Journal of Criminal Law and Criminology

Volume 68
Issue 4 *December*

Article 7

Winter 1977

Speedy Trial

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 68, No. 4

Printed in U.S.A.

SPEEDY TRIAL

United States v. Lovasco, 97 S. Ct. 2044 (1977).

The Supreme Court of the United States has recognized that the right to a speedy trial "is one of the most basic rights preserved by our Constitution."[1] The right, as encompassed by the sixth amendment to the United States Constitution,[2] can be traced to the Magna Carta of 1215,[3] which states, "we will sell to no man, we will not deny or defer to any man either justice or right."[4] The Framers of the Constitution, being well versed in the philosophy of the Magna Carta and its interpretations in the English law, considered the right fundamental and included it in the Constitution.[5]

Until recently however, the Supreme Court has provided little guidance as to when an accused may assert this right.[6] In *United States v. Marion*,[7] the Supreme Court focused on the language of the sixth amendment[8] and concluded that the sixth amendment speedy trial provision does not apply until an individual becomes an accused, that is either through arrest or indictment. The Court also stated that Rule 48(b) of the Federal Rules of Criminal Procedure[9] is limited in application to post-arrest situations, and in a footnote expressed doubt as to whether the rule applies in circumstances where the indictment is the first formal act in the criminal prosecution.[10]

In *Marion*, the defendants were indicted approximately three years after their alleged criminal acts (consumer fraud). The district court dismissed the indictment stating that the delay was bound to have seriously prejudiced

[1] Klopfer v. North Carolina, 386 U.S. 213, 226 (1967). The Supreme Court held that the right to a speedy trial is a fundamental right and is applicable to the states via the fourteenth amendment due process clause. *Id.* at 222-23.

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

[3] *See* Klopfer v. North Carolina, 386 U.S. 213, 223 (1967). Evidence that the right pre-dated even the Magna Carta may be found in Assize of Clarendon (1166). *Id.* at 223.

[4] Klopfer v. North Carolina, 386 U.S. 213, 223 (1967), (quoting Magna Carta ch. 29 (ch. 40 of King John's Charter of 1215) (1225), translated and *quoted in* Coke, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (Brooke ed. 5th ed, 1797)).

[5] Klopfer v. North Carolina, 386 U.S. 213, 225 (1967). Evidence that the right was considered fundamental is found in the early constitutions of the states and its prominent place in the sixth amendment of the United States Constitution. *Id.* at 225-26.

[6] In their concurring opinion in Dickey v. Florida, 398 U.S. 30, 40 (1970) (Brennan, Marshall, JJ., concurring), Mr. Justice Brennan and Mr. Justice Marshall criticize the Court's lack of attention with regard to the right to a speedy trial. Only three Supreme Court cases before Klopfer v. North Carolina, 386 U.S. 213 (1967), dealt with the right: Beavers v. Haubert, 198 U.S. 77 (1905), Pollard v. United States, 352 U.S. 354 (1957), and United States v. Ewell, 383 U.S. 116 (1966). The Court in *Beavers* dealt with the right in terms of the relevant circumstances surrounding the particular case. 198 U.S. 77, 86 (1904). In *Pollard*, the Court said that the delay cannot be purposeful, 352 U.S. at 361, and in *Ewell*, the Court discussed the reasons for having the right, 383 U.S. at 120. After *Klopfer* and up until the time of *Dickey*, which dealt with the right as applicable to an individual charged with a state offense but already incarcerated on an unrelated federal charge, 398 U.S. at 30, only one other case, Smith v. Hooey, 393 U.S. 374 (1969), dealt with the right. *Smith* involved the right as applicable to an individual who is serving time on a charge imposed by another jurisdiction, 393 U.S. at 377-78.

In their concurrence in *Dickey*, Brennan and Marshall note that none of the Court's opinions relating to the right to a speedy trial adequately discuss the parameters of the right and leave open such basic questions as to when the right attaches, whether prejudice to the accused must be proven, and whether the delay must be part of a deliberate scheme by the prosecutor. 398 U.S. 30, 41 (1970) (Brennan, Marshall, JJ., concurring).

[7] 404 U.S. 307 (1971).

[8] The *Marion* Court focused on the inclusion of the word 'accused' in the sixth amendment, see note 2 *supra*, and concluded that "[t]he framers could hardly have selected less appropriate language if they had intended the speedy trial provision to protect against preaccusation delay." 404 U.S. at 314-15.

[9] "If there is unnecessary delay in presenting the charge to a grand jury or in filing an indictment against a defendant who has been held to answer in the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint." FED. R. CRIM. P. 48(b).

[10] 404 U.S. at 312 n.4.

the defendants.[11] Nevertheless, no specific prejudice was claimed or demonstrated.[12]

The Supreme Court, on appeal, reversed the lower court on the grounds that neither the sixth amendment nor Rule 48(b) was applicable to the defendants' allegation that the thirty-eight month delay between the commission of the act charged and the indictment was in violation of their right to a speedy trial. The Court, however, in dicta, recognized that in certain instances a fifth amendment due process[13] claim would be warranted where the delay "caused substantial prejudice to appellees' rights to a fair trial and . . . the delay was an intentional device to gain tactical advantage over the accused."[14] However, in this situation where no actual prejudice was alleged or claimed, the Court refused to grant relief under the fifth amendment due process clause.[15]

The federal courts have been divided, in situations pertaining to pre-arrest or pre-indictment delay, in attempting to interpret and apply the dicta in *Marion*.[16] Two schools of thought have emerged: one espousing a two prong conjunctive test, requiring *both* the elements of prejudice and the showing of an intentional tactical device by the Government in order to warrant dismissal of an indictment, and the other requiring *either* prong of the test.[17]

In *United States v. Lovasco*,[18] the Supreme Court purports to clarify "the circumstances in which the Constitution requires that an indictment be dismissed because of delay between the commission of an offense and the initiation of prosecution."[19] The Court, in an opinion written by Mr. Justice Marshall, held that "to prosecute a defendant following investigative delay does not deprive him of due process,

[11] The district court reached its determination by looking at the three year delay and concluding that the relevant facts needed to initiate proceedings against the accused were available to the government three years earlier. *Id.* at 310.

