



1977

## Speedy Trial Under Rule 1100: Administrative Ease or Administrative Agony?

Michael Vitiello

University of the Pacific, [mvitiello@pacific.edu](mailto:mvitiello@pacific.edu)

Follow this and additional works at: <https://scholarlycommons.pacific.edu/facultyarticles>



Part of the [Law Commons](#)

---

### Recommended Citation

Michael Vitiello, *Speedy Trial Under Rule 1100: Administrative Ease or Administrative Agony?*, 50 TEMPLE L.Q. 513 (1977).

Available at: <https://scholarlycommons.pacific.edu/facultyarticles/619>

This Article is brought to you for free and open access by the McGeorge School of Law Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in McGeorge School of Law Scholarly Articles by an authorized administrator of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

# SPEEDY TRIAL UNDER RULE 1100: ADMINISTRATIVE EASE OR ADMINISTRATIVE AGONY?

*Michael Vitiello \**

The critical backlog of criminal cases<sup>1</sup> provided the impetus for the promulgation of rule 1100,<sup>2</sup> requiring the prompt trial of criminal

---

\* Assistant Professor, Loyola University School of Law (New Orleans). B.A. Swarthmore College (1969); J.D. University of Pennsylvania Law School (1974). Law clerk to Judge J. Sydney Hoffman of the Pennsylvania Superior Court, 1974-1977. The author wishes to emphasize that the views expressed in this article are solely those of the author and are not to be considered the views of Judge Hoffman or the Superior Court of the Commonwealth of Pennsylvania.

1. The congestion in the Philadelphia criminal court system was indicative of the critical situation that existed. The reduction of cases carried forward from one year to the next was insignificant. Some reduction occurred in minor felony cases, but the backlog of homicide cases increased. For discussion and statistics, see *Commonwealth v. Hamilton*, 449 Pa. 297, 306-07, 297 A.2d 127, 132 (1972). An extensive backlog enables the criminal litigant to manipulate a system which is bent on procuring guilty pleas. The offender has the opportunity to commit additional crimes in the interim between arrest and trial; the temptation to jump bail increases during a lengthy delay; and it is believed that delay between arrest and ultimate punishment hampers rehabilitation. *Id.* at 304-05, 297 A.2d at 131 (citing *Barker v. Wingo*, 407 U.S. 514 (1972)).

2. PA. R. CRIM. P. 1100. The full text of rule 1100 is as follows:

*Prompt Trial*

(a)(1) Trial in a court case in which a written complaint is filed against the defendant after June 30, 1973 but before July 1, 1974 shall commence no later than two hundred seventy (270) days from the date on which the complaint is filed.

(2) Trial in a court case in which a written complaint is filed against the defendant after June 30, 1974 shall commence no later than one hundred eighty (180) days from the date on which the complaint is filed.

(b) For the purpose of this Rule, trial shall be deemed to commence on the date the trial judge calls the case to trial.

(c) At any time prior to the expiration of the period for commencement of trial, the attorney for the Commonwealth may apply to the court for an order extending the time for commencement of trial. A copy of such application shall be served upon the defendant through his attorney, if any, and the defendant shall also have the right to be heard thereon. Such application shall be granted only if trial cannot be commenced within the prescribed period despite due diligence by the Commonwealth. Any order granting such application shall specify the date or period within which trial shall be commenced.

(d) In determining the period for commencement of trial, there shall be excluded therefrom such period of delay at any stage of the proceedings as result from:

(1) the unavailability of the defendant or his attorney;

(2) any continuance in excess of thirty (30) days granted at the request of the defendant or his attorney, provided that only the period beyond the thirtieth (30th) day shall be so excluded.

(e) A new trial shall commence within a period of one hundred twenty (120) days after the entry of an order by the trial court or an appellate court granting a new trial.

(f) At any time before trial, the defendant or his attorney may apply to the court for an order dismissing the charges with prejudice on the ground

defendants. The Pennsylvania Supreme Court in *Commonwealth v. Hamilton*<sup>3</sup> concluded that Pennsylvania's "two-term" rule<sup>4</sup> was inadequate to protect an accused's constitutional right to a speedy trial.<sup>5</sup> The speedy trial issue in *Hamilton* had been resolved on the federal constitutional grounds articulated by the Supreme Court in *Barker v. Wingo*.<sup>6</sup> Although *Barker* had not established a presumptive time period in which a defendant must be brought to trial,<sup>7</sup> the Pennsylvania Supreme Court favored such a rule because "it eliminates the inherent vagueness encompassed in any balancing process and it avoids the necessity of a court determining a violation of this constitutional right on a case-by-case basis."<sup>8</sup> Therefore, as an exercise of its supervisory powers, the supreme court referred the problem to the Criminal Procedure Rules Committee.<sup>9</sup> The Committee was to design a rule to help eliminate the backlog and to guarantee the speedy trial right of criminal defendants. The court believed that the drastic remedy of dismissal with prejudice would act to encourage "those entrusted with the responsibility of managing court calendars"<sup>10</sup> to adhere to the dictates of rule 1100.

Rule 1100 was designed to remedy the problems which existed under the two-term rule. Under the two-term rule, an accused was entitled to discharge if he was not already free on bail and had not been tried before the second term after his imprisonment. Because the rule was not self-executing, release resulted only if the offender applied

---

that this Rule has been violated. A copy of such application shall be served upon the attorney for the Commonwealth, who shall also have the right to be heard thereon. Any order granting such application shall dismiss the charges with prejudice and discharge the defendant.

(g) Nothing in this Rule shall be construed to modify any time limit contained in any statute of limitations.

Adopted June 8, 1973, effective prospectively as set forth in paragraphs (a) (1) and (a) (2) of this rule.

3. 449 Pa. 297, 297 A.2d 127 (1972).

4. PA. STAT. ANN. tit. 19, § 781 (Purdon 1964). Rule 1100 does not suspend either the two-term rule or the "180-day rule," PA. STAT. ANN. tit. 19, § 881 (Purdon 1964), which deals with the disposition of unresolved charges against a prisoner upon his request for trial. PA. R. CRIM. P. 1100, Comment.

5. U.S. CONST. amend. VI; PA. CONST. art. I, § 9; *Strunk v. United States*, 412 U.S. 434 (1973); *Barker v. Wingo*, 407 U.S. 514 (1972); *Dickey v. Florida*, 398 U.S. 30 (1970); *Smith v. Hoey*, 393 U.S. 374 (1969); *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

6. 407 U.S. 514 (1972). In *Hamilton*, the Pennsylvania Supreme Court articulated the following balancing test required by *Barker*: "the length of the delay; the reason for the delay; the defendant's assertion of his right; and the prejudice to the defendant. A balancing of these factors in the instant case causes us to conclude that appellee was denied a speedy trial." 449 Pa. at 299, 297 A.2d at 128.

7. 407 U.S. at 529. The Court made it clear that its failure to require a presumptive rule did not foreclose the state courts from establishing fixed periods in which to bring criminal cases to trial. *Id.* at 530 n.29.

8. 449 Pa. at 308, 297 A.2d at 132-33.

9. *Id.* at 309, 297 A.2d at 133.

10. *Id.* at 308, 297 A.2d at 133.

for discharge. Furthermore, the consequence of invoking the rule—release from custody—could be avoided if the Commonwealth immediately proceeded to trial.<sup>11</sup> Thus, the two-term rule provided little incentive to expedite the trials of criminal defendants. The rule did not alleviate the hardships suffered by defendants due to the denial of a speedy trial such as loss of employment and financial resources and the strain on family and friends.<sup>12</sup> Finally, the rule did not result in discharge with prejudice which is the only remedy that makes the right to a speedy trial meaningful.<sup>13</sup> It appeared that a presumptive rule could remedy many of these problems.

Since its adoption by the Pennsylvania Supreme Court on June 8, 1973, rule 1100 has engendered an extraordinary amount of litigation.<sup>14</sup> District attorneys throughout the Commonwealth have criticized the rule for placing unrealistic demands on limited resources. The Philadelphia District Attorney is critical of the rule because it does not achieve its stated goal of eliminating the case backlog, it is confusing, and it plagues trial courts and prosecutors unfairly.<sup>15</sup> This article is intended to familiarize the practitioner with the parameters of the rule. In addition, the article will examine the most vigorously litigated issue under the rule—whether judicial delay, such as the unavailability of court facilities, excuses noncompliance with the rule. Part I addresses questions of general application: To whom does the rule apply? How is a rule 1100 violation properly raised? How is time computed under the rule? Part II analyzes the problem of judicial delay raised in superior court decisions and recently addressed by the supreme court.

### AN OVERVIEW

The goal of the Pennsylvania Supreme Court in promulgating rule 1100 was to guarantee an accused the right to a trial within 180

---

11. For an analysis of the two-term rule, see *id.* at 305, 297 A.2d at 131.

12. *Id.* at 304, 297 A.2d at 131 (citing *United States v. Marion*, 404 U.S. 307, 320 (1971)).

13. *Id.* at 305-06, 297 A.2d at 131 (citing *Barker v. Wingo*, 407 U.S. 514, 522 (1972)). See *Strunk v. United States*, 412 U.S. 434 (1973); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE—*Standards Relating to Speedy Trial* § 4.1, at 40-41 (Approved Draft, 1968).

14. The rule has also engendered commentary. *E.g.*, Comment, *The Pennsylvania Prompt Trial Rule: Is the Remedy Worse Than the Disease?*, 81 DICK. L. REV. 237 (1977).

15. Brief for Commonwealth of Pennsylvania at 21-33, *Commonwealth v. Millhouse*, — Pa. —, 368 A.2d 1273 (1977) [hereinafter referred to as Brief for Commonwealth, *Millhouse*]. The Philadelphia District Attorney's office stated its argument as follows: "Not only does Rule 1100 *not* achieve these goals, but in its brief history the rule has generated more litigation than the entire Crimes Code. . . . Endless questions about the rule plague trial courts and when the Commonwealth guesses wrong the defendant goes free." *Id.* at 26 (emphasis in original).

days of the issuance of a criminal complaint.<sup>16</sup> The court recognized that pre-existing backlogs would prevent immediate compliance with that goal. Therefore, the rule initially would apply only to those cases in which the complaint was filed after June 30, 1973, and before July 1, 1974, and would require compliance within 270 days.<sup>17</sup> In all cases filed after June 30, 1974, the 180-day rule takes effect.<sup>18</sup>

The rule also provides that if a new trial is granted, this trial must commence within 120 days.<sup>19</sup> However, this provision of the rule did not set forth an effective date, nor was it limited explicitly to new trials granted in cases commenced after June 30, 1973. In *Commonwealth v. Woods*,<sup>20</sup> the supreme court held that this provision of the rule applied to any new trial granted after June 8, 1973, the date rule 1100 was adopted. The dates on which both the complaint had been filed and the original trial had been commenced were ruled irrelevant; the date of the order for the new trial controlled the application of rule 1100.<sup>21</sup>

The rule speaks in terms of a written complaint, and the time period in which the defendant must be brought to trial begins to run on the date on which the complaint is filed.<sup>22</sup> Because the vast majority of cases in the criminal justice system are initiated by complaint, calculation of the time period is clear under the express terms of the rule.<sup>23</sup> The superior court in *Commonwealth v. Silver*<sup>24</sup> recognized that more difficult questions arise if the criminal process begins

---

16. PA. R. CRIM. P. 1100(a)(2).

17. *Id.* 1100(a)(1).

