N.C. at 114, 579 S.E.2d at 251.
50. Id. at 118, 579 S.E.2d at 254-55.
51. Id.
circumstances as may be relevant." The court continued, "[i]n sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process."

Despite quoting Barker's proscription against talismans, the Spivey majority proceeded to apply a test replete with such magical hurdles. While Barker mandated a "sensitive balancing process," the Spivey Court adopted an analytical framework that is best described as an obstacle course: only after jumping over hurdles and meeting some high threshold of performance at each stage can a criminal defendant finally claim his or her constitutional right. This judicially created obstacle course is replete with magical talismans designed before Barker leveled the playing field; their use should not have persisted past that point.

1. Stage One: Length of Delay

The first hurdle in the judicially created obstacle course is based on the first Barker factor, the length of the delay. The Barker Court noted that the first factor serves as an initial "triggering mechanism." Only until the length of the defendant's pretrial incarceration exceeds some "presumptively prejudicial" length of time may the court proceed to inquiry of the other three factors. Nowhere, however, does the Barker Court indicate that this triggering function divorces the "length of time" factor from the rest of the balancing equation. Nowhere does Justice Powell say that this "difficult and sensitive balancing process" requires courts to treat a pretrial delay of ten years no differently than a pretrial delay barely touching the lower reaches of "presumptive prejudice."

Later U.S. Supreme Court decisions have clarified this aspect of the balancing test by recognizing that judicial consideration of this factor, in fact, requires a double inquiry. After asking whether the delay is sufficient to trigger further inquiry, reviewing courts must then consider "the extent to which the delay stretches beyond that bare minimum needed to trigger judicial examination of the claim."

52. Id. (quoting Barker, 407 U.S. at 533).
53. Id.
54. Id.
55. Spivey, 357 N.C. at 118, 579 S.E.2d at 254 (quoting Barker, 407 U.S. at 530).
57. Id. at 530.
58. Id. at 533.
60. Id. at 652.
period of time separating the actual delay from the lower reaches of a presumptively prejudicial delay is of great importance, the Court has noted, because the passage of time alone can prejudice the defendant in ways that cannot be adequately measured or remedied.61

In Spivey, the N.C. Supreme Court engages in a very limited inquiry on this first factor, restricting the analysis only to whether the period of four and a half years amounted to a sufficiently “presumptively prejudicial” period of time.62 This application defies not only superior case authority, but also the plain language of the phrase it invokes. “Presumptively prejudicial” is no term of art; it has a very real and practical meaning, one recognized consistently before and after Barker.63 As will be discussed in greater depth later in this article, a greater period of delay necessarily entails a greater likelihood of prejudice. The presumption must therefore be given different weight in each case depending on the length of the delay.64

2. Stage Two: Reason for Delay

The next obstacle offered by the Spivey majority stems from Barker’s second factor, the reason for the delay.65 In Barker, Justice Powell held that different weights should be assigned to different justifications proffered by the government.66 Powell offered a sliding-scale approach to this balancing. At one extreme, prosecutorial acts evincing a clear intent to prejudice the ability of the defendant to mount a defense should tip the scales heavily in favor of the defendant, almost irrespective of the other three factors.67 At the other extreme, justifica-

61. See Dickey v. Florida, 398 U.S. 30, 53 (1970) (Brennan, J., concurring) (“Although prejudice seems to be an essential element of speedy-trial violations, it does not follow that prejudice—or its absence, if the burden of proof is on the government—can be satisfactorily shown in most cases. . . . [C]oncrete evidence of prejudice is often not at hand. Even if it is possible to show that witnesses and documents, once present, are now unavailable, proving their materiality is more difficult. And it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and available witnesses.”); see also United States v. Mann, 291 F. Supp. 268, 271 (1968) (With long delays, “prejudice may fairly be presumed simply because everyone knows that memories fade, evidence is lost, and the burden of anxiety upon any criminal defendant increases with the passing months and years.”).
62. Spivey, 357 N.C. at 119, 579 S.E.2d at 255 (concluding four and one half years is sufficient delay to trigger inquiry into the other factors).
63. See Dickey, 398 U.S. at 53 (Brennan, J., concurring); Barker, 407 U.S. at 532.
64. Barker, 407 U.S. at 532.
65. Spivey, 357 N.C. at 118, 579 S.E.2d at 254 (quoting Barker, 407 U.S. at 530).
67. See id.
ble reasons such as a missing witness can excuse some reasonable delay and only lightly tip the balance in the defendant’s favor, if at all.68 The Court also noted the existence of a middle range of “neutral reasons” which courts must weigh against the state, albeit to a lesser extent, because “the ultimate responsibility for such circumstances must rest with the government rather than the defendant.”69 Justice Powell offered two examples of such “neutral” justifications: prosecutorial negligence and crowded dockets.70