[12] *Id.*

[13] "[N]or be deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V.

[14] 404 U.S. at 324 (1971).

[15] The Court left open the possibility that actual prejudice might be proven at trial, but since no prejudice was alleged or claimed by the defendants, the Court held that any due process claim would be "speculative and premature." *Id.* at 326.

For a case in which the defendant was granted relief under the due process clause, see Petition of Pravoo, 17 F.R.D. 183 (D. Md. 1955). The indictment was dismissed due to the delay caused by the government by bringing the case to trial in New York, when it should have known that the proper place of venue was Maryland. *Id.* at 200.

[16] For a detailed description of the disunity between and within each federal district, see United States v. Alderman, 423 F. Supp. 847, 849-55 (D. Md. 1976).

The First Circuit has required the two prong conjunctive test as a determination of a due process speedy trial claim. *See* United States v. Churchill, 483 F.2d 268 (1st Cir. 1973), and United States v. Daley, 454 F.2d 505 (1st Cir. 1972). The Second Circuit has not definitively decided whether a conjunctive or disjunctive test is appropriate. In United States v. Finkelstein, 526 F.2d 517, 525-26 (2nd Cir. 1975), *cert. denied*, 425 U.S. 960 (1976), the question had been deliberately left open. *But see* United States v. Mallah, 503 F.2d 971, 989 (2nd Cir. 1974), where the court said that pre-indictment delay may invalidate a prosecution if the delay was part of a scheme to harass the accused. The Third Circuit has also been split between the disjunctive and the conjunctive approach. *See* United States v. United States Gypsum Company, 383 F. Supp. 462 (W.D. Pa. 1974), which requires a two prong conjunctive test and United States v. Clark, 398 F. Supp. 341, 350 (E.D. Pa. 1975), which requires a disjunctive test. In Hamilton v. Lumpkin, 389 F. Supp. 1069 (E.D. Va. 1975), a district court of the Fourth Circuit interpreted *Marion* as requiring a disjunctive test. Within the Fourth Circuit, however, there are very few cases construing the *Marion* opinion and it remains unclear what the rule in this circuit is. The Fifth Circuit has recently shifted from a disjunctive test, United States v. Schools, 486 F.2d 557 (5th Cir. 1973), to a conjunctive test requirement, United States v. Duke, 527 F.2d 386 (5th Cir. 1976). The Sixth, Seventh and Eighth Circuits have all interpreted *Marion* as requiring a two part conjunctive test; United States v. Alred, 513 F. 2d 330 (6th Cir. 1975), United States v. White, 470 F.2d 170 (7th Cir. 1972), and United States v. Atkins, 487 F.2d 257 (8th Cir. 1973). The Ninth Circuit has elected to apply the disjunctive approach, United States v. Erickson, 472 F.2d 505 (9th Cir. 1973), while the Tenth Circuit has gone the other way and required a conjunctive approach, United States v. MacClain, 501 F.2d 1006 (10th Cir. 1974).

[17] Some courts have rejected both the disjunctive and conjunctive approach and have attempted to apply a balancing test. In United States v. Harmon, 379 F. Supp. 1349 (D. N.J. 1974), the court said that it does not recognize the two prong test to be the holding in Marion, and instead attempts to balance all the circumstances involved in the delay to reach a determination of the defendant's right to a speedy trial. *Id.* at 1351. *See also* United States v. Mays, 549 F. 2d 670 (9th Cir. 1977).

[18] 97 S. Ct. 2044 (1977). The opinion was written by Justice Marshall, joined by Chief Justice Burger, and Justices Brennan, Stewart, White, Blackmun, Powell, and Rehnquist, with Justice Stevens, dissenting, *id.*, at 2053.

[19] *Id.* at 2046.

even if his defense might have been somewhat prejudiced by the lapse of time."[20]

In *Lovasco,* the respondent was indicted on March 6, 1975, on three counts of unlawful possession of handguns stolen from the United States mail.[21] The indictments, handed down some seventeen months after the alleged offense, referred to eight guns which Lovasco possessed and sold to a third party between July 25, 1973 and August 31, 1973. The district court and the court of appeals[22] dismissed the indictments because the delay was "unnecessary and unreasonable" and resulted in the defendant being prejudiced in that two allegedly material witnesses had since died. It was contended that one witness, Tom Stewart, would have testified that he sold Lovasco two of the firearms in question, adding substance to Lovasco's claim that he did not know the firearms were in fact stolen from the United States mails.[23] The second witness, respondent's brother, was allegedly a witness to the transaction between Stewart and Lovasco and all of Lovasco's sales.

The district court also found that the postal inspector in charge of the case would have recommended that proceedings against Lovasco be initiated as early as October 2, 1973, based on findings contained in a report submitted to the United States Attorney.[24] The prosecuting attorney, however, attempted to justify the delay by claiming that the initiation of proceedings against Lovasco were delayed in the hope of identifying and proving the involvement of others in the offense, particularly the accused's son. The district court and the court of appeals, nevertheless, deemed the delay unjustified, unnecessary and unreasonable.

In reversing the appellate court, the Supreme Court held that although prejudice is a necessary element of a due process claim, it alone is not sufficient, so that a "due process inquiry must consider the reasons for the delay as well as the prejudice to the accused."[25] The Court based its reasoning for the holding on *United States v. Marion,* concluding that the *Marion* Court formulated a two prong conjunctive test in determining the validity of a due process claim.

The two part formulation, as espoused in *Marion*, (1) prejudice and (2) intentional delay to gain a tactical advantage, has been somewhat reformulated by the Court in *Lovasco.* While retaining the first part of the test, prejudice, the Court has altered the second part into an inquiry regarding the reasons for the delay.[26] While the significance of the reformulation is open to debate and will be explored in detail later on in the case note, it is interesting to note that both the *Marion* and *Lovasco* formulation represent a departure from the earlier Supreme Court case, *Pollard v. United States.*[27] In *Pollard,* the Court held that the "delay must not be purposeful or oppressive,"[28] and denied petitioner's claimed violation of a speedy trial based on a two year delay in sentencing after his trial. The Court in *Pollard* based its decision on the fact that the delay was accidental and promptly remedied when discovered. Under the *Marion* or *Lovasco* formulation, however, it would appear that purposeful delay by the Government would be perfectly acceptable un-

[20] *Id.* at 2052.

