ORIGINAL

In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Appellant,

v.

WILLIAM R. MARION AND
SAMUEL C. CRATCH,

Appellees.

No. 70-19

Washington, D. C.
November 8, 1971

Pages 1 thru 46

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Appellant,	:	
v.	:	No. 70-19
WILLIAM R. MARION and SAMUEL C. CRATCH, Appellees.	:	

Washington, D. C.,

Monday, November 8, 1971.

The above-entitled matter came on for argument at 11:06 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

R. KENT GREENAWALT, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, for the Appellant.

THOMAS PENFIELD JACKSON, ESQ., 1828 L Street, N.W., Washington, D. C. 20036, for Appellee Marion.

BENJAMIN WRIGHT COTTEN, ESQ., 1314 Nineteenth Street, N.W., Washington, D.C. 20036, for Appellee Cratch.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 19, United States against Marion and Cratch.

Mr. Greenawalt, you may proceed whenever you're ready.

ORAL ARGUMENT OF R. KENT GREENAWALT, ESQ.,

ON BEHALF OF THE APPELLANT

MR. GREENAWALT: Mr. Chief Justice, and may it please the Court:

This case is on direct appeal from an order of the United States District Court for the District of Columbia, dismissing an indictment on the ground that the government had failed to afford a speedy trial.

The government appealed directly to this Court pursuant to the old Criminal Appeals Act, 18 U.S.C. Section 3731, under the provision that permits an appeal from a decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

Appellees were indicted on April 21st, 1970, on 19 counts of mail fraud, wire fraud, and transportation of falsely made or altered securities. The indictment charges that appellees, in operating a home improvement company called Allied Enterprises, defrauded homeowners in various respects, including persuading them to sign deeds of trust on their homes and promissory notes, by falsely concealing the nature of these documents from the homeowners.

The indictment charges that the fraudulent scheme continued until February 1967, but the last particular act mentioned in the indictment occurred on January 19, 1966.

After the indictment appellee Marion made a motion to dismiss the indictment for failure to afford a speedy trial, which is set out on pages 12 through 14 of the Appendix, claiming that the failure to indict sooner constituted a violation of his rights under the Fifth and Sixth Amendments.

On June 8th, 1970, Judge Hart considered the motion to dismiss. It developed in these proceedings that in Feburary 1967 the Federal Trade Commission had issued a cease and desist order against Allied Enterprises and Marion, and that, in a series of articles in late September and early October 1967, the Washington Post had written about the activities of approximately a dozen home improvement companies which the articles claimed were defrauding the public, particularly in ghetto areas.

The activities of Allied Enterprieses were described in one of these series of articles. The articles also indicated that the United States Attorney was generally aware of the abuses that it reported, and that he planned an investigation. The articles did not indicate that an investigation or the bringing of criminal charges was planned in respect to any specific company or individuals.

Either in the summer of 1968, according to Mr. Marion,

or early in 1969, according to the Assistant U. S. Attorney, the records of Allied Enterprises were turned over by Marion to the U. S. Attorney's office.

At the proceedings before Judge Hart, Mr. Jackson, representing Marion, argued that given the public knowledge of the activities of Allied Enterprises, the failure to return an indictment until more than four years after the last noted event, and more than two and a half years after the articles, violated Marion's rights to a speedy trial under the Sixth Amendment.

Mr. Frankel, the Assistant U. S. Attorney, stated the government's position that the motion should be dismissed in the absence of a showing of prejudice. He indicated that so far as he knew, the reason the indictment had not been returned sooner was understaffing and a heavy caseload.

Judge Hart did not write an opinion. He indicated in an oral statement, which is set out at page 39 of the Appendix, that in the absence of a justifiable reason for the delay, from 1967, and the likely prejudiced clause, there was a lack of speedy prosecution, and he granted the motion to dismiss.

Appellees did not allege, and Judge Hart did not find, any specific prejudice to appellees, such as the death of a key witness or the destruction of particular documents. Judge Hart stated that "The ability to remember, to build up

in one's recollection, to produce the necessary defense is bound to have been seriously prejudiced by the delay.

This case presented the question whether in this kind of complex fraud prosecution a defendant's rights to a speedy trial or due process are violated, per se, by a lapse of two and a half years between the time it is assumed that the prosecutor's office has knowledge of complaints that might conceivably lead to a criminal prosecution, a lapse of two and a half years between that time and the return of the indictment.

I say that the case poses the question whether a lapse is, per se, a denial of constitutional right because there is no showing on this record that defendants suffered any particular prejudice or that the government acted purposely, arbitrarily, or even negligently, in not bringing the case before the grand jury sooner.

We believe that there is not, nor should there be, such a per se rule. Lapses in time between offense and formal accusation are, as this Court said in United States vs. Ewell, governed primarily by the statute of limitations. A potential defendant is further protected by the rule that guilt must be proved beyond a reasonable doubt, a heavy burden on the government that will ordinarily become greater as the time between offense and trial increases.

I shall argue that the Sixth Amendment does not apply before any formal accusatory action is taken by the government.

That the due process clause may reach certain exceptional circumstances in which time has elapsed before formal accusation; but that due process is not denied unless there is substantial and special prejudice to potential defendant and serious misconduct by the government.

That neither substantial prejudice nor serious misconduct have been alleged here, much less shown; and that, therefore, the judgment should be reversed and the indictment reinstated.

Q Mr. Greenawalt, there is a general five-year statute of limitations, isn't there?

MR. GREENAWALT: Yes. Yes, Your Honor.

