Duquesne Law Review

Volume 21 | Number 3 Article 8

1983

Constitutional Law - Sixth Amendment - Speedy Trial Clause

David G. Henry

CONSTITUTIONAL LAW—SIXTH AMENDMENT—SPEEDY TRIAL CLAUSE—The United States Supreme Court has held that the period of time between the dismissal of military charges and a subsequent indictment on civilian criminal charges should not be considered when evaluating an accused's right to a speedy trial.

United States v. MacDonald, 102 S. Ct. 1497 (1982).

Jeffrey MacDonald's pregnant wife and two children were murdered on the night of February 17, 1970.[1] The homicide occurred in the family's home on the Fort Bragg, North Carolina, military reservation where MacDonald, a physician, was serving as a captain in the Army Medical Corps.[2] The Army Criminal Investigation Division (CID) considered MacDonald a suspect in the case and restricted him to quarters on April 6, 1970.[3] After formally charging him under the Uniform Code of Military Justice (UCMJ)[4] on May 1, 1970, the Army appointed an officer to investigate the

---

1. United States v. MacDonald, 102 S. Ct. 1497, 1499 (1982). *See* MacDonald v. United States (MacDonald I), 531 F.2d 196 (4th Cir. 1976), *rev'd*, 435 U.S. 850 (1978), MacDonald v. United States (MacDonald II), 632 F.2d 258 (4th Cir. 1980), *reh'g denied*, 635 F.2d 1115 (4th Cir. 1980), *rev'd*, 102 S. Ct. 1497 (1982).

2. 102 S. Ct. at 1499. When the military police arrived, they found the three victims dead and MacDonald unconscious from multiple stab wounds, one of which had caused a collapsed lung. *Id.* Upon questioning, MacDonald alleged that three men and a woman had gained entrance into his home while he was asleep. They stabbed and clubbed him into unconsciousness, and when he awoke, he found his wife and two daughters dead. He called the military police before losing consciousness again. *Id.* at 1499-1500.

3. *Id.* at 1500. MacDonald was relieved of all military duties, his telephone calls were logged, and he was placed under the surveillance of an escort officer whenever he left his quarters. 531 F.2d at 200 (MacDonald I).

4. 102 S. Ct. at 1500. *See* Uniform Code of Military Justice (U.C.M.J.) art. 30, 10 U.S.C. § 830(a) (1976) which provides in pertinent part:

> (a) Charges and specifications shall be signed by a person subject to this chapter under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—
>
> (1) that the signer has personal knowledge of or has investigated, the matters set forth therein; and
>
> (2) that they are true in fact to the best of his knowledge and belief.

Id. See also U.C.M.J. art. 10, 10 U.S.C. § 810 (1976) which provides in pertinent part: "Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require . . . ." *Id. See also* U.C.M.J. art. 9, 10 U.S.C. § 809 (a), (d) (1976) which provides in pertinent part: "(a) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person . . . . (d) No person may be ordered into arrest or confinement except for probable cause." *Id.*

charges.[5] The investigating officer's report recommended that the charges and specifications against MacDonald be dismissed, which the Army did on October 23, 1970.[6] Later that year, MacDonald received an honorable discharge based upon hardship.[7]

The CID continued its investigation of the murders at the request of the United States Justice Department and submitted a thirteen volume report in June of 1972, followed by additional reports submitted in November, 1972, and August, 1973.[8] In August, 1974, the Justice Department presented its case to a grand jury, who in January, 1975, returned an indictment charging MacDonald with the three murders.[9]

MacDonald moved to dismiss the indictment prior to his trial in federal district court[10] on the grounds that the delay in bringing him to trial violated his sixth amendment right to a speedy trial.[11] Although the federal district court denied the motion,[12] the Court of Appeals for the Fourth Circuit allowed an interlocutory appeal and reversed the district court's dismissal of the speedy trial claim, holding that the delay did violate MacDonald's right to a speedy trial.[13] However, the United States Supreme Court granted certio-

---

5. 102 S. Ct. at 1500. In accordance with military law proscribed by U.C.M.J. art. 30, 10 U.S.C. § 832 (1976), an article 32 hearing was conducted by the investigating officer. The purpose of an article 32 hearing is to determine whether the suspect should be subjected to court martial proceedings. The hearing is conducted similarly to a trial, as the government and the suspect call witnesses and have the full right of cross examination. Generally, considerable latitude in admitting evidence is allowed to both sides. *See supra* note 4. For a further discussion of article 32 hearings, *see generally* E. BYRNE, MILITARY LAW §§ 319-20 (1976) and H. MOYER, JR., JUSTICE AND THE MILITARY §§ 2.425-.433 (1972).

6. 102 S. Ct. at 1500. The investigating officer concluded that the charges against MacDonald were not true and recommended that civilian authorities investigate a named suspect. 531 F.2d at 200 (MacDonald I).

