ZURLA V. STATE, 1990-NMSC-011, 109 N.M. 640, 789 P.2d 588 (S. Ct. 1990)
CASE HISTORY ALERT: see ¶28 - affects 1989-NMCA-016; see ¶25 - affects 1987-NMCA-027; see ¶21, ¶25 - affects 1981-NMCA-114

VINCENT ZURLA, a/k/a VINCENT JAMES ZURLA, a/k/a HENRY VIALPANDO, a/k/a HARRY VIALPANDO, a/k/a DAVID VINCENT SERNA, Petitioner,
vs.
STATE OF NEW MEXICO, Respondent

No. 18348

SUPREME COURT OF NEW MEXICO

1990-NMSC-011, 109 N.M. 640, 789 P.2d 588

January 25, 1990, Filed

Original Proceeding on Certiorari, Philip R. Ashby, District Judge.

COUNSEL

Hal Stratton, Attorney General, Gail MacQuesten, Assistant Attorney General, Santa Fe, New Mexico, for Appellees.

Jacquelyn Robins, Chief Public Defender, Wade H. Russell, Assistant Appellate Defender, Santa Fe, New Mexico, for Appellants.

AUTHOR: RANSOM

OPINION

*{*641}* RANSOM, Justice.

{1} Vincent Zurla was arrested on a shoplifting charge while on parole for a prior conviction. Nineteen months later his case came to trial, and he was convicted on one count of shoplifting over $100. He appealed to the court of appeals, arguing **inter alia** that his sixth amendment right to a speedy trial had been violated. The court of appeals affirmed the conviction. We granted certiorari and reverse.

{2} Zurla was arrested on December 14, 1985. The following day, he posted a $2,500 bond and was released. On December 16, he was arraigned in metropolitan court. On January 24 or 25, 1986, Zurla's parole was revoked because of the pending charges against him and because he had consumed intoxicating beverages, also in violation of his parole. Between January 27, 1986, and May 22, 1987, Zurla was in the custody of the Department of Corrections on his parole violation. Shortly after returning to prison

and with the help of a paralegal at the Department of Corrections, Zurla filed (apparently in metropolitan court) a pro se motion to have his trial set within six months, pursuant to SCRA 1986, 5-604. Zurla testified that the motion listed as his address the Department of Corrections' facility in Los Lunas.

{3} Zurla was indicted in district court on August 26, 1986. The district court was unaware that Zurla was being held in custody for a parole violation and issued a bench warrant for his arrest. Although Zurla's bond was transferred from metropolitan court to district court on September 19, 1986, the bench warrant for Zurla's arrest was not cancelled until the day after he was arraigned in district court. Zurla was not arraigned until March 2, 1987, after the Department of Corrections notified the district court that it was holding him. It was at this time that Zurla first discussed the charges against him with an attorney.

{4} A trial date first was set on a trailing docket for April 27, 1987, but was reset for May 15, 1987. Seventeen months lapsed between Zurla's arrest and the May 15 trial date. This date was continued at defendant's request until July 16, 1987. On July 9, Zurla moved to dismiss the charges for failure to afford a speedy trial as provided in the New Mexico and United States Constitutions.

{5} Evidence was adduced before the trial court that the district attorney's office could have located Zurla simply by placing a phone call to the Department of Corrections' Central Records Office, but apparently this phone call never was made. Moreover, district court employees testified that, unless notified by the district attorney who presents a case to the grand jury, a district court judge often has no way of knowing whether a defendant is being held in custody or has been released on bond when deciding whether to issue a bench warrant or to send notice of arraignment to the defendant.

{6} Zurla also claimed that two potentially exculpatory witnesses had left New Mexico subsequent to his arrest and now could not be located. According to testimony by Zurla and his wife, a neighbor and another woman whom they did not know were waiting in their car in the parking lot of the store when Zurla was arrested by a store security guard. According to Mrs. Zurla's testimony, these witnesses were in the car when, prior to her husband's arrest, she came back to the car in order to get her purse to pay for the goods. Mrs. Zurla also testified, however, that the car was parked some distance from the entrance to the store and was too far away for these witnesses to have seen Zurla's arrest. Thus, it is unlikely that they could have *{*642}* corroborated the testimony by Mrs. Zurla and her husband that he was apprehended inside the store and had not intended to steal anything. The motion to dismiss was denied on July 16 and Zurla proceeded to trial.

{7} Nature of speedy trial right. The Supreme Court has declared the sixth amendment right to a speedy trial to be a fundamental constitutional right that applies to the states through the fourteenth amendment. **Klopfer v. North Carolina,** 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967). In **Barker v. Wingo,** 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed.

2d 101 (1972), the Supreme Court set forth a four-prong test as a guide to the determination of speedy trial claims: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." **Id.** at 530, 92 S. Ct. at 2191; **see also State v. Kilpatrick,** 104 N.M. 441, 722 P.2d 692 (Ct. App.), **cert. denied,** 104 N.M. 378, 721 P.2d 1309 (1986), **on remand from Kilpatrick v. State,** 103 N.M. 52, 702 P.2d 997 (1985).

{8} These four factors, however, have no talismanic qualities; no one factor constitutes either a necessary or sufficient condition to finding a deprivation of the right to a speedy trial. **Barker v. Wingo**, 407 U.S. at 533, 92 S. Ct. at 2193, **see also Moore v. Arizona,** 414 U.S. 25, 94 S. Ct. 188, 38 L. Ed. 2d 183 (1973) (prejudice not essential to showing deprivation of speedy trial right). In applying this test, "courts must * * * engage in a difficult and sensitive balancing process * * * carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." **Barker v. Wingo,** 407 U.S. at 533, 92 S. Ct. at 2193.

{9} In its memorandum opinion,[1] the court of appeals held that the first three **Barker v. Wingo** factors, i.e., the length of delay, the reason for the delay, and the defendant's assertion of his right, all weighed in favor of Zurla, but not heavily in his favor. The court also held that Zurla failed to show prejudice and on balance had failed to show that his speedy trial rights were violated.

{10} We disagree. We believe the court of appeals incorrectly weighed the first three **Barker v. Wingo** factors too lightly in favor of the defendant and incorrectly concluded the state had prevailed on the prejudice prong of the analysis. As the court of appeals did on direct appeal, we now independently balance the factors considered by the trial court in deciding whether a speedy trial violation has taken place. **See United States v. Loud Hawk,** 474 U.S. 302, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986), **on remand,** 784 F.2d 1407 (9th Cir. 1986); **State v. Grissom,** 106 N.M. 555, 746 P.2d 661 (Ct. App. 1987).

{11} Length of delay. We note first our agreement with the court of appeals that the seventeen-month delay between arrest and the first trial date in a case as simple as this one was presumptively prejudicial and triggers inquiry into the remaining three factors. **See Grissom,** 106 N.M. at 561-62, 746 P.2d at 667-68 (delay totaling sixteen months that was attributable to state in complex conspiracy and racketeering case sufficient to trigger speedy trial analysis); **State v. Kilpatrick,** 104 N.M. at 444, 722 P.2d at 695 (delay of fifteen months in a simple assault case presumptively prejudicial).