Q And that was --

MR. GREENAWALT: That was applicable.

Q That general statute was applicable in this case?

MR. GREENAWALT: Yes.

Q Didn't it used to be three years?

MR. GREENAWALT: Yes. I think originally it was two years and then it was made three years and then made five years.

Q How long ago was it made five years, do you know?

MR. GREENAWALT: I don't -- I don't recall, Your Honor. I believe that is in the brief, but --

Q Yes. And then there are some special statutes of limitation --

MR. GREENAWALT: Yes.

Q -- for some criminal, federal criminal offenses?

MR. GREENAWALT: Yes. I think the -- some many facts apply to the statute of limitations.

Q And I think in homicide there is no statute of limitations?

MR. GREENAWALT: That's correct. For homicide and, I think, treason is another where there is -- some tax offenses, the statute of limitations is six years.

Q That's fraud.

Q Well, that's a side point.

MR. GREENAWALT: There is a preliminary question of appealability in this case. I believe our Reply Brief and the original brief indicate clearly why appellees' motion before Judge Hart was a motion in bar within the meaning of Section 3731, and I do not plan to discuss that point further.

Appellees suggested the constitutional questions need not be reached here, because Judge Hart made a discretionary ruling under Rule 48(b) of the Federal Rules of Criminal Procedure.

Again, I think the record and briefs indicate clearly that the rule was not and could not have been the source of his dismissal, and so I move now to the constitutional issues.

In our view, the Sixth Amendment does not apply until the government has taken some formal accusatory action against

a potential defendant. In terms, it states that the accused -- the accused -- shall enjoy the right to a speedy and public trial. It does not relate to the speed with which one is made an accused.

Appellees suggest that the time one becomes an accused should be moved back, for speedy trial purposes, to some point before formal action, such as when the government focuses on a potential defendant, or has sufficient evidence to indict. Such an interpretation is unwarranted by language or history or any prior decisions of this Court, and it would be most unwise for reasons like those which persuaded the Court to refuse to draw a similar line in Hoffa vs. United States.

There are many reasons why a prosecutor may decide not to prosecute. Perhaps in the typical instance, it's known that a crime has been committed, but the prosecutor thinks he does not have enough evidence to achieve a conviction against a particular potential defendant. But there are many other reasons for not going forward, especially in this kind of complex prosecution for fraud.

Not all frauds are criminal, and the prosecutor may doubt if the scheme involved falls on the criminal side of the line, or that he can establish to a jury that it falls on the criminal side of the line. Or he may doubt, even though he's quite certain he could get a conviction, whether the damage done to the public is great enough to justify using an

available criminal sanction. Or if there is a State offense, he may wait to see if a State prosecution is going to go forward.

If he is sure that some company representatives have participated in a fraud, he may be unsure which officials of the company are in fact culpable and which he can prove to be culpable to the jury's satisfaction.

Putting this all together, the prosecutor's decision whether to prosecute a particular person may not be made until an investigation has progressed far beyond the point of focus or sufficient evidence to indict.

We do not believe that a court can reconstruct, in retrospect, when either of those points is reached. And even if it could, it would not make sense to require an indictment soon after either of those points has been reached and before an investigation has been completed.

Suppose, for example, that in this kind of case probable cause exists on the basis of consumer complaints and documentary evidence? That the United States Attorney judges that a conviction cannot be obtained unless there is an inside witness who is willing to testify to the fraudulent plan as a whole, and can also testify to conversations that have taken place in --

Q Mr. Greenawalt.

MR. GREENAWALT: Yes, Your Honor?

Q I hate to interrupt you, but was any of this

before Judge Hart?

Any of this argument?

MR. GREENAWALT: I --

Q As I read it, all the -- I hate to use the word "defense", but the only explanation the government gave was that they were understaffed.

MR. GREENAWALT: That is correct, Mr. Justice Marshall.

Q So he didn't have the benefit of any of this?

MR. GREENAWALT: Let me make two points in response to that, Mr. Justice Marshall.

First, the argument I am making now is not an argument about this particular case, but an argument as to whether, in general, the Sixth Amendment should be read to say that a speedy trial -- that one becomes an accused, for speedy trial purposes, at some point before formal accusatory action is made by the government.

And so what I am making now is a general argument about the Sixth Amendment.

In terms of this particular case, I think there are two facts that -- in terms of the sparse record before Judge Hart. One is that Mr. Frankel, who argued before Judge Hart in these proceedings, was not a member of the U. S. Attorney's Office at the time most of this took place, and he frankly admitted that he did not know what had happened in terms of this

particular investigation, but that he had been told that there was understaffing and a very heavy caseload.

The second point is that the government took the position, I think quite justifiably, on the basis of any decisions of this Court and of the great majority of other federal courts, took the position that unless there was some specific prejudice, appellees here had not even alleged something that would rise either to a violation of the Sixth Amendment or to the Fifth Amendment, and so he relied primarily on that failure to show any specific prejudice in arguing before Judge Hart.

So I think that he did not think it was relevant what -- assuming that there was not a purposeful delay -- what the reasons for delay were. And I think that's part of the explanation why that's not more fully developed in those proceedings.

Q May I ask, Mr. Greenawalt, is the government going so far as to suggest that if formal action is taken before the statute of limitations runs out, that then there cannot be a violation of the Sixth Amendment?

MR. GREENAWALT: Yes. Yes. It would be a question of defining what "formal accusatory action" meant.

Q Well, let's assume it were either information or indictment, and it's a five-year statute, is the government suggesting that if an indictment or an information is brought

down on the day before the statute runs out, that that -- there can then be no basis for a claim of Sixth Amendment violation?