[21] Lovasco was actually indicted on four counts; the fourth count pertaining to the business of dealing in firearms without a license. Since this count is irrelevant to the question of whether the guns were stolen, the lower courts have treated it as distinct from the other three counts. 532 F.2d at 62 (8th Cir. 1976).

[22] 532 F.2d 59 (8th Cir. 1976).

[23] *Id.* at 61. Nevertheless, the Supreme Court stated that Lovasco failed to show how the witnesses would have aided in his defense had they been willing or able to testify. 97 S. Ct. 2047 (1977). Judge Henley's dissent to the court of appeals' opinion, brings out the same question. 532 F.2d 59, 62 (8th Cir. 1976).

[24] 532 F.2d 59, 61 (8th Cir. 1976).

[25] 97 S. Ct. at 2049.

[26] In the concurring opinion in Dickey v. Florida, 398 U.S. 30, 40 (1970) (Brennan, Marshall, JJ., concurring), Mr. Justice Brennan and Mr. Justice Marshall provide a possible insight as to why the majority's opinion in *Lovasco,* which was written by Marshall, fails to reiterate the precise language of *Marion.* In *Dickey,* Marshall and Brennan recognize delay in prosecution brought around through the negligence of the government as relevant to a speedy trial claim, 398 U.S. at 51–52. Reiteration of the language in *Marion* could have the effect of precluding a speedy trial claim based upon negligence.

[27] 352 U.S. 354 (1957).

[28] *Id.* at 361. *See* Note, *The Lagging Right to a Speedy Trial,* 51 VA. L. REV. 1587 (1965). "If 'purposeful' means bordering on bad faith, then no court delay is ever likely to run afoul of the sixth amendment. On the other hand, if 'purposeful' means intentional, it makes very little sense to draw a constitutional line between accidental delays and intentional good faith delays." *Id.* at 1600.

less it was to gain a tactical advantage over the defendant. Thus the Court has apparently shifted its approach and is willing to sanction intentional delay in certain instances in prosecuting a defendant.

Marshall's opinion in *Lovasco* has also cemented the notion that the sixth amendment speedy trial provision is not applicable to the pre-arrest, pre-indictment stage. In *Marion,* Justices Douglas, Brennan and Marshall concurred, but took issue with the majority and indicated that the sixth amendment was applicable to the pre-indictment stage.[29] Yet in *Lovasco,* Marshall was willing to accept the notion that the sixth amendment is not applicable prior to arrest or indictment. One possible explanation for this shift in opinion is that the concurring Justices in *Marion* now believe that the fifth amendment due process clause can protect the rights of the potential defendant as well as the sixth amendment speedy trial provision.

The Supreme Court, in interpreting the due process formulation espoused in *Marion* as requiring a two prong conjunctive test, will apparently eliminate some of the confusion in the federal courts surrounding a due process speedy trial claim.[30] The *Lovasco* Court based its support of the two prong formulation on three reasons. First, the Court expressed concern that "compelling a prosecutor to file public charges as soon as the requisite proof has been developed . . . would impair the prosecutor's ability to continue his investigation, thereby preventing society from bringing lawbreakers to justice."[31] Secondly, the Court has expressed its reluctance to force prosecutors into initiating proceedings in doubtful cases, and finally the Court is unwilling to interfere with the subjective analysis of the prosecutor in whether to bring charges, notwithstanding the strength of the Government's case.[32]

These three reasons in support of the two prong conjunctive formulation demonstrate the Court's unwillingness to force a prosecutor into initiating proceedings in order to avoid dismissal due to prejudice to the potential defendant. In *Hoffa v. United States,*[33] which the *Lovasco* Court cited to support this notion, the Court said:

> [T]here is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon and a violation of the Sixth Amendment if they wait too long.[34]

In addition, this line of reasoning, as expressed in *Hoffa* and reflected in *Lovasco,* demonstrates the Court's concern with the protection of societal interests. It fails, however, to take into consideration the protection of the individual's interests.

In support of its first reason, the protection of society by not cutting short an investigation into criminal activities by forcing a prosecutor to initiate proceedings against a potential defendant, the Court relies on *Rochin v. California.*[35] In *Rochin,* the Supreme Court, in examining the due process clause stated that:

> The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process.[36]

Lovasco, relying on this statement, stands for the proposition that under a due process claim, the Court will not second-guess the judgment of the prosecutor in terms of the time when

[29] 404 U.S. at 328 (Douglas, Brennan, Marshall, JJ., concurring). Justices Marshall, Brennan and Douglas refute the majority opinion's interpretation of English and colonial American history that the sixth amendment's speedy trial provision was never intended to apply to the pre-indictment stage. "The English common law, with which the Framers were familiar, conceived of a criminal prosecution as being commenced prior to indictment. Thus in that setting the individual charged as the defendant in a criminal proceeding could and would be an "accused" prior to formal indictment." *Id.* at 329.

[30] See note 16, *supra.*

[31] 97 S. Ct. at 2050.

[32] *Id.* at 2050–51.

[33] 385 U.S. 293 (1966).

[34] *Id.* at 310.

[35] 342 U.S. 165 (1952).