Robeson County prosecutors defended the delay in bringing Spivey’s case to trial by arguing that their dockets were contemporaneously clogged with murder cases and that renovation of the courthouse limited the number of cases they could hear at one time.71 Applying the Barker test, crowded dockets and other circumstances for which the government ultimately bears responsibility fall in the neutral range, weighing to the defendant’s advantage in the sensitive balancing process.

In analyzing this second factor, however, the Spivey majority presents an interesting hurdle clearly not contemplated by the U.S. Supreme Court in 1972. The Spivey majority places in front of a criminal defendant an absolute bar to the weighting of this factor unless he can show either “neglect or willfulness” on the part of prosecutors in bringing his case to trial.72 This harsh “all-or-nothing” approach to the “reason for delay” factor owns precedent in a long line of North Carolina Supreme Court cases.73 An older variation of this rule migrated to this state in 1963,74 by a decision citing a U.S. Supreme Court opinion from 1956.75 Soon after Barker rocked the foundational pillars of the

68. Id.
69. Id.
70. Id.
71. Spivey, 357 N.C. at 120, 579 S.E.2d at 255-56.
72. See id. at 119, 579 S.E.2d at 255 (“[D]efendant has the burden of showing that the delay was caused by the neglect or willfulness of the prosecution. Only after the defendant has carried his burden of proof by offering prima facie evidence showing that the delay was caused by the neglect or willfulness of the prosecution must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the prima facie evidence.”).
speedy trial right in 1972, the North Carolina Supreme Court in *State v. Hill* encountered the dilemma of contradictory precedent at the state and federal levels.\(^7^6\) Surprisingly, the *Hill* Court specifically noted the apparent contradiction between the *Barker* language and the North Carolina rule, but nonetheless applied the local state rule.\(^7^7\) Such defiance of a constitutional floor established by the United States Supreme Court is plainly incompatible with the modern conception of federalism.

The all-or-nothing, "neglect or willfulness" framework applied in North Carolina courts contradicts the *Barker* framework in three key respects. First and foremost, it necessarily precludes any "sensitive" balancing of the particular facts of each case.\(^7^8\) Once the reviewing court determines whether the hurdle has been met, the *Spivey* framework does not require further analysis of the particular facts relevant to that inquiry. Second, it places prosecutorial misconduct on the same plane as prosecutorial negligence. The operative question then is whether the prosecutors are culpable, not the extent of their culpability. Unfortunately, this second difference has had little practical value for criminal defendants, given the deference provided by our state's courts to prosecutors' proffered excuses.\(^7^9\)

A third and important distinction between the decisions is *Spivey's* crowded dockets exemption. In *Spivey*, the Court applies the North Carolina approach specifically exempting crowded dockets from inquiry, allowing such an excuse to operate as a "royal flush;" a simple demonstration that the prosecutors tried every case in order could defeat any invocation of the speedy trial right.\(^8^0\) North Carolina, in effect, places the entire onus of clogged dockets on the defendant in


\(^{77}\) *Id.* ("[The *Barker* Court held that a] 'neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.' In this *State*, the burden of showing neglect or willful delay is on the defendant.") (emphasis added).

\(^{78}\) *Barker*, 407 U.S. at 533.

\(^{79}\) Some judges in this state have acknowledged the possibility that crowded dockets could be the result of prosecutorial negligence. See *State v. Hammond*, 141 N.C. App. 152, 176-77, 541 S.E.2d 166, 183 (2000) (Greene, J., dissenting) ("Although there is no showing the prosecutor intentionally delayed the trial for the purpose of obtaining an advantage over defendant, the record clearly shows [that] the prosecutor did not make a reasonable effort to avoid the excessive delay of defendant's trial and thus was negligent.").

