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In the

Supreme Court of the United States

CLARENCE EUGENE STRUNK,

Petitioner,

v. No. 72-5521

UNITED STATES OF AMERICA,

Respondent.

Washington, D. C.
April 24, 1973

Pages 1 thru 38

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

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Washington, D. C.
Tuesday, April 24, 1973

The above-entitled matter came on for argument at 11:08 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOHN R. WIDEIKIS, Esq., 32 West Washington Street, Chicago, Illinois 60602; for the Petitioner.

WILLIAM BRADFORD REYNOLDS, Esq., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; for the Respondent.

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. 72-5521, Strunk against the United States.

Mr. Widiakis, you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN R. WIDEIKIS, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case recently began serious examination of the right to a speedy trial. It began with United States v. Marion, where this Court determined when the right to a speedy trial attaches, and continued with Barker v. Wingo, in which this Court enunciated the balancing formula to be applied in making ad hoc determinations as to whether or not that right has been violated.

This Court today is called upon to determine the sole issue of remedy to be applied upon a finding of a denial of a speedy trial. This was the basic issue or the basic question framed in the petition for writ of certiorari.

The Government in its brief, however, wishes to raise as an additional issue the question of whether the court of appeals made a proper ad hoc determination in finding that Mr. Strunk in this case had been denied his right to a speedy trial. And because I do not know whether this Court

wishes to consider re-examination of those findings of the court of appeals, I will give a broad statement of the facts.

This case began on June 30, 1969, when Clarence Strunk stole a car in Wisconsin and shortly thereafter drove it to Illinois where he abandoned it. He eventually made his way to the state of Nebraska where on July 24, 1969 he was arrested on a state charge of burglary.

On a plea of guilty to a reduced charge of larceny, he received a one to three year sentence in a Nebraska state penitentiary. While in Nebraska custody, on September 3, 1969, at his own request, he was seen by an FBI agent, at which time he was advised of his rights and signed a waiver form.

At the time of that interview, he made detailed admissions pertaining to the facts of the crime that he had committed, and he further indicated to the FBI agent that it was his intention "to demand a speedy trial under Rule 20."

On December 17, 1969, the U. S. Attorney in the District of Nebraska wrote to the U. S. Attorney in the Eastern District of Illinois and in his letter indicated that Mr. Strunk desired to enter a plea under Rule 20. And on the following day the U. S. Attorney in Illinois sent to Nebraska the necessary forms required to process the case under Rule 20.

Q How long after the indictment did that occur?

MR. WIDEIKIS: This is pre-indictment.

Q This is pre-indictment?

MR. WIDEIKIS: This is pre-indictment, Mr. Chief Justice, right, and we are raising no issue as to pre-indictment. I want to give a broad statement of facts.

On May 26, 1970, after no further word was received from Nebraska, the U. S. Attorney in Illinois presented this matter to the Grand Jury. An indictment was returned on that date.

On August 13, 1970, correspondence was received by the U. S. Attorney in the Eastern District of Illinois from his counterpart in Nebraska, indicating that Mr. Strunk definitely refused to enter a plea under Rule 20 and that he intended to raise an issue of speedy trial. As the court of appeals put it, thereafter nothing happened until February 9, 1971, when Mr. Strunk was brought to East St. Louis, Illinois on a writ of habeas corpus ad prosequendum. And there in the district court for the Eastern District of Illinois he was arraigned, at which time counsel was appointed, a plea of not guilty was entered, and trial was set for March 29, 1971.

Prior to the trial, Mr. Strunk's counsel moved for a dismissal of the indictment for want of a speedy trial. The motion was denied.

He went to trial, as originally scheduled, on March 29, 1971, was tried by a jury. He did not take the stand and he offered no affirmative defense, and he was found guilty. He received a sentence of five years imprisonment, which sentence was to run concurrently with a sentence he was then serving in Nebraska.

An appeal was taken at that point. I was appointed counselor for Mr. Strunk. Our case was argued on May 30, 1972. On June 22, 1972, the decision in Barker v. Wingo came down. It was recognized by the court of appeals, and it was the controlling case applied to the facts in the instant case.