MR. GREENAWALT: No, we concede that the Sixth Amendment is applicable to some formal accusation before an indictment, such as a complaint -- an arrest followed by incarceration, we --

Q Well, what I am trying to get to is --

MR. GREENAWALT: Yes, yes.

Q -- taken at all --

MR. GREENAWALT: Until the indictment --

Q -- the day before the statute runs out.

MR. GREENAWALT: Yes. Yes, that is our contention, that the Sixth Amendment has no application.

Q But conceding that there may be a Fifth Amendment?

MR. GREENAWALT: Yes. We do believe the due process clause covers --

Q And this depending, however, on the showing of prejudice?

MR. GREENAWALT: Yes, Your Honor.

Q Only on that basis.

MR. GREENAWALT: But our contention is that in most kinds of cases, what must be shown is both specific prejudice and serious government misconduct.

Now, I think it's a little more complicated, in the

sense that if the government's conduct is really gross, then perhaps the showing of prejudice might not have to be so great; if the showing of prejudice is tremendously great, it might even be conceivable that no matter how good the government's explanation, a prosecution couldn't go forward.

Q But this, in any event, would be exclusively a due process basis.

MR. GREENAWALT: Yes, Your Honor.

Q Not a Sixth Amendment basis.

MR. GREENAWALT: Yes, Your Honor.

Q I suppose you're going to get to that?

MR. GREENAWALT: I am, yes, Mr. Justice White.

To return very briefly to the example that I was suggesting, which is that probable cause exists, but the prosecutor doesn't think he can successfully prosecute without an inside witness.

Then, let's suppose, two years later, but within the statute of limitations, an inside witness is willing to testify. Is prosecution to be barred simply because probable cause existed two years earlier? We do not believe there is any good reason to distinguish cases in which the prosecution has little or no evidence from those in which there is probable cause but insufficient evidence to convict, and on which the prosecutor will decide not to go forward.

If indictments are brought whenever probable cause

exists, the result would be a great waste of resources in the criminal process, and, more important, very serious misfortune to those persons who were indicted but never tried and convicted, because the government indicts, because it realizes that it's reached the probable cause stage, and then decides it doesn't have enough evidence to convict and dismisses the case.

Well, that's a serious misfortune to the fellow that's indicted.

Mr. Justice Brennan's concurring opinion in Dickey vs. Florida suggested a somewhat different point; that is, the possibility that one might become an accused "after the government decides to prosecute him and has sufficient evidence for arrest and indictment."

It's our position that that point also is too difficult to determine, since a tentative decision to prosecute is typically subject to change, particularly in this kind of case, as an investigation unfolds.

If that is thought to be the standard, however, there is no reason to suppose on this record that a decision was made to prosecute these appellees until the case was -- shortly before the case was brought to the grand jury. And thus on this record, even applying that suggested standard, there is no reason to think that the Sixth Amendment is implicated in this case.

I turn now to the due process clause.

It is our position that, barring extraordinary circumstances, the statute of limitations sets the time limit in which the government can act against a potential defendant.

We do, however, believe that in certain exceptional circumstances, the due process clause may bar a conviction. For example, if the government purposely delays so that an ill witness, known to be favorable to the defendant, has a chance to die; and that that witness -- the lack of that witness is prejudicial, we would believe that that would appropriately constitute a denial of due process.

But absolutely precluding conviction for an offense is a drastic remedy, much more drastic than is involved in the implementation of most other constitutional rights, and we think it should be invoked only in such exceptional circumstances.

Any lapse in time between offense and trial may affect the trial to some extent. The defendant's primary protections, as the court has indicated and as I have stated earlier, are in the statute of limitations and the reasonable doubt requirement.

It's not contended by appellees in this case that if the government had simply remained ignorant of its activities, that the trial that might be afforded would be a denial of due process. Nor do they contend that they suffered any greater prejudice than would defendants in a similar

situation, where the government had remained ignorant for three years after the offense had taken place.

Indeed, the possibility of prejudice here is a good bit less.

Essentially their claim comes down to this: because the government had awareness of some complaints and was involved in cases of higher priority, we're denied due process, even though, if the government had been totally ignorant of what we were doing, we wouldn't be denied due process.

We do not believe that the right to fair trial turns on such a distinction. Only if the delay is oppressive and purposeful and causes specific prejudice should due process be held to bar an indictment within the statute of limitations.

We further think that if the due process clause is read to entail nice distinctions of time, subtle degrees of prejudice, and the reasonableness of the prosecutor's ordering of priorities in this area, the courts will be involved in time-consuming collateral proceedings, which will help to defeat the over-all object rather than help it, of an expeditious determination of guilt or innocence.

Turning now to the showing in this case, appellees have made no persuasive showing of prejudice. Here, as in Ewell, their claim is insubstantial, speculative, and premature. They have not suffered from the incarceration and the anxiety and concern that formal accusation may bring.

The government's case, it has said, is based in large part on documents. As to these, a lapse in time is irrelevant.

Insofar as testimony may concern specific conversations between salesman of the company and homeowners, it's highly unlikely that the salesmen who have many transactions each day would remember specific conversation months or even weeks after the conversation. What company officials would recall would be their normal mode of business operation, and there is no reason to suppose that that has been forgotten here, especially since appellees have had abundant notice that there operations were subject to attack, first through the FTC inquiry, then through the newspaper articles, then through a series of civil complaints, and finally through turning over their records to the United States Attorney.