7. 102 S. Ct. at 1500. MacDonald's discharge precluded any further proceedings against him by the Army. *Id.* at n.3. *See* United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955).

8. 102 S. Ct. at 1500.

9. *Id.*

10. *Id.* The federal district court had jurisdiction because the crimes were committed on military property. *Id.* at n.4. *See* 18 U.S.C. §§ 7(3), 1111 (1976).

11. 102 S. Ct. at 1500. *See* U.S. CONST. amend. VI which provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . . ." *Id.*

12. 102 S. Ct. at 1500.

13. *Id.* The Fourth Circuit determined that MacDonald's freedom from detention or bail during the interval between the termination of the article 32 proceedings and his arrest after indictment did not, from a practical standpoint, dispel the effects of the government's initial accusation. 531 F.2d at 204 (MacDonald I). For an analysis of the Fourth Circuit's decision, *see* 17 WAKE FOREST L. REV. 89 (1981).

rari and reversed the court of appeals on prematurity grounds.[14]

MacDonald was tried in federal district court and convicted on two counts of second degree murder and one count of first degree murder.[15] On appeal, the court of appeals followed its reasoning in *MacDonald I* and again found that MacDonald's sixth amendment right to a speedy trial had been violated and the indictment was dismissed.[16] The court also denied rehearing en banc.[17] The United Supreme Court granted certiorari[18] and reversed the court of appeals, holding that the interval of time between the dismissal of military charges and a subsequent indictment on civilian criminal charges was not relevant when considering whether the delay in bringing an accused to trial violated his sixth amendment right to a speedy trial.[19]

Writing for the majority, Chief Justice Burger[20] first examined the pertinent language of the sixth amendment and concluded that, under a literal reading of the speedy trial clause,[21] protection is only afforded after a formal accusation has been made and a criminal prosecution has begun.[22] Chief Justice Burger relied on *United States v. Marion*,[23] in which the Court held that the speedy trial clause does not apply to the period before a defendant is indicted, arrested, or otherwise officially accused.[24] The Chief

---

14. 435 U.S. 850 (1978). The Supreme Court held that the trial on the merits must be completed before a criminal defendant can appeal the denial of his motion to dismiss on speedy trial clause grounds. *Id.* at 863. *See* 102 S. Ct. at 1500.

15. 102 S. Ct. at 1500. MacDonald was sentenced to three consecutive terms of life imprisonment. *Id.*

16. 632 F.2d 258 (4th Cir. 1980) (MacDonald II). At this trial, MacDonald claimed a due process violation and raised issues involving conduct of the trial and rulings of the trial judge, but the court of appeals declined to reach those issues. 102 S. Ct. at 1500-01 n.5.

17. 635 F.2d 1115 (4th Cir. 1980). The denial of rehearing was by an evenly-divided vote. 102 S. Ct. at 1501.

18. 451 U.S. 1016 (1981).

19. 102 S. Ct. at 1501-03 (1982). The Court held that any analysis of MacDonald's speedy trial rights should not be influenced by the evidentiary basis of the jury verdict. *Id.* at 1501 n.6.

20. *Id.* at 1499. Justice Stevens wrote a separate concurring opinion. *Id.* at 1503.

21. *See supra* note 11.

22. 102 S. Ct. at 1501. *See* Dickey v. Florida, 398 U.S. 30 (1970) where the Supreme Court stated in dicta that the speedy trial guarantee does not apply to the time period before an accused is arrested or indicted.

23. 404 U.S. 307 (1971).

24. *Id.* at 313. The Court in *Marion* stated:

> On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been "accused" in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time. The Amend-

Justice also explained that in addition to the period after indictment, the period between arrest and indictment must also be considered in evaluating a speedy trial claim.[25] He pointed out that although delay prior to arrest or indictment may give rise to a due process claim under the fifth amendment,[26] or to a claim under any applicable statutes of limitations, no sixth amendment right to speedy trial arises until charges are pending.[27]

Chief Justice Burger found that the speedy trial clause also has no application after the government, acting in good faith, formally drops charges.[28] He stated that any undue delay after charges are dismissed must be scrutinized under the due process clause, not the speedy trial clause.[29]

The Chief Justice observed that the Court had identified the interests served by the speedy trial clause in *Marion*.[30] He stated

---

ment would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him.

Id.

In *MacDonald*, the government had relied heavily on the *Marion* opinion in its argument that MacDonald had no right to speedy trial protection for the time between the dismissal of the military charges and the civilian criminal indictment. *See* Brief for Petitioner at 15, 25, United States v. MacDonald, 102 S. Ct. 1497 (1982).

25. 102 S. Ct. at 1501. *See* Dillingham v. United States, 423 U.S. 64 (1975), in which the Court determined that a defendant becomes an accused upon arrest or indictment, and that his sixth amendment rights begin upon accusation. *Id.* at 65.

26. 102 S. Ct. at 1501. *See* United States v. Lovasco, 431 U.S. 783 (1977).

27. 102 S. Ct. at 1501.

