UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

WESTERN DIVISION

3:90-CV-00104-DU
3:75-CR-26-F

UNITED STATES OF AMERICA

V.

JEFFREY R. MacDONALD

RESPONSE OF THE UNITED STATES TO THE ISSUANCE OF AN ORDER AUTHORIZING THE DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA TO CONSIDER SUCCESSIVE APPLICATION FOR RELIEF UNDER 28 U.S.C. § 2255

APPENDIX OF THE UNITED STATES

VOLUME I

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Volume I

Judicial Decisions 1976-1999

United States v. Jeffrey R. MacDonald

531 F.2d 196

(Cite as: 531 F.2d 196)

United States Court of Appeals,
Fourth Circuit.
UNITED STATES of America, Appellee,
v.
Jeffrey R. MacDONALD, Appellant.
Nos. 75--1870, 75--1871.

Argued Oct. 8, 1975.
Decided Jan. 23, 1976.

Defendant was indicted for murder, and appealed from decisions of the United States District Court for the Eastern District of North Carolina, at Fayetteville, Franklin T. Dupree, Jr., J., on several of his motions. The Court of Appeals, Butzner, Circuit Judge, held that in view of the length of delay, inadequate justification for the full period thereof, defendant's assertion of his right to speedy trial and prejudice to defendant, against whom the case was entirely circumstantial, the four and one-half-year delay after formal accusation and arrest by the Army and before indictment was denial of his constitutional right of speedy trial.

Case remanded with instructions to dismiss.

Craven Circuit Judge, dissented and filed opinion.

West Headnotes

[1] Criminal Law ⇐1023(3)
110k1023(3) Most Cited Cases
Denial of plea of double jeopardy is proper subject for interlocutory review. 28 U.S.C.A. § 1291.

[2] Criminal Law ⇐1023(3)
110k1023(3) Most Cited Cases
Though guarantee of speedy trial is fundamental constitutional right, not every speedy trial claim merits interlocutory appeal; generally, this defense should be reviewed after final judgment. 28 U.S.C.A. § 1291; U.S.C.A.Const. Amend. 6; Fed.Rules Crim.Proc. rule 48(b), 18 U.S.C.A.

[3] Criminal Law ⇐1023(3)
110k1023(3) Most Cited Cases
Where defense of denial of speedy trial was not fanciful, and where defendant soldier had been exonerated by his commanding officer following hearing and there had been delay of five years between initiation of prosecution and trial, and where prosecution's case was wholly circumstantial and rested on detailed, hypothetical reconstruction of crime and witnesses had scattered across country, who would have to be interviewed and assembled at great expense to both Government and defense, interlocutory appeal on question of denial of speedy trial was allowed. 28 U.S.C.A. § 1291; U.S.C.A.Const. Amend. 6; Fed.Rules Crim.Proc. rule 48(b), 18 U.S.C.A.

[4] Criminal Law ⇐577.10(2)
110k577.10(2) Most Cited Cases
(Formerly 110k573)
To determine whether there had been denial of speedy trial in violation of Sixth Amendment, it is necessary to make ad hoc appraisal of circumstances of particular case, weighing conduct of both prosecution and defendant; factors to be considered included length of delay, reasons for delay, defendant's assertion of his right, and prejudice to defendant. U.S.C.A.Const. Amend. 6; Fed.Rules Crim.Proc. rule 48(b), 18 U.S.C.A.

[5] Armed Services ⇐47(1)
34k47(1) Most Cited Cases
Armed forces member restricted to quarters is considered to be restricted under arrest if relieved of his duties, and in lieu of arrest if he is not. 10 U.S.C.A. §§ 809, 810, 830; 18 U.S.C.A. §§ 7(3), 1111, 3231.

[6] Armed Services ⇐47(1)
34k47(1) Most Cited Cases
(Formerly 34k74(1))

Where officer's military arrest, by being restricted to quarters and relieved of his duties, was functional equivalent of civilian arrest, he could invoke Sixth Amendment's guarantee of speedy trial. U.S.C.A.Const. Amend. 6; 10 U.S.C.A. §§ 809, 810 , 830; Fed.Rules Crim.Proc. rule 48(b), 18 U.S.C.A.

[7] Criminal Law ⇐577.6
110k577.6 Most Cited Cases
(Formerly 110k573)
Though it was Army which initially accused and arrested officer, and it was civilian arm of Government subsequently prosecuting him, Sixth Amendment secured his right to speedy trial against oppressive conduct by Government in its single sovereign capacity, regardless of number and character of executive departments participating in prosecution. U.S.C.A.Const. Amend. 6; 10 U.S.C.A. §§ 809, 810, 830, 832; Fed.Rules Crim.Proc. rule 48(b), 18 U.S.C.A.

[8] Armed Services ⇐47(1)
34k47(1) Most Cited Cases
Rule providing for dismissal of indictment for unnecessary delay in bringing defendant to trial did not control military proceedings against officer and was not applicable to him until his arrest by civilian authorities. Fed.Rules Crim.Proc. rule 48(b), 18 U.S.C.A.

[9] Criminal Law ⇐577.10(1)
110k577.10(1) Most Cited Cases
(Formerly 110k573)
Absence of imprisonment, or bail, does not always render inoperative the constitutional guarantee of speedy trial. U.S.C.A.Const. Amend. 6; Fed.Rules Crim.Proc. rule 48(b), 18 U.S.C.A.

[10] Criminal Law ⇐577.5
110k577.5 Most Cited Cases
(Formerly 110k573)
Speedy Trial Act section excluding certain periods of time from period allowed for trial must be read in conjunction with entire Act; Act does not purport to mark bounds of Sixth Amendment's speedy trial clause, and single section of Act should not be used outside its statutory context as standard for interpreting Sixth Amendment. U.S.C.A.Const. Amend. 6; 10 U.S.C.A. § 832; 18 U.S.C.A. § 3161(h)(6); Fed.Rules Crim.Proc. rule 48(b), 18 U.S.C.A.

[11] Indictment and Information ⇐7
210k7 Most Cited Cases
(Formerly 110k573)
Delay of more than four and one-half years after arrest before indictment was sufficiently long to justify inquiry into other factors going into balance of assessing defendant's claim that he had been denied speedy trial. U.S.C.A.Const. Amend. 6; Fed.Rules Crim.Proc. rule 48(b), 28 U.S.C.A.

[12] Indictment and Information ⇐7
210k7 Most Cited Cases
Where investigators were not dilatory and case was complex, delay before indictment was not to be weighed heavily against Government. U.S.C.A.Const. Amend. 6; Fed.Rules Crim.Proc. rule 48(b), 18 U.S.C.A.

[13] Criminal Law ⇐577.10(4)
110k577.10(4) Most Cited Cases
(Formerly 110k573)
Mistake of law affords no justification for depriving accused of Sixth Amendment rights. U.S.C.A.Const. Amend. 6; Fed.Rules Crim.Proc. rule 48(b), 18 U.S.C.A.

[14] Criminal Law ⇐577.12(1)
110k577.12(1) Most Cited Cases
(Formerly 110k573)
Whether delay from mid-1972 when army criminal investigation division recommended prosecution until indictment was returned in January 1975, covering period in which physical evidence in murder investigation was subjected to laboratory analysis, was due to indifference, negligence or ineptitude, it was to be weighed against Government in assessing claim of denial of speedy trial. U.S.C.A.Const. Amend. 6; Fed.Rules Crim.Proc. rule 48(b), 18 U.S.C.A.

[15] Criminal Law ⇐577.10(10)
110k577.10(10) Most Cited Cases
(Formerly 110k576(8))
Person who has been arrested but not indicted is

under no compulsion to demand prosecution in order to preserve his right to speedy trial; primary responsibility for bringing cases to trial rests on the Government. U.S.C.A.Const. Amend. 6; Fed.Rules Crim.Proc. rule 48(b), 18 U.S.C.A.

[16] Criminal Law ⇐577.16(5.1)
110k577.16(5.1) Most Cited Cases
(Formerly 110k577.16(5), 110k573)
Though prejudice is one factor to be weighed by court in adjudicating accused's claim of denial of speedy trial, affirmative demonstration of prejudice is unnecessary to prove denial of the right. U.S.C.A.Const. Amend. 6; Fed.Rules Crim.Proc. rule 48(b), 18 U.S.C.A.

[17] Criminal Law ⇐577.10(1)
110k577.10(1) Most Cited Cases
(Formerly 110k573)
In assessing claim of denial of speedy trial, prejudice to defendant should be assessed in light of prevention of undue and oppressive incarceration prior to trial, minimization of anxiety and concern accompanying public accusation, and limitation of possibilities that long delay will impair ability of accused to defend himself. U.S.C.A.Const. Amend. 6; Fed.Rules Crim.Proc. rule 48(b), 18 U.S.C.A.

[18] Criminal Law ⇐577.16(5.1)
110k577.16(5.1) Most Cited Cases
(Formerly 110k577.16(5), 110k575)
Defendant's personal concerns including his being required to live with constant threat of new prosecution and being required to retain counsel at his own expense, and his suffering anxiety, concerning unresolved nature of case were significant elements of prejudice from delay in bringing to trial. U.S.C.A.Const. Amend. 6; Fed.Rules Crim.Proc. rule 48(b), 18 U.S.C.A.

[19] Criminal Law ⇐1163(1)
110k1163(1) Most Cited Cases
Even if period from May 1, 1970 to June 30, 1972 was wholly excluded as excusable, delay of more than four and one-half years after military arrest and formal accusation and before indictment was of sufficient length to be presumptively prejudicial. U.S.C.A.Const. Amend. 6; Fed.Rules Crim.Proc. rule 48(b), 18 U.S.C.A.

[20] Criminal Law ⇐577.15(4)
110k577.15(4) Most Cited Cases
(Formerly 110k573)
In view of length of delay, inadequate justification for full period thereof, defendant's assertion of his right to speedy trial and prejudice to defendant, against whom case was entirely circumstantial, four and one-half-year delay after formal accusation and arrest by Army and before indictment was denial of constitutional right of speedy trial. U.S.C.A.Const. Amend. 6; 10 U.S.C.A. §§ 810, 830, 832; Fed.Rules Crim.Proc. rule 48(b), 18 U.S.C.A.
***198** Bernard L. Segal, San Francisco, Cal. (Orrin Leigh Grover, III, San Francisco, Cal., Michael J. Malley Washington, D.C., Robert H. Hood, III, Research Triangle Park, N.C., Kenneth A. Letzler, and Jon Van Dyke, San Francisco, Cal., on brief), for appellant.

Brian M. Murtagh, Atty., U.S. Dept. of Justice, Washington, D.C. (Thomas P. McNamara, U.S. Atty., Raleigh, N.C., Victor C. Woerheide, Atty., U.S. Dept. of Justice, Washington, D.C., and James T. Stroud, Jr., Asst. U.S. Atty., Raleigh, N.C., on brief), for appellee.

Before CRAVEN, BUTZNER and RUSSELL, Circuit Judges.

BUTZNER, Circuit Judge:

Jeffrey Robert MacDonald appeals from the denial of several motions relating to his prosecution for the 1970 deaths of his wife and two daughters.[FN1] We conclude that ***199** delay of four and one-half years, dating from the Army's accusation and detention of MacDonald in May 1970 to his indictment in January 1975, even when allowances are made for several intervals, violates the right to a speedy trial guaranteed by the sixth amendment. [FN2] We therefore reverse and order dismissal with prejudice.

FN1. The district court has jurisdiction because the crimes were committed on a military base. 18 U.S.C. ss 7(3), 1111, and

3231.

FN2. 'In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial . . ..' U.S.Const. amend. VI.

I

[1] We stayed MacDonald's trial and allowed this interlocutory appeal pursuant to our decision in United States v. Lansdown, 460 F.2d 164, 170-- 71 (4th Cir. 1972).[FN3] There, we held that 28 U.S.C. s 1291 did not bar an interlocutory appeal in criminal cases where important rights, collateral to the main action, would be irreparably lost unless considered before trial. But see United States v. Bailey, 512 F.2d 833 (5th Cir. 1975). In Lansdown the appeal was from an order rejecting a plea of double jeopardy. We held that post-trial consideration of the issue could provide only inadequate relief because the double jeopardy prohibition was intended to prevent the hardship of undergoing a second trial. See Green v. United States, 355 U.S. 184, 187, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). The denial of MacDonald's plea of double jeopardy, like Lansdown's, is a proper subject for interlocutory review, but for reasons discussed in Part IV, we believe it preferable not to decide this issue. Instead, we have rested our decision on the sixth amendment's provision for a speedy trial.

FN3. In our order of August 15, 1975, allowing MacDonald's petition for an interlocutory appeal, we noted his contentions that he had been denied his rights against double jeopardy and to a speedy trial. We then concluded '. . . that the contentions made are not frivolous and that the rights asserted are too important to be denied review, and if review is postponed until after the trial of the case, claimed rights will have been irreparably lost. United States v. Lansdown . . .'
We also allowed MacDonald to appeal issues that would otherwise be subject to the final judgment rule, saying: 'In view of our accepting the appeal of (the orders overruling the double jeopardy and speedy trial defenses), we will also consider the other questions sought to be appealed, which, if not now presented, might occasion further delay in terminating this litigation.' See part IV infra.

[2] Pendent to the double jeopardy claim, and closely related to it, is MacDonald's affirmative defense of denial of a speedy trial. This sixth amendment claim is also collateral and can be decided without considering the merits of the charges against MacDonald. , the guarantee of a speedy trial is a fundamental constitutional right. Braden v. Judicial Circuit Court, 410 U.S. 484, 489--90, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973); Klopfer v. North Carolina, 386 U.S. 213, 223--25, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967); Kane v. Virginia, 419 F.2d 1369, 1371--73 (4th Cir. 1970). Not every speedy trial claim, however, merits an interlocutory appeal. Generally, this defense should be reviewed after final judgment. It is the extraordinary nature of MacDonald's case that persuaded us to allow an interlocutory appeal.

The hearing conducted by the Army in 1970 lasted for more than a month, and the government estimates that the trial would take six to eight weeks. The prosecution's case is wholly circumstantial and rests on a detailed, hypothetical reconstruction of the crime. Witnesses, who have scattered across the country in the last five years, must be interviewed and assembled at great expense to both the government and the defense.

[3] MacDonald's collateral defenses of double jeopardy and denial of a speedy trial are not fanciful. Never before, as we mention in Part IV has a soldier been prosecuted by civilian authorities after being exonerated by his commanding officer following an Article 32 hearing; and a delay of five years between the initiation of prosecution and trial is extraordinary. Had we denied the interlocutory appeal and subsequently sustained either of MacDonald's collateral defenses, all of the burdens on the *200 court and the parties of a prolonged, expensive trial would be for naught. These factors, which we regard as unique, were the basis for allowing this appeal.

II

In the early morning of February 17, 1970, military police received a call for help from Captain MacDonald, a physician stationed at Fort Bragg, North Carolina. Upon arriving at the family's quarters, the police found Mrs. MacDonald and the couple's two daughters clubbed and stabbed to death. MacDonald told the police that screams of his wife and six-year-old daughter awoke him from the couch in the living room. He said that during a short struggle four assailants stabbed him and knocked him unconscious. Upon regaining his senses, he attempted to revive his family and telephoned for help.

