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Sixth Amendment Right to Speedy Trial Does Not Apply during Interim between Dismissal of Charges and Subsequent Indictment by Same Sovereign.

Nancy Nowlin Kerr

CONSTITUTIONAL LAW—Speedy Trial—Sixth Amendment Right to Speedy Trial Does Not Apply During Interim Between Dismissal of Charges and Subsequent Indictment by Same Sovereign.

United States v. MacDonald,
___ U.S. ___, 102 S. Ct. 1497, 71 L. Ed. 2d 696 (1982).

On May 1, 1970, the Army charged Captain Jeffrey MacDonald, a physician in the Army Medical Corps, with the murders of his pregnant wife and two daughters. A hearing was held to determine whether MacDonald should be referred to a general court-martial.[1] Concluding that the evidence was insufficient to bring MacDonald to trial, the military dismissed the charges on October 23, 1970, and six weeks later granted him an honorable discharge.[2] At the request of the United States Department of Justice, the Army reopened the investigation and summarized its findings in a June 1972 report.[3] In August 1974, the federal government convened a grand jury which on January 24, 1975, five years after the crimes had been committed, indicted MacDonald for murder.[4] The district court found MacDonald guilty of three counts of murder and sentenced him to three consecutive life sentences.[5] The Court of Appeals for the Fourth

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1. United States v. MacDonald, 435 U.S. 850, 851 (1978). Article 32 of the Uniform Code of Military Justice requires that a thorough investigation be conducted into the matters set forth by the charges to determine whether a general court-martial is warranted. U.C.M.J. art. 32, 10 U.S.C. § 832 (1976). Prior to the Article 32 hearing, MacDonald had been confined to quarters and relieved of his medical duties. United States v. MacDonald, 435 U.S. 850, 851 (1978).

2. United States v. MacDonald, 531 F.2d 196, 200-01 (4th Cir. 1976), *rev'd and remanded*, 435 U.S. 850 (1978).

3. *Id.* at 201. The Army's Criminal Investigation Division compiled the information contained in the report from 699 interviews and from the F.B.I.'s laboratory analysis of the victims' clothing. *See id.* at 201.

4. United States v. MacDonald, 435 U.S. 850, 852 (1978).

5. United States v. MacDonald, 485 F. Supp. 1087, 1088 (E.D.N.C. 1979), *rev'd and remanded*, ___ U.S. ___, 102 S. Ct. 1497, 71 L. Ed. 2d 696 (1982). Before his conviction, MacDonald's case had already twice reached the Supreme Court on interlocutory appeals. In May 1978, the Court reversed the court of appeals' decision to allow MacDonald, prior to trial, to appeal the district court's denial of his motion to dismiss on speedy trial grounds. United States v. MacDonald, 531 F.2d 196, 208 (4th Cir. 1976), *rev'd and remanded*, 435 U.S. 850 (1978). In 1979, the Court denied certiorari when MacDonald appealed the court of appeals holding that an Article 32 hearing did not cause jeopardy to attach. United States v. MacDonald, 585 F.2d 1211, 1212 (4th Cir. 1978), *cert. denied*, 440 U.S. 961 (1979).

Circuit reversed on the ground that MacDonald had been denied his constitutional right to a speedy trial.[6] The Supreme Court granted certiorari to determine whether the interval between dismissal of military charges and indictment on federal criminal charges should be considered in deciding the validity of MacDonald's sixth amendment claim.[7] Held—*Reversed and remanded.* The sixth amendment right to a speedy trial does not apply during the interim between dismissal of charges and subsequent indictment by the same sovereign.[8]

The sixth amendment to the Constitution guarantees the right to a speedy trial in all criminal prosecutions.[9] The roots of this provision reach back to the Magna Carta[10] and first appeared in America in the Virginia Declaration of Rights of 1776.[11] In the 1960's, the Warren Court declared the right to be fundamental[12] and described the purposes behind it as prevention of undue pretrial incarceration, minimization of the anxiety associated with public accusation, and a reduction of possible delay that would hamper the accused's ability to defend himself.[13] In addition

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6. United States v. MacDonald, 632 F.2d 258, 267 (4th Cir. 1980), *rev'd and remanded*, ___ U.S. ___, 102 S. Ct. 1497, 71 L. Ed. 2d 696 (1982). The court of appeals, en banc, denied the government's petition for rehearing. United States v. MacDonald, 635 F.2d 1115, 1115 (1980), *rev'd and remanded*, ___ U.S. ___, 102 S. Ct. 1497, 71 L. Ed. 2d 696 (1982).

7. United States v. MacDonald, ___ U.S. ___, ___, 102 S. Ct. 1497, 1499, 71 L. Ed. 2d 696, 700 (1982).

8. *Id.* at ___, 102 S. Ct. at 1501, 71 L. Ed. 2d at 703 (1982).

9. U.S. CONST. amend. VI. *See, e.g.*, United States v. Ewell, 383 U.S. 116, 119-20 (1966) (sixth amendment safeguards right to speedy trial); Pollard v. United States, 352 U.S. 354, 361 (1957) (right to speedy trial granted by sixth amendment to Constitution); Beavers v. Haubert, 198 U.S. 77, 86 (1905) (Constitution entitles defendant to speedy trial). The Federal Speedy Trial Act of 1974, along with various state statutes and rules, supplements the constitutional right to a speedy trial. 18 U.S.C. §§ 3161-74 (1976) (amended 1979); *see, e.g.*, CAL. PENAL CODE §§ 1382-85 (Deering 1982) (statutory provisions governing speedy trial right); N.Y. CRIM. PROC. LAW § 30.20 (McKinney Supp. 1981) (defendant entitled by statute to speedy trial after commission of crime); TEX. CODE CRIM. PRO. ANN. art. 32A (Vernon Supp. 1982) (trial priorities and time limitations set forth in Texas by statute). *See generally* 1A R. TARGOW, CRIMINAL DEFENSE TECHNIQUES § 19 (1982 & Supp. 1981) (general background and application of right to speedy trial).

