Volume 61 | Number 3 Article 4

3-1-1983

Criminal Procedure-United States v. MacDonald: Continued Uncertainty in the Right to a Speedy Trial

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NOTES

Criminal Procedure—*United States v. MacDonald*: Continued Uncertainty in the Right to a Speedy Trial

The sixth amendment speedy trial guarantee[1] is a fundamental right[2] of an accused[3] in a criminal proceeding.[4] Although this right protects "basic demands" of Anglo-American criminal justice,[5] the United States Supreme Court has dealt with it infrequently.[6] A recent decision has clarified the jurisprudence of this "slippery" and "amorphous" constitutional protection[7] while simultaneously creating new ambiguity through dictum that proclaims the relevance of governmental bad faith in prosecutorial delay.[8] In a case of first impression, the Court in *United States v. MacDonald*[9] considered whether prosecutorial delay between the dismissal of military charges and the return of

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1. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S. Const. amend. VI. *See generally* J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED: PRETRIAL RIGHTS ch. 7 (1972 & Supp. 1979); 1A R. KRAUSE, CRIMINAL DEFENSE TECHNIQUES § 19 (1969 & Supp. 1981); 3 F. WHARTON, WHARTON'S CRIMINAL PROCEDURE §§ 420-422 (12th ed. 1975 & Supp. 1981); C. WHITEBREAD, CONSTITUTIONAL CRIMINAL PROCEDURE 265-72 (1978); Solomon, *The Right to a Speedy Trial: A Manual for Lawyers, Judges and Legislators*, 3 J. MAR. 1 (1978); Note, *The Right to a Speedy Trial*, 57 COLUM L. REV. 846 (1957); Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476 (1968); Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587 (1965).

2. "Klopfer v. N.C., 386 U.S. 213, 223 (1967), established that the right to a speedy trial is 'fundamental'." Barker v. Wingo, 407 U.S. 514, 515 (1972).

3. The word "accused" means "only the person who has standing to complain of prosecutorial delay . . . ." United States v. Marion, 404 U.S. 307, 328 (1971) (Douglas, J., concurring).

4. For a succinct summary of the Anglo-American common-law origins of the right to a speedy trial, see *Klopfer*, 386 U.S. at 223-26.

5. Smith v. Hooey, 393 U.S. 374, 377-78 (1969). In *Hooey* petitioner was indicted and convicted on federal charges. After state charges were filed, petitioner unsuccessfully requested a speedy trial on those indictments. Finding that the six-year prosecutorial delay violated petitioner's sixth amendment rights, the Supreme Court held that a state has a constitutional duty to bring a federal prisoner before state court on state charges upon that prisoner's request. *Id.* at 383.

Hooey refers to "basic demands" of justice that the sixth amendment safeguards. *Id.* at 378. Those demands were enumerated in United States v. Ewell, 383 U.S. 116 (1966). *See infra* text accompanying note 46.

6. *Barker*, 407 U.S. at 515; *Marion*, 404 U.S. at 315 n.7.

7. The Supreme Court characterized the speedy trial right in these terms in *Barker*, 407 U.S. at 522. *See also* Joseph, *Speedy Trial Rights in Application*, 48 FORDHAM L. REV. 611, 612 (1980).

Perhaps the Court has found the right to a speedy trial to be "slippery" and "amorphous" because it "is generically different from any of the other rights enshrined in the Constitution for the protection of the accused." *Barker*, 407 U.S. at 519. It is unique because the concern for fair and decent treatment of the accused must be weighed against the "societal interest in providing a speedy trial which exists separately from, and at times in opposition to, the interests of the accused." *Id.* The accused also may benefit from deprivation of the right. *Id.* at 521. Finally, the right is "a more vague concept" than other procedural protections. *Id.*

8. *See infra* notes 88-98 and accompanying text.

9. 102 S. Ct. 1497 (1982). *MacDonald* marked the first time a soldier was prosecuted by civilian authorities after being cleared of military charges. 531 F.2d 196, 199 (4th Cir. 1976) [hereinafter cited as *MacDonald I*], *rev'd on grounds of prematurity*, 435 U.S. 850 (1978), *on remand*, 485 F. Supp. 1087 (1979), *rev'd*, 632 F.2d 258 (4th Cir. 1980), *rev'd*, 102 S. Ct. 1497 (1982).

a civilian indictment violated the sixth amendment.[10] In attempting to resolve differences among the lower federal courts,[11] the Court held that the right to a speedy trial does not attach to the period between charges,[12] and noted in dictum that no evidence existed that the government acted in bad faith by dismissing the initial charge.[13]

In the early morning of February 17, 1970, the military police at Fort Bragg, North Carolina, responded to a call from Captain Jeffrey R. MacDonald.[14] Upon their arrival at the MacDonald home, the police found MacDonald's wife and two children brutally murdered and MacDonald unconscious from multiple stab wounds. Although MacDonald later told of a "bizarre and ritualistic murder,"[15] physical evidence at the scene contradicted his account.[16] After a ten-week investigation by the Army Criminal Investigation Division (CID), the military formally charged MacDonald with the murders. Pursuant to Article 32 of the Uniform Code of Military Justice,[17] the military conducted a lengthy hearing on the charges.[18] Based on the Article 32 hearing, military authorities dismissed the charges in October 1970 for lack of evidence. In December 1970, the Army granted MacDonald an honorable discharge based on hardship.[19]

At the request of the Justice Department, the CID continued to investigate the three murders. Although the CID submitted its report to the Justice Department in June 1972,[20] a grand jury was not convened until August 1974. During this twenty-six month period, little additional evidence was developed.[21] Five years after the crime, MacDonald was indicted.[22] Although the United States Court of Appeals for the Fourth Circuit reversed the district

10. 102 S. Ct. at 1499.

