**Analyzing Speedy Trial Claims**

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1-28-04

## ANALYZING SPEEDY TRIAL CLAIMS

### I. General nature of the right

A defendant has a *constitutional* right to a speedy trial under both the federal constitution (Sixth Amendment) and the state constitution (Art. I, § 15. cl.1), but these rights do not attach until charges are filed, or the defendant is subjected to restraints resulting from an arrest after a holding order (such as an order releasing a defendant on bail). (See *United States v. Marion* (1971) 404 U.S. 307, 320-321; *People v. Martinez* (2000) 22 Cal.4th 750, 761 and 765.) For felonies, there is a difference as to when the federal and state rights attach; the federal right does not attach until the filing of the indictment or information, or some restraint resulting from arrest after a holding order, such as release subject to bail, while the state right attaches upon the filing of a felony complaint. (*Id.* at pp. 761-762.) For misdemeanors, the right under both the federal and state constitutions attaches upon the filing of the misdemeanor complaint. (*Serna v. Superior Court* (1985) 40 Cal.3d 239, 257.)

The federal and state constitutional rights are construed and supplemented by Penal Code sections that create *statutory* speedy trial guarantees (see §§ 1381-1389.8), which are intended to implement the constitutional speedy trial rights. (See *People v. Martinez* (2000) 22 Cal.4th 750, 766; *Serna v. Superior Court* (1985) 40 Cal.3d 239, 248-249.) The state constitutional right is broader than these statutes and the federal constitutional right, in that it covers additional delay such as the delay in felony cases between the filing of the complaint and the filing of the information. (*People v. Martinez* (2000) 22 Cal.4th 750, 766-767.)

A defendant also has a separate *due process* right under both the federal and state constitutions as to delays occurring before the constitutional and statutory rights to a speedy trial attach, i.e., delays between commission of the crime and the filing of charges. (*U.S. v. Marion* (1971) 404 U.S. 307, 324; *People v. Archerd* (1970) 3 Cal.3d 615, 639.)

### II. Responding to speedy trial claims

A. **STEP ONE:** Identify the defendant's specific right implicated by the delay. Look beyond the defendant's characterization of what right is implicated, and beware of defendant's case cites that may not be valid after the decision of *People v. Martinez* (2000) 22 Cal.4th 750. (E.g., *Stabio v. Superior Court* (1994) 21 Cal.App.4th 1488, appropriately criticized in *People v. Butler* (1995) 36 Cal.App.4th 455, 467.)

1) Is the *federal Sixth Amendment right* implicated? The Sixth Amendment speedy trial right is designed to minimize lengthy incarceration prior to trial; to reduce the lesser but still substantial impairment of liberty imposed by release on bail; and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges. However, it does not purport to protect a defendant from all effects flowing from a delay before trial. (*United States v. Loud Hawk* (1986) 474 U.S. 302, 312.) The federal right applies only to:
   – Delays occurring after indictment filed.

*People v. Martinez* (2000) 22 Cal.4th 750, 762

- Delays occurring after information filed. (*Ibid.*)
- Delays occurring ~~from~~ after any "continuing restraint imposed upon an arrested defendant" after a holding order, such as release subject to bail. (*Ibid.*)
- For misdemeanors only, delays occurring after complaint is filed.

*Serna v. Superior Court* (1985) 40 Cal.3d 239, 257

The federal Sixth Amendment speedy trial right does <u>not</u> apply to:

- Delays occurring between commission of crime, and filing of *felony* complaint.

*People v. Martinez* (2000) 22 Cal.4th 750, 764-765

- Delays occurring between the filing of *felony* complaint, and indictment, information, or actual restraint stemming from arrest (including release on bail). (*Ibid.*)
- Delays occurring after a defendant is arrested but "released without restraint or charges are dismissed." (*Id.* at pp. 762-763.)
- Issuance of an arrest warrant does not trigger federal Sixth Amendment speedy trial right, because a defendant must be under some actual restraint stemming from an arrest.

*People v. Martinez* (2000) 22 Cal.4th 750, 764-765

2) Is the *state constitutional speedy trial right* (Art. I, § 15, cl.1) implicated?

- Under state constitution, an accused has the right to a speedy public trial, which attaches upon the filing of a criminal complaint.

*People v. Martinez* (2000) 22 Cal.4th 750, 765

- Like the federal Sixth Amendment right, the state constitutional speedy trial right does not apply to delays occurring between the commission of the crime and filing of the complaint.

*Scherling v. Superior Court* (1978) 22 Cal.3d 493, 504-505

3) Is the defendant alleging a *statutory* speedy trial violation (Pen. Code, §§ 1381 through 1389.8)?

- If so, look to cases interpreting the applicable statutes.
- Because the statutes all address post-charge delays, a defendant may allege the delay in his case amounted to federal and state constitutional speedy trial violations as well as statutory violations.

See *People v. Anderson* (2001) 25 Cal.4th 543, 602-605

4) Is the defendant alleging a *due process* speedy trial violation? When federal and state constitutional speedy trial rights do not apply (such as during the time between the commission of the crime and filing of charges), due process can be

invoked to challenge delays.

– Under the federal constitution, the Fifth Amendment Due Process clause is applicable to pre-charge delays (i.e., delay before the Sixth Amendment right attaches).

*People v. Martinez* (2000) 22 Cal.4th 750, 765, quoting *United States v. Marion* (1971) 404 U.S. 307, 324

–The state due process clause (Art. I, § 15, cl.7) may be invoked for delays occurring after a crime is committed but before any formal accusation, and also applies to delays not covered by any statutory speedy trial provisions (such as between the filing of the complaint and information).

*People v. Martinez* (2000) 22 Cal.4th 750, 766-767, and *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 505

**B. STEP TWO:** Look for any waiver of the right to speedy trial.

"If delay is attributable to the defendant, then his waiver may be given effect under the standard waiver doctrine."

*Barker v. Wingo* (1972) 407 U.S. 514, 529

A defendant who leaves the jurisdiction of the court *to avoid prosecution* waives the right to a speedy trial, but a defendant who leaves without knowing charges are pending does not waive the right to a speedy trial.

*People v. Perez* (1991) 229 Cal.App.3d 302, 308 & fn. 4

Mere silence in the face of prosecution's requests for continuance do not amount to a waiver, but is one of four factors to consider (along with length of the delay, the reason for the delay, and prejudice to the defendant from the delay) in determining if there was a federal Sixth Amendment speedy trial violation.

*People v. Seaton* (2001) 26 Cal.4th 598, 633-634

**C. STEP THREE:** Apply the appropriate test, based on the applicable speedy trial right, for determining if there has been a violation.

1) For claimed federal Sixth Amendment speedy trial violations, balance the following four factors, none of which, standing alone, requires relief:
   – the length of the delay;
   – the reason for the delay;
   – the defendant's assertion of his speedy-trial right; and
   – prejudice to the defendant.

*Barker v. Wingo* (1972) 407 U.S. 514, 530, 533

Note: The first factor, length of the delay, is a threshold one: "there must

be a delay long enough to be 'presumptively prejudicial'" so as to trigger application of the other three factors.

*United States v. Loud Hawk* (1986) 474 U.S. 302, 314

An uncommonly long delay plus government negligence in pursuing the prosecution may justify granting relief even without a defendant being able to demonstrate any particularized prejudice caused by the delay.

*Doggett v. United States* (1992) 505 U.S. 647, 656-658

[8-1/2 year delay between indictment and trial, during which defendant went to Colombia, was arrested in Panama, returned to the United States, moved to Virginia, obtained a college degree, got married, held a steady job, and was arrested after authorities ran a credit check on several thousand people who had outstanding warrants, and in minutes discovered where the defendant lived and worked. There was no evidence that the defendant knew he had been indicted.]

2) For state constitution speedy trial violations (Art. I, § 15, cl.1), the defendant must "affirmatively demonstrate that the delay has prejudiced his ability to defend against the charge," and, unlike the federal Sixth Amendment right, there is no presumption of prejudice even for a long pre-charge delay. After a defendant shows prejudice, the court then weighs the prejudicial effect against any justification for the delay. If a defendant fails to make the required prejudice showing, the court need not reach the issue of whether the delay was justified.

*People v. Martinez* (2000) 22 Cal.4th 750, 766-767, and
*Scherling v. Superior Court* (1978) 22 Cal.3d 493, 506-507

Note: This same test is used for state constitution due process claims (*People v. Martinez* (2000) 22 Cal.4th 750, 766-768) and for federal constitution due process claims (*People v. Butler* (1995) 36 Cal.App.4th 455, 466-467; *People v. Belton* (1992) 6 Cal.App.4th 1425, 1433).

3) For statutory speedy trial violations, check cases under the statutes in issue. In general, the defendant need not show prejudice in order to obtain dismissal if these statutes are violated, because prejudice is presumed for statutory violations.

*Scherling v. Superior Court* (1978) 22 Cal.3d 493, 504

4) For federal due process violations (i.e., delays from commission of the crime until the filing of the indictment or information, or actual restraint from an arrest), a defendant must show the delay "caused substantial prejudice

to [defendant's] rights to a fair trial and [] the delay was an intentional device to gain tactical advantage over the accused."

*United States v. Marion* (1971) 404 U.S. 307, 324

Even if a defendant demonstrates the required actual prejudice, the due process inquiry must also consider the reasons for the delay. Investigative delay does not violate due process, even where the defendant suffers some prejudice from the lapse of time, and there is no duty to file charges promptly once there is sufficient evidence to prove guilt beyond a reasonable doubt.

*United States v. Lovasco* (1977) 431 U.S. 783, 792-796

Note: This is the same test that is used to analyze state due process speedy trial claims (*People v. Butler* (1995) 36 Cal.App.4th 455, 466-467; *People v. Belton* (1992) 6 Cal.App.4th 1425, 1433), and to analyze state constitution speedy trial claims under Article I, section 15, clause 1 (see *People v. Martinez* (2000) 22 Cal.4th 750, 766-768).

