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separate and apart from freedom of the press, with which to attack such restrictions. A recent case in the United States Court of Appeals for the Fifth Circuit[50] used this dual approach by invalidating a direct ban on publication as a violation of freedom of the press and invalidating a ban on courtroom sketching since there was no valid reason for it.

Significantly, the court in the instant case was explicit that the right of access is not absolute. Under certain circumstances, the litigant's right of privacy may be a cogent reason for the exclusion of the public. By leaving this possibility open, the court struck an appropriate balance between the right of the public to open government, including the judiciary, and the right of litigants not to have the most intimate details of their lives thrust into the public eye. By recognizing both of these considerations, and accommodating each to the other, the court has sought to solve the difficult problem presented by two fundamental rights in conflict.

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The United States Court of Appeals for the Fourth Circuit was faced with a review of a denial of a speedy trial violation claim based upon a delay of over 4 years from commencement of military proceedings to a civilian indictment. In overruling the trial court, the fourth circuit gave an in depth analysis of the "factors" deemed controlling by the United States Supreme Court in reviewing such a claim. The author concludes that, notwithstanding a finding of a violation in the principal case, the right to a speedy trial may be at the mercy of prosecutorial discretion.

On May 1, 1970, appellant, a Captain in the United States Army, was charged by the Army with the murders of his wife and

50. United States v. CBS, Inc., 497 F.2d 102 (5th Cir. 1974).

two daughters. After a required investigation,[1] the charges were dismissed on October 23, 1970. Two months later appellant was honorably discharged from the service and he returned to the civilian practice of medicine. The Justice Department continued its investigation following appellant's discharge and, despite appellant's repeated requests that the investigation be ended as soon as possible, the investigation continued for several years. Finally, on January 24, 1975, appellant was indicted by a grand jury for the murders. At his trial, appellant moved for dismissal of the indictment on alternative grounds of double jeopardy[2] and denial of the right to a speedy trial.[3] The district court denied appellant's motions. The United States Court of Appeals, Fourth Circuit, stayed appellant's trial and granted his petition for an interlocutory appeal.[4] The fourth circuit *held*, reversed and remanded. The delay of over 4½ years from the Army's accusation and detention of an accused in May 1970, to his indictment in January 1975, violated the accused's right to a speedy trial as guaranteed by the sixth amendment. Therefore, the prosecution was dismissed with prejudice. *United States v. MacDonald*, 531 F.2d 196 (4th Cir. 1976).

Supreme Court decisions on the right to a speedy trial are of relatively recent vintage. Judicial treatment of these types of cases, although subject to general guidelines, is marked, through necessity, by a case-by-case balancing approach of various factors promulgated by the Supreme Court. The most important decision on the balancing test was *Barker v. Wingo*,[5] wherein the Court identified the four factors as length of delay, reason for the delay, assertion by the defendant of his right, and prejudice to the defendant.[6] Although universally treated as a starting point for analysis of the constitutional right to a speedy trial in any particular case, these

1. UNIFORM CODE OF MILITARY JUSTICE art. 32, 10 U.S.C. § 832 (1970) [hereinafter cited as U.C.M.J.].

2. "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

3. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI.

4. The court granted defendant's petition for an interlocutory appeal on August 15, 1975. The court in its order noted that the rights asserted by MacDonald were too important to be denied review, and that if review was postponed until the trial of the case, claimed rights would be irreparably lost. United States v. MacDonald, 531 F.2d 196, 199 n.3 (4th Cir. 1976).

5. 407 U.S. 514 (1972).

6. *Id.* at 530.

four factors represent only general categories for in-depth analysis.[7] Additionally, the *Barker* Court found that no one factor is to be given priority nor is it of absolute necessity; rather, all are to be viewed concurrently in arriving at a decision.[8]

Acknowledging this, the court in *United States v. MacDonald* embarked upon a discussion of each particular *Barker* factor and its relationship to the facts of the instant case.

The critical issue in the case was the identification of the event marking the commencement of the delay. This was considered to be essentially the spring board or "triggering mechanism"[9] to further inquiry. In denying MacDonald's motion for dismissal, the district court held that the right to a speedy trial arose in January 1975, when MacDonald was "indicted." The fourth circuit, however, delved into the circumstances surrounding the military procedures of 1970 to determine if the pre-indictment period was of constitutional significance under Supreme Court guidelines.