11. *See infra* notes 70-75 and accompanying text.

12. 102 S. Ct. at 1502.

13. *Id.* at 1503 n.12. *See also infra* notes 88-98 and accompanying text.

14. MacDonald was a physician in the Army Medical Corps and was stationed at Fort Bragg.

15. 102 S. Ct. at 1499-1500, 1500 n.2. MacDonald described a macabre scene reminiscent of the infamous Manson murders. He claimed "he saw a woman with blond hair wearing a floppy hat, white boots and a short skirt carrying a lighted candle and chanting 'acid is groovy; kill the pigs' " before being attacked by three men. *Id.* at 1499-1500. Military police apparently saw a woman close to that description near the MacDonald home. *Id.* at 1499 n.1. That evidence lent a measure of credence to MacDonald's allegations.

16. For the physical evidence that contradicted MacDonald's version of events, see 102 S.Ct. at 1500 n.2.

17. 10 U.S.C. § 832 (1976). The Uniform Code of Military Justice is codified at 10 U.S.C. ch. 47 (1976 & Supp. IV 1980). For a discussion of Article 32 hearings, see E. BYRNE, MILITARY LAW §§ 319-320 (1976); Everett, *The New Look in Military Justice*, 1973 DUKE L.J. 649.

18. Fifty-six witnesses testified in the Article 32 hearing. 102 S. Ct. at 1500.

19. *Id.* As a result of the discharge, the military no longer had jurisdiction over MacDonald. *Id.* at 1500 n.3 (citing United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955)).

20. This report consisted of 13 volumes. *Id.* at 1500.

21. *Id.* at 1504-05 (Marshall, J., dissenting). The CID transmitted two supplemental reports to the Justice Department during this period. These reports notwithstanding, the Fourth Circuit Court of Appeals found that "no significant new investigation was undertaken . . . and none was pursued until the grand jury was convened a year later." *MacDonald I*, 531 F.2d at 206.

22. 102 S. Ct. at 1500. MacDonald was indicted on three counts of first degree murder. Federal jurisdication existed because the crimes were committed on a military reservation. 18 U.S.C. §§ 7(3), 1111, & 3231 (1977).

court's denial of MacDonald's pretrial sixth amendment claim,[23] the Supreme Court reversed and remanded for trial, holding that speedy trial claims are not subject to interlocutory appeal.[24] On appeal following MacDonald's conviction in federal district court, the Fourth Circuit set aside the judgment on speedy trial grounds.[25]

In reversing the Fourth Circuit, the Supreme Court assumed that MacDonald was an "accused" for sixth amendment purposes while charged with murder by the military.[26] The threshold question, therefore, was whether

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23. 102 S.Ct. at 1500. This was the first of two interlocutory appeals heard by the circuit court in the *MacDonald* case. First, MacDonald appealed the district court's denial of his speedy trial and double jeopardy claims. *MacDonald I*, 531 F.2d at 199. On the speedy trial question, the court found that MacDonald became an "accused" for sixth amendment purposes once he was charged with murder by the military. *Id.* at 202-05. Without considering the significance to speedy trial analysis of the dismissal of military charges, the Fourth Circuit held that the four and one-half year delay between the Army accusation and the filing of the civilian indictment violated MacDonald's sixth amendment rights. *Id.* at 205-08.

Having granted MacDonald's appeal on speedy trial grounds, the Fourth Circuit declined to consider the double jeopardy question. Noting the unsettled nature of military law on this point, the court opined that the resolution depended "on the legal effect of the acceptance of an Article 32 recommendation by the commanding officer." *Id.* at 209.

24. 435 U.S. 850 (1978). On the second interlocutory appeal, the Fourth Circuit decided the double jeopardy question. Affirming the district court, the court of appeals held that conducting a civilian trial after the military dismissed charges did not violate the fifth amendment. United States v. MacDonald, 585 F.2d 1211 (4th Cir. 1978).

25. 632 F.2d 258 (4th Cir. 1980), *rev'd*, 102 S. Ct. 1497 (1982) [hereinafter cited as *MacDonald II*]. *MacDonald II* predicated its analysis on the initial Fourth Circuit panel's conclusion "that MacDonald's military arrest was the functional equivalent of a civilian arrest." *MacDonald I*, 531 F.2d at 204. Therefore, it triggered his speedy trial protections. Not questioning whether the protections were applicable after military charges were dismissed, *MacDonald II* built further on the fact analysis of *MacDonald I*, *id.* at 202-08, and held that prosecutorial delay violated MacDonald's sixth amendment rights. 632 F.2d at 260.

Although MacDonald also appealed on the grounds that prosecutorial delay denied him due process of law, the Fourth Circuit declined to consider that issue because "the burden on MacDonald to show an abuse of constitutional proportions under the Sixth Amendment could not be greater than his burden under the Fifth Amendment . . . ." *Id.*

26. The Court did not express any opinion on whether military proceedings had made MacDonald an accused in the sixth amendment sense. In its petition for certiorari, the government had declined to raise that issue. 102 S. Ct. at 1502 n.10. For arguments that the military proceedings made MacDonald an accused within the meaning of the sixth amendment, see *MacDonald I*, 531 F.2d at 202-05; Schumann, *Did Captain MacDonald Receive a Speedy Trial?*, 54 CONN. B.J. 69, 76-79 (1980). For opposing arguments, see *MacDonald I*, 531 F.2d at 209-14 (Craven, J., dissenting); Note, *Right to Speedy Trial in Civilian Prosecution Denied by Delay Following Dismissal of Military Charges—United States v. MacDonald*, 17 WAKE FOREST L. REV. 89, 92 (1981).

