632 F.2d 258

(Cite as: 632 F.2d 258)

United States Court of Appeals,
Fourth Circuit.
UNITED STATES of America, Appellee,
v.
Jeffrey R. MacDONALD, Appellant.
No. 79-5253.

Argued Feb. 5, 1980.
Decided July 29, 1980.
Rehearing Denied Dec. 18, 1980.

See 635 F.2d 1115.

Defendant was convicted before the United States District Court for the Eastern District of North Carolina, at Raleigh, Franklin T. Dupree, Jr., Chief Judge, of the second-degree murder of his wife and one of his children and the first-degree murder of his other child, and he appealed. The Court of Appeals, Murnaghan, Circuit Judge, held that defendant's convictions would be reversed for denial of his right to a speedy trial, since there was a delay of four and one-half years between the Army's accusation and detention of defendant in May of 1970 and his indictment in January of 1975, including a delay of over two years between the time a report of the Army's Criminal Investigation Detachment was forwarded to the Justice Department and the time a grand jury was convened, since the primary reason for the two-year delay was either a disagreement between two groups in the Justice Department as to whether the case should be prosecuted or just simple government bureaucracy, since defendant vigorously pursued his right to a speedy disposition of the charges against him, and since there was a substantial possibility of prejudice to defendant, including the lost memory of one important witness.

Reversed and remanded.

Albert V. Bryan, Senior Circuit Judge, filed a dissenting opinion.

West Headnotes

[1] Criminal Law ⇐1167(1)
110k1167(1) Most Cited Cases

[1] Indictment and Information ⇐7
210k7 Most Cited Cases
Defendant's murder convictions would be reversed for denial of his right to a speedy trial, since there was a delay of four and one-half years between the Army's accusation and detention of defendant in May of 1970 and his indictment in January of 1975, including a delay of over two years between the time a report of the Army's Criminal Investigation Detachment was forwarded to the Justice Department and the time a grand jury was convened, since the primary reason for the two-year delay was either a disagreement between two groups in the Justice Department as to whether the case should be prosecuted or just simple government bureaucracy, since defendant vigorously pursued his right to a speedy disposition of the charges against him, and since there was a substantial possibility of prejudice to defendant, including the lost memory of one important witness. U.S.C.A.Const. Amend. 6.

[2] Criminal Law ⇐577.8(2)
110k577.8(2) Most Cited Cases
(Formerly 110k577.9)
In respect to defendant's right to a speedy trial, the offending delay imposed by the Government was not the time between his indictment and trial, but the lapse of time between his military arrest and the ensuing murder trial brought by the Justice Department. U.S.C.A.Const. Amend. 6.

[3] Criminal Law ⇐577.4
110k577.4 Most Cited Cases
Sixth Amendment secures an accused's right 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. U.S.C.A.Const. Amend. 6.

[4] Criminal Law ⇐577.8(2)
110k577.8(2) Most Cited Cases
(Formerly 110k577.9)
Justice Department, to which a report was forwarded by the Army's Criminal Investigation Detachment in June of 1972, was in possession of all the evidence from June of 1972, and that is what was determinative as to the excessiveness of the delay in bringing defendant to trial, not whether the Justice Department had advice from some other government agency to take the step which is committed to it by law, and for which it is particularly equipped to make the requisite decision. U.S.C.A.Const. Amend. 6.

[5] Criminal Law ⇐577.12(1)
110k577.12(1) Most Cited Cases
In respect to a speedy trial claim, delay which is the product of sheer bureaucratic indifference weighs heavily against the government. U.S.C.A.Const. Amend. 6.

[6] Criminal Law ⇐577.16(4)
110k577.16(4) Most Cited Cases
As regards a claim of denial of speedy trial, the substantial possibility of prejudice is what controls; it is not incumbent on the defendant to prove that prejudice inescapably took place. U.S.C.A.Const. Amend. 6.

[7] Criminal Law ⇐577.16(4)
110k577.16(4) Most Cited Cases
The possibility of prejudice to the defense at trial, although important, is only one element of the prejudice that may be shown to sustain a Sixth Amendment attack. U.S.C.A.Const. Amend. 6.

[8] Criminal Law ⇐577.16(4)
110k577.16(4) Most Cited Cases
In respect to the prejudice factor of a speedy trial claim, the sensitive process of balancing is a task highly individualized by the circumstances of each prosecution. U.S.C.A.Const. Amend. 6.

[9] Criminal Law ⇐1166.6
110k1166.6 Most Cited Cases
(Formerly 110k1166.11(1), 110k1166.5)
Regardless of the correctness of a jury's verdict, the Court of Appeals cannot let such considerations condone or establish a prosecutorial method of obtaining convictions in violation of the fundamental constitutional right of future generations. U.S.C.A.Const. Amend. 6.

[10] Criminal Law ⇐577.3
110k577.3 Most Cited Cases
Under the Sixth Amendment, a showing of unreasonable delay, plus substantial proof of prejudice, mandates a holding that the constitutionally guaranteed speedy trial has been denied. U.S.C.A.Const. Amend. 6.

[11] Constitutional Law ⇐265
92k265 Most Cited Cases
For Fifth Amendment purposes, there must be a determination that the prejudice resulting from a delay in prosecution was so extreme as to amount to violation of those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play
and decency. U.S.C.A.Const. Amend. 5.

[12] Constitutional Law ⇐265
92k265 Most Cited Cases

[12] Criminal Law ⇐577.16(4)
110k577.16(4) Most Cited Cases
Under the Fifth Amendment, proof of prejudice from a delay in prosecution is generally a necessary, but it may not be a sufficient element of a due process claim; the test, as to prejudice, for Sixth Amendment purposes is not so stringent. U.S.C.A.Const. Amends. 5, 6.
*259 Ralph S. Spritzer, Philadelphia, Pa., Bernard L. Segal, San Francisco, Cal. (Wendy *260 P. Rouder, San Francisco, Cal., Michael J. Malley, Washington, D.C., Wade M. Smith, Raleigh, N.C., on brief), for appellant.

Brian M. Murtagh, Dept. of Justice, Washington, D.C., James L. Blackburn, Asst. U. S. Atty., Raleigh, N.C. (Patricia L. Holland, Atty., Dept. of

Justice, George M. Anderson, U. S. Atty., Raleigh, N.C., on brief), for appellee.

Before BRYAN, Senior Circuit Judge and MURNAGHAN and SPROUSE, Circuit Judges.

MURNAGHAN, Circuit Judge:

[1] Jeffrey R. MacDonald appeals convictions for second degree murder of his wife and one of his children and first degree murder of his other child. He has raised a number of issues as to the conduct of the trial and the rulings at trial by the district judge. He has also contended that his Sixth Amendment guarantee of speedy trial had been violated, and that there was delay so inexcusable and prejudicial as to have denied him the due process mandated by the Fifth Amendment.

Deciding as we do that MacDonald is correct on his Sixth Amendment contention, we do not reach the district judge's conduct and rulings at trial or the Fifth Amendment issue. With respect to the district judge's conduct and rulings at trial, it suffices to note that the case was a sensational, drawn-out one, both hotly contested and bristling with difficult issues. The district judge's handling of the heavy demands placed on him was admirable.

MacDonald's due process contention would require a demonstration that the delay was inexcusable and that actual prejudice occurred. United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). The requisite proof to make out a Sixth Amendment violation is no greater, and, if anything, on the facts of this case would be less, than that required to establish a Fifth Amendment violation. Under either amendment, unreasonable delay, covering essentially the same time frame must be shown. The presence of the probability of prejudice completes the necessary proof under the Sixth Amendment; the actuality of serious prejudice must be made out to validate a claim of denial of due process. Consequently, as the burden on MacDonald to show an abuse of constitutional proportions under the Sixth Amendment could not be greater than his burden under the Fifth Amendment, there is no occasion to address the due process argument.

The Supreme Court, in recent years has provided specific criteria for the balancing tests necessary to determine a Sixth Amendment speedy trial issue. In Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the Court said:

> We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

Id. at 530, 92 S.Ct. at 2192.

In the same opinion, the Court identified three of the interests against which prejudice is measured:

> This Court has identified three such interests: (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 prepare his case skews the fairness of the entire system.

Id. at 532, 92 S.Ct. at 2193.

On MacDonald's Sixth Amendment claim, we do not write on a clean slate. Prior to trial, MacDonald took an interlocutory appeal, and succeeded on the speedy trial issue, only to have the victory evaporate when the Supreme Court determined that, procedurally the matter was not ripe for review prior to trial. United States v. MacDonald, 531 F.2d 196 (4th Cir. 1976) (opinion by Butzner, J., joined by Russell, J.; Craven, J., dissenting), reversed on prematurity grounds, *261435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978), (hereafter MacDonald, First).

Now, following trial and conviction, we are called upon again to address the question answered in MacDonald's favor by this Court in 1976.

The United States advances the argument that all of the criteria announced in Barker must be viewed in a different light from that in which the criteria were considered in this Court's 1976, MacDonald, First opinion. The reason, it contends, is that there has been a jury trial in the interim, and the facts developed at trial bear on the issues created by the four Barker factors.

The United States is only partially correct. The questions necessarily posed by the first three Barker factors were in the same posture both before and after trial. It is only the fourth factor, the question of prejudice, that must be viewed differently.

Since the Court's admirable resolution of these issues has not been affected by the facts developed at the intervening trial, we adopt the reasoning of MacDonald, First on the issues concerning the effect of the length of delay; the government's reason for the delay; and MacDonald's assertion of his right.

Length of Delay

[2][3] The offending delay imposed by the government was not the time between the indictment and trial, but the lapse of time between the military arrest and trial. The military arrest was equivalent to civilian arrest and MacDonald was "subjected to 'actual restraints imposed by arrest and holding to answer a criminal charge.' " 531 F.2d at 204. It is inconsequential that the delay was the result of the accumulative action by a military and a civilian arm of government. "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." Id.

The government argues that MacDonald, First was incorrect in stating that a 13-volume report of the Army's Criminal Investigation Detachment forwarded by the CID to the Justice Department in June, 1972, was accompanied by a recommendation of prosecution. However, the United States Attorney for the Eastern District of North Carolina made the recommendation that the matter be submitted to a grand jury within six months of June, 1972, yet nothing occurred until presentation to a grand jury began in August, 1974. In the interval the CID filed two supplemental reports analyzing the significance of physical evidence recovered at the scene of the crime on or shortly after February 17, 1970, the date of the tragic occurrence. The CID had balked at a request by the Justice Department for an additional investigation, suggesting instead the convening of a grand jury.

[4] Viewing the situation as a whole, the unwarranted bureaucratic delay which MacDonald, First found had taken place is fully established regardless of the fact that a suggestion of grand jury presentation came from the CID, not in June 1972, but at some later time. The Justice Department was in possession of all the evidence from June 1972, and that is what is determinative as to the excessiveness of delay, not whether it had advice from some other government agency to take the step which is committed to it by law, and for which it is particularly equipped to make the requisite decision.

The government also has argued that the reasoning of Judge Butzner's opinion in MacDonald, First may not stand in light of the subsequent holding by the Supreme Court in United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). However, that case involved facts different in a determinative way from those presented in the instant case. Lovasco's involvement in crime came to the government's attention almost immediately, just as in MacDonald's case. Yet there are two vital distinctions. First, a postal inspector's report was prepared linking Lovasco to the offenses one month after they were committed. ***262** In MacDonald's case over two years elapsed before the CID completed its report and forwarded it to the Justice Department. Seventeen months after the postal inspector's report was prepared, Lovasco was indicted. Prior to that time, there had been no arrest, no attendant publicity prior to the indictment. Thus, there was a second distinction of controlling importance between Lovasco's case and MacDonald's. MacDonald had been subjected to the interference with his life and affairs of the Army's arrest and investigation under conditions of

extremely intrusive publicity. Lovasco was put to no similar interference prior to his indictment. As a consequence, the Supreme Court held in Lovasco that there was presented no viable speedy trial claim under the Sixth Amendment,[FN1] and turned its attention solely to the alternative assertion: that due process guaranteed by the Fifth Amendment had been denied. In MacDonald's case there was the kind of "arrest and holding to answer a criminal charge" which brings the Sixth Amendment into play. 531 F.2d at 202-04.

> FN1. The Supreme Court stated: "In United States v. Marion, 404 U.S. 307, (92 S.Ct. 455, 30 L.Ed.2d 468) (1971), this Court considered the significance, for constitutional purposes, of a lengthy preindictment delay. We held that as far as the Speedy Trial Clause of the Sixth Amendment is concerned, such delay is wholly irrelevant, since our analysis of the language, history, and purposes of the Clause persuaded us that only 'a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge . . . engage the particular protections' of that provision. Id. at 320, (92 S.Ct. at 463)." 431 U.S. at 788-89, 97 S.Ct. at 2048.

[5] Thus, pre-indictment delay was deemed altogether irrelevant under the Sixth Amendment in Lovasco, whereas, being post-arrest in MacDonald's case, as well as pre-indictment, it is relevant. But, if the 17 month delay in Lovasco had been relevant, it was far more excusable than the delay of over two years in MacDonald's case. The latter was the product of sheer bureaucratic indifference and therefore weighs heavily against the government. In Lovasco's case there were other persons, whose involvement was evident, and whose likely criminality was apparent. Delay to explore possibilities of bringing the others to book contemporaneously with Lovasco was excusable. The investigation was properly describable as incomplete, and the Supreme Court accepted that the need for more investigation and the actual conduct of more investigation were established. In MacDonald's case, on the contrary, no further investigation was undertaken. Internally, the government conducted tests on evidence already long since obtained at the scene of the crimes, and lawyers in the Justice Department vacillated over and postponed decision on whether to seek indictment.

As did the MacDonald, First panel, 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."

The Reason for the Delay

For eighteen months after the dismissal of the charges by the Army, the CID, at the request of the Justice Department, conducted another extensive investigation. The report was transmitted to the Department of Justice in June, 1972, more than two years before the commencement of grand jury proceedings. The primary reason for the two-year delay was either a disagreement between two groups in the Justice Department as to whether the case should be prosecuted, or just simple government bureaucracy (the contention of the involved Assistant U. S. Attorney). This latter two years is the most offending delay and certainly weighs heavily against the government in determining whether MacDonald's right to a speedy trial has been violated.

The Defendant's Assertion of His Right

There is no question but that MacDonald vigorously pursued his right to a speedy disposition of the charges against him. He gave statements to the CID while still in the military and testified under cross-examination *263 at the military hearing. He waived immunity and testified before the grand jury when it was finally convened, and consistently, after his discharge, contacted the Justice Department in an attempt to expedite the resolution of his case. This is entitled to strong evidentiary weight in determining whether he has been deprived of his right to a speedy trial. Barker, supra, 407 U.S. at 532, 92 S.Ct. at 2192.

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Prejudice The Fourth Barker Factor

The question of prejudice is, of course, viewed from a crucially different perspective after the trial of the case than was available prior to trial. Completed evidence presents a detailed picture from which the possibilities of prejudice can be gauged. "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. . . . Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative...." U. S. v. MacDonald, 435 U.S. 850, 858, 98 S.Ct. 1547, 1551, 56 L.Ed.2d 18 (1978).

It is a rare case, however, where testimony will simplistically demonstrate that the defense has been hampered by the passage of time. The MacDonald prosecution and defense is no exception. The evidence at trial, if anything, confused rather than clarified the question of actual prejudice at trial. As a reviewing court, our task has been to carefully sift the record and balance the evidenced effects of delay with the other "speedy trial" rules of Barker and its progeny.