28. *Id.*

29. *Id.* Justice Burger noted that the majority of the courts of appeals have held that the time after the dismissal of an original charge is not protected by the speedy trial clause. *Id.* at n.7. *See* Arnold v. McCarthy, 566 F.2d 1377 (9th Cir. 1978) (in a period after dismissal of charges and re-arrest, the defendant was no longer an accused and had no speedy trial right); United States v. Hillegas, 578 F.2d 453 (2d Cir. 1978) (after dismissal of criminal charges, defendant was not subject to the restraints of arrest, public obloquy, or disruptions of employment, thus, he was not protected by the sixth amendment); United States v. Martin, 543 F.2d 577 (6th Cir. 1976), *cert denied*, 429 U.S. 1050 (1977) (the time period between two separate indictments for the same charge did not count for speedy trial purposes, as there was no indictment which could have been tried); United States v. Bishton, 463 F.2d 887 (D.C. Cir. 1972) (period of time between prosecutions did not count for speedy trial purposes, as defendant was a free man against whom no prosectuion was pending).

30. 102 S. Ct. at 1501-02. *See* United States v. Marion, 404 U.S. 307, 320 (1971), in which the Court stated:

> Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associa-

that the purpose of the speedy trial guarantee was not primarily to prevent prejudice to the defense caused by the passage of time,[31] but rather to reduce the magnitude of the hardships that an accused might suffer, such as incarceration prior to trial, restriction of liberty while on bail, and disruption of life caused by the existence of pending criminal charges.[32] Accordingly, the Chief Justice found that once charges are dismissed, the speedy trial clause is no longer applicable, as the formerly accused person is then in the same position as any other subject of a criminal investigation. He cannot be incarcerated, is not restricted by the requirements of bail, and is no longer the subject of public accusation.[33] Even when there is a continuing investigation of the dismissed charges, the formerly accused's position does not compare to that of a defendant who is being held to answer a pending criminal charge.[34]

Chief Justice Burger disagreed with the court of appeals decisions in *MacDonald I and II*. The court of appeals had held that criminal charges were essentially pending against MacDonald during the entire period of time between his military arrest and his subsequent indictment on civilian charges.[35] The Chief Justice found that once the Army had formally dismissed the charges against MacDonald, he was free of government intervention into his personal liberty.[36] Even though the Army's investigation continued, MacDonald was in the same position as any other subject of a criminal investigation, and his constitutional rights should be evaluated as though no charges had ever been made.[37] Accordingly,

---

tions, subject him to public obloquy, and create anxiety in him, his family and his friends.

Id.

31. Chief Justice Burger noted that this interest is primarily protected by the due process clause and by statutes of limitations. 102 S. Ct. at 1502.

32. *Id.*

33. *Id.*

34. *Id.* The majority conceded that a formerly accused could suffer stress and an interruption of his ordinary life, but that he would be in the same position as any party subject to a criminal investigation who had not been officially accused. *Id.*

35. 531 F.2d 196, 204 (MacDonald I). The court of appeals determined that MacDonald's military arrest initiated the protections of the speedy trial clause. *Id.* The Supreme Court did not address the question of whether a military arrest is similar enough to a civilian arrest or indictment to engage the protections of the sixth amendment because the government expressly declined to raise that issue on appeal. 102 S. Ct. at 1502-03 n.10.

36. *Id.* at 1503. The Chief Justice stated that MacDonald was free to practice medicine and live his life as he chose. *Id.*

37. *Id.* The government argued that once the military charges were dismissed, MacDonald was free from the pending charge as well as the anxiety, expense, and infringement of liberty that accompanied the accusation. Accordingly, MacDonald was in the same situa-

Chief Justice Burger held that MacDonald had no claim regarding a violation of his speedy trial right, as there was no period of government delay during the time he was subject to pending charges.[38]

Justice Stevens, in a concurring opinion,[39] agreed with the dissenting opinion of Justice Marshall that MacDonald's speedy trial right was not suspended during the time between the Army's dismissal of its charges and the subsequent civilian indictment.[40] He concluded, however, that the delay did not violate the speedy trial clause, as the government must be allowed to proceed with caution in prosecuting such a serious offense.[41]

In dissent, Justice Marshall disagreed with the majority's view that MacDonald's speedy trial right was inapplicable to the period of time between the Army's dismissal of its charges and the return of the civilian indictment.[42] He further found that the majority's conclusion was not justified by the language of the speedy trial clause, the decisions of previous cases, or established speedy trial policies.[43]

Justice Marshall stated that because the majority had skipped some relevant facts, it was necessary for him to review them in more detail.[44] He noted that the Army's investigation and prosecution of MacDonald was exhaustive,[45] and that the charges were dismissed because the investigating officer determined that they were not true.[46] However, the CID continued its investigation, which resulted in the submission of its original report to the Justice Department in June, 1972, almost two years after the military charges against MacDonald had been dropped.[47] Justice Marshall further

---

tion as any person who is a suspect in a criminal investigation, and that situation does not compare to a defendant who is formally charged and held to answer. Brief for Petitioner at 25, United States v. MacDonald, 102 S. Ct. 1497 (1982).