Because the Fourth Circuit had declined to express a view on whether the delay in bringing MacDonald to trial violated his fifth amendment rights, the Court left that issue to be decided on remand. 102 S. Ct. at 1500 n.5. On remand, the Fourth Circuit held that the two-year interval between the dismissal of military charges and the grand jury's convocation did not deprive MacDonald of due process of law. Noting that a demonstration of actual prejudice is necessary to establish a fifth amendment violation, the court stated that claims of actual prejudice are not to be explored unless the prosecutorial delay violates fundamental conceptions of justice. 688 F.2d 224, 226-27 (1982). Relying on the Supreme Court's finding that "[t]he care obviously given the matter by the Justice Department is certainly not any indication of bad faith or deliberate delay," the Fourth Circuit concluded that the delay was not contrary to the fundamental conceptions of justice standard. 688 F.2d at 227 (quoting *MacDonald*, 102 S. Ct. 1503 n.12). This was "conclusive of the *Lovasco* test and fatal to the appellant's Fifth Amendment argument." *Id.*

The Fourth Circuit also rejected MacDonald's claims of evidentiary error. *Id.* at 277. With no additional claims of error to be resolved, this phase of the judicial saga of Captain Jeffrey R. MacDonald had come to a close.

MacDonald remained an accused after the dismissal of those charges.[27] In holding that the speedy trial guarantee had no application until after MacDonald was charged for a second time, the Court first studied the language of the sixth amendment.[28] Based on "literal reading," the Court found that the right to a speedy trial attached "only when a formal criminal charge is instituted and a criminal prosecution begins."[29] Analyzing *United States v. Marion*[30] and its progeny,[31] the Court held that the right was applicable only as long as the defendant was "indicted, arrested, or otherwise officially accused."[32] Reasoning that the time between dismissal and reindictment was analogous to the preaccusation period, the Court found that undue delay after dismissal was to be "scrutinized" under the due process rather than the speedy trial standard.[33]

The determination that the speedy trial right did not apply to the period between the dismissal of charges and the return of a new indictment, the Court concluded, was in accordance with the policies underlying the sixth amendment.[34] The Court posited that the speedy trial clause is designed to protect the accused from lengthy pretrial incarceration, to minimize the anxiety caused by public accusation, and to shorten the disruption caused by arrest.[35] The majority concluded that these interests are not served by applying the sixth amendment after charges are dropped. Once charges are dropped, the defendant no longer is an accused. A "formerly accused," such as MacDonald, is "in the same position as any other subject of a criminal investigation."[36]

In a strong dissent, Justice Marshall argued that the speedy trial clause protects an individual for the entire period between the initial charge and the

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27. 102 S. Ct. at 1499. Neither *MacDonald I* nor *MacDonald II* considered this question. *See supra* notes 23 & 25.

28. *Id.* at 1501.

29. *Id.*

30. 404 U.S. 307 (1971). *See also infra* notes 52-55 and accompanying text.

31. *See* 102 S. Ct. at 1501 & n.7, 1502 & nn.8-9. *See also infra* notes 56-75 and accompanying text.

32. *Id.* at 1501.

33. *Id.* On remand, the Fourth Circuit held that the two-year delay between the dismissal of military charges and the filing of a civilian indictment did not violate MacDonald's right to due process. *See supra* note 26.

34. *Id.* at 1501-03. The Court also noted that its holding was consistent with the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (1976). 102 S. Ct. at 1501 n.7. The Act provides that the period between the dismissal of an earlier indictment and the return of a second indictment for the same offense "shall be excluded . . . in computing the time within which trial of any such offense must commence." 18 U.S.C. § 3161(h)(6) (1976). Although this section is restricted to dismissals of indictments, Congress has suggested that it applies to dismissals of complaints as well. S. REP. No. 1023, 93d Cong., 2d Sess. 33 (1974). The Speedy Trial Act, however, was not at issue in the *MacDonald* case. The Act applies only to persons arrested or served with summons after July 1, 1976. 18 U.S.C. § 3163 (1976). Even if the Act had been applicable, it would have been subject to constitutional scrutiny. In ruling as it did, however, the Court implicitly upheld the constitutionality of 18 U.S.C. § 3161(h)(6). For a comprehensive analysis of the Act, see Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667 (1976).

35. 102 S. Ct. at 1502.

36. *Id.* The Court also stated that "[f]ollowing dismissal of charges, any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it is upon anyone openly subject to a criminal investigation." *Id.*

time the government either secures a conviction or closes the investigation.[37] Criticizing the majority for disregarding the sixth amendment's language,[38] precedents of the Court,[39] and speedy trial policies,[40] Justice Marshall examined the four speedy trial factors of *Barker v. Wingo*[41] and concluded that MacDonald's rights had been violated by the twenty-six month delay between the time the Justice Department received the Army's report and convened the grand jury.[42]

A brief survey of previous Supreme Court speedy trial decisions is a prerequisite to understanding the *MacDonald* holding. The Court began tracing the contours of this sixth amendment guarantee in *Beavers v. Haubert*.[43] In *Beavers* the Court established that the right to a speedy trial is necessarily relative and that its application depends on the circumstances of a particular case. Enunciating two principles that have formed the basis of subsequent decisions, the Court stated that the sixth amendment "secures rights" to a defendant in a criminal prosecution and, at the same time, "does not preclude the rights of public justice."[44]

The Supreme Court did not articulate the protections afforded a defendant under the first *Beavers* principle until *United States v. Ewell*.[45] In *Ewell*

37. *Id.* at 1504-10 (Marshall, J., dissenting; Brennan, Blackmun, JJ., joining). Although Justice Stevens concurred in the judgment, he agreed with the dissenters "that MacDonald's constitutional right to a speedy trial was not suspended during the period between the Army's dismissal of the charges in 1970 and the return of the civilian indictment in 1975." *Id.* at 1503 (Stevens, J., concurring).

