

## APPELLATE DELAY AS REVERSIBLE ERROR

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### I. INTRODUCTION

The criminal justice system is experiencing an increase in criminal appeals at a rate disproportionate to the increase in resources necessary to litigate them. This situation raises the question and concern as to what is sacrificed when a criminal defendant remains imprisoned—his life put on hold—pending appeal. Can the delay on appeal that is attributable to the state (both as prosecutor and judge) constitute reversible error, like the delay in the context of a denial of the accused's right to a speedy trial? I argue that the answer to that question is yes.<sup>1</sup> Treating speedy-trial provisions together with due process protections provides a vehicle for determining whether the underlying intents and purposes of those guarantees are realized when extended to the appellate process. Following the conclusion that delay on appeal could constitute reversible error, I continue by examining whether delay on appeal is a problem in Oregon's state courts and, finally, what Oregon might be able to do about it.

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\* J.D., 2008, Willamette University College of Law, *cum laude*; B.A., Lewis & Clark College, Political Science. First and foremost I would like to thank the members of the Willamette Court Study Committee, especially Chief Judge David V. Brewer, Presiding Judge Jack L. Landau, and Professor W. Warren H. Binford. Without my involvement in the important work of that committee, the ideas for this Article would not have found their way into my thoughts, nor would I have endeavored to put pen to paper. I would also like to thank all of those who offered their commentary, criticism, and support along the way, including Professor Jeffrey C. Dobbins, Robert Rocklin, Peter Gartlan, and Hadley Rose. Finally, to the entire staff of the Willamette Law Review I express my gratitude for their efforts. Although many people were consulted, the analysis and ultimate conclusions reached are solely those of the author, as are any errors.

1. A holding that appellate delay violates constitutional rights of the defendant would not be an anomaly in terms of worldwide jurisprudence. In *Pratt v. Attorney-General for Jamaica*, the Privy Council observed that, in Jamaica alone, 23 prisoners had been awaiting execution for more than ten years and 82 had been under death sentences for more than five years. The Board departed from earlier decisions and held that prolonged and unacceptable delay, pragmatically set at periods in excess of five years, might be unconstitutional. Subsequent cases have held that the five-year yardstick is not rigid and can be modified by the court as needed. 43 WIR 340 (PC 1993).

Recognizing the sheer volume of cases facing Oregon's appellate courts, the following question arises: How does caseload impact the appellate process in general and criminal appeals specifically? Does an overburdened system negatively affect the criminal appellate system and individual criminal defendants? Many people struggle to understand the provision of appeals as of right to criminal defendants in general;<sup>2</sup> however, in the interests of due process, this Article presumes that our society values both (1) the administration of justice consistent with our federal and state constitutional protections for individual rights and (2) ensuring that, when administered fairly and accurately, the justice system can be relied on to convict only truly guilty persons. Therefore, the question is not whether a crime control model or a due process model should control,<sup>3</sup> but whether protecting individual rights can accomplish the fair administration of justice. Put simply, if a criminal conviction is only as good as its constitutional foundation, then appellate processes that undermine constitutional safeguards, such as the right to a speedy trial and the right to counsel, may not be valid at all. Therefore, assuming society has an interest in crime control, we should collectively take notice of our appellate structure and its inadequacies and make amends—if not for the preservation of individual rights, then at least to guarantee that defendants properly convicted of crimes pay their debts to society in an appropriate way.

Section II begins with a look at the history behind speedy trial protections. Section III continues by delineating the three speedy trial protections available to a criminal defendant facing prosecution in an Oregon state court and whether delay can constitute an error of constitutional magnitude. Section IV discusses appellate delay in the context of Oregon's appellate courts. Section V contemplates possible solutions to the systemic problems previously discussed, and finally, Section VI concludes that it is a theoretical and practical possibility that appellate delay can constitute a violation of

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2. The United States Supreme Court has held that a state is not constitutionally required to provide an appeal as of right. *McKane v. Durston*, 153 U.S. 684, 687 (1984). However, when an appeal as of right is provided, the right to counsel is implicated in addition to other rights. *Douglas v. California*, 372 U.S. 353, 357 (1963); *see also* *Ross v. Moffitt*, 417 U.S. 600 (1974) (no right to state-provided counsel on discretionary appeals, only on first appeal as of right).

3. *See* RONALD JAY ALLEN, ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* § 1 (2d ed. 2005).

constitutional rights and, as such, the problem warrants recognition and welcomes innovative solutions.

## II. THE HISTORY AND PURPOSE OF TRIALS “WITHOUT DELAY”

“The right to a speedy trial is of long standing and has been jealously guarded over the centuries.”<sup>4</sup> The right traces back to American law’s English heritage and the Magna Carta. At that time, it was believed that “the delay in trial, by itself, would be an improper denial of justice.”<sup>5</sup> Given the prominence of what Blackstone called “the Bulwark of the British Constitution,”<sup>6</sup>

it is not surprising that when George Mason drafted the first of the colonial bills of rights, he set forth a principle of Magna Carta . . . : “[I]n all capital or criminal prosecutions,” the Virginia Declaration of Rights of 1776 provided, “a man hath a right \* \* \* to a speedy trial \* \* \*.” That this right was considered fundamental at this early period in our history is evidenced by its guarantee in the constitutions of several of the States of the new nation, as well as by its prominent position in the Sixth Amendment. Today, each of the 50 States guarantees the right to a speedy trial to its citizens.<sup>7</sup>

Although “some thought the right of speedy trial and similar rights were so clearly a part of our ‘liberty’ that no Bill of Rights was necessary,” the early Americans wanted to be sure they would enjoy certain protections from arbitrary government action; thus, the speedy-trial provision of the Sixth Amendment emerged.<sup>8</sup>

Early Americans viewed the speedy-trial right as designed to protect the defendant against the abuses of government. The right was meant to provide a trial “free from vexatious, capricious, and oppressive delays manufactured by the ministers of justice.”<sup>9</sup> As summed up in the nineteenth century by Judge Tod of the Pennsylvania Supreme Court, the protection is

intended to provide against the abuse of a protracted trial, to provide not only against the malice of a prosecutor, but against his negligence, against all his delays whether with cause or without

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4. *United States v. Provo*, 17 F.R.D. 183, 196 (D. Md. 1955).

5. *Klopfers v. North Carolina*, 386 U.S. 213, 224 (1967) (confirming that the Sixth Amendment right to a speedy trial is fundamental and is therefore applicable to the states through the Due Process Clause of the Fourteenth Amendment).

6. *Provo*, 17 F.R.D. at 196.

7. *Klopfers*, 386 U.S. at 225–26 (internal citations omitted).

8. See THE FEDERALIST, NO. 84 (Alexander Hamilton).

9. *Provo*, 17 F.R.D. at 197 (quoting BLACK’S CONSTITUTIONAL LAW § 266).

cause, against every possible act, or want of action, of the prosecutor; but not to shield a prisoner in any case from the consequences of any delay made necessary by the law itself.<sup>10</sup>

The remedy for the failure of the government to observe this right has long been to discharge the defendant's conviction or indictment.<sup>11</sup> Therefore, the modern rule of law as to speedy-trial rights under the Sixth Amendment is as follows: "If there is undue delay, and if the right is asserted in the proper manner, and if good cause for the delay is not given, then the case will be dismissed and the dismissal will (or will not) bar future prosecutions for the same offense."<sup>12</sup>

The application of the right to speedy trial beyond the trial stage of a criminal proceeding is a function of both the right to speedy trial and the right to due process. The right to speedy trial applies to actions of the federal government under the Fifth and Sixth Amendments as well as to the states via the Due Process Clause of the Fourteenth Amendment. One commentator has observed three ways due process protections can have a "healthy effect" on situations in which there is an abuse of speedy trial:

First, states not having specific guarantees could be held to a minimum standard of promptness. Second, situations where constitutional and statutory provisions for speedy trial are inapplicable would nevertheless be governed by due process. \* \* \* [Third is a situation] where a statutory or constitutional provision is applicable but is nevertheless ineffectual for the defendant because of deficiencies in the law of speedy trial.<sup>13</sup>

Bearing in mind the aforementioned considerations of the purpose of speedy-trial rights (which in many ways are a means to effectuate due process), the question becomes whether, in light of its history and purpose, the speedy-trial protection ought to encompass the appellate process. Because "criminal appeals did not exist at the time of the Founding" and "Congress did not provide for federal criminal appeals until the late nineteenth century," criminal appeals

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10. *Id.*

11. *Id.* at 198; *see also* United States v. Fox, 3 Mont. 512 (1880).

12. Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 847 (1957); *see also* Zedner v. United States, 547 U.S. 489 (2006) (discussing the federal statutory speedy trial protections provided in the Speedy Trial Act, 18 U.S.C. § 3161); Barker v. Wingo, 407 U.S. 514 (1972).

13. *The Right to a Speedy Criminal Trial*, *supra* note 12, at 862-63.

cannot be thought of as “part of the historic tradition of due process.”<sup>14</sup>

Although criminal appeals, the way we think of them today, did not exist at the time speedy-trial protections were fashioned into American law, this should not bar the extension of traditional due process to fit the current realities of our criminal justice system. Indeed, there is historical evidence that post-trial review was a common practice; thus making the absence of a constitutional right more suspect than once was thought.<sup>15</sup> The existence of a constitutional right to an appeal is discussed further in Section III.B.1, *infra*.

### III. CAN DELAY ON APPEAL CONSTITUTE A CONSTITUTIONAL VIOLATION?

The question of whether appellate delay constitutes reversible error is currently an open question of law. Before reaching that question and before an analogy to or an extension of existing law can be drawn, it is necessary to examine the contours of a defendant’s speedy-trial right. The right to a speedy trial is guaranteed in three relevant contexts:<sup>16</sup> (1) the Sixth Amendment right to a speedy trial

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14. Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 503–04 (1992).