The military police, the Army's Criminal Investigation Division (CID), the F.B.I., and the Fayetteville, North Carolina, police department immediately began an investigation of the crime. Examination disclosed that each member of the MacDonald family had a different blood type. The location of the victims' blood in the apartment and the presence of one daughter's blood on MacDonald's glasses cast doubt on MacDonald's account. Similarly, the presence of stray fibers from his pajama top in the master bedroom did not correspond with MacDonald's statement that it was ripped in a struggle in the living room. Torn and bloody pieces of surgical gloves, apparently of a type kept by MacDonald, were found near the victims. Although there were numerous unidentified fingerprints in the apartment, no direct evidence of the alleged intruders was found. From these and other circumstances, investigators theorized that MacDonald had killed his family and staged the murder scene to cover up his crime.

On April 6, 1970, the CID questioned MacDonald and informed him that he was under suspicion. That same day he was relieved of his medical duties and restricted to quarters by his commanding officer. On May 1, 1970, the Army formally charged him with the murders.

Major General Edward M. Flanagan, Jr., Commanding General of the unit to which MacDonald was assigned, appointed Colonel Warren V. Rock to investigate the charges, with the assistance of a legal officer, in accordance with Article 32 of the Uniform Code of Military Justice. Colonel Rock's final report described the manner in which the Article 32 proceedings were conducted:

> 'In view of the fact that both government and defense were represented by counsel The hearing was conducted in generally the same format as a trial. Government presented its evidence and rested, defense did likewise and finally the Article 32 Officer called for witnesses and evidence. In all instances opposing counsel was given the full right to cross examination. It was necessary to give considerable latitude to counsel and permit the introduction of some hearsaytype evidence for both sides. The legal advisor sat next to the Investigating Officer throughout the hearing and his sole function was to assist him in making proper legal rulings on all questions that arose.'

The government called 27 witnesses and MacDonald 29, including many character witnesses. He himself testified and was subjected to extensive cross-examination.

At the conclusion of the Article 32 proceedings, Colonel Rock filed an exhaustive report in which he recommended that '(a)ll charges and specifications against Captain Jeffrey R. MacDonald be dismissed because the matters set forth in all charges and specifications are not true. . . .' He also recommended that the civilian authorities investigate a named suspect. On review of Colonel Rock's report, General Flanagan dismissed the charges on October 23, 1970, and reported this to the Commanding General of Fort Bragg, who took no further action. Shortly afterward, the Army released MacDonald from quarters and, underscoring the finality of the military proceedings, ***201** it granted him an honorable discharge for reasons of hardship in December 1970. [FN4]

> FN4. MacDonald's discharge barred any further military proceedings against him. United States ex rel. Toth v. Quarles, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955).

Following MacDonald's discharge, the Department

of Justice asked the CID to continue its investigation. The CID complied, conducting 699 interviews. At the request of the department, it sent the weapons and the victims' clothing to the F.B.I. laboratory in July 1971 and in August furnished the Treasury Department's laboratory other items for analysis. The CID completed its field investigation in December 1971, and in June 1972 it transmitted to the Justice Department a 13-volume report recommending prosecution. A number of government attorneys studied the report and asked for further investigations. The CID filed two supplemental reports, but upon receiving a request for additional investigation, it suggested convening a grand jury before it expended any more effort. Finally, in August 1974 the government started presenting the case to a grand jury. Concurrently, the F.B.I. examined several items from the MacDonald house, and it exhumed the bodies of Mrs. MacDonald and the children to obtain hair samples.

Shortly after his discharge, MacDonald moved to California where he resumed the practice of medicine. In 1971 he was again interviewed by the CID. Beginning in January 1972 and continuing through January 1974, MacDonald, first in person and then through letters by his attorneys, requested the government to complete its investigation. He repeatedly offered to submit to an interview by the government attorneys in charge of the case.[FN5] The attorneys, however, declined to question him and to advise when their investigation would be completed. The correspondence appears to have come to an end in January 1974, leaving MacDonald in suspense.[FN6] MacDonald was subsequently subpoenaed to appear before the grand jury. He waived his right to remain silent and testified on two occasions for a total of more than five days.

FN5. For example, on March 27, 1973, MacDonald's attorney wrote an attorney in the criminal division of the Department of Justice:
'I am taking the liberty to again urge upon you and the Justice Department to accept our offer to submit Dr. MacDonald to an in depth on-the-record interview by your office. 'It seems to me that there are mutual advantages to our suggestion. From the standpoint of your office it would present the opportunity to perhaps obtain answers to some of the questions that may have arisen in your minds as a result of the study of the record and investigative reports in this case. From our standpoint we believe that an interview with Dr. MacDonald can only confirm the correctness of the finding of the Army's own initial hearing officer, Colonel Rock.'

FN6. On January 8, 1974, MacDonald's counsel wrote: 'It is with some reservations that I write this letter to you to inquire about the status of your Department's review of the investigation of the deaths of the MacDonald family at Ft. Bragg, North Carolina. However, in fairness to my client who has lived with the twin tragedies of those deaths and the unfounded suspicion of himself in connection with them, that I ask whether a final decision has been made in connection with any Federal criminal action against him. If such a decision has not yet been made may I inquire as to when we may reasonably expect it to be made.
'I again renew to you our previously stated offer to submit Dr. MacDonald to full questioning by attorneys of the Department of Justice.'
The chief of the General Crimes Section replied on January 23, 1974:
'For your information, this case is under active investigation and will remain under consideration for the foreseeable future.
'I do not believe it would serve any useful purpose at this time to accede to your request that Jeffrey MacDonald be questioned by attorneys from the Department of Justice.'

The grand jury indicted MacDonald on January 24, 1975. He was promptly arrested in California and a week later admitted to bail. He moved to have the

indictment dismissed, contending that the government's delay in obtaining it denied him the right to a speedy trial. The district court denied the motion, holding that MacDonald's right to a speedy trial did not arise *202 until the government accused him of the crime by the return of the indictment in January 1975.[FN7]

> FN7. In its order denying MacDonald's motion, the district court said:
> 'By this motion (to dismiss the indictment for denial of the right to speedy prosecution and trial) the defendant takes the government to task for pre-indictment delay amounting to almost five years between the date of the crime on February 17, 1970, and the return of the indictment by the grand jury on January 25, 1975. The government has undertaken to justify the delay on the grounds that 'because of government bureaucracy' the facilities of the crime laboratory of the Federal Bureau of Investigation were not brought into the case until the grand jury was finally convened in August of 1974. The right to a speedy trial under the Sixth Amendment does not arise until a person has been 'accused' of a crime, and in this case this did not occur until the indictment had been returned. On the authority of United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), the motion of defendant is denied.'

III

[4] To determine whether a person charged with crime has been denied a speedy trial in violation of the sixth amendment, it is necessary to weigh the conduct of both the prosecution and the defendant. Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Recognizing that this balance compels an ad hoc appraisal of each case, Barker identified four factors that must be considered. They are '(l)ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.' 407 U.S. at 530, 92 S.Ct. at 2192. We will assess each separately.

Length of delay. The critical issue concerning this aspect of the case is the identification of the event, and consequently the date, marking the beginning of the delay. The district court accepted the government's position that MacDonald's right to a speedy trial arose only after he was indicted in January 1975. MacDonald acknowledges that no significant delay has occurred since then. He contends, however, that the delay commenced when the Army formally charged him with murder on May 1, 1970, and restricted him to quarters. The length of delay, therefore, depends entirely on whether the pre-indictment delay on which MacDonald relies is of constitutional significance.

In United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), the Court held that a three-year delay between the commission of a crime and indictment did not infringe the right to a speedy trial. The defendants in that case, however, were not arrested or formally accused of crime until the return of the indictment. Noting this, the Court carefully avoided adopting a simplistic rule that pre-indictment delay is always immaterial. Instead, referring to the values which the speedy trial provision safeguards, the Court explained that arrest furnishes an alternative starting point for determining the length of delay. It said:

> '(I)t is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.
> 'Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge . . .' 404 U.S. at 320--21, 92 S.Ct. at 463.

Reiterating these principles in Dillingham v. United States, 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975), the Court held that even when the defendant has not shown actual prejudice, the time elapsing between arrest and indictment must be considered in appraising the alleged denial of a speedy trial. It is, therefore, essential to determine whether MacDonald's military arrest 'engage(d) the particular protections of the speedy trial provision of the Sixth Amendment.' Marion, 404 U.S. at 320,

92 S.Ct. at 463.

[5] On May 1, 1970, MacDonald's commanding officer charged under oath that MacDonald, acting with premeditation, murdered his wife and two daughters. Simultaneously, the commanding officer *203 recommended trial by general court-martial. [FN8] The charge was the functional equivalent of a civilian arrest warrant, for under U.C.M.J. Article 10, 10 U.S.C. s 810, it subjected MacDonald to arrest or confinement.[FN9] Like its civilian equivalent, military arrest must be based on probable cause.[FN10] The status of an officer restricted to quarters under arrest differs from that of one who is simply restricted to quarters in lieu of arrest. The distinction depends on whether the accused is relieved of his military duties. He is considered to be restricted under arrest if relieved of his duties, and in lieu of arrest if he is not.[FN11] Because MacDonald was relieved of his duties, he was restricted to quarters under arrest.

FN8. U.C.M.J. Art. 30, 10 U.S.C. s 830, provides:
'(a) Charges and specifications shall be signed by a person subject to this chapter under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state--
(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and
(2) that they are true in fact to the best of his knowledge and belief.
'(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.'

FN9. U.C.M.J. Art. 10, 10 U.S.C. s 810, provides:
'Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.'

FN10. U.C.M.J. Art. 9, 10 U.S.C. s 809, provides:
'(a) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.
'(c) A commissioned officer, a warrant officer, or a civilian subject to this chapter or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order such persons into arrest or confinement may not be delegated.
'(d) No person may be ordered into arrest or confinement except for probable cause.'

FN11. See P20 a and b, Manual for Courts-Martial (U.S. 1969 rev. ed.).

As the government's counsel acknowledged at oral argument, had MacDonald been an enlisted man, he probably would have been confined in a stockade. While his restriction to the bachelor officers' quarters was undoubtedly more comfortable and less confining than imprisonment in a guard house, it was nevertheless a public act that seriously interfered with his liberty. He was relieved of his duties, his phone calls were logged by a military policeman, and he was placed under the surveillance of an escort officer whenever he left his quarters.

The government relies on Wales v. Whitney, 114 U.S. 564, 5 S.Ct. 1050, 29 L.Ed. 277 (1885), to

support its argument that MacDonald's status was not analogous to that of a civilian who has been arrested. In Wales, the Medical Director of the Navy, who had been placed under arrest and restricted to the city of Washington, D.C., pending court-martial, sought a writ of habeas corpus to test the jurisdiction of the military court. The Supreme Court, noting that Washington was his place of duty, observed that '(i)t is not easy to see how he is under any restraint of his personal liberty, by the order of arrest, which he was not under before.' The Court held that the physical restraint of the Medical Director was insufficient as a matter of fact, and the moral restraint imposed by the order was insufficient as a matter of law, to justify issuance of the writ. In reaching this conclusion, the Court pointed out that other procedures allowed the Medical Director to challenge the military court's jurisdiction, and consequently the denial of his petition did not deprive him of an adequate remedy.

We find the government's attempt to equate MacDonald's situation to Wales' unpersuasive. MacDonald's arrest is distinguished from Wales' by the greater limitations ***204** placed on his liberty. Apart from this, '(n)otions of custody have changed' since 1885, Strait v. Laird, 406 U.S. 341, 351, 92 S.Ct. 1693, 32 L.Ed.2d 141 (1972) (Rehnquist, J., dissenting), and Wales' custody requirement for a writ of habeas corpus 'may no longer be deemed controlling.' Hensley v. Municipal Court, 411 U.S. 345, 350 n. 8, 93 S.Ct. 1571, 1574, 36 L.Ed.2d 294 (1973).

[6] In any event, the standard employed by the Court in Wales to evaluate a restraint of liberty for the procedural requirements of habeas corpus provides an unsatisfactory measure to test the denial of the sixth amendment's guarantee to a speedy trial. The appropriate test is found in Marion, not Wales. MacDonald was subjected to 'actual restraints imposed by arrest and holding to answer a criminal charge.' Marion, 404 U.S. at 320, 92 S.Ct. at 463. [FN12] It is these circumstances, as the Court points out, 'that engage the particular protections of the speedy trial provision of the Sixth Amendment.' Marion, 404 U.S. at 320, 92 S.Ct. at 463. We conclude, therefore, that MacDonald's military arrest was the functional equivalent of a civilian arrest allowing him to invoke the sixth amendment's guarantee of a speedy trial.

> FN12. The Assistant United States Attorney for the Eastern District of North Carolina, appearing for the government in the bail hearing before a magistrate for the United States District Court for the Central District of California, described MacDonald's status as follows:
> 'Back in the Article 32 hearing, he was in custody. He did have an officer with him, assigned to him, as Mr. Segal explained to you. He was, more or less, I believe they call it house arrest at the BOQ. And then, of course, once he was released on the charges, he was no longer required to have another Army officer with him. Shortly after that, he was discharged from the Service.'

[7][8] For the purpose of determining whether the sixth amendment applies, it is immaterial that, although the Army initially accused and arrested MacDonald, the civilian arm of the government is currently prosecuting him. [FN13] The prosecution of the same charge--murder--that the Army began was pursued by the Department of Justice. The sixth amendment, we hold, secures an accused's rights to a speedy trial against oppressive conduct by the government in its single sovereign capacity, regardless of the number and character of the executive departments that participate in the prosecution.

> FN13. We agree with the government that Fed.R.Crim.P. 48(b) did not control the military proceedings against MacDonald and thus was not applicable to him until his arrest by civilian authorities, cf. Boeckenhaupt v. United States, 392 F.2d 24 (4th Cir. 1968).

MacDonald's freedom from detention or bail during the interval between the termination of the Article 32 proceedings and his arrest after indictment did not, from a practical standpoint,

dispel the effects of the government's initial accusation. MacDonald, of course, realized that the favorable conclusion of the Article 32 proceedings was not the end of the government's efforts to convict him. Prudence obliged him to retain attorneys at his own expense for his continuing defense.[FN14] He remained under suspicion and was subjected to the anxiety of the threat of another prosecution.

FN14. MacDonald alleges that his legal expenses for contesting the Army proceedings against him and for retaining counsel since then amount to $50,000. He estimates that expenses of trial would amount to an additional $250,000.

[9][10] The absence of imprisonment or bail does not always render inoperative the constitutional guarantee of a speedy trial.[*205FN15] iN klopfer v. norTH carolina, 386 U.S. 213, 87 S.ct. 988, 18 L.ed.2d 1 (1967), the Court held that the practice of nolle prossing an indictment with leave to reinstate it deprived an accused of his right to a speedy trial even though he was not confined or required to post bail. Klopfer differs from this case in one respect: there, an indictment remained potentially effective during the period of delay; here, MacDonald was not indicted until the end of the period. Apart from the absence of an indictment, MacDonald's situation bears a marked resemblance to Klopfer's. After formal arrest and charge, both men contested their accusations with the inconclusive result of Klopfer's mistrial and the dismissal of the charges against MacDonald after the Article 32 proceedings. The prosecution against both men, however, could have gone forward promptly-- Klopfer's by retrial and MacDonald's by court-martial if the commanding general had rejected Colonel Rock's Article 32 report or if the United States Attorney had presented the case to a grand jury.[FN16] Nevertheless, neither man was held for trial. Consequently, Klopfer and MacDonald were free from imprisonment or the restraints of bail, but at all times they were subject to prosecution. Unlike defendants held pending trial, Klopfer and MacDonald were deprived of any forum in which to vindicate themselves. Most importantly, under the theory advanced by the state in Klopfer and by the federal government here, neither man would be safeguarded by the sixth amendment until the government, at its leisure, renewed the prosecution.