It is incredible to suppose that they have not carefully considered and reconsidered how they carried on their business. Moreover, they're free to call any of the homeowner clients they've had who do not think they've been defrauded.

It is even possible that there won't be a substantial discrepancy as to the crucial facts if this case goes to trial, since Mr. Jackson indicated, on pages 28 through 29 of the Appendix, that, at least about many of the basic operations of the company, there is not a dispute as to the facts.

If appellees have suffered prejudice, that can be demonstrated at their trial, and in the very small number of

cases in which convictions have been overturned because of a lapse in time before arrest or indictment, the court has made that determination with the record of trial in front of it, such as in the Ross case.

Secondly, appellees have not suggested, much less demonstrated, the kind of government delay which should be held to be unjustifiable. We have to suppose, on the basis of this sparse record, that the limited staff was initially focusing on complaints deemed a greater social -- concerning companies deemed a greater social danger. And that later considerable time was spent in developing this complex case.

Fraud cases of this kind, and a number of the courts of appeals have recognized this, are notoriously difficult and time-consuming to develop. A court simply is not in the position of assessing whether an ordering of priorities is desirable. Unless there is some special reason to suppose that this ordering is being performed in an arbitrary way, the court should not consider preindictment lapse caused by limited resources to be a form of unjustifiable delay.

If this position is rejected, and an examination is to be made of the ordering of priorities, which we do not think is necessary, then surely it should be done in a full hearing, which will allow development in this case of the facts concerning possible prejudice and the government's ordering of priorities.

But it is essentially our position that the allegations here do not even make out a claim of constitutional violation, and we thus contend that the case -- the judgment should be reversed, and the case should be remanded so that the indictment may be reinstated.

Mr. Chief Justice, I'd like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, you'll have about six minutes, I think.

Mr. Jackson.

ORAL ARGUMENT OF THOMAS PENFIELD JACKSON, ESQ.,

ON BEHALF OF THE APPELLEES

MR. JACKSON: Mr. Chief Justice, and may it please the Court:

On June 8th, 1970, District Judge George Hart dismissed the indictment of Marion and Cratch, using his words, "for lack of speedy prosecution in this case". That formula of words can either be a paraphrase of the Sixth Amendment requirement of a speedy trial, it could be an exercise of the inherent discretionary power of the court to dismiss for want of prosecution, or it could conceivably have been an exercise of power conferred expressly upon the court by Rule 48(b) conferring power upon the district judge to dismiss for unnecessary delay in presenting the charge to the grand jury.

With the exception of the jurisdictional issue, which

I do not intend to take any projected time with, the principal issue raised by this appeal underlies all of the various predicates, the possible predicates for Judge Hart's decision; which is, whether any significance whatsoever is to be given to the elapse of time between the commission of an alleged offense and the date on which the indictment is filed in determining whether an accused should be required to stand trial on criminal charges. Assuming, however, that there is technical compliance with the statute of limitations.

Briefly, it is the appellees' position that the filing of the indictment is really merely a ministerial formality which is exclusively, or virtually exclusively, within the control of the government, and the government should not be given unlimited and unsupervised use of the entire period of limitations to assemble its case, and then to indict only when it is, in effect, ready for immediate trial.

It is hardly necessary to emphasize the attention being paid to the problem of speedy trial today in this country, and rules and statutes are being formulated in a number of jurisdictions to provide that once the prosecution has been formally commenced by the filing of an indictment, then specific periods of time limitation should be followed, following the formal accusation by indictment.

And it is our position that there will be a frustration of those rules if the government can indulge itself during

the entire period of the five-year period of limitations, during which time it assembles its case, which is largely in secret, largely beyond the scrutiny of the defendant, and probably will remain beyond the scrutiny --

Q Mr. Jackson, you say the day after the crime has been discovered, and the government says five years after the crime is discovered; where do we come down?

MR. JACKSON: Our --

Q The defense says -- do you agree that there's no evidence here on one side or the other? The government doesn't explain its delay, and you don't show any injury. Is that right?

MR. JACKSON: That's correct. We have shown --

Q So we have just the fact of the date, that's all we have.

MR. JACKSON: Well, we submit, Your Honor, that --

Q You know, if we were settling a personal-injury case, it would come down to two and a half, wouldn't it?

MR. JACKSON: Yes, Your Honor, and we don't expect --

Q Well, we can't do that with the Constitution.

MR. JACKSON: We don't expect that that will be the result in this case, or should be the result.

The government contends that it was understaffed. In the 1960's the U. S. Attorney's Office didn't have sufficient staff to prosecute them, so there is this skeleton of an

explanation on the part of the government.

Q Well, we're not confined to that explanation if there are matters which we can judicially notice, are we? That's argument; that wasn't evidence.

MR. JACKSON: I think that is correct, Your Honor, but it is the only explanation that the government has offered throughout for its delay in bringing the prosecution in this case.

Q Well, we've had no trial, so there was no occasion to get into anything here except legal arguments.

MR. JACKSON: But the government didn't proffer or offer any explanation, other than what it said.

Q I don't read this record of the judge's action as inviting anybody to go into the facts. He cut off by saying the prejudice is bound to have occurred.

MR. JACKSON: I think he did --

Q That's hardly an invitation to pursue the inquiry.

MR. JACKSON: I think his conclusion was that he -- he, himself, took judicial notice, if you will, of the fact that there is an attrition of human memory over the lapse of period -- the lapse of time, particularly of one of the magnitude of which we're speaking here. And that he did not need any formal demonstration from the witness stand of actual prejudice.