{12} However, we disagree with the court of appeals as to the weight to be given this factor. "[D]elay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." **Barker v. Wingo,** 407 U.S. at 531, 92 S. Ct. at 2192. Given the sixteen-month period of time found presumptively prejudicial in **Grissom,** we weigh the seventeen-month delay in this simple shoplifting case somewhat heavily against the state.

*{*643}* **{13}** Moreover, we note that the state's chief evidence against Zurla was the testimony of the security guard who alleged he apprehended Zurla attempting to leave the store without paying for merchandise, and that this testimony was available to the state from the day of Zurla's arrest. **See United States v. Butler,** 426 F.2d 1275, 1277 (1st Cir. 1970) (absent good reason, delay of nine months overly long in case depending on eyewitness testimony), **appeal after remand,** 434 F.2d 243 (1st Cir. 1970), **cert. denied,** 401 U.S. 978, 91 S. Ct. 1207, 28 L. Ed. 2d 328 (1971). **Butler** was cited with approval in **Barker v. Wingo,** 407 U.S. at 531, n. 31, 92 S. Ct. at 2192, n. 31, as an example of a set of circumstances in which courts should tolerate less delay.

{14} Reason for the delay. The court of appeals found the state simply was negligent in failing to locate Zurla and, therefore, did not weigh this factor heavily against the state. We disagree with this result. While **Barker v. Wingo** termed negligent delay a "more neutral reason" that, along with excessive caseload, weighed "less heavily" against the state than intentional delay, 407 U.S. at 531, 92 S. Ct. at 2192, simply denominating the reason advanced by the state as "negligent delay" is not sufficient to fix the weight to be given to this consideration. **See Graves v. United States,** 490 A.2d 1086, 1092 (D.C. App. 1984) (en banc) (recognizing an intermediate category of delay for government actions, including failure to take reasonable means to bring a case to trial, that are deemed more culpable than delay due to court congestion and less culpable than tactical delay), **cert. denied,** 474 U.S. 1064, 106 S. Ct. 814, 88 L. Ed. 2d 788 **rec'd as overruled in part on other grounds, Sell v. United States,** 525 A.2d 1017 (D.C. App. 1987) (**Loud Hawk** mandates reasonable delay to pursue appeal be treated as justifiable delay); **Taylor v. State,** 429 So.2d 1172, 1174 (Ala. Crim. App.) (while state's negligence in bringing defendant to trial did not necessarily tip scales in favor of defendant, sheer bureaucratic indifference weighs heavily against state), **cert. denied,** 464 U.S. 950, 104 S. Ct. 366, 78 L. Ed. 2d 326 (1983). In weighing this factor we stress two principles from **Barker v. Wingo:** (1) the four factors are interrelated and must be evaluated in light of the particular circumstances of the case, 407 U.S. at 533, 92 S. Ct. at 2193; and (2) in evaluating speedy trial claims we should compare the conduct of the state and the defendant. 407 U.S. at 530, 92 S. Ct. at 2191.

{15} Here, the extent to which the state's negligence weighs against it is increased by the length of time during which no attempt was made to locate Zurla and by his early, pro se assertion of his right to a speedy trial. The state failed to inquire as to Zurla's whereabouts despite being put on notice that he was demanding his right to a speedy trial, despite notice of his whereabouts, and despite the simple nature of the charges against him.[2] This demonstrates an unacceptable indifference by the prosecution to its constitutional duty "to make a diligent, good-faith effort to bring a defendant to trial." **Smith v. Hooey,** 393 U.S. 374, 383, 89 S. Ct. 575, 579, 21 L. Ed. 2d 607 (1969); **see also State v. Harvey,** 85 N.M. 214, 510 P.2d 1085 (Ct. App. 1973). "[W]here the [administrative] machinery exists [to secure a defendant's presence at trial], the prosecutor has a constitutional *{*644}* duty to attempt to use it." **Id.** at 217, 510 P.2d at 1088.

{16} We believe that bureaucratic indifference should weigh more heavily against the state than simple case overload, particularly when the defendant has attempted to safeguard his rights. **See Commonwealth v. Lutoff,** 14 Mass. App. 434, 440 N.E.2d 52 (1982) (preoccupation with other cases as reason for delay weighs quite heavily against state in case in which defendant made early and persistent efforts to obtain speedy trial).

{17} As pointed out by Judge Chavez' dissent from the court of appeals opinion in this case, previous New Mexico precedent also supports our conclusion that the reason for the delay in bringing Zurla to trial should weigh heavily in his favor. In **Harvey,** the court held that the failure, despite the availability of the necessary administrative machinery, to seek extradition of the defendant from California where he was imprisoned on an unrelated charge weighed heavily against the state. **See also Dickey v. Florida,** 398 U.S. 30, 90 S. Ct. 1564, 26 L. Ed. 2d 26 (1970); **Smith v. Hooey,** 393 U.S. 374, 89 S. Ct. 575, 21 L. Ed. 2d 607 (1969). We believe failure to make an effort to locate a defendant who is imprisoned in the state's own corrections facilities and who has attempted while in prison to obtain an early confrontation with his accusers also must weigh heavily against the state. The court in **Raburn v. Nash,** 78 N.M. 385, 387, 431 P.2d 874, 876, **cert. dismissed,** 389 U.S. 999, 88 S. Ct. 582, 19 L. Ed. 2d 613 (1967) noted:

A prisoner does not forfeit his right to a speedy trial solely because he is confined in the penitentiary under sentence for another offense * * * * This is particularly true when the state that holds him in prison is the same state that presents the indictments.

(Citations omitted).

{18} Assertion of the right. As discussed above, Zurla made a pro se motion to be tried within six months, pursuant to SCRA 1986, 5-604, shortly after his parole was revoked and he was placed into custody by the Department of Corrections. Before his trial in 1987, Zurla's attorney made a motion to dismiss the charges against him for failure to afford a speedy trial.

{19} A defendant does not have a duty to bring himself to trial, and a speedy trial violation may be found even when the defendant has not asserted the right. **Barker v. Wingo,** 407 U.S. at 527-28, 92 S. Ct. at 2190-91. Nevertheless, the assertion of the right is entitled to strong evidentiary weight in deciding whether a speedy trial violation has taken place. **Id.** at 531-32, 92 S. Ct. at 2192. Under the circumstances described above, we believe this factor weighs substantially in Zurla's favor. An early assertion of the speedy trial right indicates the defendant's desire to have the charges resolved rather than gambling that the passage of time will operate to hinder prosecution. The strength of a defendant's assertions of the right (i.e., early and/or frequent) also indicates the probable extent to which the defendant has suffered from the inevitable burdens that fall upon the target of a criminal prosecution, burdens the speedy trial right was intended to minimize. **Id.** at 531, 92 S. Ct. at 2192.