\(^{80}\) *Spivey*, 357 N.C. at 117, S.E.2d at 254 ("Our courts have consistently recognized congestion of criminal dockets as a valid justification for delay.") (quoting *State v. Hughes*, 54 N.C. App. 117, 199, 282 S.E.2d 504, 506 (1981)).
spite of the fact that prosecutors exercise great control and defendants exercise little control over the speed at which trials are processed. It also appears to have largely gone unnoticed by many North Carolina jurists that crowded dockets are sometimes the result of prosecutors' negligence. In such circumstances, even the Spivey test should mandate weighting of this factor in favor of the defendant.

3. Stage Three: Assertion of the Right

The third stage of the obstacle course test applied by the Spivey Court stems from the third Barker factor, the defendant's responsibility to claim his right. In analyzing this factor, the North Carolina Supreme Court once again purports to apply the Barker balancing test but instead invokes relics of antiquated, pre-Barker North Carolina precedent explicitly rejected by the Supreme Court in 1972. In Barker v. Wingo, the Supreme Court considered and rejected a rule requiring the defendant to specifically motion for a speedy trial. The "demand-waiver" approach, applied by North Carolina courts before Barker, construed defendants' silence as a waiver of the right to a speedy trial. In denouncing this approach, Justice Powell argued its impracticality; it inevitably left defense counsel in a quandary. She could either invoke the right early and often, threatening her client's interests by disenabling time for preparation, or quietly acquiesce to the government's continuances, waiving her client's rights to a prompt disposition.

The better approach, Justice Powell opined, was a flexible rule in which the defendant has some responsibility to raise the right, but where silence and acquiescence are not treated equally. The rule, as stated by Powell, thus entailed more balancing, permitting "for example, a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed." The majority opinion and concurrence, however, made it clear that it would be inor-

81. See Hammond, 141 N.C. at 176-77, 541 S.E.2d at 183.
82. Spivey, 357 N.C. at 118, 579 S.E.2d at 254 (quoting Barker, 407 U.S. at 530).
85. See Barker, 407 U.S. at 523-25.
86. Id.
87. Id. at 528.
88. Id. at 528-29.
89. Id.
It is ordinarily difficult to show a violation of the speedy trial right unless the defendant made such protestations.  

In Spivey, the Court takes the demand-waiver approach rejected by Barker and peppers it with an even stronger flavor. After Spivey, a defendant must not only promptly motion for a speedy trial for this factor to be weighted in the balancing scheme, but he also must do so with the help and consent of his counsel.  

Henry Spivey's specific requests for a speedy trial were afforded no weight whatsoever by the North Carolina Supreme Court simply because the request was made pro se over the objection of his attorney. The motion, the North Carolina Supreme Court held, was not determinative as to whether he had requested a speedy trial, because "a defendant does not have the right to be represented by counsel and [to also] appear pro se."  

Besides creating an unsettling implication that lawyers- and not individuals- own individual rights, this language in Spivey contradicts Justice Powell's illustrations of the flexible Barker approach. In Barker, Powell explains that a situation in which the defendant is not involved in his lawyer's decisions to acquiesce to continuances should not be weighted the same as a situation in which an informed defendant deliberately and knowingly acquiesces to the government's

90. See id. at 534 ("More important than the absence of serious prejudice, is the fact that Barker did not want a speedy trial. . . . Instead the record strongly suggests that while he hoped to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges, he definitely did not want to be tried."); see also id. at 536-37 (White, J., concurring) ("Although the Court rejects petitioner's speedy trial claim and affirms denial of his petition for habeas corpus, it is apparent that had Barker not so clearly acquiesced in the major delays involved in this case, the result would have been otherwise.").

91. Cf. Spivey, 357 N.C. at 121, 579 S.E.2d at 256 (holding that the defendant's request for a speedy trial was not weighted in the balancing test because the defense counsel's objection to that request).

92. Id.

93. Id.

94. Note how Spivey is deprived of any meaningful choice in this matter. He has only two options: (1) he can defer to the lawyer's judgment, thereby waiving any right to a speedy trial; or (2) he can also fire his attorney for objecting to this request, but doing so would engender even more delay, frustrating the very purpose of the request.