15. *Id.* For example, Arkin explains that “Both English and colonial courts were accustomed to procedures for the review of trial court decisions in criminal cases, procedures that involved reconsideration by the same court or, in certain instances, by another court or by the legislature.” Citing how the High Court of Parliament “could review judgments of the Court of King’s Bench by writ of error for ‘error apparent on the record,’” as well as the fact that colonial lawyers, even before independence, had petitioned for writs of habeas corpus as a vehicle to obtain review of lower court judgments, Arkin demonstrates that “the issue of whether the federal courts were authorized to conduct direct review of federal criminal cases was unsettled as late as 1805.” In addition, the way a motion for a new trial was used “from the constitutional period and throughout the nineteenth century” also supports the idea that the current review of criminal convictions is not really such a novel concept. Arkin explains that “the rule was established quite early that a new trial could be granted in criminal matters only after a conviction, on the application for the defendant, and for his benefit.” *Id.* at 522–534. Arkin further compares these motions for a new trial to appeals and lists the common grounds for a new trial, such as incorrectly admitted or excluded material evidence, errors in jury instructions, or occasions “when the court submitted to the jury as a question of fact what was properly a question of law.” *Id.* (internal citations omitted).

16. The analysis in this Article principally focuses on the ability of an Oregon defendant to claim such protections in state court. Thus, although interesting, the Federal Speedy Trial Act (*see The Right to a Speedy Criminal Trial, supra* note 12, at 846) pertaining to federal criminal prosecutions is omitted from my discussion as it is not necessary in a discourse that encompasses state statutory and constitutional protection as well as federal constitutional protection.

guaranteed by the federal Constitution; (2) the Oregon Constitution's provision that "justice shall be administered . . . without delay;" and (3) the protection afforded by Oregon statutes.<sup>17</sup> Consideration of each of these approaches is appropriate before continuing on to determine whether such principles have application when the delay occurs at the appellate level.

#### A. *Speedy Trial Protections*

##### 1. *Federal Constitutional Right*

The Sixth Amendment to the U.S. Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy trial. In *Barker v. Wingo*, the U.S. Supreme Court set forth the analysis for resolving speedy-trial claims under the Sixth Amendment.<sup>18</sup> There are essentially three factors to be considered. First is the length of the delay. Under this factor, delays that are presumptively prejudicial trigger the inquiry of three additional factors: "whether the defendant asserted the right to a speedy trial, the reasons for the delay, and prejudice to the defendant."<sup>19</sup> Second, the reasons for the delay are considered with different weights assigned to different reasons, such as whether delay is attributable to the defendant or the government.<sup>20</sup> Third, the prejudice to the defendant is assessed in light of the interests a speedy trial was designed to protect. Those interests are: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."<sup>21</sup> Although the final factor of prejudice has proved the most controversial, the U.S. Supreme Court continues to apply this framework.<sup>22</sup>

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17. U.S. CONST. amend. XI; OR. CONST. art. I, § 10; OR. REV. STAT. §§ 135.747, 135.750.

18. 407 U.S. 514 (1972).

19. *Id.* at 530.

20. *Id.* at 531.

21. *Id.* at 532.

22. See generally *Doggett v. United States*, 505 U.S. 647 (1992) (reversing a conviction on speedy-trial grounds when eight and one-half years had elapsed between the defendant's indictment and his arrest and relying solely on prejudice to the defendant's ability to defend himself after such a long period of time).

## 2. Oregon Constitutional Right

Article I, section 10 of the Oregon Constitution<sup>23</sup> “declares that justice shall be administered without delay, which is substantially the same as guarantying a speedy trial to a defendant in a criminal action.”<sup>24</sup> The provision is said to serve “both the defendant’s interest in a speedy trial and the public’s interest in the prompt administration of justice.”<sup>25</sup> First, I will address how the speedy-trial provision of the Oregon Constitution is analyzed, followed by examples of principal Oregon cases finding violations of the provision, and concluding that the general framework for a violation of speedy-trial rights can be applied to the context of appeals.

Oregon has adopted the U.S. Supreme Court’s analytical framework in *Barker* and considers the following factors to resolve questions regarding the deprivation of defendant’s right to a speedy trial: “the length of the delay, the reasons for the delay, and prejudice to defendant.”<sup>26</sup> Despite making use of several *Barker* factors, Oregon’s adoption of the federal standard has not been wholesale, and there are marked differences worth mentioning.

The Oregon Supreme Court has recognized that not all of the *Barker* analysis is appropriate for evaluating claims under Article I, section 10.<sup>27</sup> For example, the second *Barker* factor is inapplicable under the Oregon Constitution because Oregon does not require that a defendant demand a speedy trial.<sup>28</sup> Another example of how the analysis under the Oregon Constitution differs is with regard to the federal practice of balancing the conduct of the state against that of the defendant. Oregon does not follow the federal balancing test; instead, it considers all relevant factors and assigns weight to them.<sup>29</sup> Also, delay in and of itself has been held to “be sufficient to establish a speedy-trial violation if that delay is so long that the thought of

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23. Unlike most state constitutions, the Oregon Constitution does not specifically contain a restriction conferring the right that justice shall be administered without delay on defendants in criminal proceedings.

24. *State v. Breaw*, 78 P. 896, 896 (Or. 1904).

25. *State v. Harberts*, 11 P.3d 641, 648 (Or. 2000).

26. *State v. Ivory*, 564 P.2d 1039, 1040 (Or. 1977).

27. *Harberts*, 11 P.3d at 650; *see also* *State v. Dykast*, 712 P.2d 79, 82 n.6 (Or. 1985).

28. Rather, in Oregon, the requirement that a defendant be brought to trial without delay is a mandatory directive to the State, which bears the burden to proceed promptly; it is not a “right” for a criminal defendant. *State v. Clark*, 168 P. 944 (Or. 1917).

29. *See* *State v. Mende*, 741 P.2d 496, 499 (Or. 1987); *Haynes v. Burks*, 619 P.2d 632, 637 (Or. 1980).

ordering a defendant to trial shocks the imagination and the conscience.”<sup>30</sup> In sum, the analysis of a speedy-trial claim under state law closely tracks the analysis performed under the federal Constitution, but with a few slight variations. I turn now to a case in which the court conducted such an analysis and held that the state violated the defendant’s right.

In 2000, the Oregon Supreme Court decided *State v. Harberts*, a controversial decision holding that a five-year delay in bringing the defendant to trial violated the Oregon Constitution, thereby requiring a dismissal of the indictment with prejudice.<sup>31</sup> The effect of the state’s delay in prosecution was the release of a man convicted of three counts of aggravated murder in the death of a young girl.<sup>32</sup> An unpopular decision to say the least, it was even speculated that the decision could have an effect on the upcoming gubernatorial election.<sup>33</sup>

In *Harberts*, the court was faced with a situation in which the defendant had been convicted of a felony, and therefore, “if defendant were to prevail on his statutory claim, the remedy would be dismissal of the charges without prejudice, and the state would be able to prosecute him again.”<sup>34</sup> The relief provided by the statute and the constitutional provision are very different.<sup>35</sup> On appeal, the defendant sought reversal of his convictions with prejudice.<sup>36</sup> Before considering his constitutional claims, the court stated that “[d]efendant must prevail on his state or federal constitutional speedy-trial claims to be entitled to the complete relief that he

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30. *State v. Vawter*, 386 P.2d 915, 920 (Or. 1963).

31. 11 P.3d 641, 643 (Or. 2000).

32. *Id.*

33. Jeff Mapes, *Harberts Case Could Figure in Governor’s Race*, THE OREGONIAN, Dec. 12, 2001, at C5.

34. 11 P.3d at 647.

35. The two remedies listed above, (1) dismissal of charges and (2) reversal of a conviction amounting to an acquittal, are very different. There appears to be a presumption that, at least as to the statutory right, in circumstances where the defendant’s charges are dismissed without prejudice, the state could re-file. This presumption implicates double jeopardy and instances when the state could in fact re-try a defendant, even if his charges were dismissed or his conviction overturned due to a violation of speedy trial. That inquiry is beyond the scope of this Article, but I believe there is ample authority to support the proposition that a defendant whose conviction is reversed could not be tried again. Thus, it is plausible—if not practical—that defense counsel in these cases would seek relief under the constitutional provision whenever possible.

36. 11 P.3d at 647.

seeks.”<sup>37</sup> Performing the requisite analysis of the defendant’s state constitutional claims, the court found the five-year delay “unprecedented in Oregon” and held that “the state failed to bring defendant to trial ‘without delay’ under Article I, section 10 of the Oregon Constitution.”<sup>38</sup>

Most recently, in *State v. McDonnell*, the Oregon Supreme Court had the occasion to revisit the issue of delay on appeal when the defendant challenged the fourteen-year period that elapsed between sentencing and the final sentence of death as violative of his state and federal constitutional speedy-trial rights.<sup>39</sup> The Supreme Court held that the fourteen-year period did not “shock the judicial conscience.”<sup>40</sup> The court continued by noting that, “it is obvious that the considerable delay in this case has resulted in large part from repeated appeals concerning complicated and novel questions of law arising from the trial court’s application of Oregon’s death penalty statutes . . . .”<sup>41</sup>

Despite the ultimate outcome of the *McDonnell* decision, the court did bolster the meaning of Article I, section 10 and the Sixth Amendment’s meaning in Oregon as rights that “extend[] to every component of the criminal prosecution, including the imposition of a sentence in accordance with application law.”<sup>42</sup> The court continued by delimiting the contours of the right:

Properly viewed, an appeal is a component of the criminal justice system that, by correcting errors in the trial, permits the trial court on remand to proceed with trial with a correct understanding of the law and to enter a lawful judgment. Throughout the processes of a criminal trial, appeal, and any further trial proceedings on remand, the constitutional right to the administration of justice without delay applies.<sup>43</sup>

It is clear that, after *McDonnell*, the right to a speedy-trial in Oregon extends to the appellate process.

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37. *Id.*

38. *Id.* at 657.

39. *State v. McDonnell*, 176 P.3d 1236 (Or. 2007).

40. *Id.* at 1245.

41. *Id.*

42. *Id.*

43. *Id.*

### 3. Oregon Statutory Right

Oregon has a statutory framework encompassing the right to be brought to trial within a reasonable time.<sup>44</sup> It is critical to note, as did the court in *Harberts*, that the statutory scheme appears to have relevance only for criminal defendants who have been convicted of lesser crimes than felonies.<sup>45</sup> For, as the court properly ascertained in *Harberts*, if the defendant has been convicted of a felony, a finding in favor of said defendant pursuant to the statute will not result in a reversal with prejudice—it does not foreclose the possibility of re-prosecution for the same crime.<sup>46</sup> Therefore, for such defendants a more favorable approach is to rely on the constitutional argument, which can result in reversal with prejudice. As a practical matter, however, when the charging instrument is dismissed, the state must reinitiate prosecution, but the statute of limitations may have run, making re-prosecution impossible. Of course, for crimes such as murder, there is no statute of limitations, which is one reason that defendants would make the constitutional argument. With that distinction in mind, I turn now to explain Oregon's statutory scheme, followed by illustrative cases.