38. 102 S. Ct. at 1503. The Chief Justice noted that, by his own admission, MacDonald conceded that any delay between the civilian indictment and trial was caused primarily by his own legal manuevers. *Id.*

39. 102 S. Ct. at 1503 (Stevens, J., concurring).

40. *See infra* notes 42-84 and accompanying text.

41. 102 S. Ct. at 1503 (Stevens, J., concurring).

42. 102 S. Ct. at 1504 (Marshall, J., dissenting). Justices Brennan and Blackmun joined Justice Marshall in dissent.

43. *Id.*

44. *Id.*

45. *Id.* Participating in the initial investigation were the military police, the Army's Criminal Investigation Division (CID), the Federal Bureau of Investigation (FBI), and the local police. *Id.*

46. *Id.* Fifty-six witnesses testified in the course of the article 32 hearing. *Id. See supra* note 5.

47. *Id.* 102 S. Ct. at 1504 (Marshall, J., dissenting).

noted that the CID undertook no significant new investigation into the murders after submitting its original report, and that both the United States District Attorney involved and the CID recommended that the case be submitted to a grand jury soon after the date of that report.[48] Furthermore, MacDonald repeatedly requested that the government complete its investigation and frequently offered to be interviewed or questioned, but the Justice Department commented only that the case would remain under active investigation for the "foreseeable future."[49] Finally, when the government presented the case to a grand jury in August, 1974,[50] it offered no reasonable explanation for its delay in prosecuting after the receipt of the June, 1972 report.[51]

Justice Marshall believed that the majority's analysis—that the speedy trial clause offers no protection to a criminal defendant during the period that a charge is not technically pending—was too simple.[52] He argued that this simplistic analysis had resulted in disrespect for the language of the clause, important precedents of the Court, and speedy trial policies.[53] He maintained that on its face, the sixth amendment would seem to apply to one who has been publicly accused, has obtained dismissal of the charges, and has then been charged once again with the *same* crime by the *same* sovereign.[54] He argued that nothing in the language suggests that a defendant must be continuously under indictment in order to obtain a speedy trial right, but rather a natural reading of the clause suggests that it continues to protect one who has been accused of a crime until the government has completed its attempts to try him for that crime.[55]

---

48. *Id. See* 531 F.2d at 206-07 (MacDonald I).

49. 102 S. Ct. at 1505 (Marshall, J., dissenting). *See* 531 F.2d at 207 (MacDonald I).

50. Justice Marshall noted that MacDonald waived his right to remain silent and testified before the grand jury for a total of more than five days. 102 S. Ct. at 1505 (Marshall, J., dissenting). He indicated that numerous other witnesses testified, the bodies of the victims were exhumed, and the FBI reinvestigated certain aspects of the crime. *Id.*

51. *Id.* The dissenting justices noted that the court of appeals in *MacDonald I* had found that the "leisurely pace" of the government was for its own benefit only and that the district court had concluded that the case could have been brought before the grand jury much more quickly. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* MacDonald had argued that this was the correct reading of the sixth amendment. According to this interpretation, all of the time after the Army's accusation on May 1, 1970 would have to be considered in evaluating MacDonald's claim that the government had violated his speedy trial right. Brief for Respondent at 11, United States v. MacDonald, 102 S. Ct. 1497 (1982).

Justice Marshall stated that the majority's decision contradicted previous Supreme Court cases dealing with the speedy trial clause.[56] In *Klopfer v. North Carolina*,[57] the defendant was discharged from custody and had no duty to report to the court, but was subject to a reinstatement of the previous indictment upon the prosecutor's application to the court.[58] The *Klopfer* Court determined that this was an indefinite postponement of the government's prosecution and concluded that it clearly violated the defendant's right to a speedy trial even though no charges were actively pending.[59] Justice Marshall contended that the analysis employed in *United States v. Marion*[60] was consistent with the *Klopfer* decision, as the *Marion* Court held only that the right to a speedy trial does not accrue until a defendant is officially accused, not that the dropping of the original charge terminates the defendant's speedy trial protection.[61] Justice Marshall found that the *Marion* Court did not address the question of whether a defendant is in the same constitutional situation after criminal charges have been dropped as he would have been if no charges had ever been

---

56. 102 S. Ct. at 1505 (Marshall, J., dissenting).

57. 386 U.S. 213 (1967).

58. *Id.* at 214. *See* 102 S. Ct. at 1505 (Marshall, J., dissenting).