38. *Id.* at 1505. Justice Marshall stated that "a natural reading of the language is that the Speedy Trial Clause continues to protect one who has been accused of a crime until the government has completed its attempts to try him for that crime." *Id.*

39. *Id.* at 1505-06.

40. *Id.* at 1507-08. Justice Marshall stated:

> The special anxiety that a defendant suffers because of a public accusation does not disappear simply because the initial charges are temporarily dismissed. Especially when the defendant and the public are aware of an ongoing government investigation of the same charges, the defendant's interest in final resolution of the charges remains acute. After all, the government has revealed the seriousness of its threat of prosecution by initially bringing charges.

Id. at 1507.

41. 407 U.S. 514 (1972).

42. 102 S. Ct. at 1508-10. Justice Marshall did not analyze the preceding period during which the military reinvestigated MacDonald because "the prior dismissal for insufficient evidence warranted a more extensive investigation." The period between the civilian indictment and trial also was not included in the speedy trial calculus because any delays were caused primarily by defense maneuvers. *Id.* at 1509 n.7 (Marshall, J., dissenting). For a discussion of some of these maneuvers, see *supra* notes 23 & 26.

43. 198 U.S. 77 (1905). In *Beavers* defendant was indicted on federal charges in the Eastern District of New York. While the indictment was pending, the government initiated proceedings in the Eastern District to remove defendant to the District of Columbia for trial on separate indictments. Rejecting defendant's claim that removal would violate his right to a speedy trial, the Court held that the sixth amendment, "if it has any application to the order of trials of different indictments, . . . must relate to the time of trial, not to the place of trial." *Id.* at 86.

44. *Id.*

45. 383 U.S. 116 (1966). In *Ewell* defendants were indicted and convicted of illegally selling narcotics. After their sentences were vacated because of a deficiency in the original indictment, defendants were rearrested on new complaints and reindicted. Rejecting the argument that the 19-month period between the original arrests and the hearings on the second indictment constituted an automatic speedy trial violation, the Court held that defendants had to demonstrate that

the Court held that the speedy trial right is designed "to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation, and to limit the possibilities that long delay will impair the ability of an accused to defend himself."[46] Subsequent decisions have incorporated the speedy trial interests identified in *Ewell*.

Applying the second *Ewell* protection, the Supreme Court elaborated upon the speedy trial interests of defendants in *Klopfer v. North Carolina*.[47] The State in *Klopfer* used a *nolle prosequi* with leave to postpone indefinitely the prosecution of an indictment. Although defendant was released from custody under this North Carolina procedure,[48] the indictment remained in effect, and the statute of limitations was tolled.[49] Concluding that the "pendency of the indictment" indefinitely subjected defendant to the "anxiety and concern accompanying public accusation,"[50] the Court held that the State had violated defendant's sixth amendment rights.[51]

Defining when the speedy trial guarantee becomes applicable to a criminal prosecution, the Court in *United States v. Marion*[52] considered the constitutional significance of a lengthy preindictment delay. Claiming that the government had sufficient evidence to press charges thirty-eight months earlier, defendants argued that the preindictment delay prejudiced their sixth amendment rights.[53] Finding that defendants were not "accused" during the preindictment investigatory period,[54] the Court held that the right to a speedy trial attaches only after the filing of "a formal indictment or information." In the classic exposition of the interests protected by the sixth amendment, the Court stated: "Arrest is a public act that may seriously interfere with the defendant's liberty, . . . disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and friends."[55] Nowhere in *Marion*, however, did the Court

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the potentially prejudicial delay was purposeful rather than the result of ordinary criminal safeguards and procedures. *Id.* at 118-20.

46. *Id.* at 120.

47. 386 U.S. 213 (1967). Recognizing the right to a speedy trial as a fundamental constitutional right, *Klopfer* also established that the sixth amendment was applicable to the states by virtue of the fourteenth amendment. *Id.* at 222, 225-26.

In *Klopfer* defendant, a zoology professor at Duke University, was indicted for criminal trespass. After 18 months had passed since the indictment without the State's scheduling the case for trial, defendant petitioned the court to learn his status. In response to defendant's motion, the State requested and received from the court permission to take a *nolle prosequi* with leave. *Id.* at 217-18.

48. N.C. GEN. STAT. § 15-175 (repealed 1973).

49. *Klopfer*, 386 U.S. at 215. The prosecution did not need court permission to reschedule the trial. *Id.*

50. *Id.* at 222 (quoting *Ewell*, 383 U.S. at 120).

51. 386 U.S. at 222.

52. 404 U.S. 307 (1971). In *Marion* defendants were indicted for acts of fraud and misrepresentation carried out over a two-year period. *Id.* at 308-10.

53. *Id.* at 310.

54. *Id.* at 319-20. For the *Marion* Court's discussion of the term "accused," see *id.* at 313-20. *See also id.* at 328 (Douglas, J., concurring).

55. *Id.* at 320.

consider how these speedy trial interests might be affected by the dismissal of criminal charges.