[36] *Id.* at 170–71. *See also* Lisenba v. California, 314 U.S. 219 (1941); Herbert v. Louisiana, 272 U.S. 312 (1926); and Mooney v. Holohan, 294 U.S. 103, 112–13 (1935), for the notion that due process entails the fundamental fairness of justice.

prosecution is initiated. The Court, in essence, has placed all its faith in the ethical conduct of the prosecutor,[37] which of course is open to serious abuse.[38]

The second reason the Court gives for its decision in *Lovasco* is its reluctance to force prosecutors into initiating proceedings in doubtful cases. This reason fails to take into account the interests of the individual. Those interests were taken into account, however, in *United States v. Ewell*,[39] where the Supreme Court, in discussing the speedy trial provision of the sixth amendment, said that "[t]his guarantee is an important safeguard . . . to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself."[40] While the *Ewell* Court was dealing with a post-arrest situation, it is nevertheless important to focus on its concern for minimization of anxiety. Long delays during an investigative period would clearly serve to maximize the anxiety of a potential defendant rather than minimize it. Granted, many times an individual is not even aware that he is the focus of an investigation,[41] but in those instances where he is, prolonged delay until the prosecutor makes up his mind whether or not to initiate proceedings would have the effect of maximizing anxiety, and have the potential for continuous harassment of the individual.[42]

[37] For an inquiry into the ethical considerations of the public prosecutor, see ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-13 (1976).

[38] Mr. Justice Stevens, in his dissent to *Lovasco* discussed the seriousness involved in removing all restraints on the prosecutor's power. 97 S. Ct. at 2053 (Stevens, J., dissenting).

[39] 383 U.S. 116 (1968).

[40] *Id.* at 120.

[41] For the view that another sixth amendment right, the right to counsel, attaches when the individual becomes the focus of an investigation, see Escobedo v. Illinois, 378 U.S. 478 (1964).

[42] For the view that anxiety is generally unimportant in speedy trial determinations, see Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476, 481 (1966).

See also United States v. Fay, 313 F.2d 620 (2nd Cir. 1963), where the court stated that the "general allegations regarding [defendant's] inability to maintain gainful employment or regarding his mental anguish or that of his family [do not] present the type of prejudice contemplated by the fourteenth amendment. It is not the purpose of the due process clause to defend an accused against public opprobrium." *Id.* at 624.

The second factor which the *Ewell* Court concerns itself with, the ability of an accused to defend himself, is clearly applicable in a situation where the prosecutor is hedging about whether or not to initiate proceedings against the accused. Delay in initiating proceedings carries with it the potential that the accused's ability to defend himself will be impaired, which is in direct contrast to the goals of a speedy trial as set forth in *Ewell*.

The third reason the *Lovasco* Court sets forth, the subjective analysis of the prosecutor regarding whether to bring charges, involves humanitarian concerns and societal interests. This reason is totally one-sided, putting the interests of society above that of the accused, and ignoring the protection of the individual's rights.

Though *Lovasco* appears to have settled the issue of whether a due process claim for delay in prosecution requires a two prong conjunctive or disjunctive test, the Court has provided little or no guidance as to what constitutes a valid claim under either the prejudice or reasons for the delay phase of the test:

> In *Marion* we conceded that we could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions. More than five years later, that statement remains true. Indeed, in the intervening years so few defendants have established that they were prejudiced by delay that neither the Court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay. We therefore leave to the lower courts, in the first instance, the task of applying the settled principles of due process.[43]

Regarding the prejudice aspect of the test, the lower courts, in attempting to reach some sort of formulation or guideline, have been divided. In the 1972 decision of *United States v. Dukow*,[44] the Third Circuit held first of all, that the defendants must demonstrate substantial prejudice to have their indictment dismissed, and secondly, that their claim cannot merely rest upon the passage of time and the dimming

[43] 97 S. Ct. at 2052.

[44] 453 F.2d 1328 (3rd Cir. 1972). Even though there was a 55 month delay between the time the SEC initiated proceedings against the defendants and the indictment, the court held that the defendants failed to demonstrate substantial prejudice. *Id.* at 1330.

of memories. In *United States v. Chin*,[45] however, the Second Circuit said that one may assume prejudice to a defendant arising from the delay in bringing the case to trial.

In their concurring opinion in *Dickey v. Florida*,[46] Justices Brennan and Marshall discussed the role of prejudice in speedy trial determinations:

> [C]oncrete evidence of prejudice is often not at hand. Even if it is possible to show that witnesses and documents once present are now unavailable, proving their materiality is more difficult. And it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and available witnesses.
> . . . .
> Because concrete evidence that their denial caused the defendant substantial prejudice is often unavailable, prejudice must be assumed or constitutional rights will be denied without remedy.[47]

In *Dickey*, the accused, convicted of armed robbery in 1968 seven years after an arrest warrant had been issued against him, appealed on the grounds that the delay had been so prejudicial as to make a fair trial impossible. During the seven year period, Dickey had been imprisoned on an unrelated federal offense and had repeatedly requested that the Florida state courts secure his return for a trial or withdraw the detainer for failure to provide him with a speedy trial. Reversing Dickey's conviction, the Supreme Court held that there was no reason for the delay in light of Dickey's efforts to secure his right to a speedy trial, and that there was substantial prejudice in that two witnesses had died, another had become unavailable, and police records of possible relevance had been lost or destroyed.[48]

While the majority opinion of *Dickey* held that actual prejudice to the accused resulted from the delay, there is nothing in the opinion to show how the death of two potential witnesses, the unavailablility of another, and the loss of police records *actually* prejudiced the defendants. What the majority appears to be doing is establishing that prejudice must be assumed due to the inherent difficulty in proving it. Thus, the mere allegation that two potential witnesses had since died really does not prove prejudice, since there remains the question of whether the testimony of the deceased witnesses would have exculpated the defendant.[49] Furthermore, in proving loss or lapse of memory, the accused is faced with even a greater paradox, since any attempt to show the materiality of certain evidence alleged to have been forgotten, clearly would prove that the evidence was not forgotten, and hence the defendant would be in essence disproving his point in order to prove it.[50]

This discussion illustrates that the test for prejudice has never really been defined by the Court. Reading *Lovasco* to its logical conclusion, however, warrants the determination that in contrast to *Dickey*, the Court will never assume prejudice due to a prolonged investigative period. *Lovasco's* insistence upon a two prong conjunctive test breaks down if the Court assumes that element of the test. If prejudice was assumed, all that would be necessary to dismiss an indictment would be a consideration of the reasons for the delay. It would seem illogical for the Court to assume the first part of the two part formulation when it has ruled that the formulation is conjunctive in nature.