{20} Prejudice to the defendant -- General considerations. Barker v. Wingo identified three different types of prejudice to the defendant that the sixth amendment right to a speedy trial was intended to minimize or prevent: (1) oppressive pretrial incarceration; (2) anxiety and concern of the accused; and (3) the possibility of impairment to the defense. 407 U.S. at 532, 92 S. Ct. at 2193. Of these, the Supreme Court believed impairment of the defense to be the most serious prejudice, because it "skews the fairness of the entire system." **Id.**

{21} The court of appeals held that Zurla failed to demonstrate any of these elements of prejudice. The court held that he had not been subjected to oppressive pretrial incarceration. Zurla was released on bond the day after his arrest. Unlike the defendant in **State v. Kilpatrick,** who lived under restrictions on his liberty imposed along with a $2,500 bond the entire time the charges were pending against him, Zurla lived under similar restrictions only a *{*645}* short time prior to the revocation of his parole, albeit the bond itself appears to have remained in effect while he was in the custody of the Department of Corrections. **Cf. State v. Kilpatrick,** 104 N.M. at 445-46, 722 P.2d at 696-97. Moreover, the court noted, Zurla was subject to revocation of his parole regardless of how the charges pending against him were resolved. Further, the court held, loss of the **possibility** of serving concurrent sentences did not constitute an aspect of prejudice because Zurla did not have a " **right** to being sentenced" to serve concurrent terms, citing **State v. Tarango,** 105 N.M. 592, 734 P.2d 1275 (Ct. App.), **cert. denied,** 105 N.M. 521, 734 P.2d 761 (1987), and **State v. Powers,** 97 N.M. 32, 636 P.2d 303 (Ct. App. 1981). Finally, the court held, Zurla failed to demonstrate impairment to his defense because the evidence, at best, was conflicting as to whether these witnesses did see the events giving rise to his arrest, and because he failed to make a showing of his attempts to locate these witnesses.

{22} We disagree that Zurla did not suffer oppressive pretrial incarceration and that his defense was not impaired, although we conclude that the degree of prejudice under the facts was minimal.

{23} -- Oppressive pretrial incarceration. We believe loss of the possibility of serving concurrent sentences did constitute an aspect of prejudice.[3] In **Smith v. Hooey,** the Supreme Court noted that "the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed." 393 U.S. at 378, 89 S. Ct. at 577. Loss of this possibility is therefore to be considered an element of oppressive pretrial incarceration. **Id.**

{24} Citing **Smith v. Hooey,** Judge Lopez wrote in **Harvey** that, although not weighing heavily in the defendant's favor, loss of the possibility of concurrent sentencing "denied [the defendant] the **opportunity** to sever a substantial portion of his New Mexico sentence [and this] is enough to prejudice him." 85 N.M. at 218, 510 P.2d at 1089 (emphasis in the original); **see also Taylor v. State,** 429 So.2d 1172 (Ala. Crim. App.), **cert. denied,** 464 U.S. 950, 104 S. Ct. 366, 78 L. Ed. 2d 326 (1983); **State v. Holmes,** 643 S.W.2d 282 (Mo. App.1982). Although concurring in the result of Judge Lopez'

opinion, the two other members of the **Harvey** panel did not concur in Judge Lopez' discussion of prejudice, concluding that "the three factors of length of delay, reason for delay and defendant's assertion of his right... clearly outweigh the State's equivocal showing that defendant was not prejudiced...." 85 N.M. at 219, 510 P.2d at 1090.

{25} We note that the opinions in **Powers** and **Tarango,** cited by the court of appeals in this case, failed to cite **Smith v. Hooey** or mention the court's apparent disagreement over this issue in **Harvey**. To the extent these cases suggest a rule different from that in **Smith v. Hooey,** these cases are overruled. We hold that loss of the possibility of concurrent sentencing constitutes an aspect of prejudice as defined under the sixth amendment.

{26} -- Impairment of the defense. We also disagree with the court of appeals' analysis of and conclusion on the issue of impairment of the defense. Citing **State v. Tartaglia,** 108 N.M. 411, 773 P.2d 356 (Ct. App.), **cert. denied,** 108 N.M. 318, 772 P.2d 352 (1989), the court held that Zurla had the burden of proving his speedy trial rights were violated and failed to establish the existence of any prejudice. Arguably, **Tartaglia** may be read to hold either that the defendant bears "the burden of proof" to show prejudice, or that he bears simply "the burden of producing evidence," and not the burden of persuasion, as suggested by the court of appeals. "Since defendant claims his sixth amendment rights have been violated, **he should bear the burden of producing evidence to support his *{*646}* claim." Tartaglia,** 108 N.M. at 414, 773 P.2d at 359 (emphasis added); **see generally Mortgage Inv. Co. of El Paso v. Griego,** 108 N.M. 240, 771 P.2d 173 (1989) (on distinction between burden of production and burden of persuasion).

{27} The reason advanced in **Tartaglia** for placing the burden of production on the defendant with respect to the prejudice prong of the speedy trial analysis was that

it is difficult to conceive of how the state could come forward and effectively rebut a presumption of prejudice * * * without knowing * * * how defendant claims he was prejudiced. For example, how could the state rebut a claim that a potential exculpatory witness has disappeared * * * when the state may be unaware of the existence of such a person?

108 N.M. at 415, 773 P.2d at 360. For similar reasons, the state was held to bear the burden of advancing reasons to justify any delay found to be presumptively prejudicial. **Id.** at 414, 773 P.2d at 359. **Tartaglia** also noted that the defendant did not have to establish "actual prejudice" as in a due process claim for preindictment delay; rather, he had to present specific corroboration of his allegations of prejudice. **Id.** at 416, 773 P.2d at 361; **cf. Smith v. Hooey,** 393 U.S. 374, 384, 89 S. Ct. 575, 580, 21 L. Ed. 2d 607 (1969) (Harlan, J., separate opinion) (accused must establish prima facie showing of prejudice). **But cf. Dickey v. Florida,** 398 U.S. at 53-57, 90 S. Ct. at 1576-78 (Brennan, J., concurring) (consistent with other sixth amendment rights, once defendant has made prima facie case by showing government-caused delay beyond point at which a probability of prejudice arose, burden should shift to government to establish necessary

delay or harmless error), **cited with approval in Barker v. Wingo,** 407 U.S. at 530, n. 30, 92 S. Ct. at 2191, n. 3.