The Oregon statutory speedy-trial provision provides that “[i]f a defendant charged with a crime, whose trial has not been postponed upon the application of the defendant or by the consent of the defendant, is not brought to trial within a reasonable period of time, the court shall order the accusatory instrument to be dismissed.”<sup>47</sup> Furthermore:

If the defendant is not proceeded against or tried, as provided in ORS 135.745 and 135.747, and sufficient reason therefore is shown, the court may order the action to be continued and in the meantime may release the defendant from custody as provided in ORS 135.230 to 135.290, for the appearance of the defendant to answer the charge or action.<sup>48</sup>

Finally, an order of dismissal pursuant to ORS 135.745 or ORS 135.757 “is a bar to another prosecution for the same crime if the crime is a Class B or C misdemeanor; but it is not a bar if the crime

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44. OR. REV. STAT. §§ 135.745–135.750 (2007).

45. 11 P.3d at 647.

46. *Id.*

47. OR. REV. STAT. § 135.747.

48. *Id.* § 135.750.

charged is a Class A misdemeanor or a felony.”<sup>49</sup>

State statutes, therefore, mandate that the government must bring a defendant to trial “within a reasonable period of time” unless defendant has consented to a delay. Construing the statute under the appropriate paradigm,<sup>50</sup> the Oregon Supreme Court has held that “the text indicates that a trial court *does* have some discretion to continue a case in spite of an unreasonable delay, but *only* if the trial court first determines, based on evidence that is before it, that there was sufficient reason for the failure to try the defendant within a reasonable period of time.”<sup>51</sup> The basic rule to be gleaned from the court’s holding is this: to combat a claim of unreasonable delay, the state must offer reasons for the delay coupled with factual evidence to support such reasons in order to enable the trial court to assess whether the delay was, in fact, reasonable.<sup>52</sup>

In August 2005, the Oregon Supreme Court “delivered a sweeping affirmation . . . of an individual’s fundamental right to a speedy trial, ruling that crowded dockets, short staffs and tight budgets do not excuse prosecutors and judges from moving criminal cases through the system in a reasonable period of time.”<sup>53</sup> The court made this pronouncement in three cases, all of which were brought pursuant to the state statutory speedy trial protection.<sup>54</sup> The underlying thread of the rulings was a critique of the excuse of underfunding and its impact on fundamental individual rights. I turn now to a brief discussion of those three cases.

In *State v. Johnson*, the defendant was convicted of third-degree rape.<sup>55</sup> On appeal, the defendant argued that the state had failed to bring him to trial within a reasonable period of time as required by statute. The Oregon Supreme Court easily concluded that the lapse of twenty-one months between the time when the defendant was present in Oregon and the time when an arrest warrant was issued and

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49. *Id.* § 135.753(2).

50. Statutory construction in Oregon is governed by the paradigm set forth in *P.G.E. v. Bureau of Labor and Industries*, 859 P.2d 1143 (Or. 1993). *See, e.g.*, Hon. Jack L. Landau, *Some Observations About Statutory Interpretation in Oregon*, 32 WILLAMETTE L. REV. 1 (1996); Robert M. Wilsey, *Paltry, General & Eclectic: Why the Oregon Supreme Court Should Scrap PGE v. Bureau of Labor & Industries*, 44 WILLAMETTE L. REV. 615 (2008).

51. *State v. Johnson*, 116 P.3d 879, 883 (Or. 2005) (emphasis in the original).

52. *State v. Davids*, 116 P.3d 894, 897 (Or. 2005).

53. Anne Saker, *Rulings Affirm Right to Speedy Trial in Oregon*, THE OREGONIAN, Aug. 5, 2005, at A1.

54. *Id.*

55. *Johnson*, 116 P.3d at 880.

executed based on an indictment was unreasonable.<sup>56</sup> Rejecting the state's argument, the court held that "the state had no right to decide unilaterally that delay was necessary, and defendant's speedy trial rights thus could be waived, because it was 'important' for defendant to deal with the aggravated murder charge [pending in another county] first."<sup>57</sup>

Similarly, in *State v. Davids*, the defendant was convicted of driving under the influence of intoxicants and driving while his license was suspended.<sup>58</sup> On appeal the defendant argued that the delay of eleven and one half months from indictment and issuance of an arrest warrant until execution of the warrant was unreasonable and violated the speedy-trial statute.<sup>59</sup> The Oregon Supreme Court rejected the state's argument, noting that the state made no attempt to explain the delay (citing only law enforcement's budgetary concerns), and affirmed the court of appeals' reversal of the trial court's denial of the defendant's motion to dismiss.

Finally, in *State v. Adams*, the defendant was convicted of one charge of driving under the influence of intoxicants, and a mistrial was declared as to a second charge.<sup>60</sup> Prior to the retrial, the defendant filed a motion to dismiss for a lack of a speedy trial.<sup>61</sup> His motion was granted, and the judge opined that the delay was caused by a shortage of judges in Washington County.<sup>62</sup> The Oregon Supreme Court agreed with the court of appeals that a period of twenty-three months from indictment to trial was unreasonable in this case.<sup>63</sup> Beyond the holding of delay, the court in *Adams* took the state to task for attempting to rely on budgeting constraints to justify its actions:

"[I]t could not be argued that the delay resulted from unavoidable circumstances over which the state had no control. The state, as a unitary political entity, is the plaintiff in this case: *State v. Adams*. 'The state' includes the legislative branch as well as the executive officers who apprehended and prosecuted defendant and the judicial officers who tried him. As such an entity, 'the state' has

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56. *Id.* at 890.

57. *Id.* (quoting *State v. Johnson*, 90 P.3d 4 (Or. App. 2004)).

58. *State v. Davids*, 116 P.3d 894 (Or. 2005)

59. *Id.* at 895.

60. *State v. Adams*, 116 P.3d 898, 899 (Or. 2005).

61. *Id.*

62. *Id.* at 900.

63. *Id.* at 902.

evidently chosen not to expend the resources necessary to bring defendant to trial in under 23 months. That may or may not have been a reasonable decision; it is not our office to sit in judgment on the reasonableness of the legislature's funding priorities. It is our office, however, to interpret the legislature's command that defendants be brought to trial within a reasonable period of time, a different inquiry entirely. In the present case, the state did not do so."<sup>64</sup>

The Oregon Supreme Court continued by addressing docket congestion, stating that it arises out of a legislative policy—namely, the policy to underfund—that serves neither to expand nor contract the period of time that would otherwise be considered reasonable.<sup>65</sup>

Finally, the court announced a rule for determining how long is too long in the context of the speedy-trial statute: “Although it is difficult to identify the point at which delay becomes unacceptable, we think that a delay that roughly equals the statute of limitations for the crime at issue is too long.”<sup>66</sup> While this may appear to be a guidepost for future litigants seeking to allege claims of delay, the court did not accompany its rule with any further explanation. Most likely, the court did not intend it to be a black-letter test. Many serious crimes do not have statutes of limitation, and consequently, this rule could not be applied to such cases at all. However, a test for determining the amount of time at which point delay could be inferred in the context of appeals is desirable, and possible permissible lengths of delay will be discussed later.

In summary, there are three avenues available to a criminal defendant in Oregon through which to bring a claim of trial delay. Oregon statutes provide a reasonableness mandate to the state to prosecute without delay, the state constitution requires the administration of justice without delay, and the Sixth Amendment to the federal Constitution grants criminal defendants the right to a speedy trial. The statutory standard is one of reasonableness, and the state and federal constitutional provisions follow similar, although not identical, analyses. With these rules and reasons for the rules in mind, the question becomes whether the protections afforded to a criminal defendant to be brought to justice “without delay,” “within a reasonable time,” and via a “speedy trial” include the right of the

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64. *Id.* at 900 (quoting *State v. Adams*, 89 P.3d 1283, 1286 (Or. App. 2004)) (boldface type in original omitted).

65. *Id.* at 901.

66. *Id.* at 902.

defendant not to endure unreasonable appellate delay. That is, do the protections intended by the speedy-trial concept encompass due process such that the protection ought to be extended to delay on appeal?

*B. Extending Speedy-Trial Rights to the Appellate Context*

*1. Appellate Delay Can Constitute a Constitutional Violation*

To which proceedings does the guarantee of a speedy trial attach?<sup>67</sup> It is generally accepted that the guarantee applies to pretrial and trial proceedings; however, the adjudication of a defendant's rights may, and often does, continue past the trial stage. A convicted defendant will often appeal, and most states grant a criminal defendant an appeal as of right.<sup>68</sup> As the workload of appellate courts increases and as the time elapsing from the filing of an appeal to the final appellate judgment also increases, the question of whether delay in the appellate context could serve to dismiss an indictment or even to invalidate a conviction is meaningful. The application of speedy-trial and due process protections to the appellate side of the coin is meaningful in two different contexts.

First, where the state appeals pre-trial or as an interlocutory matter, the appeal is occurring within the context of the trial in some respects, although before a verdict or final judgment has been rendered. The second situation is post-judgment, where the defendant has appealed in the usual course following a conviction. In this scenario, there is a final judgment of the trial court, jurisdiction is vested in the appellate court, and the process is now an appellate matter. The former situation is more simply analogized and resolved; the latter is where the open question lives. I address each in turn.

Situation one, in which the state appeals during (or prior to) trial, is essentially the fact pattern presented in *Harberts*.<sup>69</sup> An examination of the *Harberts* decision reveals just how the state failed to prosecute the defendant for nearly five years. The delay arose in the context of interlocutory, pre-trial appeals by the government.<sup>70</sup> It was not

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67. See *State v. Vasquez*, 88 P.3d 271 (Or. 2004) (stating that speedy-trial rights attach at indictment).

68. *But see*, *Ross v. Moffitt*, 417 U.S. 600, 610 (1974) (no right to state-provided counsel on discretionary appeals, only on first appeal as of right).