5) For state due process speedy trial violations, the test is the same as for the state constitutional right to speedy trial, i.e., the defendant must make an affirmative showing of actual prejudice, against which the court weighs any justification for delay.

*People v. Martinez* (2000) 22 Cal.4th 750, 767-768

Note: The same test applies for analyzing federal due process speedy trial claims. (*People v. Butler* (1995) 36 Cal.App.4th 455, 466-467; *People v. Belton* (1992) 6 Cal.App.4th 1425, 1433).

**D. STEP FOUR:** For *non-statutory* speedy trial violations, you may ask the trial court to defer ruling on defendant's motion to dismiss until the end of trial. The California Supreme Court has expressly authorized this procedure: "When a speedy trial claim requires a demonstration of prejudice, the trial court has discretion to defer hearing the motion until after the trial," which allows the court to best determine whether material witnesses were missing or had poor memories, and whether there was other prejudice caused by the delay.

*People v. Martinez* (2000) 22 Cal.4th 750, 769-770

## III. Cases

A. Sixth Amendment issues:

The federal Sixth Amendment right to speedy trial does not attach upon the filing

of a felony complaint.

*People v. Martinez* (2000) 22 Cal.4th 750, 763-764 [felony complaint is preliminary step to formal accusation in a court having trial jurisdiction, so it does not constitute a "formal charge" for purposes of the Sixth Amendment]

In contrast, the federal Sixth Amendment right to speedy trial does attach when a misdemeanor complaint is filed, because a misdemeanor complaint is the formal charge giving the court trial jurisdiction.

*People v. Martinez* (2000) 22 Cal.4th 750, 763-764, citing *Serna v. Superior Court* (1985) 40 Cal.3d 239, 257

Mere issuance of an arrest warrant, even though it tolls the statute of limitations (Pen. Code, § 804, subd. (d)), does not trigger Sixth Amendment protection.

*People v. Martinez* (2000) 22 Cal.4th 750, 764-765

However, if the defendant is actually arrested on the warrant or suffers any restraint from the arrest (including being released on bail), the Sixth Amendment does attach even without the filing of an indictment or information.

*People v. Martinez* (2000) 22 Cal.4th 750, 762-763, citing *Dillingham v. United States* (1975) 423 U.S. 64, 64-65 [Sixth Amendment right attached when defendant was arrested and released on bond, even though he was not indicted until 22 months later]

When there is a warrantless arrest, an order authorizing the defendant's continuing detention or other restraint (such as release on bail) triggers the Sixth Amendment right, even without the filing of an indictment or information.

*People v. Martinez* (2000) 22 Cal.4th 750, 762

Even if the Sixth Amendment right originally attaches because the defendant suffered some restraint from arrest, the right no longer applies once the defendant is released without restraint, or the charges are dismissed.

*People v. Martinez* (2000) 22 Cal.4th 750, 762-763, citing *United States v. Loud Hawk* (1986) 474 U.S. 302, 311 [where charges were ordered dismissed but government appealed dismissal order that was later reversed, the Sixth Amendment protection did not apply during the time of the appeal since there were no charges pending and the defendants had been unconditionally released during that time]

Where charges are filed, dismissed, and re-filed, delays occurring before the re-filing are subject to a due process analysis (requiring the defendant to

make an affirmative showing of prejudice, which is then weighed against the reasons for delay), but the Sixth Amendment does not apply during that time.

*United States v. MacDonald* (1982) 456 U.S. 1, 7

When the Sixth Amendment right attaches, four factors of *Barker v. Wingo* (1972) 407 U.S. 524, 530, previously listed, are balanced to determine if there is a violation: length of delay; reason for delay; defendant's assertion of his speedy trial right; and prejudice to the defendant from the delay. The first factor, length of the delay, presents a threshold inquiry, in that there must be a delay long enough to be considered "presumptively prejudicial" so as to trigger analysis of the remaining three factors.

*United States v. Loud Hawk* (1986) 474 U.S. 302, 314

An uncommonly long delay (here, 8-1/2 years between indictment and trial), coupled with government negligence in failing to pursue the prosecution, justified dismissal under the Sixth Amendment even though the defendant was unable to demonstrate specific prejudice caused by the delay.

*Doggett v. United States* (1992) 505 U.S. 647, 656-658

Regarding prejudice factor, "prejudice, in whatever form, cannot properly be evaluated in a vacuum" (*People v. Egbert* (1997) 59 Cal.App.4th 503, 511), so a trial court, in its discretion, may postpone ruling on a motion to dismiss for speedy trial violation until after the trial, so it can determine whether material witnesses were missing or had poor memories, or there was other prejudice.

*People v. Martinez* (2000) 22 Cal.4th 750, 768-770

In determining whether the defendant appropriately asserted the speedy trial right (third factor of Sixth Amendment analysis), the defendant's entire conduct is relevant. Where defendant moved repeatedly for dismissal on speedy trial grounds, that fact was not conclusive given the defendant's other conduct of filing frivolous and repetitive motions and petitions.

*United States v. Loud Hawk* (1986) 474 U.S. 302, 314-315

A Sixth Amendment motion to dismiss is properly denied where the defendant requested and obtained continuances (third factor of Sixth Amendment analysis).

*People v. McDermott* (2002) 28 Cal.4th 946, 987

Where Sixth Amendment right attached by filing of complaint in misdemeanor case, trial court erred in denying motion to dismiss solely based on prejudice factor, without considering other three factors.

*Ogle v. Superior Court* (1992) 4 Cal.App.4th 1007, 1022

Where Sixth Amendment right attached by filing of complaint in misdemeanor case and there was 18-month delay until arraignment, trial court erred in dismissing under Sixth Amendment, even though two notices sent by prosecution were misaddressed and there was no other attempt to contact the defendant. Although the delay was presumptively prejudicial so as to trigger analysis under the other three factors, the trial court erred in concluding the defendant need not show the fourth factor of prejudice, since the 18-month delay was not so long as to justify relief without any showing of prejudice.

*People v. Alvarado* (1997) 60 Cal.App.4th Supp.1, 5

Losing the chance to serve time concurrently can be asserted as prejudice flowing from delay (fourth factor).

*People v. Martinez* (1995) 37 Cal.App.4th 1589, 1594-1597

B. Federal due process cases:

For delay prior to attachment of the Sixth Amendment right, the statute of limitations provide the primary guarantee against delay, but the Fifth Amendment due process clause also applies to protect against oppressive delay.

*United States v. Lovasco* (1977) 431 U.S. 783, 788-789

The defendant must demonstrate actual prejudice from the delay to bring a due process claim, against which the reason for the delay is weighed.

*United States v. Lovasco* (1977) 431 U.S. 783, 789-790

Where a defendant alleges non-specific claims of prejudice, such as general impairment of witnesses' memories or alleged actions his counsel could have taken, the prejudice is too speculative to warrant relief.

*People v. Roybal* (1998) 19 Cal.4th 481, 513-514

> Note: To meet the specificity requirement, it could be argued the defendant has to demonstrate exactly what evidence he could have obtained during the delay, e.g., if the claim is faded memories of witnesses, it can be argued the defendant must show what the witnesses would have said that would have assisted his defense; if the claim is based on the loss of certain evidence, the defendant must show a likelihood that the evidence had exculpatory value.

Investigative delay does not violate due process, even if the defense suffered some prejudice from the delay.

*United States v. Lovasco* (1977) 431 U.S. 783, 796

> [There was 18 month delay between commission of crime and indictment, during which two allegedly material defense

witnesses died; this prejudice did not automatically entitle defendant to relief, and since the delay was to conduct further investigation, no due process violation.]

And, there is no requirement for the prosecution to file charges immediately upon obtaining sufficient evidence to convict. (See reasons discussed in case.)
*United States v. Lovasco* (1977) 431 U.S. 783, 792-795

C. State constitutional cases (Art. I, § 15, cl.1 [speedy trial] and cl.7 [due process])

Same test applies to determine if state constitutional speedy trial and due process rights were violated: the defendant must affirmatively demonstrate prejudice, against which justification for the delay is weighed.
*People v. Martinez* (2000) 22 Cal.4th 750, 766-768

Note: *Stabio v. Superior Court* (1994) 21 Cal.App.4th 1488, presumed prejudice, and is of doubtful validity after *Martinez*. *Stabio's* analysis also has been (correctly) criticized in *People v. Butler* (1995) 36 Cal.App.4th 455, 467.

The defendant bears the initial burden of showing prejudice, which requires some evidence and cannot be presumed.
*People v. Butler* (1995) 36 Cal.App.4th 455, 466; see also
*People v. Martinez* (2000) 22 Cal.4th 750, 767-768 [declining to adopt rule that presumes prejudice for any unreasonable delay after the state constitution's speedy trial right has attached]

This is the same test used in analyzing a federal due process speedy trial claim.
*People v. Butler* (1995) 36 Cal.App.4th 455, 466-467;
*People v. Belton* (1992) 6 Cal.App.4th 1425, 1433

Case examples involving state constitutional issues:

*People v. Catlin* (2001) 26 Cal.4th 81, 107
[Nine-year delay between murder and filing of charges did not warrant relief, in that there was no showing that two dead witnesses would have provided favorable defense testimony, loss of evidence was insignificant, the defendant's whereabouts were not in issue, and the delay was justified for investigative purposes.]

