**Key Takeaways:**

* The federal state constitutional requirements for a speedy trial remain a basis to attack pretrial/sentencing delay. Covid-19 does not eliminate these constitutional rights.
* The critical question: whether the pretrial/sentencing delay in your case rises to a constitutional violation.
* The answer requires close analysis of case specifics, procedural history, and individual circumstances. There cannot be a general ruling on speedy trial and Covid-19.
* The only remedy for a speedy trial violation is dismissal of the prosecution.
* Look to Barker v. Wingo, 407 U.S. 514 (1972) for the four-factor balancing test to determine whether your client’s Sixth Amendment right to a speedy trial is violated. See also State v. Reynolds, 2014 VT 16, ¶ 9, 196 Vt. 113, 95 A.3d 973 (applying same federal analysis to state constitutional speedy trial rights).
  1. Length of delay
  2. Reason for the delay
  3. Assertion of the defendant’s right, and
  4. Prejudice to the defendant.
* Overarching principles to keep in mind when going through the Barker analysis:
  + Your factual record as to all four Barker factors is critical for building your speedy trial case. Review of factual findings as to delay is highly deferential, there must be “clear error.”
  + These factors have no “talismanic qualities,” and none is “either a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial.” Barker, 407 U.S. at 533.
  + They are “related factors” that “must be considered together with such other circumstances as may be relevant.” [Id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127165&pubNum=0000780&originatingDoc=I9df7dd40809911eaafec9267fcc8c7fa&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))
  + These factors may also be relevant in a due process speedy sentencing claim. See Betterman v. Montana, ––– U.S. ––––, 136 S.Ct. 1609, 1617-18, n.12 (2016) (expressly leaving open the possibility that due process protects against improper delays in sentencing, noting that “[a]fter conviction, a defendant’s due process right to liberty, while diminished, is still present. He retains an interest in a sentencing proceeding that is fundamentally fair.” Id. at 1617. The Court did not set forth what a due process speedy sentencing claim might consist of, although it suggested that the Barker factors might be “[r]elevant considerations”).
  + “Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.”
  + If review of the other factors is triggered, the first factor then is balanced along with the other factors in determining whether a speedy-trial violation exists.

1. **First Factor: So then, under Barker, how long is too long?**
   1. **There is no bright-line rule establishing when the delay is too long. That said, there are some guiding principles…**
   2. “Our first task is to determine whether the length of the delay was presumptively prejudicial.” Reynolds, 2014 VT 16, ¶ 19, 196 Vt. 113, 122, 95 A.3d 973, 980.
   3. First, pull together key dates and build a chronology/date-clock: arrest, arraignment and probable cause determination, pretrial detention, and date when trial is expected/scheduled/held.
   4. Point to the record where the court established when jury trials are to be held in the defendant’s case. If the court has not been able to give a specific date, make sure the record is clear on this point as well. Try to lock down when the court anticipates holding a jury trial again. Use the court’s failure to give a hard-fast date as establishing that the delay is indefinite and its end point unknowable at this time.
   5. Consider the length of the delay as compared to the complexity of the case. This factor examines the length of the delay in relation to the nature of the case against the defendant. Barker, 407 U.S. at 530-31.
      1. What makes a case complex? The offense type, elements, severity of the punishment, and specific charge involved; multiplicity of counts; number of defendants and witnesses; availability of evidence; etc. The court must consider “the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim,”
   6. Consider length of delay in relation to whether defendant was incarcerated during this period.
   7. The Vermont Supreme Court has recognized:
      1. 23-month delay between defendant's arraignment and the second trial is presumptively prejudicial. Reynolds, 2014 VT 16, ¶ 19, 196 Vt. 113, 122, 95 A.3d 973, 980 (sexual assault).
      2. 18-month delay is presumptively prejudicial. State v. Turner, 2013 VT 26, ¶ 8, 193 Vt. 474, 70 A.3d 1027 (lewd or lascivious conduct with a child and unlawful restraint of a victim less than sixteen years of age).
      3. 9-month delay sufficient to trigger review of remaining Barker factors. State v. Vargas, 2009 VT 31, ¶ 13, 185 Vt. 629, 971 A.2d 665 (mem.) (lewd and lascivious conduct).
      4. 6-month delay where defendant was incarcerated sufficient to trigger review of remaining Barker factors. State v. Unwin,139 Vt. 186, 195, 424 A.2d 251, 257 (1980) (aggravated assault).
   8. Irrespective of the reason for the delay, this must be factored against the state in a speedy-trial analysis because, it is ultimately the government's responsibility to bring a defendant to trial in a timely matter. Barker, 407 U.S. at 529 (holding that “the primary burden [is] on the courts and the prosecutors to assure that cases are brought to trial”); make your argument why this factor weighs heavily in favor of defendant.
2. **Second Factor: What is the reason for the delay?**
   1. Deliberate delay on the part of the state intended to hamper the defense would obviously weigh heavily in favor of defendant.
   2. More neutral reasons for delay, such as shuttering the courts due to health concerns, should be weighted less heavily but nevertheless should still be considered against the state “since the ultimate responsibility for such circumstances must rest with the government.” Barker, 407 U.S. at 531.
3. Differing weights should be applied to different reasons for the delay: deliberate delays to hamper the defense weigh heavily against the prosecution, while a valid reason such as finding a missing witness may justify a delay. Barker, 407 U.S. at 531.
4. While institutional delays are not counted as heavily against the government as tactical delays by the prosecution, periods of unexplained inaction by the courts are “properly chargeable against the government under prevailing case law . . . .” United States v. Carini, 562 F.2d 144, 149 (2d. Cir. 1977); accord United States v. Tigano, 880 F.3d 602, 614-15 (2d Cir. 2018) (“Administrative delays are counted against the
5. government, since it is not the defendant’s responsibility to monitor” and prevent