95. While Powell's illustrations might be considered dicta, not all scholars subscribe to such a narrow definition of "holding." See Ruggero J. Aldisert, Precedent: What It is and What It Isn't, When Do We Kiss It and When Do We Kill It?, 17 Pepp. L. Rev. 605, 607 (1990) (arguing cases' holdings are limited only to their facts and outcome); but see Michael C. Dorf, Dicta and Article III, 142 U. Pa. L. Rev. 1997, 1998-99 (1994) (arguing that the holding/dictum distinction should also attribute special significance to courts' rationales).
delays. Powell referenced an example of a defendant who was not adequately informed by his counsel of his right. The facts of Spivey appear to warrant an even greater tipping of the scales, since the criminal defendant took extraordinary measures to ensure the court understood his desire for a speedy trial.

4. Stage Four: Prejudice

Finally, if a criminal defendant successfully navigates these first three obstacles, he still must clear the hurdle of the fourth Barker factor, prejudice to the defendant. In the pre-Barker era, the United States Supreme Court consistently recognized three principle interests served by the speedy trial right: prevention of undue and oppressive pretrial incarceration, minimization of the accused's anxiety arising from public accusation, and reduction of the possibility that the delay will prejudice the ability of the accused to defend himself. In Barker, Justice Powell held that the fourth factor should be assessed in light of these three interests. He opined that the last of the three interests is the most important "because the inability of a defendant to adequately prepare his case skews the fairness of the entire system." The Barker Court did not address whether an affirmative showing of particularized prejudice is required.

The question of whether a showing of actual prejudice is necessary, therefore, was unresolved. In United States v. Loud Hawk, a closely divided Supreme Court hinted in dictum it was willing to entertain a harsher rule allowing a defendant to prevail on a speedy trial claim only when he can affirmatively demonstrate that the delay was

97. Id.
98. Spivey, 357 N.C. at 115, 579 S.E.2d at 253.
99. Id. at 118, 579 S.E.2d at 254 (quoting Barker, 407 U.S. at 530).
102. Id.
103. Decisions closely following Barker did not find such a requirement of actual, particularized prejudice in the language of the opinion. See Moore v. Arizona, 414 U.S. 25, 27 (1973) ("Moreover, prejudice to a defendant caused by delay in bringing him to trial is not confined to the possible prejudice to his defense in those proceedings.").
outcome-determinative. In the principal decision, *Doggett v. United States*, however, another slim majority rejected such an approach. According to the *Doggett* Court, prejudice can be presumed when there is excessive delay, even absent a showing of particularized prejudice. Central to this holding was a recognition that prejudice can take forms that are not easily quantifiable or measurable. Requiring the defendant prove such slippery facts as the absence or loss of memory of witnesses places an insurmountable burden before even meritorious claims.

In *Spivey*, the North Carolina Supreme Court applied a rigid test requiring that the defendant affirmatively prove "actual and substantial" prejudice in order to succeed on the asserted speedy trial right violation. In essence, *Spivey* apparently requires defendants to prove their delay was outcome-determinative; that is, they would have been acquitted had their trials been held as soon as was practicable. The *Spivey* Court therefore, unlike *Barker* and *Doggett*, considers only one of the three forms of prejudice, the effect on the accused's trial, and places on the defendant the inordinately high burden of proving the delay actually hindered his ability to mount a defense. One of the first times this "actual and substantial prejudice" requirement is mentioned by a North Carolina court in the context of the right to a speedy trial was in *State v. Brown*, which despite post-dating *Barker* by about six months did not mention the landmark decision.

Nevertheless, this "actual and substantial prejudice" language appears to have reached the *Spivey* Court through faulty interpretations of federal constitutional law. Specifically, the error likely results from a failure of some courts to recognize the difference between the *Barker* Sixth Amendment speedy trial test and the *Lovasco* Due Process test designed to capture those claims falling outside of the ambit of the Sixth Amendment's protection. In *Marion*, the United States Supreme Court held that Sixth Amendment protects defendants from excessive delays only after the point at which a formal accusation is lodged.

105. *Id.* at 315 (holding that a defendant's showing of "the possibility of prejudice not sufficient to support [the defendant's position that] . . . speedy trial rights were violated.") (emphasis added).
106. See *Doggett*, 505 U.S. at 655 ("[C]onsideration of prejudice is not limited to the specifically demonstrable, and . . . affirmative proof of particularized prejudice is not essential to every speedy trial claim.").
107. *Id.*
108. *Id.*
109. See *Spivey*, 357 N.C. at 122, 579 S.E.2d at 257.
110. See *Brown*, 282 N.C. at 123, 191 S.E.2d at 664.
111. See *Marion*, 404 U.S. at 324.
The Due Process Clause, in addition to any relevant statutes of limitation, protects defendants from excessive delay before that point of accusation. While the more stringent two-pronged Lovasco test does require "actual and substantial prejudice," the flexible, four-pronged Sixth Amendment test does not.