*People v. Martinez* (1995) 37 Cal.App.4th 1589
[Defendant arrested in March 1991 on drug charges but released so he could provide information. Unbeknownst to arresting officers, defendant

was then arrested and jailed on other charges. In May 1992, a felony complaint filed, and in June 1992, authorities attempted to serve arrest warrant and were told by defendant's brother that he was in prison. The outstanding warrant was never placed into the state computer system, and the prison had no record of a hold request. The defendant initiated several inquiries about outstanding warrants, and each time, no holds or warrants were reflected in the Department of Corrections records. The defendant was released on parole in April 1993, and in November 1993 was arrested for the March 1991 charges. The defendant demonstrated sufficient prejudice by the loss of the opportunity to serve concurrent time, and the prosecution did not advance any justification for the delay, so the trial court properly dismissed the case.]

*People v. Butler* (1995) 36 Cal.App.4th 455

[Crime committed in 1990, defendant went into detox, felony complaint was filed but prosecution took no other action until the information was filed in 1993. Under the facts of the case, including that the defendant stole from people who knew him and had memory impairment from long-term alcohol ingestion rather than passage of time, insufficient prejudice warranting relief. Note that prosecution was not required to justify delay since defendant had not met initial burden of establishing actual prejudice.]

n3 Within this circuit, we have found that a sixth-month delay is a "borderline case," although we have also observed that there is a general consensus among the courts of appeals that eight months constitutes the threshold minimum. See Lam, 251 F.3d at 856 & n.5 (citing Valentine, 783 F.2d at 1417 and Beamon, 992 F.2d at 1013).

United States v. Gregory, 322 F.3d 1157, 1162 (9th Cir. 2003)

For purposes of our balancing, and given the government's own linkage of the third indictment to the first, we assume without deciding that the delay in this case should be measured from the date of the first superseding indictment, which is the first indictment in which Gregory was named. We therefore assume the district court properly found that the HN622-month delay between the date of the first superseding indictment and Gregory's August 14, 2001 trial date triggers the Barker inquiry. Given that the delay was not excessively long, however, it does not weigh heavily in Gregory's favor. See Lam, 251 F.3d at 857 (although an approximately 15-month delay was long enough to trigger Barker inquiry, it only "militate[d] slightly in Lam's favor"); Beamon, 992 F.2d at 1014 (17-month and 20-month delays were not "great").

United States v. Gregory, 322 F.3d 1157, 1162 (9th Cir. 2003)

[Some] of the factors which courts should assess in determining whether a particular defendant has been deprived of his right [are]: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. [Fn. omitted.]" ( Barker v. Wingo, supra, 407 U.S. at p. 530 [33 L.Ed.2d at pp. 116-117, 92 S.Ct. at pp. 2191-2192].)

[**731] In regard to the length of the delay, "[until] there is some delay which is presumptively prejudicial, there is no necessity for inquiring into the other factors that go into the balance." ( Id., at p. 530 [33 L.Ed.2d at p. 117, 93 S.Ct. at p. 2192].) In the [***13] case before us, there is no question but what the delay of almost five years was presumptively prejudicial. ( Jones v. Superior Court, supra, 3 Cal.3d 734: prejudice found in a delay of 19 months.)

People v. MacDonald, 27 Cal. App. 3d 508, 514 (Cal. Ct. App. 1972)

In *Serna v Superior Court, supra,* the California Supreme Court held that a misdemeanor defendant need not establish "actual prejudice" as a prerequisite to a *Barker v Wingo* hearing if the postcomplaint prearrest delay exceeds 1 year. The issue left open by the courts is this: In a case in which the prosecution cannot justify the delay, what length of delay warrants dismissal without any additional showing of "actual prejudice" by a defendant?

The California Supreme Court has held that "due process is the appropriate test to be applied to a delay occurring after a crime is committed but before a formal complaint is filed or the defendant is arrested," whichever comes first. (Scherling v. Superior Court (1978) 22 Cal.3d 493, 505; People v. Reeder (1984) 152 Cal.App.3d 900, 909.)[While a delay between the commission of an offense or the arrest of the accused and the filing of criminal charges may operate to deprive the accused of due process, it does not implicate the constitutional right to speedy trial. (Scherling v. Superior Court, supra, 22 Cal.3d at 505; People v. Archerd (1970) 3 Cal.3d 615, 639-640; People v. Allen (1979) 274 Cal.App.3d 268, 274.) Significantly, "no presumption of prejudice arises whenever there is delay between the commission of a crime and a timely formal charge is filed." (Scherling v. Superior Court, supra, 22 Cal.3d at p. 504, fn. 8.) In short, prejudice must be proven to establish a due process claim based upon preindictment delay, and may only be presumed from a delay occurring after constitutional speedy trial rights have attached." (People v. Belton (1992) 6 Cal.App.4th 1425, 1434.)] Such due process rights may stem from the federal law or from article I, section 15 of the California Constitution. (Garcia v. Superior Court (1984) 163 Cal.App.3d 148, 151; Cal. Const., art I, · 15.)

In determining whether a defendant's due process right to a fair trial has been violated, a three-step test is used. (People v.
Archerd, supra, 3 Cal.3d at pp. 639-640.) The defendant has the initial burden of showing prejudice as a result of the delay; the prosecution must then show justification for the delay; thereafter, the court balances the harm against the justification. (People v. Reeder, supra, 152 Cal.App.3d at pp. 909-910; (Ibarra v. Municipal Court (1984) 162 Cal.App.3d 853, 858.)

California authority stresses that prejudice will not be presumed and the defendant bears the burden of proving actual prejudice based on the facts of the case. (People v. Belton, supra, 6 Cal.App.4th at p. 1433; People v. Hartman (1985) 170
Cal.App.3d 572, 579; People v. Allen, supra, 96 Cal.App.3d at p. 278-279; People v. Archerd, supra, 3 Cal.3d at p. 640.) Furthermore, the cases are quite clear that "unless the defendant establishes prejudice no justification need be shown" by the prosecution for the delay. (In re Kevin F. (1989) 213 Cal.App.3d 178, 185; People v. Reeder, supra, 152 Cal.App.3d at 910.)

The amount of time between the commission of the offense and the filing of charges is not critical to determining prejudice. (Fowler v. Superior Court (1984) 162 Cal.App.3d 215, 221.) Actual prejudice to the defense of a crime may result from the shortest and most necessary delay; no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution." (People v. Price (1985) 165 Cal.App.3d 536, 543 citing United States v. Marion (1971) 404 U.S. 307, 322.) Accordingly, prejudice sufficient to sustain dismissal has resulted after a delay of five months (People v. Cave (1978) 81 Cal.App.3d 957), while charges filed after a delay of ten years have been upheld. ( Scherling v. Superior Court, supra, 22 Cal.3d at p. 493.)

Prejudice may be shown by "the loss of a material witness or other missing evidence or fading memory caused by lapse of time." (People v. Archerd, supra, 3 Cal.3d at p. 640.) However, "a denial of due process does not result from the mere possibility of prejudice attributable to a delay in prosecution ...." (People v. Price, supra, 165 Cal.App.3d at p. 542.) Only a showing of actual, not possible prejudice will suffice, since "[p]ossible prejudice is inherent in any delay, however short; it may also weaken the government's case." (People v. Price, supra, 165 Cal.App.3d at p. 543 citing United States v. Marion, supra, 404 U.S. at p. 322.) Accordingly, an appellant cannot rely:

"solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost. In light of the applicable statute of limitations, however, these
possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the
dismissal of the indictment."

(People v. Price, supra, 165 Cal.App.3d at p. 542 citing United States v. Marion, supra, 404 U.S. at pp. 425-426.)

In the statute of limitations, not the due process clause, the law has provided for a mechanism that guards against possible as opposed to actual prejudice resulting from the passage of time between the commission of the offense and arrest or accusation. (United States v. Marion, supra, 404 U.S. at p. 322.) The statute of limitations is usually considered the primary guarantee against overly stale criminal charges. ( People v. Shockly (1978) 79 Cal.App.3d 669, 679.) The purpose of such a statute is protect individuals from having to defend themselves against charges, when the basic facts may have become obscured by the passage of time, and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." (United States v. Marion, supra, 404 U.S. at p. 323 citing Toussie v. United States (1970) 397 U.S. 112, 114-115.)

In the due process context, the threshold question of whether a defendant has established actual prejudice due to delay is a factual question to be resolved by the trial court. A trial court's findings will
not be disturbed on appeal if supported by substantial evidence (People v. Hill (1984) 37 Cal.3d. 491, 499; People v. Pellegrino (1978) 86 Cal.App.3d 776, 780), or unless the lower court abused its discretion. ( People v. Cave, supra, 81 Cal.App.3d at. p. 963.)

The California right to a speedy trial under article I, section 15, of the California Constitution arises upon arrest or the filing of a criminal complaint. The initial burden is on the defendant to demonstrate prejudice attributable to the delay. "Only after he has done so must the court determine if the delay was justified and engage in the balancing process." Any prejudice to the defendant resulting from the delay is weighed against justification for the delay. (Serna v. Superior Court ( 1985) 40 Cal.3d 239, 248-249, cert. den. (1986) 475 U.S. 1096.)

The federal right to a speedy trial under the Sixth Amendment arises upon the filing of formal charges. Unlike a misdemeanor complaint, a felony complaint is not a formal accusation within the meaning of the Sixth Amendment. (Serna v. Superior Court, supra, 40 Cal.3d at p. 257, distinguishing People v. Hannon (1977) 19 Cal.3d 588, 605, on this ground. ) Once charges are filed, a claim of denial of a speedy trial is weighed by balancing the length of the delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defendant. ( Barker v. Wingo (1972) 407 U.S. 514, 530.)

Unless there has been some delay which is presumptively prejudicial, there is no need for consideration of the other factors. A delay of one year has generally been considered presumptively prejudicial, although the length of time which necessitates an enquiry "is necessarily dependent upon the peculiar circumstances of the case." (Id., at pp. 530- 531; Doggett v. United States (1992) 505 U.S. 647, 652, fn. 1; see Serna v. Superior Court, supra, 40 Cal.3d at pp. 252-254.)