It has been urged that MacDonald, First misconceived the significance of certain physical evidence obtained at the murder scene: a flower pot, MacDonald's pajama top and a coffee table. It is further insisted that, judging by what actually occurred at trial, and not by what was anticipated would occur at trial, those items were not utilized by the government in a manner unfairly prejudicial to MacDonald when the case was presented to the jury. However, those particular items were alluded to as "but examples of the many questions about physical evidence that the government's case turns on." 531 F.2d at 208. The particular differences between pre-trial expectations and the actualities of trial are insignificant in the total picture.

[6] The government has contended that pre-trial concerns about the prejudice to MacDonald from the fading memories of witnesses and the necessity for them to rely on statements made half a decade previously have proved groundless in the actual event. The prosecutor, the contention runs, did not need to refresh recollections at trial by resort to the earlier-obtained witness statements. However, that is no adequate response. The risk to MacDonald was simply too great that, in preparations prior to the testifying of each witness, the prosecutors helped fill lacunae of recollection, and assured consistency of support for their theory of the case by reminding each witness of what he had said at the outset. The intervening period of over nine years rendered it virtually impossible for MacDonald to prove the recollections of each witness to see if they were fuller than or different from what he had stated when his statement was taken.[FN2] Such refurbishing and improvement of recollections are, it is true, possible even after the lapse of over nine years from the commission of the crimes to the trial of MacDonald. Some government witnesses did change their original stories.[FN3] ***264** Yet, in general, the likelihood is greatly diminished. The substantial possibility of prejudice is what controls; it is not incumbent on the defendant to prove that prejudice inescapably took place. Cf. Moore v. Arizona, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973) (per curiam).[FN4]

FN2. Not all of the nine year delay was attributable to the government, but all of it contributed to the fading of memories. Excluding the period until June 1972 when the CID investigation report reached the Justice Department, and the time following the January 1975 indictment, which MacDonald acknowledges did not constitute inexcusable delay (see 531 F.2d at 202), there were still more than two years in which essentially all that the government did was debate, in a desultory way, whether to press for prosecution or to drop the case. That delay was unreasonable and inexcusable. It contributed to the dissipation of recollections. That consideration suffices to engage the speedy trial protection of the Sixth Amendment.

FN3. MacDonald has contended that those changes to his detriment were also prejudicial occurrences attributable to the

undue passage of time resulting from the government's delay. We need not explore the substantiality of that contention.

FN4. In Barker v. Wingo, 407 U.S. 514, 532, 92 S.Ct. 2182, 2193, 33 L.Ed.2d 101 (1972), Justice Powell identified as an interest of the defendant bearing on the existence of prejudice: "the possibility that the defense will be impaired."

In this regard, the loss of the testimony of Helena Stoeckley has been cited by MacDonald as the greatest prejudice to him occasioned by the undue passage of time. In a bizarre way, she had made remarks to others on several occasions in 1970, 1971 and 1979, which, while far from precise or complete, indicated that she was one of a group of intruders whose supposed entry into the MacDonald home and killing of his wife and children constituted the essential defense offered by MacDonald.

We do not agree that this was the greatest prejudice to the defense. Nevertheless, Stoeckley's statement on the stand at trial that she had no recollection of her whereabouts or activities during the critical period of midnight to 4:30 A.M. on the night of the crimes (although she remembered in detail events immediately prior and immediately subsequent to that crucial interval) had a great potential for prejudice to MacDonald, given the substantial possibility that she would have testified to being present in the MacDonald home during the dreadful massacre. The likelihood that Stoeckley would testify that she could not remember was inevitably increased by the passage of the period of inexcusable delay. The consequences of having put on a witness who was to have verified MacDonald's own version of a Manson-like intrusion, only to have her fail to do so, may well have been disastrous to the defense. The potential for the drawing of adverse inferences by the jury is palpable. Yet the difficulty may not be dismissed as one of the inescapable risks associated with any tactical decision taken at trial. If Stoeckley could have remembered and testified to the critical 4 1/2 hours, her remarks to others created a substantial enough basis that one cannot fault the decision to put her on the stand. MacDonald was entitled to that tactical course without its efficacy's having been vitiated by inexcusable action of the government. Had Stoeckley testified as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculably great. The possible reasons why Stoeckley did not so testify are several. [FN5] But the reason she asserted under oath was failure of memory. The government's inexcusable delay of over two years' duration cannot be eliminated as a potential indeed a probable cause of that memory lapse.

FN5. A likely one is that she was not on the scene of the crimes at all. However, that possibility did not erase the potential prejudice to MacDonald, for it was only a possibility. It was also quite possible that she was present, and could have given evidence supportive of MacDonald's thesis that intruders killed his wife and daughters.

The consideration that Stoeckley had theretofore demonstrated a great unreliability would not render omission of such testimony harmless error, for it would have only created an issue of credibility for the jury on the central question of fact which it was called upon to resolve.[FN6] The present case did not present the situation of a witness who would of necessity have to have *265 committed perjury, if allowed to testify, as would be the case with someone shown to have been in prison at the very time the events occurred about which he was to testify. Exclusion of testimony from such a source obviously would be proper. However, the possibility that Stoeckley was physically present at the scene was not ruled out. Questions as to reliability of her testimony went only to the weight a matter for the jury not to the impossibility of her having experienced what she was proffered to testify about a matter for the court.

FN6. Efforts of MacDonald to supply the deficiency of Stoeckley's memory by introducing hearsay testimony from those she had told stories which placed her on the scene on the night of the crimes were

> thwarted by government objections sustained by the district judge on the basis of Fed.Rules of Evid. 403, 804(b) (3). We have no occasion to question the correctness of the judge's evidentiary rulings. With hindsight, however, the government prosecutors may rue having prevented curative action for one potentially devastating prejudicial consequence of the government's unwarranted delay and concomitant failure to move ahead in a fashion to insure to MacDonald a speedy trial.

Nor does it suffice for the government to point out that the denial of Stoeckley's testimony to MacDonald may not have been attributable to the government's delay. The government makes reference to testimony from one of those to whom Stoeckley told a story seeming to implicate her that, within a week of the crimes, she was stating that her memory was essentially blank as to the crucial hours. Her memory has resembled a lightbulb not screwed tight, blinking on and off. Still, however much other possible explanations for her memory loss can be asserted, the unavoidable principle remains that passage of time generally tends to erase memory. While other factors may have contributed, the possibility, indeed the probability, that unreasonable delay was the cause cannot be excluded.

Although, in this important aspect, prejudice, the fourth Barker factor, we approach MacDonald's Sixth Amendment allegation from a different background than that available to this Court in MacDonald, First, supra, we are still of the opinion that viewed in the light of all the evidence developed at trial, there was substantial possibility that MacDonald's defense was prejudiced by the delay.

As stated, we need not base our conclusion of prejudice solely or principally on the failure of Stoeckley. A pertinent comment of Justice Powell in the Barker opinion is relevant to the testimony of each witness whose testimony was based on his investigation of the case more than five years before the trial: "Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." 407 U.S. at 532, 92 S.Ct. at 2193. MacDonald, First rested substantially on this general principle of almost certain memory erosion in the cases of all witnesses where the case has the characteristics of this one. Facts adduced at trial did little to dispel this judgment.

[7] The possibility of prejudice to the defense at trial, although important, is only one element of the prejudice that may be shown to sustain a Sixth Amendment attack. As Justice White stated in his concurring opinion in Barker :

> Only if such special considerations (those considerations presenting a pressing public need) are in the case and if they outweigh the inevitable personal prejudice resulting from delay would it be necessary to consider whether there has been or would be prejudice to the defense at trial. "(T)he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." United States v. Marion, supra, at 320, 92 S.Ct. at 2195-2196.

Barker, supra, 407 U.S. at 537-38, 92 S.Ct. at 2195. It is significant that the full Court later quoted with approval Justice White's language preceding the above quotation:

> Moreover, prejudice to a defendant caused by delay in bringing him to trial is not confined to the possible prejudice to his defense in those proceedings. Inordinate delay,
> "wholly aside from possible prejudice to a defense on the merits may 'seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . 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.' United States v. Marion, 404 U.S. 307, 320, (92 S.Ct. 455, 463, 30 L.Ed.2d 468) (1971). These factors are more serious for some than for others, but they are inevitably present in every case to some extent, ***266** for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty." Barker v.

Wingo, supra, at 537, (92 S.Ct. at 2195) (White, J., concurring.)

Moore v. Arizona, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973) (per curiam). See also Strunk, aka Wagner v. United States, 412 U.S. 434, 439, 93 S.Ct. 2260, 2263, 37 L.Ed.2d 56 (1973) ("The speedy trial guarantee recognizes that a prolonged delay may subject the accused to an emotional stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial . . . .").

It is also important to remember Justice Powell's admonition that the four Barker factors have "no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." Barker, supra, 407 U.S. at 533, 92 S.Ct. at 2193.

[8] The sensitive process of balancing is a task highly individualized by the circumstances of each prosecution. The amount of demonstrable trial prejudice which would be violative of MacDonald's right to a speedy trial is affected by his persevering five-year insistence that his case be resolved and by his open and aggressive participation in the investigatory process. Weighing heavily in the equation is the government's calloused and lackadaisical attitude which was solely responsible for at least the last two years of delay. To require a showing approximating actual prejudice would have the adverse effect of encouraging such irresponsible administration of criminal justice. Also included in this equation is the personal prejudice to the accused. Not only was he under a cloud of suspicion for five years prior to the trial, but the personal pressure and anxiety of a threatened prosecution for murder is demonstrated by the expense and concern he expended in attempting to have the charges resolved.

The prosecution consisted solely of highly technical circumstantial evidence. The government had the great advantage of unlimited financial and personal resources, access to laboratory and other technical devices, presenting evidence by skilled technical witnesses upon whom the jury must principally rely.[FN7]

FN7. In one sense such technical circumstantial evidence is easier to preserve during a delay, but in another sense, after five years it is easier to orchestrate an array of technical evidence. The technical witnesses frequently are relying on scientific speculation and trial and error. An example important to his case is the testimony concerning the way in which a pajama top was folded over the deceased wife. The testimony was deduced years after the crime by matching numerous ice pick holes in the garment. This testimony was calculated to demonstrate that this stabbing was arranged after her death in order to simulate an intruder's attack.

[9] The required judicial balancing process necessary to determine a violation of the Sixth Amendment, speedy trial requirements has been particularly difficult. It is made more difficult by the terrible crime and by the fact that a jury has found MacDonald guilty after a protracted trial. The vital balancing, however, tips the scales decisively in favor of finding a violation by the government of MacDonald's Sixth Amendment rights. We cannot and do not assess the correctness of the jury's verdict, and regardless of that we certainly cannot let such considerations condone or establish a prosecutorial method of obtaining convictions in violation of the fundamental constitutional right of future generations.

[10][11][12] Under the Sixth Amendment, a showing of unreasonable delay, plus substantial proof of prejudice, mandates a holding that the constitutionally guaranteed speedy trial has been denied. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). For Fifth Amendment purposes there must be a determination that the prejudice was so extreme as to amount to violation of "those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' ... and which define 'the community's sense of fair play and decency,' " United States v. Lovasco, 431 U.S. at 790, 97 S.Ct. at 2049. Under the Fifth Amendment, proof of prejudice *267 is

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generally a necessary, but it may not be a sufficient element of a due process claim. The test, as to prejudice, for Sixth Amendment purposes is not so stringent. Barker v. Wingo, 407 U.S. 514, 532, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The fact that the delay was undue and resulted in prejudice suffices in MacDonald's case, whether or not the delay and consequent prejudice were so egregious as to amount to deviation from "fundamental conceptions of justice." The extensive discussion in Lovasco of how extreme was the prejudice suffered by the accused by reason of the delay, therefore, has little pertinence to the Sixth Amendment claim of MacDonald that he was not accorded a speedy trial.

We, therefore, remand the case to the district court with directions to set aside its judgment, vacate the sentences, and dismiss the indictment.[FN8]

> FN8. Strunk, aka Wagner v. United States, 412 U.S. 434, 440, 93 S.Ct. 2260, 2263, 37 L.Ed.2d 56 (1973).

REVERSED AND REMANDED.

ALBERT V. BRYAN, Senior Circuit Judge, dissenting:

Murder of his pregnant wife and his 6- and 3-year old daughters, with a blunt instrument, a knife and an ice pick, between midnight and dawn on February 17, 1970, in their home at Fort Bragg, North Carolina, was charged to Jeffrey MacDonald by a Federal indictment. His guilt and sanity were established to the satisfaction of the trial jury beyond a reasonable doubt. Nevertheless, this court absolves him forever of this hideous offense, shockingly laying his release exclusively on the failure of the Government to prosecute within a shorter time than it did. The majority's resolution is achieved through utilization of the Sixth Amendment's exaction that "(i)n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." [FN1] This implementation of the constitutional clause was held untenable by the District Judge, and I agree.

> FN1. Incidentally, Congress has declared that there shall be no limitation of time on a prosecution for murder. 18 U.S.C. s 3281.

The opinion of the majority here alludes to Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), a decision that gives guidance in the application of this clause. In Barker, the Supreme Court charted a balancing test, identifying four factors the courts should consider in ascertaining whether the right to a speedy trial has been denied: the length of the delay; the reason for the delay; the defendant's assertion of the right; and prejudice to the defendant resulting from the delay. Id. at 530, 92 S.Ct. at 2191. The Court emphasized, however, that "(a) balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. (The Court) can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right." Id. Keeping in mind the Court's repeated admonition that none of the four points mentioned is determinative but, rather, that "they are related factors and must be considered together with such other circumstances as may be relevant," id. at 533, 92 S.Ct. at 2193, the appellant's speedy trial premise should be rejected.

With regard to the first factor, the length of the delay, the appellant calls attention to the lapse of five years between the date of the crime, February 17, 1970, and the return of the indictment, January 24, 1975.[FN2] Baldly stated, the count of five years conjures up serious prosecutorial dawdling, but in the light of the record this appearance vanishes.

> FN2. It is conceded that the Government is not responsible for any significant delay occurring since then.

Immediately upon word of the crimes, the Army's Criminal Investigation Division (CID) took the primary role in the investigation. Not until May 1, 1970, however, did the Army charge MacDonald with the murders. On October 23, 1970, the commanding general of MacDonald's unit at Fort Bragg *268 dismissed the case after reviewing the investigating officer's report which concluded that

the charges were "not true."

Nevertheless, upon the request of the Department of Justice, the CID still pursued the inquiry in an "extensive and wide ranging" discovery effort. In June, 1972, it submitted to the Department a 13-volume report; supplements thereto were transmitted in November, 1972, and August, 1973, at the Department's request. These reports reflected the sweeping breadth of the investigation, which embraced almost 700 interviews and numerous scientific tests. A number of Government attorneys having reviewed and evaluated the reports, a grand jury was impanelled in August, 1974 only one year after the filing of the CID's final investigative report to consider the MacDonald family murders.

While the grand jury was taking evidence, the Federal Bureau of Investigation continued the probe. Its exploration led to the exhumation of the bodies of the three victims; the object was to obtain samples of their hair, in order to compare them with strands found on pieces of evidence in the MacDonald home. Obviously, neither the grand jurors nor the Government were idle between the calling of the jury in August, 1974, and the return of the indictment in January, 1975.