FN15. Although the government acknowledges that the Speedy Trial Act of 1974 does not govern this case, it contends that the principles codified in 18 U.S.C. s 3161(h)(6) and its prototype, ABA, Standards Relating to Speedy Trial s 2.3(f) (App. draft 1968), should be applied to toll the running of time during the interval from the dismissal of the Army's charges against MacDonald in October 1970 to the return of the indictment in 1975. However, the tolling provision of s 3161(h)(6) must be read in conjunction with the entire Act, which sets fixed time limits after arrest, subject to certain exclusions, within which trial must take place. A single section of the Act should not be used outside of its statutory context as a standard for interpreting the sixth amendment, because the Act does not purport to mark the bounds of the sixth amendment's speedy trial clause. In contrast, Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), which eschews rigid time limits, provides the analysis which we must follow in determining whether the sixth amendment's guarantee has been violated.

FN16. U.C.M.J. Arts. 18, 32--34, 10 U.S.C. ss 818, 832--34; PP34 and 35 Manual for Courts-Martial (U.S.1969 rev. ed.); 18 U.S.C. ss 1111 and 3231.

Speaking of the purposes of the sixth amendment's speedy trial provision, the Court said in United States v. Marion, 404 U.S. 307, 320, 92 S.Ct. 455, 463 (1971):

'Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain,

the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. These considerations were substantial underpinnings for the decision in Klopfer v. North Carolina . . ..'

The considerations which the Court recognized as 'substantial underpinnings' for affording Klopfer the protection of the sixth amendment apply also, we believe, to MacDonald, whose situation, viewed realistically, was similar to Klopfer's.

[11] The delay between the accusation and detention of MacDonald and his indictment was more than four and one-half years. The Court described a five-year delay as 'extraordinary' in Barker, 407 U.S. at 533, 92 S.Ct. 2182, and in United States v. Macino, 486 F.2d 750 (7th Cir. 1973), a 28-month delay between arrest and indictment was considered excessive. We conclude, therefore, that the delay in MacDonald's case is sufficiently long to justify 'inquiry into the other factors that go into the balance' of assessing MacDonald's claim that he has been denied a speedy trial. Barker, 407 U.S. at 530, 92 S.Ct. 2182.

The reason for the delay. Barker teaches that the weight to be given delay varies with the government's reasons. Deliberate delay to hamper the defense must be weighed heavily against the government, and valid reasons such as a missing witness serve to excuse the delay. Neither of these ***206** extremes applies to MacDonald's case, which appears to fall in a middle ground. Speaking of this, the Court said that a 'neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.' 407 U.S. at 531, 92 S.Ct. at 2192.

[12] There are several identifiable phases of delay and the reasons for them differ. During the initial period, the 1970 Army investigation and Article 32 proceeding, MacDonald was being prosecuted, so the inaction of civilian authorities was justified. For the next 18 months, at the request of the Department of Justice, the CID conducted another extensive investigation. Since the charges had been previously dismissed for insufficient evidence, the civilian prosecutors understandably desired a new investigation before bringing MacDonald to trial. The investigators were not dilatory and the case is complex, so this delay should not be weighed heavily against the government. See Barker, 407 U.S. at 531, 92 S.Ct. 2182.

[13][14] The CID's report, along with its recommendation to prosecute, was transmitted to the Department of Justice in June 1972, more than two years before the commencement of grand jury proceedings. The government has not provided any satisfactory explanation for this two-year hiatus. It suggests that the need for further investigation and for its attorneys to become familiar with the case justifies the delay. But no significant new investigation was undertaken during this period, and none was pursued from August 1973 until the grand jury was convened a year later. Moreover, the United States Attorney was familiar enough with the case to recommend prosecution and specify his need for an additional attorney in the summer or fall of 1973. There is no indication in the record that the delay during this period was 'inevitable' because of '(c) rowded dockets, the lack of judges or lawyers,' or any other factor which might mitigate the government's failure to bring MacDonald to trial promptly after the CID completed its report in June 1972. See Dickey v. Florida, 398 U.S. 30, 38, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970). The leisurely pace from June 1972 until the indictment was returned in January 1975 appears to have been primarily for the government's convenience. [FN17] The Assistant United States Attorney for the Eastern District of North Carolina, who is familiar with the case, expressed an even harsher assessment of the delay. He told the magistrate at the bail hearing that the tangible evidence had been known to the government since the initial investigation in

1970 but that it had not been fully analyzed by the F.B.I. until the latter part of 1974. He explained that the F.B.I. analysis was tardy 'because of government bureaucracy.'[FN18] Whether one attributes the delay *207 from mid-1972, when the CID recommended prosecution, until the indictment was returned in January 1975 to indifference, negligence, or ineptitude, it must be weighed against the government. Barker, 407 U.S. at 514, 92 S.Ct. 2182; Dickey v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970). We turn, therefore, to the third factor prescribed by Barker, an appraisal of MacDonald's conduct.

FN17. The government may have proceeded on the erroneous assumption that no matter how much time elapsed between prosecutions, the pre-indictment delay would be of no consequence. But a mistake of law affords no justification for depriving an accused of sixth amendment rights. Dickey v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970).

FN18. During the course of the government's summation at the bail hearing, the Assistant United States Attorney and the Magistrate engaged in the following colloquy:
ASSISTANT UNITED STATES ATTORNEY: Your Honor, there is, I am sure, some question about the five-year period of time in here. This case has been investigated over a five-year period of time. It was not until very recently that the FBI Laboratory came into the case. Previously, the investigation of the case from a scientific viewpoint was by the Army CID Lab.
At the time of the Article 32 hearing in 1970 when Dr. MacDonald was released from the Army charges, much of the scientific evidence that I've made available to you today was not available to the hearing officer at that time.
THE MAGISTRATE: But this evidence has been gone over--this evidence is four or five years old now . . .
ASSISTANT UNITED STATES ATTORNEY: Yes. The evidence with regard to the pajama top, the bath mat and the sheet: All that evidence has been produced within the last five months by the FBI Lab.
THE MAGISTRATE: But that evidence--the analysis of that evidence was within the last five months, is that correct?
ASSISTANT UNITED STATES ATTORNEY: Yes, sir. The evidence was in existence the whole time: The bloody sheet, the bath mat and the--
THE MAGISTRATE: The time--three to four years passed between the creation of the evidence and its analysis?
ASSISTANT UNITED STATES ATTORNEY: That's correct.
THE MAGISTRATE: Very well.
ASSISTANT UNITED STATES ATTORNEY: We were not--Because the FBI Lab, because of Government bureaucracy, did not come into the case, and we were unable to get them into the case until the beginning of this Grand Jury.
Prior to that time, the Army CID Lab out of Fort Gordon handled it, and they do not have the sophistication that the FBI Lab has, and they will admit that.

The defendant's assertion of his right. In Barker the Supreme Court observed that some defendants may wish to delay trial in expectation of the prosecution's case becoming stale. 407 U.S. at 521, 92 S.Ct. 2182. At the same time, it rejected a strict 'demand-waiver' approach that requires a defendant to assert the right or lose it. 407 U.S. at 524--29, 92 S.Ct. 2182. It recognized, however, that an important factor in deciding a claim that a defendant has been denied a speedy trial is whether he wanted one and made his demands known to the prosecution. 407 U.S. at 531--32, 92 S.Ct. 2182.

MacDonald has by no means delayed the prosecution of his case. While he was in the Army, and afterwards, he gave statements to the CID. He testified under cross-examination in the Article 32 hearing and offered to submit himself to questioning

by attorneys in the Department of Justice. Additionally, he waived immunity and testified before the grand jury.

[15] MacDonald also has consistently expressed a desire to have the case resolved. He first attempted to expedite a decision in January 1972. Later, his attorneys wrote the department several letters inquiring about a final decision on the prosecution to relieve 'the unfounded suspicion' to which MacDonald was subjected.[FN19] A person in his position who has been arrested but not indicted is under no compulsion to demand prosecution in order to preserve his right to a speedy trial, for the primary responsibility for bringing cases to trial rests on the government. United States v. Macino, 486 F.2d 750 (7th Cir. 1973); cf. Barker, 407 U.S. at 529, 92 S.Ct. 2182. Both the facts and the law, therefore, warrant the conclusion that MacDonald reasonably asserted his right to a speedy trial. In accordance with Barker, his assertion 'is entitled to strong evidentiary weight in determining whether (he) is being deprived of the right.' 407 U.S. at 531--32, 92 S.Ct. 2182, 2192.

> FN19. Extracts from some of the letters are quoted in notes 5 and 6 supra.

[16][17] Prejudice to the defendant. An affirmative demonstration of prejudice is unnecessary to prove a denial of the right to a speedy trial. It is, however, one of the factors a court must weigh in adjudicating the accused's claim. Moore v. Arizona, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973); Barker, 407 U.S. at 533, 92 S.Ct. 2182. The Court has said the sixth amendment's guarantee of a speedy trial 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.' United States v. Ewell, 383 U.S. 116, 120, 86 S.Ct. 773, 776, 15 L.Ed.2d 627 (1966). Prejudice, therefore, should be assessed in the light of these interests. Barker, 407 U.S. at 532, 92 S.Ct. 2182.

[18] MacDonald was not imprisoned or subjected to bail from October 1970 until January 1975, but his freedom to come and go is not decisive. An accused person who ***208** is not restrained may nonetheless be prejudiced. Klopfer v. North Carolina, 386 U.S. 213, 221, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). MacDonald has had to live with the constant threat of a new prosecution. He has been required to retain counsel at his own expense, and he has suffered anxiety concerning the unresolved nature of the case. These personal concerns are significant elements of prejudice. United States v. Marion, 404 U.S. 307, 320, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

Also, MacDonald's claim that his ability to defend himself has been impaired is not unfounded. Most of his witnesses who were in the Army in 1970 have scattered across the country. Even if the government provides the defense with current addresses, interviewing these witnesses before trial and insuring their presence at trial would be time-consuming and expensive. Moreover, in the five years since the murders, memories have faded and witnesses can no longer be expected to reliably recall details.

Such potential memory loss is critical in this case, since a detailed reconstruction of the murder scene is an element of the government's case. The position of a flowerpot, the way MacDonald's pajama top was folded, the condition of the sheets in the bedroom, are but examples of the many questions about physical evidence that the government's case turns on. In one instance, the government contended at the Article 32 hearing that an overturned coffee table lying on its side showed that the murder scene was staged, since the table was top-heavy and would have turned completely over if kicked in a scuffle. When the Article 32 officer visited the scene and kicked the table over, however, it struck a chair and landed on its side. Thus, the exact position of the chair is important in determining whether MacDonald staged the murders as the government charges.

The prosecution emphasizes that all of the testimony at the Article 32 hearing and the statements made to investigators since then have

been kept and may be used to refresh memories. Yet this in itself illustrates the prejudice to MacDonald. A stale witness, forced to rely on statements made half a decade previously, cannot be as effective as one actually remembering what he saw. Since the details of any witness's testimony may change over five years, the adverse inference a jury might draw from the government's use of its old records to impeach defense witnesses cannot be overlooked.

[19][20] In sum, applying the principles of United States v. Marion, 404 U.S. 307, 320--21, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), we conclude that for the purposes of determining whether MacDonald was denied his right to a speedy trial, the Army's formal accusation and detention on May 1, 1970, entitled him to invoke the protection of the sixth amendment. See Dillingham v. United States, 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975). Weighing the factors specified by Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) , we believe that the delay--even if the period from May 1, 1970, to June 30, 1972, is wholly excluded as excusable--was of sufficient length to be 'presumptively prejudicial.' 407 U.S. at 530, 92 S.Ct. 2182. The delay, therefore, necessitates inquiry into the other factors of the balance. The government has furnished no satisfactory explanation for the delay from the end of June 1972 until the grand jury was convened in August 1974, so this time must be weighed against it. MacDonald, on the other hand, neither contributed to this delay nor acquiesced in it, so his conduct weighs heavily in his favor. Finally, it is apparent from the record that MacDonald has been prejudiced by the formal accusation and arrest of May 1970, by anxiety arising out of the delayed resolution of this charge, and by the impediment to his defense that scattered witnesses and dimmed memories inevitably cause. Weighing all of these factors, we conclude that the government has denied MacDonald a speedy trial as guaranteed by the sixth amendment and that the prosecution must be dismissed. Strunk v. United States, 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973).

*209 IV

We find no error in the district court's rulings concerning the composition of the grand jury, alleged prosecutorial misconduct, and the denial of motions for discovery and suppression of evidence.

MacDonald claims that General Flanagan's acceptance of his exoneration in the Article 32 hearing collaterally estops the government from prosecuting him again. Alternatively, he argues that the second prosecution places him in double jeopardy. The government argues, however, that the Article 32 proceedings did not place MacDonald in jeopardy since only a court-martial, which was never convened, could have convicted him. Decision of this aspect of the case depends largely on the legal effect of the acceptance of an Article 32 recommendation by the commanding officer. It appears that custom imputes finality to the commanding officer's decision. This would arguably sustain a plea of collateral estoppel, if not double jeopardy, but no military regulation or case specifically deals with this question. In view of the unsettled state of this point of military law and of our disposition of the case under the speedy trial provision of the sixth amendment, we find it unnecessary and imprudent to render an opinion, which would in effect be advisory, on an issue of general importance to military law.

The case is remanded with directions to dismiss the prosecution with prejudice because of the government's failure to accord MacDonald a speedy trial as required by the sixth amendment.

CRAVEN, Circuit Judge (dissenting):

My brothers hold that the sixth amendment compels the dismissal of the only prosecution ever begun against Dr. MacDonald. One need know very little about military law to understand that a charge of homicide can be disposed of finally only by court-martial. None was ever convened. Instead, the Army, pursuant to Article 32, Uniform Code of Military Justice,[FN1] simply conducted a 'thorough and impartial investigation' to determine whether the charge might be referred to a general court-martial, and concluded that the evidence was insufficient to justify the convening of a general court. It is true that the hearing was protracted and

made newspaper headlines. But it is also true, it seems to me (my brothers do not reach the question), that Captain MacDonald has never been put to trial by either a civil or military court. What happened to him in the Army is the substantial equivalent of an open grand jury proceeding resulting in the failure to return a true bill, and that is all.[FN2]

FN1. 10 U.S.C. s 832.

FN2. My brothers premise their analysis on an application of a civilian court of the sixth amendment speedy trial guarantee to events which occurred while MacDonald was in the military.
That the sixth amendment's speedy trial guarantee applies to the military is an appealing assumption but should be recognized as such. The criminal trial provisions of both the fifth and sixth amendments are clearly aimed at procedure in the civil courts. The fifth expressly excludes cases arising in the land or naval forces from prosecutions requiring grand jury indictment, and it is settled that neither the fifth nor sixth amendments can 'be taken to have extended the right to demand a jury to trials by military commission . . ..' Ex Parte Quirin, 317 U.S. 1, 40, 63 S.Ct. 1, 17, 87 L.Ed. 3 (1942). It is true that the Supreme Court once assumed the application of the double jeopardy clause of the fifth amendment in a military context, but in doing so it is significant that it denied relief. Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949). I think my brothers' decision would rest on firmer ground if it were pitched on the fundamental fairness doctrine implicit in the due process clause, which has been applied time and again to an infinite variety of matters not restricted to criminal procedure in the civilian courts, as is, I think, the sixth amendment right to speedy trial. See generally, O'Callahan v. Parker, 395 U.S. 258, 272--73, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969); Kinsella v. Krueger, 351 U.S. 470, 474, 76 S.Ct. 886, 100 L.Ed. 1342 (1956); Duncan v. Kahanamoka, 327 U.S. 304, 309, 66 S.Ct. 606, 90 L.Ed. 688 (1946); Burns v. Lovett, 91 U.S.App.D.C. 208, 202 F.2d 335, 341--42 (1952), aff'd sub nom., Burns v. Wilson, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953).