5. Game Recap

In sum, Barker and its progeny fashioned a flexible ad-hoc balancing test that allows reviewing courts to consider all of the relevant facts. The United States Supreme Court provided guidance in the form of four factors. To accomplish the balancing of these factors, courts must first consider whether the length of the delay permits further inquiry into the other factors, as well as whether with the length of the delay reaches past the lower bounds of presumptive prejudice. The court must then consider the government's proffered excuse for the delay, weighing this factor into the balancing scheme depending upon the degree of reasonableness. Crowded dockets, for example, are included among neutral justifications which nonetheless must be weighed in favor of the defendant. Under the Barker test, a reviewing court must next consider the extent to which the defendant attempted to assert the right. A persistent effort will weigh heavily in the defendant's favor, but complacency with the government's continuances will make it inordinately difficult for the defendant to prevail on a claim. Finally, the Barker test requires consideration of whether the defendant has suffered any prejudice as a result of the delay. Defendants are not required to affirmatively prove the prejudice was outcome determinative for this factor to be considered. In fact, the defendant's sufferance of anxiety, among other things, is afforded at least some weight.

The "balancing test" applied in Spivey, on the other hand, is a rigid, inflexible framework retaining only the outer shell of Barker in

112. See United States v. Lovasco, 431 U.S. 783, 789-90 (1971) (Proof of actual prejudice is "generally a necessary but not sufficient condition to establish a due process violation") (emphasis added); see also United States v. Sturdy, 207 F.3d 448, 452 (2000) ("To prove a violation of his due process rights, Sturdy must establish that: (1) the delay resulted in actual and substantial prejudice to the presentation of the defense . . .") (emphasis added).
113. Doggett, 505 U.S. at 651-52.
115. See id.
116. See id. at 528-29.
117. See id. at 534-35.
118. See Moore, 414 U.S. at 26.
the form of its four factors. The Spivey test, unlike Barker, forbids consideration of each factor unless the criminal defendant can first meet some high threshold of proof. The first factor, the length of the delay, serves only as an initial triggering function and plays no part in the rest of the balancing calculus. A delay of ten years is afforded no more weight than a delay of just one year. For the Court to consider the second factor, the reason for the delay, the Spivey test requires the defendant to prove that the government willfully delayed his case in order to gain a tactical advantage at trial. While the test purports to also punish prosecutorial negligence, this aspect of the test appears unsupported by case law since prosecutorial negligence, when evidenced by crowded dockets, is specifically exempted from consideration. Finally, the defendant must also prove "actual and substantial prejudice" in order for any prejudice suffered by him to be considered. In practice, Spivey requires the delay be shown to have been outcome-determinative; the defendant must meet the insurmountable burden of proving that, but for the delay, he would have been acquitted.

In form and effect, therefore, North Carolina's test for determining whether the right to a speedy trial has been violated presents a marked departure from that articulated by the United States Supreme Court in Barker and Doggett. In the balancing process, the test weights the government's excuses more heavily and the prejudice suffered by the defendants less heavily. It also permits excuses for aversion of the fact that the defendant took extreme measures to assert the right. The Spivey test is therefore more rigid and less protective of criminal defendants' rights to a speedy trial than is constitutionally permitted.

V. TANGLED IN SPIVEY'S WEB

Before proceeding to prescribe any remedies for the dire state of speedy trial constitutional doctrine in this state, this article will first establish the grave impact of Spivey's narrowing of the right. It is not difficult to imagine why a speedy trials are necessary. In courtrooms throughout the country, witnesses are called to testify about important legal distinctions rooted in trivial factual distinctions. It is not uncom-

119. Spivey, 357 N.C. at 119, 579 S.E.2d at 255.
120. Id.
121. See Brown, 282 N.C. at 124, 191 S.E.2d at 664 (1972) ("The congestion of criminal court dockets has consistently been recognized as a valid justification for delay. Both crowded dockets and lack of judges or lawyers, and other factors, make some delays inevitable.").
122. Spivey, 357 N.C. at 122, 579 S.E.2d at 257.
mon for prosecutors to ask witnesses to recount minute, peripheral details of an event long past in order to demonstrate some fuzzy legal concept, such as whether the defendant entertained "malice aforethought" or whether the defendant subjectively and objectively feared for his life. Even when the underlying events occurred years prior to trial, courts are given little choice but to proceed upon an assumption that these recounted memories are accurate portrayals of the underlying events.

