

SUPREME COURT OF UNITED STATES

United States

Vs.

Jeffrey R. Macdonald.

No. 75-1892.

Argued Jan. 9, 1978.

Decided May 1, 1978.

Mr. Justice BLACKMUN delivered the opinion of the Court.

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

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

Captain MacDonald's wife and their two daughters were murdered on February 17 at respondent's quarters. Respondent also sustained injury on that occasion. The military police, the Army's Criminal Investigation Division (CID), the Federal Bureau of Investigation, and the Fayetteville, N. C., Police Department all immediately began investigations of the crime. On April 6 the CID informed respondent that he was under suspicion and, that same day, he was relieved of his duties and restricted to quarters. On May 1, pursuant to Art. 30 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 830, the Army charged respondent with the murders. As required by Art. 32 of the UCMJ, 10 U.S.C. § 832, an investigating officer was appointed to investigate the crimes and to recommend whether the charges (three specifications of murder, in violation of Art. 118 of the UCMJ, 10 U.S.C. § 918) should be referred by the general court-martial convening authority (the post commander) to a general court-martial for trial. App. 131.

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

Following respondent's release from the military, and at the request of the Department of Justice, the CID continued its investigation. This was extensive and wide ranging. In June 1972, the CID

submitted to the Department of Justice a 13-volume report recommending still further investigation. Supplemental reports were transmitted in November 1972 and August 1973. It was not until August 1974, however, that the Government began the presentation of the case to a grand jury of the United States District Court for the Eastern District of North Carolina.³ On January 24, 1975, the grand jury indicted respondent on three counts of first-degree murder, in violation of 18 U.S.C. § 1111. App. 22-23. He was promptly arrested and then released on bail a week later.

On July 29, the District Court denied a number of pretrial motions submitted by respondent. Among these were a motion to dismiss the indictment on double jeopardy grounds and another to dismiss because of the denial of his Sixth Amendment right to a speedy trial. App. to Pet. for Cert. 44a, 46a, 49a. Relying on *United States v. Marion*, [1971] USSC 195; 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), the District Court concluded: "The right to a speedy trial under the Sixth Amendment does not arise until a person has been 'accused' of a crime, and in this case this did not occur until the indictment had been returned." App. to Pet. for Cert. 49a. Trial was scheduled to begin in August.

The United States Court of Appeals for the Fourth Circuit stayed the trial and allowed an interlocutory appeal on the authority of its decision in *United States v. Lansdown*, [1972] USCA4 100; 460 F.2d 164 (1972). App. to Pet. for Cert. 42a. The Court of Appeals, by a divided vote, reversed the District Court's denial of respondent's motion to dismiss on speedy trial grounds and remanded the case with instructions to dismiss the indictment. [1976] USCA4 59; 531 F.2d 196 (1976). The Government's petition for rehearing, with suggestion for rehearing en banc, was denied by an evenly divided vote. App. to Pet. for Cert. 2a.

The Court of Appeals panel majority recognized that the denial of a pretrial motion in a criminal case generally is not appealable. The court, however, offered two grounds for its assumption of jurisdiction in this particular case. It stated, first, that it considered respondent's speedy trial claim to be pendent to his double jeopardy claim, the denial of which *Lansdown* had held to be appealable before trial. Alternatively, although conceding that "[n]ot every speedy trial claim . . . merits an interlocutory appeal," and that "[g]enerally, this defense should be reviewed after final judgment," the court stated that it was "the extraordinary nature of MacDonald's case that persuaded us to allow an interlocutory appeal." 531 F.2d, at 199.

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

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

II

This Court frequently has considered the appealability of pretrial orders in criminal cases. See, e. g., *Abney v. United States*[1977] USSC 98; , 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977); *Di Bella v. United States*, [1962] USSC 34; 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962); *Parr v. United States*, [1956] USSC 80; 351 U.S. 513, 76 S.Ct. 912, 100 L.Ed. 1377 (1956); *Cobbledick v. United States*, [1940] USSC 33; 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783 (1940). Just last Term the Court reiterated that interlocutory or "piecemeal" appeals are disfavored. "Finality of judgment has

been required as a predicate for federal appellate jurisdiction." *Abney v. United States*, 431 U.S., at 656, 97 S.Ct., at 2039. See also *Di Bella v. United States*, 369 U.S., at 124, 82 S.Ct., at 656.