My brothers hold that the sixth amendment's guarantee of the right to a speedy trial as interpreted by the Supreme Court ***210** in Marion,[FN3] Barker, [FN4] and Dillingham,[FN5] is trigered by the Army proceedings. I think not and respectfully dissent.

FN3. United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

FN4. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

FN5. Dillingham v. United States, 403 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205, 44 U.S.L.W. 3327 (U.S., Dec. 1, 1975).

I.

In Marion the Supreme Court defined the point at which the sixth amendment becomes applicable:

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

404 U.S. at 313, 92 S.Ct. at 459 (emphasis added).

It is now settled that a civilian becomes an 'accused' when he is arrested and charged with a crime. This is so, the Supreme Court tells us, because:

> To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that

> may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

Marion, supra at 320, 92 S.Ct. at 463. See Dillingham v. United States, 403 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975) (quoting Marion).

Thus, 'it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.' Dillingham, supra; Marion, supra.

It is significant to me that the Court equates 'either a formal indictment . . . or else the actual restraints imposed by arrest . . . to answer a criminal charge . . .' It does not suggest that the amendment is triggered when the prosecutor presents the bill to the grand jury. Instead, the period of time for measuring the speed of the trial runs from the return of a true bill into the court. Charge is not enough. At most, Dr. MacDonald was 'charged.' Also, under the specific language of Marion, I do not believe the sixth amendment's speedy trial guarantee would be brought into play by an arrest without warrant by a federal drug enforcement officer, for example, if, upon presentation to a magistrate, the arrestee were released because no probable cause was shown. I do not believe my brothers would contend otherwise. [FN6]

> FN6. I note that Dillingham was arrested on a warrant. United States v. Palmer, 502 F.2d 1233, 1234 (5th Cir. 1974), rev'd sub nom. Dillingham v. United States, 403 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205, 44, U.S.L.W. 3327 (1975).

My analysis of the facts of this case is that the procedure in which MacDonald was involved falls somewhere between an unsuccessful presentation to a grand jury and an arrest and subsequent release because of a failure to demonstrate probable cause for the arrest. Neither, I believe, warrants an application of the sixth amendment's speedy trial guarantee.[FN7]

> FN7. This case differs from both my examples in that during these proceedings MacDonald was neither as free from restraints as a person under grand jury investigation nor as restricted as someone under civilian arrest. See part II, infra.

MacDonald was charged with the murder of his wife and children by Colonel Francis Kane, his immediate commander. These charges were preferred under Article 30, *211 U.C.M.J.[FN8] That article makes clear that a finding of 'probable cause' is not required to 'charge' an individual under the Code. [FN9] Indeed, anyone subject to the U.C.M.J. can prefer charges against anyone else who is also under the Code.[FN10] A determination of probable cause, or its 'functional equivalent,' is only made under military procedure at the Article 32 proceedings.[FN11]

> FN8. 10 U.S.C. s 830.
>
> FN9 Article 30 reads as follows:
> (a) Charges and specifications shall be signed by a person subject to this chapter under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state--
> (1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and
> (2) that they are true in fact to the best of his knowledge and belief.
> (b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.
>
> FN10. P29b, Manual for Courts-Martial (U.S. 1969 rev. ed.).
>
> FN11. Article 32, 10 U.S.C. s 832 reads in

relevant part:

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

In MacDonald's case, at the close of the Article 32 proceedings Major General Edward M. Flanagan, Jr., acting on the report of Colonel Warren V. Rock, who presided at those proceedings, dismissed the charges because '(i)n (his) opinion, there (was) insufficient evidence available to justify reference of the charges to trial by court-martial.'

It is therefore clear that no finding of probable cause was made in Dr. MacDonald's case at the Article 32 proceedings. My brothers are of the view, however, that we should presume such a finding was made because it should have been made prior to 'arrest' under 10 U.S.C. s 810.

Whether a finding of probable cause was made is a question of fact. If there were such a finding I should think it would be supported by the record, but the majority makes no reference to any orders, either written or oral, to indicate that a finding of probable cause was made. We are not told when the finding was made, who made it, or what procedures he followed in doing so. Instead, as I have said, a presumption is created.

First, my brothers reason that since MacDonald was relieved of his duties, his status must be that of 'arrest' rather than 'restriction to quarters in lieu of arrest.' Secondly, they correctly note that under 10 U.S.C. s 810 MacDonald was subject to arrest or confinement when charged with the murders by Colonel Kane on May 1. And finally, they infer that since 10 U.S.C. s 809 purports to require that all arrests be supported by probable cause that probable cause must have been found in MacDonald's case.

I do not believe it is necessarily the case that because MacDonald was relieved of his duties, he was arrested. I read Paragraphs 20a and b of the Manual for Courts-Martial only to say that an officer under 'arrest' may not be required to perform his duties and that an officer restricted to quarters in lieu of arrest may be required to do so. These two provisions do not forbid the Army from relieving one restricted to his quarters of any or all of his duties. That MacDonald was relieved of all duties is not, I believe, conclusive as to this status.

I agree with my brothers, as I have previously said, that MacDonald was subject to arrest or confinement under 10 U.S.C. s 810 when charged with homicide. But I cannot agree that the power to do a thing requires a finding that it was done. Whatever the logic of such a presumption, I believe Paragraph 18b of the Manual of Courts-Martial destroys it for that paragraph explicitly states that the arrest and confinement provisions, ***212** although couched in terms of requirements, are 'not mandatory and (their) exercise rests within the discretion of the person vested with the power to arrest or confine.'[FN12]

FN12. b. Basic considerations. (1) Any person subject to the code accused of an offense under the code shall be ordered into arrest or confinement, as circumstances may require; but when accused only of an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement (Art. 10). The foregoing provision is not mandatory and its exercise rests within the discretion of the person vested with the power to arrest or confine. No restraint need be imposed in cases involving minor offenses. A failure to restrain does not affect the jurisdiction of the court.

I think the Manual of Courts-Martial will take us just so far and that we are driven back to the facts, and the facts are that Dr. MacDonald was verbally restricted to quarters by Colonel Kane on April 6,

1970, and there is nothing whatsoever in the record to suggest any change in his status when he was formally charged on May 1. If MacDonald was ever arrested it must have been on April 6 when he was first restricted to quarters and his duties lifted, and on that date I do not believe that anyone suggests the existence of probable cause for arrest, let alone a specific finding to that effect.[FN13]

> FN13. All the majority tells us about that event is that on April 6 the CID informed MacDonald that 'he was under suspicion.' At 200. I find nothing in their treatment of this encounter nor anything in the record to indicate that on that day probable cause was found.

My brothers and I agree, I think, that arrest without more is not enough to trigger the sixth amendment. There must be a lawful arrest, i.e., with probable cause. It is fair to say, I think, that there is not one word in the record to even suggest that anyone, much less the equivalent of an impartial magistrate, ever purported to find probable cause to arrest Dr. MacDonald. I believe we can be fairly sure that this is the first instance in the long history of the doctrine of probable cause in which a court has assumed that there must have been such a finding because it should have been made.

Finally, I cannot agree with my brothers that Colonel Kane's charge was the functional equivalent of a civilian arrest warrant. I am not sure to what it should be equated, but it is equally plausible to view it as the functional equivalent of the complaint of the prosecutor who then must seek an arrest warrant from an impartial magistrate.

Based on the above analysis I believe it is clear that a finding of probable cause was never made in Dr. MacDonald's case. Unless we ignore as surplusage the Supreme Court's language in Marion, which it repeated in Dillingham, that to 'arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime,' I do not understand how this case can be fitted within the rule of law established by those cases. Furthermore, I do not believe that the policy underpinnings of Marion allow us to ignore the significance of a finding of probable cause. The Supreme Court concentrated on the impact of the public act of arrest on the defendant. I believe that fundamental to that impact is the fact that, in the civilian arrest context with which Marion was concerned, an arrest must be supported by probable cause. With reference to public obloquy, contrast instead, what happened to Dr. MacDonald: after the equivalent of the return of 'not a true bill,' he was honorably discharged. I, therefore, think that Dr. MacDonald's case is clearly distinguishable from any of the cases cited by the majority.

My brothers find this case to closely parallel Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967), differing from it in only one respect: 'there an indictment remained potentially effective during the period of delay; here, MacDonald was not indicted until the end of the period.' [FN14] I agree that that is the major difference between the cases, but I find the distinction to constitute the centerpiece of the Supreme Court's holding in that case *213 that Klopfer's sixth amendment rights had been violated.

> FN14. At 205.
>
> The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the 'anxiety and concern accompanying public accusation,' the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denied the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States.

386 U.S. at 222, 87 S.Ct. at 993 (footnote omitted and emphasis added).

During this four-year period MacDonald stood under no 'public accusation.' The charges had been dismissed by the Army, and this action was made

irrevocable by his discharge from the Army. I find this claim therefore to be one of double jeopardy, which I do not believe is meritorious, and which issue my brothers do not reach.

II.

Under my brothers' reasoning, we must determine that military arrest is the functional equivalent of civilian arrest for the purposes of triggering the right to a speedy trial. I conclude that MacDonald was never 'arrested' in the sense required under Marion.

MacDonald was restricted to his room in the Bachelor Officers' Quarters. [FN15] An armed MP was placed outside his door. An escort officer accompanied him when he left the quarters.[FN16] While Wales v. Whitney, 114 U.S. 564, 5 S.Ct. 1050, 29 L.Ed. 227 (1885) is, as my brothers say, no longer the law as to the degree of 'confinement' necessary to support issuance of a writ of habeas corpus, I believe it is fully applicable to the majority's search for the functional equivalent of a civilian arrest. In that respect, I believe it is still sound precedent and demands a conclusion that MacDonald was not in a civilian sense under the 'actual restraints required by arrest and holding to answer to a criminal charge.'

> FN15. The majority opinion attaches significance to the fact that had MacDonald been an enlisted man he would have probably been confined in the stockade. At 203. The fact is that he was an officer and was not so confined.
>
> FN16. The government describes MacDonald's restrictions as follows: He was to remain in his room except when he was visiting his lawyers, dining at the officers club, or making parachute jumps for pay qualification purposes. The general, though unenforced, limitation on Captain MacDonald's movement was the requirement that he be accompanied by an escort officer while on post. He was permitted to sun bathe in the vicinity of the BOQ, to play golf on post, to attend the post chapel as well as the post theatre, post liquor (Class VI) store, commissary, post exchange and the bowling alley.
> Brief for Appellee at 5--6.
> In the context of the military where a person is subject normally to the orders of his superiors, I do not find this the type of serious 'interfere(nce) with his liberty' which I believe brings the right to speedy trial into play.

In Wales a Navy officer who had been ordered to appear for trial at general courtmartial was given the following order by the Secretary of the Navy: 'You are hereby placed under arrest, and you will confine yourself to the limits of the City of Washington.' 114 U.S. at 566, 5 S.Ct. at 1051. While the majority may be correct that the cases differ with respect to 'the greater limitations placed on (MacDonald's) liberty,'[FN17] I believe, like those in Wales, the restraints imposed on MacDonald did not constitute 'actual confinement or the present means of enforcing it.' 114 U.S. at 572, 5 S.Ct. at 1053. The restraints were, under the Supreme Court's terminology, simply 'moral.' As I read Wales, the critical point was not that the petitioner in that case was free to walk the streets of Washington, D.C., alone. The Supreme Court focused on the fact that if he had wished to leave the District, he was free to do so, '(a)nd though it is said that a file of marines or some proper officer could have been sent to arrest, and bring him back, this ***214** could only be done by another order of the secretary, and would be another arrest, and a real imprisonment under another distinct order.' 114 U.S. at 572, 5 S.Ct. at 1054.

> FN17. At 203--204.

Neither side has provided this court with the orders directed to MacDonald or others concerning his restriction to quarters. At oral argument, however, we were told by the government attorney arguing the case that the MP stationed outside MacDonald's door was given specific instructions NOT to stop him if he tried to leave. The escort officer who accompanied MacDonald, according to my understanding of the facts, was not armed. I find

nothing in the record to indicate that his orders included a direction to stop MacDonald from any conduct he undertook. I therefore find the present case indistinguishable from Wales. Any actual confinement would have required an additional order, and there was therefore no 'actual confinement or the present means of enforcing it.' Wales, supra at 572, 5 S.Ct. at 1053.

III.

Having concluded that he sixth amendment's guarantee of speedy trial does not apply in MacDonald's case, he may still prevail if it were found that the delay violated his right to due process under the fifth amendment. See, e.g., Marion, supra, 404 U.S. at 324, 92 S.Ct. 455; Ross v. United States, 121 U.S.App.D.C. 233, 349 F.2d 210 (1965) . But to grant relief under the fifth amendment requires a showing of substantial prejudice, and I find none. Id.

The majority finds prejudice in the fact that MacDonald's witnesses, as Army personnel, have scattered around the world with resulting difficulty in locating them and conducting pretrial interviews. In addition, my brothers agree with MacDonald's argument that the memories of these witnesses will be dulled by time. But all that is speculative. In a wholly circumstantial type of case, it is improbable that guilt or innocence will turn upon accurate recollection of the facts. It is not suggested that any defense witness who knows the truth now cannot be produced, or if found, cannot now remember what he once knew.

But if it be assumed that these factors may supply the requisite prejudice under the sixth amendment's more specific guarantes, I do not believe they require dismissal of the indictment under the fifth amendment's guarantee of due process. Certainly that question need not be anticipated, and could best be left for determination at trial.

I would affirm.

531 F.2d 196

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Westlaw.

98 S.Ct. 1547

435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18

(Cite as: 435 U.S. 850, 98 S.Ct. 1547)

Briefs and Other Related Documents

Supreme Court of the United States
UNITED STATES, Petitioner,
v.
Jeffrey R. MacDONALD.
No. 75-1892.

Argued Jan. 9, 1978.
Decided May 1, 1978.

After defendant's motion for dismissal of a murder indictment on grounds of denial of speedy trial was denied, the United States Court of Appeals, 531 F.2d 196, allowed an interlocutory appeal and reversed. On grant of certiorari, the Supreme Court, Mr. Justice Blackmun, held that a defendant may not, before trial, appeal an order denying his motion to dismiss on speedy trial grounds.

Reversed and remanded.

Opinion on remand, 585 F.2d 1211.

West Headnotes

Criminal Law ⇐1023(3)
110k1023(3) Most Cited Cases
Defendant may not take interlocutory appeal from federal district court's pretrial order denying motion to dismiss indictment because of alleged violation of Sixth Amendment right to speedy trial. 28 U.S.C.A. § 1291; U.S.C.A.Const. Amend. 6.

***1547** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***850** A defendant may not, *before* trial, appeal a federal district court's order denying his motion to dismiss an indictment because of an alleged violation of his Sixth Amendment right to a speedy trial. Pp. 1549-1554.

4th Cir., 531 F.2d 196, reversed and remanded.

Kenneth S. Geller, Washington, D. C., for petitioner.

Bernard L. Segal, San Francisco, Cal., for respondent.

Mr. Justice BLACKMUN delivered the opinion of the Court.