59. Klopfer v. North Carolina, 386 U.S. 213, 223 (1967). Justice Marshall noted that the indictment was not dismissed under the "nolle prosequi" procedure ruled unconstitutional in the *Klopfer* case. 102 S. Ct. at 1506 (Marshall, J., dissenting). He also indicated that *Klopfer* teaches that the anxiety that an accused person suffers, even after his discharge from custody because of a dismissal of prosecution, warrants the application of sixth amendment rights. *Id.* The *Klopfer* Court stated that the defendant was not relieved of the limitations placed upon his liberty merely because he was free to go anywhere he pleased, as the pendency of the indictment might subject him to numerous hardships against which the speedy trial clause was designed to protect. 386 U.S. at 222.

60. 404 U.S. 307 (1971).

61. 102 S. Ct. at 1506 (Marshall, J., dissenting). *See* United States v. Marion, 404 U.S. 307 (1971). MacDonald relied on the *Marion* opinion for his claim that his speedy trial protection ran continuously from the date of the initial accusation against him. He argued that he was arrested and publicly charged by the Army, and that the protections of the speedy trial clause began at that time and continued through his civilian trial. Brief for Respondent at 21, United States v. MacDonald, 102 S. Ct. 1497 (1982).

Justice Marshall indicated that the *Marion* Court had explained its holding by stating that "the indictment was the first official act designating appellees as accused individuals." 102 S. Ct. at 1506 (Marshall, J., dissenting). *See* United States v. Marion, 404 U.S. at 324. That Court also found that sixth amendment provisions "would seem to afford no protection to those *not yet accused*, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time." *Id.* at 313 (emphasis added). Justice Marshall also stated that prior to the time of arrest or indictment an accused may suffer anxiety, but he does not suffer the special form of anxiety engendered by public accusation. 102 S. Ct. at 1506 (Marshall, J., dissenting).

made.[62]

The dissenter pointed out that *Marion* had alluded to a serious procedural impediment in extending the speedy trial right; inquiry into when the police could have made an arrest or when the prosecutor could have brought charges would raise difficult problems of proof.[63] He found, however, that in a case of successive prosecutions on the same charge, these difficulties do not exist, and therefore, the speedy trial right should attach from the date of the initial accusation, a date which is simple to determine.[64] Justice Marshall thus concluded that the majority's decision was not required by, and may be inconsistent with, prior cases.[65]

Justice Marshall asserted that the majority had plainly ignored fundamental speedy trial policies. He stated that the special anxiety that a defendant suffers because of public accusation does not disappear when the initial charge is temporarily dropped, especially when an investigation of the charge is continuing, leaving the final resolution of the charge suspended.[66] He claimed that because this anxiety is recognized as a major purpose for the speedy trial guarantee, the protection should have been available.[67]

The dissenting Justice was sympathetic to MacDonald's situation subsequent to the dismissal of the Army's charges. He attacked the statement made by the majority that MacDonald was in the same position as any other subject of a criminal investigation, asserting that it is absurd to suggest that he suffered no more anguish, interruption of life, or financial strain than if the military

---

62. 102 S. Ct. at 1506 (Marshall, J., dissenting). The dissenting justices noted that a majority of the courts of appeals have held that the speedy trial clause provides protection to the accused during the time after the dismissal of the initial charge. *Id.* at 1506 n.2. (Marshall, J., dissenting). *See* United States v. Roberts, 548 F.2d 665 (6th Cir.), *cert. denied*, 431 U.S. 920 (1977) (where defendants were arrested and had the charges dropped, but were subsequently indicted on the same charge, the speedy trial guarantee accrued at the date of the arrest and protected the defendants continuously from that time on); United States v. Avalos, 541 F.2d 1100 (5th Cir. 1976) (in situations where arrest warrants were dismissed, the speedy trial period is measured from the date of the original arrest); United States v. Lara, 520 F.2d 460 (D.C. Cir. 1975) (where the government has shown bad faith, the speedy trial period begins at the date of the original accusation).

63. 102 S. Ct. at 1506 (Marshall, J., dissenting).

64. *Id.*

65. *Id.*

66. *Id.* at 1507 (Marshall, J., dissenting).

67. *Id.* MacDonald had argued that terminating his speedy trial protection at the time the initial charge was dropped defeated the purpose of the speedy trial clause as it totally ignored the continuing effect that the initial charge had upon him. Brief for Respondent at 10-12, 21, United States v. MacDonald, 102 S. Ct. 1497 (1982).

charges had never been brought.[68] Justice Marshall further claimed that there was no purpose served by ignoring the time after dismissal of the initial charge.[69] He also stated that the Court's previous decision in *Barker v. Wingo*[70] required that the Court use a balancing approach rather than an inflexible rule in deciding cases involving a speedy trial claim.[71]

The due process clause, contended Justice Marshall, does not supply adequate protection to a defendant who is indicted a second time on the same criminal charge.[72] He asserted that due process constraints are limited in that the due process clause provides protection only in cases of deliberate or tactical delay prior to an indictment, as it was designed to allow the government to conduct a relatively unrestricted pre-accusation investigation.[73] Justice Marshall claimed that in cases where the government has already investigated and accused a defendant, it should have to reinvestigate and reprosecute within a reasonable period of time.[74] Consequently, failure to apply speedy trial protection after a charge has been dropped not only causes the defendant to suffer the consequences of the accusation without any protection, but presents a situation where the government could delay indefinitely a second prosecution for no reason.[75]