69. *State v. Harberts*, 11 P.3d 641, 645 (Or. 2000).

70. *Id.* at 646.

merely a protracted time from arrest to indictment; rather, within that framework, the government began to appeal pre-trial. The Court found itself unable to “ignore the passage of approximately four years from the time of defendant’s arrest until resolution of that first appeal.”<sup>71</sup>

After the first appeal was unsuccessful, the government appealed again, to which the court in review stated:

Viewed in the context of the previous four years of delay, the state’s failure to provide a strong justification for the second appeal, coupled with its failure to give this case the highest priority, means that the months of delay associated with the second appeal weigh heavily against the state in defendant’s speedy-trial claim.<sup>72</sup>

On its facts, *Harberts* may be distinguishable from most “situation two” cases. However, the court’s opinion clearly acknowledged that the time on appeal factored into the equation for speedy-trial purposes, and ultimately the court reversed the defendant’s conviction.

Situation two, where the delay occurs entirely in the context of an appeal, is the more difficult question to address.<sup>73</sup> Before reaching a conclusion, let us first examine what reason might exist to extend protection to the appellate process. When taken in light of the historical context of the right to a speedy trial and due process, it is clear that the concerns manifest at the trial level that compel the right are also present at the appellate stage of the process. When coupled with the knowledge that a criminal trial occurring today is almost certainly not going to end the inquiry, the process of “trying” the accused envisions not only the trial level but also the appellate level. Indeed, the Oregon Supreme Court’s reasoning in *State v. McDonnell* clearly contemplates this reality.<sup>74</sup>

In a modern system of complex constitutional criminal procedure, it is often expected that the defendant will appeal if there

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71. *Id.* at 657.

72. *Id.* at 653–654.

73. It is important to note that, as to the issue of waiver of one’s right to a speedy trial, there is a question of how that might operate to bar further challenges by the defendant that delay on appeal constituted reversible error. See *The Right to a Speedy Criminal Trial*, *supra* note 12 (“Since speedy trial is considered to be the defendant’s personal right, it is deemed waived if not properly asserted. The right, whether based on constitution or statute, must be asserted before trial or before entry of a plea of guilty.”). This discussion, though pertinent, is beyond the scope of this Article.

74. See *State v. McDonnell*, 176 P.3d 1236 (Or. 2007).

are non-frivolous grounds on which to do so.<sup>75</sup> Also, upon conviction, the defendant's right to liberty is significantly curtailed by imprisonment. However, other rights of the defendant do not terminate upon the announcement of a trial court judgment. The defendant's privilege against self-incrimination continues throughout the appellate process. Because it is considered a "critical stage" in the proceedings where the defendant is constitutionally entitled to counsel, it is unclear why a protection against undue delay ought to end with trial.<sup>76</sup>

Presumably, the application of due process to achieve the result of a speedy appeal would be simpler if there were in fact a federal constitutional right to a criminal appeal. This Article recognizes that the current state of federal law does not recognize a constitutional right to a criminal appeal, however, a persuasive argument is made that change is necessary and constitutionally permissible in that direction. Despite the U.S. Supreme Court's 1894 ruling in *McKane v. Durston*<sup>77</sup> that there is no such right, it is arguably appropriate that the Court should reexamine that holding in a modern context.<sup>78</sup>

In a provocative article challenging modern adherence to *McKane*, Professor Marc M. Arkin argues that under a Fairness Model of due process it is proper to recognize the reality that "the development of the appeal has irretrievably altered whatever weight once may have been given to the inviolability of trial results."<sup>79</sup>

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75. Indeed, even if the grounds are frivolous such that a lawyer cannot represent him, a defendant can appeal by way of a *Balfour* brief. It goes without saying that the idea of appellate delay pertains to delay attributable to the state (both as the Attorney General and the court). Any delay attributable to the defendant in requesting extensions or delays is therefore omitted from any such calculus.

76. One persuasive justification for terminating a defendant's right to a speedy trial concurrently with the termination of the trial itself is on the grounds that the constitutional text, by its own terms, limits the right—i.e., that the accused shall enjoy a speedy *trial*. Persuasive it is, but determinative it is not, as the modern concept of "trial" can arguably be said to include appeals in a way that was not so in the days when the Constitution was written. Regardless of this limitation, the Due Process Clauses of the Fifth and Fourteenth Amendments are able to pick up where the speedy-trial provision leaves off and can carry the protection onward in the prosecution of the defendant by the state.

77. *McKane v. Durston*, 153 U.S. 684 (1894).

78. *Id.*

79. Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 577 (1992). The Fairness Model of due process is defined by Arkin as stressing the evolving nature of constitutional standards and requires all government procedures, whether historic or modern, to satisfy an independent inquiry based on current notions of fairness. The Fairness Model is not tied to specific tests or rules, but instead, relies on a generalized sense of what is necessary to a fair adjudication.

Arkin notes inconsistencies between the Court's treatment of the historical account of post-trial review in its failing to find a constitutional right to an appeal in *McKane* and the Court's simultaneous recognition of how much more intricate and complex constitutional criminal procedure had become since the time of the founding.<sup>80</sup> Arkin concludes that, "post-trial review has become an integral part of the adjudicatory mechanism of every American jurisdiction" and "it is difficult to understand how legal doctrine would evolve and trial level errors be rectified" without criminal appeals.<sup>81</sup>

Defendants have challenged their convictions in federal courts, seeking release because of delays in a state's appellate process. In the context of state systems that egregiously deny the rights of the convicted on a consistent, shocking and systematic basis, defendants bringing habeas corpus claims in federal courts have been successful in arguing that they have been unconstitutionally deprived of appellate disposition of their cases.<sup>82</sup> Not only were prisoners successful in their arguments, but the court ordered the state to reform its ways and the legislature to fund its defense system so as to comply with the Constitution.<sup>83</sup>

In *United States v. Washington*, a class of prisoners asked a federal court to decide that the delay they were experiencing was, in and of itself, a violation of their constitutional rights.<sup>84</sup> The analysis prescribed in *Washington* provides a workable framework for adjudicating other claims of appellate delay in federal and state courts. As previously noted, there is no federal constitutional right to appeal a state court conviction.<sup>85</sup> However, when a state grants such a right (as does Oregon and most states), the state cannot take the right

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*Id.* at 571.

80. *Id.* at 577.

81. *Id.*

82. See, e.g., *Harris v. Champion*, 15 F.3d 1538, 1556 (10th Cir. 1994) (holding that, in a habeas petitioner's direct criminal appeal, a delay of two years or more from the notice of appeal without the issuance of a state appellate decision is such a long delay as to give rise to a presumption of ineffective state process, therefore excusing the exhaustion requirement of Section 2554(b)); *United States ex rel. Green v. Washington*, 917 F. Supp. 1238 (N.D. Ill. 1996).

83. See, e.g., *Harris*, 15 F.3d 1538; *Washington*, 917 F. Supp. 1238.

84. *Washington*, 917 F. Supp. at 1270.

85. *McKane v. Durston*, 153 U.S. 684 (1894).

away in an arbitrary fashion.<sup>86</sup> “If a State has created appellate courts as an integral part of the system for finally adjudicating the guilt or innocence of a defendant, the procedures in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.”<sup>87</sup> Furthermore, “an inordinate delay in the adjudication of that appeal is a paradigmatic example of a due process violation.”<sup>88</sup>

Therefore, the foundation on which to build a claim of appellate delay as constitutional error is as violation of a fundamental due process right. The next question is how a reviewing court should make its decision. This is where speedy-trial protections and analysis appear again. Courts have held that, “the balancing tests for ascertaining violations of the constitutional right to a speedy trial, as established in *Barker v. Wingo*, provides an appropriate framework for evaluating whether a defendant’s due process right to a timely direct criminal appeal has been violated.”<sup>89</sup> The *Barker* factors require consideration of (1) length of delay, (2) reason for the delay, (3) defendant’s assertion of his or her right to a timely appeal, and (4) prejudice to the defendant.<sup>90</sup>

Considering the first factor, the *Washington* court held that, “a delay in the adjudication of a state criminal appeal of more than two years from the notice of appeal to the appellate court’s decision is excessive and presumptively unconstitutional.”<sup>91</sup> It has been noted

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86. *Washington*, 917 F. Supp. at 1270; see *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (holding that a state must provide indigent defendant a free trial transcript).

87. *Washington*, 917 F. Supp. at 1270 (internal citations and quotations omitted).

88. *Id.*

89. *Id.* at 1271 (internal citations and quotations omitted). The court in *Washington* recognized that there is ample authority from other circuits supporting the reliance on the *Barker* factors in the appellate delay context. *Id.* (citing *United States v. Tucker*, 8 F.3d 673 (9th Cir. 1993); *Elcock v. Henderson*, 28 F.3d 276 (2d Cir. 1994); *Simmons v. Beyer*, 44 F.3d 1160 (3d Cir. 1995); *United States v. Johnson*, 732 F.2d 379 (4th Cir. 1984); see also *Harris v. Champion*, 15 F.3d 1538, 1559 (10th Cir. 1994) (citing *Barker v. Wingo*, 407 U.S. 514 (1972)).

90. *Barker*, 407 U.S. at 530–32.

91. *Washington*, 917 F. Supp. at 1271. See also *United States v. Antoine*, 906 F.2d 1379 (9th Cir. 1990). The Ninth Circuit in *Antoine* remanded the case to the district court to determine if delay in processing the appeal violated due process. The court did address the basis of the claim stating:

Courts have recognized that extreme delay in the processing of an appeal may amount to a violation of due process. *Rheark v. Shaw*, 628 F.2d 297, 302-03 (5th Cir. 1980), cert. denied, 450 U.S. 931 (1981); *United States v. Johnson*, 732 F.2d 379, 381 (4th Cir.), cert. denied, 469 U.S. 1033 (1984). We accept this rule in general. We reject the idea, that a due process claim can be used as a vehicle to

that the “core of the case” was “the length of the appellate process”—indeed, that is the core concern of any defendant bringing a challenge to the delay of his appeal.<sup>92</sup> The court based its analysis of this delay and its conclusion that it was in fact delay on expert testimony and the comparison of the particular appellate system at issue with like systems across the nation. The reality was that the system in *Washington* was grossly inefficient such that it “render[ed] the appellate process a meaningless ritual in an unacceptably high proportion of cases.”<sup>93</sup> Indeed, forty-five percent of the petitioner class would likely have served the entirety of their sentences before a decision was rendered in their appeals.<sup>94</sup>

At this juncture, it is important to step back from the consideration of the egregious appellate system that existed in Illinois and conceive of this problem in a less shocking case. The analysis employed in *Washington* and similar cases was one of systemic delay, which is an important consideration on a large scale. However, equally important is the application of speedy-trial principles to the individual case. That is, if inordinate delay occurs in a single defendant’s appeal, I see no reason why the principles of speedy trial and due process ought not to protect him. It is, after all, a personal right.

