Journal of Criminal Law and Criminology

Volume 73
Issue 4 *Winter*

Article 8

Winter 1982

Sixth Amendment--Limited Protection against Excessive Prosecutorial Delay

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0091-4169/82/7304-1491
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 73, No. 4
Printed in U.S.A.

SIXTH AMENDMENT—LIMITED PROTECTION AGAINST EXCESSIVE PROSECUTORIAL DELAY

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

I. INTRODUCTION

Over a decade ago, the Supreme Court held in *United States v. Marion*[1] that the speedy trial clause of the sixth amendment[2] does not apply to the period of time before a defendant is indicted, arrested, or otherwise officially accused of a crime. Last term, in *United States v. MacDonald*[3] the Court expanded this ruling and held that, in successive prosecutions by the same sovereign, the speedy trial clause is not applicable to the time period between the dismissal and reinstitution of criminal charges so long as the government acted in good faith.

This Note examines the *MacDonald* opinion and considers its impact on the sixth amendment right to a speedy trial and the rights of the criminally accused. By its decision in *MacDonald*, the Supreme Court changed the basic test for determining a speedy trial violation and created doubt as to the standard by which a sixth amendment speedy trial violation will be judged in the future. This Note argues that by excluding the period between the dismissal and reinstitution of charges, the Supreme Court has made it more difficult for individuals accused of a crime to protect themselves against excessive prosecutorial delay.

II. MACDONALD'S DECADE OF ANXIETY

In *MacDonald*, the United States Army formally charged Captain Jeffrey MacDonald, in May of 1970, with the brutal murders of his wife and two daughters. The military charges were dismissed in October of 1970.[4] MacDonald, a physician in the Army Medical Corps, thereafter

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[1] 404 U.S. 307, 313 (1971).

[2] The speedy trial clause of the sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI. *See generally* Klopfer v. North Carolina, 386 U.S. 213, 223-26 (1967) (tracing the historical development of the right to a speedy trial). See Sandell, *Speedy Trial — The Search for Workable Criteria*, 3 N. KY. ST. L.F. 42, 46-50 (1975) for a discussion of Supreme Court cases dealing with the speedy trial right.

[3] 102 S. Ct. 1497 (1982).

[4] For a discussion of the military charges against MacDonald and their effect on the

received an honorable discharge for reasons of hardship and returned to the civilian practice of medicine.[5] At the Justice Department's request, the Army's Criminal Investigation Division (CID) continued the investigation and transmitted a thirteen volume report to the Justice Department in June, 1972, recommending prosecution.[6] Not until January, 1975, however, did a grand jury indict MacDonald for the murders.

At his trial, MacDonald moved for dismissal of the indictment claiming, *inter alia*, that he had been denied his right to a speedy trial. The district court[7] denied the motion, but the Court of Appeals for the Fourth Circuit stayed the trial court proceedings and granted the petition for an interlocutory appeal.[8] The fourth circuit held that the delay of over four years from the Army's detention of MacDonald to his indictment violated his right to a speedy trial guaranteed by the sixth amendment.[9] The government appealed that decision to the United States Supreme Court which reversed and remanded the case without reaching the merits of the speedy trial claim.[10] Finally, nine years after the killings, MacDonald was tried and convicted of murdering his wife and children. On appeal, the fourth circuit again held that the delay in bringing the indictment violated MacDonald's right to a speedy trial.[11] The Supreme Court reversed and remanded.[12]

III. STOPPING THE SPEEDY TRIAL CLOCK

A. THE COURT'S REASONING

In *MacDonald*, the Supreme Court held that MacDonald's right to a speedy trial had not been violated because the time period between the

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speedy trial right, see Schuman, *Did Captain MacDonald Receive a Speedy Trial?*, 54 CONN. B.J. 69 (1980).

5 MacDonald's discharge barred any further military proceedings against him. United States *ex rel* Toth v. Quarles, 350 U.S. 11 (1955).

6 MacDonald was aware of the ongoing investigation into the murders. Several times during the period from 1972 to 1974, he requested that the Justice Department complete its investigation and offered to submit to further interviews. *MacDonald*, 102 S. Ct. at 1507 (Marshall, J., dissenting).

7 The district court had jurisdiction because the crimes were committed on military property. 18 U.S.C. §§ 7(3), 1111 (1976).

8 United States v. MacDonald, 531 F.2d 196 (4th Cir. 1976), *rev'd on prematurity grounds*, 435 U.S. 850 (1978).

9 *Id.* at 199.

10 United States v. MacDonald, 435 U.S. 850 (1978). The Supreme Court held that the "rule of finality" prohibits pretrial appeals from the denial of a motion to dismiss on speedy trial grounds. The Court reasoned that before trial "an estimate of the degree to which delay has impaired an adequate defense tends to be speculative." *Id.* at 858. Moreover, interlocutory appeals for speedy trial claims would exacerbate pretrial delay. *Id.* at 862-63. Therefore, the Court concluded that the case was not ripe for review.