This case presents the issue whether a defendant, *before* trial, may appeal a federal district court's order denying his motion to dismiss an indictment because of an alleged violation of his Sixth Amendment right to a speedy trial. [FN1]

FN1. The Sixth Amendment reads in pertinent part:
"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

I

In February 1970, respondent Jeffrey R. MacDonald was a physician in military service stationed at Fort Bragg in ***851** North Carolina. He held the rank of captain in the Army Medical Corps.

Captain MacDonald's wife and their two daughters were murdered on February 17 at respondent's quarters. Respondent also ***1548** sustained injury

on that occasion. The military police, the Army's Criminal Investigation Division (CID), the Federal Bureau of Investigation, and the Fayetteville, N. C., Police Department all immediately began investigations of the crime. On April 6 the CID informed respondent that he was under suspicion and, that same day, he was relieved of his duties and restricted to quarters. On May 1, pursuant to Art. 30 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 830, the Army charged respondent with the murders. As required by Art. 32 of the UCMJ, 10 U.S.C. § 832, an investigating officer was appointed to investigate the crimes and to recommend whether the charges (three specifications of murder, in violation of Art. 118 of the UCMJ, 10 U.S.C. § 918) should be referred by the general court-martial convening authority (the post commander) to a general court-martial for trial. App. 131.

At the conclusion of the Art. 32 proceeding, the investigating officer filed a report in which he recommended that the charges against respondent be dismissed, and that the civilian authorities investigate a named female suspect. App. 136. On October 23, after review of this report, the commanding general of respondent's unit accepted the recommendation and dismissed the charges. In December 1970, the Army granted respondent an honorable discharge for reasons of hardship. [FN2]

> FN2. Respondent's discharge barred any further military proceeding against him. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955).

Following respondent's release from the military, and at the request of the Department of Justice, the CID continued its investigation. This was extensive and wide ranging. In June 1972, the CID submitted to the Department of Justice a 13-volume report recommending still further investigation. ***852** Supplemental reports were transmitted in November 1972 and August 1973. It was not until August 1974, however, that the Government began the presentation of the case to a grand jury of the United States District Court for the Eastern District of North Carolina. [FN3] On January 24, 1975, the grand jury indicted respondent on three counts of first-degree murder, in violation of 18 U.S.C. § 1111 . App. 22-23. He was promptly arrested and then released on bail a week later.

> FN3. There was federal-court jurisdiction because the crimes were committed on a military reservation. 18 U.S.C. §§ 7(3), 1111, and 3231.

On July 29, the District Court denied a number of pretrial motions submitted by respondent. Among these were a motion to dismiss the indictment on double jeopardy grounds and another to dismiss because of the denial of his Sixth Amendment right to a speedy trial. App. to Pet. for Cert. 44a, 46a, 49a. Relying on *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), the District Court concluded: "The right to a speedy trial under the Sixth Amendment does not arise until a person has been 'accused' of a crime, and in this case this did not occur until the indictment had been returned." App. to Pet. for Cert. 49a. Trial was scheduled to begin in August.

The United States Court of Appeals for the Fourth Circuit stayed the trial and allowed an interlocutory appeal on the authority of its decision in *United States v. Lansdown*, 460 F.2d 164 (1972). App. to Pet. for Cert. 42a. The Court of Appeals, by a divided vote, reversed the District Court's denial of respondent's motion to dismiss on speedy trial grounds and remanded the case with instructions to dismiss the indictment. 531 F.2d 196 (1976). The Government's petition for rehearing, with suggestion for rehearing en banc, was denied by an evenly divided vote. App. to Pet. for Cert. 2a.

The Court of Appeals panel majority recognized that the denial of a pretrial motion in a criminal case generally is not appealable. The court, however, offered two grounds for its assumption of jurisdiction in this particular case. It stated, ***853** first, that it considered respondent's speedy trial claim ****1549** to be pendent to his double jeopardy claim, the denial of which *Lansdown* had held to be appealable before trial. Alternatively, although conceding that "[n]ot every speedy trial claim . . .

merits an interlocutory appeal," and that "[g]enerally, this defense should be reviewed after final judgment," the court stated that it was "the extraordinary nature of MacDonald's case that persuaded us to allow an interlocutory appeal." 531 F.2d, at 199.

On the merits, the majority concluded that respondent had been deprived of his Sixth Amendment right to a speedy trial. The dissenting judge without addressing the jurisdictional issue, concluded that respondent's right to a speedy trial had not been violated. *Id.*, at 209.

Because of the importance of the jurisdictional question to the criminal law, we granted certiorari. 432 U.S. 905, 97 S.Ct. 2948, 53 L.Ed.2d 1076 (1977).

II

This Court frequently has considered the appealability of pretrial orders in criminal cases. See, *e. g., Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977); *Di Bella v. United States*, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962); *Parr v. United States*, 351 U.S. 513, 76 S.Ct. 912, 100 L.Ed. 1377 (1956); *Cobbledick v. United States*, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783 (1940). Just last Term the Court reiterated that interlocutory or "piecemeal" appeals are disfavored. "Finality of judgment has been required as a predicate for federal appellate jurisdiction." *Abney v. United States*, 431 U.S., at 656, 97 S.Ct., at 2039. See also *Di Bella v. United States*, 369 U.S., at 124, 82 S.Ct., at 656.

This traditional and basic principle is currently embodied in 28 U.S.C. § 1291, which grants the federal courts of appeals jurisdiction to review "all final decisions of the district courts," both civil and criminal. [FN4] The rule of finality has particular ***854** force in criminal prosecutions because "encouragement of delay is fatal to the vindication of the criminal law." *Cobbledick v. United States*, 309 U.S., at 325, 60 S.Ct., at 541. See also *Di Bella v. United States*, 369 U.S., at 126, 82 S.Ct., at 657.

FN4. Title 28 U.S.C. § 1291 reads:
"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

This Court in criminal cases has twice departed from the general prohibition against piecemeal appellate review. *Abney v. United States, supra; Stack v. Boyle*, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951). In each instance, the Court relied on the final-judgment rule's "collateral order" exception articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547, 69 S.Ct. 1221, 1225-1226, 93 L.Ed. 1528 (1949).

Cohen was a stockholder's derivative action in which federal jurisdiction was based on diversity of citizenship. Before final judgment was entered, the question arose whether a newly enacted state statute requiring a derivative-suit plaintiff to post security applied in federal court. The District Court held that it did not, and the defendants immediately appealed. The Court of Appeals reversed and ordered the posting of security. This Court concluded that the Court of Appeals had properly assumed jurisdiction to review the trial judge's ruling, and affirmed.

The Court's opinion began by emphasizing the principle--well established even then--that there can be no appeal before final judgment "even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results." *Id.*, at 546, 69 S.Ct., at 1225. The Court's conclusion that the order appealed from qualified as a "final decision," within the language ****1550** of 28 U.S.C. § 1291, ***855** however, rested on several grounds. Those grounds were summarized in *Abney v. United States*, 431 U.S., at 658, 97 S.Ct.,

at 2040:

"First, the District Court's order had fully disposed of the question of the state security statute's applicability in federal court; in no sense, did it leave the matter 'open, unfinished or inconclusive' [337 U.S., at 546, 69 S.Ct. 1221]. Second, the decision was not simply a 'step toward final disposition of the merits of the case [which would] be merged in final judgment'; rather, it resolved an issue completely collateral to the cause of action asserted. *Ibid.* Finally, the decision had involved an important right which would be 'lost, probably irreparably,' if review had to await final judgment; hence, to be effective, appellate review in that special, limited setting had to be immediate. *Ibid.*"

Two years after the decision in *Cohen*, the Court applied the "collateral order" doctrine in a criminal proceeding, holding that an order denying a motion to reduce bail could be reviewed before trial. *Stack v. Boyle, supra.* Writing separately in that case, Mr. Justice Jackson (the author of *Cohen*) explained that, like the question of posting security in *Cohen*, "an order fixing bail can be reviewed without halting the main trial--its issues are entirely independent of the issues to be tried--and unless it can be reviewed before sentence, it never can be reviewed at all." 342 U.S., at 12, 72 S.Ct., at 7.

In *Abney*, the Court returned to this theme, holding that the collateral-order doctrine permits interlocutory appeal of an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds. In so holding, the Court emphasized the special features of a motion to dismiss based on double jeopardy. It pointed out, first, that such an order constitutes "a complete, formal and, in the trial court, a final rejection of a criminal defendant's double jeopardy claim. There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is *856 barred by the Fifth Amendment's guarantee. Hence, *Cohen*'s threshold requirement of a fully consummated decision is satisfied." 431 U.S., at 659, 97 S.Ct., at 2040. Secondly, it noted that "the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i. e.*, whether or not the accused is guilty of the offense charged." *Ibid.* Finally, and perhaps most importantly, "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." *Id.*, at 660, 97 S.Ct., at 2041.

III

The application to the instant case of the principles enunciated in the above precedents is straightforward. [FN5] Like the *857 denial **1551 of a motion to dismiss an indictment on double jeopardy grounds, a pretrial order rejecting a defendant's speedy trial claim plainly "lacks the finality traditionally considered indispensable to appellate review," *Abney v. United States*, 431 U.S., at 659, 97 S.Ct., at 2040, that is, such an order obviously is not final in the sense of terminating the criminal proceedings in the trial court. Thus, if such an order may be appealed before trial, it is because it satisfies the criteria identified in *Cohen* and *Abney* as sufficient to warrant suspension of the established rules against piecemeal review before final judgment.

FN5. Respondent would rely on *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), to demonstrate that a defendant has a right to appeal before trial the denial of a motion to dismiss an indictment on speedy trial grounds. That case, however, is clearly distinguishable. In *Marion*, the District Court *granted* the defendants' motion to dismiss the indictment on speedy trial grounds, and the Government appealed the dismissal to this Court. The appeal was predicated on the Criminal Appeals Act, 18 U.S.C. § 3731 (1964 ed., Supp. V), which, at the time, provided in relevant part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

* * *

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy." Currently, 18 U.S.C. § 3731 (1976 ed.) provides:

"In a criminal case, an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

Obviously, neither the former version of the statute nor the current one has anything whatsoever to do with a defendant's right to appeal the denial of a motion to dismiss an indictment on speedy trial grounds.

We believe it clear that an order denying a motion to dismiss an indictment on speedy trial grounds does not satisfy those criteria. The considerations that militated in favor of appealability in *Stock v. Boyle, supra*, and in *Abney v. United States* are absent or markedly attenuated in the present case.

In keeping with what appear to be the only two other federal cases in which a defendant has sought pretrial review of an order denying his motion to dismiss an indictment on speedy trial grounds, we hold that the Court of Appeals lacked jurisdiction to entertain respondent's speedy trial appeal. *United States v. Bailey*, 512 F.2d 833 (CA5), cert. dism'd, 423 U.S. 1039, 96 S.Ct. 578, 46 L.Ed.2d 415 (1975) ; *Kyle v. United States*, 211 F.2d 912 (CA9 1954). [FN6]

FN6. The justifications proffered by the Court of Appeals for its exercise of jurisdiction (see *supra*, at 1548-1549) are not persuasive for us. The argument that respondent's Sixth Amendment claim was "pendent" to his double jeopardy claim is vitiated by *Abney v. United States*, 431 U.S. 651, 662-663, 97 S.Ct. 2034, 2041-2042, 52 L.Ed.2d 651 (1977) (decided after the Court of Appeals filed its opinion), where this Court concluded that a federal court of appeals is without pendent jurisdiction over otherwise nonappealable claims even though they are joined with a double jeopardy claim over which the appellate court does have interlocutory appellate jurisdiction. See also *United States v. Cerilli*, 558 F.2d 697, 699-700 (CA3), cert. denied, 434 U.S. 966, 98 S.Ct. 507, 54 L.Ed.2d 452 (1977).

The Court of Appeals' alternative rationale--that it was the "extraordinary nature" of respondent's claim that merited interlocutory appeal, even though not all speedy trial claims would be so meritorious--is also unpersuasive. "Appeal rights cannot depend on the facts of a particular case." *Carroll v. United States*, 354 U.S. 394, 405, 77 S.Ct. 1332, 1339, 1 L.Ed.2d 1442 (1957). The factual circumstances that underlie a speedy trial claim, however "extraordinary," cannot establish its independent appealability prior to trial. Under the controlling jurisdictional statute, 28 U.S.C. § 1291, the federal courts of appeals have power to review only "final decisions," a concept that Congress defined "in terms of categories." *Carroll v. United States*, 354 U.S., at 405, 77 S.Ct., at 1339.

***858** In sharp distinction to a denial of a motion to dismiss on double jeopardy grounds, a denial of a motion to dismiss on speedy trial grounds does not represent "a complete, formal and, in the trial court, a final rejection" of the defendant's claim. *Abney v. United States*, 431 U.S., at 659, 97 S.Ct., at 2040. The resolution of a speedy trial claim necessitates a careful assessment of the particular facts of the case. As is reflected in the decisions of this Court, most speedy trial claims, therefore, are best considered only after the relevant facts have been developed at trial.

In *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the Court listed four factors that are to be weighed in determining whether an accused has been deprived of his Sixth Amendment right to a speedy trial. They are the length of the

delay, the reason for the delay, whether the defendant has asserted his right, and prejudice to the defendant from the delay. *Id.*, at 530, 92 S.Ct., at 2191. The Court noted that prejudice to the defendant must be considered in the light of the interests the speedy trial right was designed to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to **1552 prepare his case skews the fairness of the entire system." *Id.*, at 532, 92 S.Ct., at 2193 (footnote omitted).

Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative. The denial of a pretrial motion to dismiss an indictment *859 on speedy trial grounds does not indicate that a like motion made after trial--when prejudice can be better gauged--would also be denied. Hence, pretrial denial of a speedy trial claim can never be considered a complete, formal, and final rejection by the trial court of the defendant's contention; rather, the question at stake in the motion to dismiss necessarily "remains open, unfinished [and] inconclusive" until the trial court has pronounced judgment. *Cohen*, 337 U.S., at 546, 69 S.Ct., at 1225.

Closely related to the "threshold requirement of a fully consummated decision," *Abney v. United States*, 431 U.S., at 659, 97 S.Ct., at 2040, is the requirement that the order sought to be appealed be "collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i. e.*, whether or not the accused is guilty of the offense charged." *Ibid.* In each of the two cases where this Court has upheld a pretrial appeal by a criminal defendant, the order sought to be reviewed clearly fit this description. *Abney v. United States,* (double jeopardy); *Stack v. Boyle,* (bail reduction). As already noted, however, there exists no such divorce between the question of prejudice to the conduct of the defense (which so often is central to an assessment of a speedy trial claim) and the events at trial. Quite the contrary, in the usual case, they are intertwined.

Even if the degree of prejudice could be accurately measured before trial, a speedy trial claim nonetheless would not be sufficiently independent of the outcome of the trial to warrant pretrial appellate review. The claim would be largely satisfied by an acquittal resulting from the prosecution's failure to carry its burden of proof. The double jeopardy motion in *Abney* was separable from the issues at trial because "[t]he elements of that claim are completely independent of [the accused's] guilt or innocence," 431 U.S., at 660, 97 S.Ct., at 2040, since an acquittal would not have eliminated the defendant's grievance at having been put twice in jeopardy. In contrast, a central *860 interest served by the Speedy Trial Clause is the protection of the factfinding process at trial. The essence of a defendant's Sixth Amendment claim in the usual case is that the passage of time has frustrated his ability to establish his innocence of the crime charged. Normally, it is only after trial that that claim may fairly be assessed.