Although *Dillingham v. United States*[56] did not touch upon the question whether the sixth amendment would be suspended after charges were dismissed, the Court did clarify dictum from *Marion*.[57] Finding that the twenty-two months between arrest and indictment counted for speedy trial purposes, the court held that the sixth amendment attached upon arrest and the filing of charges as well as upon the issuance of a formal indictment.[58]

Later in the term in which *Marion* was decided, the Supreme Court in *Barker v. Wingo*[59] defined the criteria by which the speedy trial claims of an accused are judged. Defendant in *Barker* was not tried for more than five years after his arrest. Rejecting an "inflexible" analytical framework,[60] the Court adopted an "ad hoc" four-factor balancing test "in which the conduct of both the prosecution and the defendant are weighed."[61] After balancing the length of delay, the reason for delay, the defendant's assertion of this right, and prejudice to the defendant, the Court concluded that Barker's sixth amendment rights had not been violated.[62]

Five years after *Marion*, the Supreme Court in *United States v. Lovasco*[63] analyzed the scope of the due process protections against preindictment delay. In *Lovasco* little information, aside from the investigative report submitted one month after the crime, was developed in the eighteen months prior to indictment.[64] Stating that the due process clause "has a limited role to play in protecting against oppressive delay,"[65] the Court set forth a standard of proof for due process violations more difficult to satisfy than that required under *Barker* for speedy trial claims. The due process standard was a demonstration of actual prejudice rather than merely the potential for prejudice.[66] Once a defendant has established a possible claim by proving prejudicial delay,

56. 423 U.S. 64 (1975). In *Dillingham* defendant was arrested for automobile theft. He was indicted 22 months later and was tried a year after that. *Id.* at 64.

57. In dictum, the *Marion* Court stated that the speedy trial right also was triggered by "charge or arrest." 404 U.S. at 319. *See also* Note, *supra* note 26, at 95 n.60.

58. 423 U.S. at 64-65.

59. 407 U.S. 514 (1972). In *Barker* defendant was arrested and charged with murder. The government did not try defendant until after his accomplice, against whom there was a stronger case, was convicted. Until his trial, defendant was free on bail. *Id.* at 516-18.

60. The Court rejected the "fixed-time period" and "demand-waiver" rules. *Id.* at 529-30.

61. *Id.* at 530. Before *Barker*, the Court determined whether an accused had been denied his sixth amendment rights by applying the speedy trial policies set forth in *Ewell*, 383 U.S. at 120. For a discussion of those policies, see *supra* text accompanying note 46. For applications of those policies, see e.g. Dickey v. Florida, 398 U.S. 30, 36-38 (1970) (eight year pretrial prosecutorial delay violated speedy trial guarantee); Smith v. Hooey, 393 U.S. 374, 378-80 (1969) (for a discussion of the *Hooey* decision, see *supra* note 5).

62. 407 U.S. at 530-36. If the delay is not long enough to call into question whether the defendant received a speedy trial, the other three *Barker* factors will not come into play. *Id.* For applications of the balancing test, see Rudstein, *Right to a Speedy Trial: Barker v. Wingo in the Lower Courts*, 1975 U. ILL. L.F. 11, 16-18.

63. 431 U.S. 783 (1977). In *Lovasco* defendant was indicted for firearms violations.

64. The government continued its investigation throughout the period. *Id.* at 786, 794-95.

65. *Id.* at 789.

66. *See MacDonald I*, 531 F.2d at 207.

Lovasco states that the "inquiry must consider the reasons for the delay as well as the prejudice to the accused."[67] Based on this analysis, the Court concluded that defendant had not been deprived of due process of law.[68]

The guidelines set out in *Marion*, *Barker*, and *Lovasco* have given rise to an array of judicial decisions from the circuit courts of appeal. In the absence of Supreme Court guidance on when the speedy trial guarantee becomes disengaged, conflicting lines of cases have developed not only among the circuit courts, but also within the individual circuits.[69] While four cases support the Court's holding in *MacDonald*,[70] and three support Justice Marshall's dissent,[71] most do neither.

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67. 431 U.S. at 790.

68. *Id.* at 796.

69. Only the First, Seventh, and Tenth Circuits have held consistently that the speedy trial right applies between the dismissal of charges and the reindictment for the same offense. The Second, Fifth, Sixth, Ninth, and District of Columbia Circuits, in contrast, have held, at least on occasion, that this sixth amendment protection is inapplicable to the period from dismissal to reindictment. For the circuit court speedy trial decisions, see *infra* notes 70-75.

70. *See* United States v. Hillegas, 578 F.2d 453 (2d Cir. 1978); Arnold v. McCarthy, 566 F.2d 1377 (9th Cir. 1978); United States v. Martin, 543 F.2d 577 (6th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977); United States v. Bishton, 463 F.2d 887 (D.C. Cir. 1972).

In *Hillegas* defendant was charged with conspiracy to distribute narcotics. Because the prosecution's witnesses stopped cooperating, the government dismissed the complaint. Once the witnesses again agreed to cooperate three years later, however, the Government charged defendant with narcotics conspiracy for the second time. Construing the Current Plan of the Southern District of New York for implementing the Speedy Trial Act of 1974, the Second Circuit held that postdismissal periods were not to be considered in determining compliance with the time limits of the Act. 578 F.2d at 454-58.

In *Arnold* defendant was charged with robbery and assault with a deadly weapon. Prior to his arrest on this complaint, defendant was incarcerated on an unrelated murder charge. Following defendant's murder conviction, the State dismissed the robbery-assault indictment. After defendant was acquitted of murder on retrial, however, the State filed a second complaint on the robbery-assault charges. In adjudicating defendant's speedy trial appeal following his conviction, the Ninth Circuit found that defendant was not an "accused" during the time between the dismissal of charges and rearrest. 566 F.2d at 1380-81, 1383.