Justice Marshall concluded that the application of MacDonald's speedy trial right was not suspended during the time after the dis-

---

68. 102 S. Ct. at 1507 (Marshall, J., dissenting). Justice Marshall noted that the charges caused MacDonald to incur legal expenses, to be subjected to public suspicion, and to fear a subsequent prosection. *Id.* In his argument, MacDonald had contended that the dismissal of the charge against him by the Army did not dispel the effects that the accusation had upon him. He claimed that he was constantly subjected to publicity and public suspicion, that he was required to hire attorneys at his own expense for his continuing defense, and that his life was disrupted interminably by the threat of prosecution. Brief for Respondent at 10-12, United States v. MacDonald, 102 S. Ct. 1497 (1982).

69. 102 S. Ct. at 1507 (Marshall, J., dissenting).

70. 407 U.S. 514 (1972).

71. 102 S. Ct. at 1507-08 (Marshall, J., dissenting). *See* Barker v. Wingo, 407 U.S. 514 (1972). *See infra* notes 98-103 and accompanying text. Justice Marshall also noted that lower court opinions indicated that the balancing approach could be "faithfully discharged" in the special circumstances of successive prosecutions. 102 S. Ct. at 1508 & n.4 (Marshall, J., dissenting) (citing United States v. Henry, 615 F.2d 1223 (9th Cir. 1980); Jones v. Morris, 590 F.2d 684 (7th Cir. 1979); United States v. Roberts, 548 F.2d 665 (6th Cir. 1977); United States v. McKim, 509 F.2d 769 (5th Cir. 1975)).

72. 102 S. Ct. at 1508 (Marshall, J., dissenting).

73. *Id.* The Supreme Court has held that a criminal defendant has protection under the due process clause only if the government's pre-indictment delay was intentional in order to hinder the defense. *See* United States v. Lovasco, 431 U.S. 783 (1977).

74. 102 S. Ct. at 1508 (Marshall, J., dissenting).

75. *Id.*

missal of the Army's charges and before the civilian indictment.[76] He then considered whether the delay in bringing the civilian prosecution violated MacDonald's speedy trial right[77] by employing the balancing test enunciated by the Court in *Barker v. Wingo*[78] to the facts surrounding the twenty-six month period of time between the June, 1972, issuance of the CID report and the convening of the grand jury in August, 1974.[79] In so doing, he contended that the government's delay was long and unjustified,[80] that MacDonald undeniably had asserted his sixth amendment right,[81] and that MacDonald had suffered substantial prejudice.[82] Justice Marshall also asserted that it was possible that MacDonald suffered actual prejudice because of the government's delay, as certain witnesses could have testified differently or more effectively had the trial occurred closer to the date of the murders.[83] He concluded that MacDonald had suffered the consequences of the initial charge during the entire period of time after its dismissal, and that his speedy trial right was violated by the unreasonable delay in investigating and prosecuting him.[84]

---

76. *Id.*

77. *Id.* at 1509 (Marshall, J., dissenting). The dissenting justices found this question to be close. *Id.*

78. 407 U.S. 514 (1972). In *Barker*, the Court decided that the question of whether a defendant's speedy trial right was violated can only be answered by reviewing the facts of each case on an ad hoc basis, weighing the accused's rights against the government's conduct. The *Barker* Court found that the major factors in a speedy trial issue are the length of the government's delay, the reasons for that delay, the defendant's assertion of his speedy trial right, and the prejudice involved. *Id.* at 530-33. *See infra* notes 98-103 and accompanying text.

79. 102 S. Ct. at 1509 (Marshall, J., dissenting).

80. *Id.* The delay was more than two years long and neither the district court nor the court of appeals found a legitimate reason for the delay. *Id. See generally* 531 F.2d 196, 206 (MacDonald I) and 632 F.2d 258, 262 (MacDonald II).

81. 102 S. Ct. at 1509 (Marshall, J., dissenting). Justice Marshall stated that MacDonald frequently and vigorously asserted his speedy trial right. *Id.*

82. *Id.* Justice Marshall noted that MacDonald had suffered various forms of substantial prejudice, including anxiety, financial expense, and continuing interruptions of his private life during the twenty-six month delay. He also noted that proof of actual prejudice to an accused's defense is not necessary to maintain a speedy trial claim. *Id. See* Moore v. Arizona, 414 U.S. 25 (1973), which held that the possibility that the defense was prejudiced is the appropriate standard under the *Barker* analysis.