Relatedly, the order sought to be appealed in this case may not accurately be described, in the sense that the description has been employed, as involving "an important right which would be 'lost, probably irreparably,' if review had to await final judgment." *Id.*, at 658, 97 S.Ct., at 2040, quoting *Cohen*, 337 U.S., at 546, 69 S.Ct., at 1225. The double jeopardy claim in *Abney*, the demand for reduced bail in *Stack v. Boyle*, and the posting of security at issue in *Cohen* each involved an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial. [FN7] There perhaps is some superficial **1553 attraction in the argument that the right to a speedy trial--by analogy to these other rights-- must be vindicated before *861 trial in order to insure that no nonspeedy trial is ever held. Both doctrinally and pragmatically, however, this argument fails. Unlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a "right not to be tried" which must be upheld prior to trial if it is to be enjoyed at all. It is the delay before trial, not the

trial itself, that offends against the constitutional guarantee of a speedy trial. If the factors outlined in *Barker v. Wingo, supra*, combine to deprive an accused of his right to a speedy trial, that loss, by definition, occurs before trial. Proceeding with the trial does not cause or compound the deprivation already suffered.

> FN7. Admittedly, there is value--to all but the most unusual litigant--in triumphing before trial, rather than after it, regardless of the substance of the winning claim. But this truism is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial. Double jeopardy claims are paradigmatic. Certainly, the fact that this Court has held dismissal of the indictment to be the proper remedy when the Sixth Amendment right to a speedy trial has been violated, see *Strunk v. United States*, 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973), does not mean that a defendant enjoys a "right not to be tried" which must be safeguarded by interlocutory appellate review. Dismissal of the indictment is the proper sanction when a defendant has been granted immunity from prosecution, when his indictment is defective, or, usually, when the only evidence against him was seized in violation of the Fourth Amendment. Obviously, however, this has not led the Court to conclude that such defendants can pursue interlocutory appeals. *Abney v. United States*, 431 U.S., at 663, 97 S.Ct., at 2042; *Cogen v. United States*, 278 U.S. 221, 227, 49 S.Ct. 118, 120, 73 L.Ed. 275 (1929); *Heike v. United States*, 217 U.S. 423, 430, 30 S.Ct. 539, 541, 54 L.Ed. 821 (1910).

Furthermore, in most cases, as noted above, it is difficult to make the careful examination of the constituent elements of the speedy trial claim before trial. [FN8] Appellate courts would be in no better position than trial courts to vindicate a right that had not yet been shown to have been infringed.

> FN8. Of course, an accused who does successfully establish a speedy trial claim before trial will not be tried.

IV

As the preceding discussion demonstrates, application of the principles articulated in *Cohen* and *Abney* to speedy trial claims compels the conclusion that such claims are not appealable before trial. This in itself is dispositive. Our conclusion, however, is reinforced by the important policy considerations that underlie both the Speedy Trial Clause and 28 U.S.C. § 1291.

Significantly, this Court has emphasized that one of the principal reasons for its strict adherence to the doctrine of finality in criminal cases is that "[t]he Sixth Amendment guarantees a speedy trial." *Di Bella v. United States*, 369 U.S., at 126, 82 S.Ct., at 658. Fulfillment of this guarantee would be impossible if every pretrial order were appealable.

***862** Many defendants, of course, would be willing to tolerate the delay in a trial that is attendant upon a pretrial appeal in the hope of winning that appeal. The right to a speedy trial, however, "is generically different from any of the other rights enshrined in the Constitution for the protection of the accused" because "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." *Barker v. Wingo*, 407 U.S., at 519, 92 S.Ct., at 2186. See also *United States v. Avalos*, 541 F.2d 1100, 1110 (CA5 1976), cert. denied, 430 U.S. 970, 97 S.Ct. 1656, 52 L.Ed.2d 363 (1977). Among other things, delay may prejudice the prosecution's ability to prove its case, increase the cost to society of maintaining those defendants subject to pretrial detention, and prolong the period during which defendants released on bail may commit other crimes. *Dickey v. Florida*, 398 U.S. 30, 42, 90 S.Ct. 1564, 1571, 26 L.Ed.2d 26 (1970) (Brennan, J., concurring).

Allowing an exception to the rule against pretrial appeals in criminal cases for speedy trial claims would threaten precisely the values manifested in the Speedy Trial Clause. And some assertions of delay-caused prejudice would become self-fulfilling prophecies during the period necessary for appeal.

There is one final argument for disallowing pretrial appeals on speedy trial grounds. As the Court previously has observed, there is nothing about the circumstances that will support a speedy trial claim which inherently limits the availability of the claim. See ***1554 *Barker v. Wingo*, 407 U.S., at 521-522, 530, 92 S.Ct., at 2187-2191. Unlike a double jeopardy claim, which requires at least a colorable showing that the defendant once before has been in jeopardy of federal conviction on the same or a related offense, in every case there will be some period between arrest or indictment and trial during which time "every defendant will either be incarcerated . . . or on bail subject to substantial restrictions on his liberty." *Id.*, at 537, 92 S.Ct., at 2195 (White, J., concurring). Thus, any defendant can make a pretrial motion *863 for dismissal on speedy trial grounds and, if § 1291 is not honored, could immediately appeal its denial.

V

In sum, we decline to exacerbate pretrial delay by intruding upon accepted principles of finality to allow a defendant whose speedy trial motion has been denied before trial to obtain interlocutory appellate review. [FN9] The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

> FN9. In view of our resolution of the appealability issue, we do not reach the merits of respondent's motion to dismiss the indictment on speedy trial grounds. Similarly, we express no opinion on the District Court's denial of respondent's motion to have the indictment dismissed on double jeopardy grounds. The Court of Appeals stated that it had jurisdiction to review the latter claim, 531 F.2d 196, 199 (1976), but declined to address its merits because of the court's disposition of respondent's speedy trial motion. *Id.*, at 209.

It is so ordered.

Mr. Justice BRENNAN took no part in the consideration or decision of this case.

435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18

Briefs and Other Related Documents (Back to top)

- 1978 WL 206949 (Appellate Brief) Reply Brief for the United States (Jan. 04, 1978)
- 1977 WL 189844 (Appellate Brief) Brief for Respondent Jeffrey R. MacDonald (Nov. 07, 1977)
- 1977 WL 189842 (Appellate Brief) Brief for the United States (Sep. 07, 1977)

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(Cite as: 585 F.2d 1211)

United States Court of Appeals,
Fourth Circuit.
UNITED STATES of America, Appellee,
v.
Jeffrey R. MacDONALD, Appellant.
Nos. 75-1870, 75-1871.

Submitted Oct. 12, 1978.
Decided Oct. 27, 1978.

Defendant's motion for dismissal of a murder indictment on grounds of denial of speedy trial was denied, but the United States Court of Appeals, 531 F.2d 196, allowed an interlocutory appeal and reversed. The Supreme Court granted certiorari and reversed and remanded, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18. On remand, the Court of Appeals, Butzner, Circuit Judge, after granting a motion by defendant for supplemental briefing on the issue of double jeopardy, held that: (1) where, although investigation of defendant by military personnel culminated in acceptance of a recommendation that charges against him be dismissed because they were "not true," the proceeding did not adjudicate his guilt or innocence and he was not put to trial before a military tribunal authorized to convict or acquit him, jeopardy did not attach, and (2) where there was no determination of an issue of ultimate fact by any tribunal having jurisdiction to try him, the prosecution pending in the District Court was not barred by the Fifth Amendment's embodiment of collateral estoppel.

Order denying plea of double jeopardy affirmed, and case remanded to District Court.

West Headnotes

[1] Double Jeopardy ⇐22
135Hk22 Most Cited Cases
(Formerly 110k163)

Where, although investigation by military personnel culminated in acceptance of recommendation that charges against defendant be dismissed because they were "not true," proceeding did not adjudicate his guilt or innocence and he was not put to trial before military tribunal authorized to convict or acquit him, jeopardy did not attach and Fifth Amendment guarantee against double jeopardy did not bar subsequent prosecution in federal district court. U.S.C.A.Const. Amend. 5.

[2] Judgment ⇐646
228k646 Most Cited Cases
Where, although investigation of military personnel culminated in acceptance of recommendation that charges against him be dismissed because they were "not true," there was no determination of issue of ultimate fact by any tribunal having jurisdiction to try him, prosecution pending in district court was not barred by Fifth Amendment's embodiment of collateral estoppel. U.S.C.A.Const. Amend. 5.

***1212** George M. Anderson, U. S. Atty., N. C., James L. Blackburn, Chief Asst. U. S. Atty., Raleigh, Brian M. Murtagh, Atty., U. S. Dept. of Justice, Washington, D. C., for appellee.

Kenneth A. Letzler, Washington, D. C., Daniel H. Benson, Bernard L. Segal, San Francisco, Cal., Michael J. Malley, Washington, D. C., Orrin Leigh Grover, III, San Francisco, Cal., for appellant.

Before HAYNSWORTH, Chief Judge, and BUTZNER and RUSSELL, Circuit Judges.

BUTZNER, Circuit Judge:

In United States v. MacDonald, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978), the Supreme Court held that a defendant may not obtain interlocutory appellate review of an order denying his pretrial motion to dismiss an indictment because of alleged infringement of his sixth amendment right to speedy trial.[FN*] On remand, we granted

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(Cite as: 585 F.2d 1211)

Jeffrey R. MacDonald's motion for supplemental briefing on the issue of double jeopardy.

> FN* The Court reversed United States v. MacDonald, 531 F.2d 196 (4th Cir. 1976). The facts and issues are set forth sufficiently in both opinions.

We conclude that the proceeding against MacDonald under Article 32, U.S.C.M.J., 10 U.S.C. s 832, and the commanding officer's review were investigative. Although this investigation culminated in the acceptance of a recommendation that charges against MacDonald be dismissed because they were "not true," the proceeding did not adjudicate his guilt or innocence. Calley v. Callaway, 519 F.2d 184, 215 n.54 (5th Cir. 1975); United States v. Moffett, 10 U.S.C.M.A. 169, 27 C.M.R. 243 (1959); United States v. Zagar, 5 U.S.C.M.A. 410, 416-17, 18 C.M.R. 34, 40-41 (1955).

[1][2] Since MacDonald was not put to trial before a military tribunal authorized to convict or acquit him, jeopardy never attached. Serfass v. United States, 420 U.S. 377, 387-89, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975). Consequently, the fifth amendment's guarantee against double jeopardy does not bar subsequent prosecution in a federal district court. See Crist v. Bretz, 437 U.S. 28, 32, 98 S.Ct. 2156, 2159, 57 L.Ed.2d 24 (1978). Furthermore, because no final judgment of a tribunal having jurisdiction to try MacDonald has determined an issue of ultimate fact, the prosecution pending in the district court is not barred by the fifth amendment's embodiment of collateral estoppel. See Ashe v. Swenson, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). The absence of such a judgment distinguishes this case from United States v. Oppenheimer, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161 (1916) and United States v. Utah Construction & Mining Co., 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966), on which MacDonald primarily relies.

***1213** The order denying MacDonald's plea of double jeopardy is affirmed, and this case is remanded to the district court for further proceedings.

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U.S. v. MacDonald, 632 F.2d 258 (4th Cir.(N.C.), Jul 29, 1980) (NO. 79-5253)

History
Direct History

=> 1 **U.S. v. MacDonald,** 632 F.2d 258 (4th Cir.(N.C.) Jul 29, 1980) (NO. 79-5253)
Rehearing Denied by
H 2 U.S. v. MacDonald, 635 F.2d 1115 (4th Cir.(N.C.) Dec 18, 1980) (NO. 79-5253)
AND Certiorari Granted by
H 3 U.S. v. MacDonald, 451 U.S. 1016, 101 S.Ct. 3004, 69 L.Ed.2d 387 (U.S.N.C. May 26, 1981) (NO. 80-1582)
AND Judgment Reversed by
4 U.S. v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (U.S.N.C. Mar 31, 1982) (NO. 80-1582)
On Remand to
H 5 U.S. v. MacDonald, 688 F.2d 224, 11 Fed. R. Evid. Serv. 474 (4th Cir.(N.C.) Aug 16, 1982) (NO. 79-5253)
Certiorari Denied by
H 6 MacDonald v. U.S., 459 U.S. 1103, 103 S.Ct. 726, 74 L.Ed.2d 951 (U.S.N.C. Jan 10, 1983) (NO. 82-565)
AND Habeas Corpus Denied by
H 7 U.S. v. MacDonald, 778 F.Supp. 1342 (E.D.N.C. Jul 08, 1991) (NO. 75-26-CR-3, 90-104-CIV-3-D)
Order Affirmed by
H 8 U.S. v. MacDonald, 966 F.2d 854 (4th Cir.(N.C.) Jun 02, 1992) (NO. 91-6613)
Certiorari Denied by
H 9 MacDonald v. U.S., 506 U.S. 1002, 113 S.Ct. 606, 121 L.Ed.2d 542, 61 USLW 3356, 61 USLW 3396, 61 USLW 3400 (U.S.N.C. Nov 30, 1992) (NO. 92-703)

H 10 U.S. v. MacDonald, 778 F.Supp. 1342 (E.D.N.C. Jul 08, 1991) (NO. 75-26-CR-3, 90-104-CIV-3-D)
Motion to Reopen Denied by
H 11 U.S. v. MacDonald, 979 F.Supp. 1057 (E.D.N.C. Sep 02, 1997) (NO. 75-26-CR-3, 90-104-CIV-3-F)
Order Affirmed by
12 U.S. v. MacDonald, 161 F.3d 4 (4th Cir.(N.C.) Sep 08, 1998) (TABLE, TEXT IN WESTLAW, NO. 97-7297)

Negative Indirect History (U.S.A.)

Declined to Follow by
13 U.S. v. Tranakos, 911 F.2d 1422 (10th Cir.(Wyo.) Aug 15, 1990) (NO. 89-8021, 89-8022)★★
HN: 1 (F.2d)

H

United States District Court, E. D. North Carolina, Fayetteville Division.
UNITED STATES of America, Plaintiff,
v.
Jeffrey R. MacDONALD, Defendant.
No. 75-26-CR-3.

Sept. 14, 1979.

Proceeding was instituted on motion for admission to bail pending appeal from conviction of three counts of murder. The District Court, Dupree, J., held that request for bail pending appeal following verdicts of guilty on three counts of murder would be denied where no one or more conditions of release would reasonably insure that defendant would not flee in that he was a highly skilled physician and presumably would have no difficulty in finding employment in any country of the world that did not have an extradition treaty with the United States and, while defendant's contemplated appeal was not frivolous, defendant failed to demonstrate that it had sufficient legal merit to create genuine concern that he would be wrongfully held in custody pending appeal.

Motion denied.

West Headnotes

[1] Criminal Law ⚿577.10(1)
110k577.10(1) Most Cited Cases
Factors to be weighed in determining whether defendant has been deprived of his constitutional right to a speedy trial by reason of pretrial delay include length of delay, reason for delay, whether defendant has asserted his right, and prejudice to defendant from delay. U.S.C.A.Const. Amend. 6.

[2] Criminal Law ⚿577.15(4)
110k577.15(4) Most Cited Cases
Delay of four and one-half years between time of indictment and time of trial was not violative of defendant's right to a speedy trial where, aside from fact that delay was attributable almost entirely to pursuit by defendant of innumerable motions, appeals and attempted appeals, all of which were ultimately resolved against him, delay did not seriously prejudice defendant's ability to defend case adequately. U.S.C.A.Const. Amend. 6.