In *Martin* defendant was charged with counterfeiting. Two years after the dismissal of the original complaint, defendant was indicted for the same counterfeiting offense. On appeal following defendant's conviction, the Sixth Circuit held that the speedy trial clause was not applicable to the period between the dismissal of charges and the filing of the indictment. 543 F.2d at 578-79.

In *Bishton* defendant was arrested and indicted under the District of Columbia Code for soliciting and accepting a bribe. The indictment, however, was dismissed for a violation of a statutory technicality. Three months later, a federal indictment was brought. Following his conviction 20 months after the initial arrest, defendant appealed on speedy trial grounds. Noting that the Government had not acted in bad faith, the District of Columbia Circuit found that the sixth amendment was not applicable to the period between the two indictments because no prosecution was pending against defendant. 463 F.2d at 889-91.

71. Jones v. Morris, 590 F.2d 684 (7th Cir.) (per curiam), *cert. denied*, 440 U.S. 965 (1979); United States v. Roberts, 548 F.2d 665 (6th Cir.), *cert. denied*, 431 U.S. 920 (1977); United States v. Merrick, 464 F.2d 1087 (10th Cir. 1972), *cert. denied*, 409 U.S. 1023 (1972).

In *Jones* defendant was arrested and indicted for murder. Four months after moving successfully to dismiss the indictment, the State issued a second indictment charging defendant with the same offense. At trial 23 months after his arrest, defendant was convicted. On appeal, the Seventh Circuit found that defendant's speedy trial protection was engaged continuously during the period from arrest to trial. 590 F.2d at 685-87.

In *Roberts* defendants were arrested for robbing a bank while taking part in a prison "work release" program. Because defendants were still in prison, the Government dropped the original charge. After defendants were paroled, however, the Government secured a second indictment on the bank robbery charge. Twenty-six months after the first arrest, the trial began. Following conviction, defendants appealed on speedy trial grounds. Although the court noted that no evi-

The lower court cases that support neither the *MacDonald* majority nor the dissenters construe the period between dismissal and the filing of a subsequent indictment in four different ways. First, courts have declined to reach the question whether the speedy trial right applies when the defendant's appeal would fail under the *Barker* analysis regardless of whether the sixth amendment protection attached at the initial arrest or at the filing of the second charge.[72] Second, courts have conducted the *Lovasco* due process analysis with respect to the period between dismissal and reindictment without considering whether the speedy trial clause also applies.[73] Third, courts have applied the *Barker* balancing test to the period between charges when the prosecution arguably has acted in bad faith by forum shopping or stockpiling charges against the defendant.[74] Fourth, courts also have held that "if the

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dence existed of prosecutorial bad faith, the Sixth Circuit found that the sixth amendment right applied continuously from the time of the initial arrest. 548 F.2d at 667-68.

In *Merrick* defendant was charged with income tax evasion. Nine months after the indictment was dismissed for technical reasons, the Government handed down a second indictment. On appeal following defendant's conviction, the Tenth Circuit included in the speedy trial calculus the period between the dismissal of the initial charge and the second indictment. 464 F.2d at 1089-90.

72. *See* United States v. Henry, 615 F.2d 1223 (9th Cir.); United States v. Lai Ming Tanu, 589 F.2d 82 (2d Cir. 1978).

In *Henry* defendant was arrested for violating a federal statute prohibiting the delivery of a firearm to a common carrier for shipment in interstate commerce without first providing the carrier with written notice. The complaint was dismissed soon afterwards, however, to facilitate a state investigation of defendant's role in an attempted murder. With the state investigation completed, the Government secured an indictment on the firearms charge. Rejecting defendant's speedy trial appeal, the Ninth Circuit held that whether the delay was measured from indictment to trial or from original charge to trial was immaterial. The result would be the same, because the one year delay between the original arrest and the trial was not impermissible under the *Barker* standard. 615 F.2d at 1225-27, 1232-33, 1233 n.13.

In *Tanu* defendant was arrested by a joint federal-state task force and charged under state law with conspiracy to distribute heroin. After the 27-month-old state indictment was dismissed for speedy trial violations, federal authorities initially did not take any action. After new information surfaced, however, defendant was indicted for the same transaction by a federal grand jury. Taking note of the 20-month delay between the dismissal of state charges and the filing of the federal indictment, the Second Circuit found that defendant had not shown potential prejudice resulting from the loss of evidence. Because defendant's sixth amendment claim would fail under the *Barker* analysis whether or not delay was measured from the dismissal of state charges, the court declined to decide whether the speedy trial clause applied continuously to successive state and federal prosecutions. 589 F.2d at 83-85, 88-89.

See also United States v. Santos, 588 F.2d 1300 (9th Cir.), *cert. denied*, 441 U.S. 906 (1979).

73. *See* United States v. Davis, 487 F.2d 112 (5th Cir. 1973), *cert. denied*, 415 U.S. 981 (1974). In *Davis* defendants were indicted for bank robbery. Five months later, the charge was dismissed to permit the Government to bring conspiracy charges. Seventeen months thereafter, the conspiracy trial began. On appeal following conviction, defendants claimed that the delays violated their speedy trial rights or, in the alternative, due process of law. Treating the five-month period between the bank robbery and conspiracy charges as preindictment delay, the Fifth Circuit analyzed the next 17 months under the due process standard. The court did not consider whether the speedy trial clause applied to this period. 487 F.2d at 115-18.

74. *See* United States v. Avalos, 541 F.2d 1100 (5th Cir. 1976); United States v. McKim, 509 F.2d 769 (5th Cir. 1975).