18. *Id.* 1100, Comment, which states: "The Rule is to be prospective only." Despite the explicit language of the rule and the comment, the issue of retroactive application was litigated. *E.g.*, *Commonwealth v. Brown*, — Pa. —, 365 A.2d 853 (1976); *Commonwealth v. Woodley*, 232 Pa. Super. Ct. 427, 335 A.2d 526 (1975); *Commonwealth v. Coffey*, 230 Pa. Super. Ct. 49, 331 A.2d 829 (1974); *Commonwealth v. Pearson*, 230 Pa. Super. Ct. 304, 327 A.2d 167 (1974). *Pearson* makes it clear that the new rule is "more a matter of procedural necessity for fairness, rather than a constitutional mandate." 230 Pa. Super. Ct. at 307, 327 A.2d at 168. Thus, if rule 1100 is not applicable, the case must be decided by application of *Barker v. Wingo*, 407 U.S. 514 (1972).

19. PA. R. CRIM. P. 1100(e). This is an extension of the original rule which required that the new trial commence within ninety days. *Id.* 1100 (1968 version).

20. 461 Pa. 255, 336 A.2d 273 (1975).

21. *Id.* at 258, 336 A.2d at 274.

22. PA. R. CRIM. P. 1100(a).

23. One might question whether the rule should commence with some other action, such as arrest or arraignment, particularly if the Commonwealth has difficulty in locating the accused. If, however, the Commonwealth can show that the police exercised due diligence in attempting to arrest the accused after issuance of the complaint, any delay resulting thereby is attributed to the accused. *Id.* 1100(d)(1), Comment, which provides that "the defendant should be deemed unavailable for any period of time during which he could not be apprehended because his whereabouts were unknown and could not be determined by due diligence."

24. 238 Pa. Super. Ct. 221, 357 A.2d 612 (1976).

by any of the possible extraordinary methods.<sup>25</sup> Specifically, the court addressed the question of what action by an investigating grand jury commences the relevant period. The issue in *Silver* was whether the time period begins when an investigating grand jury issues its presentment in open court or when its presentment is submitted to an indicting grand jury.<sup>26</sup> In arguing that the complaint had been filed before the effective date of rule 1100, the Commonwealth claimed that an investigating grand jury presentment is the functional equivalent of a complaint.<sup>27</sup> However, the comment to the rule provides that "[f]or the purpose of this Rule only, it is intended that 'complaint' also includes . . . the presentment of a grand jury, based on the personal knowledge of the jurors or drafted by the attorney for the Commonwealth, *when submitted to subsequent indicting grand jury* . . . ." <sup>28</sup> The superior court held that the presentment of the investigating grand jury does not commence the 180-day period.<sup>29</sup> This conclusion is obviously correct. The period commences only when the individual is accused, not when he is merely a potential defendant.

Although rule 1100 establishes a presumptive time period within which an accused must be brought to trial, section (d) represents a recognition that in certain situations other policies require that the

---

25. The superior court recognized three extraordinary methods for initiating the criminal process:

First, when great haste is required, such as when an accused is about to flee the jurisdiction, the prosecutor may submit a bill of indictment directly to an indicting grand jury without previous binding over or commitment of the accused. . . .

Secondly, criminal proceedings may be instituted by a "presentment" of the indicting grand jury based upon the personal knowledge of the jurors without any bill of indictment having been laid before them. . . .

The third extraordinary mode of commencing a criminal proceeding is that involved in [*Silver*] . . . described . . . as "a prosecutor's submission of an investigating grand jury presentment to an indicting grand jury with leave of court."

*Id.* at 226-27, 357 A.2d at 614-15.

26. *Id.* at 224, 357 A.2d at 613.

27. The court, however, indicated that since the rule does not apply to cases in which a written complaint has not been filed before July 1, 1973, PA. R. CRIM. P. 1100(a)(1), and the presentment of the investigating grand jury was issued on June 29, 1973, the rule would not be applicable even if the presentment were equated with the filing of a complaint. 238 Pa. Super. Ct. at 224 n.5, 357 A.2d at 613 n.5.

28. PA. R. CRIM. P. 1100, Comment (emphasis added). The Comment makes no reference to the effect of commencement of proceedings in juvenile court and subsequent transfer to criminal court. See *Commonwealth v. Greiner*, 236 Pa. Super. Ct. 289, 297, 344 A.2d 915, 919 (1975). Presumably, the Commonwealth can take no action in criminal court against a juvenile until after transfer; therefore, one would argue that the date of transfer should commence the period. On the other hand, the purpose of the rule is to prevent delay at any stage of the proceedings. Certainly the Commonwealth is not justified in delaying proceedings because an accused is a juvenile. See *Commonwealth v. Bell*, — Pa. Super. Ct. —, 369 A.2d 345, 346 (1976).

29. 238 Pa. Super. Ct. at 227-28, 357 A.2d at 615.

time requirement be flexible.<sup>30</sup> The rule is concerned with fostering diligence on the part of the Commonwealth; it is not intended to aid an accused in bringing about his own release through delaying tactics. Therefore, any time period during which the defendant or his attorney is unavailable is not to be included within the 180-day period.<sup>31</sup> Thus, a defendant may request continuances and only that period in excess of thirty days will be excluded from the 180-day period.<sup>32</sup> These provisions have engendered their own questions, such as under what circumstances is the defendant or his counsel deemed to be unavailable, and how should continuances be granted to prevent the time period from running during that part of a continuance which may be attributed to the Commonwealth?

Section (d)(1) of rule 1100 addresses the problem of the unavailability of the defendant or his counsel.<sup>33</sup> The superior court has interpreted this section in several recent decisions.<sup>34</sup> In *Commonwealth v. Reese*,<sup>35</sup> the superior court was required to address two aspects of this issue: whether the defendant is unavailable during the period in which his competence to stand trial is being determined, and whether a delay should be charged against the defendant if the court on its own motion reschedules the trial in the mistaken belief that defense counsel is unavailable and defense counsel does not advise the court otherwise.

In *Reese*, the defendant was not tried until 408 days after the time period for rule 1100 began to run.<sup>36</sup> The lower court had denied the defendant's rule 1100(f) petition to dismiss the charges,<sup>37</sup> and the superior court affirmed because it found that "the unavailability of the defendant or his attorney accounted for the 138 day delay beyond the 270 day period . . . ." <sup>38</sup> Part of this delay resulted because the attending psychiatrist at Western State Penitentiary filed a petition under the Mental Health Act <sup>39</sup> to determine Reese's competency to

---

30. PA. R. CRIM. P. 1100(d).

31. *Id.* 1100(d)(1).

32. *Id.* 1100(d)(2).

33. *Id.* 1100(d)(1).

34. *Commonwealth v. McCafferty*, — Pa. Super. Ct. —, 363 A.2d 1239 (1976); *Commonwealth v. Wade*, 240 Pa. Super. Ct. 454, 360 A.2d 752 (1976); *Commonwealth v. Adams*, 237 Pa. Super. Ct. 452, 352 A.2d 97 (1975); *Commonwealth v. Reese*, 237 Pa. Super. Ct. 326, 352 A.2d 143 (1975); *Commonwealth v. Lewis*, 237 Pa. Super. Ct. 357, 352 A.2d 99 (1975).

35. 237 Pa. Super. Ct. 326, 352 A.2d 143 (1975).

36. *Id.* at 329, 352 A.2d at 145.

37. PA. R. CRIM. P. 1100(f).

38. 237 Pa. Super. Ct. at 329, 352 A.2d at 145.

39. Mental Health and Retardation Act, 1966 Pa. Laws 96, § 408 (repealed 1976, current version at Act No. 143, 1976 Pa. Legis. Serv. 345).

stand trial. The petition was granted, and a sanity commission was appointed on March 5, 1974. On July 2, 1974, the commission determined that Reese was competent to stand trial.<sup>40</sup> The superior court cited extensive authority for the proposition that trial of a legal incompetent violates due process.<sup>41</sup> From that premise, the court concluded that a defendant is unavailable during the period in which his competence to stand trial is being determined.<sup>42</sup>

The comment to rule 1100 provides that "the defendant should be deemed unavailable for any period of time . . . during which the defendant was physically or mentally incompetent to proceed . . . ." <sup>43</sup> The comment, which was not relied upon by the superior court, refers only to the period during which an accused is actually incompetent, not to the period during which experts are determining defendant's competence. Although Reese's counsel joined in the petition for appointment of a sanity commission,<sup>44</sup> it can be argued that the delay should have been treated as the delay from any other pretrial matter and not excluded under section (d)(1).<sup>45</sup> Reese illustrates the potential abuse of charging an accused with such delay. The superior court did not suggest a reasonable time frame for sanity commission proceedings. One suspects that a panel of experts should not require 118 days to determine the sanity of an accused. Rather, it is probable that much of that time was caused by administrative delay, which has been con-

40. 237 Pa. Super. Ct. at 330, 352 A.2d at 145.

41. *Id.* The court relied on: *Pate v. Robinson*, 383 U.S. 375 (1966); *Bishop v. United States*, 350 U.S. 961 (1956); *Commonwealth v. Kennedy*, 451 Pa. 483, 305 A.2d 890 (1973); *Commonwealth v. Smith*, 227 Pa. Super. Ct. 355, 324 A.2d 483 (1974).

42. 237 Pa. Super. Ct. at 329-31, 352 A.2d at 145.

43. PA. R. CRIM. P. 1100, Comment.

44. 237 Pa. Super. Ct. at 330-31, 352 A.2d at 145. In *Commonwealth v. Shelton*, 239 Pa. Super. Ct. 195, 200, 361 A.2d 873, 876, *rev'd*, — Pa. —, 364 A.2d 694 (1976), the superior court commented in dictum that to hold the defendant responsible for the delay caused by pretrial motions would hamper implementation of the rule. An interesting problem would arise if the reviewing court concluded that defense counsel was attempting to use pretrial tactics solely for purposes of delay. Any pretrial motions would, of course, be subject to provisions of rule 304 which states that by merely signing the motion the attorney certifies "that it is not interposed for delay." PA. R. CRIM. P. 304. Arguably, if the court were to grant a hearing on a motion that could conceivably force trial to be delayed beyond the period, the Commonwealth could file a rule 1100(c) petition to extend. See *id.* 1100, Comment.

45. Although this issue has not been addressed specifically by the Pennsylvania Supreme Court, Justices Roberts, Nix, and Manderino would apparently agree with this view. *Commonwealth v. Bunch*, — Pa. —, 351 A.2d 284, 287 (1976) (Roberts, J., dissenting). In a different context, the superior court has held that time taken by normal pretrial litigation is not chargeable against the accused who files pretrial motions. *Commonwealth v. Millhouse*, 239 Pa. Super. Ct. 445, 451 & n.7, 362 A.2d 398, 401 & n.7 (1976), *rev'd*, — Pa. —, 368 A.2d 1273 (1977). The superior court used the term "chargeable" in analyzing problems arising under the rule. That language was specifically disapproved by the supreme court in *Commonwealth v. Shelton* because it was not in conformity with the language of the rule which speaks in terms of exclusion of time. — Pa. —, 364 A.2d 694, 696-97 (1976).



demned by the court in other contexts.<sup>46</sup> Furthermore, *Reese* is inconsistent with the policy of rule 1100 which was intended to prevent inordinate delay at all stages of proceedings.