A defendant claiming denial of speedy trial under the Sixth Amendment has no duty to request trial, but his failure to assert his right is a factor to be considered in determining whether there has been any deprivation of the right. "We emphasize that failure to assert the right will make it difficult for a defendant to prove he was denied a speedy trial." (Barker v. Wingo, supra, 407 U.S. at pp. 527, 531-532.)

Prejudice may be presumed if the delay is lengthy, but presumptive prejudice alone is not sufficient to establish a denial of speedy trial without regard to the other Barker factors. Where the presumptive prejudice stems from governmental neglect in bringing the defendant to trial, the presumption of prejudice grows in weight as the delay becomes more and more protracted. Unless extenuated, "as by the defendant's acquiescence," or rebutted by proof of lack of prejudice, the defendant may become entitled to relief. (Doggett v. United States, supra, 505 U.S. at pp. 654-658.)

On appeal, the court reviews the trial court determinations with "considerable deference." (Id., at p. 652.)

Appellant's speedy trial claim based on the California Constitution first fails because he did not request trial under Penal Code section 1381. "A person serving a term in state prison cannot complain about the denial of a speedy trial because of a postcomplaint delay regarding a California criminal charge pending at or during his imprisonment unless he first makes a request that he be brought to trial on the pending charge." (People v. Cave (1978) 81 Cal.App.3d 957, 963.)

The California claim also fails because appellant has not shown prejudice. At the pretrial stage, the question of whether a defendant will be sentenced concurrently can be nothing more than a mere speculation. This is not sufficient of itself to enable appellant to establish prejudice sufficient to require dismissal of these charges. ( People v. Gutierrez (1994) 30 Cal.App.4th 105, 112, review den. Feb. 22, 1995. But see People v. Martinez (1995) 37 Cal.App.4th 1589, 1594, review den. Nov. 16, 1995.) Similarly, appellant's vague assertion that memories dimmed over time does not establish prejudice here, where appellant chose not to testify and the witnesses against him exhibited no difficulty in recalling the facts. (See Scherling v. Superior Court (1978) 22 Cal.3d 493, 505-507 [trial court did not err in finding no prejudice where testimony did not demonstrate any loss of memory].)

Appellant's speedy trial claim based on the Federal Constitution fails first because no delay occurred after formal accusatory charges were filed, i.e., after the filing of the information. (Serna; Hammond.)

His claim also fails because he did not assert his right to a speedy trial. While appellant's failure to request a trial is not dispositive in itself, it does make it "very difficult" for him to prove he was denied a speedy trial. (Barker v. Wingo, supra, 407 U.S. at p. 532.) This is particularly the case here, where no actual prejudice can be shown, and where the Sonoma authorities did inform appellant of the charges, and of his ability to obtain a speedy trial, long before he brought his motion.

"[W]hen the defendant knows about the pending case, responsibility for the delay may fairly be apportioned, his failure to assert his rights may be pivotal, and he will be in a position to protect his interests -- if he so chooses. [ ] Even when the government can offer no good reason to justify the delay, in a given case the defendant's own conduct may defeat his claim. Presumptive prejudice simply triggers the Barker v. Wingo balancing process." (Ogle v. Superior Court (1992) 4 Cal.App.4th 1007, 1021.)

Accordingly, we submit that the trial court did not err in

denying appellant's motion to dismiss.

Appellant contends the ◀ ***trial*** ▶ court erred in denying his motion to dismiss for pre-accusation delay in prosecution. Although the burglary and theft occurred 16 months before the complaint was filed, respondent asserts that appellant's motion to dismiss on the ground of pre-accusation delay in prosecution was properly denied.

Applicable Principles Of Law And Standard Of Review

In evaluating a claim of delay occurring prior to the filing of the information, a ◀ ***trial*** ▶ court employs a three-step analysis to determine whether the defendant's rights have been violated.

First, the defendant must show he has been prejudiced by the delay. (People v. Morris (1988) 46 Cal.3d 1, 37 [disapproved on other grounds in In re Sassounian (1995) 9 Cal.4th 535]; People v. Dunn-Gonzalez ( 1996) 47 Cal.App.4th 899, 911; People v. Martinez (1995) 37 Cal.App.4th 1589, 1593.) Where there is no claim of post-information delay, prejudice will not be presumed from delay which occurs before arrest or the filing of the information, therefore the burden is on the defendant to show such prejudice. (People v. Dunn-Gonzalez, supra, 47 Cal.App.4th at p. 911.) In Shleffar v. Superior Court (1986) 178 Cal.App.3d 937, 946, the court stated:

"unless a defendant can demonstrate specific prejudice flowing from the delay, the draconian remedy of dismissal should not be invoked merely because the accused was not arrested as quickly as would be possible in the best of all worlds. It is only . . . [when] a delay can infect the truth finding process by preventing the accused from mounting a viable defense that a dismissal is ever justified. [ ] Thus, speculation about prejudice because potential witnesses' memories have failed or because witnesses and evidence are now unavailable is insufficient to discharge defendant's burden. (See Serna v. Superior Court, supra, 40 Cal.3d at p. 250.) A particular factual context must be established in which a specific claim of prejudice can be evaluated."

This is a factual question to be determined by the ◀ ***trial*** ▶ court, and its decision will not be overturned by an appellate court if supported by substantial evidence. (People v. Martinez, supra, 37 Cal.App.4th at p. 1593, citing People v. Hill (1984) 37 Cal.3d 491, 499.)

Second, if the defendant makes such a showing, the burden then shifts to the prosecution to justify the delay. (People v. Morris, supra, 46 Cal.3d at p. 37; People v. Dunn-Gonzalez, supra, 47 Cal.App.4th at p. 911; People v. Martinez, supra, 37 Cal.App.4th at p. 1593.) If the defendant fails to show prejudice, the court need not inquire into the justification for the delay since there is nothing to "weigh" such justification against. (People v. Lawson (1979) 94 Cal.App.3d 194, 198- 199.)

Third, if the defendant has met his burden, the court balances the harm to the defendant against the justification for the delay. ( People v. Morris, supra, 46 Cal.3d at p. 37; People

v. Dunn-Gonzalez, supra, 47 Cal.App.4th at p. 911; People v. Martinez, supra, 37 Cal.App.4th at p. 1593.)

The ◀ *trial* ▶ court's determination must be upheld on appeal if it is supported by substantial evidence. (People v. Martinez, supra, 37 Cal.App.4th at p. 1597.)

Appellant Failed To Satisfy His Burden Of Going Forward Because He Did Not Show That He Was Prejudiced By The Pre-Accusation Delay In Prosecution

Appellant's Declaration Does Not Establish That The Pre- Accusation Delay In Prosecution Caused Him Any Prejudice

Appellant claims that his declaration presented in a due process hearing is sufficient evidence of prejudice to meet his burden of going forward. The declaration read in relevant part:

" . . . I did sell for scrap a stainless steel tank on October 8, 1997. I do not remember the day or date specifically but I do remember selling the tank about that time period and I have no reason to doubt the accuracy of the date on the receipt that was introduced into evidence. I remember selling that tank with my brother. The tank came from a salvage yard in Shafter that I was familiar with. I do not remember the exact spelling, but my memory is that the salvage yard was called Abernackies (or Abernathy's) Salvage. It is my understanding that Abernackies has gone out of business and the owner has moved out of state. I have no idea where he is now."

Appellant has not carried his burden of going forward because this declaration does not establish that he suffered prejudice from the pre-accusation delay in prosecution. Appellant's claims that the delay prejudiced him because he cannot now remember the exact spelling of the salvage yard business from where he alleges he purchased the tank which he sold to Western Salvage on October 8, 1997, and that the delay caused him to no longer know where the owner of Abernackies is, since he believes that the scrap yard went out of business, are insufficient to establish a showing of prejudice. The ◀ *trial* ▶ judge noted:

"What we do not have is a demonstration of any efforts that were made to confirm this to present this at ◀ *trial* ▶ to see if any of the employees were still around, to see if there were any employees, any witnesses, any documents, anything else left in the hands of the accountant for the business, if there was one. None of the things that might be available to assist the defense in its defense."

Because appellant proffered no evidence that the pre-accusation delay caused his inability to obtain this evidence, the lack of which he presently claims constitutes prejudice, these claims are "mere allegations" insufficient to shift the burden of going forward with evidence because a defendant's initial burden to show actual prejudice cannot be met with " bald allegations." (Ibarra v. Municipal Court (1984) 162 Cal.App.3d 853, 858.)

The Sixteen Month Delay In Prosecution Was Not Prejudicial To Appellant

The following courts have held that no actual prejudice to the defendant existed in the following substantial delays: Scherling v. Superior Court (1978) 22 Cal.3d 493, 505-506 [nine-year delay in prosecuting burglaries not prejudicial.]; People v.
Morris, supra, 46 Cal.3d at pp. 37-38 [three-year pre-complaint delay in robbery-murder not prejudicial.]; Shleffar v. Superior Court, supra, 178 Cal.App.3d at pp. 946-947 [four to five month pre-complaint and twenty- seven month pre arrest delay in prosecution for grand theft not prejudicial.].

In People v. Morris, supra, 46 Cal.3d at pages 37 through 38, more than a three year pre-complaint delay was caused by the case file inadvertently being placed in the archives as a closed case. That notwithstanding, the court determined that the ◀ ***trial*** ▶ court did not abuse
its discretion in denying the defendant's motion to dismiss for pre- complaint delay. (Ibid.)

