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Criminal Procedure - Speedy Trial Clause Not Applicable to Time Between Dismissal of Military Charges and Subsequent Indictment on Civilian Charges

Frank Prior

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CRIMINAL PROCEDURE—SPEEDY TRIAL CLAUSE NOT APPLICABLE TO TIME BETWEEN DISMISSAL OF MILITARY CHARGES AND SUBSEQUENT INDICTMENT ON CIVILIAN CHARGES—United States v. MacDonald, 102 S. Ct. 1497 (1982).

INTRODUCTION

The sixth amendment to the United States Constitution provides, in part, that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. . . ." 1 Although a speedy trial is guaranteed by the Constitution, the Supreme Court has dealt with this right infrequently. 2 In United States v. Ewell, 3 the Court identified the purposes of the speedy trial clause. The three purposes of the clause are: (1) to prevent undue incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation and (3) to limit the possibility that a long delay will impair the ability of an accused to defend himself. 4 Five years later in United States v. Marion, 5 the Court held that the right to a speedy trial has no application until the putative defendant in some way becomes an accused and it is only after arrest or indictment that one becomes an accused. 6 The factors a court should consider in determining whether a delay violates the accused's right to a speedy trial were first set out in Barker v. Wingo. 7 These factors are: the length of the delay, the reason for the delay, the defendant's assertion of his right and prejudice to the defendant. 8

The remedies for violations of the clause have traditionally been dismissal of the indictment or vacation of the sentence. 9 Although these remedies have been criticized as being too severe, 10 the Supreme Court continues to hold that they are the only possi-

1. U.S. Const. amend. VI.
4. Id. at 120.
6. Id. at 313.
8. Id. at 530.
10. 407 U.S. at 522.
ble remedies.\textsuperscript{11}

In \textit{United States v. MacDonald},\textsuperscript{12} the Fourth Circuit Court of Appeals reversed the murder convictions of Dr. Jeffrey MacDonald. The court held that the four and one-half year delay between MacDonald's military arrest and his civilian trial violated his speedy trial guarantee.\textsuperscript{13} MacDonald was arrested by the military police on May 1, 1970 and charged with murdering his wife and two children.\textsuperscript{14} On October 23, 1970, after a military investigation, the charges were dismissed.\textsuperscript{15} On January 24, 1975, MacDonald was indicted by a civilian grand jury and again charged with the three murders.\textsuperscript{16} He was tried and convicted in 1979.\textsuperscript{17}

Recently, the United States Supreme Court reversed the Fourth Circuit and held that, after the military charges against MacDonald were dismissed, he was no longer an accused, and the sixth amendment right to a speedy trial did not apply.\textsuperscript{18} This note will analyze the Supreme Court's holding in \textit{MacDonald}\textsuperscript{19} in view of the purposes of the speedy trial guarantee and consider possible alternatives to the drastic remedy of dismissal.

\section*{The Case}

On the morning of February 17, 1970, military police at Fort Bragg, North Carolina, responded to a call for help and found that the defendant's wife and two daughters had been clubbed and stabbed to death.\textsuperscript{20} The investigation that followed disclosed flaws in the defendant's account of the crimes.\textsuperscript{21} On May 1, 1970, the

\begin{itemize}
  \item \textsuperscript{11} Id.
  \item \textsuperscript{12} 632 F.2d 258 (4th Cir. 1980).
  \item \textsuperscript{13} Id. at 261.
  \item \textsuperscript{14} United States v. MacDonald, 102 S. Ct. 1497, 1500 (1982).
  \item \textsuperscript{15} Id.
  \item \textsuperscript{16} Id.
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} 102 S. Ct. 1497.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} United States v. MacDonald, 531 F.2d 196, 200 (4th Cir. 1976).
  \item \textsuperscript{21} Id. MacDonald told police that he was awakened by screams and that four assailants stabbed him and knocked him unconscious. The investigation by the Army Criminal Investigation Division (CID), the FBI and the local police showed that each member of MacDonald's family had a different blood type. The location of the blood, the presence of one daughter's blood on MacDonald's glasses, clothing fibers, bloody pieces of surgical gloves and other evidence discovered at the scene conflicted with MacDonald's alibi.
Army formally charged him with the murders. After an extensive\textsuperscript{22} Article 32 hearing,\textsuperscript{23} the investigator recommended that the charges be dismissed.\textsuperscript{24} The Army Criminal Investigation Division (CID) continued its investigation, however, at the request of the Justice Department.\textsuperscript{25} The CID presented a thirteen volume report, recommending further investigation, to the Justice Department in June of 1972.\textsuperscript{26} The CID submitted additional reports dur-