Q Is it correct that about two and a half months, more or less, was delayed by reason of this discussion of a plea of novo contender?

MR. WIDEIKIS: Yes, Your Honor, there was some delay on that. In fact, that subject was treated within the findings of the court of appeals. And what the court of appeals said--they concluded first--I will start with the conclusion. They said that no part of the delay after the indictment was attributable to Mr. Strunk. The court said that he did not have counsel at the time, that he may have seemed to have desired to proceed under Rule 20. And, in fact, when he was quoted as having said that he wished to demand a speedy trial under Rule 20, did not make any sense to

the court of appeals. If anything, it seemed to be an assertion of his right to a speedy trial, a desire for a speedy trial, which of course he did not get.

The court of appeals found that the length of the delay in this case between indictment and arraignment was 259 days. And they felt--

Q Do you read the Government as asking us to review the conclusion that a speedy trial was denied?

MR. WIDEIKIS: It is suggested in your brief, Your Honor, and--

Q I thought all they were saying was that--assuming arguendo, I do not understand the challenge to the finding that--

MR. WIDEIKIS: The challenge, Your Honor, I find in their brief.

Q They did not cross petition.

MR. WIDEIKIS: They did not cross petition, Your Honor.

Q And I do not read their question presented as suggesting that they challenge that holding.

MR. WIDEIKIS: However, I got that impression on page 12, Your Honor, of their brief at footnote ten, where I will quote: "If this Court should conclude on a balance of the four factors in Barker that the present circumstances--an explained ten-months' delay resulting in virtually no

prejudice to defendant--do not establish a speedy trial violation," et cetera. I was impressed at that point, Your Honor, that they were urging re-examination of those issues.

Q I just do not see how they can.

MR. WIDEIKIS: I do not either, Your Honor.

Q No cross petition. I just wondered why you are wasting so much time on it. We have got a difficult enough problem on this.

MR. WIDEIKIS: The argument is not very long at all, Your Honor.

The delay was unjustified, it was found. It was found that Mr. Strunk had satisfactorily asserted his right to a speedy trial, and it held that he was prejudiced.

A crucial aspect in this case is the type of prejudice suffered. The prejudice in this case was not prejudice with respect to the defense of his case but rather the court found that Mr. Strunk had been prejudiced because of undue and oppressive incarceration prior to trial, relying on the language in Smith v. Hooey, in that Mr. Strunk suffered a substantial loss of concurrent time.

Q Were they referring to Nebraska's incarceration of him?

MR. WIDEIKIS: No, the federal incarceration, Your Honor. No, I am sorry, I misunderstood you; right.

Q Perhaps he was in the Nebraska state

penitentiary awaiting trial, was he not?

MR. WIDEIKIS: No, he was in the penitentiary. He had been convicted in Nebraska, Your Honor.

Q Yes, but he was in Nebraska's custody.

MR. WIDEIKIS: He was in Nebraska's custody, yes.

Q Did the court of appeals think this was an oppressive custody on him?

MR. WIDEIKIS: They viewed this as oppressive incarceration, yes, Your Honor.

Q Did that rest on an independent conviction in the state of Nebraska in the state courts?

MR. WIDEIKIS: No, it rested on the language in Smith v. Hooey in that--

Q I am speaking of the custody. Nebraska's custody of this man before trial was based upon a conviction in Nebraska for a state offense and the state courts--or have I misread the record?

MR. WIDEIKIS: No, that is correct, Your Honor.

Q But the court of appeals viewed that as an oppressive custody in the context of the federal case?

MR. WIDEIKIS: They did, Your Honor, in the sense that although he was lawfully imprisoned, he was running the risk of losing substantial concurrent time. That is how they viewed the issue of prejudice in this case, and that is how they found it.

Q That would be on an assumption that the sentence was going to be concurrent, would it not?

MR. WIDEIKIS: Yes, it would be, Your Honor, right.

