In the

# Supreme Court of the United States

WILLIE MAE BARKER,

Petitioner,

vs.

JOHN W. WINGO, Warden,

Respondent.

No. 71-5255



Washington, D. C.
April 11, 1972

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Tuesday, April 11, 1972.

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
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JAMES E. MILLIMAN, ESQ., Professional Building, Shepherdsville, Kentucky 40165; for the Petitioner.

ROBERT W. WILLMOTT, JR., ESQ., Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601; for the Respondent.

[Note: Mr. Justice Marshall absent; but will participate in the decision.]

# C O N T E N T S



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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-5255, Barker against Wingo.

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

ORAL ARGUMENT OF JAMES E. MILLIMAN, ESQ.,

ON BEHALF OF THE PETITIONER

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

First, I would like to reserve five minutes for rebuttal, if I may.

The facts of this case are as follows: --

MR. CHIEF JUSTICE BURGER: The signal for that, Mr. Milliman, will be when your white light goes on.

MR. MILLIMAN: Thank you, Your Honor.

The facts of this case are as follows:

The petitioner, Willie Mae Barker, was indicted in September of 1958 for the murder of Orleana Denton; a vicious, heinous crime, in which he was accused of bursting into a bedroom and beat her to death with a tire iron; with an accomplice, one Silas Manning, who becomes very relevant.

His case was originally set for trial in October of 1958. However, there occurred a series of 16 continuances granted the prosecution in this case. Willie Mae Barker was not brought to trial until October of 1963, a delay in excess

of five years.

Q When did he have counsel?

MR. MILLIMAN: Counsel was appointed right after indictment, Your Honor. He was represented by counsel throughout this delay. He had no complaint in this regard.

Petitioner --

Q Excuse me. Did counsel receive notice of the motions for continuance?

MR. MILLIMAN: Yes, Your Honor, he had full notice of these motions for continuances.

Q Does the record show whether or not he was present, or were the motions simply filed by --

MR. MILLIMAN: The record does not show whether he was present, Your Honor, for these continuances.

There was no objection made to these continuances until 1962, at which point counsel started objecting to these continuances.

But Barker was released on bail.

Q How many continuances were granted over the objection of your client's counsel?

MR. MILLIMAN: I believe there were four or five, Your Honor. They began -- the first motion to dismiss in this case was filed on February 12, 1962. This is on page 9 of the Appendix. And thereafter the counsel for Willie Mae Barker at that time objected to further continuances.

Q There's some confusion as to whether or not it was '62 or '63 when that motion was made?

MR. MILLIMAN: Yes, Your Honor, the Kentucky Court of Appeals and the Sixth Circuit held it was 1963, that this motion was made February 12, 1963, but --

Q Right.

MR. MILLIMAN: -- the record -- and where they found this date, I have no knowledge; the record clearly shows it was made on February 12, 1962.

Q In the Federal Government's amicus brief it goes into it a little bit, too; but --

MR. MILLIMAN: Yes, Your Honor. But the District Court -- it's ironic -- the District Court, on page 22 of the Appendix, pointed out that the motion was made February 26, 1962, then talked about the resulting eight-month delay; but the delay was the resulting nineteen-month delay. So there is confusion as to this date.

But petitioner was released on $5,000 bond in June of 1959, and remained free under $5,000 bond until he was finally convicted.

Petitioner then appealed to the Court of Appeals of Kentucky, alleging he was denied his right to a speedy trial, and other errors in the trial court. The Kentucky Court of Appeals affirmed the conviction. Then, later, petitioner filed this habeas corpus proceeding in the District Court

for the Western District of Kentucky, which denied relief.

He appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the District Court decision; and this Court granted certiorari January 18th of this year.

The Court of Appeals for the Sixth Circuit decided this case on two grounds. They held that petitioner had waived his right to a speedy trial by failing to demand trial, that the demand rule states that the right to a speedy trial as guaranteed by the Sixth Amendment is a personal right, which may be waived. So the Sixth Circuit computed only the time after the first motion to dismiss was made, in computing the length of the delay, which it found to be nine months, using the 1963 date.

It also held that petitioner had not shown that he was prejudiced by the delay.

Petitioner has therefore raised two points on this appeal: first, that the demand rule is inconsistent with constitutional safeguards, and should not be required; and the second issue is, where there is a five-year delay, prejudice should be presumed as inherent in the delay.

It's important to emphasize in this case that two amicus briefs have been filed. We are concerned in this case with a five-year delay, we are not concerned with a one-year delay, a two-year delay. This case presents a five-year delay.

The demand rule, as applied in this case, is subject to attack on two grounds. This Court has consistently held that any waiver of a constitutional right must be voluntary and intelligent, knowing, and that it will not accept a passive waiver --

Q But that assumes your answer, doesn't it? That assumes that the right to a speedy trial exists without the demand?

MR. MILLIMAN: This is correct, Your Honor.

Q Well, then, how about the demand -- why shouldn't he have to demand it in order to trigger the right?