In light of the fact, "speculation about prejudice because . . . witnesses and evidence are now unavailable is insufficient to discharge defendant's burden," respondent submits that appellant has not established a particular factual context in which a claim of prejudice can be evaluated. (Shleffar v. Superior Court, supra, 178 Cal.App.3d at p. 946.) Therefore, appellant has failed to satisfy his burden of going forward, and as a result, the ◀ ***trial*** ▶ court properly denied his motion to dismiss.
The delay in this case did not "infect the truth finding process by preventing the accused from mounting a viable defense." (Ibid.) Appellant was free to demonstrate how the delay deprived him of the opportunity to call witnesses from Abernackies, or to demonstrate that this delay caused him to be unable to locate the owner, but for whatever reason he did not do so. Instead, appellant chose to rely on the "bald allegations" (Ibarra v. Municipal Court, supra, 162 Cal.App.3d at p. 858) contained in his declaration executed only five days before the ◀ ***trial*** ▶ judge was set to rule on his motion to dismiss.[Appellant cites Ibarra v. Municipal Court, supra, 162 Cal.App.3d 853. That Court, however, merely directed the lower court to conduct a hearing where a claim of prejudice by the defendant was to be weighed against law enforcement's justification for the delay. The Ibarra opinion did not rule on the merits of the defendant's motion to dismiss. Garcia v. Superior Court (1984) 163 Cal.App.3d 148, also cited by appellant, simply stands for the same rule as Ibarra, namely that courts must hold weighing hearings.]

Assuming Arguendo Appellant Is Determined To Have Demonstrated Prejudice, Thereby Satisfying His Burden Of Going Forward,
Substantial Evidence Establishes The ◀ ***Trial*** ▶ Judge Was Not In Error In Determining The Prosecution Had Satisfied Its Burden Of Justifying The Delay

The Delay Was Justified Because The Investigation Was Hampered Due To Appellant Moving Out Of State And To Different Addresses

On the basis of the information received from the buyer at Western Scrap, identifying appellant as the individual who sold a stainless steel tank filter and the testimony of Ramon Lopez, who identified appellant as being an occupant in the Ford Ranger which he observed driving away from the Hein Ranch Company shed carrying away a stainless steel tank filter, Detective Fritz attempted to locate appellant. On November 11, 1997, appellant's neighbor told Detective Fritz that appellant still lived at 111 £ Linda Vista Drive. Continued attempts by Detective Fritz to contact appellant for a statement were unsuccessful. Subsequently, Detective Fritz learned from Detective Simon that appellant and Connie Taylor had fled the state. It was not until January 15, 1998, that Detective Fritz was able to locate appellant and interview him.

Appellant's declaration states that he lived in Oildale, from October of 1997 until August of 1998, when he moved to Oregon. While living in Oildale he lived at two different addresses. Appellant's declaration states that he lived in Oregon for four months, before returning to California in December of 1998.

Taking into consideration the above facts that appellant moved between different addresses, and even out of state for a period of four months, the delay was not unreasonable because based on the somewhat uncertain state of the evidence in this case, an interview with appellant was necessary in order for investigators to determine appellant's actual involvement in this case, if any.

Moreover, under these circumstances, fairness required law enforcement officers to give appellant a chance to clear up this matter through an interview before they placed him under
arrest. The interview allowed appellant an opportunity to establish that he did, in fact, legally obtain the tank in Shafter, or to show that he was not anywhere near the Hein Ranch that day. Upon such a showing, presumably his involvement would no longer be at issue, and the investigation as to his involvement would have ended at that point.

The Delay In Filing Charges Against Appellant Was Justified By The Heavy Caseload Carried By Detective Fritz

The ◀ ***trial*** ▶ judge noted that this was a situation where the
investigating officer had a very active caseload. Indeed, at the time of the investigation, Detective Fritz maintained an active caseload of approximately 60 to 80 cases, and no longer had a partner. When Detective Fritz's active caseload is considered against the backdrop of appellant moving several times during the period after he was spotted driving away with the stainless steel tank, and becoming difficult to locate, it is not unreasonable that it took 16 months to conduct a thorough investigation which necessitated an interview, and time to determine whether to bring charges against appellant. In People v. Dunn-Gonzalez, supra, 47 Cal.App.4th at pages 914 through 915 (citing United States v. Lovasco ( 1977) 431 U.S. 783, 790-796 [rehg. den. 434 U.S. 881]), the court stated,

"[a] prosecutor abides by elementary standards of fair play and decency by refusing to seek indictments until he or she is completely satisfied the defendant should be prosecuted and the office of the prosecutor will be able to promptly establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of orderly expedition to that of mere speed. In sum, to prosecute a defendant following investigative delay does not deprive the defendant of due process, even if his or her defense might have been somewhat prejudiced by the lapse of time. . . . Thus, the difficulty in allocating scarce prosecutorial resources (as opposed to clearly intentional or negligent conduct) was a valid justification for delay in the instant case."

Accordingly, respondent submits the pre-accusation delay was justified both because appellant made himself very difficult to locate by moving and the fact that the investigating officer, Detective Fritz, during the relevant period, carried a heavy caseload.

Substantial Evidence Supports The ◀ ***Trial*** ▶ Judge's Decision To Deny Appellant's Motion To Dismiss, Because On Balance, The Harm To Appellant Was Justified By The Prosecution's Reasons For The Delay

In discussing the proper standard by which a court shall balance the harm caused to a defendant by a pre-accusation delay, against the prosecution's justification for the delay, the court in People v. Dunn- Gonzalez, supra, 47 Cal.App.4th at page 911, stated:

"The facts and circumstances must be viewed in light of (1) time involved; (2) who caused the delay; (3) the purposeful aspect of the delay; (4) prejudice to the defendant; and (5) waiver by the defendant. If the government deliberately uses delay to strengthen its position by weakening that of the defense or otherwise impairs a defendant's right to a fair ◀ ***trial*** ▶, an inordinate preindictment delay
may be shown to be prejudicial. However, a prosecutor is entitled to a reasonable time in which to investigate an offense for the purpose of determining whether a prosecution is warranted. (People v. Archerd ( 1970) 3 Cal.3d 615, 640.)"

The ◀ ***trial*** ▶ judge discussed on the record how some of the
balancing factors applied to the facts of this case.

In discussing the purposeful aspect of the delay, the ◀ ***trial*** ▶ judge stated, "In this particular case, I do not find that the delay was intentional."

In discussing who caused the delay, the ◀ ***trial*** ▶ judge noted that
the investigator was busy and did not handle this case perfectly,

"[i]n any event, this (Detective Fritz) was a person who had a very active case load, and he demonstrates that in his affidavit that's before the Court this morning. And he was at a point in time in his career when it's, perhaps, understandable that he didn't handle this appropriately."

Against the detective's conduct, the ◀ ***trial*** ▶ judge balanced the
conduct of appellant during the investigation, noting the resulting difficulty caused to the investigation,

"[w]e also have a situation where, as noted, Mr. Taylor was not around for awhile and was moving around for awhile. Detective Fritz testified [to] . . . the efforts that were made to locate Mr. Taylor. "

In discussing the prejudice caused to appellant due to the pre- accusation delay, the ◀ ***trial*** ▶ judge did not assign much weight to
appellant's contention that the delay prejudiced him by making it impossible for him to locate the business where he claimed to have legally obtained the stainless steel tank,

". . . And in fact, I am not seeing a dull memory. I am seeing a statement by him indicating that he had obtained it from a particular location in Shafter, a business which was named one thing or the other. He is not sure which. Maybe that's dull memory, but on the other hand, all you have to do is look at any directory or the telephone book for that year, and I assume one could find it."

In response to appellant's claim of prejudice with regard to the business where he obtained the stainless steel tank now being allegedly closed and the owner allegedly having moved out of state, the ◀ ***trial*** ▶ judge did not
find much, if any, prejudice resulted, and stated,

"[w]hat we do not have is a demonstration of any efforts that were made to confirm this to present this at ◀ ***trial*** ▶ to see if any of the
employees were still around, to see if there were any employees, any witnesses, any documents, anything else left in the hands of the accountant for the business, if there was one. None of the things that might be available to assist the defense in its defense."

The ◀ ***trial*** ▶ judge did find that it was prejudicial to the defense that the original color photo lineup and the photocopy of that lineup signed by witness Lopez were unavailable, but found that their absence was equally prejudicial to the prosecution.

The ◀ ***trial*** ▶ judge thoughtfully considered and balanced the facts
of this case on the record, and came to this conclusion supported by substantial evidence:

"My bottom line is when I look at all of it, I do not find that there was any prejudice that rises to the level that would cause the Court to find a violation of his [appellant's] due process rights; and accordingly,
this motion [to dismiss] is denied."

Accordingly, respondent submits the ◀ ***trial*** ▶ ⌦ judge reached a
proper conclusion, based on substantial evidence, that on balance, the existing justification for the delay in prosecution outweighed the harm if any such delay caused to appellant.

Under both the Federal and State Constitutions, a delay between the time of a crime and the time the defendant is charged with the crime, while not implicating ◀ ***speedy*** ▶ ◀ ***trial*** ▶ concerns, may implicate due process. "
There is no general right to a prosecution speedier than that laid down by the statute of limitations," and "[t]here is no statute of limitations on murder." (People v. Archerd (1970) 3 Cal.3d 615, 639.) This is not a " ◀ ***speedy*** ▶ ◀ ***trial*** ▶" case, because the right to ◀ ***speedy*** ▶ ◀ ***trial*** ▶ does not come into
play, under either federal or state law, unless a suspect has been formally arrested and charged with a crime. (See United States v. Marion ( 1971) 404 U.S. 307, 321; Scherling v. Superior Court (1978) 22 Cal.3d 493, 504.) There may be circumstances where an oppressive pre-charging delay violates due process.