10. MAGNA CARTA, c.40 (1215), *noted in* 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 172 (2d ed. 1898). King John promised not to sell, delay, or deny justice. *Id.* at 172.

11. *See* Klopfer v. North Carolina, 386 U.S. 213, 225-26 (1967). Chief Justice Warren traced the origins of the right to a speedy trial from the Assize of Clarendon in 1166 through the American Colonial period. *See id.* at 223-25. *See generally* Special Project, *Speedy Trials: An Overview of the Constitutional Right and the Federal and Texas Statutes*, 10 TEX. TECH. L. REV. 1043, 1043-49 (1979) (general discussion of early history of speedy trial right).

12. Klopfer v. North Carolina, 386 U.S. 213, 223 (1967). The *Klopfer* Court also held that the speedy trial guarantee applied to the states through the fourteenth amendment. *Id.* at 222-23.

13. *See* United States v. Ewell, 383 U.S. 116, 120 (1966); *see also* United States v.

to safeguarding the interests of the defendant, the right to a speedy trial, as interpreted by the Burger Court in *Barker v. Wingo*, also answers certain societal demands.[14] These public needs include reducing the possibility that the accused will either commit further crimes,[15] or will try to manipulate the court system stalled by a backlog of cases.[16]

The Court has never established a specific time line to demarcate the period beyond which the right to a speedy trial has been violated.[17] Instead, the outcome of a sixth amendment challenge depends upon application of the *Barker* balancing test[18] which weighs the length of the delay,[19] the reasons for the delay,[20] the defendant's assertion of his speedy

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Kaufman, 393 F.2d 172, 174-75 (7th Cir. 1968) (*Ewell* principles control resolution of speedy trial claim), *cert. denied*, 393 U.S. 1098 (1969).

14. *See* Barker v. Wingo, 407 U.S. 514, 519 (1972).

15. *See id.* at 519. The Court noted that persons free on bail have a chance to commit further crimes and that the longer the pre-trial delay extends, the more tempting becomes the opportunity to escape. *See id.* at 519-20; *see also* Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1236 (1969) (seventy percent of those arrested for robbery and released on bail were re-arrested prior to trial in Washington, D.C. in 1968). *See generally* Godbold, *Speedy Trial—Major Surgery For a National Ill*, 24 ALA. L. REV. 265, 265-66 (1972) (public safety affected by pre-trial releases on bond).

16. *See* Barker v. Wingo, 407 U.S. 514, 519 (1972). The Court described the crowded dockets as enabling defendants to bargain more effectively for reduction of charges in return for guilty pleas. *See id.* at 519; *cf.* 1A R. TARGOW, CRIMINAL DEFENSE TECHNIQUES § 19.02, at 19-4 (1982) (delay may favor a defendant through loss of prosectuion evidence or witnesses). *See generally* Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 931 (1970) (discussion of pressure that defendants free on bail exert upon court-appointed lawyers to postpone trials).

17. *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 523 (1972) (speedy trial right cannot be measured by fixed number of days or months); United States v. Ewell, 383 U.S. 116, 120 (1966) (passage of 19 months between arrests and hearings on indictments not sufficient by itself to establish sixth amendment violation); Beavers v. Haubert, 198 U.S. 77, 87 (1905) (particular circumstances of case govern speedy trial right).

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

19. *See id.* at 530. The Court stated that the length of the delay must be presumptively prejudicial before full inquiry into the remaining factors was necessary. *See id.* at 530. Wide agreement exists that delays of over one year are sufficient to create this presumption. *See, e.g.*, United States v. DiFrancesco, 604 F.2d 769, 776 (2d Cir. 1979) (30 month delay presumptively prejudicial), *rev'd on other grounds*, 449 U.S. 117 (1980); United States v. Edwards, 577 F.2d 883, 888 (5th Cir.) (21 month delay sufficient to trigger analysis), *cert. denied*, 439 U.S. 968 (1978); United States v. Roberts, 548 F.2d 665, 667 (6th Cir.) (26 month delay justifies scrutiny of speedy trial violation claim), *cert. denied*, 431 U.S. 920 (1977). Weaker consensus surrounds delays of between six months and one year. *Compare* United States v. Metz, 608 F.2d 147, 152 (5th Cir. 1979) (eight month delay not presumptively prejudicial), *cert. denied*, 449 U.S. 821 (1980) *and* United States v. Simmons, 536 F.2d 827, 831 (9th Cir.) (six month delay sufficient to trigger speedy trial right analysis), *cert. denied*, 429 U.S. 854 (1976) *with* Rowse v. District Court In and For County of Alamosa, 502 P.2d 422, 424 (Colo. 1972) (defendant bears burden of proving nine month delay unreasonable) *and* Davis v. State, 360 A.2d 467, 471 (Md. Ct. Spec. App. 1976) (less than seven months not

trial right,[21] and any prejudice incurring to the accused.[22] A successful

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adequate trigger). Delays of less than six months have generally been held reasonable. *See, e.g.,* United States v. Barboza, 612 F.2d 999, 1001 (4th Cir. 1980) (three months not presumptively prejudicial); United States v. Stoker, 522 F.2d 576, 580-81 (10th Cir. 1975) (less than three months delay insufficient to warrant speedy trial analysis); People v. Ward, 271 N.W.2d 280, 282 (Mich. Ct. App. 1978) (five months inadequate to trigger *Barker* test). *But see* United States v. Morse, 491 F.2d 149, 156-57 (1st Cir. 1974) (court engaged in full analysis although delay of only two months); State v. Bledsoe, 200 N.W.2d 529, 531 (Iowa 1972) (full analysis after delay of only 23 days).