The superior court also discussed a fifty-one day delay which the lower court had attributed to the unavailability of Reese's counsel.<sup>47</sup> The lower court was aware that defense counsel had another case scheduled at the same time as Reese's trial. The court on its own motion rescheduled Reese's trial for a date after the 270-day period had expired. Counsel filed a petition to dismiss pursuant to rule 1100(f), alleging that he in fact had been available for the originally scheduled trial date, and thus the fifty-one day delay should have been included in computing the time period.<sup>48</sup> The superior court concluded that defendant's petition was precluded by his counsel's failure to inform the court of counsel's availability when the rescheduling occurred.<sup>49</sup> Underlying the court's reasoning is the belief that defense counsel's attempt to manipulate the system should not be rewarded.

The rule does not explicitly provide a remedy for this practice.<sup>50</sup> In *Reese*, the superior court failed to articulate any test for determining which efforts to manipulate the system will be excluded from the time period. Although the court implied that the defendant was estopped from raising his counsel's availability because counsel had acted unfairly, the court did not examine a possible waiver of the right to object based on counsel's agreement to the later trial date.<sup>51</sup> Finally,

---

46. *Commonwealth v. Millhouse*, 239 Pa. Super. Ct. 445, 451-52, 362 A.2d 398, 401 (1976), *rev'd*, — Pa. —, 368 A.2d 1273 (1977) (conflicting judicial orders creating confusion do not relieve the Commonwealth of its duty to file for an extension before the time period expires); *Commonwealth v. Mayfield*, 239 Pa. Super. Ct. 279, 280-81, 362 A.2d 994, 995-96, *rev'd*, — Pa. —, 364 A.2d 1345 (1976) (Commonwealth can be held responsible for delay caused by overcrowded court docket); *Commonwealth v. Shelton*, 239 Pa. Super. Ct. 195, 207, 361 A.2d 873, 877, *aff'd*, — Pa. —, 364 A.2d 694 (1976) (rule 1100 precludes extension of the time period due to judicial delay); *Commonwealth v. Silver*, 238 Pa. Super. Ct. 221, 230-31, 357 A.2d 612, 616-17 (1976) (time period is not tolled by delay occasioned by court's attempt to secure an out-of-county judge); *Commonwealth v. Cutillo*, 235 Pa. Super. Ct. 131, 133-34, 339 A.2d 123, 124 (1975) (computer error does not excuse Commonwealth's failure to file a timely motion for extension).

47. 237 Pa. Super. Ct. at 331, 352 A.2d at 145.

48. *Id.*, 352 A.2d at 146.

49. *Id.*

50. In other contexts, the Pennsylvania Supreme Court has overlooked thinly disguised efforts to manipulate the system for a client's benefit. *E.g.*, *Commonwealth v. Millhouse*, — Pa. —, 368 A.2d 1273 (1977), which held that pretrial motions do not toll the time period but left open the question of whether the time period would be tolled if the motions were consciously employed as a delaying tactic.

51. The superior court held explicitly in *Commonwealth v. Hickson*, 235 Pa. Super. Ct. 496, 499-500, 344 A.2d 617, 618 (1975), that an accused waives the protection of rule 1100 if he agrees to a trial date beyond the time period. *Commonwealth v. Myrick*, — Pa. Super. Ct. —, 360 A.2d 598, 600 (1976).

the court did not address a complex problem raised by the facts in *Reese*. Assuming the lower court acted properly in suggesting on its own motion that counsel would be unavailable, during how many of the fifty-one days was counsel unavailable? The court assumed without analysis that counsel was unavailable for the entire fifty-one days. That assumption is not supported by the express language of the rule or by the comment. Rule 1100(d)(1) states that the delay must result from the unavailability of the defendant or his attorney. It is arguable that if on day one, but only on that day, counsel is unavailable and the case cannot be rescheduled for fifty-one days because of lack of facilities, the defendant's attorney has caused the delay. However, more accurately, his absence caused delay for one day and lack of resources caused delay for fifty days. The latter interpretation is consistent with the policy of the rule.

The superior court also addressed the unavailability of defendant's counsel in *Commonwealth v. Wade*.<sup>52</sup> On October 3, 1973, Wade was charged with receiving stolen property. On October 4, the defendant appeared for a preliminary arraignment. He had not obtained counsel at that time, but told the court that he intended to do so. Despite the criminal procedural rules governing preliminary hearings,<sup>53</sup> the district judge did not set a date for a hearing, but rather requested the defendant to have his attorney contact the court to arrange a date. On November 7, 1973, the judge had not heard from either the defendant or his counsel, and thus contacted defense counsel who requested the judge to set a date for the hearing. The hearing was set for December 6, 1973. Subsequently, Wade filed a rule 1100(f) petition which the lower court rejected, holding that the period from October 3 through November 7 should be excluded due to the unavailability of defense counsel.<sup>54</sup> The superior court reversed because rule 140(f)(1) provides that the court's duty to schedule a preliminary hearing cannot be

---

52. 240 Pa. Super. Ct. 454, 360 A.2d 752 (1976). The court mentioned two other periods to be excluded under the rule. From December 3, 1973, to February 1, 1974, counsel for Wade requested continuances. The superior court upheld the lower court's ruling that 28 days were properly excluded from the period. *Id.* at 456, 360 A.2d at 753. The court did not make explicit either the number of continuances or when each was requested. However, the rule contemplates a 30-day period upon request of each continuance. A difficult problem thus arises if counsel requests a continuance and if at the next court appearance again requests a continuance. If the total time consumed for both continuances is 70 days, are 40 days or only 10 days to be excluded? On its face, the rule seems to allow the accused to deduct 60 days. As a matter of policy to prevent undue manipulation of an already hard pressed system, it would be sound to charge appellant with 40 days.

The second time period charged against Wade was a 10-day period during which he was on trial for homicide. The Comment makes clear that such time is to be considered as a period of unavailability, thereby extending the period.

53. PA. R. CRIM. P. 140.

54. 240 Pa. Super. Ct. at 457, 360 A.2d at 753.

shifted to the defendant<sup>55</sup> and because counsel's unavailability did not cause the delay.<sup>56</sup>

In *Commonwealth v. Millhouse*,<sup>57</sup> the supreme court held that failure by a financially able defendant to retain counsel was delay attributable to the defendant. The Commonwealth argued that it was entitled to an automatic extension because Millhouse did not retain counsel until approximately three and one-half months after arraignment. The superior court had summarily rejected the Commonwealth's argument.<sup>58</sup> Since the cases of Millhouse's codefendants were assigned for trial on the same date, the superior court did not believe that Millhouse's delay in retaining counsel was a factor in delaying his trial.<sup>59</sup> However, the supreme court was unwilling to assume that in the absence of his delay, Millhouse would necessarily have been tried on the same date as his codefendants and not earlier.<sup>60</sup>

The second area of flexibility in computing the time period during which a defendant must be brought to trial involves requests for continuances, governed by section (d)(2).<sup>61</sup> The rule excludes only the delay in excess of thirty days that results from the continuance. Thus, the explicit language of the rule would permit counsel to ask for nu-

55. Rule 140(f)(1) provides:

When a preliminary hearing is not waived, the issuing authority shall: (1) fix a day and hour for a preliminary hearing which shall not be less than three nor more than ten days after preliminary arraignment unless extended for cause shown, unless the issuing authority fixes an earlier date upon request of the defendant or his attorney with the consent of the complainant and the attorney for the Commonwealth.

PA. R. CRIM. P. 140(f)(1).

56. 240 Pa. Super. Ct. at 458, 360 A.2d at 754. The superior court reached the same result in *Commonwealth v. Adams*, 237 Pa. Super. Ct. 452, 456, 352 A.2d 97, 99 (1975), holding that defense counsel has no duty to arrange for a preliminary hearing. The court in *Adams* also rejected the lower court's view that the time period during which an attorney fails to consult with his client is chargeable against the defendant due to unavailability. *Id.* at 457, 352 A.2d at 99. The superior court stated that rule 1100(d)(1) applies only when the Commonwealth can show that it was unable to call the case to trial because either the defendant or counsel was unavailable and not when it is shown only that there was no communication between counsel and defendant for a period of time. *Id.* at 456-57, 352 A.2d at 99.

57. — Pa. —, 368 A.2d 1273 (1977).

58. 239 Pa. Super. Ct. 445, 362 A.2d 398 (1976).

59. *Id.* at 452, 362 A.2d at 401. If in fact Millhouse had caused delay in the case against his codefendant, the Commonwealth had a procedural remedy. For example, assume that A and B are codefendants. During the proceedings, A engages in delaying tactics—he removes himself from the jurisdiction and must be extradited; he refuses to retain counsel. B also is unavailable for some of the same time while she is on trial in another county. *Millhouse* requires a showing that the unavailability caused some delay. A may attempt to argue that: "It was not I who caused the entire delay; B was on trial while I was being extradited." B will similarly argue that: "Even if I had been here, you could not have proceeded because A was in jail elsewhere." The Commonwealth has recourse to rule 1100(c) which permits it to place responsibility for delay on the actions of A and B, not on the Commonwealth. *Commonwealth v. Brown*, — Pa. Super. Ct. —, 364 A.2d 330 (1976); *Commonwealth v. Hagans*, — Pa. Super. Ct. —, 364 A.2d 328 (1976).

60. — Pa. at —, 368 A.2d at 1276 n.5.

merous short continuances without extending the period. A closely divided superior court has affirmed that reading of the rule in *Commonwealth v. Shields*.<sup>62</sup> The majority noted that the language of the rule precludes exclusion of a delay which results from a continuance of less than thirty days.<sup>63</sup> The court relied upon three points in addition to the language of the rule. First, it is fair to exclude time when an accused is unavailable, for to hold otherwise would invite abuse of the system. An accused could merely make himself unavailable without tolling the period. However, a court can prevent manipulation of the system by exercising its discretion in the granting of continuances. Second, if an accused makes the request less than thirty days from the end of the period, thereby creating a risk that the case cannot be tried until after the period has run, the court can condition the grant of the continuance on a waiver of the immediate rule 1100 claim. Third, even though the first thirty days of any continuance cannot be excluded, the Commonwealth can petition the court for an extension pursuant to rule 1100(c). In arguing that it has exercised due diligence, the Commonwealth may point to the continuance or continuances as one of the reasons for its inability to bring the accused to trial within the period.<sup>64</sup> Each of these points may be further illustrated within the factual context of *Commonwealth v. Coleman*,<sup>65</sup> a superior court case which arose prior to *Shields*.

In *Coleman*, the case was originally listed for trial on January 27, 1975. A continuance for an unspecified time was granted upon defense counsel's request.<sup>66</sup> Had the court and defense counsel at that time agreed upon a specific trial date beyond the time period, defendant would have waived the protection of rule 1100.<sup>67</sup> In fact, no trial date was set; subsequently, the court administrator listed the case for trial eighty-five days after the case had been continued. The lower court took judicial notice of the scheduling of criminal cases by the court administrator.<sup>68</sup> As a result of this scheduling, trial did not begin until April 22, 1975, approximately thirty days after the 180-day

61. PA. R. CRIM. P. 1100(d) (2).

62. No. 153, slip op. (Pa. Super. Ct. March 31, 1977).

63. *Id.* See *Commonwealth v. Lewis*, 237 Pa. Super. Ct. 357, 360, 352 A.2d 99, 101 (1975).

64. No. 153, slip op. at 4.

65. 241 Pa. Super. Ct. 450, 361 A.2d 870 (1976), *allocatur granted*, Crim. No. 240 (Pa. 1977 Term).