{28} Although the reasons discussed in **Tartaglia** for placing the burden of production on the defendant are cogent, this does not provide an appropriate basis to shift to the defendant the burden of persuasion. Once the defendant has demonstrated presumptively prejudicial delay and thus triggered the **Barker v. Wingo** analysis, the presumption of prejudice does not disappear. Rather, the burden of persuasion rests with the state to demonstrate that, on balance, the defendant's speedy trial right was not violated. To the extent it suggests the state does not have this burden, **Tartaglia** is overruled. Of course, as the court pointed out in **State v. Ackley,** 201 Mont. 252, 258, 653 P.2d 851, 854 (1982), "The State's burden to show a lack of prejudice becomes considerably lighter in the absence of evidence of prejudice * * * *" **See also State v. Mascarenas,** 84 N.M. 153, 500 P.2d 438 (Ct. App. 1972) (alternate holding that once defendant established presumptively prejudicial delay, state bore burden of showing absence of prejudice); **Graves v. United States,** 490 A.2d at 1091 (delay of more than a year creates presumption of prejudice and shifts burden to state to justify delay); **Smith v. United States,** 418 F.2d 1120 (D.C. Cir.) (one-year delay created rebuttable presumption of prejudice), **cert. denied,** 396 U.S. 936, 90 S. Ct. 280, 24 L. Ed. 2d 235 (1969); **Smallwood v. State,** 51 Md. App. 463, 443 A.2d 1003 (1982) (in sixth amendment cases, prejudice may be presumed from delay, but, in preindictment delay cases, prejudice may not be presumed but must be proved).

{29} We note this interpretation to be consistent with general principles regarding claims of prejudice to a criminal defendant's constitutional rights. **See Chapman v. California,** 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (when defendant raises reasonable possibility of constitutional error affecting verdict, presumption of prejudice arises that state must rebut beyond a reasonable doubt); **Manlove v. Sullivan,** 108 N.M. 471, 775 P.2d 237 (1989) (same burden when error affects appeal). We believe to apply a different rule to speedy trial claims would place an inappropriate burden on a criminal defendant in a system that "places the primary burden on the courts and the prosecutors to assure that cases are brought to trial." **Barker v. Wingo,** 407 U.S. at 529, 92 S. Ct. at 2191.[4]

*{*647}* **{30}** We now apply these principles to Zurla's allegations that his defense was impaired by the loss of two witnesses. The state maintains the missing witnesses were not in a position to see Zurla's arrest by the store security guard, and, therefore, loss of their testimony did not impair the defense. However, even if they could not have testified as to whether Zurla's arrest took place inside or outside the store, according to Mrs. Zurla's testimony these witnesses were waiting in Zurla's car when, prior to her husband's arrest, she came back to the car to get her purse in order to pay for the goods her husband subsequently was accused of stealing. While their testimony was not conclusive on the question of Zurla's guilt or innocence, these witnesses could have corroborated Mrs. Zurla's story and helped to create a reasonable doubt whether Zurla intended to shoplift. The state's argument fails to rebut this possibility.

{31} Nonetheless, the only evidence adduced at Zurla's hearing bearing on whether an attempt had been made to locate the witnesses was the testimony that one witness had moved to California, along with Mrs. Zurla's testimony that she could not get in touch with either witness. Zurla, the state argues, has failed to make an affirmative showing that his inability to locate the witnesses was attributable to the delay in bringing his case to trial. **See Grissom,** 106 N.M. at 563, 746 P.2d at 669 (evidence destroyed before delay became inordinate does not establish impairment of defense); **cf. State v. Evans,** 19 Or. App. 345, 527 P.2d 731 (1974), **cert. denied,** 423 U.S. 843, 96 S. Ct. 77, 46 L. Ed. 2d 63 (1975) (prejudice not found when defendant made no efforts to obtain lost evidence to defend himself).

{32} As we have noted, absent such corroborating evidence, "[t]he State's burden to show a lack of prejudice becomes considerably lighter * * * *" **Ackley,** 201 Mont. at 258, 653 P.2d at 854. By implication, even when the state does not carry completely its burden of persuasion to show an absence of prejudice, the extent to which the defendant can be said to have prevailed on this issue lessens substantially in the absence of corroborating evidence. **See State v. Holtslander,** 102 Idaho 306, 629 P.2d 702, 709 (1981) (presumption of prejudice entitled to little weight when defendant has neither alleged nor produced evidence of prejudice). The evidence Zurla adduced at *{*648}* the hearing does not show clearly the extent of his efforts, if any, to locate the witnesses. Nor did he present evidence sufficient to show the existence of a causal relationship between the unjustified delay and the loss of these witnesses' testimony.

{33} Yet, neither has the state shown how the evidence controverts the "presumption of prejudice" as applied to the loss of this testimony, which, as noted above, was facially material to Zurla's defense. Instead, the state rests on its argument that, absent additional evidence of attempts to locate these witnesses, there is no basis from which to conclude that Zurla's defense was impaired. We hold on balance that the state has failed to carry its burden of persuasion to show that Zurla's defense was not impaired. However, in the absence of corroborating evidence of attempts to locate the missing witnesses sufficient to establish whether or not the loss of their testimony was due to the unjustified delay, the issue of impairment to the defense weighs only slightly in Zurla's favor.

{34} Conclusion. In reweighing the factors considered by the court of appeals, we conclude that Zurla's sixth amendment rights were violated by the seventeen-month delay in this case. The **Barker v. Wingo** factors of length of the delay, reason for the delay, and assertion of the right all weigh either substantially or heavily in Zurla's favor. Although we do not believe the loss of the possibility of concurrent sentences nor the loss of the two witnesses weighs heavily in Zurla's favor, these factors nevertheless constitute some degree of prejudice. We thus face a set of circumstances not unlike the one considered by the court in **Harvey,** in which three factors weighed heavily in favor of the defendant and the record on the issue of prejudice was "equivocal." 85 N.M. at 219, 510 P.2d at 1090. In balancing these factors we reach the same result as did the court there.

{35} We believe that when the state unjustifiably has delayed a defendant's trial beyond a reasonable time, disregarding the defendant's demand for an early trial, undue emphasis should not be placed on whether the defendant is able to adduce evidence of identifiable prejudice. To hold otherwise would in effect attribute to this factor "talismanic qualities" antithetical to the understanding that animated **Barker v. Wingo,** 407 U.S. at 533, 92 S. Ct. at 2193. We find fully applicable to this case the principles articulated by Justices White and Brennan:

[Prejudice is] inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty. It is also true that many defendants will believe that time is on their side and will prefer to suffer whatever disadvantages delay may entail. But, for those who desire an early trial, these personal factors should prevail If the only countervailing considerations offered by the State are those connected with crowded dockets and prosecutorial case loads. A defendant desiring a speedy trial, therefore, should have it within some reasonable time; and only special circumstances presenting a more pressing public need with respect to the case itself should suffice to justify delay. Only if such special considerations are in the case and if they outweigh the inevitable personal prejudice resulting from delay would it be necessary to consider whether there has been or would be prejudice to the defendant at trial. "[T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." **United States v. Marion, supra** [404 U.S. 307,] at 320 [92 S. Ct. 455, at 463, 30 L. Ed. 2d 468 (1971)].

Id. at 537-38, 92 S. Ct. at 2195 (concurring opinion).

{36} Based on the foregoing considerations, the opinion of the court of appeals is reversed, and we remand this case to the district court with instructions to set aside the judgment and sentence and dismiss the charges against the defendant.