20. *See* Barker v. Wingo, 407 U.S. 514, 530 (1972). The Court allocated different weights to three categories of delay justifications. A deliberate attempt to impede the defense weighs most heavily against the government. Prosecutorial negligence or crowded court dockets weigh less, and valid reasons, such as a missing witness, do not count against the state at all. *See id.* at 531. Intentional hampering of the defense includes delay to gain a tactical advantage or to harass the accused. *See, e.g.,* United States v. Lara, 520 F.2d 460, 464 (D.C. Cir. 1975) (delay attributable to government's court shopping); Arrant v. Wainwright, 468 F.2d 677, 682-83 (5th Cir. 1972) (government used 15 month delay to induce defense witness to change testimony), *cert. denied,* 410 U.S. 947 (1973); United States v. Hanna, 347 F. Supp. 1010, 1014 (D. Del. 1972) (11 month delay caused by prosecution's efforts to persuade defendant to testify in another case). Some courts give administrative delays very little weight against the government. *Compare* United States *ex. rel.* Barksdale v. Sielaff, 585 F.2d 288, 291 (7th Cir. 1978) (delay due to overcrowded dockets caused no prejudice to defense), *cert. denied,* 441 U.S. 962 (1979) *and* Scarbrough v. State, 250 N.W.2d 354, 361 (Wis. 1977) (overload of felony cases caused delay not attributable to prosecution) *with* People v. Johnson, 606 P.2d 738, 748, 162 Cal. Rptr. 431, 441 (1980) (continuances sought by public defender due to his schedule should be charged against government) *and* Tate v. Howard, 296 A.2d 19, 26 (R.I. 1972) (state bears responsibility for giving accused trial without unnecessary delay). Reasonable time for investigation is a valid justification for delay. *See, e.g.,* United States v. Avalos, 541 F.2d 1100, 1114 (5th Cir. 1976) (continued gathering of evidence by government justified delay), *cert. denied,* 430 U.S. 970 (1977); United States v. Mackay, 491 F.2d 616, 620-21 (10th Cir. 1973) (complexity of case explains length of delay), *cert. denied,* 419 U.S. 1047 (1974); Commonwealth v. Boyd, 326 N.E.2d 320, 327 (Mass. 1975) (acceptability of delay governed by complexity of issues).

21. *See* Barker v. Wingo, 407 U.S. 514, 530 (1972). The Court observed that there is no necessity that the defendant demand his right to a speedy trial, but the failure to assert it makes proof of denial difficult. *See id.* at 531-32. Lower courts have consistently held that a defendant must demand a speedy trial in order to later claim that his sixth amendment right was denied. *See, e.g.,* United States v. Edwards, 577 F.2d 883, 891 (5th Cir.) (failure to assert right critical to finding of no denial), *cert. denied,* 439 U.S. 968 (1978); United States v. Maizami, 526 F.2d 848, 851 (5th Cir. 1976) (no merit to speedy trial contention where defendant did not assert right); United States v. Canty, 469 F.2d 114, 125 (D.C. Cir. 1972) (failure to press speedy trial right undercuts claim of violation).

22. *See* Barker v. Wingo, 407 U.S. 514, 532 (1972). The Court listed pretrial incarceration, anxiety suffered by the accused, and possible impairment of the defense as three categories of prejudice to the defendant. *See id.* at 532. Lower federal courts have attached little significance to pretrial incarceration and to the anxiety of the defendant awaiting resolution of his charges. *See, e.g.,* United States v. Johnson, 579 F.2d 122, 124-25 (1st Cir. 1978) (time spent in jail and alleged anxiety created little incremental strain); United States v. Greene, 578 F.2d 648, 655 (5th Cir. 1978) (simple personal prejudice not adequate to show prejudicial trial delay), *cert. denied,* 439 U.S. 1133 (1979); Morrison v. Jones, 565 F.2d 272, 273-74

challenge results in absolute dismissal of the case.[23]

The Supreme Court has held that the speedy trial provision of the sixth amendment does not apply until an individual becomes, in some fashion, the accused.[24] Pinpointing this stage in a criminal prosecution

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(4th Cir. 1977) (suspicion and resulting anxiety accompany every criminal charge), *cert. denied*, Morrison v. Reed, 435 U.S. 914 (1978). The *Barker* Court viewed possible impairment of the defense as the most serious of the types of prejudice. *See* Barker v. Wingo, 407 U.S. 514, 532 (1972). In a subsequent decision the Court held that proof of possible, not actual, prejudice was sufficient to establish a denial of the speedy trial right. *See* Moore v. Arizona, 414 U.S. 25, 26 (1973) (per curiam). Lower courts have, nevertheless, generally required a showing of actual prejudice. *See, e.g.*, United States v. McGrough, 510 F.2d 598, 604 (5th Cir. 1975) (death of six potential witnesses insufficient to show actual prejudice); United States v. Beidler, 417 F. Supp. 608, 617-18 (M.D. Fla. 1976) (post-indictment delay cannot be held to violate speedy trial right until actual prejudice shown); State v. Bretz, 605 P.2d 974, 983 (Mont. 1979) (self-serving statement by defense that there may have been prejudice does not meet *Barker* test which requires showing of prejudice). *But see* State v. Ivory, 564 P.2d 1039, 1043 (Or. 1977) (sufficient to show only reasonable possibility of prejudice to defense). *See generally* Rudstein, *The Right to a Speedy Trial: Barker v. Wingo in the Lower Courts*, 1975 U. ILL. L.F. 11, 18-21 (review of how *Barker* prejudice factor has been judicially interpreted).

23. *See* Strunk v. United States, 412 U.S. 434, 440 (1973). One of the primary reasons for seeking redress under the sixth amendment rather than under any applicable speedy trial statute is the difference in remedies. State statutes may allow for reprosecution after dismissal whereas the relief granted by a constitutional challenge is dismissal with prejudice, thus precluding a retrial. *See* 1A R. TARGOW, CRIMINAL DEFENSE TECHNIQUES § 19.05 (1), at 19-34 (1982) (strategic considerations behind decision to pursue constitutional rather than statutory speedy trial claim). The success of a sixth amendment challenge does not turn on the presence of any one of the four factors. *See* Barker v. Wingo, 407 U.S. 514, 533 (1972). Courts have varied considerably regarding the mechanics of performing the necessary balancing. In the federal courts, the Court of Appeals for the Sixth Circuit requires proof of intentional delay and actual prejudice while the Fifth Circuit excuses a showing of prejudice if the other factors are present. *Compare* United States v. Van Dyke, 605 F.2d 220, 226 (6th Cir.) (settled law of Sixth Circuit requires proof of intentional delay by prosecution and actual prejudice), *cert. denied*, 444 U.S. 994 (1979) *with* Hoskins v. Wainwright, 485 F.2d 1186, 1194 (5th Cir. 1973) (prejudice no longer an issue where delay stretched eight and one half years and defendant continually demanded trial). At the state level, this divergence in approach is illustrated by New Hampshire which emphasizes prejudice and the defendant's assertion of his right while New York has ignored the prejudice factor given a lengthy delay. *Compare* State v. Fraser, 411 A.2d 1125, 1127 (N.H. 1980) (prejudice and assertion of right given greatest weight) *with* People v. Blakley, 313 N.E.2d 763, 766, 357 N.Y.S.2d 459, 464 (1974) (lack of prejudice not factor to be considered under current state law).