\addcontentsline{toc}{section}{22. Id. at 200. During the hearing, which lasted for more than one month, the government presented twenty-seven witnesses, and MacDonald presented twenty-nine.}


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

(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. The accused has the right to be represented at that investigation as provided in section 838 of this title [10 USCS 838 (article 38)] and in regulations prescribed under that section. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigation officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

(c) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

(d) The requirements of this article are binding on all persons administering this chapter [10 USCS §§ 801 et seq.] but failure to follow them does not constitute jurisdictional error.

24. 531 F.2d at 200. The Army granted MacDonald an honorable discharge for reasons of hardship in December of 1970.

25. 102 S. Ct. at 1500.

26. Id.
ing November of 1972, and August of 1973. Following evaluation of the reports, the Justice Department presented the case to a grand jury in August of 1974. On January 24, 1975, the grand jury returned an indictment charging MacDonald with the three murders.

Before trial the defendant moved to dismiss the indictment claiming that the delay in bringing him to trial violated his sixth amendment right to a speedy trial. The district court denied his motion, but the Fourth Circuit allowed an interlocutory appeal and reversed. In 1978, the Supreme Court reversed the Fourth Circuit. The Court did not allow the interlocutory appeal, and sent the case back to the district court for trial. On August 29, 1979, MacDonald was convicted of one count of first degree murder and two counts of second degree murder. In 1980 the Fourth Circuit Court of Appeals reversed the convictions. The court held that defendant's arrest by the Army triggered the protections of the speedy trial clause, and the delay between his military arrest and his civilian trial violated his rights under the clause. The Supreme Court granted certiorari and again reversed the Fourth Circuit, holding that defendant's right to a speedy trial had not been violated. Relying on Marion, the Court held that since the Army dismissed the charges against the defendant, he was not accused until he was indicted by the grand jury in 1975. Therefore, the protections of the speedy trial clause did not attach until 1975.

27. Id.
28. Id.
29. Id.
30. 531 F.2d 196 at 199.
31. Id. The court allowed an interlocutory appeal because of the extraordinary nature of the case. The Fourth Circuit held that MacDonald's speedy trial right had been violated.
32. United States v. MacDonald, 435 U.S. 850 (1978). The Court held that a criminal defendant could not appeal the denial of a motion to dismiss on speedy trial grounds until the trial had been completed.
33. 102 S. Ct. at 1500. MacDonald was sentenced to three consecutive life terms.
34. 632 F.2d 258. In a split decision, the Court held that under the Barker test, MacDonald's speedy trial guarantee had been violated. The dissent agreed that the military arrest triggered the protections of the clause but would have reached a different conclusion under the Barker analysis.
35. Id. at 261.
36. 102 S. Ct. 1497.
37. Id. at 1503.
38. Id.
In Klopfer v. North Carolina, the Supreme Court traced the development of the speedy trial clause and stated, "[t]he history of the right to a speedy trial and its reception in this country establish that it is one of the most basic rights preserved by our Constitution." The Court held that the right to a speedy trial is fundamental and enforceable against the states by way of the fourteenth amendment.

In 1966 the Supreme Court, in United States v. Ewell, identified the three basic demands of criminal justice that the speedy trial clause is designed to protect. "This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that a long delay will impair the ability of an accused to defend himself." In addition to the concerns of the defendant, there are also societal interests in providing a criminal defendant with a speedy trial. Lengthy pretrial detention not only causes anxiety to the accused, but is also costly to the government. In addition, persons released on bail are free to commit other crimes. A long delay can also work to the advantage of the accused in that prosecution witnesses may become unavailable or their memories may fade.