{37} IT IS SO ORDERED.

SOSA, C.J., and MONTGOMERY, J., concur.

*{*649}* BACA, J., dissents.

WILSON, J., not participating.

DISSENT

BACA, Justice (Dissenting).

{38} I respectfully dissent from the majority opinion. I hereby adopt the court of appeals opinion (filed March 14, 1989) as my dissent.

STATE of New Mexico, Plaintiff-Appellee, vs. Vincent ZURLA, a/k/a Henry Vialpando, a/k/a Harry Vialpando, a/k/a David Vincent Serna, Defendant-Appellant.

No. 10230

Court of Appeals of New Mexico

March 14, 1989

MEMORANDUM OPINION

DONNELLY, Judge.

{39} On motion for rehearing our prior opinion is withdrawn and the following is substituted.

{40} Defendant, Vincent Zurla, appeals from a felony conviction for shoplifting over $100, contrary to NMSA 1978, Section 30-16-20(B)(2) (Repl. Pamp.1984). He claims the trial court erred by refusing to dismiss the indictment against him on: (1) speedy trial grounds and (2) due process grounds. We affirm.

FACTS

{41} Defendant was arrested and placed in custody on December 14, 1985, for shoplifting. The next day he posted a $2,500 surety bond and was released. On either January 24 or 25, 1986, his parole on a previous conviction was revoked because of his consumption of intoxicating beverages and because of the shoplifting charge. Several days later, defendant was incarcerated in a facility of the Department of Corrections (DOC) on the prior conviction as a result of the parole revocation. A short time later defendant filed a pro se motion to be tried on the shoplifting charge within six months.

{42} On August 26, 1986, defendant was indicted for shoplifting over $100, count I, and conspiracy to commit shoplifting, count II. The following month, the bond that defendant had posted in metropolitan court on the shoplifting arrest was transferred to district court. For some unexplained reason, defendant was not arraigned in district court until March 2, 1987, over six months after indictment. Defendant's trial was set for April 27, 1987, and at his request it was continued to July 16, 1987. On May 22, 1987, defendant was released from custody.

{43} On July 9, 1987, defendant filed a motion to dismiss the indictment against him on speedy trial and due process grounds because of the preindictment and postindictment delays. The trial court denied defendant's motion. At trial, defendant was found guilty on count I and acquitted on count II.

I. CLAIM OF DENIAL OF SPEEDY TRIAL

{44} Claims alleging denial of a right to speedy trial under the sixth amendment of the United States Constitution and Article II, Section 14 of the New Mexico Constitution are decided on a case-by-case basis. **See Barker v. Wingo,** 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); **State v. Grissom,** 106 N.M. 555, 746 P.2d 661 (Ct. App.1987); **State v. Kilpatrick,** 104 N.M. 441, 722 P.2d 692 (Ct. App.1986). Proof of the passage of time, without more, is not determinative of allegations of denial of a speedy trial. **Barker v. Wingo.** In **Barker,** the Supreme Court enumerated four factors for courts to consider in reviewing speedy trial claims, the first of that is the length of delay. A delay which is sufficient to give rise to a presumption of prejudicial delay must exist before the other **Barker** factors -- reason for the delay, assertion of the right to a speedy trial, and prejudice to the defendant -- are evaluated to determine whether a defendant has been denied his right to a speedy trial. **State v. Grissom; State v. Kilpatrick.** In this balancing test, the conduct of both the prosecution and the defense are weighed. **See id.** *{*650}* The weight to be assigned to these factors depends upon the particular facts and circumstances of the case. **See Barker v. Wingo.** A finding in favor of one party on any one of these factors is not necessarily dispositive of the speedy trial claim; rather, these factors are interrelated and must be considered in toto, together with other relevant circumstances of the case. **See id. See also Moore v. Arizona,** 414 U.S. 25, 94 S. Ct. 188, 38 L. Ed. 2d 183 (1973). Since a fundamental right is involved, courts must engage in a sensitive and difficult balancing process. **Id.** On appeal, we independently balance the factors the trial court considered in deciding whether a defendant's right to a speedy trial has been violated. **State v. Grissom.**

{45} Defendant has the burden of proving that his constitutional right to a speedy trial has been denied. **State v. Tartaglia,** 108 N.M. 411, 773 P.2d 356 (1989). In this case, the state and defendant agree that the length of delay gives rise to a presumptively prejudicial delay that is sufficient to trigger an inquiry into the other **Barker** factors. **See State v. Kilpatrick.** They also agree that the reasons for the delay and assertion of the right factors should be weighed in the defendant's favor. They disagree on the evaluation of and weight to be given to the remaining **Barker** factor -- prejudice to defendant.

{46} We have independently reviewed the evidence on the first three factors, and agree with the parties that they should be weighed in defendant's favor. We note, however, that the reason for delay is not weighed heavily against the state since the delay was negligent, not deliberate. **See State v. Kilpatrick.** Because there is no dispute as to these factors, we need examine only the prejudice factor, and then balance all four factors.

Prejudice to Defendant

{47} In conducting this analysis we recognize that "the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." **United States v. Marion,** 404 U.S. 307, 320, 92 S. Ct. 455, 463, 30 L. Ed. 2d 468 (1971). Prejudice to defendant should be assessed in light of the interests the speedy trial right was designed to protect, and include undue or oppressive

pretrial incarceration, the anxiety and concern of defendant accompanying public accusation, and the possibility of impairment to the defense. **See Barker v. Wingo. See also United States v. Marion.**

{48} The state argues that if we find no prejudice to defendant, this finding should weigh more heavily than the other factors and thus tip the scales in the state's favor. The state urges us to follow the rule of the Eleventh Circuit that unless the other **Barker** factors weigh heavily against the state, defendant must demonstrate actual prejudice to prove a speedy trial violation. **See United States v. Mitchell,** 769 F.2d 1544 (11th Cir.1985), **cert. denied,** 474 U.S. 1066, 106 S. Ct. 819, 88 L. Ed. 2d 792 (1986). We decline to adopt such a rule on an inflexible basis because **Barker** does not indicate that any one factor should carry more weight than any other factor. Rather, **Barker** instructs that no single factor is either a necessary or sufficient condition to a finding of a speedy trial violation, and that all of the factors are related and should be considered together, along with other relevant facts and circumstances of the case. 407 U.S. at 533, 92 S. Ct. at 2193.