24. United States v. Marion, 404 U.S. 307, 313 (1971). This case focused on the time period between the criminal act and the indictment. *See id.* at 313. Asserting that the government had been aware of the crimes and identities of those eventually charged for three years prior to the indictment, the defendants moved to dismiss on speedy trial grounds. *See id.* at 310. The Court equated indictment with accusation and held that the sixth amendment's guarantee of a speedy trial does not apply to pre-accusation delay. *See id.* at 313. Nor is the government required to investigate or accuse any person within a particular period of time. *See id.* at 313; *cf.* Hoffa v. United States, 385 U.S. 293, 310 (1966) (no constitu-

has been accomplished by using arrest or the filing of an indictment or information as the moment of transformation.[25] Delays which precede arrest or indictment are subject to scrutiny under the relevant statute of limitations[26] or due process clause rather than the sixth amendment.[27] Winning dismissal of the case on due process grounds requires a showing that the pre-indictment or pre-arrest delay caused substantial prejudice to the defendant's rights during trial and was motivated by the prosecution's desire to gain a tactical advantage.[28]

While the attachment date of the right to a speedy trial is now settled with regard to a single prosecution,[29] disagreement over this subject still exists among the lower federal courts in the event of successive prosecutions.[30] When both the state and federal governments prosecute an indi-

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tional right to be arrested at any precise moment during criminal investigation).

25. *See* Dillingham v. United States, 423 U.S. 64, 65 (1975) (per curiam) (arrest causes attachment of right to speedy trial); United States v. Marion, 404 U.S. 307, 320-321 (1971) (individuals became "accused"after indictment). Most of the lower federal courts addressing the attachment date issue prior to *Marion* had used the same benchmarks, indictment or arrest, to signal the commencement of the speedy trial right. *See, e.g.*, United States v. Freinberg, 383 F.2d 60, 65 (2d Cir. 1967) (shelter of sixth amendment not available until after arrest); Harlow v. United States, 301 F.2d 361, 366 (5th Cir.) (sixth amendment right to speedy trial engaged at indictment), *cert. denied*, 371 U.S. 814 (1962); Foley v. United States, 290 F.2d 562, 565 (8th Cir.) (delay preceding indictment not covered by sixth amendment), *cert. denied*, 368 U.S. 888 (1961). *But see* United States v. Wahrer, 319 F. Supp. 585, 586-87 (D. Ala. 1970) (entire period following date of offense must be considered in speedy trial evaluation); United States v. Parrott, 248 F. Supp. 196, 202 (D.D.C. 1965) (speedy trial computation begins at date of offense).

26. *See, e.g.*, United States v. Marion, 404 U.S. 307, 322 (1971) (statutes of limitation perform function of guarding against pre-accusation delay prejudicial to defense); United States v. Ewell, 383 U.S. 116, 122 (1966) (statute of limitations is primary protection between crime and arrest or charge); United States v. Pallan, 571 F.2d 497, 499 (9th Cir.) (statute of limitations complements due process clause as safeguard during pre-indictment delay), *cert. denied*, 436 U.S. 911 (1978).

27. *See, e.g.*, United States v. Lovasco, 431 U.S. 783, 788-89 (1977) (delay prior to arrest or indictment gives rise to due process claim); United States v. Marion, 404 U.S. 307, 324 (1971) (pre-indictment delay could require dismissal on fifth amendment grounds); Sanchez v. United States, 341 F.2d 225, 228 n.3 (9th Cir.) (pre-prosecution delay may result in denial of due process), *cert. denied*, 382 U.S. 856 (1965).

28. *See, e.g.*, United States v. Lovasco, 431 U.S. 783, 789-90 (1977) (due process claim requires proof of actual prejudice and of prosecution's departure from fundamental justice); United States v. Marion, 404 U.S. 307, 324 (1971) (substantial prejudice to defendant's right to fair trial and intent on part of government to acquire tactical edge could require dismissal on fifth amendment grounds); United States v. Comosona, 614 F.2d 695, 696-97 (10th Cir. 1980) (per curiam) (defendant bears burden in due process claim of making prima facie showing that delay actually prejudiced defense and promoted by government to gain tactical advantage).

29. *See* Dillingham v. United States, 423 U.S. 64, 64-65 (1975).

30. *See* Koeppel, *The Speedy Trial Act: Conflict Among the Circuits*, 29 BUFFALO L. REV. 149, 149-67 (1980) (discussion of circuit court approaches to time of attachment of

vidual for the same conduct, some courts hold that the right to a speedy trial attaches once the government, at either level, arrests or indicts the accused.[31] Other courts keep the two sovereigns separate for speedy trial purposes.[32] Likewise, when the same sovereign brings charges, dismisses them before trial, and then elects to reindict, authorities diverge on whether the defendant's speedy trial right attaches as of the date of the first or second set of charges.[33] Using the original accusation date as the starting point, some jurisdictions then exclude the time between dismissal and subsequent refiling.[34] Others begin computation anew upon reindictment or upon the second filing of charges.[35]

Although a single sovereign can constitutionally dismiss charges and then later reindict, double jeopardy bars such an entity from prosecuting a defendant twice for the same conduct.[36] Since the military and the

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speedy trial right in dual prosecution cases).