MR. MILLIMAN: Your Honor, in the present case, it is contended that the demand rule as such chills his right to a speedy trial. We have a man here who was indicted for willful murder. Now, his accomplice had twice received the death penalty. This put him in the position of, if he has to demand trial to protect his right to a speedy trial, he is possibly aksing for himself -- asking the prosecution to give him the electric chair. The result, if he is successful, is death.

This is the grisly choice, which this Court condemned in Fay vs. Noia, where the --

Q Well, you're saying that he can't be required to come in and ask for what he will later contend he should have been given automatically. I don't see that there is any

chilling or burden there when you're dealing exactly with the thing that you're requesting.

MR. MILLIMAN: Your Honor, your question, if I understand it, supposes that the right is a personal right which can be waived. Now, we are contending that to ask him to demand trial in the face of a death sentence is putting him in the same position that the defendant was in in Fay vs. Noia.

Q Well, are you saying, in effect, that a trial is the last thing he wants, and therefore he shouldn't be compelled to ask for what he doesn't want?

MR. MILLIMAN: It may well be the trial is the last thing he wants, Your Honor.

Q Well, is that what you're arguing?

MR. MILLIMAN: No, we're not arguing this.

Q That he should not be compelled to ask for it, because he really doesn't want it; he wants to postpone that evil day.

MR. MILLIMAN: Well, this is correct, and I think this would be desired by any defendant, really.

Q But, nonetheless, he can come in and, if he hasn't been tried in a particular time, even though he hasn't requested it, say that now you've got to dismiss the whole procedure?

MR. MILLIMAN: This is what we're contending, Your Honor.

Q What if he had asked? What if he had asked for all the continuances?

MR. MILLIMAN: Then we would have an entirely different situation.

Q Why is that different now, will you explain that?

MR. MILLIMAN: In this case the defendant did not in any way contribute to the delay. He made no continuance himself. He made no dilatory motions. He merely --

Q Well, Mr. Milliman, going back to your proposition that the predicate of your whole argument here is that because death may await him down at the end of the road, he therefore doesn't want a trial. That seems to be your predicate. Well, now, that same error might get him to come in every time that the case was set for trial and ask for a continuance.

But you say if he asked for it and got it, that would be different from getting it without asking for it?

MR. MILLIMAN: In that event, Your Honor, he would have affirmatively contributed to the delay. He would have brought it about by his own affirmative actions, by merely sitting back and doing nothing, he did nothing to contribute to the delay.

Now, he did file a motion to dismiss on February 12, 1962.

Q Well, do you say that it would be unconstitutional if the State had a rule, a court rule, that says that continuances by the State and delay must be on notice to the defendant, and that unless -- and that if the defendant wants a trial and isn't going to be responsible for the delay, he must object?

MR. MILLIMAN: Your Honor, in that event I would think that there would be less, far less of a constitutional objection. In that case we would still have this grisly choice.

Q So you still claim it would be unconstitutional if the State said to him: Look, we're going to give you an early trial or a late trial, now which one do you want?

And he said, I want the late trial.

MR. MILLIMAN: I would contend in that event that it would still be unconstitutional, but for less sufficient reason. Because there is another impelling reason in this case. When must the demand be made? The demand rule has set a standard. It says: A petitioner, a defendant must demand trial.

But when must he make that demand? There are no guidelines, there are no standards. Florida has passed a statute that says after three successive demands.

Q Well, here, at least for three or four years, the continuances were on notice to him and he never objected

to them.

MR. MILLIMAN: This is correct, Your Honor.

Q And you say that the State, nevertheless, should be charged with that delay?

MR. MILLIMAN: Your Honor, under our system of jurisprudence, the burden of prosecution is on the State. To require this man, Willie Mae Barker, to demand trial is imposing the burden upon him to bring about trial, to prove his innocence. This is contrary to established principles in this country.

He should not have the burden of bringing about trial. This is the burden of the prosecution. It is their duty. The American Bar Association has disapproved of the demand rule for this reason, that the burden is on the prosecution to bring trial, not on the defendant.

But when does the defendant demand trial? Must he demand trial at the indictment, after a year, at every term of court? Any waiver of a constitutional right must be made intelligible.

Now, petitioner was represented by counsel. But, I submit, that even though he is represented by counsel, his counsel couldn't determine when the demand must be made. What if it had been made at the indictment and no other demand had been made? Would it have done him any good?

In other words, what the demand rule is, it's

treating the constitutional right as a procedural nicety, which can be waived, like venue, if you fail to demand it.

Q Well, you're treating it as something basically like a statute of limitations, and this runs without regard to the defendant, say, in a civil case giving notice , to say that he's invoking the statute of limitations. He simply comes in after it's run and says --

MR. MILLIMAN: That is correct, Your Honor.

Q The problem, as I see it, with your position is that there isn't any fixed time that you're talking about, the way there is with the statute of limitations; at least, the State has notice that if they don't, for constitutional purposes, try a person within a certain period of time, then they're through.

MR. MILLIMAN: Well, Your Honor, we submit that the burden, since the burden is on the State to bring about trial, that notice to the State is not nearly as essential as notice to the defendant as to when the demand must be made.