This traditional and basic principle is currently embodied in 28 U.S.C. § 1291, which grants the federal courts of appeals jurisdiction to review "all final decisions of the district courts," both civil and criminal.⁴ The rule of finality has particular force in criminal prosecutions because "encouragement of delay is fatal to the vindication of the criminal law." *Cobbledick v. United States*, 309 U.S., at 325, 60 S.Ct., at 541. See also *Di Bella v. United States*, 369 U.S., at 126, 82 S.Ct., at 657.

This Court in criminal cases has twice departed from the general prohibition against piecemeal appellate review. *Abney v. United States*, *supra*; *Stack v. Boyle*, [1951] USSC 87; 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951). In each instance, the Court relied on the final-judgment rule's "collateral order" exception articulated in *Cohen v. Beneficial Industrial Loan Corp.*, [1949] USSC 81; 337 U.S. 541, 545-547[1949] USSC 81; , 69 S.Ct. 1221, 1225-1226, 93 L.Ed. 1528 (1949).

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

The Court's opinion began by emphasizing the principle—well established even then—that there can be no appeal before final judgment "even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results." *Id.*, at 546, 69 S.Ct., at 1225. The Court's conclusion that the order appealed from qualified as a "final decision," within the language of 28 U.S.C. § 1291, however, rested on several grounds. Those grounds were summarized in *Abney v. United States*, 431 U.S., at 658, 97 S.Ct., at 2040:

"First, the District Court's order had fully disposed of the question of the state security statute's applicability in federal court; in no sense, did it leave the matter 'open, unfinished or inconclusive' [337 U.S., at 546[1949] USSC 81; , 69 S.Ct. 1221]. Second, the decision was not simply a 'step toward final disposition of the merits of the case [which would] be merged in final judgment'; rather, it resolved an issue completely collateral to the cause of action asserted. *Ibid.* Finally, the decision had involved an important right which would be 'lost, probably irreparably,' if review had to await final judgment; hence, to be effective, appellate review in that special, limited setting had to be immediate. *Ibid.*"

Two years after the decision in *Cohen*, the Court applied the "collateral order" doctrine in a criminal proceeding, holding that an order denying a motion to reduce bail could be reviewed before trial. *Stack v. Boyle*, *supra*. Writing separately in that case, Mr. Justice Jackson (the author of *Cohen*) explained that, like the question of posting security in *Cohen*, "an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried—and

unless it can be reviewed before sentence, it never can be reviewed a all." 342 U.S., at 12, 72 S.Ct., at 7.

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

III

The application to the instant case of the principles enunciated in the above precedents is straightforward.⁵ Like the denial of a motion to dismiss an indictment on double jeopardy grounds, a pretrial order rejecting a defendant's speedy trial claim plainly "lacks the finality traditionally considered indispensable to appellate review," *Abney v. United States*, 431 U.S., at 659, 97 S.Ct., at 2040, that is, such an order obviously is not final in the sense of terminating the criminal proceedings in the trial court. Thus, if such an order may be appealed before trial, it is because it satisfies the criteria identified in *Cohen* and *Abney* as sufficient to warrant suspension of the established rules against piecemeal review before final judgment.

We believe it clear that an order denying a motion to dismiss an indictment on speedy trial grounds does not satisfy those criteria. The considerations that militated in favor of appealability in *Stock v. Boyle*, *supra*, and in *Abney v. United States* are absent or markedly attenuated in the present case. In keeping with what appear to be the only two other federal cases in which a defendant has sought pretrial review of an order denying his motion to dismiss an indictment on speedy trial grounds, we hold that the Court of Appeals lacked jurisdiction to entertain respondent's speedy trial appeal. *United States v. Bailey*, [1975] USCA5 789; 512 F.2d 833 (CA5), cert. dismissed, 423 U.S. 1039, 96 S.Ct. 578, 46 L.Ed.2d 415 (1975); *Kyle v. United States*, [1954] USCA9 98; 211 F.2d 912 (CA9 1954).