31. *See* United States v. Cabral, 475 F.2d 715, 718 (1st Cir. 1973) (delay preceding federal prosecution on possession of firearms charge measured from date of state arrest for same offense); United States v. DeTienne, 468 F.2d 151, 155 (7th Cir. 1972) (initial federal arrest marks starting point of speedy trial right's applicability when later state prosecution is for same offense), *cert. denied*, 410 U.S. 911 (1973).

32. *See* United States v. Phillips, 569 F.2d 1315, 1317 (5th Cir. 1978) (state arrest for possession of prohibited weapon followed by federal prosecution for same act did not trigger federal court's speedy trial time limits); United States v. Mejias, 552 F.2d 435, 442-43 (2d Cir.) (right to speedy trial in federal court does not attach upon previous state arrest for same illegal activity), *cert. denied*, 434 U.S. 847 (1977).

33. *See* Joseph, *Speedy Trial Rights in Application*, 48 FORDHAM L. REV. 611, 641 (1980) (discussion of how such circumstances are treated by different jurisdictions). *Compare* WASH. R. CRIM. P. 3.3(g)(4)(West 1980) (time between dismissal of charge and refiling of same charge excluded in calculating time for trial) *with* ARK. R. CRIM. P. 28.2(b) (1977) (time period for speedy trial purposes commences anew from date defendant is recharged).

34. *See, e.g.*, 18 U.S.C. § 3161(h)(6) (1976) (delay from date charge was dismissed to date of commencement of new charges excluded from consideration under federal Speedy Trial Act); N.C. GEN. STAT. § 15-A-701(b)(5) (Supp. 1981) (period between dismissal of charges and reindictment excluded from speedy trial computation); WASH. R. CRIM. P. 3.3(g)(4) (West 1980) (speedy trial calculation does not cover interval following dismissal of charges and their later refiling).

35. *See* Crocket v. Superior Court, 535 P.2d 321, 324, 121 Cal. Rptr. 457, 460 (1975) (speedy trial period runs anew from filing of second indictment or information); ARK. R. CRIM. P. 28.2(b) (1977) (date of refiling of charges starts speedy trial computation anew).

36. U.S. CONST. amend. V. *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 319-20 (1978) (successive prosecutions are impermissible where different jurisdictions are creatures of same sovereign); Waller v. Florida, 397 U.S. 387, 394-95 (1970) (prosecution for same act of larceny by both state and municipal courts barred since judicial power springs from single source); Puerto Rico v. Shell Co., 302 U.S. 253, 264 (1937) (successive prosecutions by federal and territorial courts violate double jeopardy since both courts emanate from same sovereign). Jeopardy attaches in a non-jury trial when the court begins to hear evidence. Serfass v. United States, 420 U.S. 377, 388 (1975). In a jury trial, jeopardy attaches when the jury is empaneled and sworn. Crist v. Bretz, 437 U.S. 28, 29 (1978).

United States Department of Justice are considered divisions of the same sovereign, i.e., the federal government, consecutive prosecutions by each are barred.[37] The nation's highest military court has extended the application of this single sovereign doctrine to sixth amendment challenges enabling a serviceman to use a federal civilian arrest to engage his speedy trial right when later confronted with a military prosecution.[38]

In *United States v. MacDonald*,[39] the Supreme Court found that once the government drops charges in good faith, the sixth amendment right to a speedy trial is no longer engaged.[40] The majority determined that the right to a speedy trial attaches only when a defendant is indicted, arrested, or officially accused.[41] The Court noted that the right to a speedy trial is intended to minimize time spent in jail prior to trial, to reduce the loss of liberty experienced by an accused released on bail, and to shorten the personal social disruption resulting from arrest and unresolved charges.[42] Observing that these goals are no longer relevant once charges are dismissed, the Court concluded that after October 1970, MacDonald was constitutionally in the same position as if charges had never been filed.[43] Since there were no charges pending against MacDonald after

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37. *See* Grafton v. United States, 206 U.S. 333, 354-55 (1907) (power of both military and federal tribunal exerted by authority of United States government); *see also* Everett, *The New Look in Military Justice*, 1973 DUKE L.J. 649, 668 (because court-martial and United States district court are federal tribunals, serviceman cannot be prosecuted in both forums for same conduct).

38. *See* United States v. Hubbard, 21 C.M.A. 131, 132, 44 C.M.R. 185, 186 (1971) (F.B.I. arrest prior to private's court-martial engaged speedy trial right); *see also* Schumann, *Did Captain MacDonald Receive A Speedy Trial?*, 54 CONN. B.J. 69, 74-80 (1980) (analysis of military and Department of Justice as single sovereign for speedy trial purposes); *cf.* United States v. Small, 345 F. Supp. 1246, 1249 (E.D. Pa. 1972) (serviceman can use accusation by military to trigger speedy trial right when subsequently prosecuted by federal government).

39. ___ U.S. ___, 102 S. Ct. 1497, 71 L. Ed. 2d 696 (1982).

40. *Id.* at ___, 102 S. Ct. at 1501, 71 L. Ed. 2d at 703. Justice Stevens disagreed with the majority's conclusion that dismissal of charges suspends this sixth amendment guarantee but concurred in the judgment because, in his opinion, MacDonald's right to a speedy trial had not been violated. *Id.* at ___, 102 S. Ct. at 1503, 71 L. Ed. 2d at 705-06 (Stevens, J., concurring).

41. *Id.* at ___, 102 S. Ct. at 1501, 71 L. Ed. 2d at 703. The Court followed its decisions as to the attachment date of the speedy trial right. *See, e.g.*, United States v. Lovasco, 431 U.S. 783, 788-89 (1977) (only indictment, information, or arrest engage constitutional right to speedy trial); Dillingham v. United States, 423 U.S. 64, 64-65 (1975) (arrest, as well as indictment, triggers sixth amendment right to speedy trial); United States v. Marion, 404 U.S. 307, 313 (1971) (no sixth amendment application to individuals merely accused).