In this case, petitioner Willie Mae Barker had no idea as to when a demand must be made. He made a motion to dismiss on February 12th, 1962; he filed another motion to dismiss prior to trial, because it was denial of the right to a speedy trial. But both of those motions --

Q He never did ask for a speedy trial; he asked that the indictment be dismissed, isn't that right?

MR. MILLIMAN: This is correct, Your Honor, and this raises another problem. The Sixth Circuit held that the motion to dismiss was equated with the demand. The Solicitor General's brief and other courts have held that a motion to dismiss is not a demand.

What is a demand? There are no standards. There are no guidelines. There are in Florida now three times: that you either try him --

Q And there are under the Second Court of Appeals, aren't there?

MR. MILLIMAN: Please?

Q Aren't there also in New York State and in the Second Court of Appeals --

MR. MILLIMAN: In the Second Court of Appeals, this is correct.

Q -- at least respectively?

MR. MILLIMAN: But petitioner had none of these guidelines to guide him in this choice.

Respondent, the Commonwealth of Kentucky, has admitted in their brief that any demand would have been superfluous, that it wouldn't have been granted. It was a useless act to require him to demand trial, and after requiring, asking him to bring about his own prosecution to prove his innocence.

Q You mean in this particular case?

MR. MILLIMAN: In this particular case.

Q Because the key witness would have pleaded compulsory self-incrimination --

MR. MILLIMAN: That is correct.

Q -- in trying this one?

MR. MILLIMAN: Now, this brings us to the second issue, the issue of prejudice. Looking at the bare record in this case, there is no specific example of prejudice, except for the testimony of one witness, Martha Barber, sister-in-law of the accomplice Silas Manning, who could not recall certain specific events, but otherwise testified with certainty.

Q What kind of prejudice are you talking about? Evidence at the trial --

MR. MILLIMAN: Actual prejudice in the form --

Q This was at the trial?

MR. MILLIMAN: Yes, Your Honor, in the form of lost witnesses, faded memories --

Q Well, what about other prejudice that the speedy trial provision is supposed to protect against?

MR. MILLIMAN: The speedy trial provision, as this Court has held, in each speedy trial case brought before it, pretrial anxiety, hostility in the community, loss of jobs, curtailment of associations. There's even more of a specific pretrial prejudice here.

Q Well, how do you square that with your earlier

argument that he really doesn't want a trial, and therefore should not be put to the burden of asking for what he doesn't want?

MR. MILLIMAN: Simply because, that he has the right under the Sixth Amendment to be brought quickly to trial, whether he asks for it or not. Now, it may be that he affirmatively does not want trial. He will make the motion for continuances.

As everyone knows, a defense lawyer could continue a trial indefinitely, and if he had actually wanted or was afraid of being brought to trial, he would have moved for a continuance.

Now, it's true that the reason for this delay was the Commonwealth of Kentucky's desire to secure the testimony of the accomplice, Silas Manning. And it's true that if Silas Manning were never convicted, Willie Mae Barker would never have been convicted. We concede this.

The Commonwealth admits it.

Q Or if you had gone on trial before he did, he wouldn't have been convicted?

MR. MILLIMAN: This is correct, Your Honor. So that what the Commonwealth was doing was postponing Willie Mae Barker's trial until they convicted Silas Manning. There is only one problem --

Q Until they got the evidence and the conviction?

MR. MILLIMAN: This is correct, Your Honor. It only took them six trials to convict Silas Manning.

And so there is prejudice even there, that if he had been brought speedily to trial, of course the testimony of Silas Manning would not have been available to convict him. But this doesn't appear in the black-and-white record.

More fundamentally, petitioner is now released on parole. He was paroled in August of 1971, after serving eight years of a life sentence.

Now, had he been brought to trial in 1959, and in Kentucky the normal sentence is seven or eight years for a life imprisonment, had he been brought to trial in 1959, it's very reasonable to assume that he would have been released four or five years ago to resume his rightful place in society.

Q I'd say that it's even more reasonable to assume he might have been acquitted, if Manning's testimony hadn't been available.

MR. MILLIMAN: Well, had he been brought to trial without the testimony of Silas Manning, Your Honor, the Commonwealth of Kentucky has admitted specifically, in its response to the motion to dismiss, October 9, 1963, that they could not convict Wille Mae Barker without the testimony of Silas Manning. They admitted this.

Q Suppose the witness that was needed for this conviction had been a fugitive from justice, living in Algeria

or Canada or some place where he couldn't be reached and brought back, would you think that would alter the State's posture on the delay?

MR. MILLIMAN: If Silas Manning had been a fugitive, it would have given some more sufficient reason for the delay, whether it would have justified it for five years is highly debatable. In other words, there would be a burden on the prosecution to make every effort to bring this man back. But it certainly would be more sufficient reason than in the present case.

Q Well, was his testimony in the circumstances of this case any more or less available in realistic terms than if he had been in Algeria?

MR. MILLIMAN: Yes, Your Honor. It was available at all times. All the Commonwealth of Kentucky had to do was convict him.