[45] 306 F. Supp. 397 (S.D. N.Y. 1969). Where the defendant was indicted for income tax evasion on April 10, 1962 for offenses occurring between 1955 and 1956, and was not tried until 1969, the court said that one may assume prejudice from the delay. *But see* United States v. DeLeo, 422 F.2d 487 (1st Cir. 1970), *cert. denied*, 397 U.S. 1037 (1970), where the court was "not persuaded that a presumption of prejudice arising from the mere passage of time is either the prevailing doctrine or the most effective way fully to assure the Sixth Amendment's speedy trial." *Id.* at 494.

[46] 398 U.S. 30 (1970).

[47] *Id.* at 53-55.

[48] *Id.* at 36.

[49] *See, e.g.*, Judge Henley's dissent in United States v. Barket, 530 F.2d 189 (8th Cir. 1976), where the death of six witnesses and a 47 month delay in initiating prosecution was not enough, according to Henley, to demonstrate prejudice. This view was reiterated in United States v. Lovasco, 532 F.2d 59, 62 (8th Cir. 1976), where Henley again questioned the finding of prejudice. See note 23 *supra*.

[50] For a discussion of five factors to be considered in determining whether or not a pre-arrest delay has prejudiced an accused's defense, see Note, *Pre Arrest Delay: Evolving Due Process Standards*, 43 N.Y.U. L. REV. 722 (1968). The factors discussed are: (1) ability of the defendant to re-collect, (2) the level of education of the defendant, (3) notice to the defendant that he is under investigation, (4) failure to locate witnesses and their potential loss of memory and (5) length of the delay. *Id.* at 734.

Relying on the above reasoning, it appears that Mr. Justice Marshall has shifted from his opinion in *Dickey,* where he admitted that prejudice to a potential defendant is almost impossible to prove and must be assumed, so as now to require a potential defendant to prove that he was prejudiced by the delay.[51] Marshall even points out that so few individuals have successfully alleged prejudice that the Court has not had a sustained opportunity to examine the other half of the test, reasons for the delay. Thus on one hand, while acknowledging the enormous difficulties an individual who has not been either arrested or indicted has in proving prejudice due to a prolonged investigative period, the Court still requires proof of prejudice to overcome the first hurdle in the two prong test.

Another interpretation of Mr. Justice Marshall's apparent shift of opinion could be that in certain instances prejudice can be assumed depending on the length of the delay and the particular offense, and in other instances it must be proven. This interpretation gains support from *Beavers v. Haubert,*[52] where the Supreme Court of the United States held that "[t]he right to a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances."[53] In *Beavers,* the appellant was indicted in New York and Washington D.C. and claimed his right to a speedy trial was violated when the prosecution removed the proceedings from New York to the District of Columbia. The Supreme Court, in affirming the dismissal of the claim, held that the speedy trial right would not give the defendant the option to claim it for one offense in order to prevent arrest for other offenses.[54]

If, as Marshall seems to contend, prejudice is to be assumed in certain instances and not in others, then clearly the latter would warrant the application of the two prong test. But this predetermination of whether the two part formulation should be used appears to defeat the purpose of the test for it demonstrates the inherent difficulties of the test's consistent application.

This approach also, in light of the lack of legislative enactment on the question, would appear to leave the question of prejudice to the discretion of judges without any guidelines to satisfy the nonarbitrary approach of a due process claim required under *Rochin.*[55]

One possible guideline for the maximum amount of time the government may delay prosecution without prejudice can be the statute of limitations.[56] The Supreme Court, in *Toussie v. United States,*[57] defined the purpose of a statute of limitations as:

> [T]o limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutory effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.[58]

In *United States v. Ewell,*[59] the Court also noted that "the applicable statute of limitations . . . is usually considered the primary guarantee against bringing overly stale criminal charges."[60]

Although there were hints that the courts would use the statute of limitations as their guide in fifth amendment speedy trial determinations, this issue was put to rest in *Marion,* which recognized the statute of limitations as an upper boundary, but also acknowledged

[51] The facts relating to the allegation of prejudice in *Dickey* and *Lovasco* are almost identical. The defendants, in both cases, have alleged that because of the delay, material witnesses had become unavailable, either through death or other reasons. While in *Dickey* the prejudice stemming from the deceased witnesses is assumed or has been considered to be proven by the majority, 398 U.S. at 38, the Supreme Court in *Lovasco* has not given a definitive answer regarding prejudice, but questions the materiality of the witnesses. 97 S. Ct. at 2098–99.

[52] 198 U.S. 77 (1905).

[53] *Id.* at 87.

[54] *Id.*

[55] See note 36 *supra* and accompanying text.

[56] "Except as otherwise expressly provided by law, no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." 18 U.S.C. § 3282 (1954) (*Offenses; not Capital*).

[57] 397 U.S. 112 (1970).

[58] *Id.* at 114.

[59] 383 U.S. 116 (1966).

[60] *Id.* at 122.

that prejudice can result if the delay was within the applicable statute of limitation.[61]

In their concurring opinion in *Dickey*,[62] Brennan and Marshall also point out that the statute of limitations is subject to change at the whim of the legislature, that all crimes do not have applicable statute of limitations, and that the applicable statutes may not supply an individual his minimum rights to a speedy trial as guaranteed by the Constitution.

An examination of the second part of the two prong formulation, the inquiry into the reasons for the delay, reveals that the Court has given little or no guidance as to what constitutes an effective claim. The *Lovasco* Court, in looking to the reasons for the delay, has apparently incorporated the dicta in *Marion*; one must consider whether "the delay was an intentional device to gain tactical advantage over the accused."[63] Whether *Lovasco* has expanded upon the *Marion* formulation, however, is not clear, and is open to serious debate.

In a footnote to the majority opinion, the Court in *Lovasco* makes reference to the brief filed on behalf of the government, which concedes that "[a] due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense."[64] While the Court did not have to decide a recklessness issue in *Lovasco*, it can be inferred from the inclusion of this language in the majority's opinion that the Court might be willing to entertain a broader concept of the second part of the test than that which was formulated in *Marion*.