11 United States v. MacDonald, 632 F.2d 258 (4th Cir. 1980), *rev'd*, 102 S. Ct. 1497 (1982).

12 *MacDonald*, 102 S. Ct. at 1503.

dismissal of criminal charges and the reinstitution of those charges by the same sovereign is not to be considered in determining whether a defendant's sixth amendment right to a speedy trial has been violated.[13] The Court recognized that this rule would apply only so long as the government was acting in good faith in dismissing and later reinstituting the criminal charges against the defendant.[14] If the government has acted in good faith, any claim of an alleged constitutional violation during the dismissal period must be brought on due process grounds.[15] The Court concluded that the sixth amendment was not intended to protect an accused against prejudice resulting from delay in prosecution.[16]

Writing for the majority, Chief Justice Burger first invoked the principle set forth in *United States v. Marion*[17] that the speedy trial clause does not apply to the pre-arrest or pre-indictment period.[18] Extending this principle, the Chief Justice concluded that the sixth amendment guarantee does not apply after the government, acting in good faith, formally drops charges against a criminal defendant.[19] The speedy trial clock stops when criminal charges are dismissed and does not start ticking again until the government reinstitutes criminal charges.

The Chief Justice reached his conclusion by equating a defendant's position during the period between dismissal and reinstitution of charges with the position of an individual who is the subject of a criminal investigation but who has not been formally accused, as was the case in *Marion*.[20] He reasoned that an ongoing investigation causes stress and discomfort and disrupts the lives of individuals to about the same degree in either situation, but unlike the case of individuals who face pending charges, their personal liberty is not seriously impaired.[21] The Supreme Court has recognized that a pending indictment may subject individuals to public scorn, deprive them of employment, and force them to curtail

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13 *See id.* at 1501.

14 *Id.*

15 *Id.* The due process clause of the fifth amendment provides that "No person shall . . . be deprived of life, liberty or property without due process of law . . . ." U.S. CONST. amend. V.

16 *MacDonald*, 102 S. Ct. at 1502.

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

18 *MacDonald*, 102 S. Ct. at 1501.

19 *Id.*

20 In *Marion*, there was a three year gap between the alleged offense and the indictment. Appellees claimed that since the government had known of the crimes and appellees' identities for three years, the failure to bring them to trial deprived them of their rights to due process of law and a speedy trial. This was the first time that the Court had dealt with the question of when the speedy trial right attaches. It held that the protection of the sixth amendment right attaches only after an individual has been formally accused of a crime either by arrest or formal indictment. United States v. Marion, 404 U.S. 307, 320 (1971).

21 *MacDonald*, 102 S. Ct. at 1502.

their speech and associations.[22] The purpose of the sixth amendment is to minimize these adverse effects resulting from arrest and subsequent unresolved charges.[23] Chief Justice Burger concluded, however, that after charges against an individual have been dismissed, "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,"[24] and that therefore the individual is not entitled to the protection of the speedy trial clause.

Justice Marshall, in his dissent, argued that sixth amendment protection should apply to anyone against whom charges were dismissed and reinstituted. He found nothing in the amendment to suggest that a defendant must be continuously under indictment to receive its benefits.[25] Accordingly, he concluded 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."[26]

Unlike the Chief Justice, Justice Marshall found that there is a meaningful distinction between those individuals who are facing reinstitution of charges and those who have not yet been charged. He criticized the majority for its "unrealistic" suggestion that an individual, once accused of a crime, is in the same position as any other person subject to a criminal investigation.[27] Justice Marshall said that, "[i]t is simply absurd to suggest that he [MacDonald] has suffered no greater anxiety, disruption of employment, financial strain or public obloquy than if the military charges had never been brought."[28] Justice Marshall also criticized the majority for ignoring the Court's own precedent. He noted that no charges were pending against the defendant in *Klopfer v. North Carolina*,[29] in which the Court held that the indefinite postponement of prosecution over a defendant's objection denies an accused the right to a speedy trial.[30] Justice Marshall argued that *Klopfer* implied that the anxiety suffered by a criminal defendant after prosecution ter-

22 Klopfer v. North Carolina, 386 U.S. 213, 222 (1967).

23 *Id.*

24 *MacDonald*, 102 S. Ct. at 1502.

25 *Id.* at 1505 (Marshall, J., dissenting).

26 *Id.*

27 *Id.* at 1507.

28 *Id.*

29 386 U.S. 213 (1967).

30 *Klopfer* involved a *nolle prosequi*, a procedural device whereby the accused is discharged from custody but remains subject to prosecution at any time in the future at the prosecutor's discretion. *Klopfer* may be distinguished from the *MacDonald* case because the indictment had technically not been dismissed when the defendant was released from custody. Justice Marshall recognized this distinction but did not consider it controlling. He emphasized that although no charges were actively pending against Klopfer, the Court held that the speedy trial right applied. *MacDonald*, 102 S. Ct. at 1506.

minates justifies application of the speedy trial protection.[31]

In holding that the sixth amendment speedy trial clause does not apply to the period between dismissal and reinstitution of charges, Chief Justice Burger examined the interests served by the speedy trial clause and then proceeded to narrowly redefine the purposes of the sixth amendment guarantee. He stated that the speedy trial clause was designed to "minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges."[32] Previously, the Supreme Court set forth the purposes of the speedy trial clause in *United States v. Ewell*,[33] concluding that "[t]his guarantee is an important safeguard 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."[34] By narrowly redefining the purposes of the sixth amendment speedy trial right, however, the Chief Justice excluded what had been heretofore an interest served by the sixth amendment under *Ewell*, i.e., the interest in protecting against prejudice to the defendant in presenting a defense.