Q And no one knew that at the time.

MR. WIDEIKIS: There would be no way to know. And I submit that the language in Smith v. Hooey where it points out that the possibility of the loss of concurrent time is what the Court really meant in that respect. It is the possibility of this loss. And, of course, the possibility did in fact become true in our case.

The court in our case acknowledged that dismissal of the indictment was the traditional remedy. However, they felt that that was drastic relief in this case. Accordingly they remanded the case, with directions that Mr. Strunk be given 259 days' credit on his sentence.

I would like to point out one thing parenthetically. The Government in its brief asserts that the petitioner somehow believes that the remedy applied below was appropriate. Of course, if that is true, I do not know why I am here today. But, in any event, the briefs in the case below were written prior to the Barker v. Wingo decision. And we know that the Barker dicta contain some very interesting language on the subject of remedy.

Furthermore, in my briefs below I listed a series of alternative reliefs. I did that in the event that if no

finding of a denial of speedy trial were arrived at, that if the Court found some other error that was amenable to correction, I wanted to tender relief that they might resort to.

Technically the issue below, before the Seventh Circuit Court of Appeals, was whether or not the district court had erred in denying Mr. Strunk's motion to dismiss his indictment for want of a speedy trial. And we submit that the perspective of the court of appeals was fixed by that issue and that it was obliged to view the facts in analysis in that case from the same perspective as the court of appeals.

The issue would necessarily require the Court to make a determination as to whether or not there was a violation of the right. And since the court of appeals found the denial, it is reasonable the district court should have found the denial of the right to a speedy trial. And had the district court done so, we submit that the one thing that it could not do at that point was to order Mr. Strunk's trial notwithstanding. Yet this was the effect of the remedy that was applied by the court of appeals.

The Government in its brief suggested that the district court, while finding a denial of a speedy trial, could order Mr. Strunk to trial despite that fact, adding that in the event he were convicted, they would couple a

ruling which would say he could be given credit on his sentence for whatever unjustified delay occurred in that case.

The difficulty with that argument is that it ignores that at the time of the finding, Mr. Strunk was presumed innocent. And if on trial he were acquitted, the result would have been an admitted denial of the right, with no remedy. And this is serious, we submit, because it judicially repeals the word "speedy" from the Sixth Amendment and merely leaves an accused with the right to be tried.

We are also arguing in this case here that the remedy applied below, if permitted to stand, will encourage Government prosecutors to give low priority to cases of a sort involved here. That is, where you have an accused who is a prisoner in another jurisdiction on an unrelated charge.

If a prosecutor can reasonably anticipate that the only prejudice to be suffered by an accused is the Smith v. Hooey type of undue and oppressive incarceration prior to trial, he is really under no duty to exercise diligence in bringing the accused to trial. For the district court presumably can compensate for a violation of the right in the event of conviction.

Since an accused such as Strunk can be seemingly

made whole, the prosecutors will assign a low priority to such cases. The Government in its brief asserts that there is no substance to this position, and I have difficulty understanding how they could make that assertion.

I would like to call the Court's attention specifically to page 10 in the Government's brief where the Government, in endeavoring to explain the delay in bringing Mr. Strunk to trial, admits that in this case prosecutorial resources were devoted to other active cases commanding a higher priority than Mr. Strunk's.

The final point that I would like to make, Your Honors, is that we are urging the remedy for a violation of a right to a speedy trial to be absolute discharge.

Q In your view, if in fact the prosecutor assigned a higher priority to take their terms to people who were being held in custody without bond awaiting trial, would you consider that an invalid priority assignment as compared with this man in a state prison under conviction in another charge?

MR. WIDEIKIS: Your Honor, I find, I am sorry, a system of priorities in this area to be totally repugnant. And I submit this because it works such a gross unfairness to a defendant to have his case relegated to a low priority.

Q I am just asking you whether in your view any priority would be invalid at all?