To understand whether the reformulation in *Lovasco* of the second prong of the test expanded the dicta in *Marion*, it is essential to focus on the language in *Marion*. It is apparent that the Court has given little or no guidance as to what it means when it speaks in terms of intentional delay. In *United States v. Frumento*,[65] the court said that "[m]ere conscious knowledge of the delay on the part of the government is not enough to satisfy the requirement of bad faith and purposeful delay in the pre-indictment, pre-arrest period."[66] This line of reasoning appears to follow *Marion* in that something more than knowledge is necessary in order for the defendant to show an intentional delay by the prosecution. Nevertheless, the question arises as to whether the language of *Marion* precludes a fifth amendment claim for delay in prosecution brought about by the negligence of the government.

A footnote to the majority's opinion in *Lovasco*[67] sheds some light on this matter, in that it can be inferred that the Court will entertain a claim based upon recklessness. However, the footnote is unclear as to ordinary negligence.

In their concurring opinion in *Dickey v. Florida*,[68] Brennan and Marshall discuss delay in prosecution brought about by the negligence of the government:

> A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by that right as an intentional failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials.

Based on this concurring opinion, it would appear that Marshall (and Brennan) would entertain a fifth amendment due process claim based upon negligence.

Nevertheless, Marshall in *Lovasco* purports to follow the Court in *Marion*, and whether this represents a departure from the intentional test of *Marion* is at best still unclear. It can also be argued that this represents a signal from the Court, that the formulation of the second aspect of the test is still evolving, perhaps to more accurately reflect the totality of the circumstances underlying the delay.

Part of the confusion about what the precise test is can be demonstrated by *United States v. Shaw*,[69] a post-*Lovasco* case in which the Fifth Circuit broadly interpreted the language in *Lovasco* in focusing on "whether the prosecution's actions violated 'fundamental conceptions

[61] 404 U.S. at 324.

[62] 398 U.S. at 47 (Brennan, Marshall, JJ., concurring).

[63] 404 U.S. 324 (1971).

[64] 97 S. Ct. at 2051–52 n.17.

[65] 405 F. Supp. 23 (E.D. Pa. 1975).

[66] *Id.* at 28.

[67] 97 S. Ct. at 2051–52 n.17.

[68] 398 U.S. 39, 51–52 (Brennan, Marshall, JJ., concurring).

[69] 555 F.2d 1295 (5th Cir. 1977).

of justice' or the 'community's sense of fair play and decency.'"[70] In *Shaw*, the defendant was indicted twenty-eight months after his alleged offense of defrauding the telephone company of money due for long distance calls. The prosecution attempted to explain the delay on the basis of the need to verify incriminating evidence and the low priority of the case with regard to the allocation of prosecutorial resources. The court, notwithstanding the claim of prejudice by the defendant, affirmed the conviction because the delay was "not such a deviation from elementary standards of fair play and decency or so inimical to our fundamental conceptions of justice as to deprive defendant of due process of law in violation of the Fifth Amendment."[71]

The language of *Lovasco* which *Shaw* relies on to reach its decision refers to the *Lovasco* Court's notion that a prosecutor would not be deviating from "fair play and decency" by delaying an indictment until he is confident of establishing guilt beyond a reasonable doubt. The language *Shaw* relies on is not the test espoused in *Lovasco*, but instead appears to be an amorphous arbitrary concept that can be used to justify *any* delay. The difficulty which the *Shaw* Court has apparently encountered in interpreting *Lovasco* and the relevant law in terms of pre-arrest, pre-indictment delay, is representative of the confusion and the lack of guidance the courts have in these situations.

In addition to the Supreme Court's lack of guidance regarding the application of the "reasons for delay" aspect of the test, the Court has yet to determine conclusively who has the burden of proof regarding this issue. The practicalities of the situation, as shown by *Lovasco*, may render the burden of proof issue moot, however. In *Lovasco*, the district court found that the majority of the information concerning the crime was gathered during the first month of the delay and very little during the next seventeen months.[72] The Supreme Court, nevertheless, sanctioned the delay on the basis that the Government was awaiting results of additional investigations.[73] Thus, for the potential defendant to establish that the delay was part of a tactical ploy on the part of the Government is almost an impossible task.[74] Any allegations as such can be countered by the prosecution claiming that the delay was necessary to further the investigation against other potential wrongdoers. Since prosecutorial records, which may or may not be discoverable may not reflect the intention of the prosecutor in delaying proceedings against the accused, the defendant is left at the mercy of the ethical conduct of the prosecution in determining whether there was a legitimate justification for the delay.

Mr. Justice Stevens, in his dissenting opinion in *Lovasco*,[75] clearly demonstrates the potential for abuse in such a situation. Even though the lower courts found no justification for the delay in handing down the indictment, in *Lovasco*, the Court, in a very unusual display of reviewing the findings of fact, reversed, stating that the delay was caused by efforts of the prosecution to identify others involved in the offense.[76] By doing so, Stevens points out, the Court has in essence removed the "constraints on the prosecutor's power to postpone the filing of formal charges to suit his own convenience."[77]

The *Lovasco* opinion can also be criticized because in examining the practicality of the two prong formulation in determining whether pre-indictment or pre-arrest delay should warrant dismissal of an indictment, the question arises as to whether the two phases of the test are distinct enough, so as to be treated as separate entities. Under the *Marion* formulation, it is very difficult to imagine a situation in which an accused can successfully demonstrate that the delay was caused by the Government in order to gain a tactical advantage, and yet fail to prove prejudice. By the very nature of the proof necessary to demonstrate the former, the latter would be proven. Nevertheless, the converse of this, as illustrated by *Lovasco*, is not true. Thus, a defendant, by establishing prejudice, will not prove the proposition that the Government engaged in the delay for tactical purposes. Expanding this reasoning to its logical conclusion would warrant the determination

[70] *Id.* at 1299.
[71] *Id.*
[72] 97 S. Ct. at 2047.
[73] *Id.* at 2051–52.
[74] Moreover, for the view that forcing a prosecutor to turn over records to the accused will have a chilling effect as to what evidence is ultimately recorded on paper, see United States v. United States Gypsum Company, 383 F. Supp. 462 (W.D. Pa. 1974).
[75] 97 S. Ct. 2053 (Stevens, J., dissenting).
[76] 97 S. Ct. at 2051. *See* Berenyi v. Immigration Director, 385 U.S. 630, 635 (1967).
[77] 97 S. Ct at 2054 (Stevens, J., dissenting).

that the two prong conjunctive test is unnecessary and that only the tactics the Government engaged in should be considered.