In United States v. Marion, the Supreme Court determined when the protections of the speedy trial clause attach. The Court held that "the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'ac-
The Court reached its decision by examining the sixth amendment itself, stating that 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. In Marion, the defendants claimed their speedy trial right was violated by the three year delay between the time the government became aware of the relevant facts, in 1967, and their indictment in 1970. The Court disagreed and held that the speedy trial protections had not yet attached, stating that, "it is either formal indictment or information or else the actual restraints imposed by an arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provisions of the Sixth Amendment." In Marion, the defendants were not arrested before the indictment in 1970. Therefore, the protections of the speedy trial clause attached upon the indictment in 1970, and the clause was not applicable to the three year delay between 1967 and 1970. The Supreme Court, in both Marion and Dillingham v. United States, made it clear that the sixth amendment right to a speedy trial does not attach until arrest or indictment, at which time the putative defendant becomes an accused.

One year after Marion, in Barker v. Wingo, the Court formulated the test used to determine if the post-arrest or indictment delay violates the speedy trial clause. Since it is impossible to determine exactly when the right has been denied, the Court adopted a balancing test to be applied on an ad hoc basis. The Court identified four factors that should be weighed to determine if a particular defendant's speedy trial guarantee has been violated. These factors are: the length of the delay, the reasons for

49. Id. at 313.
50. Id.
51. Id.
52. Id. at 320.
53. Id. at 313.
54. 423 U.S. 64 (1975). In Dillingham, there was a twenty-two month interval between the defendant's arrest and indictment and an additional twelve month interval between indictment and trial. The Court, per curiam, emphasized that it is either arrest or indictment that triggers the protections of the speedy trial clause, and held that the delay between defendant's arrest and trial violated the clause.
55. 407 U.S. 514.
56. Id. at 521.
57. Id. at 530.
58. Id.
the delay, the defendant’s assertion of his right and the prejudice to the defendant.\(^69\)

The first factor, the length of the delay, is the triggering mechanism.\(^60\) There is no need to consider the other three factors until there is some delay that is presumptively prejudicial.\(^61\) Whether the length of the delay is presumptively prejudicial is dependent on the particular circumstances and complexities of the case.\(^62\) The weight of the second factor, the reason for the delay, also depends on the circumstances of the case.\(^63\) A deliberate attempt to delay the trial is weighed more heavily against the government than a neutral reason such as overcrowded dockets.\(^64\) The third factor, the defendant’s assertion of his speedy trial right, is entitled to strong consideration in determining whether the defendant has been deprived of that right, and failure to assert the right will make it difficult to show a violation of the clause.\(^65\) The fourth factor, prejudice to the defendant, should be examined in light of the purposes of the speedy trial clause identified in \textit{Ewell}.\(^66\)

The \textit{Barker} factors should be considered together with all other relevant circumstances, and the courts must engage in a difficult and sensitive balancing process.\(^67\) The defendant in \textit{Barker} was not tried until more than five years after he had been arrested. The Court weighed all the factors and determined that the delay did not violate the defendant’s right to a speedy trial.\(^68\)

Once a court determines that the protections of the clause have attached under \textit{Marion}, and that the clause has been violated

\begin{align*}
59. \text{Id.} \\
60. \text{Id.} \\
61. \text{Id.} \\
62. \text{Id.} \\
63. \text{Id. at 531.} \\
64. \text{Id.} \\
65. \text{Id. at 532.} \\
66. \text{Id.} \\
67. \text{Id. at 533.} \\
68. \text{Id. at 534. The Court stated that the five-year delay between arrest and trial was extraordinary and that only seven months of that period was attributed to a strong excuse, the illness of the investigation sheriff. The Court found, however, that two factors counterbalanced the deficiency. The first factor was the lack of serious prejudice. Barker only spent ten months in jail and none of his witnesses had died or become unavailable. The second, and most important factor to the Court, was the fact that Barker did not want a speedy trial. He was gambling on his accomplice’s acquittal. The Court held that Barker was not deprived of his speedy trial right.}
\end{align*}
under the *Barker* analysis, the only remedy available is to dismiss the indictment or reverse the conviction and vacate the sentence.  