With all due respects to the Commonwealth of Kentucky, the only reason for the delay here was their incompetence and their inability to convict this man. The errors they committed. One conviction was reversed because of the admission of illegally seized evidence; and the admission of an involuntary confession. Another conviction was reversed because they insisted on trying the crime in the venue where the crime was committed, amid pretrial hostility.

They made these motions. They tried Silas Manning.

They committed these constitutional errors and procedural errors, in an attempt to convict him for a procedural advantage, for a strategical advantage; but could not succeed, because the Court of Appeals would not affirm the conviction obtained under these grounds.

So he was there. All they had to do was convict him legitimately.

Q Mr. Milliman, you state in your brief that there cannot be a passive waiver of the right to a speedy trial. Do you consider that failure of counsel to object to these 16 continuances was a passive waiver?

MR. MILLIMAN: No, Your Honor, I do not. I think his failure to object was more on the grounds of perhaps of procedural error, in the sense that an attorney fails to object to a hearsay statement or a leading question and is precluded from raising it on appeal.

Q Are you suggesting that a continuance, particularly one granted 16 times, is procedural so far as the right to a speedy trial is concerned?

MR. MILLIMAN: No, Your Honor, I believe that is most substantive in a constitutionally defined area, and that's why I say that his failure to object should not be, and would not be a passive waiver of any kind.

He did file the motion to dismiss, he did make his motion to dismiss --

Q He made that in 1962. What did he do between March of '62 and March of '63?

MR. MILLIMAN: He did absolutely --

Q Counsel for the petitioner?

MR. MILLIMAN: Please?

Q Counsel for the petitioner.

MR. MILLIMAN: He filed his motion to dismiss in February of 1962, February 12th.

Q Right.

MR. MILLIMAN: Then, as the Appendix shows that there were further continuances made, on June 4th, 1962, --

Q Did he object to that?

MR. MILLIMAN: No, he didn't, Your Honor. And then on February 11, 1963, the Commonwealth made the motion to continue and, over the objection of defendant, he objected to this motion, and then he objected to a motion, I believe -- no, on June 17th, 1963, they continued again over the objection of the defendant to the --

Q That was when the witness was ill, wasn't it?

MR. MILLIMAN: That was after the sheriff, the material witness, was ill; the man who had arrested the petitioner, yes. And the Sixth Circuit held that this was a sufficient reason for delay, and we don't deny this. We concede that this was sufficient for the delay from March 1963 to October; but it does not explain the delays prior

to that.

But the question again, Your Honor, is: when should he have made the demand? He didn't know, counsel wouldn't know. In other words, we're requiring counsel for petitioner to speculate and guess as to what he must do, what procedures he must take to protect and preserve the constitutional right of the accused. And that's the issue.

Q You weren't the counsel, were you?

MR. MILLIMAN: Please?

Q I say, you weren't the counsel, were you?

MR. MILLIMAN: No, I was not, Your Honor, and I'm glad I wasn't.

But with respect to the prejudice issue, again, he would have been released. There's no question. He had pretrial anxiety. And that we do not know as to what influence this delay had on the witnesses. We cannot tell from the record whether their memory is faded, even though the record doesn't show they said it; we don't know from the record what facts were distorted; we don't know from the record what the attitude in the community was at that time, whether it was still hostile or whether it had calmed considerably.

The only thing we can do to protect his right in this case is presume that there was such a possibility of prejudice after five years. Everyone knows that memories are going to fade, that facts are going to become distorted. To

protect his rights, we have to presume, after five years these things happen.

Q Does this record show what happened to Mr. Manning?

MR. MILLIMAN: Mr. Manning finally, the Appendix doesn't show, the transcript of record, Your Honor, would show that Mr. Manning was convicted in March of 1963 to life imprisonment, and convicted in December -- or March of 1962, I'm sorry, to life imprisonment, and in December of 1962 to life imprisonment for the murder of the other party. There were two parties killed.

And he served, life sentence -- I don't know if he's still in jail or not.

Q And how many other trials were there?

MR. MILLIMAN: Mr. Manning was tried six times, Your Honor. The first trial resulted in a hung jury; the second trial, he received the death penalty. The Court of Appeals of Kentucky reversed that because of the admission of illegally seized evidence and the admission of an involuntary confession, I believe.

Q Then I suppose one could argue that, with all these trials, the memory of witnesses is indeed kept alive.

MR. MILLIMAN: It is possible that the memories of the witnesses would be kept alive, and it's possible that the hostile attitude of the community was indeed kept alive,

also. This was a vicious crime of two prominent people, in a rural community. And it is very possible that the Manning trials kept alive the hostility of the community to the petitioner in this case. We don't know this, I'm speculating.

Q You're not suggesting that the community attitude would be more hostile in 1963 than it would have been in 1958, are you?

MR. MILLIMAN: Yes, Your Honor, I am. For the simple reason, here we've had one indicted murderer tried six times. The Commonwealth Attorney of Kentucky is going to have a very difficult time explaining to the electorate why he can't convict this man. And the fact that this man is not being convicted is going to stir the animosity of the community.

In fact, petitioner's first two trials were tried at the scene of the crime, the county of the crime. His third trial, he requested a change of venue because of hostility, which the court refused.

Q Barker got three trials?