The harm suffered by the individual defendant, beyond the due process violation, is that he is at “increased risk of suffering a range of adverse psychological reactions beyond those that might be suffered by anyone incarcerated.”<sup>95</sup> This harm exists regardless if one prisoner or several thousand experience it. Thus, appellate delay can be, in and of itself, a constitutional violation of due process, judged by speedy-trial standards and brought by an individual.

The presumption of inordinate delay at two years is also a relative standard subject to change. There is no indication by the federal courts that the Constitution mandates a two-year limitation,

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implement specific requirements, such as those in the Speedy Trial Act. Indeed, “not every delay in the appeal of case, even an inordinate one, violates due process.” Rheuark, 628 F.2d at 303.

906 F.2d at 1382. The court cast further light on how such a claim would fare saying, “If his conviction was proper, there has been no oppressive confinement: he has merely been serving his sentence as mandated by law.” *Id.*

92. Stephen L. Wasby, *Special Issue: Comparative Perspective, Delay as a Due Process Violation*, 19 JUST. SYS. J. 235, 237 (1997).

93. *Washington*, 917 F. Supp. at 1272.

94. *Id.*

95. Wasby, *supra* note 92, at 239.

either as a floor or ceiling. Consequently, if a court were to look at any state appellate court system and find that it was disproportionately slow as compared to others similarly situated, that court may find constitutionally offensive appellate delay present and hold the delay to be so significant as to justify overturning the underlying conviction. More specifically, a court looking within its system and comparing similarly situated appeals to each another might find one appeal that has taken twice as long as another, therefore meeting the same inordinate delay standard articulated above. The length of delay is relative, but the federal due process guarantee is not. From the discussion above, it is clear that appellate delay can be a constitutional violation of due process, and therefore, it can be reversible error when inordinate delay is present.

## 2. *What is the Appropriate Remedy?*

Even if delay on appeal can, as a constitutional matter, constitute a violation of a legally cognizable constitutional right, there remains a question of the appropriate remedy. What is the consequence for violating a criminal defendant's right to a speedy trial on appeal? Is reversal of a conviction the only way to fully vindicate the right, or is something less drastic permissible? For the individual defendant, no doubt the remedy is his foremost concern. For, if there is no desirable remedy, what would cause anyone to assert such a right; further, if there are no consequences to its violation, what incentive is there for the state to strive to protect it?

First, I will consider the remedy for a speedy-trial violation, and following that discussion, I will seek to analogize those concerns to the context of the appellate process. In *Strunk v. United States*, the U.S. Supreme Court held that, "when a defendant has been denied a speedy trial dismissal must remain . . . the only possible remedy."<sup>96</sup> One commentator has been incredulous about this holding, citing that "Anglo-American law has long provided remedies for denial of a speedy trial other than dismissal of the prosecution with prejudice."<sup>97</sup> It has noted that remedies such as expediting trial or dismissal of the indictment without prejudice have been available, so "[s]urely, the primary form of judicial relief against denial of a speedy trial should

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96. *Strunk v. United States*, 412 U.S. 434 (1973).

97. Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 534-35 (1975).

be to expedite the trial, not to abort it.”<sup>98</sup> It is also argued that “where undue delay occurs during the court phase and does not entail the likelihood of prejudicing the defendant in his defense, dismissal seems wholly inappropriate.”<sup>99</sup>

The most persuasive argument against reversal is the practicality of its enforcement by courts in certain situations. “Moreover, the specter of immunizing, of turning loose, persons proved guilty of serious criminal offenses has been thoroughly repugnant to judges, and they have accordingly held that shockingly long delays do not violate the sixth amendment.”<sup>100</sup>

Applied to the context of the appellate process, there are several possible remedies for the violation of this constitutional right: (1) reversal of the conviction (with or without prejudice), (2) expediting the appellate process and (3) money damages pursuant to Section 1983 litigation.<sup>101</sup> In order to know which remedy may be appropriate in any given case, it is also important to have an idea of what is being protected—for the right can only be properly effectuated if the remedy is tailored to its purpose.

#### IV. DOES OREGON’S CRIMINAL APPELLATE SYSTEM TRIGGER CONCERN ABOUT DELAY?

##### A. Background

The judicial article of the Oregon Constitution was adopted in 1857 establishing a state supreme court.<sup>102</sup> In 1910 Oregon’s judiciary was changed by voter initiative to allow the justices to be elected in statewide elections for six-year terms.<sup>103</sup> As Oregon’s population grew, the Oregon Supreme Court’s workload also increased to the point that civil litigants often had delays of two or three years on appeal.<sup>104</sup>

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98. *Id.* (citing *Mann v. United States*, 304 F.2d 394 (D.C. Cir. 1962) (dismissal without prejudice); *United States v. Patrisso*, 21 F.R.D. 363 (S.D.N.Y. 1958) (expediting trial)).

99. *Amsterdam*, *supra* note 97, at 537.

100. *Id.* at 539.

101. *See* 42 U.S.C. § 1983 (2006) (providing a civil cause of action for the deprivation of federal rights).

102. OR. CONST. art. VII, § 2 (amended 1910).

103. OR. CONST. art. VII, § 1. (amended 1910).

104. Thomas H. Tongue, *Delays on Appeal to the Oregon Supreme Court*, 36 OR. L. REV. 253 (1957).

In 1957, lawyer Thomas H. Tongue III wrote a pointed description and call to action regarding the current state of appellate delay in the Oregon Supreme Court. Acknowledging a resolution of the Oregon State Bar that, “the problem of delay on appeals to the Oregon Supreme Court is one of the most serious problems confronting the administration of justice in Oregon at the present time,” he recommended several solutions.<sup>105</sup> Tongue suggested that adoption of the following would result in substantial relief:

- (1) An increase in the number of justices from seven to nine.
- (2) A substantial increase in salaries, both during active service and upon retirement.
- (3) Selection of the chief justice on the basis of administrative qualifications and experience, rather than upon the basis of rotation or seniority, and with a longer term of office.
- (4) Adoption of a plan for compulsory retirement of judges from active service at a given age, but with the provision that a judge shall, after retirement, continue as a retired judge or as a “justice emeritus” and be “subject to call” to sit as a member of the court whenever its docket is congested or whenever his special qualifications may be of particular value to the court.<sup>106</sup>

Several of these suggestions were later adopted by the Oregon judiciary in some form.<sup>107</sup> However, the problem of appellate delay has persisted over time, much to the displeasure of the man who became the seventy-fifth associate justice of the Oregon Supreme Court. Indeed, Justice Tongue’s attention to the problems of appellate delay for litigants, the bench, and the bar did not cease upon his ascension to Oregon’s highest court in 1969.

However, it was not until the 1969 legislative session that the legislature seriously considered the idea of creating an intermediate court of appeals to ameliorate the delay and workload of the state’s highest court.<sup>108</sup> Despite testimony by future Supreme Court justices on both sides of the proposal, the legislation passed.<sup>109</sup> The Oregon

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105. *Id.* (quoting Resolution No. 6, adopted at the annual meeting of the Oregon State Bar, Gearhart, Oregon, Sept. 29, 1956).

106. *Id.* at 264.

107. For example, article VII, section 1(a) as amended, of the Oregon Constitution provides mandatory retirement for judges at the end of the calendar year in which the judge attains the age of 75 years.

108. Norman J. Wiener & Ky Fullerton, *Does Oregon’s Appellate Court System Need Fixing?*, 81 OR. L. REV. 477, 483 (2002).

109. *Id.* (noting that future Justices Hans Linde and Jacob Tanzer testified in support of the H.B. 1195, whereas Senator Berkeley Lent, a future chief justice, testified in opposition).

Court of Appeals was established on July 1, 1969.<sup>110</sup>

On January 1, 1978 the appellate jurisdiction of the court of appeals, which “was previously limited to criminal, probate, guardianship, adoption, juvenile and domestic relations cases and to appeals from state or local agencies,”<sup>111</sup> “was extended to tort, contract and equity cases, among other civil cases, so as to include the remaining one-half of appellate jurisdiction” that the supreme court previously had enjoyed.<sup>112</sup> The current structure of Oregon’s appellate courts is such that the intermediate appellate court possesses exclusive jurisdiction over most appeals, and the supreme court retains discretionary jurisdiction to review decisions of the lower court.<sup>113</sup>

In 2006, there were 2,152 criminal appeals filed in the Oregon Court of Appeals.<sup>114</sup> As Oregon’s intermediate appellate court, the Oregon Court of Appeals has mandatory jurisdiction to hear these cases, and for the majority of cases, it is where they will end.<sup>115</sup> Therefore, the Oregon Court of Appeals is the functional equivalent to a court of last resort for most appeals and indeed undertakes the

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110. Act of May 19, 1969, ch. 198, 1969 OR. LAWS 327.

111. *State v. Classen*, 590 P.2d 1198, 1207 n.1 (1979) (Tongue, J., concurring).

112. *Id.*

113. ORS 2.516 provides: “Except where original jurisdiction is conferred on the Supreme Court by the Oregon Constitution or by statute and except as provided in ORS 19.405 and 138.255, the Court of Appeals shall have exclusive jurisdiction of all appeals.” OR. REV. STAT. § 2.516 (2007). For example, ORS 163.116 provided that, when a death sentence is imposed,

[t]he judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court within 60 days after certification of the entire record by the sentencing court, unless an additional period not exceeding 30 days is extended by the Supreme Court for good cause. The review by the Supreme Court shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Supreme Court.

OR. REV. STAT. § 163.116(5) (repealed 1981). The Oregon Supreme Court also has mandatory jurisdiction over tax, certain writs, lawyer and judge misconduct disciplinary cases, redistricting, and ballot title challenges.