In 1971, the Supreme Court held in *United States v. Marion*[10] that the right to a speedy trial accrued from either the time of the indictment or the time of actual arrest.[11] Since there was no significant delay following the civil indictment, the decision hinged on whether or not MacDonald was "arrested" by the Army. After viewing the factors surrounding the military events and the Army's earlier investigation, the majority and the dissent came to opposite conclusions on this point.

The majority opinion stressed the limitations on MacDonald's freedom in concluding that his military restriction "was the functional equivalent of a civilian arrest allowing him to invoke the sixth amendment's guarantee of a speedy trial."[12] On April 6, 1970, MacDonald was informed that he was under suspicion, relieved of his duties and restricted to quarters.[13] The court found that MacDonald

7. *See, e.g.*, Rudstein, *The Right to a Speedy Trial: Barker v. Wingo in the Lower Courts*, 1975 U. ILL. L.F. 11, 58. *See also* Comment, *Devitalization of the Right to a Speedy Trial: The "Per Case" Method v. the "Per Se" Theory*, 5 ST. MARY'S L.J. 106, 114 (1973), wherein the author suggests that the approach advocated in *Barker* is really nothing new at all.

8. 407 U.S. at 533.

9. *Id.* at 530.

10. 404 U.S. 307 (1971).

11. The Supreme Court stated "it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." *Id.* at 320.

12. 531 F.2d at 204.

13. *Id.* at 200.

was "under arrest" from the date that the commanding officer charged MacDonald with the murders — May 1, 1970. The court took the view that since the "charge"[14] amounted to an arrest warrant subjecting MacDonald to arrest[15] and since he was confined to his quarters and was relieved of his duties,[16] the constraints of actual arrest justified further inquiry into the speedy trial claim.

Looking at the same restrictions,[17] the dissent concluded that they were insufficient to constitute an "arrest." The difference is explainable in the opposing views as to the continued viability of the 1885 Supreme Court decision of *Wales v. Whitney*[18] in which the petitioner was denied a writ of habeas corpus. In *Wales*, the Secretary of the Navy had ordered the Navy's chief medical officer to remain within the bounds of the city of Washington, D.C. This was held to be insufficient restraint for habeas corpus purposes in 1885. The *MacDonald* majority noted that since *Wales* is no longer controlling in cases involving a speedy trial claim. On the other hand, the dissent would have resurrected *Wales* as the standard in analyzing military arrest procedures and how they relate to the civilian system.[20]

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14. U.C.M.J. art. 30, 10 U.S.C. § 830 (1970) states that:

(a) Charges and specifications shall be signed by a person subject to this chapter under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state -

(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and

(2) that they are true in fact to the best of his knowledge and belief.

15. U.C.M.J. art. 10, 10 U.S.C. § 810 (1970) reads in part: "Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require . . . ."

16. U.C.M.J. art. 9, 10 U.S.C. § 809(a) (1970): "Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person." See Manual for Courts-Martial, ¶ 20 *a* (U.S. 1969 rev. ed.).

17. "MacDonald was restricted to his room in the Bachelor Officers' Quarters. An armed MP was placed outside his door. An escort officer accompanied him when he left the quarters." 531 F.2d at 213 (Craven, J., dissenting).

18. 114 U.S. 564 (1885).

19. *See* Hensley v. Municipal Court, 411 U.S. 345, 350 n.8 (1973) wherein the court observed that "[i]nsofar as former decisions, . . . *Wales v. Whitney* . . . may indicate a narrower reading of the custody requirement, they may no longer be deemed controlling."

20. Analogies to civilian procedure may not have been necessary. The fact is that the two systems of criminal justice are not alike. An analysis of military cases will show that restraint or formal presentment of charges triggers the right to a speedy trial. *See* United States v. Burton, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971); United States v. Mladjen, 19

In considering the fact that MacDonald was free from detention or bail from the termination of the Article 32 proceedings until the indictment, the court decided that since MacDonald was still under suspicion and subject to the threat of another prosecution, his so called "freedom" did not dispel the effects of the initial accusation.[21] In arriving at its decision, the court analogized MacDonald's predicament to that of the petitioner in *Klopfer v. North Carolina*.[22] In *Klopfer*, the defendant was the subject of a *nolle prosequi*[23] which left him with no forum within which to proceed with his vindication. The indictment was subject to reinstatement at anytime which left the accused entirely at the mercy of the solicitor. Here, while petitioner was not under indictment, the court correctly noted that MacDonald was subject to the same uncertainty and anxiety. MacDonald's fear of prosecution was evidenced by the fact that he retained counsel since he knew he was still subject to an investigation.