The crucial period of delay attributable to the Government, then, is, at most, the period of slightly more than two years between the CID's submission of its initial, major report in June, 1972, and the convening of the grand jury in August, 1974. Even assuming that the case could have been put before a grand jury at an earlier date, the fact that some substantial delay occurred only touches off inquiry into the other relevant factors and does not itself establish a constitutional deviation. Barker v. Wingo, 407 U.S. at 530, 92 S.Ct. at 2191.

Passing to the second factor isolated in Barker the justification the Government offers for its delay contrary to the majority's condemnation of the Government, to me the deferment of grand jury submission was well advised, both in public concern and in fairness to MacDonald. Certainly, the Department of Justice was wise to await a mature completion of the CID's inquisition, taking advantage of the comprehensiveness and expertness of its scrutiny and evaluation of the evidence.

Fairness to MacDonald, too, dictated postponement of the calling of a grand jury. Historically, the grand jury has been, and presently still stands as, an institution interposing a bulwark for the protection of the individual citizen as well as of the public. Because an indictment is a solemn charge, whether followed by a verdict of guilty or an acquittal, the deliberations and returns of a grand jury should never be regarded as mere formalities. Notwithstanding that, after acquittal, the indictment is theoretically without force or effect, as a practical matter, it brands the subject as a criminal suspect for the rest of his life; it will be recalled whenever his name is mentioned, especially when the offense charged is particularly grave or shocking. In addition to the personal anxiety and humiliation anyone so accused endures, the practical consequences of this stigma to a banker, lawyer, physician, or any person holding a position of responsibility may be devastating. It follows as a matter of fairness that no one should be exposed to this future shadow until the Government has gleaned all available evidence.

Appellant contends, and the majority agrees, that the justifications the Government offers for its delay in seeking the indictment are wholly unacceptable. Insofar as the Government may cite internal bureaucracy as a source of postponement, some disapproval may be warranted. Nevertheless, the quantity of evidence amassed, and the time required to assess it, must be taken into account. The 1972 report, it will be remembered, comprised not less than 13 volumes; these had to be closely read and digested, not given just a sketchy oversight. Finally, it should be kept in mind throughout, any failure of the Government's explanation completely to justify the entire period of delay is not *269 decisive; it is merely a factor to be considered in the balance.

As to the third consideration enumerated in Barker, it is indisputable that MacDonald attempted to assert his right to a speedy trial. During the years involved, he manifested an eagerness to have the matter resolved and apparently did nothing to

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impede the progress of the prosecution.

The fourth factor to which Barker directs attention is prejudice to the defendant. There and in Moore v. Arizona, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973) (per curiam), the Court "expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial." Id. at 26, 94 S.Ct. at 189. The majority here relies on that precept in averring that the delay in MacDonald's indictment gave rise to "the substantial possibility of prejudice," and in deeming that possibility a sufficient basis for concluding that his right to a speedy trial had been denied.

Admittedly, MacDonald need not affirmatively prove actual prejudice as a single, essential prerequisite to his claim under the Sixth Amendment; nonetheless, we must turn to the record and to the surrounding circumstances to ascertain the extent, if any, to which MacDonald's defense was impaired directly as a consequence of the delay in prosecution.[FN3] Although the focus is on the possibility of prejudice, we must not ignore what actually transpired.[FN4] In this, I join the District Judge's finding, in his posttrial order refusing bail pending appeal, that "(t)he fears . . . 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." United States v. MacDonald, 485 F.Supp. 1087 (E.D.N.C.1979) (accent added).

> FN3. Prejudice is to be considered in the light of the purposes of the speedy trial right: "(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." Barker v. Wingo, 407 U.S. at 532, 92 S.Ct. at 2193. The first concern is not raised in this case because MacDonald was subject to some form of restraint for only the brief period between April and October, 1970, and that by the Army. Moreover, acknowledging that prejudice, in the form of personal adversity unrelated to the merits of the defense, will be "inevitably present in every case to some extent," id. at 537, 92 S.Ct. at 2195 (White, J., concurring), quoted in Moore v. Arizona, 414 U.S. at 27, 94 S.Ct. at 190, it may be presumed that MacDonald suffered anxiety and concern as a result of the delay in prosecution. Nevertheless, the record reveals that he was able to proceed with his life, reestablishing himself professionally and developing new friendships. Because the postponement of his indictment does not appear to the District Judge or to me to have impaired, directly or inordinately, MacDonald's personal life during the period at issue, this form of prejudice is not a crucial factor in this case. Therefore, the analysis will focus on the third concern, prejudice to MacDonald's defense on the merits.
>
> FN4. The opinion of the Supreme Court holding that this prosecution could not be dismissed on speedy trial grounds prior to trial on the merits, United States v. MacDonald, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978), rev'g 531 F.2d 196 (4th Cir. 1976), supports this approach. The Court noted that "(t)he resolution of a speedy trial claim necessitates a careful assessment of the particular facts of the case" after those facts have been established at trial. Id. at 858, 98 S.Ct. at 1551. The Court added: "Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative." Id. One of the advantages of reviewing such a motion after a decision on the merits has been rendered, therefore, is that, for the most part, speculation can be avoided.

Both in brief and in oral argument, appellant put forward a number of instances in which, he complains, his defense suffered as a result of the delay in his trial. A reading of the record reveals, however, that MacDonald's ability to defend

himself was not significantly impaired, either in the particular ways he names or in any other manner apparent in the record.

Among the impediments to his defense MacDonald urges is deterioration of certain physical evidence between the time of the murders and the trial date. He calls attention to his pajama top, asserting that characteristics of the multiple puncture holes found in it characteristics that might have enabled him to contradict the prosecution's *270 damaging inferences had vanished with time. Advertence to the record discloses, however, that the loss of these characteristics (the visible differences between "entry holes" and "exit holes") took place rapidly and may not be attributed specifically to the two-year delay imputed to the Government; indeed, it is admitted that even in 1971 few of the holes in the garment could be identified as entry or exit holes. Another of MacDonald's aggrievements centers on the deterioration of a bloody footprint, which he was no longer able to distinguish adequately at trial. He had not contested the print as his, however, and he fails to show the import of that line of inquiry. Other contentions of changes in the physical evidence likewise do not demonstrate convincingly that the defendant's situation was significantly weakened by the delay in indictment.

The next ground for MacDonald's insistence as to prejudice is the effect of the delay on the testimony of witnesses. Foremost in this argument is the impact of the postponement on the testimony of Helena Stoeckley. MacDonald contends that delay effectively robbed him of the benefit of her testimony because, in the intervening period, she had lost memory of her activities, her whereabouts, and her companions on the night of the murders, and of certain inculpatory remarks she subsequently had made.

The majority agrees with appellant that Stoeckley's statement at trial that she could not recall her activities in the critical hours "had a great potential for prejudice to MacDonald, given the substantial possibility that she would have testified to being present in the MacDonald home during the dreadful massacre." Supra, at 264. Nothing in the record, however, warrants the assumption that Stoeckley would have or could have given the testimony the majority would ascribe to her had the Government secured its indictment earlier.

Stoeckley herself in her trial testimony explains that her inability to recall the pre-dawn events of February 17, 1970, resulted from her consumption, earlier in the evening, of large quantities of drugs; she in no way indicated that time had weakened her recollection. The evidence given by a neighbor of Stoeckley's at the Army hearings in 1970 narrates that, within a week or two of the murders, Stoeckley told him that she could not remember where she had been on the night of the crime. Similarly, the record reveals that the statements concerning the murders, which she reputedly made to various persons in the months and years preceding MacDonald's trial, are vague, fragmented and contradictory; they do not indicate simply a gradually fading memory, eroded by time.[FN5] Unmaintainable on the record is the majority's position that it was "reasonable to expect (Stoeckley) might have testified" that she witnessed the murders and that "(t)he Government's inexcusable delay of over two years' duration cannot be eliminated as a potential indeed a probable cause of (her) memory lapse." Supra at 264. Instead, the record fully upholds the Government's contention that any culpable delay on its part had no discernible effect on Stoeckley's testimony. Furthermore, none of the other instances of prejudice *271 he lists tends to prove that MacDonald's ability to defend himself was impaired significantly by the deferred indictment.

> FN5. The District Judge noted, with regard to Stoeckley's testimony at trial:
> 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 . . . clothing (similar to that ascribed by MacDonald to one of the alleged intruders)

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(Cite as: 632 F.2d 258)

> . . . and to 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.
> United States v. MacDonald, 485 F.Supp. 1087 (E.D.N.C.1979). Totally apart from the question of the trustworthiness or untrustworthiness of Stoeckley's testimony, her remarks on the stand do not reflect a diminishing recollection of the events of nine years before, but rather a pre-existing gap in her ability to recount those events. This gap cannot reasonably be attributed to the prosecution's failure to secure an indictment earlier.

Finally, in this case, viewed in its entirety, the absence of substantial prejudice and the reasonable assessment of the other factors to which Barker draws attention do not sustain the accusation that the Government disregarded its constitutional duty to bring MacDonald promptly to trial or trampled on the aims of the Sixth Amendment.

Affirmance of the judgment now on appeal is demanded by the record.

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END OF DOCUMENT

Westlaw.

456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696

(Cite as: 456 U.S. 1, 102 S.Ct. 1497)

Briefs and Other Related Documents

Supreme Court of the United States
UNITED STATES, Petitioner
v.
Jeffrey R. MacDONALD.
No. 80-1582.

Argued Dec. 7, 1981.
Decided March 31, 1982.

Defendant was convicted before the United States District Court for the Eastern District of North Carolina, at Raleigh, of murdering his wife and children, and he appealed. The Court of Appeals, 632 F.2d 258, reversed on speedy trial grounds, and denied a petition for rehearing, 635 F.2d 1115. Upon granting certiorari, the Supreme Court, Chief Justice Burger, held that time between dismissal of military charges and a subsequent indictment on civilian criminal charges should not be considered in determining whether the delay in bringing respondent to trial violated his right to a speedy trial under the Sixth Amendment.

Reversed and remanded.

Justice Stevens filed an opinion concurring in the judgment.

Justice Marshall filed a dissenting opinion in which Justice Brennan and Justice Blackmun joined.

West Headnotes

[1] Criminal Law ⇐577.8(1)
110k577.8(1) Most Cited Cases
(Formerly 110k577.8)
Time between dismissal of military charges and a subsequent indictment on civilian criminal charges should not be considered in determining whether the delay in bringing respondent to trial violated his right to a speedy trial under the Sixth Amendment. U.S.C.A.Const.Amend. 6.

[2] Criminal Law ⇐577.8(2)
110k577.8(2) Most Cited Cases
(Formerly 110k577.9)
A literal reading of the Sixth Amendment suggests that the right to a speedy trial attaches only when a formal criminal charge is instituted and a criminal prosecution begins. U.S.C.A.Const.Amend. 6.

[3] Criminal Law ⇐577.8(2)
110k577.8(2) Most Cited Cases
(Formerly 110k577.9)
Speedy trial clause of the Sixth Amendment does not apply to the period before a defendant is indicted, arrested, or otherwise officially accused. U.S.C.A.Const.Amend. 6.

[4] Criminal Law ⇐577.8(2)
110k577.8(2) Most Cited Cases
(Formerly 110k577.9)
In addition to the period after indictment, the period between arrest and indictment must be considered in evaluating a claim under the speedy trial clause of the Sixth Amendment. U.S.C.A.Const.Amend. 6.

[5] Criminal Law ⇐577.8(2)
110k577.8(2) Most Cited Cases
(Formerly 110k577.9)
Although delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment, or to a claim under any applicable statutes of limitation, no Sixth Amendment right to speedy trial arises until charges are pending. U.S.C.A.Const.Amends. 5, 6.

[6] Constitutional Law ⇐265
92k265 Most Cited Cases

[6] Criminal Law ⇐577.6

110k577.6 Most Cited Cases
The speedy trial clause of the Sixth Amendment has no application after the Government, acting in good faith, formally drops charges; any undue delay after charges are dismissed, like any delay before charges are filed, must be scrutinized under the due process clause, not the speedy trial clause. U.S.C.A.Const.Amends. 5, 6.

[7] Constitutional Law ⇦265
92k265 Most Cited Cases

[7] Criminal Law ⇦577.4
110k577.4 Most Cited Cases
Sixth Amendment right to a speedy trial is not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the due process clause and by statutes of limitations. U.S.C.A.Const.Amends. 5 , 6.

[8] Criminal Law ⇦577.6
110k577.6 Most Cited Cases
Once charges are dismissed, the speedy trial guarantee--which is designed primarily to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges--is no longer applicable. U.S.C.A.Const.Amend. 6.

[9] Criminal Law ⇦577.6
110k577.6 Most Cited Cases
Following dismissal of charges, any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it is upon anyone openly subject to a criminal investigation, as regards the Sixth Amendment right to a speedy trial. U.S.C.A.Const.Amend. 6.

[10] Criminal Law ⇦577.14
110k577.14 Most Cited Cases
Court of Appeals erred in holding, in essence, that criminal charges were pending against respondent during the entire period between his military arrest and his later indictment on civilian charges; although respondent was subjected to stress and other adverse consequences flowing from the initial military charges and the continuing investigation after they were dismissed, he was not under arrest, not in custody, and not subject to any "criminal prosecution" until the civilian indictment was returned; he was legally and constitutionally in the same posture as though no charges had been made. U.S.C.A.Const.Amend. 6.

****1498 *1 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 Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

In May 1970, the Army formally charged respondent, a captain in the Army Medical Corps, with the murders earlier that year of his pregnant wife and two children on a military reservation. Later that year, the military charges were dismissed and the respondent was honorably discharged on the basis of hardship, but at the Justice Department's request the Army Criminal Investigation Division (CID) continued its investigation of the homicides. In June 1972, the CID forwarded a report recommending further investigation, and the Justice Department, in 1974, ultimately presented the matter to a grand jury, which returned an indictment in January 1975, charging respondent with the three murders. On an interlocutory appeal from the District Court's denial of respondent's motion to dismiss the indictment, the Court of Appeals reversed, holding that the delay between the June 1972 submission of the CID report to the Justice Department and the 1974 convening of the grand jury violated respondent's Sixth Amendment right to a speedy trial. After this Court's decision that respondent could not appeal the denial of his motion to dismiss on speedy trial grounds until after completion of the trial, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18, respondent was tried and convicted. The Court of Appeals again held that the indictment violated respondent's right to a speedy trial and dismissed the indictment.

Held: The time between dismissal of the military charges and the subsequent indictment on civilian charges may not be considered in determining whether the delay in bringing respondent to trial violated his right to a speedy trial under the Sixth Amendment. Pp. 1501-1503.

*2 (a) The Speedy Trial Clause of the Sixth Amendment does not apply to the period before a defendant is indicted, arrested, or otherwise officially accused. Although delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment or to a claim under any applicable statute of limitations, no Sixth Amendment right to a speedy trial arises until charges are pending. Similarly, any undue delay after the Government, acting in good faith, formally dismisses charges must be scrutinized under the Due Process Clause, not the Speedy Trial Clause. Once charges are dismissed, the speedy trial guarantee--which is designed primarily to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, **1499 impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges--is no longer applicable. Following dismissal of charges, any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it is upon anyone openly subject to a criminal investigation. Pp. 1501-1502.