114. DAVID V. BREWER, CHIEF JUDGE, STATE OF OR. JUDICIAL DEP’T, ANNUAL REPORT OF THE OREGON COURT OF APPEALS 5 (2006), available at <http://www.publications.ojd.state.or.us/2006CARreport.pdf> [hereinafter 2006 ANNUAL REPORT].

115. DAVID V. BREWER, CHIEF JUDGE, STATE OF OR. JUDICIAL DEP’T, ANNUAL REPORT OF THE OREGON COURT OF APPEALS 1–2 (2005), available at <http://www.publications.ojd.state.or.us/2005CARreport.pdf> [hereinafter 2005 ANNUAL REPORT]. The majority of appeals end at the court of appeals because the Oregon Supreme Court has discretionary jurisdiction and, in contrast to the court of appeals, it reviews on average approximately six percent of the court of appeals’ cases each year.

biggest portion of appellate review in Oregon.<sup>116</sup>

Table 1. Total Appeals from 2000-2006

	2001	2002	2003	2004	2005	2006
<b>Court of Appeals<sup>117</sup></b>						
Total Filings	4,181	3,277	3,180	3,677	3,801	3,518
Criminal <sup>118</sup> Filings	2,526	1,782	1,619	2,102	2,238	2,152

It is apparent that, in addition to its law-announcing function, the court of appeals enjoys the primary responsibility for error-correcting via the process of appellate review under the current appellate structure. Although historical context and systemic processes must be taken into account, much of the concern and discussion of appellate delay is centered at the intermediate level. The workload once balanced by the supreme court has largely been shifted to the court of appeals, with few cases ever reaching Oregon's highest court. The two layers of appellate review in Oregon are inextricably linked, making it appropriate—if not mandated—that the concerns of one court ought to be considered by the other, and they are considered together in this Article.

#### *B. Does Appellate Delay Exist in Oregon?*

Having addressed whether a right to a “speedy appeal” is a theoretical possibility, I now return to the current state of the law and next seek to determine (1) whether, given the current time on appeal for the typical criminal case in Oregon, there is something that could be called “delay” in the appellate process and (2) whether that “delay” could constitute reversible error.

While the term “delay” often has a pejorative connotation, in the following context, I affix that label to situations with care. The

116. However, the problem of appellate delay is not confined to the court of appeals. The supreme court has been the forum for much of the discussion of appellate delay that has come from the Oregon judiciary. Much of the analysis in this Article emphasizes the Oregon Court of Appeals; however, the issue is pertinent for both state appellate courts.

117. 2006 ANNUAL REPORT, *supra* note 114, at 5.

118. *Id.* The category of “criminal” filings includes appeals, habeas corpus, post-conviction relief and parole review.

appellate process varies measurably from that of trial, and it is necessary that an appellate decision take a certain amount of time that a decision from a trial judge generally would not. The appellate process is one of deliberation, thoughtfulness and (sometimes) compromise; well-reasoned law is not made hastily or simply.

“That delays were *lengthy* does not, of course, make them *excessive*; the latter judgment requires application of standards.”<sup>119</sup> With that in mind, there is a further presumption that appellate “delay” occurs when an appeal has languished too long, presupposing that there is an amount of time that is appropriate and reasonable, against which “delay” can be measured. My conclusions are tempered further by the realization that the idea of a right to a “speedy appeal” envisions the extraordinary case—the case which does not conform to the uniform goal of timely disposition for all cases.<sup>120</sup>

In April 2003, in response to a request from the legislature to review current operations of the judiciary, the Appellate Process Review Committee (APRC) was formed and charged with reviewing the structure, timeliness, cost, and workload of Oregon’s appellate courts.<sup>121</sup> The APRC found that in 2002 it took an average of 18 months (1.5 years) to process civil appeals and 21.6 months (1.8 years) to process criminal appeals.<sup>122</sup> More recent case processing times are not available, and it is important to bear in mind that there is a possibility that processing time has changed in the interim. After

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119. Wasby, *supra* note 92, at 237 (emphasis in original).

120. For example, I am not seeking to invalidate all convictions that took three years to dispose of on appeal. I am instead seeking to find a determinable standard against which inordinate delay could be measured and upon such a finding a violation of the defendant’s statutory and constitutional rights could rest.

121. OR. STATE BAR, OREGON STATE BAR APPROVED SUMMARY & ANALYSIS: APPELLATE PROCESS REVIEW COMMITTEE REPORT 1 (2004), *available at* [http://www.osbar.org/\\_docs/lawimprove/documents/04AugustAppellateReport.pdf](http://www.osbar.org/_docs/lawimprove/documents/04AugustAppellateReport.pdf) [hereinafter APPELLATE PROCESS REVIEW COMMITTEE REPORT].

122. *Id.* at 82. It should be noted that the APRC maintains that its numbers may not be “totally reliable,” but due to the lack of technological advances of the system being utilized, these are the most accurate numbers available. The APRC statistics are taken from a random sample of ten percent of the civil and criminal cases closed during 2002. *Id.* at 82 tbl.3b.

The “Criminal” cases exclude approximately 200 “prostitution-free and drug-free zone” cases out of Multnomah County, all of which were filed between 1994 and 1997, all of which were held pending disposition of three lead cases, and all of which were closed in 2002 following a Supreme Court decision in the lead cases without preparation of transcripts, briefing, or oral argument, or new decision by either the Court of Appeals or Supreme Court.

*Id.* at 82.

breaking down the overall time spent on appeal, criminal appeals<sup>123</sup> on average had the following durations at specified intervals (in months):

Filing of notice of appeal to transcript preparation = 3.1;

Transcript preparation to the completion of briefing = 14.1;

Completion of briefing to submission = 3.0;

Submission to decision = 4.4;

Decision to petition for review = 2.4;

Decision or disposition of petition for review to judgment = 2.3.<sup>124</sup>

When viewed in intervals, the length of time allowed for briefing is significant. Criminal appeals took 2.6 months longer to be briefed than civil appeals. This disparity is no doubt due to the internal practice established many years ago when

the Chief Judge of the Court of Appeals conferred with the . . . [Legal Services Division of the Office of Public Defense Services] regarding the amount of time that attorneys with that office handling direct criminal appeals would have to file the opening brief, and established the opening brief filing period at 210 days from the date the record settles.<sup>125</sup>

It has been the practice of the Oregon appellate courts to allow the parties to determine the pace of their own litigation, with minimal interference by the court—a practice that is evidenced in the briefing arrangement between the Attorney General and the Public Defender.

The 210 day requirement continues to be the practice and it is recognized that “[t]he extraordinary amount of time allowed to Public Defender attorneys reflects the serious and chronic lack of sufficient staff for the Office of Public Defense Services.”<sup>126</sup> The problem of underfunding and its implications are discussed further below.<sup>127</sup> At this point, however, it is important to merely recognize the source of the initial prolonged briefing period, which occurs at the outset of every criminal appeal handled by public attorneys, and to realize the prolonged briefing period might fairly be characterized as delay. It is also important to note the impact of these appeals, because most

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123. The time breakdown for civil appeals is as follows: Notice of appeal to transcript preparation = 3.6 mo.; Transcript preparation to completion of briefing = 11.5 mo.; Briefing completion to submission = 3.7 mo.; Submission to decision = 2.0 mo.; Decision to petition for review = 2.0 mo.; Decision or disposition of petition for review to judgment = 3.1 mo. *See id.*

124. *Id.*

125. *Id.* at 50.

126. *Id.*

127. *See* Section V.B.1 *infra*.

criminal defendants are represented by public attorneys; thus, provision of public defense services has a systemic effect.

The time allowed for briefing is partially under the court's control because the court could refuse to grant motions for time extensions, or it could even demand that the Attorney General and Public Defender come to a different agreement, if it felt so inclined.<sup>128</sup> Realizing that a different agreement could be reached does not necessarily acknowledge the other difficulties that perhaps could be the underlying reason the current agreement continues to endure. That is, with underfunding of all parties involved, it is another question whether any side or court could work faster without more resources at their disposal.

Beyond briefing, the time that elapses between submission and decision is uniquely within the court's control as no other part of the process is. The time from submission to decision in a criminal case (4.4 months) is twice as long as for civil cases (2.0 months). This discrepancy could be a function of many factors and it is important to recognize that advocating for a decrease in appellate delay is not intended to reduce the full, fair, and deliberative nature of appellate review, especially in criminal cases where the defendant's life and liberty are at stake. In addition, in all types of cases, law is formed, interpreted, and refined in important ways at the appellate level.

It is arguable whether or not the case processing times cited above constitute systemic appellate delay. In Table 2, the processing times in Oregon are compared to the processing times in similarly situated state courts. However, the American Bar Association (ABA) has promulgated standards for case processing intervals in appellate courts that provide objective guidelines by which Oregon and other states can measure their performance. The ABA standards provide the following:

- Preparation of the record = 30 days;
- Preparation of the transcript = 30 days, (OR = 3.1 months);
- Completion of briefing = 110 days, (OR = 14.1 months);
- Completion of briefing to setting of oral argument = 55 days, (OR = 3 months);

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128. *Id.* at 51. The question that is presented by this issue is whether, even if the court did act more heavy-handedly, it would make a difference. Even if the court had briefs submitted and cases waiting in the wings (more so than already), those measures would have little overall effect if the judges did not have the ability to get to the cases quicker. The court may be reluctant to act this way toward litigants without being able to ensure it could speed up its own production accordingly.

Oral Argument to decision = 55 or 90 days, (OR = 4.4 months).<sup>129</sup>

It is apparent from the ABA standards that criminal appeals in Oregon's appellate courts have some measure of delay, as do many (if not all) state courts. The ABA standards allow for 280 days from filing to disposition and for 315 days in the instance of a death penalty case or cases of extraordinary complexity. The question appears to be one of reasonableness. Unfortunately, the ABA standards have proven difficult to practically implement.<sup>130</sup> While they may be unworkable, the ABA standards could be a good guideline from which to fashion a reasonable goal for case processing times. For example, perhaps a more practicable approach is to recognize the many stages and times necessary for an effective appeal when setting a number. While 280 days eludes courts in implementation, perhaps 365 days (one year) could be a workable, possible, and desirable goal from filing to disposition.