MR. MILLIMAN: No. I'm talking about Manning now.

Q Oh.

MR. MILLIMAN: So this leads me to believe that the hostilities increased as time went by, because nothing had been done to bring these two people to trial, or nothing had been done to convict them. And we have to understand the

attitude and the circumstances at the time.

Q Yet that attitude seems to have not interfered with his being placed on parole. When did he go on parole?

MR. MILLIMAN: He went on parole in August of 1971, Your Honor. And I submit to you that the attitudes of rural Kentucky have changed greatly from 1958 to 1970. There's a possible explanation why he had been paroled in 1971, and why there was hostility in the early 1960's.

Q What was the situs here, Hopkinsville?

MR. MILLIMAN: This was Christian County, Kentucky; Hopkinsville, the county seat, in southern Kentucky.

Q That's a pretty good-sized town.

MR. MILLIMAN: Yes, it is. And we won't go into things not in the record, Your Honor; but -- thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Milliman.

Mr. Willmott.

ORAL ARGUMENT OF ROBERT W. WILLMOTT, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

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

The facts in this case are not in dispute. The Commonwealth did delay the trial of the petitioner for five years. And I think a little more thorough explanation of why it delayed it is in order.

The Commonwealth chose to prosecute Silas Manning

first. This decision, I don't know why it was made, but the Commonwealth Attorney did make it.

And, as stated by my brother, they did have some difficulty in obtaining a valid conviction.

I don't think it can be blamed on any incompetence on the part of the Commonwealth Attorney. And after -- in December of 1962, when Manning's final trial was held, trial was set for the next term of court, the February term of the 1963 Christian County Circuit.

The chief corroborating witness was the sheriff of Christian County, Sheriff McKinney. He became seriously ill with a stomach disorder, he was later admitted to the hospital and portions of his stomach were removed, and he later underwent a gall bladder operation.

Q Well, when did that -- that didn't come until 1963?

MR. WILLMOTT: 1963.

Q Well, that doesn't explain '58 to '63 at all, does it? It doesn't affect that, does it?

MR. WILLMOTT: No, it's just an explanation of the last ten months or so of the delay. The first four years of delay were due to Manning being unavailable for testimony.

Q Yes, if it were a ten-month delay, we probably wouldn't be here on this case, would we?

MR. WILLMOTT: Right, Your Honor.

Q Probably.

MR. WILLMOTT: Right.

The Commonwealth submits that the real issue in this case is not when the demand should be made, or if a demand should be made; but narrows down to the fact, may the Commonwealth delay a trial for any reason for this period of time.

Now, there are several statutes from different States which call for a dismissal of the indictment, similar to the Federal Rule 48(b), if a trial is not had within so many days or so many months or so many terms of court. But every rule or every statute also states, in the final line, "unless good cause be shown."

And our contention is that the Commonwealth had good cause in this case. It's a simple fact, without Manning we would not be here today, because petitioner would not have been convicted. And without the sheriff, the corroborating evidence would have been insufficient to support the testimony of an accomplice.

Q Did Manning -- Manning didn't testify -- I mean the petitioner didn't testify at Manning's trial, did he?

MR. WILLMOTT: No, sir. And Manning never took the stand.

Q Then the State, the Commonwealth had evidence, other evidence against Manning, is that right?

MR. WILLMOTT: Yes, sir. They had -- they found this car, or the --

Q You're telling us that the petitioner could not have been convicted without the confederate Manning's testimony.

MR. WILLMOTT: Yes, sir.

Q But apparently Manning could be and was convicted without his confederate's testimony.

MR. WILLMOTT: Well, Manning came into the house covered with blood, and there was tangible evidence to convict Manning.

Q All right.

MR. WILLMOTT: But Manning was --

Q And that clearly shows why the Commonwealth chose to try Manning first. You said you didn't know. It's very clear why they did, isn't it?

MR. WILLMOTT: Well, yes, sir, I believe that is the reason that they felt more assured of securing conviction of Manning. The evidence was stronger against Manning than it was against Barker.

Q So that unless they convicted Manning, they couldn't have convicted either of them.

MR. WILLMOTT: Right.

Q Initially they were relying on his confession, Manning's confession.

MR. WILLMOTT: In the Barker case or the Manning case?

Q The manning case.

Wasn't that one of the reasons for reversal in one trial?

MR. WILLMOTT: No, sir. I believe the reason for reversal was -- well, yes, sir. One of them. It was improperly admitted evidence as a result of a search-and-seizure, and on involtunary confession; yes, sir.

Q Right.

So they did have a confession from Manning?

MR. WILLMOTT: Yes, sir.

Q But not from this defendant?

MR. WILLMOTT: This -- there was an admission made by Barker along the lines of, when the sheriff came to arrest him, he blurted out, before being asked or told anything, "If you're wondering what happened to those old folks, Manning did it."

And that was a major portion of the sheriff's testimony, was this admission.

Now, as stated, the reason for the delay in this case is legitimate, in my opinion. The interest of society had to be balanced against the interest of the accused. And if there is a valid reason, if there can be any valid reason for postponement of a trial for five years, this case presents the same.