66. *Id.* at 451, 361 A.2d at 871.

67. *Commonwealth v. Hickson*, 235 Pa. Super. Ct. 496, 344 A.2d 617 (1975).

68. 241 Pa. Super. Ct. at 451-52, 361 A.2d at 871. At the time *Coleman* was litigated, Montgomery County did not schedule continuous criminal sessions. Subsequently, this policy was changed. Brief for Montgomery County Public Defender Association as Amicus Curiae at 18, *Commonwealth v. Mayfield*, — Pa. —, 364 A.2d 1345 (1976).

period had expired. In rejecting defendant's petition to dismiss, the lower court held that "the entire delay was 'inevitably caused' by the continuance requested by [defendant]." <sup>69</sup> The superior court reversed because the delay was not caused by the defendant's request for a continuance, but rather by Montgomery County's schedule of criminal sessions which excluded a session during March 1975.<sup>70</sup> The court noted that the burden was on "those entrusted with the responsibility of managing court calendars" <sup>71</sup> to bring the accused to trial. Further, the court cited its decision in *Commonwealth v. Shelton* <sup>72</sup> for the proposition that the purpose of rule 1100 was to require the courts as well as the prosecutors to decrease the case backlog.<sup>73</sup>

The court did not deal with the question of whether a contrary result would be reached if Montgomery County scheduled continuous sessions. For example, assume that on the 150th day of the 180-day period, an accused charged in a county with continuous criminal sessions requests a continuance for purposes of finding a material witness. The court does not specify a new trial date, but remits the case to the court administrator. The court administrator lists the case for the next available date, eighty-five days later, which results in the accused being tried after the period has expired. Clearly, the continuance was granted at the defendant's request and at least some of the delay resulted from that request. At the same time, lack of resources or inefficient use of resources also accounted for some of the delay. The rule does not suggest an easy answer to the problem. Obviously, if the accused requests a continuance for a specified number of days <sup>74</sup> or agrees to a specific date for relisting the case,<sup>75</sup> the court must exclude any delay in excess of thirty days from the period. Absent either of

---

69. 241 Pa. Super. Ct. 452, 361 A.2d at 871.

70. *Id.* at 454, 361 A.2d at 872.

71. *Id.* (emphasis in original) (quoting *Commonwealth v. Hamilton*, 449 Pa. 297, 308, 297 A.2d 127, 133 (1972), as quoted in *Commonwealth v. Silver*, 238 Pa. Super. Ct. 221, 231, 357 A.2d 612, 617 (1976)).

72. 239 Pa. Super. Ct. 195, 207-08, 361 A.2d 873, 879, *rev'd*, — Pa. —, 364 A.2d 694 (1976).

73. 241 Pa. Super. Ct. at 454, 361 A.2d at 872. The supreme court apparently envisioned that its decision in *Hamilton*, and the rule promulgated pursuant thereto, would result in a dedication of increased resources to the criminal justice system. The existing resources simply did not meet the overwhelming demands imposed on the system as evidenced by the backlog. That is, the court anticipated that the rule would change the practice, not that the rule would be interpreted to fit existing practice. If the suggested analysis is correct, the superior court's conclusion that Montgomery County must change its schedule to provide more sessions for criminal trials if the rule is not to be emasculated is unassailable. 241 Pa. Super. Ct. at 454, 361 A.2d at 872. *But see Commonwealth v. Shelton*, — Pa. —, 364 A.2d 694 (1976).

74. This is one situation contemplated by rule 1100(d)(2). *See Commonwealth v. Coleman*, 241 Pa. Super. Ct. 454 n.1, 361 A.2d 870, 873 n.1 (1976), *allocatur granted*, Crim. No. 240 (Pa. 1977 Term).

75. *Commonwealth v. Hickson*, 235 Pa. Super. Ct. 496, 499-500, 344 A.2d 617, 618 (1975).

these situations, a court might attempt to allocate part of the time to each party,<sup>76</sup> because both the court system and the accused caused the delay. This case-by-case calculation would be contrary to the policy articulated in *Commonwealth v. Hamilton*.<sup>77</sup> If the entire period of the continuance is excluded, there is a lack of incentive to comply with the rule once the thirtieth day has passed. However, if the period is not extended at all, defense attorneys, recognizing the limited resources of the courts, have incentive to ask repeatedly for continuances with the hope that the case cannot be rescheduled. Part of the answer is that courts must grant continuances sparingly.<sup>78</sup> Nonetheless, if counsel falsely represents his need for a continuance, such a policy becomes difficult to effectuate. In addition, if a court erroneously denies a bona fide request for a continuance, it may be reversible error.<sup>79</sup> Finally, the Commonwealth should petition the court for an extension under rule 1100(c), relying upon its effort to schedule the trial prior to the end of the period and the defendant's role in delaying trial.<sup>80</sup> Certainly this should amount to a showing of due diligence.

Rule 1100(d) suggests at least one other problem. If counsel requests a continuance because he or his client will be unavailable, should the court count the resulting delay as a continuance subject to the thirty-day exemption, or as a period of unavailability, in performing its rule 1100 mathematics?<sup>81</sup> Under some circumstances, a court may be hard-pressed to distinguish a continuance from a delay caused by unavailability. The comment to rule 1100, however, suggests that the following situations constitute unavailability:

---

76. Such allocations, however, would impose on the courts the complicated task of determining which portion of the elapsed time is attributable to each party. This raises the question of whether the defendant or the Commonwealth should be favored in the allocation of time. When confronted with this situation, the court in *Coleman* did not imply that any of the 85 days could be charged to the defendant. 241 Pa. Super. Ct. at 454, 361 A.2d at 872. Of course, the court would have had to conclude that *Coleman* required a continuance in excess of 30 days to compute any time against the defendant.

77. 449 Pa. at 306-08, 297 A.2d at 131-32.

78. See, e.g., Philadelphia rules governing continuances and conflicts in an attorney's schedule. PHILA. CT. R. 800-810; *Commonwealth v. Shields*, No. 153, slip op. (Pa. Super. Ct. March 31, 1977).

79. E.g., *Ungar v. Sarafite*, 376 U.S. 575, 588-91 (1964) (grant of a continuance is traditionally within the discretion of the trial judge, but the circumstances of the case and the reasons presented at the time of the request are to be examined to determine if a denial violated due process); *Commonwealth v. Ross*, 350 A.2d 836, 841 (Pa. 1976) (refusal to grant a continuance infringed appellant's right to counsel of his own choice and, consequently, infringed all rights guaranteed by jury trial since counsel would have had to go to trial unprepared).

80. *Commonwealth v. Brown*, — Pa. Super. Ct. —, 364 A.2d 330, 332-33 (1976) (dictum).

81. At times courts have had difficulty discerning whether they are dealing with a continuance or an instance of unavailability. E.g., *Commonwealth v. Millhouse*, — Pa. —, 368 A.2d 1273, 1277 (1977) (Manderino, J., concurring); *Commonwealth v. Bean*, — Pa. Super. Ct. —, 368 A.2d 765, 768 (1976) (Hoffman, J., dissenting).

[T]he defendant should be deemed unavailable for any period of time during which he could not be apprehended because his whereabouts were unknown and could not be determined by due diligence; or during which he contested extradition, or a responding jurisdiction delayed or refused to grant extradition; or during which the defendant was physically or mentally incompetent to proceed; or during which the defendant was absent under compulsory process requiring his appearance elsewhere in connection with other judicial proceedings.<sup>82</sup>

The common thread in these examples is that the court does not have jurisdiction to proceed<sup>83</sup> or cannot proceed without violating due process.<sup>84</sup> Consistent with this reading of the rule, an attorney would be unavailable if he were ill or required by the rules of court to be in another court in which he would be subject to sanctions for failure to appear.<sup>85</sup> Thus, regardless of the denomination of the extension as a continuance, such cases are clearly distinguishable. A continuance would be any delay requested by the defendant or his attorney for preparation or personal reasons. A court could reasonably deny a request for a continuance,<sup>86</sup> and thereby prevent abuse of the system by counsel, but could not deny a request based on a bona fide claim of unavailability. This distinction becomes important when a court must calculate the relevant period. For example, if trial were to begin on the 215th day, and during the 180-day period the case had been delayed for thirty-five days, a court would reach a different result depending on whether the delay was due to unavailability or whether the case had been continued. The Commonwealth could bring the accused to trial only if the defendant or his attorney had been unavailable for those thirty-five days.

Once the time period in which the trial must be commenced has expired, rule 1100(f) states that "the defendant or his attorney may apply to the court for an order dismissing the charges with prejudice."<sup>87</sup> The motion is properly raised before trial.<sup>88</sup> The superior

82. PA. R. CRIM. P. 1100, Comment. See *Commonwealth v. Bean*, — Pa. Super. Ct. —, 368 A.2d 765, 768 (1976) (Hoffman, J., dissenting).

83. See *Commonwealth v. Reese*, 234 Pa. Super. Ct. 326, 252 A.2d 143 (1975).

84. *Commonwealth v. McQuaid*, 464 Pa. 499, 347 A.2d 465 (1975) (delay of trial caused by defendant's incompetence to stand trial is necessary for protection of a defendant's right to a fair trial, but may create a valid speedy trial claim upon a sufficient showing of delay and prejudice). See *Pate v. Robinson*, 383 U.S. 375 (1966); *Commonwealth v. Kennedy*, 451 Pa. 483, 305 A.2d 890 (1973). See generally Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525 (1975).

85. See PHILA. CT. R. 800.

86. *Id.*

87. PA. R. CRIM. P. 1100(f).

88. *Id.*

court has held that an appeal from the denial of a rule 1100(f) motion is interlocutory and that there are no special and exceptional circumstances which justify review before trial and conviction.<sup>89</sup> Although an accused must raise a rule 1100(f) claim before trial, the issue has been raised post-trial in the absence of a pretrial petition under the rubric of ineffective assistance of counsel. As analyzed by the superior court in *Commonwealth v. Dever*,<sup>90</sup> the test to be applied to counsel's failure to raise a timely rule 1100(f) motion is whether counsel's action had any reasonable basis.<sup>91</sup> In most cases, it is difficult to imagine a reasonable basis for an attorney's failure to file a meritorious motion that could lead to the unconditional discharge of his client.<sup>92</sup> However, if counsel has failed to file a rule 1100(f) motion, the appellate court may have difficulty determining whether or not counsel's action had any reasonable basis since the lower court would not have held a hearing. In addition, lack of a hearing prevents the Commonwealth from coming forward with evidence that the period was automatically extended by operation of section (d). The supreme court has resolved this issue by remanding the case for an evidentiary hearing.<sup>93</sup>

The supreme court in *Commonwealth v. Bunch*<sup>94</sup> decided a related issue involving the ineffectiveness of counsel and denied relief to the defendant. The defendant had been granted a new trial on November 26, 1973; therefore, under the version of section (e) in effect at that time, the Commonwealth had ninety days in which to bring a new

89. *Commonwealth v. Bennett*, 236 Pa. Super. Ct. 509, 514-15, 345 A.2d 754, 757 (1975). See *Commonwealth v. Bunter*, 445 Pa. 413, 418-19, 282 A.2d 705, 707 (1971). This, of course, does not prevent certification by the trial court that the case involves a controlling question of law about which there is considerable controversy and appellate court acceptance of jurisdiction. PA. STAT. ANN. tit. 17, § 211.501 (Purdon Supp. 1975). E.g., *Commonwealth v. Shelton*, — Pa. —, 364 A.2d 694, 696 (1976).