In speedy trial cases, prejudice caused by delay traditionally has been measured in terms of the three purposes set forth in *Ewell*. A defendant can be prejudiced by lengthy pretrial incarceration, by anxiety and concern, or by the possibility of an impaired defense.[35] Chief Justice Burger, however, concluded that the speedy trial clause is not intended to prevent the third kind of prejudice caused by the passage of time—an impaired defense. Rather, any adverse effects of the passage of time on witnesses' memories or the accused's ability to gather evidence in his or her defense, for example, are to be governed by the due process clause and the statutes of limitations.[36] Accordingly, he concluded that any constitutional challenge regarding the period between

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[31] *MacDonald*, 102 S. Ct. at 1506. After analyzing the Court's holding in *Marion*, Justice Marshall decided that it was consistent with *Klopfer*. He noted that the Court in *Marion* stated that the indictment was the "first official act" to accuse the individual, and that the Court did not address the question of the defendant's constitutional status once the charges have been dropped. He also emphasized the Court's concern with the procedural difficulties involved in extending the speedy trial right to the period prior to the first arrest or indictment. Observing that these considerations do not apply to successive prosecutions on the same charge, he concluded that the speedy trial right should attach from the date of the initial prosecution. *Id.*

[32] *Id.* at 1502.

[33] 383 U.S. 116 (1966).

[34] *Id.* at 120-21.

[35] *Id.* at 120. *See* Barker v. Wingo, 407 U.S. 514, 532 (1971).

[36] *MacDonald*, 102 S. Ct. at 1502.

dismissal and reinstitution of charges must be brought on fifth rather than sixth amendment grounds.[37]

Justice Marshall disagreed with the Chief Justice's position that the due process clause adequately protects criminal defendants from prejudice caused by prosecutorial delay. He cautioned that the due process clause will not provide sufficient protection to the accused between dismissal and reinstatement of charges: "It is no answer that the Due Process Clause protects against purposeful or tactical delay that causes the accused actual prejudice at trial. The due process constraint is limited, and does not protect against delay which is not for a tactical reason but which serves no legitimate prosecutorial purpose."[38] Justice Marshall recognized that the majority's decision to employ only the protection of the due process clause presents a serious potential for abuse. Henceforth, according to Justice Marshall, the government could delay a second prosecution indefinitely for no reason, "or even in bad faith, if a defendant is unable to show actual prejudice at trial."[39] Consequently, unreasonable and unjustifiable delay between successive prosecutions could become commonplace.[40]

B. THE IMPACT OF *MACDONALD*

The result in *MacDonald* could be viewed as the product of the Supreme Court's unwillingness to allow a defendant, who has been convicted of a heinous crime, to escape punishment by invoking a somewhat amorphous[41] speedy trial right. That right has been applied under the flexible approach of *Barker v. Wingo*[42] involving a "difficult and sensitive balancing process."[43] After all, the Court was faced not only with a constitutional question but also with a question of justice.[44] Neverthe-

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37 *Id.* at 1501.

38 *Id.* at 1508 (Marshall, J., dissenting).

39 *Id.*

40 *Id.*

41 It has been postulated that the Burger Court's criminal justice decisions can be explained by the Court's primary concern with convicting the factually guilty and that this emphasis results in constitutional interpretations that place fewer restraints on official behavior. *See* Chase, *The Burger Court, The Individual and the Criminal Process: Directions and Misdirections*, 52 N.Y.U.L. REV. 518 (1977). *But see* Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980). That author argues that the Burger Court's criminal procedure decisions do not parallel a defendant's guilt or innocence. Instead, the Burger Court, like the Warren Court, is using the criminal justice system as a tool for social engineering.

42 407 U.S. 514 (1972).

43 *Id.* at 533. For a discussion of the *Baker* test, see *infra* text accompanying notes 45-51.

44 *See* Uviller, *Barker v. Wingo: Speedy Trial Gets A Fast Shuffle*, 72 COLUM. L. REV. 1376, 1400-01 (1972) (the author discusses the difficulty which a judge faces in choosing between strict adherence to constitutional principles and doing justice in a particular case).

The *MacDonald* case presents a very sensitive issue of justice. It involved the brutal mur-

less, the decision expresses more fundamental views of the role that the sixth amendment right to a speedy trial should have in criminal jurisprudence.

The Court's decision in *MacDonald* has important ramifications for the application of the speedy trial right. The decision could have a significant impact on the Court's previous test for speedy trial violations outlined in *Barker v. Wingo*.[45]

The Supreme Court in *Barker* adopted an *ad hoc* balancing approach for determining violations of the right to a speedy trial.[46] Justice Powell, writing for the majority, outlined four factors to be examined in determining whether a particular defendant's speedy trial right has been violated: "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[47] In applying the four factors, Justice Powell viewed the length of delay as a "triggering mechanism."[48] If the delay is long enough to be "presumptively prejudicial,"[49] the court then must examine and weigh the other factors. He emphasized, however, that no one of the four factors was sufficient or necessary in itself to justify the finding of a speedy trial violation: "In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process."[50] The Court's decision generated strong criticism of both the test and its inconsistent applica-

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der of a pregnant woman and two small children. Judge Murnaghan aptly described the case as "sensational [and] drawn out . . . both hotly contested and bristling with difficult issues." United States v. MacDonald, 632 F.2d 258, 260 (4th Cir. 1980), *rev'd*, 102 S. Ct. 1497 (1982). There was a great deal of publicity surrounding the trial. *See, e.g.*, N.Y. Times, Feb. 18, 1979, at 60, col. 3; N.Y. Times, Dec. 24, 1978, at 1, col. 4. The Supreme Court was dealing with an individual who had been convicted of a particularly horrible crime and the Court was well aware of it. *MacDonald*, 102 S. Ct. at 1501 n.6.