(b) The Court of Appeals erred in holding, in essence, that criminal charges were pending against respondent during the entire period between his military arrest and his later indictment on civilian charges. Although respondent was subjected to stress and other adverse consequences flowing from the initial military charges and the continuing investigation after they were dismissed, he was not under arrest, not in custody, and not subject to any "criminal prosecution" until the civilian indictment was returned. He was legally and constitutionally in the same posture as though no charges had been made; he was free to go about his affairs, to practice his profession, and to continue with his life. Pp. 1502-1503.

632 F.2d 258 and 635 F.2d 1115, reversed and remanded.

Alan I. Horowitz, Washington, D.C., for petitioner.

*3 Ralph S. Spritzer, Philadelphia, Pa., for respondent.

Chief Justice BURGER delivered the opinion of the Court.

[1] We granted certiorari to decide whether the time between dismissal of military charges and a subsequent indictment on civilian criminal charges should be considered in determining whether the delay in bringing respondent to trial for the murder of his wife and two children violated his rights under the Speedy Trial Clause of the Sixth Amendment.

I

The facts in this case are not in issue; a jury heard and saw all the witnesses and saw the tangible evidence. The only point raised here by petitioner involves a legal issue under the Speedy Trial Clause of the Sixth Amendment. Accordingly, only a brief summary of the facts is called for. In the early morning of February 17, 1970, respondent's pregnant wife and his two daughters, aged 2 and 5, were brutally murdered in their home on the Fort Bragg, N.C., military reservation. At the time, MacDonald, a physician, was a captain in the Army Medical Corps stationed at Fort Bragg. When the military police arrived at the scene following a call from MacDonald, they found the three victims dead and MacDonald unconscious from multiple stab wounds, most of them superficial, but one a life-threatening chest wound which caused a lung to collapse.

At the time and in subsequent interviews, MacDonald told of a bizarre and ritualistic murder. He stated that he was asleep on the couch when he was awakened by his wife's screams. He said he saw a woman with blond hair wearing a floppy hat, white boots, and a short skirt carrying a lighted *4

candle and chanting "acid is groovy; kill the pigs." [FN1] He claimed that **1500 three men standing near the couch attacked him, tearing his pajama top, stabbing him, and clubbing him into unconsciousness. When he awoke, he found his wife and two daughters dead. After trying to revive them and covering his wife's body with his pajama top, MacDonald called the military police. He lost consciousness again before the police arrived.

> FN1. A woman generally within this description was apparently seen by the military police as they rushed to answer respondent's call. During the course of this case, considerable suspicion has been focused upon Helena Stoeckley. Stoeckley was 19 at the time and a heavy user of heroin, opium, mescaline, LSD, marihuana, and other drugs; within days after the crime she began telling people that she was involved in the murder or that she at least had accompanied the murderers and watched them commit the crimes. She also wore mourning dress and displayed a funeral wreath on the day of the victims' funeral. The investigation confirmed that she had been seen returning to her apartment at 4:30 on the morning following the killings in the company of men also generally fitting the descriptions given by MacDonald. Stoeckley testified at trial that she had no memory of the night in question because she was "stoned" that night. She did, however, admit that at the time of the crime she owned and frequently wore a blond wig and a pair of white boots and that she destroyed them within a few days after the crime because they might connect her with the episode.

Physical evidence at the scene contradicted MacDonald's account and gave rise to the suspicion that MacDonald himself may have committed the crime. [FN2] On April 6, 1970, the Army Criminal Investigation Division (CID) advised MacDonald that he was a suspect in the case and confined him to quarters. The Army formally charged MacDonald with the three murders on May 1, 1970. In accordance with Article *5 32 of the Uniform Code of Military Justice, 10 U.S.C. § 832, the Commanding General of MacDonald's unit appointed an officer to investigate the charges. After hearing a total of 56 witnesses, the investigating officer submitted a report recommending that the charges and specifications against MacDonald be dismissed. The Commanding General dismissed the military charges on October 23, 1970. On December 5, 1970, the Army granted MacDonald's request for an honorable discharge based on hardship. [FN3]

> FN2. Threads from MacDonald's pajama top, supposedly torn in the living room, were found in the master bedroom, some under his wife's body, and in the children's bedroom, but not in the living room. There were 48 puncture holes in the top, yet MacDonald had far fewer wounds. The police were able to identify the bloodstains of each victim, and their location did not support MacDonald's story. Blood matching the type of MacDonald's children was found on MacDonald's glasses and pajama top. Fragments of surgical gloves were found near the bodies of the victims; the gloves from which those fragments came were found under a sink in the house.

> FN3. 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).

At the request of the Justice Department, however, the CID continued its investigation. In June 1972, the CID forwarded a 13-volume report to the Justice Department recommending further investigation. Additional reports were submitted during November 1972 and August 1973. Following evaluation of those reports, in August 1974, the Justice Department presented the matter to a grand jury. On January 24, 1975, the grand jury returned an indictment charging MacDonald with the three murders.

Prior to his trial in Federal District Court, [FN4] MacDonald moved to dismiss the indictment, in part on the grounds that the delay in bringing him to trial violated his Sixth Amendment right to a speedy trial. The District Court denied the motion, but the Court of Appeals allowed an interlocutory appeal and reversed, holding that the delay between the June 1972 submission of the CID report to the Justice Department and the August 1974 convening of the grand jury violated MacDonald's constitutional right to a speedy trial. *MacDonald v. United States*, 531 F.2d 196 (CA4 1976). We granted certiorari and reversed, holding that a criminal defendant could not appeal the denial of a motion to dismiss on Speedy Trial Clause grounds until after the trial had been completed. *United States v. MacDonald*, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978).

> FN4. The District Court had jurisdiction because the crimes were committed on military property. 18 U.S.C. §§ 7(3), 1111.

*6 MacDonald was then tried and convicted on two counts of second-degree murder and one count of first-degree murder. He was sentenced to three consecutive terms of life imprisonment. On appeal, a divided panel of the Fourth Circuit again held that the indictment violated MacDonald's Sixth Amendment right to a speedy trial and dismissed the indictment. **1501632 F.2d 258 (1980). [FN5] The court denied rehearing en banc by an evenly divided vote. 635 F.2d 1115 (1980).

> FN5. In addition to the Speedy Trial Clause issue, MacDonald raised a number of issues involving the conduct of the trial and rulings of the trial judge. He also claimed that the delay in bringing him to trial resulted in a denial of his Fifth Amendment due process rights. The Court of Appeals declined to reach those issues. Accordingly, we do not decide those issues, instead leaving them for the Court of Appeals on remand.

We granted certiorari, 451 U.S. 1016, 101 S.Ct. 3004, 69 L.Ed.2d 387 (1981), and we reverse. [FN6]

> FN6. Our analysis of the speedy trial claim is not to be influenced by consideration of the evidentiary basis of the jury verdict. The jury that heard all of the witnesses and saw the evidence unanimously decided that respondent murdered his wife and children. Respondent does not challenge the jury verdict itself.

II

[2] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...." A literal reading of the Amendment suggests that this right attaches only when a formal criminal charge is instituted and a criminal prosecution begins.

[3][4][5] In *United States v. Marion*, 404 U.S. 307, 313, 92 S.Ct. 455, 459, 30 L.Ed.2d 468 (1971), we held that the Speedy Trial Clause of the Sixth Amendment does not apply to the period before a defendant is indicted, arrested, or otherwise officially accused:

> "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, *7 nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time. The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him."

In addition to the period after indictment, the period between arrest and indictment must be considered in evaluating a Speedy Trial Clause claim. *Dillingham v. United States*, 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975). Although delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment, see *United States v. Lovasco*, 431 U.S. 783, 788-789, 97 S.Ct. 2044, 2047-48, 52 L.Ed.2d 752 (1977), or

to a claim under any applicable statutes of limitations, no Sixth Amendment right to a speedy trial arises until charges are pending.

[6] Similarly, the Speedy Trial Clause has no application after the Government, acting in good faith, formally drops charges. Any undue delay after charges are dismissed, like any delay before charges are filed, must be scrutinized under the Due Process Clause, not the Speedy Trial Clause. [FN7]

> FN7. Our holding agrees with the determination made by Congress in enacting the Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq*. The Act, intended "to give effect to the sixth amendment right to a speedy trial ...," S.Rep.No. 93-1021, p. 1 (1974), provides that if charges are initially dismissed and later reinstated, the period between the dismissal and the reinstatement is not to be included in computing the time within which a trial must commence. 18 U.S.C. § § 3161(d), 3161(h)(6).
> Most of the Courts of Appeals considering this issue have also reached the conclusion that the period after dismissal of initial charges is not included in determining whether the Speedy Trial Clause has been violated. See, *e.g., United States v. Hillegas*, 578 F.2d 453, 457-458 (CA2 1978); *Arnold v. McCarthy*, 566 F.2d 1377, 1383 (CA9 1978); *United States v. Martin*, 543 F.2d 577 (CA6 1976), cert. denied, 429 U.S. 1050, 97 S.Ct. 762, 50 L.Ed.2d 766 (1977); *United States v. Bishton*, 150 U.S.App.D.C. 51, 55, 463 F.2d 887, 891 (1972). The Fifth Circuit reached a seemingly contrary result in *United States v. Avalos*, 541 F.2d 1100 (1976), cert. denied, 430 U.S. 970, 97 S.Ct. 1656, 52 L.Ed.2d 363 (1977).
> However in that case the court relied on unusual facts; the Government dismissed charges pending in one district in order to prosecute the defendants on those same charges in another district.
> In none of the cases cited in the dissenting opinion, *post*, at 1506, n.2, from the First, Seventh, or Tenth Circuits did the Court of Appeals consider or discuss the issue before us.

**1502 The Court identified the interests served by the Speedy Trial Clause in *United States v. Marion, supra*, at 320, 92 S.Ct., at 463:

> "Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective *8 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."

See also *Barker v. Wingo*, 407 U.S. 514, 532-533, 92 S.Ct. 2182, 2192-2193, 33 L.Ed.2d 101 (1972).

[7][8] The Sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

[9] Once charges are dismissed, the speedy trial guarantee is no longer applicable. [FN8] At that point, the formerly accused is, at most, in the same position as any other subject of a criminal *9 investigation. Certainly the knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life. This is true whether or not charges have been filed and then dismissed. This was true

in *Marion*, where the defendants had been subjected to a lengthy investigation which received considerable press attention. [FN9] But with no charges outstanding, personal liberty is certainly not impaired to the same degree as it is after arrest while charges are pending. After the charges against him have been dismissed, "a citizen suffers no restraints on his liberty and is [no longer] the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer." *United States v. Marion*, 404 U.S., at 321, 92 S.Ct., at 463. Following dismissal of charges, any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it is upon anyone openly subject to a criminal investigation.

FN8. *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967), is not to the contrary. There, under an unusual state procedure, a prosecutor was able to suspend proceedings on an indictment indefinitely. The prosecutor could activate the charges at any time and have the case restored for trial, "without further order" of the court. *Id.*, at 214, 87 S.Ct., at 989. The charges against the defendant were thus never dismissed or discharged in any real sense so the speedy trial guarantee continued to apply.

FN9. The *Marion* defendants were charged with operating a fraudulent home improvement business. The Court noted that the Washington Post ran a series of articles about the ongoing investigation of the business, and reported that the local United States Attorney predicted that indictments would be forthcoming. *United States v. Marion*, 404 U.S., at 309, 92 S.Ct., at 457.

III

[10] The Court of Appeals held, in essence, that criminal charges were pending against MacDonald during the entire period between his military arrest and his later indictment on civilian charges. [FN10] We disagree. **1503 In this case, the homicide charges initiated by the Army were terminated less than a *10 year after the crimes were committed; after that, there was no criminal prosecution pending on which MacDonald could have been tried until the grand jury, in January 1975, returned the indictment on which he was tried and convicted. [FN11] During the intervening period, MacDonald was not under arrest, not in custody, and not subject to any "criminal prosecution." Inevitably, there were undesirable consequences flowing from the initial accusation by the Army and the continuing investigation after the Army charges were dismissed. Indeed, even had there been no charges lodged by the Army, the ongoing comprehensive investigation would have subjected MacDonald to stress and other adverse consequences. However, once the charges instituted by the Army were dismissed, MacDonald was legally and constitutionally in the same posture as though no charges had been made. [FN12] He was free to go about his affairs, to practice his profession, and to continue with his life.

FN10. The original Court of Appeals decision concluded "that MacDonald's military arrest was the functional equivalent of a civilian arrest" for Speedy Trial Clause purposes. *United States v. MacDonald*, 531 F.2d 196, 204 (CA4 1976). Judge Craven, dissenting, disagreed with that conclusion stating that the military proceedings were equivalent to a grand jury investigation followed by a failure to file an indictment. *Id.*, at 209. In its petition for certiorari, the Government expressly declined to raise the issue of whether the military investigation triggered MacDonald's Sixth Amendment rights; we therefore do not express any opinion on that issue.

FN11. The initial Court of Appeals panel held that the prosecution by the Army and that by the Justice Department were conducted "by the government in its single sovereign capacity ...." *Id.*, at 204. Of course, an arrest or indictment by one

sovereign would not cause the speedy trial guarantees to become engaged as to possible subsequent indictments by another sovereign.

FN12. There is no allegation here that the Army acted in bad faith in dismissing the charges. This is not a case where the Government dismissed and later reinstituted charges to evade the speedy trial guarantee. The Army clearly dismissed its charges because the Commanding General of MacDonald's unit, following the recommendation of the Article 32 investigating officer, concluded that they were untrue. There is nothing to suggest that the Justice Department acted in bad faith in not securing an indictment until January 1975. After the Army dismissed its charges, it continued its investigation at the request of the Justice Department; the Army's initial 13-volume report was not submitted to the Justice Department until June 1972, and supplemental reports were filed as late as August 1973. Within a year, the Justice Department completed its review of the massive evidence thus accumulated and submitted the evidence to a grand jury. The grand jury returned the indictment five months later.

Plainly the indictment of an accused--perhaps even more so the indictment of a physician--for the heinous and brutal murder of his pregnant wife and two small children is not a matter to be hastily arrived at either by the prosecution authorities or by a grand jury. The devastating consequences to an accused person from the very fact of such an indictment is a matter which responsible prosecutors must weigh carefully. The care obviously given the matter by the Justice Department is certainly not any indication of bad faith or deliberate delay.

*11 The Court of Appeals acknowledged, and MacDonald concedes, that the delay between the civilian indictment and trial was caused primarily by MacDonald's own legal manuevers and, in any event, was not sufficient to violate the Speedy Trial Clause. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Justice STEVENS, concurring in the judgment.

For the reasons stated by Justice MARSHALL in Part II of his opinion, I also conclude that MacDonald's constitutional right to a speedy trial was not suspended during the period between the Army's dismissal of its charges in 1970 and the return of the civilian indictment in 1975. Justice MARSHALL also is clearly correct in stating that the question whether the delay was constitutionally unacceptable is "close." *Post*, at 1509. Since his opinion fairly identifies the countervailing factors, **1504 I need only state that the interest in allowing the Government to proceed cautiously and deliberately before making a final decision to prosecute for such a serious offense is of decisive importance for me in this case. I therefore concur in the Court's judgment.

*12 Justice MARSHALL, with whom Justice BRENNAN and Justice BLACKMUN join, dissenting.