In *Avalos* defendants were arrested on federal narcotics charges in the District of Columbia. Nine months later, defendants were indicted in the Southern District of Florida on charges arising from the same narcotics conspiracy for which they previously had been arrested. The Government brought the indictments in Florida because the judicial climate was perceived as more hospitable than in the District of Columbia. Following their convictions at trial, defendants appealed on speedy trial grounds. The Fifth Circuit found that the government had engaged in a deliberate

crimes for which a defendant is ultimately prosecuted really only gild the charge underlying his initial arrest . . . , the initial arrest may well mark the speedy trial provision's applicability as to prosecution for all the interrelated offenses."[75]

Faced with these few decisions delineating the scope and nature of the speedy trial clause, the Supreme Court decided *United States v. MacDonald*. In holding that the dismissal of military charges suspended the application of the sixth amendment, the Court did not have much guidance from its previous rulings. *Ewell* defined the purposes of the speedy trial clause.[76] *Marion* held that an individual became an accused upon the filing of an indictment or information, but did not indicate how long one remained an accused.[77] The Court's subsequent speedy trial decisions also did not consider when the right became disengaged. *Barker* outlined a four-factor balancing test that was relevant only while the conclusory label "accused" applied.[78] *Lovasco* provided the due process framework for analyzing prosecutorial delay prior to accusation.[79] The Court's task was further complicated because lower court cases did not delineate a clear line on either side of the issue.[80]

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attempt at forum shopping, and applied the *Barker* analysis to the 15 months between the initial arrest in the District of Columbia and the filing of the indictment in Florida. 541 F.2d at 1104-06, 1110-17.

In *McKim* defendant was arrested for marijuana smuggling. Before being charged with the crime, defendant escaped from federal custody. After being taken back into custody, defendant was tried for marijuana smuggling while the government held off prosecuting the escape charge. Once the marijuana conviction was reversed, however, defendant was indicted for escape from federal custody. In deciding defendant's speedy trial appeal, the Fifth Circuit applied the speedy trial clause to the one-year period from the escape to the indictment on that offense. 509 F.2d at 771-73.

Cf. United States v. Bishton, 463 F.2d 887 (D.C. Cir. 1972) (sixth amendment not applicable when government had not acted in bad faith). *See supra* note 70. *But cf.* United States v. Roberts, 548 F.2d 665 (6th Cir. 1977), *cert. denied*, 432 U.S. 920 (1977) (speedy trial clause applied continuously despite lack of prosecutorial bad faith). *See supra* note 71.

75. United States v. DeTienne, 468 F.2d 151, 155 (7th Cir. 1972), *cert. denied*, 410 U.S. 911 (1973); United States v. Nixon, 634 F.2d 306 (5th Cir.), *cert. denied*, 102 S.Ct. 120 (1981).

In *DeTienne* defendant jumped bail following his conviction for theft, forgery, and conspiracy. Following his arrest on a federal unlawful flight warrant, defendant was identified as a suspect in an attempted bank robbery. One year later, defendant was indicted for attempted bank robbery. In dismissing defendant's sixth amendment appeal, the Seventh Circuit refused to apply the speedy trial clause from the date defendant was arrested on the escape warrant. The escape was to avoid confinement on state offenses unrelated to the bank robbery attempts. 468 F.2d at 154-56.

In *Nixon* defendant was arrested for counterfeiting. After failing to discover physical evidence of the crime, the prosecution dismissed the complaint. Nevertheless, the investigation continued. Based on new evidence, the Government opened grand jury proceedings in which defendant testified to his innocence. One year later, the physical evidence necessary to implicate defendant in the counterfeiting was discovered. Based on his grand jury testimony, defendant was convicted of perjury four years after his counterfeiting arrest. Holding that the sixth amendment remains applicable after charges are dismissed when the next charges are for the same offense, the Fifth Circuit found that the perjury charge for which defendant ultimately was prosecuted did not "gild" the counterfeiting charge underlying his original arrest. The court, therefore, did not engage in a speedy trial analysis. 634 F.2d 307-10.

76. *See supra* notes 45-46 and accompanying text.

77. *See supra* notes 52-55 and accompanying text.

78. *See supra* notes 59-62 and accompanying text.

79. *See supra* notes 63-68 and accompanying text.

80. *See supra* notes 69-75 and accompanying text.

Because of the paucity of relevant case law, the decision in *MacDonald* turned on the interpretation given the language and purposes of the speedy trial clause, and on the Court's decision in *Klopfer*. The language of the clause could be interpreted to make the sixth amendment protection applicable "only when a formal criminal charge is instituted and criminal prosectution begins,"[81] or to protect an "accused . . . until the government has completed its attempts to try him for that crime."[82]

The speedy trial interests also are subject to differing interpretations. On the one hand, applying the sixth amendment to the period between the dismissal of charges and the return of an indictment might not serve those interests, because the defendant then is like any other subject of a criminal investigation.[83] On the other hand, applying the constitutional guarantee might serve those interests because "[t]he special anxiety a defendant suffers because of a public accusation does not disappear simply because the initial charges are temporarily dismissed."[84]

Furthermore, *Klopfer* can be construed in two diametrically opposed manners. *Klopfer* is distinguishable from *MacDonald* because the charges against defendant in *Klopfer* were never dismissed. Because defendant was still under indictment, the statute of limitations remained tolled.[85] Despite this difference, however, the features distinguishing *Klopfer* from *MacDonald* may be constitutionally insignificant. The lesson of *Klopfer* is "that the anxiety suffered by an accused person, even after the prosecution has been terminated and after he has been discharged from custody, warrants application of the speedy trial protection."[86] Had the Court shifted its focus from indictment formalities to the anxiety suffered by the accused, it might have found the reasoning in *Klopfer* persuasive. The Supreme Court in *MacDonald*, however, favored the "rights of public justice" over those of a defendant in a criminal prosecution,[87] and interpreted the speedy trial clause and *Klopfer* as requiring that the sixth amendment be suspended once charges are dismissed.