**ANALYSIS**

The Fourth Circuit Court of Appeals held, once in 1976 and again in 1980, that MacDonald's right to a speedy trial had been violated. The Fourth Circuit held that MacDonald's military arrest in 1970 was the functional equivalent of a civilian arrest and, under *Marion*, was sufficient to trigger the protections of the speedy trial clause, since at that point he became an accused. Using the *Barker* analysis, the court of appeals found that the subsequent delay violated the defendant's speedy trial guarantee. The court held that the offending delay imposed by the government was the lapse of time between the military arrest and civilian trial. This delay was held to be sufficiently long to be considered presumptively prejudicial and warrant inquiry into the other three *Barker* factors. The court found that the delay between 1972, when the government was in possession of all the evidence, and the convening of the grand jury in 1974, was due to sheer bureaucratic indifference and weighed heavily against the government. The court also found that MacDonald had vigorously pursued his right to a speedy trial. The fourth *Barker* factor, prejudice, was considered in view of the three purposes of the clause stated in *Ewell*. The court found that the possibility of prejudice to the defense at trial is but one element, and the major evil is the personal anxie-

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70. 531 F.2d 196.
71. 632 F.2d 258.
72. 531 F.2d at 203. The court held that the military arrest was the functional equivalent of a civilian arrest. Both must be based on probable cause. The fact that MacDonald was restricted to his quarters and relieved of his duties makes this the equivalent of an arrest. If he had been restricted to his quarters but not relieved of his duties, he would not have been considered under arrest.
73. 632 F.2d at 266.
74. Id. at 261.
75. Id. at 262.
76. Id.
77. Id. MacDonald gave statements to the CID and testified at the military hearing. He also waived immunity and testified before the grand jury. After MacDonald was discharged, he consistently contacted the Justice Department in an attempt to expedite the disposition of charges. Id. at 263.
78. Id. at 265.
ties of the defendant caused by public accusation. The court did not require a showing of actual prejudice to MacDonald's defense and held that the government's lackadaisical attitude in presenting the case to the grand jury and the anxieties suffered by the defendant in the interim were sufficient to violate the clause.

When MacDonald reached the Supreme Court, the Court addressed the question whether the time between dismissal of military charges and subsequent indictment on civilian charges should be considered in determining if the delay in bringing the defendant to trial violated his rights under the speedy trial clause of the sixth amendment. The Court held that this time should not be considered. After the military charges were dropped, the defendant was no longer an accused; therefore, he was not protected by the clause.

The Supreme Court did not address the issue of whether the military arrest was sufficient to invoke the clause; rather, the Court relied on the subsequent dismissal of charges in reaching its decision. When the charges were dismissed, the protections of the clause ceased and were not revived until the indictment in 1975. The Court held that the interval between the indictment in 1975 and trial in 1979 did not violate the defendant's speedy trial guar-

79. Id.
80. Id. at 266.
81. 102 S. Ct. at 1499. In United States v. MacDonald, 531 F.2d 196, 204 (4th Cir. 1976), the Fourth Circuit held that the 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. The court found that the prosecutions by the Army and the Justice Department were conducted by the government in its single sovereign capacity, since both were federal tribunals. In United States v. MacDonald, 102 S. Ct. 1497, 1503 n.11 (1982), the Supreme Court stated that an arrest or indictment by one sovereign would not cause the speedy trial guarantee to become engaged as to possible subsequent indictments by another sovereign. Therefore, an arrest by federal authorities would not toll the speedy trial guarantee for a subsequent state prosecution of the same offense, since federal and state authorities constitute two separate sovereigns.
82. Id. at 1503.
83. Id. at 1502 n.10. "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."
84. Id. at 1503.
85. Id.
CAMPBELL LAW REVIEW

The majority, in an opinion delivered by Chief Justice Burger, relied heavily on Marion in reaching its decision. According to Marion, the clause has no application until a defendant is indicted, arrested or otherwise formally accused. Although the defendant was arrested by the military, the subsequent dismissal of military charges negated his speedy trial claim since he was no longer an accused. The protections of the clause were not revived until his civilian indictment; therefore, the time between military dismissal and civilian indictment was not considered in evaluating the defendant's claim.

Delay prior to arrest or indictment may give rise to a due process claim under the fifth amendment. It may also give rise to a claim under the applicable statute of limitations, but no speedy trial claim arises until charges are pending. The defendant did raise a fifth amendment due process claim, but the Court did not consider it in this case.