{49} We do not apply the same test for proving a claim of denial of speedy trial as is required for proving a claim of due process violation under the fourteenth amendment of the United States Constitution and New Mexico Constitution, Article 2, Section 18. **See State v. Grissom** (in proving a claim of preindictment delay in a due process claim, defendant must show actual prejudice as a result of the delay by showing how his defense would have been more successful absent the delay. The state's conduct is then weighed against the actual prejudice to determine if defendant has been substantially prejudiced by the delay). Different purposes underlie the speedy trial right and the due process clause as those provisions relate to a claim of prosecutorial delay. The underlying purpose of the speedy trial right is the orderly expedition of the criminal process, while the due process *{*651}* clause is primarily intended to prevent prejudice to the defense because of the passage of time. **See State v. Kilpatrick.**

{50} Defendant claims that both the entire seventeen months of his incarceration on the parole revocation and the bond's impairment of his liberty constitute oppressive pretrial incarceration. The state claims the incarceration should not be considered because defendant would have been confined as a result of the parole violation regardless of whether or not he was timely tried on the new charges. We decline to adopt a fixed rule on this factor and, pursuant to **Barker,** decide the issue under the particular facts existing in each individual case.

{51} In weighing the element of the restraint on defendant's liberty in this case, we determine that defendant has failed to establish the existence of any prejudice arising from his pretrial incarceration due in part to a parole revocation stemming from an unrelated offense. **See Mackey v. State,** 279 Ark. 307, 651 S.W.2d 82 (1983) (although trial commenced a year after defendant's arrest, he was not denied a speedy trial where, following his arrest, his parole was revoked, but he was not jailed solely on the pending charge). **See also State v. Dudley,** 433 A.2d 711 (Me.1981); **State v. Harvey,** 184 Mont. 423, 603 P.2d 661 (1979).

{52} Defendant argues that his incarceration on an unrelated offense should be counted in evaluating his speedy trial claim, relying upon **Raburn v. Nash,** 78 N.M. 385, 431 P.2d 874 (1967) and **State v. Harvey,** 85 N.M. 214, 510 P.2d 1085 (Ct. App.1973). In **Raburn** the court held that a prisoner does not forfeit his right to a speedy trial solely because he is confined in the penitentiary under sentence for another offense. Similarly, in **Harvey** (Wood, C.J. and Hendley, J., specially concurring), this court found an accused's incarceration in another state does not restrict his speedy trial claim.

{53} However, these cases do not answer the question before us, that is, whether the incarceration for the parole violation should be considered as oppressive pretrial incarceration for **this** crime. Under the record before us we find no prejudice to defendant resulting from his pretrial incarceration. The only period of restraint on defendant's liberty solely resulting from the shoplifting charge was less than one and one-half months from the date of his posting bond to his incarceration for the parole violation. **See State v. Kilpatrick** (the restrictions imposed by bond on defendant's freedom of movement are factors to be considered in evaluating a claim of denial of a speedy trial). The time from his release from DOC until the second trial setting two months later should not be considered because defendant was responsible for the delay during this period. **See State v. Grissom.**

{54} In evaluating this factor, we find that the time period during which defendant was incarcerated or subject to pretrial incarceration did not constitute an oppressive period of time. **Cf. Barker v. Wingo** (minimal prejudice to defendant resulting from delay of over five years even though he was incarcerated ten months of this period and then released on bail); **State v. Ackley,** 201 Mont. 252, 653 P.2d 851 (1982) (forty-one days of actual pretrial incarceration is not a determinative factor in considering defendant's claim of denial of speedy trial right).

a. Anxiety and Concern of the Accused

{55} Defendant argues the delay deprived him of the opportunity to seek concurrent sentences for the term left on his prior conviction and for the term on the shoplifting charge. The possibility of serving a sentence concurrently has been held not to be a right and that factor alone cannot amount to prejudice. **State v. Tarango,** 105 N.M. 592, 734 P.2d 1275 (Ct. App.1987). **See also State v. Powers,** 97 N.M. 32, 636 P.2d 303 (Ct. App.1981). Under the facts before us, we do not weigh this element in favor of either party.

b. Impairment to Defense

{56} Defendant argues that the delay cause two witnesses to become unavailable when they **might** otherwise have provided testimony to the defense. The evidence was, at best, conflicting as to whether *{*652}* these witnesses did see the events giving rise to defendant's arrest. **Cf. State v. Lucero,** 91 N.M. 26, 569 P.2d 952 (Ct. App. 1977) (claim of prejudice because of lost witnesses is insufficient where defendant made no showing as to their lost testimony). The mere possibility that these witnesses may have

appeared and testified on defendant's behalf had the delay been shorter is insufficient to establish an impairment to the defense. **See State v. Tartaglia.** In addition, defendant made no showing of attempts to locate these witnesses. **State v. Evans,** 19 Or. App. 345, 527 P.2d 731 (1974), **cert. denied,** 423 U.S. 843, 96 S. Ct. 77, 46 L. Ed. 2d 63 (1975) (no prejudice where defendant does not show his efforts to obtain lost evidence to defend himself). Therefore, we weigh this element in the state's favor.

{57} Our evaluation of the fourth balancing factor discloses that defendant has failed to establish that he sustained any prejudice.

{58} In summation of the speedy trial claim, the length of prosecutorial delay was sufficient to raise a presumption of prejudice, thereby triggering our evaluation of the remaining **Barker** factors in light of the facts and circumstances of this case. Although the first three **Barker** factors are weighed in favor of defendant we do not weigh them heavily against the state. In weighing the fourth factor we find that any prejudice to defendant as a result of the delay was not significant. **See Barker v. Wingo. Cf. United States v. Avalos,** 541 F.2d 1100 (5th Cir.1976), **cert. denied,** 430 U.S. 970, 97 S. Ct. 1656, 52 L. Ed. 2d 363 (1977) (describes the three levels of prejudice that may require reversal of a conviction: (1) a showing of actual prejudice even when the three remaining factors are not weighted heavily in favor of accused; (2) deliberate and lengthy government delay for tactical advantage; and (3) when the three other elements of the **Barker** test are heavily weighted in favor of the accused, accused does not need to demonstrate any prejudice); **State v. Harvey,** 85 N.M. 214, 510 P.2d 1085 (Wood, C.J. & Hendley, J., specially concurring) (an inadequately explained twenty-six-month delay and assertion of a speedy trial right by defendant required dismissal on speedy trial grounds despite an equivocal showing of prejudice).

{59} Thus, in the instant case in balancing the **Barker** factors, we do not find that the first three factors weigh heavily in favor of defendant. Coupled with the fact that defendant has not presented proof of any prejudice resulting from the delay, we conclude the trial court properly denied defendant's claims of denial of speedy trial.

II. CLAIM OF DENIAL OF DUE PROCESS

{60} Defendant also asserts the approximately eight-month delay between his arrest in December 1985 and his indictment in August 1986 deprived him of due process because the "unavailability" of two potential witnesses impaired his defense. At the July 1987 pretrial hearing on defendant's motion to dismiss the indictment, defendant's wife testified that a friend, Flora Garcia, and another woman unknown to the Zurlas waited in the car while she and defendant were in K-Mart. Garcia moved to California at some unspecified time after defendant's arrest. Defendant argues the delay caused prejudice to his defense because Garcia was no longer available at the time of trial. He argues the prejudice exists because she "might have seen the arrest" and thus corroborate his story that he was arrested inside the store. However, none of the testimony at the hearing supports his contention. There was no evidence presented that Garcia or the other unknown woman saw anything. In fact, Mrs. Zurla testified upon direct

examination that the car was parked "a little bit far," so the two women could not have seen the store doors. Defendant admitted in his brief that he "could not establish conclusively what these witnesses would have been able to testify about."