On February 17, 1970, in the early morning, Dr. Jeffrey R. MacDonald called military police and requested help. When police arrived at the family quarters, they found him unconscious and suffering from multiple stab wounds, including one that threatened his life. His wife and two young children had been murdered. On May 1, 1970, the Army formally charged him with the murders. The Army dropped those charges on October 23, 1970, but reopened the investigation at the request of the Justice Department and handed over a comprehensive report in June 1972. The Justice Department did not convene a grand jury until August 1974, more than two years later. The Court of Appeals charged this delay to Government "indifference, negligence, or ineptitude." *United*

States v. MacDonald, 531 F.2d 196, 207 (CA4 1976) (*MacDonald I*). On January 24, 1975, MacDonald was indicted by a civilian grand jury on three counts of murder, the same charges that the military authorities had dropped. Trial commenced in the summer of 1979.

Confronted with these facts, the majority reaches the facile conclusion that the speedy trial right is not implicated at all when the same sovereign initiates, drops, and then reinitiates criminal charges. That conclusion is not justified by the language of the Speedy Trial Clause or the teachings of our cases, and it is hopelessly at odds with any sensible understanding of speedy trial policies. I must dissent.

I

Because the majority scants the relevant facts in this case, I review them in somewhat more detail. The initial investigation of the murders in this case was conducted by the Army's Criminal Investigation Division (CID) and the Federal Bureau of Investigation, as well as the local police. On May 1, 1970, the Army formally charged MacDonald with three specifications of murder, in violation of Article 118 of ***13** the Uniform Code of Military Justice, 10 U.S.C. § 918. The Army conducted a lengthy hearing during which 56 witnesses testified. MacDonald himself testified and was extensively cross-examined. At the conclusion of the hearing, the investigating officer filed an exhaustive report recommending that the charges against MacDonald be dismissed "because the matters set forth in all charges and specifications are not true." See *MacDonald I, supra*, at 200. He also recommended that the civilian authorities investigate Helena Stoeckley, who had told several persons that she was involved in the crime. On October 23, 1970, the Commanding General of MacDonald's unit accepted the recommendation and dismissed the charges. In December, MacDonald received an honorable discharge.

The prosecution did not, however, terminate on that date. Within a month of MacDonald's discharge, at the specific request of the Justice Department, the CID continued its investigation. The renewed investigation was extensive and wide-ranging. The CID conducted 699 interviews and, at the request of the Department, sent the weapons and the victims' clothing to the FBI laboratory in July 1971. In December 1971, the CID completed its investigation, and in June 1972, the CID submitted a 13-volume report to the Justice Department. Although supplemental reports were transmitted in November 1972 and August 1973, the Court of Appeals found that "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." *MacDonald I, supra*, at 206. Indeed, the United States Attorney for the Eastern District of North Carolina recommended ****1505** that the matter be submitted to a grand jury within six months of June 1972, and in 1973, the CID suggested the convening of a grand jury before it conducted further investigation.

MacDonald was fully aware of these investigations. After his honorable discharge, MacDonald moved to California and resumed the practice of medicine. In 1971, the CID again interviewed ***14** him. From January 1972 to January 1974, he repeatedly requested the Government to complete its investigation, and offered to submit to further interviews. The Justice Department declined to question him or to advise him when the investigation would terminate. In January 1974, the Department wrote that "this case is under active investigation and will remain under consideration for the foreseeable future." *MacDonald I, supra*, at 201 n. 6. There was no further correspondence.

The Government did not present the case to a civilian grand jury until August 1974. MacDonald waived his right to remain silent and testified before the grand jury for a total of more than five days. Numerous other witnesses testified, the bodies of the victims were exhumed, and the FBI reinvestigated certain aspects of the crime. An indictment was returned on January 24, 1975. The indictment charged MacDonald with three counts of first-degree murder.

The Government offered no legitimate reason--not even docket congestion--for the delay between the

submission of the June 1972 report and the presentation to the grand jury in August 1974. The Court of Appeals explained:

> "The leisurely pace from June 1972 until the indictment was returned in January 1975 appears to have been primarily for the government's convenience. 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.' " *MacDonald I, supra*, at 206 (footnotes omitted).

The FBI's failure to complete its analysis until 1974 is the only Government justification for the delay that the District ***15** Court mentioned in its initial decision denying MacDonald's motion to dismiss on speedy trial grounds. 1 App. for Appellant in No. 79-5253 (CA4), p. 46. In its post-trial decision, the District Court again denied the motion, but stated its belief that "the case could have been put before the grand jury at a much earlier date than it was." 485 F.Supp. 1087, 1089 (EDNC 1979).

II

The majority's analysis is simple: the Speedy Trial Clause offers absolutely no protection to a criminal defendant during the period that a charge is not technically pending. But simplicity has its price. The price, in this case, is disrespect for the language of the Clause, important precedents of this Court, and speedy trial policies.

"In all criminal prosecutions," the Sixth Amendment recites, "the accused shall enjoy the right to a speedy and public trial." On its face, the Sixth Amendment would seem to apply to one who has been publicly accused, has obtained dismissal of those charges, and has then been charged once again with the *same* crime by the *same* sovereign. Nothing in the language suggests that a defendant must be continuously under indictment in order to obtain the benefits of the speedy trial right. Rather, a natural reading of the language is that the Speedy Trial Clause continues to protect one who has been accused of a crime until the government has completed its attempts to try him for that crime.

Our cases, to the extent they address the issue, contradict the majority's view. In ****1506***Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967), the prosecutor entered a "*nolle prosequi* with leave" after the first trial ended in a mistrial. Under that procedure, the defendant was discharged from custody and subject to no obligation to report to the court, but the prosecutor could reinstate the indictment at any time upon application to the court. This Court held that the indefinite postponement of the prosecution, over the defendant's objection, "clearly" denied the defendant the right to a speedy ***16** trial. *Id.*, at 222, 87 S.Ct., at 993. The Court reasoned that the defendant "may be denied an opportunity to exonerate himself in the discretion of the solicitor and held subject to trial, over his objection, throughout the unlimited period in which the solicitor may restore the case to the calendar. During that period, there is no means by which he can obtain a dismissal or have the case restored to the calendar for trial." *Id.*, at 216, 87 S.Ct., at 990. In that case, of course, the indictment technically had not been dismissed when the defendant was discharged from custody. However, the prosecutor was required to take affirmative steps to reinstate the prosecution; no charges were actively pending against Klopfer. The Court nevertheless held that the speedy trial right applied.

Klopfer teaches that the anxiety suffered by an accused person, even after the initial prosecution has terminated and after he has been discharged from custody, warrants application of the speedy trial protection. The analysis in *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), relied on by the majority, is entirely consistent with this teaching. The Court in *Marion* held that the Speedy Trial Clause does not apply to the period before a defendant is first indicted, arrested, or otherwise officially accused. However, the Court hardly suggested that after the first

official accusation has been made, the dropping of charges prior to a *second* official accusation wipes the slate clean.

The Court explained its holding by stating that "the indictment was the *first official act* designating appellees as accused individuals." *Id.*, at 324, 92 S.Ct., at 465. (emphasis added). Sixth Amendment provisions "would seem to afford no protection to those *not yet accused*, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time." *Id.*, at 313, 92 S.Ct., at 459. (emphasis added). Prior to the time of arrest or indictment, an accused may suffer anxiety, but he does not suffer the special form of anxiety engendered by public accusation. "Arrest is a public act that may seriously interfere with the defendant's liberty, ***17** 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." *Id.*, at 320, 92 S.Ct., at 463. The Court did not address the question whether, after a public accusation has been made but charges have technically been dropped, the defendant is in precisely the same constitutional situation as if no accusation had ever been made.

Marion also adverts to a serious procedural impediment to extending the speedy trial right prior to a first arrest or indictment: inquiry into when the police could have made an arrest or when the prosecutor could have brought charges would raise difficult problems of proof. *Id.*, at 321, n. 13, 92 S.Ct., at 463, n. 13; see *id.*, at 313, 92 S.Ct., at 459. But in a case of successive prosecutions on the same charge, these difficulties do not exist: the speedy trial right should attach from the date of the initial accusation, a date which is simple to determine. [FN1] In short, the majority's decision to suspend application of the speedy trial right is not required by, and may be inconsistent ****1507** with, our prior cases. [FN2]

FN1. *Marion* also notes that the statute of limitations will serve as protection in cases of pre-indictment delay. But no such protection exists here, since there is no statute of limitations for murder.

FN2. Contrary to the majority's suggestion, most of the Courts of Appeals considering the issue have concluded that the period after dismissal of initial charges *is* included for speedy trial purposes. The First, Fifth, Seventh, and Tenth Circuits have all reached this conclusion. See *United States v. Cabral*, 475 F.2d 715 (CA1 1973) ; *United States v. Nixon*, 634 F.2d 306, 308-309 (CA5), cert. denied, 454 U.S. 828, 102 S.Ct. 120, 70 L.Ed.2d 103 (1981) ; *United States v. Avalos*, 541 F.2d 1100, 1108, n. 13 (CA5 1976); *United States v. McKim*, 509 F.2d 769, 773 (CA5 1975); *Jones v. Morris*, 590 F.2d 684 (CA7) (*per curiam*), cert. denied, 440 u.s. 965, 99 S.Ct. 1513, 59 L.Ed.2d 780 (1979); *United States v. DeTienne*, 468 F.2d 151, 155 (CA7 1972), cert. denied, 410 U.S. 911, 93 S.Ct. 974, 35 L.Ed.2d 274 (1973); *United States v. Merrick*, 464 F.2d 1087, 1090 (CA10), cert. denied, 409 U.S. 1023, 93 S.Ct. 462, 34 L.Ed.2d 314 (1972). See also *United States v. Small*, 345 F.Supp. 1246, 1248-1250 (ED Pa.1972) (holding that right attaches from initial military arrest through civilian trial, although in fact civilian indictment immediately followed dismissal of military charges). But see *United States v. Davis*, 487 F.2d 112, 116 (CA5 1973), cert. denied, 415 U.S. 981, 94 S.Ct. 1573, 39 L.Ed.2d 878 (1974).
Even the Circuits whose opinions the majority cites as support have issued somewhat contradictory signals on this question. See *United States v. Lai Ming Tanu*, 589 F.2d 82, 88-89 (CA2 1978) (leaving open question whether speedy trial right may ever apply continuously to successive state and federal prosecutions for the same transaction); *United States v. Roberts*, 548 F.2d 665 (CA6), cert. denied, *sub nom. Williams v. United States*, 431 U.S. 920, 97 S.Ct. 2188, 53 L.Ed.2d 232

(1977) (considering time between dismissal and indictment for speedy trial purposes without discussing contrary opinion in *United States v. Martin*, 543 F.2d 577 (CA6 1976), cert. denied, 429 U.S. 1050, 97 S.Ct. 762, 50 L.Ed.2d 766 (1977); *United States v. Henry*, 615 F.2d 1223, 1233, n. 13 (CA9 1980) (leaving question open, and limiting *Arnold v. McCarthy*, 566 F.2d 1377 (CA9 1978), to the case of a dismissal following a mistrial); *United States v. Lara*, 172 U.S.App.D.C. 60, 63-65, 520 F.2d 460, 463-465 (1975) (considering tactical Government delay between dismissal and indictment for speedy trial purposes).

The majority also plainly ignores fundamental speedy trial policies. The special anxiety that a defendant suffers because of a public accusation does not disappear simply because the initial charges are temporarily dismissed. Especially when the defendant and the public are aware of an ongoing government investigation of the same charges, the defendant's interest in final resolution of the charges remains acute. After all, the government has revealed the seriousness of its threat of prosecution by initially bringing charges. The majority thus paints an entirely unrealistic portrait when ***18** it suggests that such a defendant "is, at most, in the same position as any other subject of a criminal investigation." *Ante*, at 1502.

MacDonald was painfully aware of the ongoing Army and Justice Department investigations. He was interviewed again by military authorities soon after his honorable discharge. He repeatedly inquired about the progress of the investigations. He even proposed to submit to further interviews in order to speed final resolution of his case. MacDonald "realized that the favorable conclusion of the [military] proceedings was not the end of the government's efforts to convict him. Prudence obliged him to retain attorneys at his ***19** own expense for his continuing defense. He remained under suspicion and was subjected to the anxiety of the threat of another prosecution." *MacDonald I*, 531 F.2d, at 204 (footnote omitted). It is simply absurd to suggest that he has suffered no greater anxiety, disruption of employment, financial strain, or public obloquy than if the military charges had never been brought.

The majority's insistence that the dismissal of an indictment eliminates speedy trial protections is not only inconsistent with the language and policies of the Speedy Trial Clause and with this Court's decisions. It is also senseless. Any legitimate government reason for delay during the period between prosecutions can, indeed must, be weighed when a court determines whether the defendant's speedy trial right has been violated. No purpose is served by simply ignoring that period for speedy trial purposes. [FN3] In ****1508***Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) , this Court rejected an inflexible approach to the right to a speedy trial in favor of "a difficult and sensitive balancing process." *Id.*, at 533, 92 S.Ct., at 2193 (footnote omitted). Lower court opinions indicate that this responsibility can be faithfully discharged in the special circumstances of successive prosecutions. [FN4]

FN3. The Government argues that considering the time between dismissal and reinstitution of charges for speedy trial purposes will have untoward consequences: it will discourage prosecutors from dismissing charges that were obtained improperly or prematurely, or that appear unwarranted in light of new evidence, and it will dissuade prosecutors from reopening dismissed charges in light of changed circumstances. The argument is specious, since a court will consider the Government's reasons for delay in ruling on the speedy trial issue. If the Government has dismissed charges in good faith and reopens the case based on material new evidence, then the delay should not count against the Government. In this case, the Court of Appeals sensitively evaluated the Government's reasons for delay and only counted a portion of that time against the Government. See n. 7, *infra*.

FN4. See, *e.g., United States v. Henry, supra* (assuming that time between indictments is considered in speedy trial calculus but finding no violation, where part of one-year delay was due to renewed investigation, part was due to negligence, and prejudice was not shown); *United States v. Roberts, supra* (considering time between dismissal of initial charges and return of indictment but finding no violation, where two of codefendants were involved in other court proceedings, evidence was complex, witnesses changed their stories, prosecution needed to judge whether to use confidential informants, and defendant showed no actual prejudice); *Jones v. Morris, supra* (considering time between dismissal of first indictment and reinstitution of proceedings but finding no violation, where defendant did not assert speedy trial right until after second indictment was brought, on the eve of trial; where delay, although unexplained, was not in bad faith; and where defendant proved no special anxiety or actual prejudice); *United States v. McKim, supra* (considering time between first indictment and trial on *third* indictment but finding no violation, where delay was only one year and defendant did not prove actual prejudice).

***20** It is no answer that the Due Process Clause protects against purposeful or tactical delay that causes the accused actual prejudice at trial. The due process constraint is limited, and does not protect against delay which is not for a tactical reason but which serves no legitimate prosecutorial purpose. [FN5] See *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). According only limited protection is appropriate prior to the first arrest or indictment because the state has a substantial interest in conducting a relatively unrestricted pre-accusation investigation, see *id.*, at 790-795, 97 S.Ct., at 2048-2051, and because a person not yet accused has a lesser interest in a speedy prosecution. But when a government has already investigated and accused a defendant, it is in a much better position, and properly shoulders a greater responsibility, to reinvestigate and reprosecute the defendant with reasonable promptness. Moreover, as explained above, delay between public accusation, dismissal of charges, and renewed indictment causes peculiar anxiety to the accused, as well as the other consequences of arrest described in *Marion*. Thus, the government must affirmatively demonstrate a legitimate reason, other than neglect or indifference, for such a delay.