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

In *Barker v. Wingo*, [1972] USSC 146; 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the Court listed four factors that are to be weighed in determining whether an accused has been deprived of his Sixth Amendment right to a speedy trial. They are the length of the delay, the reason for the delay, whether the defendant has asserted his right, and prejudice to the defendant from the delay. *Id.*, at 530, 92 S.Ct., at 2191. The Court noted that prejudice to the defendant must be considered in the light of the interests the speedy trial right was designed to protect: "(i) to prevent 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 (footnote omitted).

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

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

Even if the degree of prejudice could be accurately measured before trial, a speedy trial claim nonetheless would not be sufficiently independent of the outcome of the trial to warrant pretrial appellate review. The claim would be largely satisfied by an acquittal resulting from the prosecution's failure to carry its burden of proof. The double jeopardy motion in *Abney* was separable from the issues at trial because "[t]he elements of that claim are completely independent

of [the accused's] guilt or innocence," 431 U.S., at 660, 97 S.Ct., at 2040, since an acquittal would not have eliminated the defendant's grievance at having been put twice in jeopardy. In contrast, a central interest served by the Speedy Trial Clause is the protection of the factfinding process at trial. The essence of a defendant's Sixth Amendment claim in the usual case is that the passage of time has frustrated his ability to establish his innocence of the crime charged. Normally, it is only after trial that that claim may fairly be assessed.

Relatedly, the order sought to be appealed in this case may not accurately be described, in the sense that the description has been employed, as involving "an important right which would be 'lost, probably irreparably,' if review had to await final judgment." *Id.*, at 658, 97 S.Ct., at 2040, quoting *Cohen*, 337 U.S., at 546, 69 S.Ct., at 1225. The double jeopardy claim in *Abney*, the demand for reduced bail in *Stack v. Boyle*, and the posting of security at issue in *Cohen* each involved an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.⁷ There perhaps is some superficial attraction in the argument that the right to a speedy trial—by analogy to these other rights—must be vindicated before trial in order to insure that no nonspeedy trial is ever held. Both doctrinally and pragmatically, however, this argument fails. Unlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a "right not to be tried" which must be upheld prior to trial if it is to be enjoyed at all. It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial. If the factors outlined in *Barker v. Wingo*, *supra*, combine to deprive an accused of his right to a speedy trial, that loss, by definition, occurs before trial. Proceeding with the trial does not cause or compound the deprivation already suffered.

Furthermore, in most cases, as noted above, it is difficult to make the careful examination of the constituent elements of the speedy trial claim before trial.⁸ Appellate courts would be in no better position than trial courts to vindicate a right that had not yet been shown to have been infringed.

IV

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

Significantly, this Court has emphasized that one of the principal reasons for its strict adherence to

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

Many defendants, of course, would be willing to tolerate the delay in a trial that is attendant upon a pretrial appeal in the hope of winning that appeal. The right to a speedy trial, however, "is generically different from any of the other rights enshrined in the Constitution for the protection of the accused" because "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." *Barker v. Wingo*, 407 U.S., at 519, 92 S.Ct., at 2186. See also *United States v. Avalos*, [1976] USCA5 1677; 541 F.2d 1100, 1110 (CA5 1976), cert. denied, 430 U.S. 970, 97 S.Ct. 1656, 52 L.Ed.2d 363 (1977). Among other things, delay may prejudice the prosecution's ability to prove its case, increase the cost to society of maintaining those defendants subject to pretrial detention, and prolong the period during which defendants released on bail may commit other crimes. *Dickey v. Florida*, [1970] USSC 118; 398 U.S. 30, 42[1970] USSC 118; , 90 S.Ct. 1564, 1571, 26 L.Ed.2d 26 (1970) (Brennan, J., concurring).

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

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

V

In sum, we decline to exacerbate pretrial delay by intruding upon accepted principles of finality to allow a defendant whose speedy trial motion has been denied before trial to obtain interlocutory appellate review.⁹ The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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