45 407 U.S. 514 (1972).

46 Two rigid approaches had been urged upon the *Barker* Court which it rejected. The first approach was that the Constitution requires the states to offer defendants a trial within a specified period of time. The Court found "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." 407 U.S. at 523. The second approach, called the "demand-waiver doctrine," provides that a defendant waives the right to a speedy trial for any period in which the defendant has not demanded a trial. *Id.* at 525. This approach was deemed inconsistent with the Court's pronouncements on waiver of constitutional rights. *Id.*

47 *Barker*, 407 U.S. at 530.

48 *Id.*

49 For a discussion of how lower courts have interpreted this phrase, see Joseph, *Speedy Trial Rights in Application*, 48 FORDHAM L. REV. 611, 623 (1980).

50 *Barker*, 407 U.S. at 533. The petitioner in *Barker* was not brought to trial until more than five years after he had been arrested. During this time, the prosecution repeatedly obtained continuances. The petitioner, however, made no objection until three and one half years after his arrest. The Court, after weighing the various factors, concluded that the prejudice to Barker had been minimal and that he did not really want a speedy trial. Therefore, his right to a speedy trial had not been violated.

tion by the lower courts.[51]

The impact of *MacDonald* on *Barker* is not entirely clear. While holding that the speedy trial clause has no application after the government, acting in good faith, formally drops criminal charges, Chief Justice Burger's opinion casts doubt on how one prong of the *Barker* test, prejudice to the defendant, should be applied in the future. The Chief Justice stated that "[t]he Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by the statutes of limitations."[52] The Chief Justice then went on to redefine the interests that the sixth amendment is designed to protect, i.e., minimizing the possibility of lengthy pre-trial incarceration, reducing the impairment of liberty imposed on an accused released on bail, and shortening the disruption of life caused by arrest and unresolved criminal charges.[53] By narrowing the purposes which the sixth amendment is designed to serve the Chief Justice essentially bifurcated prejudice into two types. Type I prejudice results from loss or impairment of evidence or witnesses due to the passage of time, and Type II results from the impairment of liberty and disruption of life caused by arrest and indictment.[54] After finding that Type II prejudice does not implicate the sixth amendment once charges are dismissed, the Court then decided that Type I prejudice is adequately protected against by the due process clause. In doing so, the Court opened the door for prosecutors to argue that Type I prejudice should no longer be considered in any analysis of the right to a speedy trial.

By limiting the purposes of the speedy trial clause to Type II

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51 *See generally* Rudstein, *The Right to a Speedy Trial: Barker v. Wingo in the Lower Courts*, 1975 U. ILL. L.F. 11; Note, *Right to a Speedy Trial — A Balancing Test*, 58 CORNELL L. REV. 399 (1973); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1,164-71 (1972); Note, *The Constitutional Guarantee of a Speedy Trial*, 8 IND. L. REV. 414 (1974); Uviller, *supra* note 44.

52 *MacDonald*, 102 S. Ct. at 1502. For a discussion of the relationship between the speedy trial guarantee and the statutes of limitations see Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 528 (1975); Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476, 491-93 (1968); Note, *Justice Overdue, Speedy Trial for the Potential Defendant*, 5 STAN. L. REV. 95, 103 (1952); Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587, 1613 (1965) (all authors argue that the statutes do not provide adequate protection).

53 *MacDonald*, 102 S. Ct. at 1502.

54 The Supreme Court's opinion does not use the "Type I" and "Type II" dichotomy; these labels are used herein only to simplify the discussion. The lower courts have generally distinguished between three types of prejudice based on the three interests that the speedy trial right is designed to protect. *See supra* text accompanying notes 32-34. *See, e.g.*, United States v. Tercero, 640 F.2d 190, 193 (9th Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981); United States v. Hill, 622 F.2d 900, 910 (5th Cir. 1980); United States v. New Buffalo Amusement Corp., 600 F.2d 368, 378-79 (2d Cir. 1979); United States v. Dreyer, 533 F.2d 112, 115 (3d Cir. 1976); United States v. Macino, 486 F.2d 750, 753 (7th Cir. 1973); Arrant v. Wainwright, 468 F.2d 677, 682 (5th Cir. 1972), *cert. denied*, 410 U.S. 947 (1973).

prejudice, and by stating that prejudice to the defense in the form of an impaired defense is protected against by the due process clause and by statutes of limitations, the *MacDonald* decision implies that the prejudice prong of the *Barker* test may have to be modified. Even though the speedy trial clause was held to be inapplicable in *MacDonald*, the Court's decision can be interpreted as taking Type I prejudice out of the sixth amendment in cases where the speedy trial clause applies. Although the decision has this implication, nowhere does the Chief Justice recognize that his opinion could have an impact on the *Barker* test.