Q And you would argue this if Barker had, every

week, demanded a trial?

MR. WILLMOTT: Yes, Your Honor.

Q So I gather your submission is that we don't have to view, not actually concession, I take it, but on the premise that the speedy trial guarantee does not require the accused to make a demand. Assuming that premise, you say, nevertheless, the State, for good reason, may continue a trial until it's ready to go to trial?

MR. WILLMOTT: Right, Your Honor. I believe the demand issue is secondary. I do not feel that the accused should be allowed to play both ends against the middle, and sit back and not take any affirmative action.

Q But if the rule were that he had to make a demand, we don't reach this point?

MR. WILLMOTT: I don't think -- I think you have to consider both of them, in a case such as this.

Q You could prevail on either point, I take it, if the Court were to adopt the line of reasoning favorable to you?

MR. WILLMOTT: Right, Your Honor. I think initially there's very little guidance on what constitutes good cause for the government delaying the trial. There's ample evidence as to the defendant filing dilatory pleadings or shuffling his feet and avoiding trial, being a fugitive, being incompetent. These do not violate the right to a speedy

trial.

Q Yes.

MR. WILLMOTT: However, there is very little guidance as to why the government may delay a trial. Most decisions have followed the Lutzman case, which necessitates a demand. And if a demand is not made, waiver is presumed.

Q And you could prevail, I suppose, still on a third ground, with or without demand, with or without good cause on the part of the Commonwealth, and the last, the constitutional provision is not violated without a showing of prejudice.

MR. WILLMOTT: Yes, sir; that is my position. The only prejudice that could be assumed, and my brother points out in his brief, that possible prejudice may be presumed, in that he suffered the scorn or the stigma of being under an indictment for five years for a horrendous crime, such as murder. There is no actual, physical, tangible prejudice shown.

All the witnesses testified. They were also witnesses at Manning's trial. And by the petitioner's trial they were thoroughly versed in their testimony, and one has but to read the evidence to see how concrete they were in answering their questions.

Q But Manning did testify at the trial that was finally held?

MR. WILLMOTT: Yes, Your Honor, at Barker's trial.

Q Yes. And it was his testimony and the sheriff's testimony that were the two major factors?

MR. WILLMOTT: Yes, sir. There was other corroborating evidence, but it was not what one would consider the major, key witness.

Q Well, I take it, Manning described the crime that had been committed by the two men together? And that the sheriff's testimony with respect to the admissions was the corroborating evidence?

MR. WILLMOTT: Well, the sheriff was also the one that found the car -- Barker's car parked in front of the house next door, and he had some other investigative facts that he put in.

Q To meet the Kentucky requirement of corroboration of testimony?

MR. WILLMOTT: Yes, sir. I think his testimony alone would have been enough; but I don't think the sum of the other testimony would have been enough to corroborate Manning's testimony.

Q This was not a felony murder, I take it, burglary or robbery, or something?

MR. WILLMOTT: They initially were drinking and needed some money, and they had heard that Mr. and Mrs. Denton kept large sums of money.

Q So that they did break in for that purpose?

MR. WILLMOTT: Yes, sir; they went in the window with a tire iron, and proceeded, I think they hit Mrs. Denton first, while she was in bed. They --

Q Mr. Willmott -- excuse me.

MR. WILLMOTT: Yes, sir.

Q Did I interrupt you in your pursuing --

MR. WILLMOTT: No, sir; go ahead.

Q I understood you to say that there were one or more Kentucky statutes that related to speedy trial, and in each instance provided that just cause would be an excuse for not going forward. Are those statutes cited in the briefs or in the record?

MR. WILLMOTT: Your Honor, I may have misled you. I didn't mean to say that Kentucky had some statutes. There's -- I think California and Michigan --

Q Other States.

MR. WILLMOTT: Other States have enacted --

Q California and Illinois, for example.

MR. WILLMOTT: Right. And the Model Penal Code, I believe contains a provision.

Q May I ask this question on an entirely different matter: Would you refresh my recollection as to what motions were made after the petitioner's first motion to dismiss in 1962, I think it was February of '62, and the date of the trial?

MR. WILLMOTT: There were three others.

Q Three others.

MR. WILLMOTT: There was the initial one in February of '62; there was one in the summer, I believe in July of '62.

Q Right.

MR. WILLMOTT: And then there was one in March of '63; in the summer of '63, June or July, and then at trial, just before the trial started.

Q The ground for all of those was unavailability of witnesses?

MR. WILLMOTT: Yes, Your Honor.

Q Well, the ground for the motion was the denial of a right to a speedy trial, wasn't it?

MR. WILLMOTT: Motion to dismiss for lack of prosecution --

Q To dismiss, and then --

MR. WILLMOTT: -- as to whether they filed --

Q -- the prosecution defended against the motion, saying that a witness was not available; is that it?

MR. WILLMOTT: Yes, sir. On the --

Q It was the motion for continuances that I was asking about.

Q Oh, I beg your pardon.

There were, however, how many motions to dismiss on behalf of the defendant?

MR. WILLMOTT: Four motions.

Q Four. Beginning in '62?