Nevertheless, if one interprets *Lovasco* as extending the *Marion* formulation by examining the reasons for the delay, then the argument can be presented that the two prong test is necessary. Under such an approach, considerations which have little or no bearing on prejudice may be determinative of a valid claim under the second part of the test.

It is also interesting to note that prejudice and reasons for the delay, the two aspects of a fifth amendment due process claim, represent two of the four requirements the Court has set forth in examining a sixth amendment claim. In *Barker v. Wingo*,[78] the Court was presented with a sixth amendment speedy trial claim based upon a five year delay between arrest and trial. In determination of the claim, the Court identified four factors which should be assessed in determining whether a defendant has a valid sixth amendment claim. These factors are: (1) length of delay, (2) the reasons for the delay, (3) the defendant's assertion of the right and (4) prejudice to the defendant.[79]

Contrasting the *Barker* formulation with the two prong test of *Marion* and *Lovasco*, it appears that the courts will give the sixth amendment test a more liberal construction since they can take into account more factors and considerations than under the fifth amendment due process test. For example, the *Barker* Court mentions delay caused by the negligent action of the prosecutor under the second factor.[80] It is still debatable though, whether negligence would have any relevance under the fifth amendment test.[81] The Court in *Barker* also states that:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.[82]

Hence, rather than requiring a conjunctive test such as in *Marion* and *Lovasco*, the *Barker* Court has taken the approach of encompassing the totality of circumstances in its determination. Whether such an approach should be followed for fifth amendment claims also is open to serious debate. Such an approach was used in *United States v. Mays*,[83] a pre-*Lovasco* case. The Ninth Circuit rejected both the conjunctive and disjunctive two prong test and used an approach that balances three different factors in reaching its determination. With the exception of the defendant's assertion of his right to a speedy trial, the factors are identical to those espoused in *Barker*.[84] In *Mays*, the defendant was indicted four and one half years after the offense of misappropriated bank funds. The court, in reversing the trial court's dismissal of the indictment, found that the accused failed to adequately prove prejudice by merely stating that potential witnesses became unavailable.[85]

Although it is not clear whether the court in *Mays* actually reached its decision by balancing the factors it listed, it nevertheless represents an alternative fifth amendment approach to the *Marion, Lovasco* formulation. Part of the problem in determining how the court in *Mays* reached its decision stems from the notion that the two prong test may actually encompass a balancing test similar to the one espoused in *Barker*. As already noted,[86] for the accused to prove prejudice, it is a very onerous task. Courts, though not expressly admitting that they have weighed various factors in their de-

[78] 407 U.S. 514 (1972).
[79] *Id.* at 530.
[80] *Id.* at 531.
[81] See notes 64 & 68, *supra*, and accompanying text.
[82] 404 U.S. at 533 (1972).
[83] 549 F.2d 670 (9th Cir. 1977). See note 17, *supra*.
[84] 549 F.2d at 677. With respect to the right to a speedy trial, during the pre-arrest, pre-indictment stage it is apparent that the defendant's assertion of his right to a speedy trial is irrelevant. The accused at this time may not even know he is the focus of an investigation and even if he is aware of such proceedings, an indictment or arrest warrant may never be issued. Thus, at this point in time, any assertion of the right to a speedy trial will be too premature and speculative to have any meaning.
[85] In a strong dissent to the opinion, Judge Ely stated that prejudice based upon missing witnesses relates to the materiality of their connection to the offense charged but "the burden of summoning affadavits from buried bodies or dimmed minds will be insurmountable." *Id.* at 682 (Ely, J., dissenting).
[86] See text accompanying notes 44–63.

termination of prejudice, are sometimes inclined to look at the length of the delay and the reasons for the delay in their overall assessment.[87]

Another aspect of *Lovasco* which the Court has failed to deal with adequately concerns Rule 48(b) of the Federal Rules of Criminal Procedure,[88] which allows for dismissal of an indictment if there is unnecessary delay surrounding the proceedings. In *United States v. Marion,* the Court held that Rule 48(b) is "clearly limited to post-arrest situations."[89] While not addressing directly the issue of when the rule attaches, a district court in *United States v. Navarre*[90] shed some light on the test for applying the rule by distinguishing between a motion to dismiss based upon a constitutional right and one grounded upon a rule:

> Dismissal based upon a constitutional right requires stricter proof than dismissal based on nonconstitutional grounds under a Rule. In order for the Court to dismiss for failure to grant a speedy trial under the Sixth Amendment, defendant must prove the following: (1) length of delay: (2) reason for delay: (3) prejudice to defendant; and (4) no waiver by defendant . . . For dismissal on a non-constitutional ground under Rule 48(b), the only factor which the defendant must prove is that the delay was unnecessary.[91]

Focusing on this difference of the standard of proof between a rule and a constitutional guarantee, it is apparent that some determination is necessary in order to establish guidelines regarding when the courts should apply either in relation to a speedy trial claim. If the Court in *Marion* is correct that Rule 48(b) does not become applicable until a post-arrest situation, then clearly the sixth amendment speedy trial provision would also be applicable to the post-arrest period, and the courts will face the dilemma of deciding via which route to judge a speedy trial claim.