The Court also relied on the Speedy Trial Act of 1974. The Act, which was intended to give effect to the speedy trial clause, states that if charges are dismissed and later reinstated, the period between dismissal and reinstatement is not to be included in computing the time within which a trial must commence. Once

86. Id.
87. Chief Justice Burger was joined by Justices White, Powell, Rehnquist and O'Connor.
88. 404 U.S. at 320.
89. 102 S. Ct. at 1502.
90. Id. at 1503.
91. Id. at 1501. In United States v. Lovasco, 431 U.S. 783, 790 (1977), the Court held that under the fifth amendment due process clause, a defendant must show that the delay actually prejudiced his case. The court must also consider the reasons for the delay.
92. 102 S. Ct. at 1501.
93. Id. at 1500 n.5. MacDonald also appealed on the issue of double jeopardy. In United States v. MacDonald, 585 F.2d 1211, 1212 (4th Cir. 1978), cert. denied, 440 U.S. 961 (1979), the Fourth Circuit allowed an interlocutory appeal and stated, "Since MacDonald was not put to trial before a military tribunal authorized to convict or acquit him, jeopardy never attached." Therefore, the fifth amendment's guarantee against double jeopardy did not bar MacDonald's subsequent prosecution in federal court.
§ 3161(d)(1)-If any indictment of information is dismissed upon motion
charges are dismissed, the former accused is in the same position as any other subject of a criminal investigation.97 Although knowledge of an ongoing criminal investigation will cause stress, discomfort and a disruption of normal life, personal liberty is not impaired to the same degree as it is after arrest or indictment.98 In MacDonald, there were no charges pending between the dismissal of military charges in 1970 and the indictment in 1975.99 The delay between the indictment and trial in 1979 was caused primarily by the defendant's own legal maneuvers and was, therefore, not suffi-
cient to violate the speedy trial clause.\textsuperscript{100} Therefore, the Supreme Court held that the clause was not violated; in fact, the clause did not apply to the period before the indictment.\textsuperscript{101} The Court did not reach the \textit{Barker} analysis, which the Fourth Circuit had decided twice in favor of the defendant.\textsuperscript{102}

Justice Marshall, joined by Justices Brennan and Blackmun, lodged a strong dissent.\textsuperscript{103} The dissenter argued that the dismissal of military charges did not negate the speedy trial protection. In the dissenters' opinion the entire nine year period between the military arrest and civilian trial should have been considered in evaluating the defendant's claim.\textsuperscript{104} They agreed with the Fourth Circuit's result under the \textit{Barker} test and would have affirmed the Fourth Circuit's decision.\textsuperscript{105}

As the dissent states, "[A]rrest 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."\textsuperscript{106} Justices Marshall, Brennan and Blackmun felt that the anxiety a defendant suffers because of public accusation does not disappear simply because charges are temporarily dismissed\textsuperscript{107} and referred to the majority's opinion as "a disappointing exercise in strained logic and judicial illusion."\textsuperscript{108}

The dissenter relied heavily on the Court's decision in \textit{Klopfer v. North Carolina};\textsuperscript{109} \textit{Klopfer}, however, presented a different question than \textit{MacDonald}. Under North Carolina criminal procedure, prior to 1973, the prosecutor was able to take a \textit{nolle prosequi} "with leave."\textsuperscript{110} Under this procedure the prosecutor was

\begin{itemize}
\item 100. Id.
\item 101. Id.
\item 102. 531 F.2d 196; 632 F.2d 258.
\item 103. 102 S. Ct. at 1504.
\item 104. Id. at 1508.
\item 105. Id. at 1510.
\item 106. Id. at 1506. \textit{See also} 404 U.S. at 320.
\item 107. Id. at 1507.
\item 108. Id. at 1510. "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."
\item 109. 386 U.S. 213.
\item 110. N.C. GEN. STAT. § 15-175 (1965) (repealed 1973).
\end{itemize}

A \textit{nolle prosequi} 'with leave' shall be entered in all criminal actions in which the indictment has been pending for two terms of court and the
able to indefinitely suspend proceedings on an indictment. The prosecutor could, without further order, have the case restored for trial. In Klopfer, the Court held that the delay resulting from this procedure violated the defendant's speedy trial guarantee. Klopfer is not contrary to the majority opinion in MacDonald because under a nolle prosequi "with leave," the charges against the defendant are never dismissed, and the speedy trial clause continues to apply.

Justice Stevens concurred with the majority, but he agreed with the dissent's opinion that the dismissal of military charges did not suspend the protections of the speedy trial clause. Applying the Barker analysis, Justice Stevens thought that the need to proceed cautiously before deciding to prosecute such a serious case outweighed the defendant's interest in a speedy disposition of charges.