He did certainly give the government an opportunity to explain why it had taken so long to do so, and the only explanation which was offered was that in argument by the Assistant U. S. Attorney who argued the case, who could have, had he had evidence of other reasons, presented that evidence at that time.

I don't believe that the record can be read as providing for an abrupt interruption by Judge Hart of Mr. Frankel. I think he extended him all the courtesy and the opportunity to make his case that he needed to do.

I don't see that the government has been denied an opportunity, and the government, of course, knew that the facts that we were representing to the court had been made in the motions papers and could have responded, had it wished to do so, with other facts of its own.

In 1965-1966, Mr. Marion was the proprietor of a business firm which sold home intercom systems to homeowners in the District, and without going into the business practices in any great detail, by the second week of December of the year 1966 the Federal Trade Commission at that time had reasonable grounds to believe that there had been a violation of the law and they proceeded against Mr. Marion.

Mr. Marion did not contest those proceedings, and by the first week of February 1967 the Federal Trade Commission issued a cease and desist order, and so all of the information

about the business practices, which the government has characterized as a complex fraud case, all of this information was in the possession of the government. Nothing else whatsoever occurred from February of 1967 until October of 1967, when the newspaper articles, coupled with editorials which vehemently demanded prosecution of the people that the newspaper articles thought were the culprits, exposed these business practices to public view, and actually branded them as fraudulent.

On October 4th, 1967, on the front page of his morning newspaper, Mr. Marion and the entire Washington, D. C., Metropolitan Area saw him publicly denounced as a cheat and a fraud.

Dealing with the question as to whether or not there is a showing of prejudice in this case, and I indicated to you, sir, in response to your question, that there is a showing of actual prejudice in that there is an attrition, or it can be assumed that there is an attrition of human memory, a lapse of human memory.

As a graphic illustration of that, at the same time these articles were appearing in the newspaper, the 1967 World Series was being played, and Judge Hart was asked to conceive of the difficulty of remembering the details of the 1967 World Series, which had occurred in 1967, not 1965 or 1966, as the events, the 23-month so-called business fraud, which the

government alleges in this indictment. And it is difficult, I think, for all of us to remember the details of events that far in the past.

Q On the other hand, I think if you had played in the World Series in 1967 you would remember the details pretty well.

MR. JACKSON: If, indeed, you had played in it. And there is no showing that Mr. Marion, yet, --

Q You are saying there is no evidence to believe he was involved in this.

MR. JACKSON: -- had played in this game. That is correct.

Q Except as decided by bystanders, or newspaper readers.

MR. JACKSON: Well, that remains to be seen, Your Honor, since the case has not been tried; so I do not know.

Q Well, the allegation is that your client is involved in these things, isn't it?

MR. JACKSON: It was that he was involved, yes. Whether or not he was involved in the so-called criminal activities is another matter.

Q Yes, it remains to be tried in court.

MR. JACKSON: These articles, however, were filled with ominous quotations attributed to the then United States Attorney, to the effect that a special fraud squad had been

set up, that the chief of that fraud squad had been relieved of all other duties, and was to be concentrating on this -- these cases thereafter, exclusively, and that he also indicated, or is quoted as having indicated that he expected indictments within two weeks.

But nothing happened within the next two weeks or the next two months, and it was not until, by Marion's recollection, the following summer that anything whatever occurred. The government remembers that it was winter a year when it occurred, and that was an informal inquiry from the Assistant United States Attorney in charge of the case to bring records and documents down to the office; that we do not know how voluminous these records were, or at least it does not appear of record how voluminous they were, but it can be inferred from the record that they were of no greater quantity than to have required one trip by one man to take them to the Assistant United States Attorney's Office, which he did. And he conferred with Mr. Glanzer, the Assistant United States Attorney in charge of this matter, and he did so at some length.

Again, nothing happened. An entire year passed, and more, and finally, in March of 1970, Mr. Marion learned that --

Q As of that time, had he been indicted then?

MR. JACKSON: Your Honor, our position is that it is a rule or ought to be a rule of reason, the question is when did the government objectively have notice that a crime

had been committed by the one they intended to bring to trial for it. And once that rule of reason is applied, which cannot be any hard-and-fast rule, --

Q What's your rule when it's a conspiracy?

MR. JACKSON: I'm sorry, Your Honor, I didn't understand the question.

Q There's a possibility of eight people conspiring, you zoom in on one, you don't know the other seven; you've got to indict that one right then and there?

MR. JACKSON: I do not think so, Your Honor. I think again that would be one of the factors to be considered on when the government ought to proceed for an indictment.

Q Do you think that on every indictment now, you are going to expect the court to find out whether it should have been handed up in June instead of August?

MR. JACKSON: No, Your Honor. I think in the vast run of cases --

Q Well, what is your --

MR. JACKSON: -- it will not occur.

Q -- this is the third time; I'm still trying to get what is your rule?

MR. JACKSON: Our rule --

Q That you're asking us to assert.

MR. JACKSON: The rule that we believe ought to be applied is one as to -- one of notice, simple notice to the

government, consistent with all of the various factors which bear upon the rapidity with which a case ought to be brought to prosecution.

Q The Federal Trade Commission didn't give you notice?

MR. JACKSON: It did give the defendant notice.

Q It gave you cease and desist notice.

MR. JACKSON: Our position is that it is the notice to the government. When does the government objectively know --

Q Well, couldn't the government assume that you had ceased and desisted?

MR. JACKSON: I'm sure that it could assume --

Q I hate to use that language.