[3] Criminal Law ⚿419(5)
110k419(5) Most Cited Cases
Evidence with respect to out-of-court statements made by a defense witness who was allegedly in home of victims at time of crimes was not admissible as an exception to hearsay rule as tending to exculpate defendant, even if witness was unavailable and assuming arguendo that statements were against her penal interest, where corroborated circumstances did not clearly indicate trustworthiness of statements in that there was no necessity for witness to make statements and statements were made while witness was under influence of powerful narcotics. Fed.Rules Evid. Rules 403, 804(a)(3), (b)(3), 28 U.S.C.A.

[4] Witnesses ⚿386
410k386 Most Cited Cases
Out-of-court statements of a defense witness who was allegedly in home of victims at time of crimes were not admissible for impeachment purposes where statements, though in some instances at variance with witness' sworn testimony, were entirely consistent with such testimony and, thus, would have only added to confusion already engendered by such testimony. Fed.Rules Evid. Rules 403, 613, 28 U.S.C.A.

[5] Criminal Law ⚿472
110k472 Most Cited Cases
Evidence of an expert is not necessarily admissible simply because witness purports to base his testimony on an ostensibly scientific principle;

principle must be sufficiently established to have gained general acceptance in particular field to which it belongs.

[6] Criminal Law ⚿472
110k472 Most Cited Cases
The opinion of an expert because of its seeming objectivity is apt to carry undue weight, so not every ostensibly scientific technique should be recognized as the basis of expert testimony.

[7] Criminal Law ⚿674
110k674 Most Cited Cases
(Formerly 110k469)
Irrespective of admissibility of proffered psychiatric testimony as evidence of a pertinent trait or character of defendant for purpose of proving that he acted in conformity therewith on a particular occasion, probative value of such testimony was substantially outweighed by danger of misleading jury, unfair prejudice, and confusion of issues and, hence, was subject to being excluded in that numerous lay witnesses, most of whom were highly intelligent and articulate professional and business people, had already testified to defendant's character traits of peacefulness, nonviolence, rationality and compassion for his fellow man. Fed.Rules Evid. Rules 403-405, 28 U.S.C.A.

[8] Homicide ⚿1134
203k1134 Most Cited Cases
(Formerly 203k228(1))
Evidence, including highly technical and scientific evidence on each side, sustained verdicts of guilty on three counts of murder.

[9] Bail ⚿44(3.1)
49k44(3.1) Most Cited Cases
(Formerly 49k44(3))
Request for bail pending appeal following verdicts of guilty on three counts of murder would be denied where no one or more conditions of release would reasonably insure that defendant would not flee in that he was a highly skilled physician and presumably would have no difficulty in finding employment in any country of the world that did not have an extradition treaty with the United States and, while defendant's contemplated appeal was not frivolous, defendant failed to demonstrate that it had sufficient legal merit to create genuine concern that he would be wrongfully held in custody pending appeal. 18 U.S.C.A. §§ 3146 et seq., 3148.
*1088 Asst. U. S. Atty. James L. Blackburn, Raleigh, N. C., for United states.

Bernard L. Segal, San Francisco, Cal., and Wade M. Smith, Raleigh, N. C., for Dr. MacDonald.

ORDER

DUPREE, District Judge.

Convicted by a jury of three counts of murder and sentenced by the court to three consecutive life sentences the defendant, Jeffrey R. MacDonald, through his counsel moved in open court immediately following pronouncement of judgment to be permitted to remain on bail pending appeal. The motion was denied initially but without prejudice to defendant's right to reduce the motion to writing and support it with further authorities and argument. This has now been done and two informal hearings attended by counsel for defendant and the government have been held. The court's final decision not to allow bail pending appeal was announced on September 7, 1979, and the reasons supporting this conclusion will now be recorded.

Although the government did not seek the death penalty in this case, the statute under which it was prosecuted still provides for such penalty, and traditionally bail has not been allowed in capital cases. The Bail Reform Act of 1966, 18 U.S.C. ss 3146, et seq., however, provides for release on bail of persons convicted of a capital offense who have filed an appeal in accordance with the provisions of 18 U.S.C. s 3146 "unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community . . . or if it appears that an appeal is frivolous or taken for delay . . . ." 18 U.S.C. s 3148 . While it is true that this defendant is a well established professional man (a doctor) and has never heretofore failed to meet all court appearances, the situation with which he is now

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confronted is, of course, far different from that which has heretofore obtained. As a highly skilled physician the defendant presumably would have no difficulty at all in finding employment in any one of the many countries in the world which do not have in effect extradition treaties with the United States, and the temptation to seek refuge in another country would certainly be great indeed in this case.

Even so, the court would be reluctant to keep this defendant imprisoned while awaiting appeal if the court were convinced of the possibility of serious, reversible error in defendant's trial. Defense counsel were ***1089** therefore requested to set forth in their written motion for bail those assignments of error on which principal reliance would be placed in the appeal, and in their motion they have listed some sixteen or more allegations of error only a few of which the court has deemed worthy of comment.

[1] The cornerstone of defendant's legal defense remains his claim that he was denied his constitutional right of a speedy trial in the case. Quite correctly he points to the fact that the initial ruling of this court denying his motion to dismiss based on speedy trial grounds was reversed in a split decision by the Fourth Circuit almost four years ago. United States v. MacDonald, 531 F.2d 196 (4th Cir. 1976). But the Supreme Court held that the Fourth Circuit lacked jurisdiction to entertain MacDonald's speedy trial appeal, and the case was eventually remanded to this court for trial. 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978). After referring to the four factors to be weighed in determining whether an accused has been deprived of his constitutional right to a speedy trial as set forth in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (length of delay, reason for delay, whether defendant has asserted the right and prejudice to defendant from the delay) the Supreme Court stated that prejudice to the defendant from the delay was the most serious and went on to say:

> "Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative. The denial of a pre-trial motion to dismiss an indictment on speedy trial grounds does not indicate that a like motion made after trial when prejudice can be better gauged would also be denied. Hence, pre-trial denial of a speedy trial claim can never be considered a complete, formal and final rejection by the trial court of the defendant's contention; rather, the question at stake in the motion to dismiss necessarily 'remains open, unfinished (and) inconclusive' until the trial court has pronounced judgment." Id., 435 U.S. 858-9, 98 S.Ct. 1551.

In the light of the Supreme Court's decision this court summarily overruled defendant's renewed motion to dismiss on speedy trial grounds again interposed at the pre-trial conference held on July 14, 1979. At that time the defendant took the position, to which he apparently still strongly adheres, that since the Fourth Circuit has already expressed its opinion on the speedy trial issue notwithstanding its decision was overturned later on jurisdictional grounds, it is a foregone conclusion that the case will again be dismissed on these grounds when it reaches the Fourth Circuit on appeal. This court does not believe that this result necessarily follows, and it is noted in the inception that following the court's order of July 14, 1979 the defendant promptly petitioned the Fourth Circuit for a writ of mandamus asking that the indictment be dismissed on speedy trial grounds which petition the Fourth Circuit just as promptly rejected.

Accordingly, the case has been tried to a jury in this court in a trial lasting six and one-half weeks during all of which time this court has been alert to detect the existence of any of the four factors required to be considered under Barker v. Wingo, supra, in determining the speedy trial issue. The length of the delay between the time of the crimes and the return of the indictment, almost five years, is, of course, fixed and indisputable, and although the government's explanation for much of the delay is not without plausibility, the impression remains that the case could have been put before the grand jury at a much earlier date than it was. There is also some evidence that the defendant expressed the desire to have the case brought to a head one way or the other much earlier than the time the indictment was returned. The assertion of a right to a speedy trial, however, is normally understood to refer to a

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right to a trial by one who has been indicted and is subject to a trial rather than to a right to have the government to accelerate its efforts to obtain an indictment. It will be remembered, of course, that the four-and-a-half-year delay which followed the indictment was attributable almost entirely to *1090 the pursuit by defendant of innumerable motions, appeals and attempted appeals, all of which were ultimately resolved against him.

[2] Essentially, then, the question involved here is whether the defendant has been prejudiced by pre-indictment delay. As stated in Barker, this question must be considered in the light of the interests the speedy trial right was designed to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."

While the Fourth Circuit in its original consideration of the speedy trial issue seemed to equate the defendant's restriction to quarters during the time the case was under investigation by the Army authorities with "pretrial incarceration", Judge Craven in his dissenting opinion in that case pointed out that the conditions under which defendant was restricted were far from burdensome. He apparently was able to go to and from his meals, to play golf and to have a feminine companion to visit him in his quarters from time to time, amenities certainly not enjoyed by one incarcerated in a jail awaiting trial. He apparently continued to draw his full pay without having to work, a privilege which few, if any, persons incarcerated awaiting trial ever enjoy. This court cannot see that there has been any "oppressive pretrial incarceration" in this case.

The anxiety and concern, if any, of this defendant would involve his subjective feelings, and while it can certainly be assumed that he would have much preferred to know that the matter had been finally put to rest, the evidence is that following his honorable discharge from the Army and a short return to his home in New York he moved to California where he promptly established himself in the practice of his profession and acquired a wide host of friends both professional and social. The record would not support a finding that this defendant has suffered great anxiety and concern by reason of the pre-indictment delay in this case.

The fears expressed by the Fourth Circuit in its 1976 decision that the defendant's ability to defend the case adequately might be seriously prejudiced by the pre-indictment delay have not been borne out in the record developed at trial. Almost incredibly, the only material witness on either side of the case shown to have died was a government witness, and not only were all of defendant's original witnesses shown to be available to testify, but he was also able to produce one or more witnesses who were not even known to the defendant until recent times and who gave testimony vital to the defense. In addition the defendant was able to have the benefit of the testimony of several highly competent expert witnesses who were not known to or available to him at the time of the Army hearing in 1970. Finally, by reason of the excellent record he has made in the practice of his profession in California in the last seven or eight years defendant was able to produce a most impressive array of character witnesses none of whom would have been available to him had he been brought to trial within a year or two after the crimes were committed.

Significantly, in none of his motions based on speedy trial grounds has the defendant alleged any particular in which his defense has been prejudiced in the least by delay. Contrarily, this court is of opinion that the delay may very well have worked in defendant's favor in that juries are not known to look with favor on stale claims, and there was no way that the jury in this case could have known that approximately one-half of the delay here was attributable to actions taken by the defendant himself rather than the government. Be this as it may, the court finds that the defendant's ability to defend this case adequately was not prejudiced by any of the delay, pre-indictment or otherwise, and that his speedy trial claim should be denied.

Since the court's instructions to the jury were not objected to by either party at the trial and defendant has pointed to nothing in the instructions which

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might conceivably constitute plain error, it is assumed that defendant's principal claim of prejudicial *1091 error during the course of the trial will center around the court's alleged erroneous evidentiary rulings. The two principal exceptions taken were to the court's refusal to admit testimony of witnesses to statements made out of court by the defendant's witness, Helena Stoeckley, and its refusal to admit the testimony of a psychiatrist, one Dr. Sadoff. The bases of the court's rulings on these two questions were dictated into the record at trial, see Transcripts for August 20, 1979 (Stoeckley) and August 22, 1979 (Sadoff), but it was indicated at the time that the court might elaborate further on its rulings in writing as soon as time should permit. This will now be done.

The Stoeckley Witnesses. Helena Stoeckley, an acknowledged drug addict, was living in Fayetteville at the time of the murders in question in February, 1970, as a fairly well-known member of the drug culture. Colonel Rock, who conducted the Article 32 proceedings for the Army in 1970, had recommended that Stoeckley be investigated as a possible suspect in the MacDonald murders. Apparently this was based on the fact that this drug-addicted girl had engaged in some rather bizarre behavior shortly after the murders and had been unable to account for her whereabouts for about four hours on the early morning of February 17, 1970, during which time the murders occurred. She reportedly made statements to the effect that she thought she might have been in the MacDonald home at the time of the crimes, and there was evidence to the effect that she obtained some funeral wreaths from a florist shop near her residence and wore black for a while as if she were in mourning for the murder victims. There was also evidence that she had a long blond wig and a "floppy" hat and boots which in some respects seemed similar to those allegedly worn by one of the intruders claimed by defendant MacDonald to have committed the murders of his wife and two young daughters.

Stoeckley was located during the course of the trial at a place in South Carolina near Greenville and because of her reluctance to come to court in obedience to a subpoena the court ordered her taken into custody and brought to Raleigh to testify on behalf of the defendant. Upon her arrival counsel for defendant asked for a short recess to interview Stoeckley, and this stretched into almost an entire day of conferences between defense counsel, Stoeckley and a number of witnesses to whom she had allegedly made statements of one kind or another over the nine and one-half years which have elapsed since the murders in which she would indicate some possibility of her own involvement in these crimes.

On the following day Stoeckley was put on the stand by defense counsel and questioned at considerable length about her knowledge of the MacDonald murders. The substance of her testimony was that she was not involved in the murders but that because of her drug-crazed condition she had at least come to wonder whether or not she was in fact involved, and she admitted to owning the clothing referred to above and the fact that she seemed to go into mourning following the murders. The court gained the unmistakable impression which it believes was shared by the jury that this pathetic figure was suffering from drug-induced mental distortion and that she could be of no help to either side in the case.

The defendant next took the voir dire testimony of a half dozen or more witnesses to whom Stoeckley had made statements relating to the MacDonald murders beginning with a Fayetteville detective who interviewed her within a few days after the murders and ending with witnesses including members of defense counsel's staff who interviewed Stoeckley on the day she arrived in Raleigh to testify.

Several of these witnesses talked to Stoeckley in Nashville, Tennessee where she was living in the fall of 1970 and the early part of 1971. When she would talk to these witnesses she would sometimes be "hysterical", "crying", and "blubbering". She would say things like "I don't know whether I did it or not." She told one witness that she remembered being at the MacDonald home, that she knew who did it but *1092 that she did not do it herself, that she remembered nothing about the evening, that

MacDonald himself did the killings and that she was unable to describe anything inside the MacDonald apartment. She was under the influence of drugs at times when she talked to this witness but at other times she was not under the influence of drugs. She was interviewed by a CID agent on April 23 and April 24 of 1974 and told him that she was convinced that she had participated in these crimes for three or four months but was now of the opinion that she was present but did not participate. She was under the influence of narcotics the first day she talked to the CID agent but was "better" on the next day when she retracted everything she had told the agent on the previous day. This agent was unable to develop any information from Stoeckley showing that she really had any knowledge of the crime, and all the possible leads she was able to furnish were checked out and it was verified that the persons named by her were not involved.

The Fayetteville detective, one Beasley, interviewed Stoeckley at her home in Fayetteville between 2:30 and 3:00 a. m. on the morning of February 18, which was the day following the murders, and she told him at that time "in my mind it seems that I saw this thing happen," but she stated further that she was under the influence of the drug mescaline at the time and that she then backed off and would say no more. This officer held Stoeckley and several of her male companions for about an hour that morning after requesting his headquarters to contact the CID and have them come and interview these people, but when the CID agents did not arrive in about an hour the detective released these people and has never seen them again. Curiously, this officer's notes of his interviews with Stoeckley and her companions were lost or misplaced, and he has never seen them again. If it is within the province of this court to pass on the trustworthiness of a witness who proposes to testify as to statements of another witness allegedly qualifying as an exception to the hearsay rule, see United States v. Satterfield, 572 F.2d 687 at p. 691 (9th Cir. 1978), cert. denied, 439 U.S. 840, 99 S.Ct. 128, 58 L.Ed.2d 138, this court would be constrained to hold Officer Beasley's testimony to be unreliable. It is simply incredible that any self-respecting, competent police officer who really thought he had a substantial lead toward solving these sensational murders would allow the suspects to go after waiting only an hour for the Army investigators to come when he had had no direct contact with them himself and that he would never again pursue the lead on his own.