83. 102 S. Ct. at 1509-10 (Marshall, J., dissenting). Justice Marshall noted that memory loss occurs over time and that the coaching of witnesses prior to their testimony may have had a greater impact on the defense and its use of cross-examination since the trial was delayed for such a long period of time. *Id.*

84. *Id.* at 1510 (Marshall, J., dissenting). Justice Marshall recognized that the government has a legitimate interest in investigating a charge which has been dismissed and that such investigation should be carefully undertaken, but contended that unjustifiable delays cannot be tolerated when the defendant is enduring hardships caused by the initial charge.

Although the speedy trial clause of the United States Constitution has been in existence since 1791,[85] the Supreme Court has addressed it infrequently, with most of the cases construing the clause occurring within the past fifteen years. An early interpretation was provided in 1905 in *Beavers v. Haubert*,[86] in which the Court ruled that the right to a speedy trial is necessarily relative, as it depends upon the facts and circumstances involved in each case.[87] The *Beavers* Court further found that the clause secures rights to a defendant, but does not preclude the rights of public justice.[88]

More recently, in *United States v. Ewell*,[89] the Court reaffirmed *Beavers* and further clarified the purpose of the speedy trial clause, stating that the clause is to prevent unnecessary incarceration before trial, to minimize the anxiety and concern that is caused by public accusation, and to limit the likelihood that delays between accusation and trial will hinder the accused's defense.[90] In the following year, the Court in *Klopfer v. North Carolina*[91] held that the sixth amendment standards are rendered obligatory upon the individual states by virtue of the fourteenth amendment. The *Klopfer* Court also noted the various hardships imposed on the criminally accused, including subjection to public scorn, employment interruptions, and the creation of anxiety and concern relating to the charges.[92] The Court reasoned that those hardships require that the government not delay in bringing trial against the criminally accused.[93]

In response to continued litigation involving the speedy trial clause in the lower courts, the Supreme Court decided *United States v. Marion*.[94] That case involved a delay of approximately

---

He also asserted that suspending the availability of the speedy trial guarantee during the time between successive prosecutions serves no legitimate government interest and disregards the continuing effect that the initial charge has upon the defendant. Justice Marshall further contended that the majority's opinion was "a disappointing exercise in strained logic and judicial illusion" which misconstrues the individual's right to a speedy trial. *Id.*

85. *See supra* note 11.

86. 198 U.S. 77 (1905).

87. *Id.* at 87.

88. *Id.*

89. 383 U.S. 116 (1966).

90. *Id.* at 120. The Court noted that statutes of limitations are usually considered to be the primary guarantee against the bringing of stale criminal charges. *Id.* at 122.

91. 386 U.S. 213 (1967).

92. *Id.* at 222-26.

93. *Id.*

94. 404 U.S. 307 (1971).

three years between the commission of the crime and the date the government formally charged the accused.[95] The *Marion* Court found that the sixth amendment had no application to pre-indictment delays, as the fifth amendment's due process clause and applicable statutes of limitations provide protection in those cases.[96] The Court concluded that the speedy trial clause is activated only upon the initiation of a criminal prosecution and provides protection only to those accused in that prosecution. The *Marion* Court ruled that it is either a formal indictment or information, or else an actual arrest and holding, that initiates the protections of the speedy trial provision.[97]

One year later, *Barker v. Wingo*[98] was decided. The Court stated that one of the major purposes of the speedy trial clause is to guard against inordinate delays between public charge and trial, and held that speedy trial protection can only be determined on an ad hoc basis by weighing the accused's rights against the government's conduct in the particular instance.[99] According to the *Barker* Court, the major considerations involved in resolving the issue include the length of the delay,[100] the reason for the delay,[101] the defendant's assertion of his speedy trial right,[102] and prejudice to the defendant.[103] After the *Barker* case, eleven years passed before the Supreme Court again addressed the speedy trial clause in *MacDonald*.[104]

---

95. *Id.* at 308.

96. *Id.* at 323-24.

97. *Id.* at 320. The *Marion* Court also declared that the protections of the speedy trial clause apply only to those citizens who have suffered a restraint on their liberty or have been the subject of public accusation. The possibility that delays prior to trial could prejudice the defendant does not activate his speedy trial right. *Id.* at 325-26.

98. 407 U.S. 514 (1972).

99. *Id.* at 530. The Court discussed the unique character of the speedy trial right — calling it "vague, amorphous, and slippery." *Id.* at 521-22. Therefore, in the *Barker* Court's opinion, only by the use of a balancing approach can cases hinging on the speedy trial right be fairly decided. *Id.* at 530.

100. 407 U.S. at 530. The *Barker* Court concluded that the length of the delay is the triggering mechanism to cause an inquiry into the other pertinent factors. *Id.*

101. *Id.* at 531. The *Barker* Court explained that the various reasons which the government assigns to the delay should be given different weight by the Court. For example, deliberate delay to hamper the defense should weigh heavily against the government, while a valid reason (such as a missing witness) would justify a reasonable delay. *Id.*

102. *Id.* The *Barker* Court emphasized that failure to appropriately assert the speedy trial right would harm the defendant's cause in subsequently claiming a violation of that right. *Id.* at 532.