MR. JACKSON: -- that it had ceased and desisted, yes, Your Honor. And that was the -- that, in fact, was the case. They did cease and desist, as of February 1967.

Q So they didn't have to indict then, did they?

MR. JACKSON: I don't believe so, Your Honor.

Q Well, when?

MR. JACKSON: Within a reasonable time thereafter.

Q What time?

MR. JACKSON: Again, it would be consistent with all the facts of this case. Did the government have -- was there a fugitive defendant, for example? Was there a -- well, did they have to develop evidence of a conspiracy? Were there other

problems involved? Was there an undercover agent, or some inside witness, as Mr. Greenawalt has referred to, who --

Q Well, I assume that you said to the district court, to Judge Hart, that two and a half years is, per se, too long. Period. Isn't that what you said?

MR. JACKSON: No, Your Honor, we said, given the circumstances of this case, for a period of nearly four years -- well, as a matter of fact, more than four years from the last date charged in the indictment -- was unreasonable and oppressive, and that it was a violation of his Fifth and Sixth Amendment rights, to bring him to trial at this time.

Q Per se, I mean, per se.

MR. JACKSON: Per se, except to the extent that prejudice may be inferred or presumed from the lapse of time in the attrition of his memory, his ability to respond to these stale charges.

Q So now, if that rule is applied, then anybody that is indicted four years after the crime automatically files a motion and is dismissed?

MR. JACKSON: I do not believe so, Your Honor. I think it would -- again it would require a determination as to the reasonableness under all circumstances.

Q Well, in all mail fraud cases?

MR. JACKSON: Again, not in all mail fraud cases. Again, a rule of reason, a question as to whether or not there

were reasons for the government's not going forward at that particular time.

Q You mean the burden is put on the government to show why it took four years?

MR. JACKSON: I think the burden ultimately would devolve upon the government to show why they had waited, after the defendant had assumed the burden of showing that the government had objective notice of the existence of the crime, and that it --

Q And that it was four and a half years after that. Period. That's all the defendant shows?

MR. JACKSON: In a case such as this, I would think so.

Q And if the government does nothing, then it's dismissed?

MR. JACKSON: If the government does not sustain its burden -- a burden of explaining why the delay was as extensive as it was, given those circumstances.

Q Have you got any case you can cite on that?

MR. JACKSON: Well, Your Honor, the -- perhaps the most recent exposition of the considerations involved is Mr. Justice Brennan's concurring opinion in the Dickey vs. Florida case, in which all of these considerations are explored. And it is not one which accommodates itself to a precise rule.

Q He said per se, automatically?

MR. JACKSON: No, Your Honor, I don't believe he said per se.

Q I don't think he did. As a matter of fact, I know he didn't.

MR. JACKSON: He did not say that it was a per se rule. But we're not contending for a per se rule, we're simply contending for a rule in which there is a rule of reason as to the time in which the government is to be obliged to go forward.

Q Well, isn't it true that in most stock fraud and other types of cases, and mail fraud cases, they barely get it in before the statute of limitations? It takes four and five years to do those cases.

MR. JACKSON: If the government had had a reason for delaying four years in this case, it could have been advanced before Judge Hart, and was not. The only explanation was that this was a case of low priority and they didn't have enough prosecutors to proceed with the case at that time.

Q Yes, but that's not the grounds he dismissed it; he dismissed it on the grounds that two and a half years was too long. That's what he said.

MR. JACKSON: He found that there was bound to have been an attrition --

Q Right.

MR. JACKSON: -- of the memory of the defendants in

this case.

Q Right. You want us to sustain that?

MR. JACKSON: Yes, Your Honor, I do.

Q Which means that next week all two-and-a-half-year indictments go out, as of now.

MR. JACKSON: Well, I don't know where the period of two and a half years derives, Your Honor. The last event charged in the indictment occurred in January 1966.

Q Well, all right; all four-and-a-half-year indictments go out. Do you want us to establish that rule?

MR. JACKSON: I do not believe that this requires a per se rule as to four-year delays. It is a rule of reason, based upon what Judge Hart, in effect, found; namely, that there had been a lapse of time which impaired the defendants' ability to defend, coupled with the fact that there was no satisfactory explanation by the government as to why it took that long to bring this case to trial.

Q On what evidence did Judge Hart make that finding?

MR. JACKSON: The finding as to the attrition of the individual's memory?

Q Yes.

MR. JACKSON: I think he presumed it.

Q Yes. So he had no evidence on --

MR. JACKSON: There was no testimony.

Q -- the subject at all, did he?

MR. JACKSON: He had no evidence, that's correct; no testimony as to actual prejudice.

But, Your Honor, insofar as we are talking about a constitutional right, we get into a great deal of difficulty in requiring a showing of prejudice as a condition to an assertion of the Sixth Amendment right, this particular Sixth Amendment right, because a number of others have not required a specific showing of prejudice before they can --

Q Mr. Jackson, is your argument, the rule of reason, is that predicated on the Sixth or the due process?

MR. JACKSON: Our argument here is predicated upon the Sixth Amendment. While there conceivably could be a due process argument based upon extreme circumstances, the criteria, which we're contending ought to be applied, is a criteria which is of a speedy trial nature. It involves all of the rights of the defendant, the difficulty of defending after a lengthy period between the time of the commission of the offense and it involves questions of public confidence in the integrity of the judicial process. It -- they are typical speedy trial criteria, and so it is not primarily a Fifth Amendment argument that we are making, Your Honor, it is one which is predicated upon an application of the Sixth Amendment to the preindictment period. The pre-formal accusatory period.