42. United States v. MacDonald, ___ U.S. ___, ___, 102 S. Ct. 1497, 1502, 71 L. Ed. 2d 696, 704 (1982). Prejudice to the defense caused by passage of time is not the primary interest protected by the sixth amendment. *See id.* at ___, 102 S. Ct. at 1502, 71 L. Ed. 2d at 704.

43. *Id.* at ___, 102 S. Ct. at 1502-03, 71 L. Ed. 2d at 704-05.

their official termination by the military and before the grand jury's indictment in January 1975, the court of appeals erred in extending sixth amendment analysis to this period of further investigation.[44] The majority reasoned that the time period following dismissal of initial charges and prior to their later reinstatement is subject to review under the due process clause, not the speedy trial clause.[45]

In a strong dissent, Justice Marshall, joined by Justices Blackmun and Brennan, maintained that MacDonald's right to a speedy trial attached from the date of the first public accusation, the filing of military charges on May 1, 1970,[46] and was violated by the delay preceding the federal indictment.[47] Marshall argued that in the event of successive prosecutions by the same sovereign for the same crime, the accused's right to a speedy trial should remain continuously attached since the dismissal of charges followed by their subsequent reinstatement creates peculiar anxiety, different in degree from that suffered by someone who has yet to be publicly accused.[48] The dissent noted that certain problems of proof justify not extending sixth amendment protection to individuals who are simply under investigation but not yet formally charged.[49] These problems revolve around making an accurate determination of when a timely arrest or indictment could have been sought.[50] In the event of successive prosecutions, however, as in MacDonald's case, the date of initial accusation is easy to ascertain by determining when formal charges were first brought.[51] Thus, the interim period following the dismissal of charges should be considered in a speedy trial claim.[52] The dissent concluded, after balancing the *Barker* factors,[53] that MacDonald's constitutional right

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44. *Id.* at ___, 102 S. Ct. at 1502-03, 71 L. Ed. 2d at 704-05.

45. *Id.* at ___, 102 S. Ct. at 1501, 71 L. Ed. 2d at 703.

46. *Id.* at ___, 102 S. Ct. at 1505-06, 71 L. Ed. 2d at 708-09 (Marshall, J., dissenting).

47. *Id.* at ___, 102 S. Ct. at 1509, 71 L. Ed. 2d at 712 (Marshall, J., dissenting).

48. *Id.* at ___, 102 S. Ct. at 1506, 71 L. Ed. 2d at 709 (Marshall, J., dissenting). Justice Marshall asserted that prior Supreme Court cases indicate that anxiety occurring even after an initial prosecution has ended justifies extension of the speedy trial guarantee. *Id.* at ___, 102 S. Ct. at 1506, 71 L. Ed. 2d at 709 (Marshall, J., dissenting). *See* Klopfer v. North Carolina, 386 U.S. 213, 222 (1967) (indefinite prolonging of anxiety resulted in denial of speedy trial right).

49. *See* United States v. MacDonald, ___ U.S. ___, ___, 102 S. Ct. 1497, 1506, 71 L. Ed. 2d 696, 709 (1982) (Marshall, J., dissenting).

50. *See id.* at ___, 102 S. Ct. at 1506, 71 L. Ed. 2d at 709 (Marshall, J., dissenting).

51. *See id.* at ___, 102 S. Ct. at 1506, 71 L. Ed. 2d at 709 (Marshall, J., dissenting).

52. *Id.* at ___, 102 S. Ct. at 1506, 71 L. Ed. 2d at 709 (Marshall, J., dissenting). Justice Marshall pointed out that because there is no statute of limitations for murder, that type of protection does not cover the pre-indictment delay at issue here. *Id.* at ___, 102 S. Ct. at 1506 n.1, 71 L. Ed. 2d at 709 n.1 (Marshall, J., dissenting).

53. *See* Barker v. Wingo, 407 U.S. 514, 530 (1972). Length of delay, the claimed justification for it, the accused's assertion of his speedy trial right, and prejudice to the defendant

to a speedy trial had been violated.[54]

The majority's decision to exclude from speedy trial calculation the time period between dismissal of charges and subsequent reinstatement[55] is entirely consistent with the Supreme Court's treatment of the investigatory stage of a criminal prosecution.[56] In the past, the Court has emphasized that the government is not required by the Constitution to accuse or investigate an individual within any certain period of time.[57] Hence, the use of arrest or indictment as the clearly visible starting line for speedy trial determination has become a well-established principle.[58] Even Justice Marshall, prior to his dissent in *MacDonald*, argued most persuasively for this identical boundary line in his majority opinion in *United States v. Lovasco*,[59] a case which solidified the Court's view that

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were the four factors listed by the *Barker* Court as essential to sixth amendment analysis. *See id.* at 530.

54. *Id.* at ___, 102 S. Ct. at 1509-10, 71 L. Ed. 2d at 712-13 (Marshall, J., dissenting). Justice Marshall stated that the correct focus for speedy trial analysis was the 26 months between the June 1972 submission of the Army's report and the calling of the grand jury in August 1974. *Id.* at ___, 102 S. Ct. at 1509, 71 L. Ed. 2d at 712 (Marshall, J., dissenting). He reasoned that the government's lack of any legitimate excuse for the delay, MacDonald's continual assertion of his speedy trial right, and possible prejudice to the accused at trial tipped the balance in support of finding a sixth amendment violation. *See id.* at ___, 102 S. Ct. at 1509-10, 71 L. Ed. 2d at 712-13 (Marshall, J., dissenting).

55. United States v. MacDonald, ___ U.S. ___, ___, 102 S. Ct. 1497, 1501, 71 L. Ed. 2d 696, 703 (1982).

56. *See, e.g.*, Brewer v. Williams, 430 U.S. 387, 400-01 (1977) (no right to legal representation during government interrogation before commencement of formal judicial proceedings); Kirby v. Illinois, 406 U.S. 682, 689-90 (1972) (no sixth amendment right to counsel during informal investigative identification prior to indictment); Massiah v. United States, 377 U.S. 201, 205-06 (1964) (right to counsel's presence during police-initiated questioning attaches after indictment). These cases illustrate that the Supreme Court has refrained from imposing constitutional limitations upon police investigations prior to the initiation of judicial proceedings. *See* Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 527 (1975) (laxity of legal controls upon phase of criminal prosecution between commission of crime and filing of charges).