103. *Id.* The *Barker* Court stated that prejudice should be assessed in light of the interests that the speedy trial right seeks to protect. *Id.*

104. 102 S. Ct. 1497 (1982). Apparently the Supreme Court determined that it was

The holding in *MacDonald* is that the period of time between the dismissal of an original criminal charge and a subsequent indictment on the same charge is not considered when evaluating an accused's right to a speedy trial.[105] This holding is difficult to fully reconcile with the more recent decisions of the Supreme Court, the purposes of the speedy trial clause, and the public policy of the justice system.

The majority relied almost exclusively on the *Marion* case in ruling that no speedy trial right exists unless formal charges are pending.[106] Although the *Klopfer* case was noted by Chief Justice Burger, it was factually distinguishable because it contained an unconstitutional nolle prosequi procedure not present in *MacDonald*.[107] However, the balancing approach formulated in *Barker*[108] was not even mentioned, leaving the consideration involved in weighing the rights of the accused against the government's conduct unresolved. Even the majority's use of the *Marion* case is difficult to reconcile with that opinion, as the *Marion* Court does not specifically hold that the dropping of the original charge ends the defendant's speedy trial protection.[109]

The majority opinion can be viewed as being at odds with the established purpose of the speedy trial rule, as it denied sixth amendment protection to MacDonald even though he continuously suffered the consequences of the original accusation. All of the recent Supreme Court cases have stated that the major purpose of the speedy trial clause is to reduce the unfavorable effects that public accusation has upon the criminal defendant.[110] Denying speedy trial protection to MacDonald on the technical grounds that there were no pending charges refuses to recognize that the consequences of a criminal accusation do not disappear when the

---

necessary to more clearly define the speedy trial right, as the courts had been faced with numerous cases involving speedy claims resulting in inconsistent decisions in the courts of appeals. *See supra* notes 25 and 62.

105. 102 S. Ct. at 1501.

106. *Id. See supra* note 24 and accompanying text.

107. 102 S. Ct. at 1502 n.8. Under this procedure, the prosecutor was able to indefinitely suspend the proceedings on the indictment, and could activate the charges and have the case restored for trial at his will. *Id. See supra* notes 58-59 and accompanying text.

108. 407 U.S. 514 (1972). *See supra* notes 98-103 and accompanying text.

109. This position was advanced by MacDonald and accepted by the dissenting justices. *See supra* notes 60-62 and accompanying text.

110. *See* Barker v. Wingo, 407 U.S. 514, 519-20 (1972); United States v. Marion, 404 U.S. 307, 320 (1971); Klopfer v. North Carolina, 386 U.S. 213, 222 (1967); United States v. Ewell, 383 U.S. 116, 120. (1966).

charge is dropped.[111]

The *MacDonald* decision is also difficult to explain on public policy grounds because there are important conflicting concerns. If an accused's speedy trial right continues to run after the charges against him have been dismissed, such dismissals would be discouraged, as prosecutors would be induced to try all cases immediately rather than dismissing the charges and losing any subsequent trial on speedy trial grounds. The result would be that in cases where dismissal pending further investigation would be appropriate, there would be both unnecessary trials of innocent defendants as well as acquittals of guilty defendants who might have been convicted if additional investigation was possible.[112] If, however, the period of time protected by the speedy trial clause is not measured from the date of the original accusation, the prosecution could circumvent the speedy trial requirement by continually dismissing and reinstituting the same criminal charge against the same defendant. Delays in bringing a defendant to trial as a result of this approach will produce detrimental effects upon the administration of justice and the correctional system.[113]

The closeness of the question of whether the speedy trial clause is applicable to the time period between the dismissal of an initial charge and a subsequent indictment on the same crime is apparent from the division of the Court in *MacDonald*.[114] Nevertheless, it is likely that the effect of *MacDonald* will be limited because prosecution of most crimes is governed by a statute of limitations which greatly reduces the potential for prosecutorial delay. Therefore, delays in prosecutions are already severely restricted regardless of the *MacDonald* holding.

David G. Henry

---

111. This view was held by both MacDonald and the dissenting justices. *See supra* notes 66-67 and accompanying text.

112. *See* Brief for Petitioner at 17-18, United States v. MacDonald, 102 S. Ct. 1497 (1982).

113. *See* Brief for Respondent at 24-25, United States v. MacDonald, 102 S. Ct. 1497 (1982). Justice Marshall's dissenting opinion also discussed the potential for government abuse under the majority's decision. 102 S. Ct. at 1508 (Marshall, J., dissenting).

114. Although only Justices Brennan and Blackmun joined in Justice Marshall's dissent, Justice Stevens agreed with the dissenters that MacDonald's right to a speedy trial was not suspended during the time period between the Army's dismissal of its charges and the return of the civilian indictment. 102 S. Ct. at 1503 (Stevens, J., concurring).