{61} To prevail on a claim that prosecutorial delay caused a deprivation of due process, the defendant must show the delay caused substantial prejudice, that is, his defense would have been more successful absent the delay. **State v. Duran,** 91 N.M. 756, 757, 581 P.2d 19, 20 (1978); **State v. Lewis,** *{*653}* 107 N.M. 182, 754 P.2d 853 (Ct. App. 1988). Substantial prejudice means "actual prejudice to the defendant together with unreasonable delay of the prosecution." **State v. Duran,** 91 N.M. at 757-58, 581 P.2d at 20-21. Lapse of time alone is insufficient to establish prejudice. **Id.** at 757, 582 P.2d at 20; **State v. Jojola,** 89 N.M. 489, 490, 553 P.2d 1296, 1297 (Ct. App.1976).

{62} Defendant has failed to show the substantial prejudice required to obtain dismissal of the indictment under the fourteenth amendment. Defendant has made no showing that the potential defense witnesses were unavailable because of the delay or that he made any attempt to contact them. Moreover, the record does not reflect when Garcia left New Mexico. More importantly, defendant has not shown how the witnesses' absence prejudiced his defense. He has only made vague, unsupported allegations that they "might have seen" the arrest and, thus, might have been able to corroborate his version. As noted above, there is no evidence in the record to support this allegation, since defendant's wife admitted that the women were too far from the crime scene to have observed anything. Proof of prejudice must be definite and not speculative. **State v. Lewis.** The mere possibility of the existence of exculpatory evidence cannot suffice to show prejudice to the defense. Rather, the defendant must "establish with specificity the critical testimony which [he] assert[s] has been lost or whether this evidence is available from other sources." **State v. Grissom,** 106 N.M. at 566, 746 P.2d at 672. Because defendant has failed to do so, the trial court properly denied his motion to dismiss on due process grounds.

CONCLUSION

{63} The trial court did not err in denying defendant's motion to dismiss the indictment on either speedy trial grounds or due process grounds. Accordingly, defendant's conviction is affirmed.

{64} IT IS SO ORDERED.

BIVINS, C.J., concurs.

CHAVEZ, J., dissenting.

CHAVEZ, Judge (dissenting).

{65} I cannot agree with the majority's application of the **Barker** factors in this case. I find the seventeen (17) month delay to be inexcusably long in such a simple case.

Defendant was in the custody of DOC during most of the delay period. He asserted his right shortly after his arrest. He lost the opportunity for concurrent sentencing and might have had his defense impaired due to the delay.

{66} A finding in favor of one party on any one of the four factors is not necessarily dispositive of a speedy trial claim, **see, Barker v. Wingo,** 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); **State v. Kilpatrick,** 104 N.M. 441, 722 P.2d 692 (Ct. App.1986); **State v. Tartaglia,** 108 N.M. 411, 773 P.2d 356 (1989). Rather, they are related factors and should be considered together, along with any other relevant circumstances. **See Barker, Kilpatrick, Tartaglia.** I disagree that the first three factors do not weigh heavily in favor of defendant.

LENGTH OF THE DELAY

{67} The length of the delay serves a dual role in the analysis of the right to a speedy trial. **State v. Holtslander,** 102 Idaho 306, 629 P.2d 702 (1981); **Barker v. Wingo.** First, it is a triggering mechanism for screening frivolous cases. Second, it is one of the factors to be considered in the balancing process. Thus, the seventeen-month delay in this case should weigh heavier than a ten-month delay. **State v. Kilpatrick** (over ten months of pre-indictment delay was excessive in a simple assault case). Here, over eight months elapsed between arrest and indictment on a simple shoplifting charge. Defendant was not arraigned until seven months after the indictment and the first trial setting was nine months after the indictment. A total of seventeen-month delay from arrest to trial in an uncomplicated case should be afforded more weight than that given by the majority.

ASSERTION OF THE RIGHT

{68} A defendant's assertion of his speedy trial right is entitled to strong evidentiary *{*654}* weight. **Barker v. Wingo.** Here, defendant asserted his right in a **pro se** motion a short time following his arrest. This assertion reflects that defendant wanted a timely resolution of the charges against him and was not gambling that a delay might work to his advantage due to loss of memory, loss of evidence or witness unavailability. I would weigh this factor heavily in defendant's favor.

REASON FOR THE DELAY

{69} The reason for the delay offered by the state was that it was unaware of defendant's incarceration for much of the time in question. A prisoner does not forfeit his right to a speedy trial solely because he is incarcerated under sentence for another offense, particularly when the state that holds him in prison is the same state that is prosecuting him on the present offense. **State v. Harvey,** 85 N.M. 214, 510 P.2d 1085 (Ct. App.1973); **Raburn v. Nash,** 78 N.M. 385, 431 P.2d 874 (1967). In **State v. Harvey** defendant made demands for determination of pending charges while he was incarcerated in California. The state did not seek to extradite him so he could be tried on the New Mexico charges. We held that where the administrative machinery exists,

incarceration in a foreign jurisdiction does not provide an adequate reason for the delay and we weighed this factor heavily against the state. Here, defendant was being held in the custody of the state because his parole was revoked. This was partially due to the arrest on the present charge. The state should know the whereabouts of a defendant when it is holding him in custody. According to the testimony of a secretary at the district attorney's office, one phone call to Central Records would have informed the district attorney whether the defendant was being held in custody in any facility in the state. When the machinery exists, the prosecutor has a constitutional duty to attempt to use it. **State v. Harvey.** Upon demand of an accused who is incarcerated, the state must at least make "a diligent, good-faith effort" to obtain his presence for the purpose of trial. **Smith v. Hooey,** 393 U.S. 374, 89 S. Ct. 575, 21 L. Ed. 2d 607 (1968). It would have required minimal effort on the part of the prosecutor to find that the state was holding him in custody. Thus, I would weigh the reason for the delay heavily against the state.

PREJUDICE TO DEFENDANT

{70} The majority rejects defendant's claim that he suffered prejudice due to the delay. In **Smith v. Hooey,** the U.S. Supreme Court specifically addressed how an unreasonable delay can harm an accused who is incarcerated in another jurisdiction. Many of the same considerations apply to one who is incarcerated in the same jurisdiction. The Court stated:

First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him.

.....

... his ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired.