If *MacDonald* actually removes Type I prejudice from the *Barker* test, the "sensitive balancing process"[55] of *Barker* will be disturbed since courts have tended to relegate the remaining Type II prejudice to secondary status. Type II prejudice protects the accused's interests against lengthy pre-trial incarceration and anxiety and concern. Courts often neglect to mention these factors in a discussion of the prejudice prong of the *Barker* test,[56] however, and those courts which do address the factors have been reluctant to give them much weight. In cases involving pretrial incarceration, courts have tended to find that the prejudice suffered by a defendant was either minimal or nonexistent.[57] Courts have been even less willing to recognize that the accused suffers any substantial anxiety and concern and have required a showing of extreme anxiety and concern to the accused.[58] Vague or conclusory allegations of anxiety and stress have generally been held insufficient to show prejudice.[59] The removal of Type I prejudice, therefore, decreases the importance of one prong of the *Barker* test and makes it nearly impossible, absent a showing of extreme circumstances, for an accused to show prejudice

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[55] *Barker*, 407 U.S. at 533.

[56] *See, e.g.*, Morrison v. Jones, 565 F.2d 272, 273-74 (4th Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); United States v. Fay, 505 F.2d 1037 (1st Cir. 1974); United States v. Anderson, 471 F.2d 201, 203 (5th Cir. 1973); State v. Harris, 297 So. 2d 431 (La. 1974); State v. Hunter, 16 Md. App. 306, 295 A.2d 779 (1972).

[57] *See, e.g.*, United States v. Davis, 487 F.2d 112, 117 (5th Cir. 1973) (defendant incarcerated 13 or 14 days on pending charges), *cert. denied*, 415 U.S. 981 (1974); United States v. Jones, 475 F.2d 322, 324 (D.C. Cir. 1972) (accused incarcerated for eight months during delay). In *Barker* itself, the Court found only minimal prejudice even though the defendant spent ten months in jail awaiting trial. *Barker*, 407 U.S. at 534.

[58] *See, e.g.*, United States v. New Buffalo Amusement Corp., 600 F.2d 368, 379 (2d Cir. 1979) (prejudice from anxiety is especially significant where prolonged for four and one half years); United States v. Dreyer, 533 F.2d 112, 116 (3d Cir. 1976) (accused suffered a severe mental disturbance); Arrant v. Wainwright, 468 F.2d 677, 682 (5th Cir. 1972) (anxiety is especially severe in a capital case), *cert. denied*, 410 U.S. 947 (1973).

[59] *See, e.g.*, United States v. Hill, 622 F.2d 900, 910 (5th Cir. 1980); United States v. McGrath, 622 F.2d 36, 41 (2d Cir. 1980); United States v. Noll, 600 F.2d 1123, 1128 (5th Cir. 1979); United States v. Annerino, 495 F.2d 1159, 1163-64 (7th Cir. 1974); United States v. DeTienne, 468 F.2d 151, 156-57 (7th Cir. 1972), *cert. denied*, 410 U.S. 911 (1973).

caused by prosecutorial delay.[60]

C. THE BAD FAITH AND DELIBERATE DELAY STANDARD

The Supreme Court's decision in *MacDonald* could have further implications for how the *Barker* test is applied. By establishing a bad faith and deliberate delay standard for judging the government's delay between dismissal and reinstitution of charges, the decision could affect another prong of the *Barker* test—the reason for delay.

In *MacDonald*, the Court adopted a bad faith and deliberate delay standard for determining whether an accused suffered a violation of his right to a speedy trial for the period of time between dismissal and reinstatement of charges.[61] After determining that MacDonald was "legally and constitutionally" in the same position as if he had never been charged once the Army had dismissed the initial charges,[62] Chief Justice Burger noted that there was no allegation that the Army had acted in bad faith in dismissing the charges[63] nor had the Justice Department acted in bad faith in not obtaining the indictment until January 1975.[64] Chief Justice Burger considered the nature of the crime and the consequences to MacDonald and concluded that the long period between the dismissal and the indictment was justified in this case. The Chief Justice did not indicate, however, whether the period after dismissal should be included in determining speedy trial clause violations once a showing of bad faith has been made.[65] The Court also did not discuss how an accused is supposed to demonstrate that prosecutors have dismissed and reinstituted charges to evade the speedy trial clause.

There is a danger that the lower courts may adopt the bad faith and deliberate delay standard of *MacDonald* and apply it to all cases involving a possible speedy trial violation. Courts are required under

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60 Although none of the factors in *Barker* is dispositive, traditionally prejudice has been an important factor in a court's determination of a speedy trial violation. Courts have been particularly concerned with protecting the defendant's ability to present an adequate defense. In *Barker* itself, Justice Powell concluded that protecting the defendant's ability to defend himself or herself was the most serious of all the interests protected by the speedy trial guarantee. *Barker*, 407 U.S. at 532. Prejudice, especially in regard to impairment of MacDonald's defense, was a major concern of the fourth circuit in its treatment of the case. The fourth circuit's decision in *MacDonald*, to a certain extent, turned on the issue of prejudice. *See infra* text accompanying notes 86-88. For discussions of the fourth circuit *MacDonald* decisions, see Schuman, *supra* note 4; Note, *Military Restriction Triggers the Right to a Speedy Civilian Trial*, 30 U. MIAMI L. REV. 1083 (1976); Note, *Right to Speedy Trial in Civilian Prosecution Denied by Delay Following Dismissal of Military Charges*, 17 WAKE FOREST L. REV. 89 (1981).