Oregon's 210-day briefing period for criminal cases defended by public defenders, by itself, constitutes two-thirds of the entire period mandated by the ABA for case processing time.<sup>131</sup> If a goal is set of

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129. 3 AMERICAN BAR ASS'N JUD. ADMIN. DIV., STANDARDS RELATING TO APPELLATE COURTS §§ 3.53–3.55 (1994).

For example, Rule § 3.53(a)(i) provides thirty days for preparation of the record and thirty days for preparation of the transcript. Rule § 3.54(a) provides fifty days for the filing of appellant's brief, fifty days for the filing of appellee's brief and a reply brief is permitted within ten days. Rule § 3.55(a)(i) provides that oral argument should be set within fifty-five days from the filing of appellee's brief. Rule § 3.55(a)(iii) provides that opinions should be prepared fifty five days from the date of oral argument, or ninety days if it is a death penalty case or case of extraordinary complexity.

W. Warren H. Binford et al., *Seeking Best Practices Among Intermediate Appellate Courts: A Nascent Journey*, 9 J. APP. PRAC. & PROCESS 37, 44 n.18 (2007). See APPELLATE PROCESS REVIEW COMMITTEE REPORT, *supra* note 121, at 82, for the Oregon data.

130. See generally Binford et al., *supra* note 129, at 114.

131. *Id.* at 71–72. However, Oregon is not alone in its extended time for briefing. Colorado reports that in 2005 it took 146 days for civil cases and 283 days for criminal cases. Colorado reports that criminal cases are subject to the same briefing rules as civil cases, however, there is an agreement between the Office of the Colorado Public Defender's Appellate Section and the Colorado Attorney General's Office that the court allow the Public Defender to place cases on an "automatic extension list" with an automatic 120 day extension for filing the opening brief. The Attorney General may then place the case on an automatic extension list for an extension of 60 days. Colorado reports that due to backlog in these offices the court regularly grants extensions above the automatic extension lists. This is especially interesting because in the study conducted by the Willamette Court Study Committee, Colorado ranked last (nine out of the nine courts that reported sufficient data) for overall efficiency, showing it to have the longest average case processing time. *Id.* at 72.

365 days from filing to disposition, the 210 day briefing period would still constitute fifty-seven percent of the entire time on appeal. Clearly these problems of appellate delay warrant the attention of the bench, bar, public, and the legislature.

Table 2. Comparing State Intermediate Appellate Court Case Processing Times<sup>132</sup>

	Average total time	Total Time: <sup>133</sup> civil	Total Time: criminal
Arkansas	300 days	268 days	332 days
Colorado	720 days	656 days	784 days
Connecticut	578 days		
Kansas	332 days	291 days	352 days
Michigan	449 days		
Minnesota	278 days	260 days	317.5 days
New Jersey	442 days	403 days	540 days
New Mexico	447 days		
North Carolina	301 days	315 days	293 days
Oregon	594 days	540 days	648 days

Viewing Oregon's case processing times<sup>134</sup> with those times provided by other jurisdictions, a few things become clear. Only one court (the Minnesota Court of Appeals) studied by the Willamette Court Study Committee<sup>135</sup> met the ABA standards for case processing times. Also, all but one court (the North Carolina Court of Appeals) took longer to process criminal cases than to process their civil counterparts. Given the conventional wisdom that criminal cases, which implicate fundamental rights of liberty and due process, must

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In addition, Arkansas (a state with one of the quickest case processing times) reported that it took 156 days to brief civil cases and 232 for criminal cases. See *id.* at 37 for the article resulting from the Willamette Court Study Committee's efforts in studying intermediate courts of appeal.

132. The listed case processing times are taken from court surveys used by the Willamette Court Study Committee, [http://www.willamette.edu/wucl/articles/appellate\\_courts](http://www.willamette.edu/wucl/articles/appellate_courts). The courts were asked to report answers to the survey using 2005 (or equivalent court or fiscal year) data.

133. *Id.* (reporting answers to survey question 31).

134. It should be noted that Oregon's data was not taken from the same time period as the data reported in the Willamette Court Study Committee survey.

135. See Binford et al., *supra* note 129, at 59.

be disposed of with relative quickness or even expedited, these across-the-board results are somewhat shocking.<sup>136</sup> Although Oregon may be in good company, many states are in a position to consider the length of time on appeal and how it could affect the outcome of its cases (e.g., whether appellate delay could constitute reversible error). Just as the issues facing the Oregon system are not unique to Oregon, neither should the possibility that extraordinary delay, attributable to the state on appeal, could constitute reversible error as a violation of a defendant's rights be confined solely to Oregon.

The inordinate delay analysis, when conducted under Oregon law, would likely not yield a finding of systemic delay given the current case processing times. Oregon's state constitutional guarantee, however, is not limited by its language to speedy trials and therefore might be susceptible to expansion to the appellate process. The Oregon statutory protections clearly apply to trials and would need to be amended in order for the court to find guarantees applicable to the appellate process. In sum, if a situation presented itself (and no doubt a situation exists) where the defendant has experienced delay that is, relative to other defendants, extraordinary, it is possible under the aforementioned analysis that there lies a claim for relief.

## V. HOW CAN OREGON REDUCE APPELLATE DELAY?

Recognizing that appellate delay could have consequences for criminal indictments, trials, and convictions, and further taking note of the structure of Oregon's appellate system, it is helpful to turn now to what solutions may exist for combating delay at the appellate level in Oregon as well as in other states. I continue by exploring how to alleviate the burden felt by our state courts in an effort to encourage shorter case processing times.

### A. *A Judicial View of Delay in Criminal Appeals*

The Oregon Court of Appeals has stated that the length of time for processing criminal appeals is "mostly due to extensions of time for briefing requested by the parties to those cases."<sup>137</sup> The goal of the court is to "shorten the average cumulative length of extensions of

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136. An interesting topic for further study would be to see if case processing times for criminal cases are longer or shorter in federal courts, relative to civil cases in federal courts and also relative to state court processing times.

137. 2005 ANNUAL REPORT, *supra* note 115, at 14.

briefing time by helping publicize the crisis in resource shortages that plague the offices of the Attorney General and Public Defender, as well as the private Bar, which, in turn, drive these unacceptable delays in brief filing in criminal appeals.”<sup>138</sup> The court’s approach to this problem consisted of three concepts:

designating lead cases on recurring legal issues so as to reduce the need for extended briefing in related cases;

holding continuing legal education programs for criminal law practitioners to improve briefing practices; and

adopting court practices that will allow the parties to brief cases more efficiently without losing quality.<sup>139</sup>

The court is moving in the right direction in addressing this problem and seeking to identify possible reforms that could alleviate such delay. To have an impact for positive change in this area, the court really must engage in the battle and take charge in some ways, as only it can. Fortunately, the court’s leadership is actively pursuing reform and refining of its practices.<sup>140</sup>

### B. Resources<sup>141</sup>

One of the challenges courts continue to face is insufficient budget resources. Following the recession in 2001, state budgets have taken an upward turn, however, this does not necessarily translate into greater funding for state judicial departments.<sup>142</sup> A 2006 study conducted by the National Center for State Courts predicted that fiscal trends in state courts will not improve due to the decreased amounts of federal funding that is shifting the fiscal burden for state courts to the individual states.<sup>143</sup> “Beginning in 2005, states noticed decreased federal grants and support to justice programs, transportation, and education.”<sup>144</sup> If this trend continues, the study predicts it “will

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138. *Id.*

139. *Id.*

140. See DAVID V. BREWER, CHIEF JUDGE, STATE OF OR. JUDICIAL DEP’T, ANNUAL REPORT OF THE OREGON COURT OF APPEALS (2007), available at <http://www.ojd.state.or.us/courts/coa/documents/2007CARReport.pdf>.

141. The first paragraph of this section is reprinted with permission from the author. See Binford et al., *supra* note 129, at 94.

142. NATIONAL CENTER FOR STATE COURTS, *Future Trends in State Courts 2006*, 14 (Carol A. Flango, Chuck Campbell & Neal Kauder eds., Williamsburg, VA: National Center for State Courts 2006).

143. *Id.* Decreased federal funding is attributed to the rising cost of healthcare as the population ages and also the continually high federal deficit.

144. *Id.*

certainly put a great deal of strain on state coffers” and “by FY 2008, at least 19 states expect structural deficits.”<sup>145</sup> The issue of insufficient budget resources reaches all aspects of the judicial system, including the provision of public attorneys.

### 1. *Public Defense Attorneys*

States that provide a right to a direct criminal appeal must also provide indigent appellants with counsel.<sup>146</sup> At one time, it was thought that the solution to the increasing appellate caseloads and delays was to create a state public defender office.<sup>147</sup> Such offices are now widespread; however, the problems have only become more complex. The Oregon Office of Public Defense Services (OPDS) is charged with providing public defense services to those in Oregon who cannot afford to pay for a lawyer and are therefore entitled to a public attorney to effectuate his or her constitutional right to counsel.<sup>148</sup> The issues confronting public defense work are by no means new or novel; however, they are long lasting. There is a general understanding that public defenders are overworked and underpaid. Recognizing these issues is only part of the analysis of why and how public defense services can be provided in a way that will protect the rights of the accused, while causing the criminal justice system to continue on its course without significant backlog or delay. The criminal justice system is predicated on the notion that there are two equal and opposing advocates squaring off before a neutral decisionmaker. If either advocate is less-equipped to meet the task that premise (and goal) is undermined.

The right to counsel and the right to a speedy trial seem inextricably linked. If a state does not provide counsel, a defendant is denied that right and his conviction is called into question. Or, if the counsel that is provided is somehow ineffective or inadequate, then there is again means to challenge the conviction.<sup>149</sup> But, if counsel is appointed and the defendant waives his right to a speedy trial, there is a much smaller likelihood the conviction can be questioned on either

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145. *Id.*

146. *United States ex rel. Green v. Washington*, 917 F. Supp. 1238, 1273 (N.D. Ill. 1996) (citing *Douglas v. California*, 372 U.S. 353, 355 (1963)).

147. See Winslow Christian, *Delay in Criminal Appeals: A Functional Analysis of One Court's Work*, 23 STAN. L. REV. 676, 691 (1971).