Although the majority opinion did not consider the Barker analysis, it is consistent with the Court's holdings in Marion and Dillingham. The protections of the speedy trial clause extend only to an accused and only after arrest or indictment does a defendant become an accused. MacDonald presented an additional issue which the Court had not previously decided: What effect did the dismissal of military charges and subsequent indictment on civilian charges have on the speedy trial clause? In holding that the dismissal negated the clause's protection, the Court followed the intent of Congress as stated in the Speedy Trial Act of 1974, and,

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defendant has not been apprehended and in which a nolle prosequi has not been entered, unless the judge for good cause shown shall order otherwise. The clerk of the superior court shall issue a capias for the arrest of any defendant named in any criminal action in which a nolle prosequi has been entered when he has reasonable ground for believing that such defendant may be arrested or upon the application of the solicitor of the district. When any defendant shall be arrested it shall be the duty of the clerk to issue a subpoena for the witness for the State indorsed on the indictment.

111. 386. U.S. at 214.
112. Id.
113. Id. at 222.
114. 102 S. Ct. at 1502 n.8.
115. Id. at 1503.
116. Id.
118. 18 U.S.C. § 3161 (1974). The period between dismissal of an indictment and reinstatement of charges for the same offense shall be excluded in computing the time within which the trial must commence. Id. at § 3161(h)(6).
in effect, limited the *Marion* decision. According to *Marion*, the clause protects an accused after arrest or indictment.\(^{119}\) According to *MacDonald*, although a defendant has been arrested, he is no longer protected by the clause if the charges are later dropped.\(^ {120}\) Though never mentioned in the decision, the effect of the remedy of dismissal may have influenced the Court in reaching its decision to limit the clause’s protection.

The remedy of dismissal is an “unsatisfactorily severe one.”\(^{121}\) In *Barker*, the Court stated, “This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime may go free, without having been tried.”\(^ {122}\) In *MacDonald*, it would have meant that a defendant who had been convicted of murdering his family would have gone free if the Court had found a violation of the clause. Perhaps this prospect influenced the Court in holding as it did. If alternative remedies were available, courts might be more willing to find violations of the clause.

In *United States v. Strunk*,\(^ {123}\) the Seventh Circuit Court of Appeals attempted to fashion a practical remedy for violations of the speedy trial clause.\(^ {124}\) The court said that the severity of the remedy of dismissal has caused courts to be extremely hesitant in finding violations of the speedy trial clause, and there is no reason why less drastic relief may not be granted in appropriate cases.\(^ {125}\) In *Strunk*, there was no question about the sufficiency of the evidence showing guilt, and the defendant made no claim of prejudice in the presentation of his defense.\(^ {126}\) The court felt that dismissal of the indictment was inappropriate.

Rather, we think that the proper remedy is to remand the case to the district court with the direction to enter an order instructing the Attorney General to credit the defendant with the period of time elapsing between the return of the indictment and the date of the arraignment. Fed. R. Crim. P. 35 provides that the district court may correct an illegal sentence at any time. We choose to treat the sentence here imposed as illegal to the extent of the de-
lay we have characterized as unreasonable.\textsuperscript{127}

Such a remedy would be appropriate in cases where the defendant was not prejudiced by the delay. In situations where the defense witnesses or evidence became unavailable because of the delay, the defense would be prejudiced and dismissal would be the only fair remedy to the defendant. The main issue in deciding which remedy is appropriate would be prejudice. If the defendant's case was prejudiced, dismissal would be appropriate. If not, a reduction of sentence would suffice.

The Supreme Court, in \textit{Strunk v. United States},\textsuperscript{128} had an opportunity to adopt the remedy fashioned by the Seventh Circuit but declined to do so.\textsuperscript{129} The Court relied on \textit{Barker} and held that dismissal must remain the only possible remedy.\textsuperscript{130}

In \textit{Ewell}, the Court identified the three purposes of the clause: (1) to prevent undue incarceration prior to trial; (2) to minimize anxiety and concern accompanying public accusation and (3) to limit the possibility that a long delay will impair the ability of an accused to defend himself.\textsuperscript{131} In both \textit{Marion} and \textit{MacDonald}, the Court shifted the emphasis of the clause and held that it was not primarily intended to guard against actual or possible prejudice to an accused's defense.\textsuperscript{132} The Court stated that the primary purposes of the clause were to prevent undue incarceration prior to trial and to minimize the anxiety caused by public accusation.\textsuperscript{133}