61 *MacDonald*, 102 S. Ct. at 1503 n.12.

62 *Id.* at 1503.

63 *Id.* at 1503 n.12.

64 *Id.*

65 *Id.*

one prong of *Barker* to weigh the different reasons for government delay.[66] In applying the *Barker* test to MacDonald's case, the fourth circuit found that the delay in obtaining an indictment was the result of government indifference or negligence and found that this weighed heavily against the government.[67] If the lower court had applied a bad faith standard like the one set forth by the Supreme Court for the period between dismissal and reinstatement of charges, however, indifference or negligence would have been insufficient to invoke speedy trial protection. If adopted, this approach could make it increasingly difficult for an accused to prove a violation of the sixth amendment right to a speedy trial. Bad faith or deliberate delay is difficult to prove, especially when prosecuting officials assert that they needed more time to collect new evidence.

Even if the bad faith standard is not adopted under the *Barker* test, the bad faith standard has significant implications for prosecutorial strategy. After *MacDonald*, the government can press charges against an individual, but finding that it lacks sufficient evidence, the government can drop those charges and continue to investigate the case at its leisure while the accused suffers the anxiety of knowing that the charges will be reinstated. In effect, the majority's decision eliminates a constitutional safeguard against prosecutorial tactical maneuvering which subverts the right to a speedy trial itself. So long as the government can demonstrate a need for new evidence, a need which is seemingly limitless, the only restraint upon prosecutorial delaying tactics will be an ineffective[68] due process clause.

The setting of the standard of bad faith and deliberate delay in *MacDonald* can be seen as the Court's attempt to place limits on the sixth amendment right to a speedy trial and to favor criminal investigative procedures.[69] Chief Justice Burger does not support the decision

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66 Barker v. Wingo, 407 U.S. 514, 531 (1972).

67 United States v. MacDonald, 632 F.2d 258, 262 (4th Cir. 1980), *rev'd*, 102 S. Ct. 1497 (1982); United States v. MacDonald, 531 F.2d 196, 207 (4th Cir. 1976), *rev'd on prematurity grounds*, 435 U.S. 850 (1978).

68 *See* text accompanying notes 73-77.

69 This view would be consistent with the Court's decisions concerning the relationship between investigative delay and the due process clause. In *United States v. Lovasco*, the Court held that the prosecution of a defendant following a good-faith investigative delay does not deprive the individual of due process. 431 U.S. 783, 796 (1977). In his majority opinion, Justice Marshall discusses the reasons for the Court's reluctance to place limitations on investigative delay. He notes that an immediate arrest or indictment might make it difficult for the prosecution to continue the investigation and obtain additional indictments. *Id.* at 792-93. A requirement of immediate prosecution upon probable cause would also pressure prosecutors into resolving doubtful cases in favor of early, and perhaps unwarranted, prosecutions and would preclude full consideration of the desirability of not prosecuting in a particular case. *Id.* at 793-94.

with strong policy arguments although such arguments were presented to the Court by both sides in their briefs.[70] Instead, the Chief Justice's opinion implicitly accepts the government's contention that the application of the speedy trial clause to the period between dismissal and reinstatement of charges would have an adverse impact on the administration of justice.[71] If the Burger Court truly is concerned with maintaining law and order,[72] this would provide a strong policy rationale for the decision.

D. RAISING THE HURDLES BY SWITCHING AMENDMENTS

The *MacDonald* case has further implications for the rights of the accused. By requiring courts to apply a due process standard rather than the speedy trial standard to the period between dismissal and reinstatement of charges, the Court is placing a greater burden on the accused. The quantum of proof required to show actual prejudice and intentional delay, the components of the due process test,[73] is much higher than the proof required under the *Barker* test for speedy trial violations. In its disposition of the *MacDonald* case, the fourth circuit compared the two standards in terms of the proof required for a showing of prejudice:

> For Fifth Amendment purposes there must be a determination that the prejudice was so extreme as to amount to violation of "those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' . . . and which define 'the community's sense of fair play and decency,' ". . . . The test, as to prejudice, for Sixth Amendment purposes is not so stringent. The fact that the delay was undue and resulted in prejudice suffices in MacDonald's case, whether or not the delay and consequent prejudice were so egregious as to amount to deviation from "fun-

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[70] *See* Reply Brief for Petitioner at 16, United States v. MacDonald, 102 S. Ct. 1497 (1982); Reply Brief for Respondent at 16, United States v. MacDonald, 102 S. Ct. 1497 (1982). The government also presented a due process argument. *See* Brief for Petitioner at 18-22, United States v. MacDonald, 102 S. Ct. 1497 (1982).

[71] But these exercises of prosecutorial discretion will be greatly discouraged if the Speedy Trial Clause continues to apply after dismissal. Rather than forfeit the government's right to try the accused at any time, prosecutors will have an incentive to proceed with prosecutions that otherwise might have been dismissed pending further investigation. The result would be deleterious to both defendants and the government.