Having held that the military procedures "triggered" the right to a speedy trial, the court concluded its analysis of the first factor by stating that a delay of over 4½ years certainly fulfilled the minimum length requirements[24] so as to require inquiry into the

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U.S.C.M.A. 159, 41 C.M.R. 159 (1969); United States v. Williams, 16 U.S.C.M.A. 589, 37 C.M.R. 209 (1967); United States v. Kama, 47 C.M.R. 838 (N.C.M.R. 1973).

In defining the scope of restriction that is necessary, MacDonald's restriction to quarters certainly appears to fit within the framework of decided military cases. *See, e.g.*, United States v. Haynes, 15 U.S.C.M.A. 122, 124, 35 C.M.R. 94, 96 (1964) ("Restriction to quarters or to barracks is in fact arrest. . . ."); and, United States v. Smith, 17 U.S.C.M.A. 427, 38 C.M.R. 225 (1968).

As to absence of actual confinement in a brig, it should be noted that the military, generally, disfavors pre-trial incarceration and also distinguishes between officers and enlisted men. Historically, the need for all available manpower left incarcertation as a last resort. *See generally* Boller, *Pretrial Restraint in the Military*, 50 MIL. L. REV. 71 (1970). Pretrial incarceration is only to be used where necessary to insure the accused's presence at the trial or because of the seriousness of the charge. MANUAL FOR COURTS-MARTIAL, ¶ 20 *c* (U.S. 1969 rev. ed.). Also, "the decision whether to confine an accused person until his trial is wholly discretionary . . . ." Lermack, *Summary and Special Courts-Martial: An Empirical Investigation*, 18 ST. LOUIS U.L.J. 329, 350 (1974).

21. It should be noted that had this case been subject to the new Federal Speedy Trial Rule, 18 U.S.C.A. § 3161 *et seq.* (Supp. 1976), dismissal of charges by the military would have tolled the "statutory" time period. However, as per 18 U.S.C.A. § 3173 (Supp. 1976), "[n]o provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution."

22. 386 U.S. 213 (1967).

23. *Nolle prosequi*, in a criminal charge, refers to the situation where the prosecution will forego proceedings against the defendant.

24. In Barker v. Wingo, 407 U.S. 514, 533 (1972), a 5 year delay was characterized as extraordinary (although other mitigating facts were present). A 28-month delay was deemed

other factors of the *Barker* balancing test.

The second factor considered in determining whether defendant's right to speedy trial was violated was the reason for the delay. For purposes of this analysis, the court divided the entire period into three phases of delay — (1) the initial period taken up by the military proceedings; (2) the next 18 months wherein the Department of Justice undertook another investigation; and, (3) the period from the submission of a report recommending prosecution by the Army's Criminal Investigation Division (CID) to the Department of Justice until the date of the grand jury proceedings more than 2 years later.

Reasons for delay generally fall into three categories giving rise to a system of weighing by the courts: deliberate attempts to delay which are weighted most heavily against the government; neutral reasons, such as negligence, which are weighted "less heavily" against the government; and valid reasons, which are excusable.[25]

The court held that the first phase was excusable since the Army investigation and the Article 32 proceeding justified inaction by civilian authorities. The second phase was not weighted "heavily" against the government since the charges were previously dismissed for insufficient evidence, the case was complex, and the investigators were not dilatory. However, for the third phase, the government had not provided any satisfactory explanation; therefore, the court determined that this factor must be weighted against the government.[26] Two important subfactors in the court's reasoning were the CID's recommendation to prosecute more than 2 years prior to the grand jury proceeding and the testimony of the

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excessive in United States v. Macino, 486 F.2d 750 (7th Cir. 1973). In United States v. Holt, 448 F.2d 1108, 1109 (D.C. Cir.), *cert. denied*, 404 U.S. 942 (1971), the court stated that "[t]he defense claim has prima facie merit if the lapse between arrest and trial is longer than one year."

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

26. Even though there is not a deliberate attempt to delay, negligence or indifference as a reason for the delay may be weighted against the government. *See generally* Fleming v. United States, 378 F.2d 502 (1st Cir. 1967); Hanrahan v. United States, 348 F.2d 263 (D.C. Cir. 1965); State v. Hollars, 266 N.C. 45, 145 S.E.2d 309 (1965).