delay) (quoting Carini); United States v. Myers, 930 F.3d 1113, 1119 (11th Cir. 2019)

(observing delay caused by negligence or overcrowded courts weighs against the government).

1. Negligence in bringing a case to trial is an unacceptable reason for delay. State v. Charlie, 2010 MT 195, ¶ 53, 239 P.3d 934. The weight assigned to institutional delay increases as the delay becomes more protracted. State v. Radler,448 P.3d 613, 619 (N.M. Ct. App. 2019).
2. The government assumes responsibility for delays where the attempt at reach a plea bargain is ultimately unsuccessful. Tigano, 880 F.3d at 615 (quoting United States v. New Buffalo Amusement Corp., 600 F.2d 368, 378 (2d Cir. 1979)). The reason is that the prosecution may lull a defendant into not pressing for a speedy trial by promising an attractive plea deal. Carini, 562 F.2d at 149.
3. Look closely at the Governor’s changing emergency orders on this front and see how the Court is tracking with/keeping up with these changing standards. Make the record clear what is going on elsewhere in this regard. Compare what is happening in other jurisdictions. The point here is to build the record that the government/courts are ultimately responsible for setting the timeframe for resuming jury trials.
4. **Third Factor: Did the defendant assert his or her speedy trial constitutional rights?**
5. And to what extent did the defendant assert them?
6. A defendant’s personal invocation of the right puts the government on notice that he or she wishes for a speedy trial. United States v. Black, 918 F.3d 243, 264 (2d Cir. 2019).
7. Note: “that motion to dismiss for lack of a speedy trial is not the equivalent of a demand for an immediate trial.” State v. Keith, 160 Vt. 257, 268, 628 A.2d 1247, 1254 (1993).
8. A defendant’s assertion of the right “is entitled to strong evidentiary weight in determining whether the defendant [was] deprived of the right.” Barker, 407 U.S. at 531-52.
9. The Court must indulge every reasonable presumption against waiver. Barker, 407 U.S. at 525-26.
10. **Fourth Factor: What is the prejudice to the defendant?**
    1. The most important and final factor.
    2. Claims of prejudice “should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect,” including “(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.” Barker, 407 U.S. at 532.
    3. Actual prejudice/injury not required.
    4. Negligence in bringing a case to trial “falls on the wrong side of the divide

between acceptable and unacceptable reasons for delaying a criminal prosecution

once it has begun.” Doggett v. United States, 505 U.S. 647, 657 (1992). Courts

consider “dead time” and the “detrimental effect of living under a cloud of anxiety,

suspicion, and often hostility.” Black, 918 F.3d at 265 (quoting Barker, 407 U.S. at

532-33) (quotation marks omitted).

* 1. Argue the specific facts involved in your case: length/conditions of pretrial/presentence incarceration/loss of liberty and risk to health, access to counsel, ability to prepare for a defense, losing custody of a child, housing, employment.