Reply Brief for Petitioner at 16, United States v. MacDonald, 102 S. Ct. 1497 (1982).

[72] The Burger Court has been criticized for placing too much emphasis on law and order and for placing increased restrictions on the Warren Court's expansive interpretation of the rights of those accused of a crime. *See, e.g.*, L. LEVY, AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE 423 (1974) (a particularly vehement attack on the Burger Court's decisions). *But see* Israel, *Criminal Procedure, the Burger Court and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320 (1977) (arguing that the Burger Court has not been as restrictive as its opponents claim and, in certain areas, has even expanded constitutional rights); Swindler, *The Court, the Constitution and Chief Justice Burger*, 27 VAND. L. REV. 443 (1974) (maintaining that the Burger Court is seeking to establish practical boundaries for the criminal justice system).

[73] United States v. Marion, 404 U.S. 307, 324 (1971).

damental conceptions of justice."[74]

As Justice Marshall pointed out in *MacDonald*, proof of actual prejudice is not required to demonstrate a speedy trial violation.[75]

Furthermore, circuit court decisions since *United States v. Lovasco*,[76] which further defined the due process standard, have evidenced great reluctance on the part of the courts to find a violation of due process in pre-accusation delay.[77] Since the majority in *MacDonald* considered delay during the period between dismissal and reinstatement of charges to be in the same category as pre-indictment or pre-accusation delay, it is likely that courts will be just as reluctant to find that a prolonged period between dismissal and reinstatement of charges has violated a defendant's due process rights. In this context, the due process clause will provide limited and arguably insufficient protection. If extended to the *Barker* test, the due process standard could severely impact the right to a speedy trial itself.

In *United States v. Lovasco*[78] the Court elaborated on the due process test of *United States v. Marion*.[79] In order to prove that pre-indictment delay has violated the accused's right to due process, Justice Marshall, writing for the majority, held that there must be both proof of actual prejudice and proof of a deliberate attempt by the government to gain a tactical advantage over the accused.[80] In his dissent in *MacDonald*, Justice Marshall found that there had been actual prejudice[81] to MacDon-

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74 United States v. MacDonald, 632 F.2d 258, 266 (4th Cir. 1980), *rev'd*, 102 S. Ct. 1497 (1982) (citation omitted).

75 MacDonald, 102 S. Ct. at 1509 (Marshall, J., dissenting) (citing Moore v. Arizona, 414 U.S. 25, 94 (1973)(per curiam)).

76 431 U.S. 783 (1977).

77 *See, e.g.*, United States v. Riley, 657 F.2d 1377 (8th Cir. 1981) (indictment 11 months after occurrence of crimes); United States v. Saunders, 641 F.2d 659 (9th Cir. 1980) (three year delay between violation and indictment), *cert. denied*, 452 U.S. 918 (1981); United States v. Comosona, 614 F.2d 695 (10th Cir. 1980) (435 days between offense and indictment); United States v. Rowell, 612 F.2d 1176 (7th Cir. 1980) (29 month delay in prosecution); United States v. Cerrito, 612 F.2d 588 (1st Cir. 1979) (four year pre-indictment delay); United States v. King, 560 F.2d 122 (2d Cir. 1977) (two years between offense and indictment is acceptable), *cert. denied*, 434 U.S. 925 (1977); United States v. Shaw, 555 F.2d 1295 (5th Cir. 1977) (28 month delay between offense and indictment does not violate due process because of need to investigate). In none of these cases did the courts find a due process violation.

78 431 U.S. 783 (1977).

79 404 U.S. 307, 325 (1971).

80 *Lovasco*, 431 U.S. at 790. According to Justice Marshall's majority opinion, the action complained of deprives the individual of due process only if it violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions . . . and which define the community's sense of fair play and decency." *Id.* (citations omitted).

81 Justice Marshall was particularly concerned with the possible prejudice to MacDonald resulting from the apparent loss of memory of one particular witness, Helena Stoeckley. Her testimony was critical because MacDonald's principal defense was that Stoeckley was one of the murderers. Justice Marshall felt that her testimony might have been more helpful to MacDonald and less confused if it had been given at an earier date. *MacDonald*, 102 S. Ct. at

ald at trial although this proof was somewhat "speculative."[82] He also found, however, that the delay was due to the government's indifference and neglect.[83] He concluded that it was unclear whether the government's delay fell into that category of delay "which is not for a tactical reason but serves no legitimate purpose" and which is not protected by the due process clause.[84] For MacDonald to prevail on remand, he must show actual prejudice and an intent by the government to gain a tactical advantage over him.

Many defendants will find the first hurdle of the due process test of *Lovasco* insurmountable. For example, the fourth circuit held in *MacDonald*[85] that the defendant had been prejudiced by the delay because his ability to defend himself had been impaired by the memory loss of a witness. Then in its second *MacDonald* decision,[86] the fourth circuit applied a "substantial possibility of prejudice" standard and found that there was a substantial possibility that MacDonald's defense was prejudiced due to the memory loss of a witness. It concluded that "[t]he substantial possibility of prejudice is what controls" under a sixth amendment violation.[87] However, the Supreme Court made it clear in *Marion* that a witness's memory loss alone is not sufficient to prove actual prejudice in a due process claim.[88] If a court can find no more than the substantial possibility of prejudice, a defendant's due process claim must fail. In many cases, however, criminal defendants should be able to demonstrate actual prejudice.