90. — Pa. Super. Ct. —, 364 A.2d 463 (1976).

91. *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, 604, 235 A.2d 349, 352 (1967) (inquiry into a claim of ineffective assistance of counsel ceases once the court is able to conclude that the particular course of action chosen by counsel had some reasonable basis to effectuate his client's interests).

92. Under some circumstances, it may be more important for an accused to seek exoneration at trial than for him to be granted dismissal on procedural grounds. In *Commonwealth v. Thorpe*, the Commonwealth suggested that the accused might seek exoneration if he were faced with revocation of probation or parole unless acquitted. In such an instance, failure to pursue dismissal would have some rational basis. Brief for the Commonwealth at 6, *Commonwealth v. Thorpe*, — Pa. Super. Ct. —, 359 A.2d 910 (1976).

93. *Commonwealth v. Twiggs*, 460 Pa. 105, 331 A.2d 440 (1975). In *Twiggs*, the issue was whether appellant had received ineffective assistance of counsel when his trial attorney had neglected to secure the appearance of a witness. The supreme court remanded the case for an evidentiary hearing to determine whether defense counsel had concluded that such action would not have advanced the interests of his client, or was the result of a lack of awareness of all the possible alternatives. *Id.* at 111, 331 A.2d at 443.

94. — Pa. —, 351 A.2d 284 (1976).



trial.<sup>95</sup> In this second trial, the defendant did not appear before the court until fifty-five days after the ninety day period had expired, at which time he pleaded guilty.<sup>96</sup> On appeal, he contended that his trial counsel had been ineffective for failing to file a motion to dismiss the charges under rule 1100(f).<sup>97</sup> The court stated, quite accurately, that the naked fact of listing the trial beyond the time limit did not establish a violation of the rule, and therefore, that failure to petition for dismissal "is not an automatic indication of ineffectiveness of defense counsel."<sup>98</sup> The court did not reach the issue of whether defense counsel had been ineffective,<sup>99</sup> nor did it remand for a hearing. Rather, the court reaffirmed that the only grounds for appealing a guilty plea are the voluntariness of the plea and the legality of the sentence.<sup>100</sup> The defendant did not contend that his guilty plea was involuntary as a result of counsel's failure to pursue the rule 1100 claim.<sup>101</sup>

*Commonwealth v. Sprankle*<sup>102</sup> represents another exception to the requirement that a petition to dismiss must be filed before trial. In *Sprankle*, the Commonwealth had filed a petition for extension pursuant to rule 1100(c) before the expiration of the 180-day period. The lower court granted the extension citing a full docket of jury trials predating defendant's trial.<sup>103</sup> Appellant never filed a rule

---

95. *Id.* at —, 351 A.2d at 286 n.2.

96. *Id.* at —, 351 A.2d at 286 n.3.

97. *Id.* at —, 351 A.2d at 285.

98. *Id.* at —, 351 A.2d at 286. Justice Roberts in his dissent found it inconceivable that "defense counsel could claim to be serving the best interests of his client while failing to pursue a course of action which would completely free his client." *Id.* at —, 351 A.2d at 287. According to Justice Roberts, any violation of rule 1100 and failure of counsel to petition for dismissal clearly indicates the ineffective assistance of counsel. *Id.* The dissent viewed the facts leading to the delay differently than the majority. The majority indicated that the delay was caused by the unavailability of counsel and the necessity of a psychiatric examination to determine competency to stand trial. *Id.* at —, 351 A.2d at 286 n.3. See *Commonwealth v. Reese*, 237 Pa. Super. Ct. 326, 352 A.2d 143 (1975), discussed at pp. 518-20 *supra*. The dissent did not suggest that delays caused by the unavailability of counsel are not chargeable against the defendant. — Pa. at —, 351 A.2d at 287. However, Justice Roberts disagreed that the defendant in any way contributed to the delay. Although a court-ordered psychiatric examination accounted for 21 days of the delay, there was nothing in the record to explain a further delay of 59 days. *Id.* One reason the record did not clearly indicate the reasons for the delay was the absence of a hearing, a result of trial counsel's failure to file a rule 1100(f) petition.

99. *Id.* at —, 351 A.2d at 286-87 n.6.

100. *Id.* at —, 351 A.2d at 286. It is questionable whether Bunch has an appropriate forum to raise his claim that his plea was not voluntary because counsel was ineffective. See Post Conviction Hearing Act, PA. STAT. ANN. tit. 19, §§ 1180-1—1180-14 (Purdon 1976). In *Bunch*, Justice Roberts emphasized that defendant would have been discharged, precluding the necessity for a plea, if he had received effective assistance of counsel. Thus, if an appellant is not informed that he could be free on the basis of rule 1100, his plea is not knowing, intelligent, and voluntary. — Pa. at —, 351 A.2d at 287.

101. *Id.* at —, 351 A.2d at 286.

102. 241 Pa. Super. Ct. 298, 361 A.2d 385 (1976).

103. *Id.* at 300, 361 A.2d at 386.

1100(f) motion, but raised the issue in post-verdict motions. The superior court stated that the rule had been violated and that the failure to file the motion did not constitute a waiver under these circumstances. The court concluded that a contrary view would require a defendant to file a petition raising issues identical to those already resolved against him as soon as the court had ruled on the Commonwealth's petition.<sup>104</sup>

*Sprankle* turns on the unstated assumption that grounds raised as a basis for an extension under rule 1100(c) will be the same that permit an exclusion of time under rule 1100(d).<sup>105</sup> During a rule 1100(c) hearing, the Commonwealth must prove that it has exercised due diligence in attempting to bring the accused to trial. In *Sprankle*, the superior court relied upon its earlier holding in *Commonwealth v. Shelton*<sup>106</sup> that a request for an extension based on unavailable court resources can never amount to due diligence. However, the supreme court subsequently held that in some circumstances the Commonwealth may assert a lack of court facilities as a basis for an extension if it has otherwise acted with due diligence.<sup>107</sup> Nevertheless, the inquiry does vary depending upon whether the Commonwealth petitions for an extension under rule 1100(c) or the defendant petitions for dismissal under rule 1100(f). An extension under rule 1100(c) requires the court to focus on the Commonwealth's actions which must amount to due diligence. Under rule 1100(f), once the court concludes that the period has expired and no extension was granted, the only inquiry is whether the defendant caused the delay, thereby extending the period under rule 1100(d). For example, in *Commonwealth v. Brown*,<sup>108</sup> the codefendant caused considerable delay. The superior court concluded that the delay did not result from defendant's action and could not extend the trial period under rule 1100(d). The court noted, however, that because the delay was not caused by the Commonwealth or the court system, a short extension could have been granted under rule 1100(c).<sup>109</sup>

---

104. *Id.* at 300 n.1, 361 A.2d at 386 n.1.

105. See *Commonwealth v. Shelton*, 239 Pa. Super. Ct. 195, 202-05, 361 A.2d 873, 877-78, *rev'd*, — Pa. —, 364 A.2d 694 (1976).

106. — Pa. at —, 361 A.2d at 386 (citing *Commonwealth v. Shelton*, 239 Pa. Super. Ct. 195, 361 A.2d 873 (1976)).

107. *Commonwealth v. Shelton*, — Pa. —, 364 A.2d 694, 697-98 (1976). For an analysis of the supreme court's ruling in *Shelton*, see pp. 535-38 *infra*.

108. — Pa. Super. Ct. —, 364 A.2d 330 (1976).

109. *Id.* at —, 364 A.2d at 332-33. See *Commonwealth v. Hagans*, — Pa. Super. Ct. —, 364 A.2d 328 (1976). Cf. *Commonwealth v. Burton*, No. 1711, slip op. (Pa. Super. Ct. Mar. 31, 1977) (failure to object to exclusion of 41 days under rule 1100(d) caused by stay in proceedings requested by defendant constitutes a waiver and makes Commonwealth's rule 1100(c) petition timely).

Once it is realized that the inquiry varies depending upon whether a rule 1100(c) or (f) motion is before the court, the requirement that a claimed violation of the rule be raised by pretrial motion is a meaningful one. As in *Sprinkle*, the only record before the appellate court may involve the question of whether the Commonwealth exercised due diligence. The lower court's decision may be erroneous. However, if the defendant has never filed a motion to dismiss, the Commonwealth may have failed to build a complete record. For example, the basis of the Commonwealth's rule 1100(c) petition might be that the Commonwealth had not subpoenaed the proper witnesses for trial due to a computer failure.<sup>110</sup> Assume that the lower court grants the extension and the defendant is tried 190 days after the filing of the complaint; the defendant never files a rule 1100(f) petition, but instead first raises the claim in post-trial motions. An appellate court might conclude that the Commonwealth simply did not exercise due diligence. That should not necessarily end the inquiry. Had a rule 1100(f) motion been filed, the Commonwealth might have placed evidence in the record that the defendant was in another state and that he contested extradition for thirty days, thereby extending the period by operation of rule 1100(d) and making trial timely.<sup>111</sup>

### JUDICIAL DELAY

The most hotly contested issue under rule 1100 has been whether "Commonwealth" as used in the rule refers only to district attorneys or whether it also refers to courts and court administrators. The distinction becomes crucial when a court must decide whether judicial delay precludes a finding of due diligence on the part of the Commonwealth for purposes of computing the relevant time period.<sup>112</sup> The Pennsylvania Supreme Court granted allocatur in two cases raising this issue.<sup>113</sup> The Commonwealth, the appellant in both of these cases,

---

110. *But see* Commonwealth v. Cutillo, 235 Pa. Super. Ct. 131, 339 A.2d 123 (1975) (computer error does not excuse Commonwealth from timely filing for an extension of the period).

111. *But see* Commonwealth v. McCafferty, — Pa. Super. Ct. —, 363 A.2d 1239, 1241 (1976) (Commonwealth's duty under rule 1100 to bring defendant to trial is not affected by the fact of his incarceration in a federal penitentiary in Wisconsin).

112. Judicial delay has been defined by the Pennsylvania Supreme Court as "delay in the commencement of trial caused by the judiciary." Commonwealth v. Shelton, — Pa. —, 364 A.2d 694, 696 n.5 (1976).