It is interesting to note that the military courts have established a clear cut standard for this factor, i.e.,

> in the absence of defense requests for continuance, a presumption of an Article 10 violation [the military's statutory version of the speedy trial provision] will exist when pretrial confinement exceeds three months. In such cases, this presumption will place a heavy burden on the Government to show diligence, and in the absence of such a showing the charges should be dismissed.

United States v. Burton, 21 U.S.C.M.A. 112, 118, 44 C.M.R. 166, 172 (1971).

Assistant United States Attorney (who was familiar with the case) that the delay in FBI analysis from 1970 until 1974 was due to "government bureaucracy."

The third *Barker* factor is the defendant's assertion of his right. In *Barker* the Court's treatment of this factor was somewhat paradoxical. The Supreme Court on the one hand rejected a strict "demand-waiver" approach[27] and held it to be merely a "factor." On the other hand, the Court stated that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."[28]

In *MacDonald*, however, the fourth circuit had little trouble in deciding this factor in favor of the defendant since the latter had written several letters to the Department of Justice inquiring into a final decision, had offered to submit to questioning by the Department of Justice, and had waived immunity at the grand jury proceedings.

The fourth and final factor considered was prejudice to the defendant. As is true with the other factors, an affirmative showing of prejudice is not a necessary prerequisite to an eventual finding of a speedy trial violation.[29] Prejudice is evidenced by the infringement upon any of several interests of the defendant that must be protected in speedy trial cases: prevention of oppressive pretrial incarceration; minimization of anxiety and concern which comes from public accusation; and preservation of the ability of the defendant to effectively defend himself.[30] Here, the court found prejudice to the second two interests — freedom from anxiety and ability to defend oneself. As to the first factor, the court noted one who "is not restrained may nonetheless be prejudiced."[31]

The court found anxiety and concern on MacDonald's part from his knowledge of the continuing investigation, constant threat of prosecution, hiring of an attorney, and inquiry into the unresolved nature of the case.

Impairment of the ability to defend oneself is the most obvious prejudice to a defendant in a speedy trial violation. MacDonald

27. Under this approach, "a defendant who fails to demand a speedy trial forever waives his right." 407 U.S. at 528.

28. *Id.* at 532.

29. Moore v. Arizona, 414 U.S. 25, 26 (1973).

30. 407 U.S. at 532; United States v. Ewell, 383 U.S. 116, 120 (1966).

31. 531 F.2d at 207-08, *citing* Klopfer v. North Carolina, 386 U.S. 213, 221 (1967).

claimed, and the fourth circuit agreed, that his ability in this regard was impaired.[32] This was evident from the scattering of Army witnesses throughout the country and the circumstantial nature of the case. Moreover, economic considerations were important according to this court (e.g. counsel was retained at MacDonald's expense, and interviewing and insuring the presence of the widely scattered witnesses would be time consuming and expensive).[33]

It is noteworthy that prejudice in *MacDonald* was evident from the record. In cases where prejudice is not so clear, a difficult and, as of now, undefined concern in speedy trial cases lies in the allocation of the burden of proof. Should the defendant be made to prove prejudice when claimed? Or, should the government, with its vastly superior investigative force, be made to show that a delay is *not* prejudicial to the defendant?[34] In *United States v. Ewell*,[35] a claim of prejudice was dismissed as speculative, thus giving rise to a placing of the burden on the defendant. However, *Barker* views delay as "presumptively prejudicial" once the delay is seen as sufficient to justify further inquiry.[36] This would seem to shift the burden to the government to prove an absence of prejudice. In keeping with the later approach, the *MacDonald* court appears to have viewed the placing of the burden as a function of time of delay. First, as seen previously, 4½ years is viewed as sufficient to justify further inquiry. Then, with the burden shifted, the court correctly rejected the government's argument that the defendant was not prejudiced by stale witnesses, and other factors, due to the preservation of the testimony at the Article 32 hearing. In other words, the government had not sustained its burden of proving an absence of prejudice.[37]

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32. Examples of the hardship are given in Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476, 482 (1968):

> A delay can impair an individual's ability to prepare a defense in several ways. Documents or other physical evidence may deteriorate or be lost. Potential witnesses may die or disappear, and those witnesses who are available may be unable to remember the events in question. Furthermore, the passage of time may weaken the defendant's ability to recall the facts or witness that would have comprised his alibi or other defenses [footnotes omitted].

33. 531 F.2d at 208.