As noted earlier in this article, the speedy trial guarantee was designed to ensure that defendants would not be unfairly hindered in their ability to mount a successful defense due simply to the passage of time. Of the three interests articulated by Brennan in Dickey, this interest is by far the most important to our system of criminal justice because it implicates both central, warring themes mentioned in the introduction of this article: the judicial search for truth and the due process model.

In his Dickey v. Florida concurrence, Justice Brennan noted that the passage of time alone significantly hinders the quest for that judicial Holy Grail, truth. Witnesses may die or move away while the defendant awaits trial, depriving the jury of their versions of events. Physical evidence may also be lost during that interim period, depriving the court of their rightful probative benefit. Justice Brennan also expressed concern that witnesses' memories may fade while they wait to play their role in the criminal proceedings. This effect, he noted, is inherent in delay, yet is so slippery that it can very rarely ever be affirmatively proven.

Because of the prevalence of eyewitness testimony in American courtrooms, the effect of faded memories has the potential to wreak havoc on defendants' ability to receive fair trials. Unfortunately, jurors place greater weight on eyewitness evidence than any other forms of evidence. In a study conducted by cognitive psychologist Elizabeth

125. See Dickey, 398 U.S. at 42 (Brennan, J., concurring).
126. Id.
127. Id.
128. Id.
129. Id.
130. Elizabeth F. Loftus, EYEWITNESS TESTIMONY 9 (1979) ("Jurors have been known to accept eyewitness testimony pointing to guilt even when it is far outweighed by evidence of innocence"); see also U.S. Department of Justice, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999) ("Although the evidence eyewitnesses provide can be tremendously helpful in developing leads, identifying criminals, and
Loftus in 1979, jurors in her mock trials were 400% more likely to convict the defendant when the prosecution presented eyewitness testimony than when only circumstantial evidence was presented.\textsuperscript{131} Remarkably, Loftus' test revealed that jurors were still 378% more likely to convict the defendant when the prosecution used a discredited eyewitness.\textsuperscript{132} In spite of the great reliance our system places on eyewitness testimony, such evidence is historically prone to error. Studies have consistently shown that around ninety percent of all capital felons later exonerated by DNA evidence were convicted at least in part on the basis of eyewitness testimony.\textsuperscript{133} One of the primary reasons such evidence has caused such grave errors is because of the corrosive effect of the passage of time on witnesses' memories.

While Brennan may lack expertise in the relevant disciplines, his grave warnings that the judicial journey towards truth can be derailed by long pretrial delays have born fruit in the field of cognitive psychology. According to experts in the field, the passage of time has two primary negative effects on the ability of witnesses to testify accurately: memory erosion and memory alteration.\textsuperscript{134}

In the interim period between crime and trial, it is inevitable that the witness' memories will fade. As demonstrated by Ebbinghaus' Forgetting Curve in 1885 and confirmed many times since, the passage of time alone significantly erodes the completeness of witnesses' testimony.\textsuperscript{135} As days, months, and years pass us by, we naturally shed memories of our past experiences. While the rate of erosion dimin-
ishes with time, it never ceases to persist. Therefore, the failure of our courts to promptly dispose of criminal trials virtually ensures that fact-finders do not receive the fullest picture of the underlying events.

Memory decay, of course, might be of little consequence in criminal trials if witnesses pleaded ignorance whenever their memories failed them. Studies have shown, however, that witnesses are more than willing to fill in the blanks created by memory decay. What is placed in these blanks is often a reflection of two of memory's primary corruptive influences: bias and post-event information. The work of British psychologist Frederick C. Bartlett in 1932 demonstrated that humans store memories in organization systems that reflect our present biases and prejudices. Other psychological studies have also demonstrated that witnesses adapt their memories to make them consistent with subsequently acquired information. A longer period of time between the crime and testimony inevitably permits these corruptive influences greater opportunity to alter witnesses' memories.