113. Commonwealth v. Mayfield, — Pa. —, 364 A.2d 1345 (1976); Commonwealth v. Shelton, — Pa. —, 364 A.2d 694 (1976). Commonwealth v. Millhouse, — Pa. —, 368 A.2d 1276 (1977), a third case ostensibly raising the same issue and arising from the same factual situation as *Shelton*, was decided instead under rule 1100(d). Thus, the court did not reach the issue, decided in *Mayfield* and discussed in extensive dictum in *Shelton*, of whether judicial delay justified extension of the period under rule 1100(c). For a discussion of the supreme court's decision in *Millhouse*, see p. 522 *supra*.

sought reversal of the superior court's dismissal orders arguing that judicial delay is not chargeable against the Commonwealth as a matter of construction of the rule and that as a matter of public policy, rule 1100 is too stringent and must be rewritten to prevent windfall dismissals of the guilty.<sup>114</sup>

In *Commonwealth v. Shelton*,<sup>115</sup> the Philadelphia Special Investigating Grand Jury had issued a presentment on December 20, 1973, recommending that defendant be indicted on charges of extortion, larceny, bribery, perjury, and related offenses arising out of alleged dealings in smuggled cigarettes. Shelton was indicted on January 3, 1974, as recommended by the grand jury.<sup>116</sup> After the indictment was handed down, defendant sought discovery at three pretrial conferences, resulting in an order by the lower court which directed the Commonwealth to produce certain documents.<sup>117</sup> Thereafter, on April 17, 1974, the lower court became aware of a potentially conflicting order entered by the court supervising the investigating grand jury which called for an impoundment of the grand jury records.<sup>118</sup> The conflicting discovery orders were finally resolved on July 3, 1974, which was still well within the rule 1100 time limit. On July 31, 1974, appellant filed pretrial motions which were answered by the Commonwealth on September 20, 1974. Despite the fact that the 270th day was approaching, the Commonwealth did not request an extension.<sup>119</sup> On October 9, 1974, defendant made an oral application for dismissal under rule 1100(f); on October 21, he filed a written application to dismiss.<sup>120</sup> In its answer to defendant's petition, the Commonwealth for the first time sought an extension pursuant to rule 1100(c).<sup>121</sup> Although defendant's application to dismiss was denied, the judge certified an appeal to the superior court from his interlocutory order.<sup>122</sup> The superior court had little difficulty in disposing of the case on its merits. It held that the lower court had erred in granting the Commonwealth's

---

114. Brief for Commonwealth, *Millhouse*, at 21-22.

115. 239 Pa. Super. Ct. 195, 361 A.2d 873, *aff'd*, — Pa. —, 364 A.2d 694 (1976).

116. *Id.* at 198, 361 A.2d at 874.

117. Brief for Appellant at 5-6, *Commonwealth v. Shelton*, — Pa. —, 364 A.2d 694 (1976).

118. 239 Pa. Super. Ct. at 198, 361 A.2d at 875.

119. It should be noted that the lower court had warned the Commonwealth that a petition to extend might be necessary. *Id.* at 200 n.6, 361 A.2d at 875 n.6.

120. *Id.* at 199, 361 A.2d at 875.

121. *Id.*

122. *Id.* at 197 n.1, 361 A.2d at 874 n.1. See *Commonwealth v. Bennett*, 236 Pa. Super. Ct. 509, 345 A.2d 754 (1975); PA. STAT. ANN. tit. 17, § 211.501 (Purdon Supp. 1975).

petition for an extension of time since the application was not made until the 270-day period of rule 1100 had expired.<sup>123</sup>

What makes *Shelton* an important case is the dictum<sup>124</sup> by which the superior court, after deciding the case on the merits, attempted to clarify its interpretation of rule 1100. Approximately one-half of the text of the court's decision in *Shelton* is devoted to the argument that even if a petition had been timely filed, the Commonwealth would not have been entitled to an extension based on a claim of judicial delay.<sup>125</sup> The court's position may be summarized as follows: the right to a speedy trial is "one of our 'most basic rights,'" <sup>126</sup> *Barker v. Wingo*<sup>127</sup> announced a minimum constitutional guarantee and did not preclude fixed time periods; *Commonwealth v. Hamilton*<sup>128</sup> established the policy that a clear rule based on a fixed time period avoids the inherent vagueness of a balancing test and evidences the Pennsylvania Supreme Court's view "[t]hat a mandatory time requirement will act as a stimulant to those entrusted with the responsibility of managing court calendars." <sup>129</sup> Rule 1100 was promulgated to effectuate this policy and to eliminate the large backlog of cases which eroded the consti-

---

123. 239 Pa. Super. Ct. at 202, 361 A.2d at 877. On April 22, 1975, one year prior to *Shelton*, the superior court unanimously decided *Commonwealth v. Cutillo*, 235 Pa. Super. Ct. 131, 339 A.2d 123 (1975). The Commonwealth contended that judicial delay caused by a mistaken computer listing of the status of the case was responsible for failure to call the case within the time period. *Id.* at 134, 339 A.2d at 124. The Commonwealth admitted that its petition to extend under rule 1100(c) was filed after the period had run. The court stated that if the due diligence standard is required for an extension of time when a petition is timely filed, at least that standard must be met when the petition is late. *Id.* at 136, 339 A.2d at 125. On the same day that the superior court decided *Cutillo*, the supreme court held in *Commonwealth v. Woods*, 461 Pa. 255, 257-58, 336 A.2d 273, 274 (1975), that the Commonwealth's petition for an extension, filed simultaneously with the defendant's petition to dismiss under rule 1100(f), was not filed within the time period prescribed by the rule. In light of *Cutillo* and *Woods*, the superior court's decision in *Shelton* is hardly startling.

124. The Commonwealth has argued that the superior court's dictum in *Shelton* is significant because those who are called upon to administer court rulings do not distinguish between dicta and holdings. Indeed, the Commonwealth stated that numerous cases had been dismissed in Philadelphia because of the *Shelton* dictum. Brief for Commonwealth, *Millhouse*, at 17.

125. 239 Pa. Super. Ct. at 203, 361 A.2d at 877. The Commonwealth's position before the superior court in *Shelton* was interesting. It argued that defendant rather than the judiciary had caused the delay. *Id.* at 200, 361 A.2d at 876. Given its failure to file a petition to extend under rule 1100(c), the Commonwealth had little choice. Due diligence is irrelevant once the period has run. Unfortunately, the Commonwealth had admitted in its pleadings in the lower court that none of the delay had been caused by the defendant and thus was precluded from successfully arguing this point. *Id.* See *Commonwealth v. Eller*, 232 Pa. Super. Ct. 99, 102-03, 332 A.2d 507, 509 (1974), where the Commonwealth impliedly admitted that the defendant only caused a 30-day delay.

126. 239 Pa. Super. Ct. at 203, 361 A.2d at 877 (citing *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967)).

127. 407 U.S. 514 (1972).

128. 449 Pa. 297, 297 A.2d 127 (1972).

129. 239 Pa. Super. Ct. at 204, 361 A.2d at 878 (citing *Commonwealth v. Hamilton*, 449 Pa. 297, 308, 297 A.2d 127, 132 (1972)).

tutional guarantee. Therefore, the court stated that rule 1100 requires that the prosecution, not the defense, be held responsible for judicially caused delays.<sup>130</sup>

Implicit in *Shelton* was the superior court's rejection of the view that judicial delay could extend the period in which to try a defendant. Rather, the superior court found that such delay precluded a finding that the Commonwealth had acted with due diligence. However, the case did not arise in that posture; thus, the implication that such delay would not extend the period was merely dictum. In *Commonwealth v. Mayfield*,<sup>131</sup> the superior court squarely faced this issue. In *Mayfield*, the Commonwealth filed a timely petition to extend based upon its claim that although it had acted with due diligence, an overcrowded court docket prevented it from bringing the defendant to trial within the required time period.<sup>132</sup> A criminal complaint had been filed against Mayfield on November 29, 1974. Having waived a preliminary hearing, the defendant was indicted on February 20, 1975. On May 8, 1975, he was advised that the trial would begin on June 6, 1975. Because May 27 was the last day a trial could begin under rule 1100, the Commonwealth filed for an extension on May 16. The defendant filed for dismissal of charges with prejudice on May 27. At the hearing, the lower court denied the defendant's application and granted the Commonwealth's petition. At the subsequent trial, the defendant was convicted.<sup>133</sup> Although the analysis in *Shelton* was technically dictum, the superior court in *Mayfield* quoted its "holding" in *Shelton* that "Rule 1100 . . . precludes an *extension* of the prescribed time period predicated upon judicial delay." <sup>134</sup>

The difficult question implicit in *Shelton* and *Mayfield* is that of the meaning of the term "Commonwealth" in rule 1100(c). In neither of these opinions does the superior court offer a close textual reading of rule 1100(c). In *Shelton*, the court relied on language in *Hamilton's* statement of policy that a rule should be designed to eliminate court backlog,<sup>135</sup> concluding that the best way to effectuate that policy was to reject the position that the term "Commonwealth" included only the various district attorneys and accept the position that

---

130. *Id.* at 208, 361 A.2d at 880.

131. 239 Pa. Super. Ct. 279, 362 A.2d 994, *rev'd*, — Pa. —, 364 A.2d 1345 (1976).

132. *Id.* at 280, 362 A.2d at 995-96.

133. *Id.* at 281-82, 362 A.2d at 996 (Jacobs, J., dissenting).

134. *Id.* at 280-81, 362 A.2d at 996 (emphasis in original). The court also disapproved the Montgomery County District Attorney's practice of filing form rule 1100(c) petitions without alleging specific bases for a claim of due diligence and the Montgomery County Courts of Common Pleas practice of granting such petitions without further inquiry. *Id.* See Brief for Montgomery County Public Defender as Amicus Curiae at 6-17, *Commonwealth v. Mayfield*, — Pa. —, 364 A.2d 1345 (1976).

135. 239 Pa. Super. Ct. at 204, 361 A.2d at 878.

the rule does not "distinguish in its application between the prosecution, the court, and the court administrator."<sup>136</sup>

In both *Shelton*<sup>137</sup> and *Mayfield*,<sup>138</sup> the Commonwealth argued that the rule requires the district attorney to apply to the court for an extension; it does not contemplate the court petitioning itself, so that "Commonwealth" must refer to the various district attorneys. By application of that definition, section (c) would read that "[s]uch application shall be granted only if trial cannot be commenced within the prescribed period despite due diligence by the [district attorney]." The dissent in *Mayfield* agreed with this contention and distinguished the Commonwealth which is a party to the case from the court system which is the trier of the case. Because the Commonwealth showed that it had acted with due diligence in attempting to bring the case to trial, a commonsense reading of the rule would allow for an extension under rule 1100(c).<sup>139</sup> Under this reasoning, the prosecution could petition the court before the expiration of the period and show that it was then prepared to go to trial, that during the period it had not occasioned delay when a courtroom was available, and that the trial could not then commence because facilities were unavailable. It would be irrelevant that substantial delay might have been occasioned by an unresponsive judiciary's mismanagement of the docket.

Rule 1100(c), however, permits another commonsense reading. It states that "the attorney for the Commonwealth may apply to the court for an order extending the time for commencement of trial."<sup>140</sup> Thus, the rule holds the various prosecutors responsible for placing the entire judicial system on notice of its failure to proceed expeditiously.<sup>141</sup> In an application for an extension, the district attorney must argue that trial could not be commenced "despite due diligence by the Common-

---

136. *Id.* at 208, 361 A.2d at 880. In *Commonwealth v. Silver*, 238 Pa. Super. Ct. 221, 357 A.2d 612 (1976), the superior court relied on similar reasoning. In *Silver*, the Commonwealth argued that the delay was due to the lower court's attempt to secure an out-of-county judge and therefore should not be computed against the Commonwealth. The superior court found that because the right to a speedy trial is a basic constitutional right and because rule 1100 was promulgated to protect that right, an interpretation which limited the maximum time between filing the complaint and trial was necessary. *Id.* at 230-31, 357 A.2d at 616-17 (citing *Klopfer v. North Carolina*, 368 U.S. 213, 226 (1967); *Commonwealth v. Hamilton*, 449 Pa. 297, 308, 297 A.2d 127, 133 (1972)). The court cited reasons for the necessity of a prompt trial, including potential disruption of the defendant's employment and personal life, as well as possible prejudice against the defense on the merits. *Id.* The court noted that "none of these consequences is lessened by the fact that the delay is occasioned by courts rather than the prosecutor." *Id.*

137. 239 Pa. Super. Ct. at 201-02, 361 A.2d at 876.