34. There is a split of authority on this point. *See* 58 CORNELL L. REV. 399, 409 (1973), for a list of cases going both ways.

35. 383 U.S. 116 (1966).

36. 407 U.S. at 530 (1972).

37. Since *MacDonald* involves many comparisons between the military and civilian criminal justice systems, it is interesting to note that under the military system the burden is definitely placed on the government in such a situation. United States v. Burton, 21 U.S.C.M.A. 112, 116, 44 C.M.R. 166, 170 (1971).

When all of the factors in a case are found to be in the defendant's favor — here all were found to be in MacDonald's favor — the required dismissal[38] of a speedy trial case directly follows under the balancing test rationale.

By finding a denial of the right to a speedy trial, the court was spared the necessity of a decision as to the double jeopardy claim which would have involved a case of first impression. [In dictum, the court noted that there has never before been a case of a prosecution following dismissal after an Article 32 hearing.][39] While custom in the military imputes finality,[40] this does not necessarily mean that a civilian court would be bound thereby. In light of its holding with respect to the speedy trial provision, the court declined to determine the effect of such a dismissal, viewing such a determination as advisory in nature.[41]

MacDonald exemplifies the great confusion possible when the outcome of a claim depends on a balancing test. This is particularly unsatisfactory where a constitutional right is involved. The obvious danger of such uncertainty is evident from the possibility that a different circuit, or for that matter the same circuit at a different time, can view similar facts and come to an opposite conclusion (as, indeed, the dissent did here). The fourth circuit reaffirmed the Supreme Court's requirement of finding a triggering event as a prerequisite to further inquiry into the speedy trial claim. The courts may be placing an unreasonable amount of discretion in the hands of the government. MacDonald was lucky. He had a prior, triggering act on the government's part upon which to base his claim, i.e., the military arrest. (Even then, the dissent would have held otherwise.) Without this, it is suggested that a defendant is left at the mercy of the prosecution. In other words, the interests of the defendant, presumably protected by the speedy trial right, are not so protected until the government arbitrarily decides to "pull the trigger." In light of this discretion, the right to a speedy trial may have been written out of the Constitution.[42]

38. The severe remedy of dismissal is the only possible remedy. Strunk v. United States, 412 U.S. 434, 439-40 (1973).

39. Slip Opinion at 29-30. (This was not reprinted in the Federal Reporter.)

40. 531 F.2d at 209.

41. *Id.*

42. The Court, in United States v. Marion, 404 U.S. 307 (1971), stated that the sixth amendment need not be pressed into service in pre-arrest or pre-indictment situations since the statutes of limitation protect the accused. 404 U.S. at 323. The fallacy of that argument

It should be noted that there is "a societal interest in providing a speedy trial which exists separate from . . . the interests of the accused."[43] Society's interest stems from the backlog increase from delay in bringing cases to trial, the opportunity for those released on bail to commit other crimes, the temptation for the accused to jump bail and escape, and the detrimental effect on rehabilitation from the delay between arrest and punishment.[44] It is suggested that these interests are not served by the present status of speedy trial case law. Perhaps a solution which would take into account the interests of both society and the accused can be found. However, any change which would enhance the rights of the accused is doubtful in light of the "general indifference to the rights of those accused of crime exhibited by the Supreme Court under the leadership of Chief Justice Burger . . . ."[45] The end result is that the interests of both society and the accused will suffer.

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Expanded Right to Voluntary Dismissal Upheld

In the noted case, the Florida Supreme Court held that the right to take a voluntary dismissal is absolute and can be had even after the judge has granted defendant's motion for a directed verdict. The author, after reviewing the history and case law on voluntary dismissals, concludes that although the decision was a correct one in light of the Florida Rule of Civil Procedure 1.420 (a)(1), the purpose of the rule would be better served if it were revised so as to put greater limitations on the availability of a voluntary dismissal by a plaintiff.

Petitioner and her husband brought suit against respondents and the Insurance Company of North America, to recover damages resulting from an automobile accident. At the charge conference,

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is apparent in murder cases, such as MacDonald's, where there is no statute of limitations. 18 U.S.C. § 3281 (1970) reads: "An indictment for any offense punishable by death may be found at any time without limitation except for offenses barred by the provisions of law existing on August 4, 1939."

43. Barker v. Wingo, 407 U.S. 514, 519 (1972).

44. *Id.* at 519-20.

45. Rudstein, *supra* note 7, at 58.