MR. WILLMOTT: Yes, sir. February of '62. That is, according to the record, I don't know how the court, the District Court and the Sixth Circuit Court of Appeals got them confused, but they have cited it as the first demand being made in '63.

Q Mr. Willmott, the Court rendered an opinion in United States v. Marion last December. This is not cited in your brief or in the other brief or in the main amicus brief; it is cited in the government's amicus brief. Does this -- are you familiar with this case?

MR. WILLMOTT: Your Honor, I picked up a slip sheet on it this morning, when I became aware of it. We did not have the advance sheet in our office before I came down to Washington.

Q Well, what I wanted to ask you, of course, and perhaps you can't comment on it, is whether you feel it has any pertinency in this case.

I'll ask the same question of your opponent when he is up in rebuttal.

MR. WILLMOTT: Well, as I understand Marion, it was a pre-indictment delay, and this Court held that the Sixth Amendment speedy trial clause was not applicable to pre-indictment delays.

Now, the concurring opinion --

Q Under all circumstances?

MR. WILLMOTT: That was my opinion, that it was not applicable to the pre-indictment stage, because a person had not become an accused.

Q Right.

MR. WILLMOTT: Back in the prejudice argument, we have stated that there were no lost witnesses, that the witnesses' memory was -- there was no mnemonic loss, no lack of testimony to align this case with a case such as Dickey, which states that if a person's defense is impaired or it is lost through some witnesses dying, disappearing, or being unavailable, then I think this would distinguish this case from Dickey.

So, in the main, and I think the Commonwealth's contentions can be divided into three categories: the first is that if there is such a thing as a valid government delay, that this case must meet the standards. And we base this on the fact that in applying the demand rule, the demand was made after almost four years, three and a half years had passed. That the reasons for the delay were valid. There would have been no conviction in this case if the Commonwealth had been forced to trial earlier than it was.

There was no lack of diligence on the part of the Commonwealth in this case. I am certain that the Commonwealth Attorney in Hopkins County -- Christian County, excuse me,

got very tired of this case. He was in court with it every open term of court, or else Manning had an appeal pending. He wanted to conclude this more than anyone, I would assume.

Q Mr. Willmott, is the Kentucky State Court setup such that a court is continuously sitting except for vacation time in Christian County, or does it just sit on circuit there, at certain times of the year?

MR. WILLMOTT: In Christian County, it is not a continuous session.

Q How many sessions of court do they have each year in Christian County?

MR. WILLMOTT: Three sessions, I believe.

Q And how long does an average session last? Approximately?

MR. WILLMOTT: I would say a month and a half or two months.

Q So a court would be sitting in Christian County maybe six months out of the twelve of each year?

MR. WILLMOTT: Unless -- I think there is a provision for a prolonged calendar if the docket load is heavy, unusually heavy. I don't think they're bound to a specific termination date on each call.

So the prejudice resulting from this delay, that has been argued, was not great. Petitioner was not the object of a prolonged delay in order to gain an advantage; the

government prosecuted this case with diligence. It went to trial the first open term of court that all the witnesses were available. And it is very -- the petitioner was -- came very close to not being tried when sheriff McKinney went in the hospital.

Q How soon after that was Manning tried the first time?

MR. WILLMOTT: He was tried at the first term of court, in October.

Q Within six months after the murder?

MR. WILLMOTT: Two months, three months.

Q Three months after the murders.

MR. WILLMOTT: I think the murders were on July the 20th, and he was tried October the 9th, I believe is the date of his first trial. And he was prosecuted every succeeding term of court, or had an appeal pending in the Kentucky Court of Appeals at every subsequent term of court.

So this, coupled with the fact that the petitioner's defense was in no way impaired, that the demand was not made until very late in the time period, and no loss of prejudice, and the good cause for which the continuances were granted, the Commonwealth submits that these grounds are sufficient and adequate to affirm the Sixth Circuit's opinion.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Willmott.

Mr. Milliman, you have a few minutes left. Do you have anything further?

REBUTTAL ARGUMENT OF JAMES E. MILLIMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MILLIMAN: Yes, Your Honor.

I'd like to express my opinion on the reason for delay. The Sixth Circuit Court of Appeals did not specifically decide this question. They decided simply that from the period of the time the demand, which they found to be February the 12th, 1963, to the time of trial, that there was a sufficient reason. We did not specifically urge this point on our petition for certiorari for the simple reason that the Court of Appeals did not really decide it, and that this Court could conceivably, if they wished, remand to the Sixth Circuit Court of Appeals for further findings on that issue, if they would strike down the demand rule and hold that petitioner has shown or is not required to show prejudice. It could remand to the Sixth Circuit for further findings as to the reason for delay.

As His Honor, I believe, Justice Blackmun referred to the U. S. vs. Marion case, we would like to accept the good and reject the bad. The Marion case is not applicable to this case, for the simple reason that in that case this Court held that the defendants were not an accused, because they were talking about a pre-indictment delay, and that the Sixth

Amendment applies only to an accused, and one does not become an accused until he is indicted.

And there's no question in this case that Willie Mae Barker fits the definition of an accused.