FN5. Whether the delay in this case falls within that category is unclear. The Court of Appeals did not reach the due process issue, and this Court therefore properly leaves it open on remand.

***21** The majority's approach denigrates speedy trial policies and presents a serious potential for abuse. Under that approach, the government could indefinitely delay a second prosecution for no reason, or even in bad faith, [FN6] if the defendant is unable to show actual prejudice at trial. The Court of Appeals in this very case suggested that the Government may have proceeded on the assumption that pre-indictment delay would be of no speedy trial consequence. *MacDonald I, supra*, at 206, n. 17. I fear that, as a consequence of today's decision, unreasonable and unjustifiable delay between ****1509** prosecutions may become commonplace.

FN6. The majority's statement that the delay in this case was not in bad faith, *ante* , at 1503, n. 12, is puzzling. Under the majority's constricted view of the Sixth Amendment, the good or bad faith of the government in the period between successive prosecutions is entirely irrelevant to whether the defendant's speedy trial right has been violated, since the defendant is not continually under formal accusation during that period.

III

I conclude that application of the speedy trial right was not suspended during the period between the

Army's dismissal of murder charges against MacDonald in October 1970 and the return of a civilian indictment on the same charges in January 1975. The question remains whether the delay violated his speedy trial right. I find the question close. However, after examining the four speedy trial right factors enunciated in *Barker v. Wingo, supra*--length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant--I agree with the Court of Appeals that MacDonald's speedy trial rights were violated.

The proper focus for this analysis is the 26-month period between June 1972 and the convening of a grand jury in August 1974. [FN7] Neither the District Court nor the Court of Appeals ***22** found any legitimate reason for this delay. As the Court of Appeals' second panel concluded: "The primary reason for the two-year delay was either a disagreement between two groups in the Justice Department as to whether the case should be prosecuted, or just simple government bureaucracy (the contention of the involved Assistant U. S. Attorney)." 632 F.2d 258, 262 (CA4 1980) *(MacDonald II)*. Although the FBI did conduct further tests and investigation after the grand jury was convened, the Government has not demonstrated that it could not have pursued those leads earlier.

> FN7. Although the total period of delay between initial prosecution and trial is more than nine years, the period prior to dismissal of military charges is not chargeable to the Government because those charges were promptly resolved. The Court of Appeals properly also gave little weight to the period between the CID's initial reinvestigation and the submission of its report to the Justice Department in June 1972, since the prior dismissal for insufficient evidence warranted a more extensive investigation. The period subsequent to the civilian indictment was mainly consumed by judicial proceedings to evaluate MacDonald's speedy trial claims.

MacDonald undeniably asserted his right to a speedy trial vigorously and often, beginning in January 1972. Although the Government's delay in pressing formal civilian charges prevented MacDonald from filing a formal motion to dismiss on speedy trial grounds, he invoked his right in the only meaningful way open to him. Indeed, the strength of his efforts is a powerful indication that he has suffered serious personal prejudice. See *Barker v. Wingo*, 407 U.S., at 531, 92 S.Ct., at 2192.

The last speedy trial factor, and the most difficult to evaluate on this record, is prejudice to the accused. Proof of actual prejudice to the defense at trial is not, of course, necessary to demonstrate a speedy trial violation. *Moore v. Arizona*, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973) (*per curiam*). In *Moore*, this Court held that a defendant's speedy trial claim should not have been dismissed without further hearing, where the defendant was tried three years after he was first charged and 28 months after he demanded a speedy trial. In this case, the period of unjustified delay is at least two years, and MacDonald demanded an early disposition prior to that period. Because of this delay, a speedy trial violation could be found in this case, even without proof of actual prejudice at trial. ***23** The record is clear that the delay caused MacDonald to suffer other forms of substantial prejudice, including continuing anxiety, intrusive publicity, legal expense, and disruption of a new civilian career.

The proof of actual prejudice at trial in this case, although somewhat speculative, does buttress MacDonald's speedy trial claim. It is possible that Stoeckley's trial testimony would have been less confused and more helpful to MacDonald at an earlier date. This testimony was critical to MacDonald, whose principal defense was that she was one of a group of intruders who committed the murders. Although Stoeckley was hardly a reliable witness, she did testify at trial that she had no memory of the events that night, in contradiction ****1510** to some of her earlier out-of-court statements. See *MacDonald II*, 632 F.2d, at 264-265. Her claim of loss of memory obviously became more credible with the passage of time. It

is likewise possible that the inevitable "coaching" of Government witnesses prior to their testimony would have had lesser adverse impact on the defense, and could have been minimized more effectively by cross-examination, had the trial occurred earlier. [FN8] See *id.*, at 263-264. The unusual facts of this case, recited by the majority, suggest that slight differences in trial testimony may well have influenced the verdict. [FN9]

> FN8. For example, a babysitter who had testified in 1970 that she had not seen an ice pick in MacDonald's home had changed her story by the time of trial. Cross-examination by the defense did not cause her to reaffirm her earlier story. Tr. 3559-3560, 3567-3572.
>
> FN9. I therefore disagree with the majority that the speedy trial analysis should not be influenced by the evidentiary basis for the jury verdict. *Ante*, at 1501, n. 6. Moreover it is obvious that respondent "does not challenge the jury verdict itself," *ibid.*, only because that issue is not directly presented on this petition.

Balancing these factors, I conclude that the Court of Appeals was correct in finding a speedy trial right violation. The Government undoubtedly has an interest in renewing the investigation of a charge that has been dismissed, in evaluating *24 carefully whether a second prosecution should be brought, and in avoiding undue haste, especially when the charge is murder. By the same token, when such a serious charge has already been brought, and when the defendant is suffering the consequences of that public charge and of a renewed investigation, the Government must not delay its decision for reasons of indifference or neglect. The Government's interest in reaching an informed decision whether to prosecute is certainly legitimate; but vague, unexplained references to internal disagreement about prosecution cannot justify more than two years of indecision. Because the record in this case reveals no legitimate reason for a substantial period of pretrial delay, and because MacDonald may have suffered prejudice at trial and clearly suffered other forms of prejudice, I would affirm the Court of Appeals' ruling that his speedy trial right was violated.

IV

The majority's opinion in this case is a disappointing exercise in strained logic and judicial illusion. Suspending application of the speedy trial right in the period between successive prosecutions ignores the real impact of the initial charge on a criminal defendant and serves absolutely no governmental interest. This Court has warned before against "allowing doctrinaire concepts ... to submerge the practical demands of the constitutional right to a speedy trial." *Smith v. Hooey*, 393 U.S. 374, 381, 89 S.Ct. 575, 578, 21 L.Ed.2d 607 (1969). The majority fails to heed that advice.

For the foregoing reasons, I dissent.

Briefs and Other Related Documents (Back to top)

- 1981 WL 390070 (Appellate Brief) Reply Brief for the United States (Nov. 30, 1981)
- 1981 WL 390068 (Appellate Brief) Brief for Respondent (Sep. 12, 1981)
- 1981 WL 390064 (Appellate Brief) Brief for the United States (Aug. 10, 1981)

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Westlaw.

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688 F.2d 224, 11 Fed. R. Evid. Serv. 474

(Cite as: 688 F.2d 224)

H

United States Court of Appeals,
Fourth Circuit.
UNITED STATES of America, Appellee,
v.
Jeffrey R. MacDONALD, Appellant.
No. 79-5253.

Argued June 9, 1982.
Decided Aug. 16, 1982.

Defendant was convicted before the United States District Court for the Eastern District of North Carolina, at Raleigh, Franklin T. Dupree, Jr., Chief Judge, of murdering his wife and children, and he appealed. The Court of Appeals, 632 F.2d 258, reversed on speedy trial grounds. Upon granting certiorari, the Supreme Court, 102 S.Ct. 1497, 71 L.Ed.2d 696, reversed and remanded. Upon remand, the Court of Appeals, Albert V. Bryan, Senior Circuit Judge, held that: (1) defendant was not denied due process by the two-year interval between termination of military proceedings and grand jury's convocation; (2) trial court did not abuse its discretion in rejecting defendant's tendered expert psychiatric character testimony; (3) allowing Government to demonstrate similarity between pattern of puncture holes in his pajama top and pattern of icepick wounds in his wife's chest was not an abuse of discretion; (4) court properly refused to allow into evidence the findings and conclusions of investigating officer designated by the Army to determine whether probable cause existed to court-martial defendant; and (5) defendant was not denied due process by the trial court's exclusion of the testimony of seven witnesses, all of whom would have testified to various inculpatory comments or statements allegedly made by woman whom defendant claimed to be involved in the crimes.

Affirmed.

Murnaghan, Circuit Judge, filed a concurring opinion.

See also, 4 Cir., 585 F.2d 1211.

West Headnotes

[1] Constitutional Law ⇐265
92k265 Most Cited Cases
Although objectionable, the two-year interval between termination of military proceedings and grand jury's convocation did not amount to a denial of due process, since, plainly, the indictment of defendant for the murder of his pregnant wife and two small children was not a matter to be hastily arrived at either by prosecution authorities or a grand jury. U.S.C.A.Const.Amends. 5, 6.

[2] Constitutional Law ⇐265
92k265 Most Cited Cases
Laggardness in prosecuting a criminal charge rightfully exposes the government to censure, but not every delay is of constitutional moment.

[3] Criminal Law ⇐338(1)
110k338(1) Most Cited Cases
Appraisal of the probative and prejudicial value of evidence under Rule 403 is entrusted to the sound discretion of the trial judge, and absent extraordinary circumstances, the Courts of Appeals will not intervene in his resolution. Fed.Rules Evid. Rule 403, 28 U.S.C.A.

[4] Criminal Law ⇐377
110k377 Most Cited Cases
In prosecution of defendant for the murder of his pregnant wife and two small children, the trial court did not abuse its discretion in rejecting defendant's tendered expert psychiatric character testimony. Fed.Rules Evid. Rule 404(a)(1), 28 U.S.C.A.

[5] Criminal Law ⇐650
110k650 Most Cited Cases

Trial court did not abuse its discretion, in prosecution of defendant for the murder of his pregnant wife and two small children, in allowing the Government to demonstrate the similarity between pattern of puncture holes in his pajama top and pattern of icepick wounds in his wife's chest. Fed.Rules Evid. Rule 403, 28 U.S.C.A.

[6] Criminal Law ⇐429(1)
110k429(1) Most Cited Cases
Although report, which army investigating officer prepared to determine whether probable cause existed to court-martial defendant, met the facial standards of admissibility in the subsequent prosecution of defendant for the murder of his pregnant wife and two small children, the trial court did not abuse its discretion in refusing to allow into evidence the findings and conclusions of the army officer, since defendant nowhere showed that the report would have helped toward an answer to the ultimate query of whether defendant committed the crimes charged, and since, indeed, the report's admission would have tended to perplex the jury. Fed.Rules Evid. Rule 803(8)(C), 28 U.S.C.A.; UCMJ, Art. 32, 10 U.S.C.A. § 832.

[7] Constitutional Law ⇐268(10)
92k268(10) Most Cited Cases
In prosecution of defendant for the murder of his pregnant wife and two small children, defendant was not denied due process by the district court's exclusion of the testimony of seven witnesses, all of whom would have testified to various inculpatory comments or statements allegedly made by woman whom defendant accused of being involved in the crimes; furthermore, there was no abuse of the court's discretion in excluding the testimony of those
witnesses as impeachment of the woman's testimony. Fed.Rules Evid. Rules 403, 804(b)(3), 28 U.S.C.A.

[8] Criminal Law ⇐417(15)
110k417(15) Most Cited Cases
As applied to criminal matters, three requisites must be met prior to the reception of hearsay testimony as being contrary to the declarant's penal interest: first, the declarant must be unavailable; second, from the perspective of the average, reasonable person, the statement must have been truly adverse to declarant's penal interest, considering when it was made; and finally, corroborating circumstances must clearly establish the trustworthiness of the statement. Fed.Rules Evid. Rule 804(b)(3), 28 U.S.C.A.

[9] Criminal Law ⇐1153(1)
110k1153(1) Most Cited Cases
Role of the Court of Appeals in reviewing decisions at nisi prius construing Rule 804(b)(3), pertaining to the admissibility of a hearsay statement which is contrary to the declarant's penal, pecuniary or proprietary interest, is a limited one; the Court of Appeals must uphold the trial court unless it has abused its discretion. Fed.Rules Evid. Rule 804(b)(3), 28 U.S.C.A.

[10] Homicide ⇐1134
203k1134 Most Cited Cases
(Formerly 203k250)
Evidence was sufficient to establish beyond a reasonable doubt defendant's guilt on charges of murdering his pregnant wife and two small children.
***226** Ralph S. Spritzer, University of Pennsylvania, Philadelphia, Pa., Bernard L. Segal (Wendy P. Rouder, San Francisco, Cal., Michael J. Malley, Phoenix, Ariz., Wade M. Smith, Raleigh, N.C., on brief), for appellant.

John F. De Pue and Brian M. Murtagh, Dept. of Justice, Washington, D.C. (Samuel T. Currin, U. S. Atty., James Blackburn, Asst. U. S. Atty., Patricia L. Holland, Barbara L. Miller, Dept. of Justice, Raleigh, N.C., on brief), for appellee.

Before BRYAN, Senior Circuit Judge, MURNAGHAN and SPROUSE, Circuit Judges.

ALBERT V. BRYAN, Senior Circuit Judge:

In United States v. MacDonald, --- U.S. ----, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982), the Supreme Court reversed our holding [FN1] that appellant's Sixth Amendment right to a speedy trial was abridged by the Government's delay in obtaining the indictment. On remand, we now speak to

MacDonald's remaining advancements of error. See id. at 1497 n.4, 102 S.Ct. at 1500 n.4. Since the Supreme Court's opinion scrupulously chronicles both the facts of record and the protracted history of the case, see id. at ----, 102 S.Ct. at 1499- 1500, we forego repetitious narration.

FN1. United States v. MacDonald, 632 F.2d 258 (4th Cir.), rehearing denied by an equally divided Court, 635 F.2d 1115 (1980).

I. Due Process

(1)(2) Our first concern is the accused's grievance that the two-year interval between the termination of the military proceedings and the grand jury's convocation [FN2] amounted to a denial of constitutionally-guaranteed due process. Laggardness in prosecuting a criminal charge rightfully exposes the Government to censure. Still, not every delay is of Constitutional moment. Indeed, we conclude that the instant hiatus, although objectionable, falls short of Constitutional injury.

FN2. It is now firmly established that only this period is subjected to the accusation of dilatoriness. See --- U.S. at ---- n.12, 102 S.Ct. at 1503 n.12; 632 F.2d at 263 n.2, 268.

To maintain this challenge, MacDonald must initially identify prejudice ascribable to the two-year gap. While a Sixth Amendment violation is made out merely by showing the potential for prejudice, here, under the Fifth Amendment, one must demonstrate actual prejudice. United States v. Lovasco, 431 U.S. 783, 789, 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752 (1977); *227United States v. Marion, 404 U.S. 307, 325, 92 S.Ct. 455, 466, 30 L.Ed.2d 468 (1971). We need not explore MacDonald's claims of actual prejudice, however, unless we also are assured that the delay "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define the community's sense of fair play and decency." 431 U.S. at 790, 97 S.Ct. at 2048 (citations omitted).