MR. WIDEIKIS: I am not saying that--what I think I am trying to say, Your Honor, is that--and I am not avoiding your question--is that we have a problem today that all of us recognize in terms of the effective administration of criminal justice. We have tremendous backlogs. We have overworked prosecutors. We have overworked, overburdened judges. There is no doubt about it.

So, while the system is far from perfect, it is not any defendant's fault that it is. If we have to assign responsibility for a poor administration of justice, if we care to call it that, then it is society's fault, not a defendant's. And for that reason I cannot acknowledge any validity to any system of priorities within cases. I cannot see how a decision can be made arbitrarily that one case is more important than another.

Q Mr. Wideikis, you have repeatedly referred to undue and oppressive incarceration. I am confused by your use of the word "oppressive." Why is incarceration any more oppressive than any other prisoner's?

MR. WIDEIKIS: I think the language I have used, Mr. Justice Blackmun, comes from the decision in Smith v. Hooey. The Court used that language. Of course, it was in U. S. v. Ewell also. I think what the language suggests is that the distinction is this. Undue incarceration, I would submit, arises out of a negligence context--let us say a

carelessness context--in bringing someone to trial. Mere accident in delaying. Or as appressive would be the most heinous form of incarcerattion prior to trial, because there I think it is purposeful.

I am not making any claim in this case that there was oppressive incarceration. I have coupled the term "undue and oppressive" because of the language in Smith v. Hooey.

Q You are talking about the passage quoted on the top of page 11 of your brief, I assume?

MR. WIDEIKIS: Yes, Your Honor.

Q Which in Smith v. Hooey quoted that language I think from the Ewell case, if I am not mistaken, "undue and oppressive incarceration prior to trial."

MR. WIDEIKIS: That came from Ewell, yes, Your Honor. And in the decision they elaborated on it within a prisoner accused context.

Q Right.

MR. WIDEIKIS: While the remedy of absolute discharge is severe, it is no more severe than what a finding of a denial of a speedy trial right asserts. A finding of a denial of the right to a speedy trial is one of the few areas in the law that is not gray. It contains within itself a distinction. It is clearly precise, as midnight is from noon. It says essentially, "Government, you had the

full and unfettered opportunity to try this accused. You failed to do so, and the fault is entirely yours."

If we wish to give meaning to the constitutional mandate that trials be speedy, then we submit we should enforce it vigorously, with absolute discharge.

Q Yet we have always spoken of prejudice in connection with a speedy trial right. What was his prejudice here, except the denial of possible concurrent time?

MR. WIDEIKIS: Nothing more than that, Your Honor. That was it.

Q And did not the Seventh Circuit result render unto him that denial?

MR. WIDEIKIS: Exactly. What the Government taketh the Court can give back. It was a compensatory remedy, but it has no constitutional foundation for points that I have raised earlier. It is the kind of remedy that a district court could not have done. To give a compensatory remedy recognizes the validity of a trial, while with this finding, we submit, there could not have been a trial. This man was procedurally innocent. He could not get to a substantive stage of proceedings.

The Government suggests that absolute discharge serves to penalize society. If it does, then society must chastise not this defendant, Mr. Strunk, but its agent, the

Government, for squandering its right to try him. The Government suggests that we are urging amnesty in this case. I do not understand how they can use the word "amnesty" since amnesty is usually given to one who is at fault, who has committed some wrong. But the finding of a denial of a speedy trial says that Strunk was procedurally innocent.

Finally, the court suggests that the remedy urged by the petitioner visits retribution on the Government and the public. If it does, we submit that the retribution is self-inflicted and the injured should not be heard to complain. Thank you.

Q You feel that you are not attacking the underpinnings of Barker v. Wingo in any way?

MR. WIDEIKIS: No, sir; no, Your Honor.

Q It seems to me that what you have argued is precisely an attack on that case.

MR. WIDEIKIS: I do not see that at all, Your Honor. We had Barker v. Wingo applied by the court of appeals to the facts in the case. They made a determination that there was a denial of speedy trial here. Barker v. Wingo did not speak directly to the issue of a remedy for a denial of a speedy trial, but it contained dicta which suggested that dismissal of the indictment was the only possible remedy. But I have no appreciation of a suggestion, Your Honor, that it conflicts in any way with Barker v. Wingo.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Reynolds?