57. *See* United States v. Marion, 404 U.S. 307, 313 (1971) (investigation by government not confined within specific time limits); Hoffa v. United States, 385 U.S. 293, 310 (1966) (no right to be arrested at any particular stage in a criminal investigation); *cf.* United States v. Watson, 423 U.S. 411, 431 (1976) (Powell, J., concurring) (sound police practice often requires arrest be postponed to gather further evidence).

58. *See, e.g.*, United States v. Jones, 524 F.2d 834, 839 n.7 (D.C. Cir. 1975) (established that sixth amendment right to speedy trial attaches at arrest or formal charges); United States v. MacClain, 501 F.2d 1006, 1010 (10th Cir. 1974) (sixth amendment speedy trial guarantee available after accusation occurring at indictment); United States v. Andros, 484 F.2d 531, 533 (9th Cir. 1973) (unquestionable that speedy trial right attaches only after filing of indictment, information, or arrest); *see* 1A R. TARGOW, CRIMINAL DEFENSE TECHNIQUES § 19.02, at 19-6 (1982) (sixth amendment right to speedy trial attaches upon filing of indictment or upon arrest, whichever occurs first).

59. 431 U.S. 783 (1977).

pre-indictment or pre-arrest delay is irrelevant as far as the sixth amendment is concerned.[60] MacDonald was neither under indictment nor in custody during the disputed time period but rather was the subject of a complex investigation.[61] Justice Marshall argues that this time period was not investigatory because of the previously filed military charges.[62] Following the Army's dismissal of charges, however, MacDonald was no longer under the stigma of a formal accusation or susceptible to the kind of defense prejudice that the speedy trial guarantee was intended to prevent.[63] The Court correctly categorized the interval subsequent to the dropping of charges as one of pre-indictment inquiry and as such, beyond the legitimate scope of the sixth amendment.[64]

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60. *See id.* at 788-89. In this eight-to-one decision, Justice Marshall described the problems that would be created for both the prosecution and the defense by starting the speedy trial clock prior to arrest or indictment. If, for example, time commenced upon the establishment of probable cause, law enforcement officials would be spurred to halt an investigation before evidence was fully developed in order to hasten the prosecution. *See id.* at 791-92. Defendants likewise would suffer as a result of such a starting point since the time spent accused but untried would be lengthened. *See id.* at 791-92; *cf.* 71 CHRISTIAN SCIENCE MONITOR 4 (Aug. 28, 1979) (criminal defense lawyers maintain "too speedy" justice an obstacle to effective representation of clients).

61. *See* United States v. MacDonald, 531 F.2d 196, 201 (4th Cir. 1976), *rev'd and remanded*, 435 U.S. 850 (1978); *see also* United States v. MacDonald, 635 F.2d 1115, 1117 (4th Cir. 1980) (Russell, Widener, Hall, and Phillips, J.J., dissenting), *rev'd and remanded*, ___ U.S. ___, 102 S. Ct. 1497, 71 L. Ed. 2d 696 (1982). The dissenters below called attention to the fact that from December 1971 to January 1975 MacDonald was actively engaged in the practice of medicine and was not suffering from social stigma. *See* United States v. MacDonald, 635 F.2d 1115, 1117 (4th Cir. 1980) (Russell, Widener, Hall, and Phillips, J.J., dissenting), *rev'd and remanded*, ___ U.S. ___, 102 S. Ct. 1497, 71 L. Ed. 2d 696 (1982).

62. *See* United States v. MacDonald, ___ U.S. ___, ___, 102 S. Ct. 1497, 1505-06, 71 L. Ed. 2d 696, 708-09 (1982) (Marshall, J., dissenting).

63. Telephone interview with LeRoy Jahn, Assistant U.S. Attorney for the Western District of Texas (June 24, 1982). *See also* United States v. Flores, 501 F.2d 1356, 1359-60 (2d Cir. 1974) (after dismissal of complaint and before later indictment, individual not under disabilities linked with being under arrest or under formal charges); United States v. Bishton, 463 F.2d 887, 891 (D.C. Cir. 1972) (sixth amendment not applicable when citizen neither arrested nor indicted). Certain authorities cited by Justice Marshall to support his contention that this dismissal period should count for speedy trial purposes deal with the attachment of the speedy trial right in dual prosecutions based on different charges by the state and federal governments and thus, are misapplied to the *MacDonald* fact situation. *See, e.g.*, United States v. Lai Ming Tanu, 589 F.2d 82, 83 (2d Cir. 1978) (court focused on delay in bringing defendant to trial in federal court on drug conspiracy charge after dismissal of state charges for sale of controlled substances); United States v. Cabral, 475 F.2d 715, 717-18 (1st Cir. 1973) (defendant challenged delay between state arrest for stolen goods and federal prosecution for possession of weapon); United States v. DeTienne, 468 F.2d 151, 154-55 (7th Cir. 1972) (controversy centered on use of state arrest for unlawful flight as starting point for speedy trial computation when followed by federal prosecution for bank robbery), *cert. denied*, 410 U.S. 911 (1973).

64. *See, e.g.*, United States v. Dennis, 625 F.2d 782, 793 (8th Cir. 1980) (speedy trial

While treatment of the investigatory stage has remained uniform, the Supreme Court's views of the purposes served by the sixth amendment have undergone an evolution, a fact which *MacDonald* clearly underscores.[65] Recently, increased public attention has been focused on the speedy trial guarantee and the societal interests at stake when trials are delayed.[66] A change in emphasis in the Court's portrayal of speedy trial objectives reflects this trend.[67] Traditionally, protection of the accused's rights was the primary purpose behind obtaining a speedy trial.[68] The Court has more recently added a second dimension to this purpose by stressing the public needs, such as crime deterrence, increasingly threatened by lack of prompt justice.[69]

Although these social concerns were not expressly addressed by the *MacDonald* majority, the impact of the majority's decision will be to diminish the state's burden of proof while adding to that of the defense.[70] If

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right does not apply during period between indictments); Arnold v. McCarthy, 566 F.2d 1377, 1383 (9th Cir. 1978) (defendant no longer had right to demand speedy trial following dismissal of charges and prior to second charging); United States v. Martin, 543 F.2d 577, 579 (6th Cir. 1976) (speedy trial right not engaged because indictment not pending during interim between dismissal of first indictment and return of second), *cert. denied*, 429 U.S. 1050 (1977).