In this regard, we write mindful of Supreme Court guidance peculiarly applicable here. While it did not decide this question, six Justices commented on the nature of and reasons for the delay in indicting MacDonald. For the Court, Chief Justice Burger concluded:

> Plainly the indictment of an accused-perhaps even more so the indictment of a physician-for the heinous and brutal murder of his pregnant wife and two small children is not a matter to be hastily arrived at either by the prosecution authorities or by a grand jury. The devastating consequences to an accused person from the very fact of such an indictment is a matter which responsible prosecutors must weigh carefully. The care obviously given the matter by the Justice Department is certainly not any indication of bad faith or deliberate delay.

--- U.S. at ---- n.12, 102 S.Ct. at 1503 n.12. See also id. at ----, 102 S.Ct. at 1503 (Stevens, J., concurring). We think this conclusive of the Lovasco test and fatal to the appellant's Fifth Amendment argument. [FN3]

FN3. MacDonald further avers that he was denied due process of law through pervasive prosecutorial and judicial misconduct from indictment to conviction. We reject this argument, adhering to our observation in 1980:

> (T)he case was a sensational, drawn-out one, both hotly contested and bristling with difficult issues. The district judge's handling of the heavy demands placed on him was admirable.

632 F.2d at 260.

II. Psychiatric Character Testimony

MacDonald presses, too, that the trial court was at fault in rejecting tendered expert psychiatric character testimony. See Fed.R.Evid. 404(a)(1). After presenting thirteen lay witnesses who vouched for his nonviolent nature, MacDonald sought to present as evidence the conclusions of Dr. Robert L. Sadoff, a forensic psychiatrist, who would opine that the defendant was possessed of "a personality configuration inconsistent with the outrageous and senseless murders of (his) family." [FN4] See

Fed.R.Evid. 404(a)(1). The trial judge, however, declined to permit the witness to testify, ruling

> FN4. The following written proffer was made:
> 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 antisocial 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.
> See 485 F.Supp. at 1094.

> that irrespective of the admissibility of the proffered evidence under 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 ....

485 F.Supp, 1087 at 1096-97; see Fed.R.Evid. 403 . MacDonald now challenges this decision.

(3)(4) At the outset, we must recall that the appraisal of the probative and prejudicial value of evidence under Rule 403 is entrusted to the sound discretion of the trial judge; absent extraordinary circumstances, *228 the Courts of Appeal will not intervene in its resolution. E.g., Salem v. United States Lines Co., 370 U.S. 31, 35, 82 S.Ct. 1119, 1122, 8 L.Ed.2d 313 (1962) (exclusion of expert testimony to be sustained "unless manifestly erroneous"); United States v. Masters, 622 F.2d 83, 87-88 (4th Cir. 1980) (reversed only if decision is rendered "arbitrarily or irrationally"). The District Judge was keenly aware of the factors bearing on the wisdom of admitting Dr. Sadoff's testimony and painstakingly examined each. Militating against admissibility were the cumulative nature of this testimony,[FN5] and the certainty of fostering a "battle of the experts" over Dr. MacDonald's psychiatric composition.[FN6] The Court concluded that an expansion of the inquiry into this uncertain area would more likely confuse, rather than assist, the jury. A fair reading of the record and the District Court's memorandum opinion belies any claim that this decision abused the discretion reposed in the trial court, and we refuse, as we must, the invitation to substitute our judgment for its.[FN7]

> FN5. As noted already, thirteen lay witnesses, described by the District Court as "highly intelligent and articulate, professional business people," 485 F.Supp. at 1094, testified at length to Dr. MacDonald's good character.

> FN6. The Government was prepared to call a parade of experts who would give opinions antipodal to Dr. Sadoff's. Under these circumstances, when ostensibly well-qualified medical experts square off with sharply divergent views, it seems likely the jury will only be confused. See 2 J. Weinstein & M. Berger, Evidence P 405(03), at 405-36 n.18 (1981), quoting Falknor & Steffen, Evidence of Character: From the "Crucible of the Community" to the "Couch of the Psychiatrist," 102 U.Pa.L.Rev. 980, 994 (1954).

> FN7. Appellant places much emphasis on

> the following portion of the Advisory Committee's note to Rule 405 of the Federal Rules of Evidence, reprinted in Federal Rules Pamphlet, Criminal at 171 (West 1981):
>
> If character is defined as the kind of person one is, then account must be taken of the varying ways of arriving at that 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.
>
> This statement, however, merely manifests that, in the opinion of the Advisory Committee, expert psychiatric testimony would be relevant evidence of one's personality. If the District Court determines that the prejudicial impact of such evidence exceeds its probative value, however, Rule 403 permits exclusion of that evidence, "(a)lthough relevant."

III. Pajama Top Demonstration

(5) We next analyze appellant's contention that the trial court erred in allowing the Government to demonstrate the similarity between the pattern of puncture holes in his pajama top and the pattern of icepick wounds in his wife's chest. The top was found draped over Mrs. MacDonald's chest when the authorities first arrived at the crime scene; [FN8] it was soaked with the victim's blood and, among other breaks in the fabric,[FN9] contained 48 round punctures. MacDonald has insisted that the shirt was damaged when, after it was pulled over his head in a scuffle and became entangled about his hands, he used it to fend off blows from an icepick wielded by the same assailants he avers murdered his family. According to his version of the incident, he placed the nightshirt on his wife's chest when he regained consciousness and discovered her body.

> FN8. When the police first arrived at the MacDonald home, the defendant was lying across his wife's body. To administer first aid, an officer rolled him off his wife and onto the floor. This process, the defense argued, inevitably disturbed the positioning of the pajama top before the photographs of the scene were taken. Although some variation of the posture of the shirt may have been occasioned by this act, we think it unlikely that the most crucial aspect of the shirt's configuration-that is, the right sleeve being turned inside out-would be affected noticeably by this movement.
>
> FN9. The shirt contained a single cigarette burn, several slashing tears, and a rip extending down from the V-neck.

Suspicious of this story, the prosecution theorized that he intentionally placed the pajama top on his wife's body to disguise the fact that her blood had stained it in his fatal attack on her. Consistent with this hypothesis and the defendant's alleged maiming of the bodies to give the appearance of a massacre, the Government postulated *229 that he riddled his wife's body with an icepick after laying the shirt across her body. Laboratory experts were asked to fold the shirt in the same manner as it was found at the MacDonald home and to determine whether the pattern of holes in the shirt and in the body coincided. Acting on these directions, the investigators folded the right sleeve inside out [FN10] and, after some adjustment, aligned the 48 holes so that a pattern of 21 punctures emerged. The resulting array, 5 holes on the right side and 16 on the left, bore a striking resemblance to the pattern of icepick wounds suffered by Mrs. MacDonald.

> FN10. See note 8 supra.

The defense contends that allowing the jury to view this exhibition was error, urging that the prejudicial impact of this demonstration far outweighed its probative value. See Fed.R.Evid. 403. Further, counsel poses the possibility that the shirt was moved before it was photographed at the crime scene, the potentially infinite ways to align the 48 holes into a pattern of 21, and a variety of plausible shortcomings in the methods employed by the Government investigators. Each of these points merits scrutiny, and each was advanced, without limitation, before the jury.

Our task, however, is not to decide this dispute. As with the District Court's refusal to admit expert psychiatric testimony on the issue of Dr. MacDonald's personality, our inquiry now is, baldly, only whether that Court abused its discretion by finding this demonstration more probative than prejudicial. See part II supra. We think the District Court's decision that this evidence was not unduly prejudicial was acceptable. See United States v. Baller, 519 F.2d 463, 466 (4th Cir.), cert. denied, 423 U.S. 1019, 96 S.Ct. 456, 46 L.Ed.2d 391 (1975) . We therefore do not think its ruling was an abuse of discretion.[FN11]

FN11. Although each determination of the admissibility of evidence under Rule 403 must be analyzed separately, we believe it instructive to note two pertinent distinctions between the psychiatric evidence that was excluded by the District Court and the nightshirt demonstration which was admitted. Perhaps most significant is that the demonstration of the pajama top was in no way repetitive of any earlier testimony or demonstration. Additionally, however, the District Court made the determination, well-supported by authority, that psychiatric characterizations of personality are the type of evidence that the Court in Baller said "an exaggerated popular opinion of the accuracy of a particular technique makes its use prejudicial or likely to mislead the jury." Despite the error inherent in all scientific inquiry, we find no abuse of discretion in the decision that the examination of physical evidence is more reliable than the conclusions of a psychiatric examination of a person's character.

IV. The Rock Report

(6) Next, MacDonald argues the District Court erred when it refused to allow into evidence the findings and conclusions of Colonel Warren V. Rock, the investigating officer designated by the Army in 1970 to determine whether probable cause existed to prosecute MacDonald.[FN12] Principally, MacDonald argues the report was admissible as a public record under Fed.R.Evid. 803(8) (C).

FN12. See Uniform Code of Military Justice art. 32, 10 U.S.C. s 832 (1976).

Under Article 32 of the Uniform Code of Military Justice, an accused has a right to a pre-court martial investigation. An impartial officer is charged with assembling the evidence, ascertaining what charges may be brought, whether the charges are true, and what disposition should be made of the accusations in the interest of justice and discipline. See 10 U.S.C. s 832(a) (1976). While this probe is purely advisory, the subject is furnished counsel with the right to cross-examine witnesses. The officer then must forward a report to the appropriate military authorities. Id.

MacDonald contends that these attributes place the Rock report squarely within Rule 803(8)(C). Under this rule, public records, reports, or statements of factual findings, although hearsay, are admissible against the Government in a criminal case if "resulting from an investigation, made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." *230 The Government attacks its admissibility, pressing first that it was not trustworthy because in the years after 1970, a more detailed and sophisticated examination of physical and other proof was possible and second, that even if literally acceptable, the District Court had discretion, which it properly exercised, to exclude the proffer on grounds of irrelevance, prejudice, or confusion.

Although Rule 803(8)(C) apparently has never been construed in this context, we think it apparent that the Rock report met the facial standards of admissibility. It was a) a "public record," b) to be introduced against the Government in a criminal case, c) containing factual findings, d) made pursuant to an investigation mandated by law, e) containing, given the impartiality of the investigating officer, the availability of counsel, and the right to examine and cross-examine, adequate circumstantial assurances of trustworthiness. This

conclusion only begins our inquiry, however, because Rule 803 does not mandate admission, it only allows reception of qualifying evidence.

In Cox v. Babcock E. Wilcox Co., 471 F.2d 13 (4th Cir. 1972), we indicated that the admission of evaluative public records was discretionary with the trial court. Citing the dissent from the denial of rehearing in Smith v. Universal Services, Inc., 454 F.2d 154, 160 (Dyer, J., dissenting), we said that a trial judge's decision to reject an EEOC investigative report was unassailable. As Smith made clear, such reports at times suffer from an undue risk of prejudice. To the extent they contain credibility determinations, they tend to undermine the exclusive province of the jury.

Such reasoning upholds the presiding judge's disallowance of Colonel Rock's findings and conclusions. While the Court properly could have admitted the evidence, we do not question the ruling of declination. The ultimate query to the jury in this case was whether defendant committed the crimes charged. Nowhere has appellant shown that this report would have helped towards an answer to this question. Indeed, its admission would have tended to perplex, in that it likely would have distracted the jury's attention from its task of ascertaining guilt or innocence to a second-guessing of the Government's conduct of the murder investigation. There is no question that MacDonald was free to call any witnesses who testified in the Article 32 investigation or, indeed, to use such testimony, as appropriate, at his trial. Under these circumstances, we think the District Court sensitively concluded that the Rock report should be excluded. Seeing no abuse of discretion, we reject this assignment of error.

V. The Stoeckley Witnesses

(7) Finally, appellant lays fault to the District Court's exercise of discretion in excluding the testimony of seven witnesses, all of whom would have testified to various inculpatory comments or statements assertedly made by Helena Stoeckley. The exclusion of this evidence, charges MacDonald, was error in that it abridged appellant's Fifth Amendment right to call witnesses in his own defense, was admissible under Rule 804(b)(3) and, in any event, constituted proper impeachment of Stoeckley's own testimony. Reviewing the evidence in question, we analyze these contentions in turn.

A

Since the commission of the crimes in February 1970, MacDonald has maintained that he and his family all were victims of a bizarre cult attack. He claims that the perpetrators included three men and a woman wearing a floppy hat, having blond hair, and wearing boots. The woman, he says, was Helena Stoeckley.

At trial, Stoeckley testified that although her hair was brown in color, she owned a blond wig at the time of the crimes. She further said that she owned a floppy hat and boots. Although her recollection of events on the evening of February 16 and during the early morning hours of February 17 was, at best, hazy, she recalls not wearing the blond wig. However, she admitted to burning the wig and discarding the boots two days later.

*231 While Stoeckley offered this much evidence seeming to corroborate MacDonald's version of the killings, the remainder of her testimony either contradicted him or tended to undercut his narration of the events. For example, she testified that she had never seen MacDonald before trial, had never been in his Fayetteville apartment, and while she vaguely felt that she might have had some connection with the crimes, since she had no explanation of her whereabouts between midnight and 5:30 a. m., she insisted she was not present at their commission. In all, the evidence disclosed that Stoeckley's memory was exceedingly poor and that she was constantly under the influence of narcotic drugs.

Because of this faulty memory, appellant sought to introduce a series of inculpatory statements through other witnesses. In this proffer to the District Court, in the absence of the jury, it was shown that these witnesses would give evidence substantially as follows:

1) Robert A. Brisentine, an Army investigator

assigned to the homicides, interviewed Stoeckley April 23 and 24, 1971, approximately 14 months after the crime. Stoeckley told him she was present during the murders, but did not think that she had taken part. She offered to divulge the participants and provide more details, but wanted immunity from prosecution. Subsequently, she said she had "said too much."

2) James Gaddis, an officer of the Nashville Police Department, revealed that Stoeckley had confessed her belief that she was involved in the crimes in the fall of 1970. She also said that she knew others who were involved.

3) P. E. Beasley, a former detective with the Fayetteville Police Department, explained that Stoeckley had been a reliable drug informant for several years prior to the murders. On the morning of February 18, 1970, a day after the fateful events, she told Beasley, in response to his accusation that she matched MacDonald's description of the female intruder, "(i)n my mind, it seems I saw this thing happen ... I was heavy on mescaline." Beasley also said that he observed funeral wreaths in the yard of Stoeckley's home. He added that she had told him she was mourning the MacDonalds.

4) Jane Zillioux, a Nashville neighbor of Stoeckley throughout the fall of 1970, said that Stoeckley had confided to her that she could not return to Fayetteville because she was involved in murders there. She further confessed that the victims were a woman and two small children and that she had disposed of the clothes she had been wearing to sever her connection with the crimes.

5) Charles Underhill, another Nashville acquaintance, testified that Stoeckley told him "they killed her and the two children."

6) William Posey, a neighbor of Stoeckley in Fayetteville, testified that Stoeckley told him a few days after the slayings that she didn't kill anyone herself, but did hold a light while the crime was in progress. She also confided to him that she was spotted by a policeman leaving the house.

7) Wendy Rouder, one of MacDonald's lawyers, testified that two days after Stoeckley had testified she could not remember anything about the night of the crime, she told Rouder "I still think I could have been there that night." Stoeckley also feared she would not be able to live with the guilt if MacDonald were convicted. Finally, she recalled standing by the couch in the MacDonald apartment holding a candle "only-you know-it wasn't dripping wax; it was dripping blood."