ORAL ARGUMENT OF WILLIAM BRADFORD REYNOLDS, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The issue in this case concerns the nature of the relief that can properly be accorded by the courts upon finding a violation of the Sixth Amendment right to a speedy trial.

Q Mr. Reynolds, I gather you are defining this by asking us to review the holding that there was a denial; are you?

MR. REYNOLDS: Your Honor, I think that this Court could appropriately affirm--

Q Do you think we took the case for that purpose?

MR. REYNOLDS: I do not believe you did take the case for that purpose. I am suggesting that--

Q You mean if we want to avoid citing the issue for which we took it.

MR. REYNOLDS: That is correct.

Q And your response certainly never suggested that to the petition for certiorari.

MR. REYNOLDS: No, that is--

Q And you never filed any cross petition.

MR. REYNOLDS: That is true, we did not file a cross petition.

Q What are you doing; you are just saying we do not have to decide the question because they were wrong anyway on the holding?

MR. REYNOLDS: I think that this Court could properly make that decision.

Q You are urging us to do it, are you not?

MR. REYNOLDS: We do address ourselves in our main brief to the principal issue. We do not, as you pointed out--

Q Why would we have taken the case if that was the disposition to be made of it?

MR. REYNOLDS: Your Honor, I am not sure that we can anticipate the disposition that the Court is going to make. But I think that that is an argument.

Q We have enough things to do, I should suggest.

MR. REYNOLDS: I plan to address myself to the issue of the remedy. And I think that that issue is whether the remedy of the court of appeals can properly be accorded by the courts on a finding of a Sixth Amendment speedy trial violation.

That fundamental right to a speedy trial has for many years been defined by the courts in absolute terms.

That is, that it requires trial within a specified time frame or that it can be invoked only after a speedy trial has been demanded by the accused. Within that relatively rigid framework, the finding of the constitutional violation in this area has in the past almost invariably turned on one of two considerations, either that the delay in bring the case to trial has been such as to presumptively or actually prejudice the preparation of the defense of a case or that the delay has been a purposeful one by the prosecutor which was designed to gain some tactical advantage over the accused.

In both of those situations the most basic notions of fundamental fairness dictate a dismissal of the indictment as the only effective remedy for enforcing the speedy trial right. And that, not surprisingly, has heretofore been the uniform response to the finding of a denial of a constitutional right to a speedy trial.

Last term, however, this Court in Barker v. Wingo, at 407 U.S., examined the speedy trial guarantee in considerable detail and concluded that the right did not by nature lend itself to any mechanical test for determining when it had been violated. Thus the Court, as Mr. Justice Brennan forecast in his concurring opinion in Dickey v. Florida, the Court announced a more flexible standard for ascertaining whether this fundamental right has been infringed in the

circumstances of a particular case:

A standard based on a careful and sensitive balance of four related factors--the length of the delay, the reason for the delay, the assertion by the defendant of his right to a speedy trial, and the prejudice resulting from the delay.

The court of appeals looked to those factors in the present case, and it found on a balance of those factors that the ten-month delay here between indictment and trial was unconstitutional in the particular circumstances involved here.

Counsel for petitioner has discussed those circumstances already, and I do not think there is any need to go into them in any detail at this point. I think the important thing is that this pre-trial delay, ten-month delay, and this is agreed to, did not prejudice the defendant in the preparation of his defense in any way. There is no claim of personal prejudice such as a loss of liberty or employment or financial resources and the like, personal prejudice due to the pre-trial incarceration, because that incarceration was in a Nebraska state penal complex and it was solely related to the state conviction where he was serving a one-to-three year sentence at the time.

And it is also not asserted that the pending federal indictment adversely affected the state confinement or caused

him any mental anguish or anxiety that would accompany public accusation because of the pending indictment.