As explained in United States v. Lovasco (1977) 431 U.S. 783, 789, "statutes of limitations . . . provide `the primary guarantee against bringing overly stale criminal charges.' [Citations.] But . . . the `statute of limitations does not fully define [defendants'] rights with respect to the events occurring prior to indictment,' [citation], and . . . the Due Process Clause has a limited role to play in protecting against oppressive delay." (Ibid., quoting United States v. Marion, supra, 404 U.S. at pp. 322, 324.) Proof of "actual prejudice" is required to make a due process claim "concrete and ripe for adjudication," but such proof does make the claim "automatically valid." (United States v. Lovasco, supra, at p.
789.) Any prejudice must be considered against "the reasons for the delay." (Id., at p. 790.) "[T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment." (Ibid.) Rather, courts are to determine only whether the delay complained of violated those "`fundamental conceptions of justice which lie at the base of our civil and political institutions,' [citation], and which define `the community's sense of fair play and decency,' [citations]." (Ibid.)

Analysis of pre-charging delay under the State Constitution is similar. "[D]ue process is the appropriate test to be applied to a delay occurring after a crime is committed but before a formal complaint is filed or the defendant is arrested. But regardless of whether defendant's claim is based on a due process analysis or a right to a ◀ ***speedy*** ▶ ◀ ***trial*** ▶ not
defined by statute, the test is the same, i.e., any prejudice to the defendant resulting from the delay must be weighed against justification for the delay." (Scherling v. Superior Court, supra, 22 Cal.3d at p. 505. )

"`In the balancing process, the defendant has the initial burden of showing some prejudice before the prosecution is required to offer any reason for the delay [citations]. The showing of prejudice requires some evidence and cannot be presumed. [Citations.]' [Citations.] Prejudice may be shown by loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay. [Citation.]" (People v. Morris (1988) 46 Cal.3d 1, 37, disapproved on other grounds in In re Sassounian (1995) 9 Cal.4th 535, 543-544, fn. 5.)[Appellant's suggestion that "with a delay as long as the one in this case, . . . a presumption of prejudice should arise" is

directly contrary to both federal and state law. (See United States v. Lovasco, supra, at pp. 789-790 [proof of "actual prejudice" required]; Scherling v. Superior Court, supra, 22 Cal.3d at pp. 497-500, 506 [no prejudice from delay of over 9 years].)]
In meeting his initial burden of showing prejudice, a defendant may not merely invoke an incantation of "faded memories, unavailable witnesses, and lost evidence." The claimed deprivations must be genuine, and they must be such as could make a difference in the defense of the case which is simply to say, they must result in the denial of a "fair ◀ ***trial.*** ▶" (Scherling v. Superior Court, supra, 22 Cal.3d at p. 507.) Thus, a defendant's claim of "faded memory" may be disproved by testimony and evidence showing that he in fact has specific memory of relevant details; and a claim of "unavailable witnesses" may be rendered non-prejudicial by evidence that the unavailable testimony would have been cumulative to available evidence. (Scherling v. Superior Court, supra, 22 Cal.3d at p. 506.) The existence of interview reports and other evidence contemporaneous to the crime which may be used to refresh recollection can also defeat any claim of prejudice due to faded memories. (Ibid.) Furthermore, the claimed prejudice must relate to a genuine, disputed issue at ◀ ***trial*** ▶, and not to a fact which "was not at all a real issue in the case." (Scherling v. Superior Court, supra, 22 Cal.3d at p. 506 [defendant's alleged memory loss not related to matters of "crucial significance"]; People v. Conrad, supra, 31 Cal.App.3d at p. 317 [inability to cross-examine witnesses on details of pretrial identifications not prejudicial where identity not at issue].)

Where the defendant fails to demonstrate prejudice, there is no need to inquire into the prosecution's justification for the delay. ( Scherling v. Superior Court, supra, 22 Cal.3d at p. 506.) Appellant strenuously complains that the ◀ ***trial*** ▶ court erred by not "shifting the
burden" to the prosecution to justify the precharging delay. Appellant confuses a ◀ ***trial*** ▶ court's function when it rules pretrial with that when it
rules post-◀ ***trial.*** ▶ Appellant relies on Ibarra v. Municipal Court (1984)
162 Cal.App.3d 853, 858, to argue that even a "minimal" showing of prejudice will suffice to "shift the burden." However, Ibarra involved a pretrial ruling where the ◀ ***trial*** ▶ court denied a motion to dismiss for
precharging delay with no record against which to
assess the defendant's claim of prejudice. (See ibid.) The situation is much different where, as here, the court defers its ruling until after it hears all the evidence in the case. Where the ruling is deferred, the ◀ ***trial*** ▶ court has a complete record from which it can assess whether there was genuine prejudice in light of all the evidence at ◀ ***trial.*** ▶ (See People
v. Martinez (2000) 22 Cal.4th 750, 769; People v. Archerd, supra, 3 Cal.3d at p. 641; People v. Butler (1995) 36 Cal.App.4th 455, 464.) Unlike in the pretrial setting, the ◀ ***trial*** ▶ court is in an excellent position to
determine whether the defendant was actually deprived of a fair ◀ ***trial*** ▶ after it has benefit of hearing the ◀ ***trial*** ▶ evidence. (People v. Martinez,
supra, 22 Cal.App.4th at p. 769.)[Thus, appellant's statement that "only one California case" has declined to "shift the burden" to the prosecution to explain a delay based on a defendant's claim of memory loss is misleading, for he mixes cases involving pretrial and post-◀ ***trial*** ▶ rulings.

As explained, after ◀ ***trial*** ▶, the record allows an assessment of prejudice that simply is not possible when the court elects to rule pretrial. In any event, there are multiple cases where the reviewing court has upheld the ◀ ***trial*** ▶ court's finding of no prejudicial delay without inquiring into the justification for the delay. (See, e.g., Scherling v. Superior Court, supra, 22 Cal.3d at pp. 506-507; People v. Butler, supra, 36 Cal.App.4th at pp. 464-465; People v. Conrad, supra, 31 Cal.App.3d 308, 316-317.)]

As appellant grudgingly concedes, "[p]rejudice is a factual question to be determined by the ◀ ***trial*** ▶ court." (People v. Hill (1984) 37 Cal.3d 491, 499.) On appeal, the ◀ ***trial*** ▶ court's determination must be upheld if supported by substantial evidence. (Ibid.) Applying these standards, the ◀ ***trial*** ▶ court's finding that appellant failed to prove prejudice from the delay is supported by substantial evidence.

Appellant lists a number of ways he assertedly was prejudiced by the delay in charging. He makes no attempt to assess his allegations of prejudice against the actual ◀ ***trial*** ▶ record. When measured against that record, it is apparent appellant was not denied a fair ◀ ***trial*** ▶ from the delay.

At ◀ ***trial*** ▶, appellant placed his greatest emphasis on his own claimed memory loss. On appeal, he seems to take his purported memory loss as a given asserting that he "did not take the stand because his memory had been ravaged by age, strokes and heart disease to the point he could not face cross examination." This claim is insupportable in view of the detailed and specific testimony given by appellant at the post- ◀ ***trial*** ▶ hearing and of the ◀ ***trial*** ▶ court's explicit finding discrediting appellant's claim of memory loss. Appellant was adamant that he did not load the shotgun, aim the weapon, or pull the trigger. While disclaiming any recollection of speaking to the police, he testified to a version of the shooting that was consistent in all significant details to what he told the police, down to his very specific statement that his wife was looking at the serial numbers when the gun discharged. His claimed memory loss that he did not know where his hands were at the instant the gun fired was identical with his statement to police immediately after the crime. Not only did appellant demonstrate recall as to the shooting, he also remembered meeting his wife's lover Greg Hall at a poetry meeting and shaking his hand. He specifically disclaimed making any threatening statements about Abigail to his friend Hazel Lane, and he recalled the same information about fixing up the old shotgun which he reported to police. Given this specific testimony, the statements appellant gave contemporaneous to the crime about the shooting, and the ◀ ***trial*** ▶ court's credibility findings, his claim of memory loss can serve as no basis for a finding of prejudice from the precharging delay.[Lack of prejudice is further demonstrated by the expert testimony presented by appellant, which established that, while his overall memory was in the low-average range, his long term memory was in the 91st percentile and any memory problem was not extreme. ]

Appellant also speculates that the shotgun may have been tampered with and changed in the interim between the crime and ◀ ***trial.*** ▶ The evidence, however, was to the contrary. Edward Peterson, the last expert to examine the shotgun, testified that the force required to both cock the hammer and pull the trigger had remained unchanged from when the gun was tested immediately after the shooting. This led Peterson to conclude that the firing mechanism of the gun was working in essentially the same way as when Mrs. Niebauer was shot. The ◀ ***trial*** ▶ court found that "the reality is, the shotgun was in the condition it was in in 1998 as it was in 1985," a finding fully supported by criminalist Peterson's testimony.[Appellant makes much of the fact that the ◀ ***trial*** ▶ court referred to expert Moorehead, instead of Peterson, as supporting its finding that the gun was unchanged. This misattribution by the ◀ ***trial*** ▶ court is of no significance given that Peterson's testimony amply supports the court's findings.] Even if there were some conceivable doubt as to whether the gun had been altered, as a matter of law this could not result in the remedy of dismissal. "[W]hen it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight." (People v. Riser (1956) 47 Cal.2d 566, 581, disapproved on other grounds in People v. Morse (1964) 60 Cal.2d 631, 637, fn. 2, 648-649.) Appellant demonstrates no prejudice regarding the shotgun.