The speedy trial right is also consonant with the due process model, standing among those procedural safeguards ensuring that criminal defendants are not unduly punished while the presumption of innocence still stands. In Dickey, Justice Brennan noted two other interests are served by the speedy trial right which seeks to prevent unfair punishment of criminal defendants: the prevention of undue and oppressive pretrial incarceration and minimization of the defendant's anxiety arising from public accusation.

VI. A BITTER PILL AND A GREAT LEAP FORWARD

As constitutional doctrine, the speedy trial right currently stands on shaky ground. The latest Supreme Court decision articulating a flexible Barker interpretation was decided by only a single vote. In that pivotal decision, dissenters favored a watered-down approach not altogether different from the one applied in Spivey. For that reason, I propose two solutions to ensure criminal defendants are afforded the full protection of Barker for the foreseeable future in this state. First, the North Carolina General Assembly should revive its Speedy Trial

136. Id.
137. Loftus, supra note 130, at 82-84.
139. Loftus, supra note 130, at 54-55.
140. See generally Klopfer v. North Carolina, 386 U.S. 213 (1967) (holding that the speedy trial right is incorporated to the states as a procedural due process guarantee).
142. See id. at 659-71 (Thomas, J., dissenting).
Act, setting hard deadlines for all phases of criminal trials. Second, the North Carolina Supreme Court should take a great leap forward in speedy trial constitutional doctrine; our Highest Court should not only catch up our state to the constitutional floor of Barker and Doggett, but actually elevate our state-based speedy trial right above that floor as well.

My first proposal is the passage of a Speedy Trial Act to ensure that cases are promptly disposed of by our state judicial system. In federal courts, the Barker balancing test was made nearly moot with the passage of the Speedy Trial Act in 1974. With this bill, Congress legislatively filled the same void that the Barker Court believed itself institutionally incompetent to address by setting hard deadlines for certain phases of federal criminal trials. In 1977, the North Carolina General Assembly passed a Speedy Trial Act modeled on the one adopted by Congress. Not long thereafter, however, the General Assembly repealed the act, citing commissioned studies showing that prosecutorial districts were failing to comply with the law. One possible means of alleviating the harshness of Spivey would be a revival of this Speedy Trial Act, but with more realistic deadlines.

Another means of ensuring that cases are promptly disposed is by a reconsideration of the meaning of the speedy trial right guaranteed by Article I, § 18 of the North Carolina Constitution. Barker, though clearly more protective of the public's interests in speedy trials than Spivey, is not without its critics. One scholar has described the federal Barker test as merely "the right of a few defendants, most egregiously denied a speedy trial, to have the criminal charges dismissed against them on that account." "Quite obviously," another scholar contends, "criminal defendants as a class need some additional basis upon which to compel the government to try them promptly." North Carolina should provide this additional basis in some constitutional form.

The United States Supreme Court has made clear that their interpretations of fundamental rights provide merely constitutional minimums; states are free to exceed those protections by more expansive interpretations if their decisions are based on adequate and indepen-

144. See Barker, 407 U.S. at 529-30.
147. Wayne R. Lafave et al., Criminal Procedure § 18.3 (3d ed. 2000).
148. Id.
dent state grounds. The North Carolina Supreme Court therefore is free to interpret our state's speedy trial guarantee as providing additional protection to criminal defendants. Given the delicate balance on the United States Supreme Court and the narrow majority voting to sustain the flexible *Barker* framework in *Doggett*, the North Carolina Supreme Court should attach a stronger meaning to our speedy trial guarantee in Article I, § 18.

VII. Conclusion

The problems encountered by the North Carolina Supreme Court in *Spivey* demonstrate the pitfalls of the constitutional floor doctrine, now a mainstay of "new federalism." First, when dealing with cases involving fundamental constitutional rights, state courts must vigilantly research the appropriate topics to ensure their decisions comport with the existing federal constitutional law. An honest mistake, like a misinterpretation of a Fifth Amendment speedy trial case as Sixth Amendment speedy trial precedent, might convert an otherwise uneventful decision into a constitutional quagmire. Second, the constitutional floor doctrine greatly encourages state courts to err on the side of liberality. While a restrictive interpretation of a federal constitutional test will often encounter problems with the constitutional floor doctrine, a liberal, rights-protective interpretation will virtually always pass muster. Because of this fact, the *Barker* test, described as "flexible," will only permit contortions one way. State courts thus will generally stop short of the breaking point to ensure compliance with the constitutional floor doctrine.

*Darren Allen*