148. See *Gideon v. Wainwright*, 372 U.S. 335, 342–345 (1963).

149. See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984); *Rodriguez-Moreno v. Oregon*, 145 P.3d 256 (Or. 2006); *Stevens v. Oregon*, 902 P.2d 1137 (Or. 1995).

ground.<sup>150</sup> Due to the backlog, lack of staff, and underfunding, it is said to be impossible in many cases for public attorneys to comply with court deadlines and still effectively serve their clients. What result? Speedy-trial rights are traded for a more fundamental right to counsel.<sup>151</sup> Is this the necessary answer? The question throughout this Article is whether there is room for both rights to be protected and for the overall system to be advanced. More pointedly, society ought not to have the choice to fund either the right to counsel or the right to a speedy trial and appeal, but be required to protect both. With that in mind, I progress to consider the provision of public defense services.

Created by statute, the Oregon Public Defense Services Commission (PDSC) is charged with establishing and maintaining a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution, and Oregon and national standards of justice.<sup>152</sup> PDSC consists of two divisions, the Legal Services Division (LSD), which provides appellate legal services to indigent criminal defendants, and the Contracts and Business Services Division (CBS), which administers the state's public defense contracting and payment systems.<sup>153</sup> My comments are confined to the LSD as the relevant body of appellate attorneys for the scope of this inquiry.

Much of the fault for delay that occurs on the part of LSD can be attributed to insufficient resources. Oregon's appellate public defenders carry a caseload that is fifty percent higher than the national

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150. See Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 344 (2002). Bernhard presents an optimistic view of how to improve the provision of indigent defense services, stating that

everyone agrees that *Gideon* was correctly decided. There is near unanimity that public defense systems must be improved. Finally, all who have seriously considered the question agree that Strickland has not worked either to prevent miscarriages of justice or to improve attorney performance. If the legislature refuses to support the defense function, the criminal justice community and the courts must devise a solution. I believe they can.

*Id.*

151. This is, of course, an overly simplistic characterization.

152. OR. REV. STAT. § 151.216 (2007).

153. PUBLIC DEFENSE SERVICES COMMISSION, THE EXECUTIVE DIRECTOR'S BIENNIAL REPORT TO THE OREGON LEGISLATIVE ASSEMBLY FOR 2005-07 3 (2007), available at <http://www.ojd.state.or.us/osca/opds/Reports/documents/pdscexecdirprttoleg2007.pdf>.

average and recommended caseload.<sup>154</sup> Caseloads cannot be reduced without adding more attorneys—something which requires greater funding by the legislature. LSD received funds to increase the salaries of its lawyers for the 2007-2009 biennium, the first such increase since 1991.<sup>155</sup> However, more is needed to fully fund the system adequately.<sup>156</sup> Beyond a need for greater numbers of public attorneys, there is also a need for expertise in certain areas, such as post-conviction relief or capital cases. As constitutional criminal procedure has become increasingly complex and appellate practice more sophisticated, the need for talented and experienced attorneys to serve these clients has increased.

Another significant factor contributing to delay on all sides is the sea change that takes place whenever the U.S. Supreme Court issues a landmark decision. LSD cited *Crawford v. Washington* and *Blakely v. Washington* as examples of decisions that “directly and dramatically impacted caseload,” and further, “if additional funding is not provided to address such changes, the quality of representation is further eroded.”<sup>157</sup> Decisions such as these have a significant impact on the public defender, the attorney general, and the courts that are all grappling with what they do, or do not, mean for pending and future cases. Also, when a decision such as *Crawford* is handed down, LSD must go through every active case to determine if it is affected by the decision and how to proceed because in such a case the court may look at the case as plain error.<sup>158</sup> The courts understand the impact had by these cases:

As a result, there has been an increased volume of criminal appeals in Oregon that have presented numerous complex sentencing and evidentiary issues, requiring prompt published opinions from both of Oregon’s appellate courts. When cases like *Blakely* and *Crawford* are decided, we have no choice but to divert our resources to expedite the decision-making process in cases involving sentencing and evidentiary issues, to assure the integrity

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154. PUBLIC DEFENSE SERVICES COMMISSION, ANNUAL PERFORMANCE PROGRESS REPORT FOR FISCAL YEAR 2005-06 5 (2006) [hereinafter APPR], available at <http://www.oregon.gov/DAS/OPB/APPR06.shtml>.

155. *Public Defense Services Commission Achieves Funding Increase*, CAPITOL INSIDER: OSB PUBLIC AFFAIRS NEWSLETTER FOR BAR LEADERS, July 9, 2007, at 2, available at [http://www.osbar.org/\\_docs/lawimprove/capinsider/ci\\_070709.pdf](http://www.osbar.org/_docs/lawimprove/capinsider/ci_070709.pdf).

156. *Id.*

157. APPR, *supra* note 154, at 3.

158. Interview with Peter Gartlan, Chief Defender, Oregon Public Defense Commission, in Salem, Or. (Oct. 17, 2007).

of our criminal justice system.<sup>159</sup>

It is commendable the way that the Oregon Court of Appeals was able to deal with these issues by identifying lead cases the resolution thereof would decide issues in other cases. That process no doubt increased the efficiency and decreased the time to decision on countless pending cases, which otherwise would have been dealt with one by one, perhaps unnecessarily.

Because it is not possible to predict how the constitutional landscape will change over time, the best way to prepare for new developments in constitutional criminal procedure is to eliminate the backlog and delay in the system. Thus, when a significant change does occur, those involved will be capable of taking it in stride without adding its complications to an already high pile of backlogged cases.

## 2. Attorney General's Office

The underfunding of public attorneys is not confined to the public defender's office. The Attorney General's Office also has experienced budget reductions that caused the Solicitor General to slow its briefing schedule as well.<sup>160</sup> Delays on this end also have an impact on the overall process, although the impact is usually not as significant. This is perhaps in part because the Attorney General's Office is thought to occupy a kind of "favored child" status in contrast to the status of the Public Defense Commission. The appellate division also received a sizeable funding increase for the 2007-2009 biennium, allowing it to add new attorneys and increase salaries.

In order to ensure that the public defender and solicitor general are equal opposing forces in the adversarial process, such that they are equal in resources, I would propose a scheme in which both branches are funded equally. Such a system already exists at the federal level,<sup>161</sup> and to do so at the state level could eliminate many problems and arguably expedite appeals by adding resources to the entire system in a balanced manner. One important difference between the operation of the OPDS and the Attorney General's office is that the work done by the appellate attorneys in the Legal Services Division of OPDS is solely criminal defense. In contrast, the appellate division

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159. 2005 ANNUAL REPORT, *supra* note 115, at 4.

160. *Id.* at 5.

161. Interview with Peter Gartlan, Chief Defender, Oregon Public Defense Commission, in Salem, Or. (Oct. 17, 2007).

of the Department of Justice encompasses much more than criminal law and, in fact, requires its attorneys to be generalists. I would advocate for a system that is proportionally balanced between those prosecuting and those defending such that there are two equal and opposing forces squaring off in any given case.

### 3. *The Bench*

As noted above, the problem of insufficient resources is not confined to the attorneys who practice criminal law; the allocation of judicial resources is also highly important. A few states have combated the problem of appellate delay by looking to the bench itself and adding more judges in an effort to better handle the volume. For example, in 2005, the Colorado Court of Appeals undertook an “extensive time use study” that showed the court needed 25 judges to support its current caseload.<sup>162</sup> Following the study, Colorado increased its bench from 16 to 19 judges in 2006 and requested an additional 3 judges to be added in 2008, subject to approval from the legislature.<sup>163</sup>

Similarly, when the Minnesota Court of Appeals was created by statute in 1983 there was “a specific mechanism for increasing the number of judges, in proportion to the caseload,” however, the formula was never implemented and that part of the statute was repealed.<sup>164</sup> Minnesota suggested it “could easily absorb another six judges (two panels of three)” to manage the backlog, but the state does not have the funding.<sup>165</sup>

A recent study of thirteen intermediate appellate courts found a statistically significant correlation between the number of total opinions issued by a court and the number of judges on the court.<sup>166</sup> Such a conclusion can hardly be surprising, and it gives credence to the idea that more judges results in the disposal of more cases. It does not suggest, however, that to reduce appellate delay in criminal cases, all one must do is increase the size of the bench in any given jurisdiction.

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162. Binford et al., *supra* note 129, at 99 (Colorado’s survey response to question 41).

163. *Id.*

164. *Id.* at 98 (Minnesota survey response to question 41).

165. *Id.*

166. *Id.* at 98 n.388. (“Statistically significant correlations were found between the number of total opinions issued and . . . the number of judges ( $N= 13$ ;  $r = .967$ ;  $p = .000$ , sig. at .01”).

While it makes good sense to increase the number of judges in some cases, an increase in the number of judges also raises the concern that if the number of judges becomes too great, it could undermine the collegiality of the court and, by doing so, hinder rather than help the situation leading to the conclusion that such a reform can only be assessed on a court-by-court basis. Further, I think it is unlikely that simply adding a new panel of judges will serve to reduce systemic delay involving the defense, the prosecution, and the court. Although, it may be wise for courts to engage in self-evaluation and determine first whether such a change would be desirable and result in increased court performance, and second, whether the courts are likely to gain the approval of and necessary funding from the legislature for such a change.

#### VI. CONCLUSION

The most important conclusion of this Article is the conceptualization of the idea of appellate delay as a constitutional violation in practical terms. That is, applying principles of the right to a speedy trial and due process to the context of an appeal to determine that inordinate delay could constitute constitutional and reversible error. Criticisms of appellate courts and the time which they take to dispose of cases are frequent and not altogether surprising. However, in the context of criminal appeals, there is room for constructive criticism of systems in which the convicted experience undue delay in the processing of an appeal, when that delay is attributable to the state. Given the propensity of courts to uphold speedy-trial protections, it is important to view the right to a speedy appeal in the context of what a violation thereof could mean; that is, reversal of a conviction. If for no more noble a reason than preservation of individual liberties, it ought to be sufficient fuel for the fire of reform to come to realize that delay can lead to freeing those convicted of heinous crimes—for the violation of constitutional rights does not (and should not) trade in guilt or innocence. Therefore, for the advancement of the greater good, as well as preservation of individual liberty, it is important to look critically at our appellate systems and react accordingly.