Id. at 378-80, 89 S. Ct. at 577-78. Here, defendant lost the opportunity to receive a sentence partially concurrent with the one he was serving. The majority is correct that receiving a concurrent sentence is not a right and does not constitute actual prejudice. **State v. Powers,** 97 N.M. 32, 636 P.2d 303. But an accused is entitled to have something less than actual prejudice weigh in his favor under a speedy trial analysis. **Tartaglia.** If defendant had received concurrent sentencing, he would have spent less time in custody. A trial court has discretion to impose concurrent or consecutive sentences. **State v. Mayberry,** 97 N.M. 760, 643 P.2d 629 (Ct. App.1982). The state's delay, however, took that discretion from the court and guaranteed that defendant would serve a longer sentence. This constitutes enough prejudice in my *{*655}* opinion to have the oppressive incarceration and anxiety subfactors weigh slightly in favor of defendant, or at least, to make them neutral.

{71} Defendant also claims he lost track of two witnesses who could have corroborated his testimony. He made no definite showing as to what their testimony would be. But did he have opportunity to confer with them, in view of his incarceration? After his release, he was unable to locate them. Had the state brought this case to trial at a reasonable time, the witnesses may have been available to testify regarding what they saw, if anything.

{72} Defendant's assertions as to the lost witnesses may be insufficient to establish an impairment to his defense but this subfactor should not be allowed to tip the scales. **Moore v. Arizona,** 414 U.S. 25, 94 S. Ct. 188, 38 L. Ed. 2d 183 (1973). The majority, however, rules that defendant's speedy trial right was not violated although the only factor in favor of the state was the impairment of the defense.

{73} By placing undue emphasis on the prejudice factor, the majority rules, in effect, that there is little difference between the application of the speedy trial right and the due process right of an accused. "[T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense". **United States v. Marion,** 404 U.S. 307, 320, 92 S. Ct. 455, 463, 30 L. Ed. 2d 468 (1971). A defendant is not required to show actual prejudice in order to have this factor weigh in his favor. **State v. Tartaglia.** That is the standard for due process, not speedy trial claims. **See, e.g., State v. Duran,** 91 N.M. 756, 581 P.2d 19 (1978). The underlying purpose of the right to a speedy trial is the orderly expedition of the criminal process. **Kilpatrick.** It is not rooted in the prevention of prejudice to a defendant but is "directed principally toward the protection of other interests". **Kilpatrick,** 104 N.M. at 444, 722 P.2d 692.

CONCLUSION

{74} In **Kilpatrick** there was a total of fifteen-month delay between arrest and trial. Defendant did not assert his right until thirteen months after arrest. He was out on bond the entire time. A witness died two months after the arrest. The only evidence as to the witness's testimony was defendant's affidavit. Yet, in **Kilpatrick** we found a speedy trial violation. By comparison, the present case warrants weighing the factors more in defendant's favor than that afforded defendant Kilpatrick, and by no means should there be a different result.

{75} In the speedy trial balancing process, the conduct of both the prosecution and the defendant are weighed. **Barker v. Wingo, State v. Grissom, State v. Kilpatrick.** It is the state's responsibility to bring an accused to trial within a reasonable time given the circumstances of the case and the complexity of the charges. **Barker, Kilpatrick.** In the balance, this case violated defendant's speedy trial right and the expectations of society in the orderly expedition of the criminal process. **State v. Kilpatrick, State v. Mascarenas,** 84 N.M. 153, 500 P.2d 438 (Ct. App.1972)

{76} I therefore dissent.

1 The court of appeals first assigned Zurla's case to the summary calendar. Upon motion from the Public Defender's Department, the court reassigned the case to the general calendar and, in December 1987, affirmed Zurla's conviction in a memorandum opinion. Upon motion for rehearing, the court issued a second, formal opinion in December 1988, which also affirmed the conviction. After a second motion for rehearing, the court again withdrew its opinion and filed a third, memorandum opinion on March 14, 1989. This third opinion is the opinion on which we directed a writ of certiorari to the court of appeals.

2 At the district court hearing on Zurla's speedy trial motion, the district attorney took the position that, as the state had no actual knowledge of Zurla's whereabouts, the delay in bringing him to trial did not constitute an "irregularity." The state, however, had the responsibility to manage its case against Zurla in a manner that allowed it to fulfill its constitutional obligation to bring him to trial within a reasonable time. **See Barker v. Wingo,** 407 U.S. at 529, 92 S. Ct. at 2191. The district attorney was chargeable with constructive knowledge of what a reasonable discharge of those case-management responsibilities would have revealed, e.g., the contents of the preindictment metropolitan court file on Zurla's case (including his motion for a speedy trial) and the revocation of his parole. Moreover, the failure of the district attorney's office to alert the district court that Zurla was in custody appears from the record to have created much of the bureaucratic confusion in this case, in which a bench warrant was issued on a defendant who in fact had posted bond and then in fact was in the custody of the Department of Corrections. Had the court properly been informed of Zurla's whereabouts, he could have been arraigned promptly on the pending charges.

3 We note that, while the court held incarceration on a parole revocation did not amount to prejudice, the court failed to address whether Zurla's liberty interests nevertheless were impaired during this period because of the $2,500 bond. We find, however, little if any additional impairment to these interests under the circumstances.

4 We do not decide in this case the weight of the burden that the prosecution must meet. **Chapman** held that, generally, if the prosecution can prove **beyond a reasonable doubt** that a constitutional error did not contribute to the verdict, the error is harmless and the verdict may stand. 386 U.S. at 24, 87 S. Ct. at 828. **Manlove** applied the same standard to the question of whether an alteration of the record deprived the petitioner of his right to an appeal. 108 N.M. at 477, 775 P.2d at 243. The Supreme Court also has applied the **Chapman** burden in some sixth amendment contexts. **See Satterwhite v. Texas,** 486 U.S. 249, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988) (psychological evaluation of future dangerousness obtained in violation of right to counsel in capital murder case).

In other cases, when the alleged constitutional violation did not implicate the reliability of the judicial process, the Court has applied a **preponderance of the evidence** standard.

See, e.g., Nix v. Williams, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984) (admissibility of evidence alleged to be fruits of an illegally obtained confession); **United States v. Matlock,** 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974) (fourth amendment suppression hearings); **Lego v. Twomey,** 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972) (hearings on whether confession was voluntary). In **Lego,** for example, the Court noted that involuntary confessions often are reliable. 404 U.S. at 485-86, 92 S. Ct. at 624-25. Moreover, the Court noted, regardless of the trial court's determination of admissibility, the jury still has before it evidence of the circumstances surrounding the confession by means of which to determine the weight to be given to that confession. **Id.**

In considering these principles in the present context, we note the compound nature of the interests protected by the speedy trial right. Two of the subparts to the prejudice analysis -- oppressive pretrial incarceration and the anxiety and concern of the accused -- have little if anything to do with the reliability of the judicial process. The third variety of prejudice, however, is impairment of the defense. As discussed in the body of this opinion, impairment of the defense was seen as the most important type of prejudice by the Court in **Barker v. Wingo** because it "skews the fairness of the entire system." 407 U.S. at 532, 92 S. Ct. at 2192. Thus, a strong argument exists for applying the **Chapman** burden at least in the analysis of impairment of the defense. We do not decide this question, however, because we conclude that the state has failed to carry its burden of persuasion even under the lesser preponderance standard.