138. 239 Pa. Super. Ct. at 283, 362 A.2d at 997 (Jacobs, J., dissenting).

139. *Id.* at 283-85, 362 A.2d at 997-98.

140. PA. R. CRIM. P. 1100(c) (emphasis added).

141. See *Commonwealth v. Cutillo*, 235 Pa. Super. Ct. 131, 339 A.2d 123 (1975) (judicial delay due to computer error did not excuse Commonwealth's failure to file a timely motion for extension).

wealth"—not just by the district attorney's office, but by the entire court system. If this reading of the rule is correct, then the question of delay must be rephrased: If courtroom space is unavailable due to lack of resources, has the Commonwealth, not just the prosecutor, exercised due diligence? Thus read, the rule requires the entire system to exercise due diligence. It would appear that this reading of rule 1100 and the policy articulated in *Hamilton* are consistent. *Hamilton* negates the proposition that unavailability of resources excuses non-compliance with the rule. The purpose of the rule is to guarantee an accused the right to a speedy trial. To do so, the Commonwealth must eliminate court backlog which is the result of sluggish administration of the court system, inadequate resources, and inefficient use of available resources. *Hamilton* called for a harsh remedy as a stimulant to the administrators of the system. Thus, it would seem illogical to suggest that a rule intended to effectuate the policy expressed in *Hamilton* contemplated the existence of a court backlog as a reason to avoid the rule.

The decisions of the superior court created considerable public concern.<sup>142</sup> Prior to those decisions, lower courts had routinely granted extensions based on unavailability of courtrooms.<sup>143</sup> In light of the extraordinary impact of the superior court decisions, the Pennsylvania Supreme Court granted allocatur in both cases on May 5, 1976. The cases were argued on June 22, 1976. On October 8, 1976, the supreme court handed down *Commonwealth v. Mayfield*<sup>144</sup> and *Commonwealth v. Shelton*<sup>145</sup> in which the court addressed the issue of delay caused by the judiciary. A unanimous court affirmed the superior court's order in *Shelton*,<sup>146</sup> but disapproved its dictum, and reversed the superior court's order in *Mayfield*.<sup>147</sup>

The supreme court in *Shelton* had little difficulty in deciding the merits of the Commonwealth's appeal. Since the mandatory period had passed before the Commonwealth applied for an extension and neither exception under rule 1100(d) applied, the superior court had been correct in reversing the trial court.<sup>148</sup> As was true with the superior court decision, the supreme court decision is notable for its

---

142. *E.g.*, Philadelphia Evening Bulletin, April 5, 1976, at 1, col. 4.

143. *E.g.*, *Commonwealth v. Robinson*, 238 Pa. Super. Ct. 508, 362 A.2d 1005 (1976).

144. — Pa. —, 364 A.2d 1345 (1976).

145. — Pa. —, 364 A.2d 694 (1976).

146. In *Shelton*, Justice Eagen, now Chief Justice, delivered the opinion for the unanimous court.

147. Justice Roberts authored the court's opinion in *Mayfield*.

148. — Pa. at —, 364 A.2d at 698. The supreme court had arrived at this same conclusion previously. *Commonwealth v. O'Shea*, — Pa. —, 350 A.2d 872 (1976); *Commonwealth v. Wood*, 461 Pa. 255, 336 A.2d 273 (1975).



dictum. The supreme court rejected the dictum of the superior court which had noted that judicial delay did not result in an exclusion under rule 1100(d) nor justify an extension under rule 1100(c). The supreme court rejected this position, noting that delay caused by the judiciary was not covered by the rule.<sup>149</sup> The superior court had believed that the term "Commonwealth" included both the prosecutor and the judiciary so that the rule mandated due diligence by both, a conclusion buttressed by its reading of *Hamilton* and rule 1100. The supreme court's answer to this analysis was brief: "The 'Commonwealth' in the context of the Rule clearly refers to prosecutorial officers and not to the judiciary."<sup>150</sup> The supreme court recognized that under its reading "an accused's right to a speedy trial may not be completely protected by Rule 1100."<sup>151</sup> Nevertheless, in instances of judicial delay, because the Commonwealth must file a rule 1100(c) petition, the court system will be alerted to the problem and can remedy it "through proper scheduling of trials."<sup>152</sup> In addition, an accused will always have recourse to the federal constitutional protection mandated by *Barker v. Wingo*.<sup>153</sup> However, the court did note that certain types of judicial delay can justify an extension. The court listed nonexclusive examples of "the type of circumstances wherein an extension may be justifiably granted because of a causal relationship between the 'judicial delay' and the Commonwealth's inability to commence trial despite due diligence."<sup>154</sup> Thus, judicial delay was not intended to become a panacea for lack of prosecutorial diligence.

The analysis of the supreme court is troubling. Rule 1100(c) is not as simple as suggested by the court's literal reading. One of the examples which the court gave as judicial delay justifying an extension was unavailability of the court due to scheduling difficulties.<sup>155</sup> This exclusion in effect reads out of the rule a requirement of due diligence by the judicial system, for it has left unsolved one of the primary

---

149. — Pa. —, 364 A.2d at 698.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* (citing *Barker v. Wingo*, 407 U.S. 514 (1972)).

154. *Id.* at —, 364 A.2d at 699. The court delineated the following examples of circumstances which may justify the granting of an extension:

(1) Situations where judicial proceedings involving prosecution of the charges are still pending or resolved so near the expiration of the mandatory period fixed by the Rule or prior order granting an extension so as to preclude commencing trial within the period despite the Commonwealth's due diligence.

(2) Situations where the Commonwealth is prepared to commence trial prior to the expiration of the mandatory period but the court because of scheduling difficulties or the like is unavailable.

*Id.*

155. *Id.*

causes of judicial delay. In light of the history and purpose of the rule, it is incongruous that the drafting committee and the supreme court when it adopted the rule would have overlooked one of the primary sources of delay. *Shelton* indicates that the rule 1100(c) petition will alert the courts to the delay in proceedings, and the courts will then be able to avoid an infringement of the accused's constitutional right to a speedy trial "through proper scheduling of trials." However, the problem does not arise as a result of occasional scheduling mishaps, but is instead the result of too many cases in an already hard-pressed system. Thus, even if a court administrator is aware of the difficulty in arranging trial in one case, that case may be placed at the end of a long list of similar cases that the courts simply cannot reach in a timely fashion. The supreme court believed that the superior court's analysis rendered the due diligence exception a nullity because even if the Commonwealth as prosecutor acted with due diligence, judicial delay could cause the time period to pass without a trial.<sup>156</sup> However, it is the supreme court's conclusion that "Commonwealth" does not include the judiciary, and not the superior court's analysis, which creates the anomaly. The preparedness of the prosecutor is only one element of due diligence. Absent unusual circumstances,<sup>157</sup> the Commonwealth is not acting with due diligence if it cannot provide courtroom space or a judge to try a case. Lack of resources is normally the result of inadequate allocation of existing resources. Poor management of resources can never amount to due diligence.

Finally, the supreme court's approach mandates a case-by-case analysis to determine the source of the judicial delay. The supreme court's ruling requires further guidelines before courts can determine which kinds of delay permit extension and which do not. Such a case-by-case approach is in direct conflict with the stated policy of rule 1100. Moreover, the supreme court's statement that at a minimum defendants can rely upon *Barker v. Wingo* violates the very reason for the creation of the rule. In *Hamilton*, the court may have been shortsighted, but its intent was clear—dismissal may be a drastic remedy, but it is the only effective one. Under the court's test, as long as the Commonwealth files a timely rule 1100(c) petition, dismissal with prejudice results only if the delay infringes on the constitutional rights of the accused under *Barker v. Wingo* or if the Commonwealth is unprepared at the last listing prior to the expiration of the period. Presumably, even if unprepared, the Commonwealth may successfully

---

156. *Id.* at —, 364 A.2d at 698.

157. Although not specifically addressed by the superior court, that court did not exclude the possibility that an emergency situation—for example, illness of a judge—could justify an extension as technically "judicial delay."

petition the court for an extension if a witness is ill or some other event beyond the prosecutor's control prevents him from proceeding. The court did not indicate that it repudiated *Hamilton* which so vigorously defended the rights of the accused. At the same time, the legal analysis of *Shelton* seriously erodes the policies enunciated in *Hamilton*.

Unlike *Shelton*, the supreme court's discussion of judicial delay in *Commonwealth v. Mayfield*<sup>158</sup> was necessary to the decision since the prosecutor had filed a timely petition to extend pursuant to rule 1100(c). The supreme court cited the American Bar Association standards which place responsibility for proper management of the court calendar on the trial court.<sup>159</sup> Furthermore, the court quoted *Hamilton* for the proposition that rule 1100(c) was intended to encourage "those entrusted with the responsibility of managing court calendars"<sup>160</sup> to expedite criminal cases:

[W]e recognize the need to insure that trial courts exercise due diligence in implementing the objectives of rule 1100.

. . . .

This Court . . . expects our trial courts, as well as counsel for defense and prosecution, to exercise the highest standards of professional responsibility in order to implement rule 1100's mission of speedy trials.<sup>161</sup>

The court reversed the superior court's order in *Mayfield* because its approach was too inflexible.<sup>162</sup> The supreme court then postulated a standard to determine whether an extension may be granted. Under this standard, a trial court may grant an extension only if the prosecutor exercises due diligence and the record includes a certification that the court has scheduled the trial "for the earliest date consistent with the court's business."<sup>163</sup> In addition, if the court is unable to bring the accused to trial within the required time period, the reasons for the delay must appear in the record.<sup>164</sup> There is a serious question

---

158. — Pa. at —, 364 A.2d at 1346-47.

159. *Id.* at —, 364 A.2d at 1347-48 (citing ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *Standards Relating to the Function of the Trial Judge* § 3.8(a) (Approved Draft, 1972); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *Standards Relating to Speedy Trials* § 6.2 (Approved Draft, 1968)).

160. — Pa. at —, 364 A.2d at 1348 (quoting *Commonwealth v. Hamilton*, 449 Pa. 297, 308, 297 A.2d 127, 133 (1972)).

161. *Id.* at —, 364 A.2d at 1349.

162. *Id.* at —, 364 A.2d at 1348.

163. *Id.* at —, 364 A.2d at 1349.

164. *Id.* at —, 364 A.2d at 1350.

whether the result in *Mayfield* is correct under its own test.<sup>165</sup> In reversing the superior court, the supreme court inferred due diligence from a silent record.<sup>166</sup>

Several problems will be engendered by the *Mayfield* requirement that the court certify that trial has been scheduled for the earliest possible date.<sup>167</sup> Review of such a certification may be impossible. The reviewing court cannot determine the accuracy of such an assertion without analyzing court management in detail. Furthermore, as long as the delay results from the backlog which prevents the case from being listed seasonably, there would appear to be no limitation on the time in which to bring the accused to trial other than *Barker v. Wingo*.

Most troublesome is that the two cases have created significant confusion. In *Shelton*, the court explicitly stated that "Commonwealth" does not include the judiciary. Yet the court went on to formulate examples of when judicial delay will support an extension of time in which to bring the case to trial. In *Mayfield*, the court did not discuss whether the courts are explicitly within the ambit of rule 1100. Instead, Justice Roberts wrote of the judiciary's role in "implementing the objectives of rule 1100" through its exercise of due diligence.<sup>168</sup> His formulated standard does not place the judiciary within the 180-day limitation, but requires only that the trial be scheduled "at the earliest date consistent with the court's business."<sup>169</sup> However, the effect of *Mayfield* is to require the judiciary to exercise due diligence, albeit under a standard less strict than that applied to the prosecutor. Arguably, this brings the judiciary within the definition of "Commonwealth." Thus, the issue is no longer whether the judiciary is included, but when is it included—that is, when does a court not act with due diligence?