The Marion case would be applicable in that it explained that the statute of limitations, for example, are designed to guarantee against stale claims. And of course in Kentucky and most States there is no statute of limitations for murder. So there is no statute of limitations to apply in this case.

And it did point out again, it reaffirmed this Court's position of the prejudice resulting from the pretrial delays, the anxiety, the hostility, and so forth. So in that respect it is most applicable to this case.

Q But up to February 12th, 1962, your anxiety and hostility arguments really don't square with your argument that he didn't want to have this confrontation with society, and that that's why he didn't ask for it.

MR. MILLIMAN: Again, Your Honor, I would refer to the American Bar Association project for minimum standards, that this is no reason for delay, that his acquiescence or the fact that he may desire to --

Q But that doesn't justify delay. I simply was addressing that observation to the weight of your argument on that point.

MR. MILLIMAN: Your Honor, I would concede that Willie Mae Barker probably -- I don't know this for a fact -- probably did not want to be tried. I don't think any man wants to be tried. And I don't consider this a liability on his behalf. I don't blame him.

What he was trying to do was, once he found Manning had been convicted, then, of course, he wanted the case dismissed. There's no question about this. The way --

Q You're not arguing that every accused person is in the posture of not wanting a trial, are you?

MR. MILLIMAN: No, Your Honor, I'm sure that some accused people do; but even to someone who's innocent, there is always the specter that he may be convicted, even though innocent, and the fact that he is going to come to trial is going to cause him great apprehension, unquestionably.

Q That specter might be more acute if he knows that he's guilty, wouldn't it, so that you can't really generalize on that.

MR. MILLIMAN: I don't know if it could be more acute or not, Your Honor. A guilty man may well be resigned to his fate.

Q Well, are you making any claim that the counsel was inadequate in this case?

MR. MILLIMAN: No, Your Honor, I'm not.

Q Well, he was counseled, and if the State's

evidence was so weak, you would think there might have been an interest in an early trial.

MR. MILLIMAN: This is quite possible.

Q Well, how about if counsel makes the decision that it's better to wait than to try now, that might be a gross error; but it might not be a gross error.

MR. MILLIMAN: Again, Your Honor, to answer this question in the affirmative would be to require the speculation from the record that he did take -- make a strategical maneuver.

Q Well, counsel had the choice of either objecting or not objecting.

MR. MILLIMAN: This is true, Your Honor. This is true.

Q And he exercised that choice, by not objecting?

MR. MILLIMAN: We don't know whether he did -- he exercised that choice, but we don't know if he did that for a strategical purpose or not.

Q Well, isn't it reasonable to assume that he knew the problem of the unavailability of Manning until Manning's conviction was definite?

MR. MILLIMAN: Well, Your Honor, it's possible that he thought that they had other grounds to convict, based upon the testimony of the sheriff. Now, looking at the scene of the trial, it's quite possible that he thought, under the

hostility prevailing at the time, if there was such, that the man would have been convicted, based upon the testimony of the sheriff. We don't know his reasons for not demanding a speedy trial, but we do know that it would have been superfluous.

Q But, isn't it reasonable to assume that when the prosecution asked for a continuance, they were required to give a reason, that the reason was that Manning was not available?

MR. MILLIMAN: This was --

Q Wasn't that a fact known to everybody?

MR. MILLIMAN: This is reasonable, Your Honor.

Q To the extent that the defense counsel's consent to the continuances may have been based on the possibility of the future absence of a witness, to the extent that the sheriff was important to the prosecution in this case, it almost paid off, I take it?

MR. MILLIMAN: It almost did, Your Honor, except for one thing, if I may state this. It's important to note that Manning was convicted of the first murder in March of 1962, but they still didn't bring Barker to trial. They tried Manning again in December of 1962. There is no reason in the world they couldn't have brought Barker to trial after the first conviction of Manning; but they refused.

Q Well, do you mean that Manning would have been

a willing witness just because he had a conviction --

MR. MILLIMAN: Your Honor, the record shows that Willie Mae Barker was keeping company with Mr. Manning's wife at the time, and whether that would have made him a willing witness or not, I think it would have made him more willing than otherwise.

MR. CHIEF JUSTICE BURGER: Very well. I think your time is up, Mr. Milliman. Thank you.

MR. MILLIMAN: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Willmott. The case is submitted.

[Whereupon, at 11:58 o'clock, a.m., the case was submitted.]

MR. CHIEF JUSTICE BURGER: Before we take up the argument in the cases this morning, we take note, with sadness today, of the death of former Justice James F. Byrnes in his 93rd year.

Justice Byrnes served on this Court in 1941 and 1942, at which time he resigned from the Court upon being appointed by President Roosevelt as Director of the Office of Economic Stabilization.

The sadness on the death of Mr. Justice Byrnes is tempered by the knowledge of the full and rich life that he lived, serving as he did in the House of Representatives, in the United States Senate, as Governor of South Carolina, as Secretary of State, and as a Justice of this Court.

He therefore served with great distinction at the highest levels in all three branches of Government, as well as in the highest office of his native State. Few men have served their country so long or so well.

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Tuesday, April 11, 1972.