Appellant also claims he was prejudiced by certain items of lost physical evidence, including Mrs. Niebauer's clothing, her poetry and journals, and the shell casing, pellets and wadding from the fatal shot. Mrs. Niebauer's clothing was photographed at the autopsy on the day following her death. All experts were able to rely on these photographs, and there was no evidence that the absence of the actual clothing could have been detrimental to the defense in any significant way. Defense expert Morton suggested that examination of soot deposits on the clothing itself would have enabled a more precise estimation of how far away Mrs. Niebauer was standing from the gun. But Morton and all other experts were able to come up with roughly the same range: Morton -- 6-8 inches to 18- 20 inches; Martin Fackler -- 10-14 inches; Richard Mason -- 10-18 inches. Morton's closer estimate was contradicted by the absence of powder burns on Mrs. Niebauer's skin, and by appellant's own statements to police and at the post-◀ ***trial*** ▶ hearing that his wife had been standing several feet away. The absence of the clothing caused no genuine impediment to estimating how far away Mrs. Niebauer was from the gun.

No expert, including Morton, suggested any significance to the loss of the shotgun wadding and pellets. Appellant claims that loss of the fatal shell casing foreclosed inquiry about what caused the shell to explode. However, criminalist Peterson whose testimony appellant cites made clear that the shell could not have fired through spontaneous combustion. Even if the shell had been struck a number of blows (which a preserved photograph of the shell tended to disprove), it would still have required a sharp blow to drive the firing pin into the shell primer to cause it to explode, rather than a series of light blows.

Appellant suggests that a lost partial latent fingerprint, " possibly usable," lifted from the shotgun barrel might have been Mrs. Niebauer's. If it were, he asserts, it would have

"substantially supported the defense." It is difficult to see how this could be so. There was no evidence that Mrs. Niebauer was actually touching the gun when it fired and, indeed, she could not have been in the view the nature of the wound and the unanimous opinion of the experts. Conceivably, the presence of such a print could have had some relevance to Mrs. Niebauer's fear of guns, but even appellant admitted to police that her fear of weapons was real. Assuming Mrs. Niebauer had touched the gun at some point, this would have done nothing to explain how the gun got loaded and how it was fired while pointing directly at her heart from point-blank range. The "possibly usable" fingerprint could have shed no light on these fundamental questions.

As to Mrs. Niebauer's poetry and journals, this evidence turned up missing immediately after the crime, even though son James had seen the journals a few days previously. Both the police and appellant's daughter Catherine were unable to find the journals anywhere in the house. Appellant told Catherine that he did not know where they were, but inconsistently suggested to daughter Cara they had been damaged by water. The precharging delay had nothing to do with the disappearance of these journals.

Appellant points to the death of Laurie Gelardi. He claims she was a "key witness" but does not explain how. The parties stipulated that Gelardi told police she and appellant had twice stayed at the motel which was directly across the street from Greg Hall's apartment a fact also admitted by appellant to the police. Gelardi's unavailability could not have been prejudicial.

Finally, appellant points to the generalized loss of recall mentioned by numerous witnesses during their testimony. However, he claims no specific inability to confront and cross-examine any of these witnesses. It is difficult to imagine any ◀ ***trial*** ▶ where one or more
witnesses does not lack specific recall as to some events, regardless of how short or long the delay between the crime and the ◀ ***trial.*** ▶ Appellant
relies on the court's unremarkable statement that it would be difficult for all witnesses, including appellant, "to recall and recollect all the details of something that happened in 1984 and 1985." This is not the type of specific prejudice a defendant must show to win a dismissal for precharging delay; if it were, few criminal trials could be held. Here, the recollections of witnesses were refreshed with statements to police and other investigators, there was abundant physical and expert evidence offered by both sides, and virtually all the witnesses were able to present remarkably detailed testimony about specific events of importance. Appellant's generalized claim of loss of memory is supported by nothing more than counting how many times someone said during the course of a two- month ◀ ***trial*** ▶ that they could not recall. He provides no context, and no
discussion of whether the respective witness's recollection was or could have been refreshed. He has not shown prejudice.

Whether appellant's claims are considered singularly or together, they do not amount to prejudice when assessed in light of the entire ◀ ***trial*** ▶ record. Though the ◀ ***trial*** ▶ court correctly did

not find it necessary to weigh any justification by the prosecution, that justification nevertheless appears on the record. In its written response to appellant's pretrial motion to dismiss, the prosecution stated that it would be relying on "new evidence in the form of experiments conducted by a Palo Alto Police Officer and several expert opinions about the significance of those results" to justify the precharging delay. The ◀ ***trial*** ▶ record develops this justification.

Agent Yore assumed responsibility for the case in 1993, and thereafter conducted the test firings which enabled Drs. Martin Fackler and Richard Mason to conclude that Mrs. Niebauer had been standing in a " defensive posture," with her arms pressed against her body and her hands protecting her face, when she was shot.[The record does not show when Yore conducted his tests, but Dr. Fackler testified before the grand jury that he performed his review in May, 1996. Apart from the generalized "lack of recall" claim, all other specific attempts to identify prejudice from the delay concern events that predated the new experiments and opinions, such as the loss of physical evidence and the death of Laurie Gelardi. No specific claim of prejudice is directed towards the time period from Yore's renewed investigation to the date of charging.] In United States v. Lovasco, supra, 431 U.S. 783, 796, the Supreme Court held that delaying a prosecution to enable a complete investigation so that a doubtful case may be resolved against prosecution does not constitute a denial of due process, even if some prejudice results to the defendant from the delay. The Court explained:

"[I]nsisting on immediate prosecution once sufficient evidence is developed to obtain a conviction would pressure prosecutors into resolving doubtful cases in favor of early and possibly unwarranted prosecutions." (Id., at p. 793.)

"Rather than deviating from elementary standards of `fair play and decency,' a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of `orderly expedition' to that of `mere speed' [citation]. This
the Due Process Clause does not require. We therefore hold that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." (Id., at pp. 795-796.)

Here, the delay was due precisely to the reasons discussed in Lovasco, constituting obvious justification. Were it necessary to balance this substantial justification against the prejudice from the delay (which, as we have shown above, was insignificant), the ◀ ***trial*** ▶ court's ruling
denying appellant's motion to dismiss would plainly have to be affirmed.

In sum, substantial evidence supports the ◀ ***trial*** ▶ ⌦ court's ruling
that appellant was not prejudiced by the pre-charging delay. (People v. Hill, supra, 37 Cal.3d at p. 499.) Appellant's contention, therefore, must be rejected.

The Sixth Amendment right to a ***speedy*** ***trial*** does not apply until the defendant has been charged with a crime. U.S. v. Marion, 404 U.S. 307, 313, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971). Prior to this time, the defendant is protected from prejudicial delay in prosecution by the Fifth Amendment guarantee of due process. Id. at 324; U.S. v. Lovasco, 431 U.S. 783, 788- 89, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977). The Fifth Amendment protects against government delay used as a deliberate device to gain a tactical advantage that causes actual prejudice. U.S. v. Marion, 404 U.S. at 324; U.S. v. Lovasco, 431 U.S. at 789-790. It is the petitioner's burden to establish actual and substantial prejudice. U.S. v. Marion, 404 U.S. at 324.[ 2. In his Opening Brief, Saitta argues that his ***speedy*** ***trial*** rights were violated by the 2-year delay between his arrest and ***trial.*** However, the right to a ***speedy*** ***trial*** did not attach in this case until after Saitta was formally charged since he was held in the custody of Riverside County and the Department of Corrections for unrelated crimes prior to this time. (See U.S. v. Marion, 404 U.S. at 320 ( the filing of a felony complaint does not trigger a person's ***speedy*** ***trial*** rights, a person is "accused" for Sixth Amendment purposes when there is either a formal information or the actual restraints imposed by arrest and holding to answer on a criminal charge begin).) Therefore, the right to a ***speedy*** ***trial*** does not apply to the 16-month period between Saitta's arrest and arraignment. Although the ***speedy*** ***trial*** right does apply to the 8-month period between Saitta's arraignment and ***trial***, Respondent will not address this portion of the argument as the District Court denied the certificate of appealability as to this separate claim.]2/ The defendant has a heavy burden in proving that a charging delay caused actual prejudice. U.S. v. Butz, 982 F.2d 1378, 1380 (9th Cir. 1993) (and cases cited therein).

Saitta has failed to show that his

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF VENTURA**

**APPELLATE DIVISION**

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| THE PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff/Respondent,<br>vs.<br>CHRISTOPHER BURSON,<br>Defendant/Appellant. | Case No.: 2004020231<br>**OPINION AND JUDGMENT** |

## I. INTRODUCTION

Christopher Burson, defendant and appellant ("appellant"), appeals from a final judgment of conviction entered February 16, 2006. Specifically, appellant alleges the trial court's denial of his "*Serna*" motion was improper and the case should have been dismissed. For the reasons explained below, we affirm the judgment.

## II. SUMMARY OF RELEVANT FACTS

Appellant was arrested on May 20, 2004 for misdemeanor driving under the influence of alcohol. The appellant posted bail and was released to appear June 23, 2004. Although the appellant did not appear in court June 23, 2004, no complaint had been filed. His bail bond was exonerated and the appellant was discharged.

A misdemeanor complaint was filed by the district attorney on January 11, 2005 alleging violations of Vehicle Code sections 23152 and 12500. A letter was sent to the appellant's address notifying him of the charges against him and the arraignment date February 14, 2005.

The appellant failed to appear February 14, 2005 and a bench warrant was issued for his arrest. On June 1, 2005 the appellant appeared in court, the public defender was appointed and the arraignment was continued with a time waiver to June 9, 2005. The case was continued to September 26, 2005 for the purposes of a motion to dismiss pursuant to *Serna v. Superior Court* (1985) 40 Cal.3d 239. The motion was heard September 27, 2005 and denied September 30, 2005.

The case was continued ten times after that. On February 16, 2006 there was a waiver of jury; the Honorable Judge Roland Purnell heard the trial, found the appellant guilty and granted probation.

A timely notice of appeal was filed March 8, 2006.