After all of these individuals had testified without the presence of the jury, the District Court excluded the evidence. It ruled the statements inadmissible hearsay because untrustworthy. In addition, the Court rejected MacDonald's attempt to use the statements as impeachment on the grounds that it was not impeachment, properly so called, and in any event, was excludible under Rule 403 as unduly confusing and prejudicial.

B

Relying on *232Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), MacDonald complains that the exclusion of the testimony of these seven "Stoeckley witnesses" deprived him of due process. He also maintains that Fed.R.Evid. 804(b)(3) explicitly supplies an exception to the hearsay rule and authorized admission of the Stoeckley witnesses' testimony.

Chambers involved an appeal of a criminal conviction obtained after the refusal of the trial court to permit defendant to introduce the testimony of three witnesses who would have said that one Gable MacDonald admitted to each witness that he was guilty of the murder charged to Chambers. The Mississippi courts excluded the testimony on the ground that it was hearsay and not admissible under any exception recognized in that State. Particularly, Mississippi did not recognize statements against one's penal interest as an exception to the general hearsay prohibition.

The Supreme Court reasoned that enforcement of this hearsay rule denied Chambers' due process. In so concluding, it found sufficient indications of trustworthiness in the circumstances of McDonald's

admissions. For example, the evidence disclosed that each of the three witnesses was a close associate of McDonald and that McDonald had made the damaging remarks spontaneously. In addition, they were corroborated by other facts-a sworn (although subsequently repudiated) confession by McDonald, testimony of an eyewitness putting McDonald at the crime scene, proof that McDonald owned a gun similar to the weapon used, and evidence that he was seen with the gun just after the shooting-giving credence to the asserted veracity of the hearsay. Finally, the Court noted that McDonald was present and available for the prosecution to call to the stand if it so chose. In circumstances "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Id. at 302, 93 S.Ct. at 1049.

(8) This ruling, in large measure, is codified for Federal Courts in Fed.R.Evid. 804(b)(3).[FN13] It conditions admissibility on the unavailability of the declarant, and provides that a statement of the declarant is admissible if

> FN13. Two qualifications, however, should be made. First Rule 804(b)(3) conditions admissibility on the unavailability of the declarant. In contrast, the Chambers Court found that the declarant's availability strengthened its conclusion that the declarant's admissions were reliable. One could argue that Chambers applies only where the declarant is available and where he is unavailable, the sole basis for contesting admissibility is Rule 804(b)(3).
> Rather than drawing this distinction, however, we hold that Chambers and Rule 804(b)(3) impose the same standard. In so declaring, however, we do not mean to constitutionalize this or any other Federal Rule of Evidence. Chambers, it must be recalled, is peculiar because it arose in a State Court. Where a case arises in Federal Court, our supervisory power usually allows us to avoid treating evidentiary matters as Constitutional issues.

> at the time of its making (it was) so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position ,would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Fed.R.Evid. 804(b)(3). Thus, as applied to criminal matters, three requisites must be met prior to reception of the hearsay testimony. First, the declarant must be unavailable. Second, from the perspective of the average, reasonable person, the statement must have been truly adverse to the declarant's penal interest, considering when it was made. Cf. United States v. Evans, 635 F.2d 1124 (4th Cir. 1980), cert. denied, 452 U.S. 943, 101 S.Ct. 3090, 69 L.Ed.2d 958 (1981) (suggesting that statement is not against penal interest where declarant made statements which appeared to subject *233 himself to criminal liability but which actually would constitute defense to more serious crime). Finally, corroborating circumstances must clearly establish the trustworthiness of the statement. United States v. Satterfield, 572 F.2d 687 (9th Cir.), cert. denied, 439 U.S. 840, 99 S.Ct. 128, 58 L.Ed.2d 138 (1978).

We have no difficulty in agreeing with appellant that declarant Stoeckley was unavailable [FN14] and that her statements, if true, clearly would be against her penal interest. The question remains, however, whether the "corroborating circumstances clearly indicate the trustworthiness of the statement(s)."

> FN14. Stoeckley actually testified at length at the trial. As to the subject matter of these statements, however, she claimed a loss of memory. Rule 804(a) (3) specifically includes asserted loss of

> memory as within the definition of "unavailability."

As corroborating circumstances, MacDonald adverts to the fact that Stoeckley owned and regularly wore boots, a blond wig, and a floppy hat, thus permitting her to fit the description of the female assailant described by defendant. In addition, defendant argues that Stoeckley had no motive to fabricate; that each admission was consistent with the others; that, for the most part, her declarations were spontaneous and to close associates; that at the time of their making, she was (and is) still subject to criminal liability, and in making these statements, she recognized this fact; that she cannot account for her whereabouts on the night of the crime; and that her mourning the deaths evinces a consciousness of guilt. The District Court, by contrast, concluded the declarations were untrustworthy because Stoeckley's pattern of remarks in admitting and denying complicity rendered her hopelessly unreliable, and because her pervasive involvement with narcotic drugs, and her admissions that she was under the virtually continual influence of the drugs when these statements were made further manifested unreliability.

(9) As with other of these evidentiary objections, our role in reviewing decisions at nisi prius construing Rule 804(b)(3) is a limited one. We must uphold the trial court unless it has abused its discretion. See United States v. Guillette, 547 F.2d 743 (2d Cir. 1976). No such abuse is evident here.

It is to be recalled that Rule 804(b)(3) places upon the proponent of a statement against interest a formidable burden. The declaration offered to exculpate the accused must be supported by corroborating circumstances that "clearly indicate the trustworthiness of the statement." (emphasis added). Cf. Fed.R.Evid. 804(b)(5) (residual exception only requires "equivalent circumstantial guarantee of trustworthiness"). As the Advisory Committee's Notes on this provision instruct, the risk of fabrication in this setting is significant. Consequently, rather than permitting only the jury to decide what weight to give the evidence, the initial responsibility is vested in the District Court. It is admonished that "(t)he requirement of corroboration should be construed in a manner (so) as to effectuate its purpose of circumventing fabrication." See Advisory Committee's Notes to Rule 803, reprinted in Federal Rules Pamphlet, Criminal at 222 (West 1981).

At bottom, the sticking point here, as recognized by the District Court, is the fundamental problem of trustworthiness. While MacDonald is able to point to a number of corroborating circumstances, he does not demonstrate, finally, that they make Stoeckley's alleged declaration trustworthy. Her apparent longstanding drug habits made her an inherently unreliable witness. Moreover, her vacillation about whether or not she remembered anything at all about the night of crime lends force to the view that everything she has said and done in this regard was a product of her drug addiction. Given the declarant's "pathetic" appearance, our conviction is that the District Court was not in error in adjudging that defendant failed to carry his burden under Rule 804(b) (3). Thus MacDonald's argued violation of the Due Process clause fails.

C

Failing to establish the truth of the proffered Stoeckley declarations, MacDonald *234 endeavored to use this same testimony as impeachment of Stoeckley's own testimony. The trial judge rejected the attempt, but on alternative grounds. To begin with, he explained that the testimony was unduly confusing and not proper as impeachment since its substance already had been ruled inadmissible for its truth. Second, the Court concluded that the evidence to be offered by the Stoeckley witnesses did not contradict Stoeckley's own sworn testimony. Rather, it merely tended to supplement her statements.

The Court, we believe, properly used Rule 403 to exclude such testimony. As we observed in United States v. Morlang, 531 F.2d 183 (4th Cir. 1975), there is a significant danger of prejudice where evidence is adduced for impeachment purposes that could not be presented directly on the merits of the case. Id. at 190. Of course, as defendant rightly

notes, Fed.R.Evid. 607 permits a party to impeach its own witness. Still, where as here, the jury is likely to be confounded by statements which Stoeckley repeatedly avowed under oath she did not remember making, the District Court properly can exclude them under Rule 403.

VI

(10) At end, MacDonald asserts that the evidence, even when taken most favorably for the prosecution, does not justify the finding of guilt beyond a reasonable doubt. See Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). Our canvass of the record, however, gives ample warrant for the verdict. With no merit in any issue on this appeal, the judgment of conviction is affirmed.

Affirmed.

MURNAGHAN, Circuit Judge, concurring:

On the discretion of the district judge, the opinion of Judge Bryan rests. On the present state of the law as it applies to the particular case before us, I find myself, albeit not without substantial misgiving, obliged to concur.

Nevertheless, I perceive a useful purpose for future cases in addressing one troubling aspect. It is evident that a basis may be erected for finding the hearsay statements of Helena Stoeckley untrustworthy. Given the wide discretion vested in the trial judge, we should not fault Judge Dupree to the extent of reversing.[FN1] Nevertheless, in view of the issues involved, and the virtually unique aspects of the surrounding circumstances, had I been the trial judge, I would have exercised the wide discretion conferred on him to allow the testimony to come in. My preference derives from my belief that, if the jury may be trusted with ultimate resolution of the factual issues, it should not be denied the opportunity of obtaining a rounded picture, necessary for resolution of the large questions, by the withholding of collateral testimony consistent with and basic to the defendant's principal exculpatory contention. If such evidence was not persuasive, which is what the government essentially contends in saying that it was untrustworthy, the jury, with very great probability, would not have been misled by it.

> FN1. Cf. United States v. Poland, 659 F.2d 884, 895 (9th Cir. 1981), cert. denied, 454 U.S. 1059, 102 S.Ct. 611, 70 L.Ed.2d 598 (1981).

In deciding whether a statement against interest should be admitted under the exception to the hearsay rule, the court must determine whether the "corroborating circumstances clearly indicate the trustworthiness of the statement." F.R.Evid. 804(b)(3). The question is whether the statement is believable,[FN2] that is to say appears to have *235 been clearly within the competence of the witness to observe, without a demonstrable intention or disposition to prevaricate. See United States v. Atkins, 558 F.2d 133, 135- 136 (3d Cir. 1977), cert. denied, 434 U.S. 929, 98 S.Ct. 416, 54 L.Ed.2d 289 (1977). There the district judge had excluded an overheard acknowledgment of guilt by someone other than the defendant because the witness was a minor, who had not completed high school, was unemployed, and was on welfare. The allegedly overheard conversation occurred outside a bar on a crowded street corner and was deemed unreliable by the district judge. In reversing, the Third Circuit emphasized that immediately after the witness overheard the declarant confess murder she saw parts of a rifle or shotgun in his car trunk, promptly told the story to the victim's family and accompanied them to the police station.

> FN2. Note that the test is not whether the district judge is satisfied that the statement is actually true as to the fact it is adduced to prove. Responsibility for that determination rests with the jury, as fact finder, not with the judge. The rule is not intended to allow the trial judge to admit only that evidence which satisfies him or conforms to his views as to what the disposition of the case should be. Cf. 4 Weinstein's Evidence P 804(b)(3)(03) and the pungent comments relative to a trial

> judge's assessment of trustworthiness of the witness, rather than of the declarant: "The corroboration requirement should not be used as a means of usurping the jury's function."

Credibility can be established in various ways. Considerations include the circumstances surrounding the statements, United States v. Atkins, supra, and the absence of motivation on the part of the declarant to fabricate, United States v. Thomas, 571 F.2d 285, 290 (5th Cir. 1978) ("... the possibility of fabrication which is the rationale of the corroboration requirement, is slight. Weeks had no motive to falsify," he being a co-defendant who had pleaded not guilty). Another factor deserving recognition is that of the general societal frame of reference. The latter can provide increased support for the believability of statements such as the ones now at issue. The likelihood of the truth of a seemingly outrageous story grows when an appreciation of current events is applied to the known facts and circumstances of a given case.

The defense of a marauding, drug-crazed purposeless group of homicidal maniacs is one which, absent the events surrounding the behavior of Charles Manson and the excruciating horror of the indescribably base murder of Sharon Tate, would have been dismissed as so incredible as to merit no serious attention. All that changed with the advent of Manson. Thereafter the possibility of such an occurrence, while still macabre, was considerably enhanced. The evidence, in my humble judgment, tended to show an environment in the vicinity of the military base where MacDonald was stationed in which persons might indeed emulate Manson or independently behave in such a fashion. Helena Stoeckley was shown to be a person of no fixed regularity of life, roaming the streets nocturnally at or about the time of the crimes, dressing in a bizarre fashion, and capable of so short-circuiting her mental processes through an indiscriminate taking of drugs that (a) she could well accept her presence and, to some extent, her involvement in the MacDonald murders and (b) she could become so separated from reality that, on the fatal evening, she was ripe for persuasion to participate.

It should be emphasized that the condition on admissibility of corroborating circumstances indicating trustworthiness represents an accommodation between concern about third party confessions and their high potential for fabrication, on the one hand, and awareness of the enhancement of reliability flowing from the exposure to punishment for crime for the confessing declarant, on the other. Notes of the Advisory Committee on the Proposed Federal Rules of Evidence. Rule 804(b) Exception (3): "The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication." The reason prompting Congress to add the corroboration provision to F.R.Evid. 804(b)(3) derived from the "special dangers of a trumped-up confession by a professional criminal or some person with a strong motive to lie." 4 Weinstein's Evidence P 804(b)(3)(03), at 804-103.

The record in the case satisfies me that, among the possible motivations leading to the statements of Helena Stoeckley, fabrication was not a likely one. The matter of what constitutes corroborating circumstances which clearly indicate the trustworthiness of the statement was left for judicial (i.e. case-by-case) development. 11 Moore's Federal Practice s 804.06(3)(2), at VIII-281. "It is clear that the standard for corroboration must not be too high." Id. at VIII-283.

*236 A factor of corroboration cited by Justice Holmes in his famous dissent in Donnelly v. United States, 228 U.S. 243, 277, 33 S.Ct. 449, 461, 57 L.Ed. 820 (1913) was "that there be no connection between declarant and accused." 4 Weinstein's Evidence P 804-104, n.6. MacDonald and Stoeckley were not in any way acquainted.

Weinstein additionally has this to say:

> The court should only ask for sufficient corroboration to "clearly" permit a reasonable man to believe that the statement might have been made in good faith and that it could be true. If, for example, the proof is undisputed that the person confessing to a shooting could not have

> been at the scene of the crime because he was in prison, it will be excluded. But if there is evidence that he was near the scene and had some motive or background connecting him with the crime that should suffice.

Id. 804-104-05. But cf. Lowery v. State of Maryland, 401 F.Supp. 604, 607 (D.Md.1975), aff'd without published opinion, 532 F.2d 750 (4th Cir. 1976), cert. denied, 429 U.S. 919, 97 S.Ct. 312, 50 L.Ed.2d 285 (1976).

For all those considerations, my view is that the testimony should have been admitted. But it would read out of the law the concept of trial court discretion were courts of appeals to label as "abuse of discretion" any action by a district court with which the appellate court disagrees. Accordingly, I do not regard it proper to dissent.

I conclude with the observation that the case provokes a strong uneasiness in me. The crimes were base and horrid, and whoever committed them richly deserves severe punishment. As Judge Bryan has pointed out, the evidence was sufficient to sustain the findings of guilt beyond a reasonable doubt. Still, the way in which a finding of guilt is reached is, in our enduring system of law, at least as important as the finding of guilt itself. I believe MacDonald would have had a fairer trial if the Stoeckley related testimony had been admitted. In the end, however, I am not prepared to find an abuse of discretion by the district court, and so concur.

688 F.2d 224, 11 Fed. R. Evid. Serv. 474

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