The confusion engendered by *Shelton* and *Mayfield* is illustrated by the superior court's decision in *Commonwealth v. Mitchell*.<sup>170</sup> In

165. Rule 1100(c) would appear to require that the Commonwealth prove that it has exercised due diligence. The *Mayfield* test indicates that the record must show the basis for the delay whether it is caused by the prosecutor or the trial court. *Id.*

166. *Id.* at —, 364 A.2d at 1349. The court stated that "[t]here is nothing in this record to indicate that the cause of the delay was due to the lack of diligence on the part of the trial court." *Id.* Under such circumstances, the more appropriate course would have been to remand the case for a determination of the causes for the delay. The court did cite the existence of the "backlog of cases" as an excuse for the failure to try *Mayfield* within 180 days. *Id.* The court did not have before it any information concerning the cause of the delay. The lack of information resulted in part from the Montgomery County District Attorney's practice of filing rote petitions alleging due diligence and the trial court practice of granting those petitions without developing the record. *Commonwealth v. Mayfield*, 239 Pa. Super. Ct. 279, 281, 362 A.2d 994, 996, *rev'd*, — Pa. —, 364 A.2d 1345 (1976).

167. — Pa. at —, 364 A.2d at 1349.

168. *Id.*

169. *Id.*

170. No. 1700, slip op. (Pa. Super. Ct. Feb. 18, 1977).

*Mitchell*, the Commonwealth filed a timely rule 1100(c) petition alleging judicial delay because the justice of the peace had requested a continuance for the preliminary hearing. The continuance prevented presentation of the case to the grand jury in September and resulted in delay until the following January.<sup>171</sup> Although the delay of the preliminary hearing was a violation of rule 140(f)(1),<sup>172</sup> the majority did not address the question of whether this would amount to a lack of due diligence by the judiciary. Rather, the majority, relying upon *Shelton*, cited scheduling difficulties as an example of the type of judicial delay which would justify an extension.<sup>173</sup> *Mayfield* was only cited for its rejection of the superior court's prior holding that judicial delay could never justify an extension.<sup>174</sup>

In comparison, the *Mitchell* dissents focused on *Mayfield*.<sup>175</sup> In his dissent, Judge Price recognized that the delay caused by the justice of the peace was judicial delay,<sup>176</sup> but he went further and applied *Mayfield's* due diligence requirement to the judiciary.<sup>177</sup> It was clear to the dissenters that the court had not met its due diligence requirement of scheduling trial for the earliest date consistent with its business. *Mayfield* was read as qualifying the examples in *Shelton* and requiring that even a case squarely within an example must comply with *Mayfield* as well.<sup>178</sup> Because no reason had been given as to why the delay was unavoidable and because the delay had resulted from a violation of a specific rule of criminal procedure, Judge Price would not have granted an extension.<sup>179</sup> While the majority perpetuated the confusion by deciding the case under *Shelton*, the dissenters were able to reconcile *Shelton* and *Mayfield* by giving an example of the judiciary's failure to exercise due diligence—failure to comply with a mandatory rule of criminal procedure resulting in undue delay of a defendant's trial.

---

171. *Id.* at 1, 3.

172. PA. R. CRIM. P. 140(f)(1).

173. No. 1700, slip op. at 4.

174. *Id.* at 3-4.

175. Judge Price wrote a dissent in which Judges Spaeth and Hoffman joined. *Id.* at 1 (Price, J., dissenting). Judge Hoffman also wrote a dissent in which Judges Price and Spaeth joined. *Id.* at 1 (Hoffman, J., dissenting). Judge Hoffman added a dissent because he believes *Shelton* and *Mayfield* are inconsistent regarding whether "Commonwealth" includes the judiciary. He resolves any contradiction by relying upon *Mayfield's* holding that the judiciary must exercise due diligence and by ignoring any contrary dictum in *Shelton*. *Id.* at 3.

176. *Id.* at 2 (Price, J., dissenting).

177. *Id.* at 3.

178. *Id.* at 5.

179. *Id.* at 4.

## CONCLUSION

Rule 1100 procedure is relatively simple. Once it is determined that a case is within the ambit of the rule, defense counsel must file a timely pretrial motion requesting dismissal with prejudice. That petition may be filed at any time prior to trial and is not governed by the requirement that a pretrial motion be filed ten days prior to trial.<sup>180</sup> Obviously, in many instances the period would not have run ten days prior to trial and filing would be premature,<sup>181</sup> but the rule would be violated in the interim.

More difficult issues arise when one attempts to compute the period. Rule 1100(d) sets out two limited exclusions that may extend the period: (1) unavailability of the defendant or his attorney, and (2) continuances in excess of thirty days, but only to the extent that the continuance exceeds thirty days. Confusion has arisen when courts have had to analyze whether the delay was caused by the defendant's action.<sup>182</sup> This question often raises difficult questions of public policy. For example, it is relatively common practice in Pennsylvania's smaller counties to schedule infrequent grand juries. If the defendant's unavailability prevents submission of charges to one grand jury, a long delay may follow before indictment is finally handed down.<sup>183</sup> If the court holds that such delay cannot be attributed to the defendant, it holds essentially that delay results from a failure to dedicate sufficient resources to the criminal justice system—a very unpopular notion among prosecutors who feel helpless to influence allocation of resources.<sup>184</sup>

Increased dedication of financial resources to the judicial system has lurked in the background of the most heatedly litigated issue under the rule. *Hamilton* stated specifically that the Rules Committee was

---

180. PA. R. CRIM. P. 304, 305.

181. *E.g.*, *Commonwealth v. Robinson*, 238 Pa. Super. Ct. 508, 362 A.2d 1005 (1976).

182. *Compare* *Commonwealth v. Millhouse*, 239 Pa. Super. Ct. 445, 362 A.2d 398 (1976), *rev'd*, — Pa. —, 368 A.2d 1273 (1977) *with* *Commonwealth v. Coleman*, 241 Pa. Super. Ct. 450, 361 A.2d 870 (1976), *allocatur granted*, Crim. No. 240 (Pa. 1977 Term).

183. *Commonwealth v. Coleman*, 241 Pa. Super. Ct. 450, 361 A.2d 870 (1976), *allocatur granted*, Crim. No. 240 (Pa. 1977 Term).

184. The scope of the problem is indicated by an amicus curiae brief submitted by the Pennsylvania District Attorney's Association in *Mayfield*, *Millhouse*, and *Shelton*. The Association circulated a questionnaire to prosecutors throughout the Commonwealth, with emphasis on counties of the third class and smaller, in an attempt to gauge the impact of the rule. The brief summarized some of the problems which make it difficult for smaller counties to comply with the rule: fewer court sessions for criminal cases and fewer judges so that the illness of a single judge could postpone the trial beyond the time period. Brief for Pennsylvania District Attorneys Association as Amicus Curiae at 2, *Commonwealth v. Millhouse*, — Pa. —, 368 A.2d 1273 (1977); *Commonwealth v. Mayfield*, — Pa. —, 364 A.2d 1345 (1976); *Commonwealth v. Shelton*, — Pa. —, 364 A.2d 694 (1976).

to design a rule to help eliminate the backlog and to guarantee the right of the accused to a speedy trial. Assuming that the rule contemplates due diligence by the entire court system, can a court grant an extension pursuant to rule 1100(c) if part of the delay results from inadequate resources?<sup>185</sup> That precise issue was not faced by the supreme court in *Mayfield* or *Shelton*. The implication of *Mayfield*, however, seems to be that the question of due diligence is to be determined on a case-by-case basis and as long as the court and the prosecutor can point to their specific efforts to bring an accused to trial, the defendant is not entitled to relief based on a general lack of resources. The rule calls for better management of existing resources without necessarily demanding dedication of greater resources.<sup>186</sup>

This article has not attempted to address the policy of the rule's prescribed remedy. One may question the wisdom of using such a drastic disposition to remedy all speedy trial problems.<sup>187</sup> Rather, the article has focused on the uncertainty of the rule and the copious litigation it has spawned. We must be aware of the irony of these results. The stakes have been high and the resulting litigation has contributed to the backlog which the rule was to alleviate. Whether *Mayfield* and *Shelton* will facilitate application of the rule has yet to

---

185. Although not framed in those terms, *Commonwealth v. Lewis*, No. 1458, slip op. (Pa. Super. Ct. Mar. 31, 1977), indicates a greater willingness on the part of the superior court to permit rule 1100(c) extensions when delay results from limited resources. "In many of the smaller counties in our Commonwealth, . . . criminal sessions held four times a year are more than adequate to keep the court's business current. Additional court sessions should not be required unless there is a clear showing that the business of the court requires such a procedure." *Id.* at 6.

186. In this sense, *Mayfield* interprets the rule consistently with traditional notions of the judicial function. It is questionable whether a court could require society to dedicate additional financial resources to the system of criminal justice pursuant to its rulemaking function. Perhaps the most important result of the rule is an impetus to use available resources more efficiently. The experience in Philadelphia suggests that the rule already has ameliorated the system.

Significant amounts of time have been saved by the use of District Attorneys Informations, a practice instituted because of Rule 1100 pressure. The Court of Common Pleas of Philadelphia County in direct response to the Rule and appellate decisions construing it, has developed a number of programs and reforms to comply with the Rule. First, in the last two months a new system to identify and specifically assign cases with Rule 1100 problems has been put into effect. Second, the old practice of automatically continuing a case for a month has been abandoned: cases nearing the Rule run date are now assigned for shorter periods and a plan is in preparation to cut the standard continuance period from approximately one month to only two weeks. Third, cognizant of Rule 1100 problems, the individual trial judges have been significantly less prone to grant continuances without satisfactory reasons. Similarly prosecutors, and defense counsel, have also been more reluctant to continue matters for fear that the continuances attributed to them will cause the Rule to run (or be extended).

Brief for Philadelphia Public Defender Association as Amicus Curiae at 21, *Commonwealth v. Millhouse*, — Pa. —, 368 A.2d 1273 (1977); *Commonwealth v. Mayfield*, — Pa. —, 364 A.2d 1345 (1976); *Commonwealth v. Shelton*, — Pa. —, 364 A.2d 694 (1976).

187. For a critical view of using dismissal as the sole remedy in protecting the right to a speedy trial, see Amsterdam, *supra* note 84, at 534-35.

be resolved. *Mayfield* and *Shelton* at least clarify proper procedure for the Commonwealth. As long as its petition for extension is timely filed, it can raise the lack of facilities as justification for delay. Whether that result is consistent with *Hamilton* and the text of the rule is open to question. These decisions, however, prevent wholesale release of many individuals who, but for the promulgation of a rule not mandated by the United States Constitution, might otherwise be convicted and punished. Finally, *Mayfield* and *Shelton* inform the courts and litigants that lack of resources does not preclude a finding of due diligence, but the definition of due diligence is presumably a matter to be resolved in further litigation.<sup>188</sup>

---

188. See, e.g., *Commonwealth v. Martin*, No. 1337, slip op. (Pa. Super. Ct. Mar. 31, 1971) (Commonwealth does not exercise due diligence when it loses track of a defendant already incarcerated during the period of delay).