65. *Compare* Barker v. Wingo, 407 U.S. 514, 532 (1972) (most serious interest served by speedy trial right is prevention of impairment of defense) *with* United States v. MacDonald, ___ U.S. ___, ___, 102 S. Ct. 1497, 1502, 71 L. Ed. 2d 696, 704 (1982) (sixth amendment right to speedy trial not primarily intended to bar prejudice to defense).

66. *See, e.g.*, San Antonio Express, June 23, 1982, at 18A, col. 2 (public concern regarding fact it took 15 months to bring John Hinckley, Jr., President Reagan's attempted assassin, to trial); N.Y. Times, June 27, 1979, § A, at 30 (editorial describing court congestion and delay); N.Y. Times, May 7, 1979, § A, at 13 (courts vexed by trial delays).

67. *Compare* Klopfer v. North Carolina, 386 U.S. 213, 222 (1967) (speedy trial right protects accused against lengthy public scorn and oppressive anxiety) *with* Barker v. Wingo, 407 U.S. 514, 534 (1972) (prejudice minimal from four year cloud of anxiety and suspicion).

68. *See* United States v. Ewell, 383 U.S. 116, 120 (1966) (sixth amendment right to speedy trial safeguards rights of accused); Beavers v. Haubert, 198 U.S. 77, 87 (1905) (speedy trial right protects defendant's interests).

69. *See* Barker v. Wingo, 407 U.S. 514, 519-21 (1972). The Court depicted the speedy trial right as different from all other constitutional rights designed to protect the accused because it also protects society's interests. *See id.* at 519. Listed among these interests were reduction of jail costs and lessening the possibility that the accused will commit further crimes. *See id.* at 519-21; *see also* United States v. Dyson, 469 F.2d 735, 738-39 (5th Cir. 1972) (society directly benefited when criminal swiftly brought to justice).

70. *See* United States v. MacDonald, ___ U.S. ___, ___, 102 S. Ct. 1497, 1501, 71 L.Ed. 2d 696, 703 (1982). Since the period following dismissal of charges is not subject to sixth amendment review, the government will not be required to justify it in a manner acceptable under the *Barker* test. *See* Barker v. Wingo, 407 U.S. 514, 531 (1972) (different weights assigned to various reasons submitted by government for excusing delays). Unless a statute of limitations applies, the only claim a defendant has available to challenge delay occurring between successive charges or indictments is one based on due process grounds, which ex-

the government drops charges in good faith, the speedy trial clock ceases to run, thus inflicting upon the accused the necessity of showing an intentional bad faith dismissal.[71] Identifying the ingredients which constitute bad faith and gathering the evidence necessary to prove it are the same problems which have weighed heavily upon the defense in making out a due process violation during pre-indictment delay.[72] Case law in the fifth amendment area is a clue to the magnitude of this burden and does not augur well for the success of a defendant confronted with an interruption in his prosecution by the same sovereign.[73]

The United States Supreme Court in *MacDonald* remained true to precedent by shielding the investigative stage of a criminal prosecution from the ticking of the speedy trial clock. As a result, prosecutors need not be discouraged from dismissing charges when evidence proves insufficient or from reinstating them if new information later surfaces.[74] The trend implicit in the Court's sixth amendment decisions reveals a turnaround from the sixties' spotlight on the rights of the accused toward a contemporary focus on the needs of society. Given the hurdle of the defendant's burden of proof in challenging pre-trial delay, the current balance, as

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acts demanding proof that fundamental concepts of fairness have been violated. *See* United States v. Lovasco, 431 U.S. 783, 790 (1977); *see also* United States v. Holman, 490 F. Supp. 755, 762 (E.D. Pa. 1980) (where sixth amendment claim fails, due process claim fails a fortiori).

71. *See* United States v. MacDonald, ___ U.S. ___, ___, 102 S. Ct. 1497, 1501, 71 L. Ed. 2d 696, 703 (1982).

72. *See* United States v. Lovasco, 431 U.S. 783, 796-97 (1977). The Court stated that it could not particularize the circumstances composing undue delay because so few defendants had thus far been able to establish it. *See id.* at 796-97.

73. *See, e.g.*, United States v. Ciraulo, 486 F. Supp. 1125, 1128 (S.D.N.Y. 1980) (conclusory statements by defense that delay was purposeful and prejudicial totally inadequate to meet due process proof); United States v. Cueto, 506 F. Supp. 9, 12 (W.D. Okla. 1979) (proof of government's ulterior motive and of actual prejudice to defense mandatory in due process claim before courts may second-guess government's timing); United States v. Williams, 437 F. Supp. 1047, 1049-50 (W.D.N.Y. 1977) (general, unsubstantiated statements regarding unavailability of witnesses and allegations that government's negligence caused delay do not warrant indictment's dismissal on due process grounds). *But see* United States v. Glist, 594 F.2d 1374, 1378 (10th Cir. 1979) (sufficient evidence of fault by government representatives to support dismissal for pre-indictment delay under due process standards of *Lovasco*).

74. Telephone interview with Susan Reed, Assistant District Attorney, Bexar County District Attorney's Office (June 16, 1982). Reed stated that if the dismissal period counted, the state would indeed be reluctant to drop charges and later refile them. If such a rule were incorporated into a statutory scheme containing definite time limits, the state could be permanently barred from prosecuting, thereby, in effect, creating a statute of limitations. At least with regard to the crime of murder, public policy strongly militates against such a result. *See id.*

struck in *MacDonald*, is visibly weighted in the government's favor.

Nancy Nowlin Kerr