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.\textsuperscript{134}

\textsuperscript{127} \textit{Id.}
\textsuperscript{128} 412 U.S. 434.
\textsuperscript{129} \textit{Id.} at 440.
\textsuperscript{130} \textit{Id.} The Court based its finding on the rationale that denial of the right to a speedy trial, unlike some of the other guarantees of the sixth amendment, can not be cured in a new trial. \textit{Id.} at 439.
\textsuperscript{131} 383 U.S. at 120.
\textsuperscript{132} 404 U.S. at 307; 102 S. Ct. at 1502.
\textsuperscript{133} 102 S. Ct. at 1502.
\textsuperscript{134} \textit{Id.}
Since prejudice to an accused's defense is no longer a primary purpose of the speedy trial clause, the Strunk remedy of the Seventh Circuit would appear sufficient to provide appropriate relief for violations of the clause. A reduction of sentence would not suffice if the delay has prejudiced the accused's defense, but according to MacDonald, such prejudice is not the primary purpose of the speedy trial clause. If a defendant can show that the delay prejudiced his right to a fair trial, then the due process clause or the applicable statute of limitations may provide a basis for dismissing an indictment.\textsuperscript{135} Dismissal of an indictment or reversal of a conviction seems too drastic a remedy for violations of the speedy trial clause if the clause is designed to prevent oppressive pretrial incarceration and to minimize anxiety accompanying public accusation. Reducing one's sentence by the length of the unreasonable delay would be better tailored to the purposes of the clause and would be more equitable than the present remedy. With such an alternative available, courts may be more willing to provide relief to a defendant who has suffered incarceration or anxieties due to unwarranted prosecutorial delays in bringing the case to trial.

In MacDonald, the Court did not analyze the delay under the Barker test; instead, it restricted the scope of the clause so as not to include the time between dismissal of military charges and subsequent indictment on civilian charges. If the Court had adopted the Strunk approach, it might have been more inclined to extend the scope of the clause to cover the period in question and analyze defendant's claim under the Barker test. If the Court had had an alternative to dismissal, it might have provided defendant with some type of relief to compensate him for the anxieties he suffered before trial.

Under the Strunk approach, the Court could have reduced defendant's sentence by the length of the unreasonable delay. The court of appeals did not find that defendant's defense was actually prejudiced by the delay.\textsuperscript{136} The court relied on the personal hardships suffered by the defendant as a result of the arrest and investigation and the inability of the government to explain the delay.\textsuperscript{137} Therefore, reduction of sentence would have been appropriate in defendant's case. By reducing defendant's sentence by the length

\begin{footnotesize}
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\item[135.] 404 U.S. at 326.
\item[136.] 632 F.2d at 266.
\item[137.] Id.
\end{itemize}
\end{footnotesize}
of the unreasonable delay, the Court could have compensated him for the anxieties he suffered during the delay, without reversing the convictions and setting him free. Such an approach would benefit the defendant because courts would be more inclined to provide relief, and it would also benefit society because fewer convicted criminals would be set free due to delays in prosecution.

CONCLUSION

In MacDonald,138 the Supreme Court held that the time between the dismissal of military charges against the defendant and the subsequent filing of civilian charges should not be considered in evaluating MacDonald’s speedy trial claim. The Court said that the dismissal of the military charges negated the protections of the clause. The protections of the clause only attach while charges are pending. The Court relied on Marion139 and the Speedy Trial Act of 1974140 in reaching its decision.

The Court refused to extend the scope of the clause to cover the period in question. Although it was not mentioned in the opinion, the harsh effect of the remedy of dismissal might have influenced the Court in reaching its decision. With dismissal as the only remedy for violations of the clause, courts will be hesitant to find infractions. If the Court had adopted the approach of the Seventh Circuit in Strunk,141 the goals of the clause would be better served. Reducing sentence, in appropriate cases, is a far less drastic remedy than freeing a defendant after conviction.

The Strunk142 remedy would provide a means of compensating a defendant for the pretrial incarceration and hardships caused by unwarranted prosecutorial delays, without resorting to the drastic remedy of reversing a conviction and setting a convicted criminal free. Such an alternative would be beneficial to society as a whole, as well as to the individual defendants. Courts would be more likely to analyze a defendant’s speedy trial claim and provide some type of relief.

Frank Prior

138. 102 S. Ct. 1497.
139. 404 U.S. 307.
141. 467 F.2d 969.
142. Id.