## III. DISCUSSION

### A. Standard of Review

"The question of whether a defendant has established prejudice occasioned by the delay is a factual matter to be resolved by the trial court, and its decision on that point will not be overturned by an appellate court if supported by substantial evidence." (*People v. Martinez* (1995) 37 Cal.App.4th 1589, 1593.) Thus, the trial court's decision based on the facts, i.e., whether appellant suffered prejudice, is reviewed using the substantial evidence standard.

The trial court's decision after balancing the competing interests is reviewed under the abuse of discretion standard. (*People v. Cave* (1978) 81 Cal.App.3d 957, 963.)

### B. Right to Speedy Trial

A defendant may be protected by his federal and state constitutional "speedy trial rights," depending upon when the alleged delay occurred in relation to the status of any criminal prosecution. "The nature of the right asserted dictates the procedural mechanism for evaluating the claimed violation." (*Ibarra v. Mun. Ct.* (1984) 162 Cal.App.3d 853, 857.)

#### *1. Attachment of Constitutional Rights*

a. Federal right: The federal Sixth Amendment speedy trial right attaches when a defendant becomes an "accused" or, stated another way, is "held to answer." Case law

finds this occurs in California felony cases at the earlier of the filing of the felony information, indictment, or arrest with continuing restraint. It does not occur merely because a felony complaint has been filed even if a warrant is issued based upon the complaint. (*People v. Martinez* (2000) 22 Cal.4th 750, 762 ("it appears that the right attaches upon arrest *unless* the defendant is released without restraint or charges are dismissed.") Italics in original.)

In California misdemeanor cases, the filing of a complaint is sufficient to trigger the Sixth Amendment protection. (*Serna v. Sup. Ct., supra,* 40 Cal.3d at 262.) However, arrest alone does not trigger the right. (*Ibarra v. Mun. Ct., supra,* 162 Cal.App.3d at 857 *impliedly overruled on other grounds in Serna v. Sup. Ct., supra,* 40 Cal.3d 239)[1]) Although *Serna* does state "the Sixth Amendment right to speedy trial attaches in misdemeanor prosecutions, as it does in felonies, with the filing of the accusatory pleading, here a misdemeanor complaint, or arrest, whichever is first" (*Serna v. Sup. Ct., supra,* 40 Cal.3d at 262), neither the holding in the case,[2] the court's analysis[3] nor its

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[1] *Ibarra* held the defendant's Sixth Amendment right did not attach until his second arrest, 12 months after the misdemeanor complaint was filed. (*Ibarra v. Mun. Ct., supra,* 162 Cal.App.3d at 856-857.) *Serna* quite clearly holds Sixth Amendment protection is triggered by the filing of a misdemeanor complaint. (*Serna v. Sup. Ct., supra,* 40 Cal.3d at 262.) *Serna* makes no mention of *Ibarra.* More recent cases cite *Ibarra* favorably for other grounds. (*See e.g., People v. Morris* (1988) 46 Cal.3d 1, 37 *overruled on another ground in In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn.5; *People v. Egbert* (1997) 59 Cal.App.4th 503, 511.)

[2] In *Serna,* after the misdemeanor complaint was filed no arrest occurred until over four years later. (*Serna v. Sup. Ct., supra,* 40 Cal.3d at 246-247.) The court held the filing of the complaint triggered the right. Thus the court's comment regarding arrest alone triggering the right is *dicta.*

[3] In holding that the filing of a misdemeanor complaint triggers the federal speedy trial right in California, *Serna* emphasized a misdemeanor complaint is the "formal charge, an accusatory pleading giving the court jurisdiction to proceed to trial"; that a "misdemeanor complaint is a public document" (*Serna v. Sup. Ct., supra,* 40 Cal.3d at 260) and because "[a]n arrest warrant issued on the strength of a complaint ... is not confidential," (*Ibid.*) there exists a danger "that a pending misdemeanor complaint of which the defendant is unaware may cause disruption of his life by affecting his credit rating, job applications, admission to schools and other activities in which background checks are routine." (*Id.* at 261.) The same concerns do not exist when one is merely arrested and released without more.

subsequent cases[4] support the conclusion that a pre-complaint arrest and release without restraint triggers the right.[5]

b. State right: Under the California Constitution, the filing of the misdemeanor complaint triggers the speedy trial right. (*Serna v. Sup. Ct., supra,* 40 Cal.3d at 248.)

*2. Prejudice to Defendant*

Under both the federal and state constitutional rights to speedy trial, there must be some prejudice to the defendant. (*People v. Hill* (1984) 37 Cal.3d 491, 496 ("prejudice is relevant under either the federal or the state standard.").)

a. Federal right: Once the federal speedy trial right attaches, where there has been delay that is "uncommonly long" prejudice to the defendant caused by that delay is presumed. Thus "a defendant can establish a speedy trial claim under the Sixth Amendment without making an affirmative demonstration that the government's want of diligence prejudiced the defendant's ability to defend against the charge." (*People v. Martinez, supra*, 22 Cal.4th at 755.)

In California misdemeanor cases, the California Supreme Court has held a delay of *more* than one year is "uncommonly long" and triggers the presumption of prejudice. (*Serna v. Sup. Ct., supra,* 40 Cal.3d at 253.)

b. State right: "Under the state Constitution's speedy trial right, however, no presumption of prejudice arises from delay...: rather, in this situation a defendant

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[4] *People v. Martinez, supra,* 22 Cal.4th at 763, cites numerous authorities in support of its decision that the right attaches upon arrest unless the defendant is released without restraint or charges are dismissed. Included among those authorities is the American Bar Assoc. proposed standards "proposing that a defendant is 'held to answer' for speedy trial purposes when 'brought before a judicial officer on some allegation of a crime or crimes (not necessarily a charge, as heretofore defined) upon which that judicial officer orders the defendant thereafter held in custody or released on bail or recognizance'." 2 *ABA Stds. for Crim. Justice* (2d ed. 1980) com. to std. 12-2.2, p. 12.20.

[5] We are aware of no material difference between a pre-complaint arrest and release in a felony case versus a pre-complaint arrest and release in a misdemeanor case. Neither situation requires the prosecution to file a complaint or to pursue charges. Neither requires a judicial officer to make orders regarding the defendant's release status. Thus, if there is no trigger of the Sixth Amendment right in felony cases when a defendant is arrested and released, pre-complaint, then likewise there can be no trigger in misdemeanor cases.

seeking dismissal must affirmatively demonstrate prejudice." (*People v. Martinez, supra*, 22 Cal. 4th at 755 (internal citations omitted).)

*3. Balancing Tests*

Once prejudice is found, either by presumption or an affirmative showing, under both constitutional rights, a balancing of interests occur.

a. Federal right: "For the federal Constitution's speedy trial right, the United States Supreme Court has articulated a balancing test that requires consideration of the length of the delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defense caused by the delay. (*People v. Martinez*, *supra*, 22 Cal.4th at 755.)

b. State right: "A defendant must first show that the delay caused actual prejudice, after which the burden shifts to the prosecution to justify the delay. If justification is shown, the court weighs the justification against the actual prejudice suffered by the defendant." (*People v. Roybal* (1998) 19 Cal.4th 481, 513.)

If there is prejudice and justification then in applying the balancing test: "The facts and circumstances must be viewed in light of (1) time involved; (2) who caused the delay; (3) the purposeful aspect of the delay; (4) prejudice to the defendant; and (5) waiver by the defendant." (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 911.)[6]

This Appeal

We turn now to the findings and claims made in the instant case.

*1. No Evidence of Actual Prejudice was Presented or Argued*

Even if the state right had attached at the time of the initial arrest as argued by the appellant, the requirement of actual prejudice was not met in this case.

*2. As There was no Finding of Prejudice, no Balancing Test was Triggered*

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[6] In this weighing process, the court may also be required to consider evidence of the defendant's guilt, (*see, e.g., People v. Vanderburg* (1973) 32 Cal.App.3d 526, 532-533), and to consider the seriousness of the crime charged. (*Penney v. Sup. Ct.* (1972) 28 Cal.App.3d 941, 954.)

The federal balancing test was not triggered as the time begins to run January 11, 2005, the date of the filing of the misdemeanor complaint. The appellant appeared in court June 1, 2005 approximately 5 ½ months after the filing of the complaint. The court correctly found there to be no delay and no presumed prejudice.

## IV. ORDER AND JUDGMENT

The order denying appellant's motion to dismiss is affirmed.

REBECCA S. RILEY
Judge of the Superior Court
Appellate Division

BARRY B. KLOPFER
Presiding Judge of the Superior Court
Appellate Division

TARI L. CODY
Judge of the Superior Court
Appellate Division

Dated: APR - 3 2007

SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

Case No. 2004020231 Petitioner BURSON

I am employed in the County of Ventura, State of California. I am over the age of 18 years and not a party to the above-entitled action. My business address is 800 S. Victoria Avenue, Ventura, California 93009. On APR - 3 2007, I served the following document described as: **OPINION AND JUDGMENT**

by placing a true copy thereof for collection and mailing so as to cause it to be mailed on the above date, following standard court practices, in sealed envelopes addressed as follows:

CONFLICT DEFENSE ASSOCIATES
DAVID L. McDUFFIE, ESQ.
674 County Square Dr., #202E
Ventura, CA 93003

GREGORY D. TOTTEN
Office of the District Attorney
MICHELLE J. CONTOIS, DEPUTY
Via Brown Mail No. 2730

HON. ROLAND N. PURNELL
Ventura County Superior Court

HON. KEVIN J. McGEE
Assistant Presiding Judge
Ventura County Superior Court

I am readily familiar with the county's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the United States postal service and/or interoffice mail on that same day with postage thereon fully prepaid at Ventura, California in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Dated and executed at Ventura, California on APR - 3 2007.

**MICHAEL D. PLANET,**
Executive Officer and Clerk

By: Rosauna Corona
Deputy Clerk

**DECLARATION OF MAILING**