To rectify this potential area of confusion, two explanations are possible as to why both Rule 48(b) and the sixth amendment speedy trial provision are concurrently applicable with different standards of proof. First of all, it is possible that the *Navarre* court is in error when it distinguished between a rule and a constitutional amendment.[92] This however, is highly unlikely in view of the history of the rule. According to Moore's Federal Practice:

> Rule 48(b) is a codification of the inherent power of a court to dismiss a case for want of prosecution. The Rule also implements the right of an accused to a speedy trial under the sixth amendment. But it is not entirely coextensive with that right. While most dismissals for delay in prosecution are grounded on the constitutional provision, Rule 48(b) serves a somewhat broader purpose and these are instances of dismissal involving no denial of constitutional rights.[93]

The second explanation, and the more plausible one, questions the validity of the *Marion* Court's determination that Rule 48(b) attaches only in a post-arrest situation. Perhaps prior to arrest and indictment, and before the sixth amendment right to a speedy trial attaches, Rule 48(b) of the Federal Rules of Criminal Procedure should govern the determination of a speedy trial violation rather than the fifth amendment due process clause. Under Rule 48(b), with its less stringent burden of proof requirements, a potential defendant would have a more realistic opportunity to validate a speedy trial claim than under the stricter due process grounds. It must be remembered, that under *Lovasco's* two prong test, the requisite amount of proof necessary to establish a due process claim is extremely high. This difficulty is increased when one considers that a future defendant may not even be aware of the initial delay in the proceedings against him, and as a consequence, fails to keep an account or record of material events or witnesses which may eventually prove the prejudicial effect of the delay.

[87] See note 50 *supra.*

[88] See note 9 *supra.*

[89] 404 U.S. at 319. *See also* Nickens v. United States, 323 F.2d 808 (D.C. Cir. 1963), Harlow v. United States, 301 F.2d 361 (5th Cir. 1962), United States v. DeTienne 468 F.2d 151 (7th Cir. 1971), *cert. denied,* 410 U.S. 911 (1973).

[90] 310 F. Supp. 521 (E.D. La. 1969). In *Navarre,* the defendant was arrested on November 2, 1967 and indicted on January 1, 1969 for an offense alleged to have occurred October 31, 1967.

[91] *Id.* at 522. *See also* United States v. McKee, 332 F. Supp. 823 (D. Wyo. 1971).

[92] *But see* United States v. Ward, 240 F. Supp. 659 (W. D. Wis. 1965) ("Rule 48(b) is merely a contemporary enunciation of the Constitutional right to a speedy trial.") (quoting United States v. Palermo, 27 F.R.D. 393 (1961)).

[93] 8B MOORE'S FED PRACTICE § 48.03.

In order to eliminate some of the confusion in the courts regarding the application of the fifth amendment, perhaps what is required is an extension of the Speedy Trials Act of 1974[94] to the pre-arrest and pre-indictment stage. The Act, which at present only pertains to the post-arrest or post-indictment stage of a prosecution, sets forth various time limits in which an accused must be brought to trial. By extending the Act to include the pre-indictment, pre-arrest stage, the legislature would be enacting the much needed guidelines for the courts to follow in making a determination of just how much delay is tolerable in the investigative period. Furthermore, the guidelines would be a more realistic determination than the statute of limitations which some courts had adhered to as their guide before *Marion*.[95]

In formulating such guidelines, under the Speedy Trials Act, a balance must be struck between societal interests, which the Court has intently focused upon, and individual rights, which it has appeared to ignore. This is, of course, much easier said than done. One suggestion may be that the burden of proof required should be determined as inversely related to the length of time of the delay, due to the increasing presumption of prejudice as time elapses. Thus, for example, during the first six months of an investigation, the strict due process conjunctive test could be applied, but after the six months, a more lenient test, such as Rule 48(b), would be applicable. If the legislature would enact such legislation for each of the various crime categories, *e.g.* felony or misdeameanor, then the courts would at least be able to establish some uniformity in their determinations.

In his dissent in *United States v. Lovasco*,[96] Mr. Justice Stevens indicated that the majority's opinion concerning the pre-arrest, preindictment period, as applied to the constitutional right to a speedy trial, would have the effect of undermining the Speedy Trials Act of 1974. While Congress never intended that the Act should apply to the pre-indictment, pre-arrest stage of an investigation,[97] Stevens' point is well founded. Once a prosecutor files an indictment or has an individual arrested, under the Speedy Trials Act, that individual must be brought to trial within a certain period of time. With this in mind, a prosecutor may deliberately delay indictment or arrest in order to toll the time limit imposed via the Speedy Trials Act. The only recourse, available to an individual in this situation, would then be the stringent two prong test required under *Lovasco*. Hence, the Speedy Trials Act has and will create[98] increasing pressure for the courts to deal with pre-indictment and pre-arrest delay. Without the appropriate guidelines available, the courts will continue to face enormous discontinuity and confusion in attempting to interpret and apply the relevant law.

The Supreme Court granted certiorari in *United States v. Lovasco* to consider the various circumstances in a pre-arrest, pre-indictment situation that would require dismissal of an indictment due to delay.[99] The Court purported to clear up some of the confusion concerning the due process standards evolved in *Marion* by making it clear that a two part conjunctive test is required under the fifth amendment. The Court, however, has sidestepped the issues of what each of these prongs of the test entails and to whom, and to what extent, the burdens of proof falls. The Court has also, by not explicitly reviewing each aspect of the test, left some doubt as to the future of *Marion's* standards of prejudice and the intentional tactics engaged in by the government.

With the implementation of the Speedy Trials Act of 1974, additional pressure will be brought upon the courts to make determinations regarding prolonged delay during the investigative period. Without appropriate guidelines to aid in this determination, the outlook for uniformity and consistency within the courts appears bleak. For now, the courts must attempt to interpret the two part conjunctive test of *Lovasco,* requiring a showing of prejudice to the accused and a consideration of the reasons for the delay.

[94] 18 U.S.C. § 3161 (1975 amend.). The Act sets forth various time limits between arrest, indictment and trial.

[95] See notes 58 & 59 *supra* and accompanying text.

[96] 97 S. Ct. at 2054 (Stevens, J., dissenting).

[97] 120 CONG. REC. 41618 (1974).

[98] 18 U.S.C. §§ 3163, 3164.

[99] 97 S. Ct. at 2046.