In resolving this speedy trial question regarding the duration of the constitutional protection, *MacDonald* created new problems in sixth amendment jurisprudence through dictum suggesting that the result might have been different had the government acted in bad faith. One issue is the proper interpretation of that dictum.[88] Because the bad faith dictum is subject to two interpretations, confusion may result among the lower courts as they attempt to comply with the *MacDonald* decision.

First, lower courts could find that the bad faith dictum should not be read

81. *MacDonald*, 102 S. Ct. at 1501.
82. *Id.* at 1505 (Marshall, J., dissenting).
83. *Id.* at 1502.
84. *Id.* at 1507 (Marshall, J., dissenting).
85. *Id.* at 1502 n.8.
86. *Id.* at 1506 (Marshall, J., dissenting).
87. Beavers v. Haubert, 198 U.S. 77, 87 (1905).
88. The dissenters called the dictum "puzzling" and did not consider it an element of the Court's decision. 102 S. Ct. at 1508 n.6 (Marshall, J., dissenting).

into the holding. Were this interpretation adopted, defendants could not assert speedy trial violations with respect to the period between charges. Therefore, if the defendant could not demonstrate the actual prejudice necessary to trigger the *Lovasco* due process analysis,[89] the government could, in murder cases, "delay a second prosecution for no reason" with impunity.[90]

Second, lower courts could find that the bad faith dictum qualifies the holding.[91] With this caveat governing its application, *MacDonald* is a flexible decision in accordance with the Court's admonition against "allowing doctrinaire concepts . . . to submerge the practical demands of the constitutional right to a speedy trial."[92] Under this approach, courts could apply the *Barker* balancing test to bad faith prosecutorial delay after the dismissal of the original charges.

Although considering the bad faith dictum as a caveat to the *MacDonald* holding might better serve the interests of justice by providing courts with the doctrinal flexibility needed to deal with instances of prosecutorial misconduct, this interpretation would call into question fundamental precepts of speedy trial jurisprudence. Under *Marion* and *Barker*, the four-factor balancing test for determining sixth amendment violations is applicable only to an accused.[93] *MacDonald*, however, apparently held that a criminal defendant no longer is an accused once charges are dismissed.[94] Therefore, applying the *Barker* analysis to the period between charges would indicate that bad faith prosecutorial delay either confers upon the defendant the status of an accused or makes *Barker* applicable although the defendant is not an accused.

Assuming an exception should be made to established doctrine to accommodate the ends of justice, another issue is what constitutes the prosecutorial bad faith necessary to trigger the *Barker* analysis. Reference to dictum in Supreme Court cases and to the array of circuit court decisions construing *Marion* and its progeny suggest four possible answers. The *Barker* balancing test could be applied to the period between charges when the government: (1) "dismissed and later reinstituted charges to evade the speedy trial guarantee,"[95] or (2) delayed prosecution solely "to gain a tactical advantage over the

89. In fact, MacDonald could not demonstrate the requisite prejudice. On remand, the Fourth Circuit Court of Appeals rejected MacDonald's due process appeal. *See supra* note 26.

90. 102 S. Ct. at 1508 (Marshall, J. dissenting). A capital crime such as murder does not have a statute of limitations. *See* 18 U.S.C. § 3281 (1976). Because defendants rarely prevail on due process claims, *see Lovasco*, 431 U.S. 783, 796-97 (1971), the government conceivably could delay prosecuting a murder with impunity. Most crimes, however, have a statute of limitations that prevents the "bringing of overly stale criminal charges." United States v. Ewell, 383 U.S. 116, 122 (1966).

91. Thus qualified, the holding would be that absent proof of prosecutorial bad faith, claims of speedy trial right violations in the period between accusations are not justiciable. For the implications of such a holding for speedy trial jurisprudence, see *infra* text accompanying notes 93-98.

92. 102 S. Ct. at 1510 (Marshall, J. dissenting) (quoting Smith v. Hooey, 393 U.S. 374, 381 (1969)). In *Barker v. Wingo* the Court also rejected an "inflexible" analytical framework. *Barker*, 407 U.S. 514, 517-18 (1972)

93. *See supra* text accompanying notes 52-55, 59-62.

94. 102 S. Ct. at 1502.

95. 102 S. Ct. at 1503 n.12. The Court implied that this constituted prosecutorial bad faith. *See id.*

accused,"[96] or (3) engaged in forum shopping or stockpiling charges,[97] or (4) ultimately prosecuted the defendant for crimes that only gilded "the charge underlying his initial arrest."[98]

In conclusion, the Supreme Court in *United States v. MacDonald* was faced with a difficult problem the parameters of which were not defined by stare decisis. That problem was determining whether prosecutorial delay between the dismissal of military charges and the return of civilian indictment violated the sixth amendment. The Court found that a defendant ceased to be an accused once charges were dismissed and held that the sixth amendment did not apply to the period between accusations. The Court's doctrinaire holding resolved one gray area of speedy trial jurisprudence. The bad faith dictum, however, once again muddied the waters of this "slippery" and "amorphous" constitutional right. Because that dictum is subject to two interpretations, there will be new confusion in speedy trial jurisprudence as the lower courts attempt to follow the mandate of *MacDonald*.

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96. United States v. Marion, 404 U.S. 307, 325 (1971).

97. *See supra* note 74 and accompanying text.

98. United States v. DeTienne, 468 F.2d 151,155 (7th Cir. 1972), *cert denied*, 410 U.S. 911 (1973). *See also supra* note 75.