

SECOND CIRCUIT REVIEW

Expert Analysis

## Measuring the Speedy Trial Clock

Last month, in *United States v. Black*, the U.S. Court of Appeals for the Second Circuit ruled for the third time in two years that a district judge in the Western District of New York violated a criminal defendant's Sixth Amendment right to a speedy trial and reiterated that both courts and the government owe an "affirmative obligation" to criminal defendants and the public to bring matters to trial promptly. In a 2-1 decision authored by Judge Rosemary Pooler and joined by Judge Jon O. Newman, the Second Circuit held that a criminal defendant's right to a speedy trial attaches



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at the time of the first indictment, regardless of the filing of a superseding indictment. U.S. District Judge Denise Cote, sitting by designation, concurred in part and dissented in part, stating that the Sixth Amendment right to a speedy trial, like the right to counsel, is offense-specific and attaches at the time the superseding indictment is filed for charges that constitute a separate offense.

### 'Blockburger v. United States'

The Sixth Amendment provides defendants with the right to a speedy trial as well as the right to counsel. The case law

is well-settled that the right to counsel attaches when formal judicial proceedings have been initiated against a defendant, and are offense-specific. See *Texas v. Cobb*, 532 U.S. 162 (2001). The question of when the right to counsel attaches most frequently arises where both charged and uncharged offenses are involved, and courts evaluating the issue have relied on the *Blockburger* test, imported from double jeopardy jurisprudence. *Id.* at 173. Under *Blockburger*, a single action can result in two distinct offenses if each offense requires proof of an additional fact that the other offense does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Therefore, when an uncharged offense does not require proof of an additional fact, then the right to counsel is deemed to have attached at

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the time of the charged offense. The right to counsel is deemed not in play when an uncharged offense requires new proof.

### Other Circuits

In 1996, the Eleventh Circuit used reasoning similar to that applied in *Blockburger* to determine the length of delay under a right to a speedy trial claim. *United States v. Derose*, 74 F.3d 1177 (11th Cir. 1996). The defendant was initially charged with conspiracy, followed by an additional charge of drug possession two years later. The Eleventh Circuit held that because the possession charge was a separate offense, the clock to calculate the length of delay for the prosecution of that possession charge started with the second indictment and did not violate defendant's Sixth Amendment right to a speedy trial. *Id.* at 1185. Other circuit courts, however, have declined to adopt the *Derose* court's ruling or apply the *Blockburger* approach to calculation of the relevant delay. When considering Sixth Amendment speedy-trial claims, the First, Third, Fifth, Seventh, Eighth, and Tenth Circuits have each

calculated the length of delay from the first indictment to trial, even in the face of a subsequent indictment.

### Measuring the Speedy Trial Clock in 'Black'

The passage of time between an initial indictment or arrest and trial can span months—sometimes years—thereby implicating a defendant's Sixth Amendment right to a speedy trial. Courts consider four factors when determining whether a defendant's right to a speedy

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trial has been violated: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). If a length of delay qualifies as "presumptively prejudicial," a court must consider the remainder of the speedy trial analysis. *Id.*

The Second Circuit has previously applied this analysis, calling a delay of four and a half years "unquestionably substantial" and a delay of seven years "extreme." *United States v. Tigano*, 880 F.3d 602 (2d Cir. 2018).

In *Black*, defendants suffered a delay of nearly five years and eight months from the time of the first indictment to trial. Defendants were first indicted on a single count of Hobbs Act conspiracy on March 6, 2012. *United States v. Black*, 918 F.3d 243, 249 (2d Cir. 2019). The prosecution informed the court the next day that the case may become eligible for capital prosecution, resulting in delays related to the death penalty authorization and missing evidence. *Id.* at 249-51. Two years and nine months after the initial indictment, and before the magistrate judge could rule on an evidentiary hearing, the prosecution filed a superseding indictment with eight additional counts including robbery and extortion, kidnapping, use of a firearm, and use of a firearm resulting in a death, making defendants eligible for the death penalty. *Id.* at 252. A month later, the prosecution

informed the court that it would not be seeking the death penalty after all. *Id.* Almost three more years passed as pre-trial matters were addressed and, by the time the jury was finally sworn in on Nov. 7, 2017, a total of five years and eight months had elapsed. *Id.*

### The Second Circuit Opinion

In considering the first *Barker* factor, the Second Circuit held that the clock begins to run for purposes of determining the length of the delay with the *first* indictment or arrest underlying the actions leading to the prosecution regardless of whether there has been a subsequent indictment. Following the First, Third, Fifth, Seventh, Eighth and Tenth Circuits, the Second Circuit panel majority rejected the *Blockburger* approach and distinguished the right to a speedy trial from the right to counsel.

Though the right to counsel is offense-specific, the Second Circuit declined to apply the same limitations to the right to a speedy trial. By holding that the right to a speedy trial is aimed at preserving an individual's liberty interests by minimizing both incarceration prior

to trial and, more broadly, the disruption caused by an arrest and subsequent charges, the Second Circuit ruled that new counts in a superseding indictment should not be considered separately from the count in the initial indictment with respect to speedy-trial computation. *Id.* at 255.

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In her partial dissent, Judge Cote stressed that each offense should be evaluated separately applying the *Blockburger* test. *Id.* at 275-76. Applying this approach, the delay caused by the filing of the superseding indictment with new counts would have been measured in *Black* from the time of the superseding indictment through trial, reducing the length of "delay" from five years and eight months to just under three years. *Id.* at 288-89. Though three years is still a long time, it is arguably below

the threshold length of time the Second Circuit considers "presumptively prejudicial."

### Conclusion

By holding that the clock for speedy-trial computation relates to the time of initial arrest on an original indictment, the Second Circuit joined six other circuit courts in establishing that, unlike the right to counsel where the protection attaches to the filing of specific charges, the right to a speedy trial under the Sixth Amendment attaches to the broader legal process as a whole, starting with the initial arrest.