Either that or it is an interpretation of either Rule

48(b) of the Federal Rules of Criminal Procedure to permit that to be done, or an exercise of the inherent discretionary power.

In other words, to allow a district court to take into account the factors occurring, take into account the delay, the lapse of time between the alleged commission of the offense and the time at which a formal indictment is filed in some form, either as an exercise of discretion, as an exercise of Rule 48 power, or under the Sixth Amendment.

The government has argued that Rule 48(b) cannot -- has argued in its brief and not here today -- that Rule 48(b) cannot be construed in such a form to confer this power upon the district court to dismiss. That, however, is not a ruling, or is not a reading of that rule which is compelled by the rule itself. And, in fact, so to read it makes it considerably more a rule of substance than one of procedure.

Because the government contends that until an individual is held to answer in the district court, in effect, unnecessary delay in proceeding for an indictment is not within the consideration of the district court. The district court can only consider whether, unnecessary or not, delay which occurs after the formal accusatory stage has been reached, the indictment has been filed. And if there is impermissible delay prior to that time, then that is not within the consideration of the district court in determining whether or not to dismiss.

That does not seem to be a reading which is compelled by the language of Rule 48(b), and it would be entirely possible to read it in such a fashion, to allow the case to be decided on discretionary grounds without formally reaching the question of whether or not the Sixth Amendment applies to the preindictment period.

It is the government's position, as I understand Mr. Greenawalt, that the statute of limitations must be the exclusive determinant of the time within which the government is entitled to proceed.

Q You were discussing Dickey v. Florida a little bit earlier. And the facts in Dickey v. Florida as distinguished from the general legal discussion have no resemblance to this case, have they?

MR. JACKSON: No, they do not, Your Honor.

Q The reason for the delay by the State of Florida in that case was that the man was -- Dickey was in a federal prison, and it was pointed out in the Court's opinion that they could have reached him any time and brought him down for trial; but they just deliberately waited until he was released from -- to be released from the federal penitentiary.

MR. JACKSON: That is correct, Your Honor, although there are -- it was not too long prior to that, to Dickey vs. Florida, that there was substantial question as to whether or not there was an obligation on the State to request an

individual --

Q Well, all I am suggesting is that Dickey v. Florida, on its facts, doesn't have much to do with this case, does it?

MR. JACKSON: It -- the facts are clearly distinguishable; there's no question about that, Your Honor.

But that does not, nevertheless, mean that the Sixth Amendment cannot apply to the delay occurring between the commission of the offense and the time at which the man is formally accused of the crime.

Those -- this Court, as a matter of fact, in the Provo case, in affirming the decision of Judge Thompson in Provo, by affirming that appeared, at least, to approve his formulation by which he did take into account a significant delay between the time that the government knew or ought to have known of the facts of which Provo was accused, and the time at which they finally decided to proceed against him for indictment.

And that of course is not determinative of this case, because Provo is a unique case; it stands on its own facts, it probably will never be duplicated again. At least insofar as the duplication of the documentation of the prejudice that inhered in that particular case, and the formal recording of the reasons that the government had done the various things that it had done.

The government suggests that we ought to be obliged to make an actual showing of prejudice -- or an actual showing of oppressive or purposeful conduct, serious government misconduct. That is probably one that -- a burden of proof that a defendant will almost never be able to carry. It is extremely difficult today to determine, very often, the facts upon which the defense must be predicated. It would be almost impossible, and certainly not under the present state of the rules, to invade the province of the prosecutor's office, his memoranda, and actually the mental impressions of the prosecutor himself, to determine whether or not he had acted purposely or oppressively.

I do not think, for example, in the Dickey case, there was any showing of oppressive or purposeful conduct; there was simply inaction. No consideration of the motive of the prosecutor, other than simply an observation that he had failed to act during the period in time it was available to him to act.

This Court, in the Klopfer case, in 1967, stated that the right to a speedy trial was as fundamental as any of the Sixth Amendment rights, and traced its origin back to the early days of the Magna Carta. And in the case of Escobedo vs. Illinois, this Court held that the right to the assistance of counsel, which is a companion Sixth Amendment right, attached at an earlier stage than the formal filing of the indictment.

In other words, the language of the Sixth Amendment was not so restrictive as to permit the Court to look only to postindictment availability of counsel, but would look to the period preindictment when it became necessary that he be so protected, and did confer upon the defendant in that case the right to have counsel even though he had not yet been formally indicted.

That simply is the same rule that we ask that the Court apply in this instance; namely, that the Sixth Amendment right to a speedy trial, being one which is of great significance, as significant as any of the other Sixth Amendment rights, to be held to be applied in circumstances prior to the formal filing of the indictment.

We do not believe that the statute of limitations represents an adequate protection. The statute of limitations which was in effect from 1876 to 1954 was a three-year statute of limitations; in 1954 the statute of limitations was amended, what appears to us to be very perfunctorily at the request of the government, to obtain -- to provide more time to prosecute certain particular officials.

Q Is that what the -- what does that legislative history show?

MR. JACKSON: The legislative history shows --

Q Substantially what you've just said?

MR. JACKSON: Yes, Your Honor. It's cited in our

brief; it's in 100 Congressional Record, and it is -- consists primarily of the remarks of Senator Williams, who amended a House of Representatives bill to deny annuities to certain government employees who had been convicted of certain crimes. And a Section 10 amendment was added at his instance, to that bill, to expand the period of limitations from three to five years.

And it was apparently done at the urgent request of the Department of Justice, for more time to detect and prosecute these individuals.