Statements allegedly made by Stoeckley to her neighbor, one Posey, were of the same equivocal character as the statements sought to be proven by the other witnesses referred to above. For reasons which were brought out more fully by the government's cross-examination of this witness, if required to do so this court would find his testimony untrustworthy.

[3] The defendant sought to introduce testimony of these out-of-court statements by Stoeckley as exceptions to the hearsay rule under Rule 804(b)(3) of the Federal Rules of Evidence, contending that they qualified as statements against Stoeckley's penal interest in view of Stoeckley's "unavailability as a witness." In view of Stoeckley's testimony that she had no recollection of the subject matter of at least some of her statements, the court was prepared to rule that she qualified as an unavailable witness under Rule 804(a)(3), and although it is a debatable proposition, the court was willing to assume arguendo that the statements were against Stoeckley's penal interest. The trouble with the proffered testimony, however, lies in its failure to meet the test of the second sentence of Rule 804(b)(3) which reads as follows:

> "A statement tending to expose the declarant to criminal liability and offer to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

After studying the transcript of Stoeckley's own testimony and that of the proposed *1093 witnesses given on voir dire the court was convinced that far from being shown by corroborating circumstances to be clearly trustworthy, the alleged statements of Stoeckley were so clearly untrustworthy that the court should not hesitate to exercise its discretion to exclude the evidence under Rule 403, F.R.E., which provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

That the determination of admissibility under Rule 804(b)(3) is left to the discretion of the trial court is hardly open to question, United States v. Guillette, 547 F.2d 743 (2nd Cir. 1976); United States v. Oropeza, 564 F.2d 316, 325 (9th Cir. 1977), and the standard for appellate review is whether or not the discretion was abused. United States v. Bagley, 537 F.2d 162, 166- 167 (5th Cir. 1976).

The closest case on the facts which the court was able to find was United States v. Satterfield, 572 F.2d 687 (9th Cir. 1978), cert. denied, 439 U.S. 840, 99 S.Ct. 128, 58 L.Ed.2d 138. In that case the witness took the Fifth Amendment and therefore made himself unavailable. In sustaining the trial court's ruling excluding testimony about an alleged statement made out of court by the witness because clear circumstances corroborating the veracity of the witness were absent, the court listed some of the circumstances which tended to corroborate the trustworthiness of the statement and others which indicated that the statements were untrustworthy. The court said:

> "Under Rule 804(b)(3), the corroborating circumstances must do more than tend to indicate the trustworthiness of the statement; they must clearly indicate it. There is good reason to believe that (the witness) staged the argument with (the defendant's) help and that his alleged statements . . . were also fabricated. The trial court did not abuse its discretion in denying (defendant's) motion to admit this evidence." Id. p. 693.

In assessing the trustworthiness of statements of the kind sought to be introduced here the court must inquire into the reliability of and the necessity for the statement. United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), cert. denied, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224. Here the statements of Stoeckley were anything but reliable, and no necessity for her making the statements was ever shown. To the contrary, it appears that for the most part the statements were made by her voluntarily while she was under the influence of powerful narcotics.

The case relied upon by defendant, Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), is clearly distinguishable. In that case the hearsay statements of the declarant were originally made and subsequently offered at the trial under circumstances that provided assurance as to their trustworthiness. The statements consisted of the confessions made spontaneously by the declarant to a close acquaintance shortly after the crime had occurred; the statements were corroborated by other evidence in the case including the declarant's sworn confession which he later repudiated, the testimony of an eye witness to the murder, the testimony that the declarant was seen with a gun immediately thereafter and proof that the declarant owned a weapon of the kind involved in the crime. Moreover, "(t)he sheer number of independent confessions provided additional corroboration for each" and "each confession here was in a very real sense self-incriminatory and unquestionably against interest." 410 U.S. 300-301, 93 S.Ct. 1048. Nothing remotely resembling such corroborating circumstances is present in the case at bar.

[4] As an alternative ground for the admission of the out-of-court statements of Stoeckley defendant argued that the statements were admissible for impeachment purposes under Rule 613, F.R.E. The court had the definite feeling that the real purpose of counsel in endeavoring to get the ***1094** evidence in as impeachment was simply to get it before the jury, and if this is so the evidence was properly excluded under United States v. Morlang, 531 F.2d 183, 190 (4th Cir. 1975), where it was said:

> "The overwhelming weight of authority is . . . that impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible."

In that case it was recognized that the danger of

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confusion, even where the evidence is limited to impeachment, may be so great as to upset the balance and warrant its exclusion. Authority for exclusion of such evidence is now contained in Rule 403, F.R.E.

The court chose to exclude the evidence on other grounds. To begin with, in order to impeach a witness by a prior statement there must in fact be testimony which is inconsistent with the prior statement. Gilmour v. Strescon Industries, Inc., 66 F.R.D. 146 (E.D.Pa.1975), aff'd, 521 F.2d 1398 (3rd Cir. 1975).

> "Any statement is inconsistent if under any rational theory it might lead to any relevant conclusion different from any other relevant conclusion resulting from anything the witness has said." 3 Weinstein's Evidence, 613-11.

The alleged statements made by Stoeckley are in some instances at variance with her sworn testimony given at the trial in this case, but by the same token the statements in some respects are entirely consistent with testimony given at the trial by Stoeckley. And so we were simply left with conflicting statements made by Stoeckley to the same witness, and to have allowed such statements to be admitted could only have added to the confusion already engendered by her own vague and totally untrustworthy testimony which she had given from the witness stand.

The Psychiatric Testimony. The defendant proffered the testimony of a forensic psychiatrist, Dr. Robert L. Sadoff, who apparently proposed to give testimony as follows:

> "That it is recognized and accepted by reputable specialists in the field of forensic psychiatry that certain personality/emotional configurations are identifiable in human beings which, because of the mental disorders involved, are indicative of a capability or disposition to certain types of anti-social conduct, including the commission of homicides involving extreme brutality to one's own spouse and small children and other crimes of violence; and that, conversely, other personality/emotional configurations are identifiable which are inconsistent with such anti-social behavior.
>
> "That based on his psychiatric examination of the defendant, it is his opinion of the character of Dr. MacDonald that the defendant was and is a man who is not given to extraordinary violent outbursts of physical violence against his wife and children; that he was and is an emotionally normal, mentally stable man, neither evasive nor apparently untruthful about the significant events of his life, including the murders of his family, who did not possess the type of personality/emotional configuration that would be consistent with and/or manifests this type of murderous assault on his wife and small children."

This evidence was sought to be introduced under Rule 404(a)(1) of the Federal Rules of Evidence which declares admissible evidence of a pertinent trait of the character of an accused for the purpose of proving that he acted in conformity therewith on a particular occasion. Defendant contended that the proffered psychiatric testimony would show that the defendant "was a well-adjusted man, without violent tendencies" and would "establish a personality configuration inconsistent with the outrageous and senseless murders of defendant's family."

Numerous lay witnesses most of whom were highly intelligent and articulate, professional and business people, had already testified to the defendant's character traits of peacefulness, non-violence, rationality and compassion for his fellow man, but it was the position of the defendant that the *1095 opinion of a qualified psychiatrist based on his examination of the defendant might well be more reliable evidence of character than that of even the most perceptive lay observer. Defendant points to a note by the Advisory Committee to Rule 405, F.R.E ., which he contends expressly sanctions the introduction of such psychiatric opinion testimony. The note reads in pertinent part as follows:

> "If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing. No effective dividing line exists between character and mental

capacity, and the latter traditionally has been provable by opinion."

In ruling on the admissibility of this proffered expert testimony the court indicated that it would allow testimony by Dr. Sadoff as to the defendant's character traits such as peacefulness and non-violence which would be inconsistent with the commission of the crimes in question, but that it had been concluded following a study of the pertinent authorities that the proffered testimony to the effect that "certain personality/emotional configurations are identifiable in human beings which, because of the mental disorders involved, are indicative of a capability or disposition to certain types of anti-social conduct including the commission of crimes of the type here involved" should not be admitted. Several reasons led the court to this conclusion.

The legal principles applicable have been stated in United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973), as follows:

"The basic purpose of any proffered evidence is to facilitate the acquisition of knowledge by the triers of fact thus enabling them to reach a final determination. As often stated, our system of evidence rests on two axioms: Only facts having rational probative value are admissible and all facts having rational probative value are admissible unless some specific policy forbids. . . . Evidence which has any tendency in reason to prove any material fact has rational probative value.

"The general test regarding the admissibility of expert testimony is whether the jury can receive 'appreciable help' from such testimony. . . . The balance of the probative value of the tendered expert testimony evidence against its prejudicial effect is committed to the 'broad discretion' of the trial judge and his action will not be disturbed unless manifestly erroneous. . . .

"The countervailing considerations most often noted to exclude what is relevant and material evidence are the risk that admission will (1) require undue consumption of time, (2) create a substantial danger of undue prejudice or of confusing the issues or of misleading the jury, (3) or unfairly and harmfully surprise a party who has not had a reasonable opportunity to anticipate the evidence submitted. Scientific or expert testimony particularly courts the second danger because of its aura of special reliability and trustworthiness.

"Because of the peculiar risks of expert testimony, courts have imposed an additional test, i. e., that the testimony be in accordance with a generally accepted explanatory theory." Id., p. 1152.

The court assumed that Dr. Sadoff could qualify as an expert in forensic psychiatry, but proof that his proffered testimony would conform to a generally accepted explanatory theory was lacking. In his brief the defendant cited several articles in psychiatric journals which were said to deal with this subject, but the articles were not made available to the court, and with the possible exception of the case of United States v. Staggs, 553 F.2d 1073 (7th Cir. 1977), the court was not cited any case decided under the Federal Rules of Evidence supporting the admissibility of psychiatric testimony of the type sought to be introduced here. The government, on the other hand, has cited an article by an Assistant Professor of Psychiatry at UCLA ***1096** entitled "A Critique of the Psychiatrist's Role as Expert Witness," 12 Journal for Science 172 (1967), from which the following quote is taken:

"It is not possible, nor is it likely in the near future, for a psychiatrist who first sees the patient some time, often months, after the offense, to give specific information about the mental state of the defendant at the time of the offense. However, the moment that the psychiatrist is pressed to give his opinion, which is no more than his personal guess or moral conviction, there suddenly appears something interpreted as tangible and scientific. Under the guise of science, part or all of the responsibility for the difficult issue of criminal responsibility is thus handed over to the psychiatrist."

[5][6] Evidence is not necessarily admissible simply because the witness purports to base his testimony on an ostensibly scientific principle. The principle must be sufficiently established to have

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gained general acceptance in the particular field to which it belongs. United States v. Brown, 557 F.2d 541, 556 (6th Cir. 1977). Moreover, the opinion of an expert because of its seeming objectivity is apt to carry undue weight, so not every ostensibly scientific technique should be recognized as the basis of expert testimony. United States v. Baller, 519 F.2d 463, 466 (4th Cir. 1975).

> "In order to prevent deception or mistake and to allow the possibility of effective response, there must be a demonstrable, objective procedure for reaching the opinion and qualified persons who can either duplicate the result or criticize the means by which it was reached, drawing their own conclusions from the underlying facts." Id., p. 466.

In United States v. Brown, supra, the court rejected the government's proffered expert testimony demonstrating that ion microprobic analysis of human hair had reached a level of general acceptance in the field to make it a sufficiently reliable and accurate means for expert identification of hair. The court said:

> "While it is a truism that every useful new development must have its first day in court . . ., expert testimony on a critical fact relating to guilt or innocence is not admissible unless the principle upon which it is based has attained general acceptance in the scientific community and is not mere speculation or conjecture." Id., pp. 558-9.

Our case here was further complicated by the fact that the government's own forensic psychiatrist had examined the defendant and had reached conclusions diametrically opposed to those of Dr. Sadoff. The report of this expert which has been furnished counsel for defendant and to the court for its in camera review tends to indicate that the defendant does indeed possess those traits of character which are consistent with his commission of the crimes with which he is charged and that he possesses other traits which tend to cast serious doubt on the credibility of his explanation of how the crimes occurred.

The result was that we had shaping up a "battle of the experts" referred to by Weinstein in his work on Evidence, Section 405(03), pages 405-34 where he quotes from an article by Falknor and Steffen entitled "Evidence of Character: From the 'Crucible of the Community' to the 'Couch of the Psychiatrist' ", 102 Univ. of Pa.L.Rev. 980, 994 (1954) as follows:

> "Even in the case of strictly medical testimony, where the issue concerns physical rather than mental or psychological condition or disability 'objective' rather than 'subjective' symptoms experience has demonstrated the commonness of disagreement among the 'experts.' When the inquiry is centered on an intangible, impalpable, wholly subjective thing like state of mind, personality or 'propensity,' the likelihood of disagreement is greatly enhanced. Thus there is point to the conclusion of the New Mexico court to the effect that it was 'unwilling to enlarge the already immense field where medical experts, apparently equally qualified, express such diametrically opposite views on the same facts and conditions,' to the 'bewilderment of the fact finder.' "

[7] In view of all of these considerations the court concluded that irrespective of the admissibility of the proffered evidence under *1097 Rules 404 and 405, F.R.E., the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury and that it should be excluded under Rule 403. See further Wright & Graham, Federal Practice & Procedure, s 5265.

[8] The defendant's proposed assignment of error based on the denial of defendant's motion for judgment of acquittal made at the close of the government's evidence (but not renewed, as the court recalls, at the close of all the evidence) is considered to be without merit. Although the introduction of evidence by the parties extended over the better part of six weeks and encompassed much highly technical and scientific evidence on each side, the one central question involved in the case from the beginning to the end was whether the jury would believe the defendant's story that the murders had been committed by four intruders who

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entered his home through an unlocked back door in the early morning hours of February 17, 1970. Selection of this jury extended over a period of three days, and while in the court's view the parties were entitled to only ten challenges each, at their insistence they were allowed twenty challenges each as provided in capital cases involving the death penalty. The result was the selection of a jury panel composed of intelligent, conscientious citizens from almost every walk of life who were obviously imbued with a serious sense of responsibility and who gave the case their undivided attention throughout the unusually long trial. Counsel for both sides agreed that it was a good jury, and the six and one-half hours of deliberations which they required to reach a verdict demonstrates that their task was not taken lightly. This jury obviously declined to accept Dr. MacDonald's story, and the result was the return of the guilty verdict. The court remains of opinion that the verdict was fully supported by the evidence and that the denial of the motion for judgment of acquittal was proper.

The court has considered the twelve additional proposed assignments of error relating principally to evidentiary rulings, and it would serve no useful purpose to examine these seriatim at this time. Suffice it to say that in those instances where objections were properly lodged and an explanation for the court's ruling was considered appropriate, the same will appear in the transcripts of the trial and the pre-trial proceedings. The court remains of opinion that these rulings were proper.

The court is fully cognizant of the fact, of course, that it is not its province to sit in appellate review of itself, and the elaboration herein on what it understands to be defendant's principal proposed assignments of error is intended only to comply with the court's intention expressed at trial to explicate some of its rulings more fully as soon as time should permit and to state additional reasons as to why the court has concluded not to allow bail pending appeal.

[9] In summary, the court remains of opinion that no one or more conditions of release will reasonably insure that the defendant will not flee and that while defendant's appeal is certainly not frivolous, he has failed to demonstrate to this court that it has sufficient legal merit to create in the court a genuine concern that defendant will have wrongfully been held in custody pending his appeal. His motion for bail must therefore be and is hereby denied.

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