The real impact of *MacDonald* on a prosecutor's ability to use delay

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1509 (Marshall, J., dissenting). However, in the fourth circuit's second hearing of the *MacDonald* case, Judge Bryan, in his dissent, noted that Stoeckley, a heavy user of drugs, was unable to remember where she had been that night within a week or two after the murders and that she herself attributed her inability to recall the events of that night to her consumption of drugs. He concluded that "her remarks on the stand do not reflect a diminishing recollection of the events of nine years before, but rather a pre-existing gap in her ability to recound those events." United States v. MacDonald, 632 F.2d 258, 270 n.5 (4th Cir. 1980) (Bryan, J., dissenting), *rev'd*, 102 S. Ct. 1497 (1982).

82 *MacDonald*, 102 S. Ct. at 1509 (Marshall, J., dissenting).

83 *Id.* at 1510.

84 *Id.* at 1508 n.5.

85 United States v. MacDonald, 531 F.2d 196, 208 (4th Cir. 1976), *rev'd on prematurity grounds*, 435 U.S. 850 (1978).

86 United States v. MacDonald, 632 F.2d 258, 265 (4th Cir. 1980), *rev'd*, 102 S. Ct. 1497 (1982).

87 *Id.* at 264.

88 404 U.S. at 326. *See also* United States v. Riley, 657 F.2d 1377, 1388 (8th Cir. 1981); United States v. Stone, 633 F.2d 1272, 1274 (9th Cir. 1980); United States v. Comosona, 614 F.2d 695, 697 (10th Cir. 1980). Not even the death of a witness necessarily results in a finding of a due process violation. *See* United States v. Lovasco, 431 U.S. 783 (1977). *See also* United States v. Reed, 647 F.2d 849, 852 (8th Cir. 1981); United States v. Saunders, 641 F.2d 659, 665 (9th Cir. 1980), *cert. denied*, 452 U.S. 918 (1981); United States v. Brand, 556 F.2d 1312, 1316-17 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978).

under the guise of investigative need can be seen in the tactical advantage requirement of the due process clause. In order to establish a due process violation under *Lovasco*, the delay must be motivated by the government's attempt to gain a tactical advantage over the defendant.[89] In *MacDonald*, the court of appeals attributed the government's delay to "indifference, negligence, or ineptitude."[90] An examination of lower court decisions,[91] however, indicates that a finding of mere negligence or indifference is not sufficient to satisfy this prong of the due process test.

The prosecution's need for new evidence effectively prevents the accused from demonstrating both bad faith and a deliberate attempt by the government to gain a tactical advantage over the defendant. In *Lovasco*, the sole reason for the government's delay, which the Court determined was justifiable, was a hope by the prosecutor that others who had participated in the crime might be discovered.[92] It will be extremely difficult to prove that prosecutors have deliberately dismissed and reinstated charges to gain a tactical advantage because prosecutors can base their discretionary decisions on an assortment of reasons, from a need for more evidence to mere negligence or indifference. In effect, the Supreme Court's decision in *MacDonald* replaces the protection offered by the sixth amendment with that offered by the fifth despite the fact that the latter amendment was neither designed nor intended to address speedy trial issues and concerns.

IV. CONCLUSION

In *United States v. MacDonald* the Supreme Court restricted the application of the sixth amendment speedy trial clause by holding that it does not apply to the period between the dismissal of charges and subsequent reinstatement of the same charges by the same sovereign so long as the government is acting in good faith. Any alleged violation of an accused's constitutional rights during this period must be measured by the fifth amendment due process standard. By holding that the sixth

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89 *Lovasco*, 431 U.S. at 795.

90 United States v. MacDonald, 531 F.2d at 207. In the second *MacDonald* opinion, the court adopted this finding and noted that the delay was the product of "sheer bureaucratic indifference." United States v. MacDonald, 632 F.2d at 262.

91 *See, e.g.*, United States v. Riley, 657 F.2d 1377, 1389 (8th Cir. 1981) (accused must show delay was intentional or undertaken to gain tactical advantage); United States v. Comosona, 614 F.2d 695, 696 n.1 (10th Cir. 1980) (government's reasons for delay must be something more than mere negligence); United States v. King, 560 F.2d 122, 129 (2d Cir. 1977) (government's actions must intend to deprive defendants of their rights of defense or be in reckless disregard of those rights), *cert. denied*, 434 U.S. 925 (1977).

92 United States v. Lovasco, 431 U.S. 783, 796 (1977). In *Lovasco*, the respondent was not indicted until more than 18 months after the alleged offenses had been committed. During that time, two witnesses had died. Respondent claimed that the pre-indictment delay deprived him of due process.

amendment does not protect against prejudice caused by delay, the Court has created doubt as to what the proper test for a speedy trial violation will be in the future. As a result of the Court's decision, it will be more difficult for individuals accused of a crime to prove that their sixth amendment right to a speedy trial has been violated. Finally, it is questionable whether the due process clause will provide adequate protection in cases of successive prosecutions especially if the delay was for investigative purposes.

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