There is no showing that Congress took into account -- that it conceived, of itself, as implementing the Sixth Amendment right to a speedy trial; there is no showing that Congress took into account the considerations bearing upon the -- the considerations favorable to the accused, namely, his anxiety, his difficulty in mounting a defense, in expanding that statute of limitations. And in the circumstances of this case, it appears to us that this is an ideal illustration of the difficulty of looking to the political process, namely, the Congress in its statute of limitations, to provide adequate protection for accused in criminal cases.

Q But we have to assume from that that this extension from three years to five years was thoughtlessly done without any concern for the realities.

MR. JACKSON: I don't suggest that it was thoughtlessly

done. I do not think that the Congress, at that time, conceived of itself as considering and implementing the rights of defendants or accused in criminal cases; that their primary concern was to provide the government with time to detect and prosecute criminals that the government thought that it had not had sufficient time to catch before.

That was the significance of the legislative history.

Q All of these rules that you're suggesting, such as the Second Circuit rule and recent actions in other areas, have had to do with bringing cases on for trial after indictment, have they not?

MR. JACKSON: That's correct, Your Honor. And our position --

Q None of those things reached the problem we're dealing with here?

MR. JACKSON: None of those cases -- none of those rules reached them; and in fact our position is that they will be frustrated, vitiated in effect, if the government has the entire five-year hiatus of the period of limitations, to do whatever it needs to do to prepare its case, and then, and only when it is ready to go to trial, it obtains the indictment and then announces immediately "we are ready for trial" against a defendant who have been, during a four-year period, unaware of who his accusers would be, what evidence would be offered to support those accusations, and how in the world he could under-

take to disprove the allegations that would be made against him.

Under those circumstances, a 60 or a 90-day night to a speedy trial is, if anything, a liability to him; it doesn't help him. It puts him in perhaps a much worse position than he would be if he had sufficient time to develop a case.

Thank you, Your Honor.

MR. JUSTICE BURGER: Thank you, Mr. Jackson.

We'll take you up in rebuttal after lunch, Mr. Greenawalt.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Greenawalt, you may continue. You have 7 minutes.

REBUTTAL ARGUMENT OF R. KENT GREENAWALT, ESQ.,

ON BEHALF OF THE APPELLANT

MR. GREENAWALT: Mr. Chief Justice, and may it please the Court:

I think, on the major issues, that the questioning of the Court has done a much more effective job than I could possibly do, to suggest that the reasons why the statute of limitations should be regarded, that an objective cutoff should be regarded as the primary block to prosecution at some time after the offense has taken place.

Also there were a few questions, Mr. Chief Justice, regarding the hearing before Judge Hart. It was not a hearing at which facts were developed; it was a hearing in which there was legal argument. And I think the way that Judge Hart handled the case did not suggest that any elaboration of the facts would be relevant to his determination.

I would like to mention just a few peripheral points.

First of all, in terms of the FTC cease and desist order of February 1967, I don't think we can assume that there is such communication between federal agencies that there's instantaneous knowledge by the prosecutor's office of every

cease and desist order of the Federal Trade Commission.

Moreover, this order was limited to a particular aspect of what is now claimed to be the fraudulent scheme of appellees, it was particularly related to the sales referral plan; and I think if one reads that order, which is Exhibit A in the record, although not in the Appendix, one would not necessarily suppose that there was a criminal violation.

Secondly, some of the questioning suggested that there was some objective knowledge of a crime here. I'd like to remind you again that one of the problems with a case like this is that there are consumer complaints and you simply don't know whether those constitute true, and if true would indicate criminal activity.

I wrote a letter to the U. S. Attorney in New York last year about some communications between a photographic studio and my wife. Now, would that be notice if the prosecutor wanted to indict the photographic studio three or four years later? If something appears in the local newspaper, is that notice? Is the Washington Post notice, because that's a more major newspaper?

Also, the Post articles, which are in the record, indicated that Mr. Marion -- attributed to Mr. Marion statements that indicated that he realized that his salesmen sometimes went beyond bounds, but his instructions to them were never to defraud anybody. So, if that were read at face value, it might

have been supposed that Mr. Marion, at least, was not involved in criminal activity.

Thirdly, it's our contention that apart from Rule 48(a) there is no inherent discretionary power to dismiss cases at this stage of the courts. We think that this falls within what has traditionally been considered to be within the prosecutor's discretion. And I note that Rule 48(b) was said to embody whatever common law powers there were to dismiss for want of prosecution, and that Rule 48(b) plainly does exclude this kind of circumstance.

There is a proposed change in the Rules that would give the courts broader power in this respect, but we do not believe the courts now have any broader powers, and thus we think the Court must face the constitutional issues that are posed; and also there is the fact that Judge Hart apparently did not rely on any discretionary powers.

Finally, in regard to one point that was suggested by the questioning of Mr. Jackson, we do think there are some situations in which the facts, the objective facts themselves may suggest purposeful delay; which you know, when the case was brought you know what witnesses are put on, and you just can't understand any reason why the prosecutor would not have gone forward sooner, unless he had some bad or arbitrary motive.

So that I don't think we're really thrust back in all circumstances on finding out what's going on in the

prosecutor's office. There may be cases which, very unlike this one, do suggest from the very objective facts that there is some kind of purposeful delay; and then the Court would, of course, appropriately inquire into that possibility.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Greenawalt. Thank you, Mr. Jackson.

The case is submitted.

[Whereupon, at 1:05 p.m., the case was submitted.]

- - -