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.[1] 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.

* 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,

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

cannot be thought of as "part of the historic tradition of due process."[14]

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.[15] 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:[16] (1) the Sixth Amendment right to a speedy trial

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.[17] 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

2. Oregon Constitutional Right

Article I, section 10 of the Oregon Constitution[23] "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."[24] 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."[25] 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."[26] 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.[27] For example, the second *Barker* factor is inapplicable under the Oregon Constitution because Oregon does not require that a defendant demand a speedy trial.[28] 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.[29] 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

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).

seeks."[37] 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."[38]

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

3. Oregon Statutory Right

Oregon has a statutory framework encompassing the right to be brought to trial within a reasonable time.[44] 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.[45] 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.[46] 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."[47] 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.[48]

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

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."[49]

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,[50] 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."[51] 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.[52]

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."[53] The court made this pronouncement in three cases, all of which were brought pursuant to the state statutory speedy trial protection.[54] 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.[55] 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

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.[56] 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

> 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."[64]

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.[65]

Finally, the court announced a rule for determining how long is too long in the context of the speedy-trial statute: "Although it is ely,
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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

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."[71]

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.[72]

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.[73] 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

away in an arbitrary fashion.[86] "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."[87] Furthermore, "an inordinate delay in the adjudication of that appeal is a paradigmatic example of a due process violation."[88]

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."[89] 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.[90]

Considering the first factor, the *Washington* court held that, "a delay in cess and Equal4llc1o05 Tc08Wess a10 7.5 3A4-1. constrinI,f5(,)-3..6(e)-4eld (io)-4.5(,)-3 t
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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.[92] 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."[93] Indeed, forty-five percent of the petitioner

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."

be to expedite the trial, not to abort it."[98] 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."[99]

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."[100]

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.[101] 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.[102] In 1910 Oregon's judiciary was changed by voter initiative to allow the justices to be elected in statewide elections for six-year terms.[103] 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.[104]

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.[105] 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.[106]

Several of these suggestions were later adopted by the Oregon judiciary in some form.[107] 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 was established on July 1, 1969.[110]

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,"[111] "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.[112] 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.[113]

In 2006, there were 2,152 criminal appeals filed in the Oregon Court of Appeals.[114] 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.[115] Therefore, the Oregon Court of Appeals is the functional equivalent to a court of last resort for most appeals and indeed undertakes the

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, .

biggest portion of appellate review in Oregon.[116]

Table 1. Total Appeals from 2000-2006

	2001	2002	2003	2004	2005	2006
Court of Appeals[117]						
Total Filings	4,181	3,277	3,180	3,677	3,801	3,518
Criminal[118] 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."[119] 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.[120]

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.[121] 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.[122] 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

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 [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[123] 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;

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.[128] 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 theoTuke. .4( )4ukeoffec5ce the:.'

Oral Argument to decision = 55 or 90 days, (OR = 4.4 months).[129]

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.[130] 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.[131] If a goal is set of

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 rely 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

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[132]

	Average total time	Total Time:[133] 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[134] 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[135] 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

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. 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.[136] 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."[137] The goal of the court is to "shorten the average cumulative length of extensions of

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.

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average and recommended caseload.[154] 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.[155] However, more is needed to fully fund the system adequately.[156] 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."[157] 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.[158] 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

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.

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.[159]

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 it's 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.[160] 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,[161] and to do so at the state level could eliminate many problems and arguably expedite appeals by adding resources to the entire

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

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,pens7lce0y in guo comnggmvayer(w