Rather, the only prejudice claimed by petitioner and the only prejudice found by the court of appeals to have resulted from the pre-trial delay depended on the concurrent sentence petitioner received following his dire act conviction.

Thus, on the basis of the sentence imposed by the federal judge after the dire act conviction, on hindsight, this ten-month delay caused petitioner to lose time he was serving on his state sentence that would otherwise have run concurrently with the federal sentence.

If we accept the court of appeals decision that the proper balance was struck here on the issue of whether there was a violation, the remedy fashioned by the court which petitioner concedes fully cured the only prejudice suffered by crediting him with the time of the pre-trial incarceration between indictment and arraignment, that remedy, we submit, was entirely proper.

To the extent that the flexible standard announced by this Court in Barker v. Wingo permits a finding of a constitutional speedy trial violation on facts such as these, so too flexibility is needed in the remedy phase of the inquiry so that in appropriate cases the courts can taylor their relief to the infringement they find needs to be cured.

What the court of appeals did here was to devise relief less drastic than the dismissal of the indictment, relief which fully restored petitioner to the position he would have been in had there been no unreasonable pre-trial delay. By giving petitioner credit on his federal sentence for his incarceration during the period between indictment and arraignment, the court fashioned relief to vindicate the only interest of the accused that it found had been adversely affected by the Sixth Amendment violation.

Moreover, this relief served far better than would dismissal of the indictment, served the societal interests underlying the speedy trial provision. Public concern is with the effective prosecution of criminal cases with reasonable dispatch. Delays can often work to the Government's disadvantage by reducing its capacity to prove its case.

Where, however, the prosecution's case remains unimpaired by the delay, as here, and where there has been no prejudice to the accused in the sense of impairment of his defense or in the sense of personal prejudice due to pre-trial incarceration or the public accusation that accompanies return of indictment, as again is the case here, then society's interest is generally best served by allowing the case to proceed to trial and letting the jury decide whether to acquit or convict.

There is the obvious exception where the prosecutor engages in purposeful delay to gain a tactical advantage, as Mr. Justice Harlan pointed out in noting such official misconduct in his dissenting opinion in Chapman v. United States at 386, and I quote: "Society cannot tolerate giving final effect to a judgment tainted with such intentional misconduct."

But there is no such official abuse of the criminal process involved in this case. And thus the societal interest in trying people accused of crime is served best, not by granting petitioner immunization because of legal error but by fashioning his sentence, as did the court of appeals, to cure whatever possible prejudice he was caused by the unreasonable delay.

Q Mr. Reynolds, what you are saying is a very rational justification for the action of the court of appeals in this case. But, of course, as my Brother Brennan has indicated, when we grant certiorari in a case generally, if our rules are taken seriously, it is because the issue has emanations beyond the four corners of the particular case. And what I am concerned about is, What sort of guidance does this give to district courts in the future? When a motion is filed to dismiss the indictment because of a denial of a speedy trial, is a district court to say, "Yes, you have been denied a speedy trial, but I am not going to dismiss the

indictment. You have to go and be tried." That is what you are telling us.

MR. REYNOLDS: I am saying, Your Honor, that in appropriate cases that may very well be appropriate relief. I am suggesting that just as this Court announced an ad hoc finding or an ad hoc basis for looking at the speedy trial violation itself, that so too it is appropriate to have the district courts examine the various factors that we are talking about, that the Court was talking about in Barker v. Wingo.

Q You cannot see all of those factors until after a trial. And yet Barker v. Wingo, as you and I both know, said that the basic remedy for denial of a speedy trial is that there is not going to be any trial.

MR. REYNOLDS: The determination in Barker v. Wingo is also before a trial. That is when those factors are examined by the district courts, and that is when they apply those same factors--

Q I just read the motion here. I suppose it was prepared by the--was it prepared pro se?

MR. REYNOLDS: I believe there was counsel, Your Honor. It was prepared by counsel.

Q What made think that it was perhaps prepared pro se was that he said he did not have access to Smith v. Hoosy. You would think that counsel would have available

somewhere the United States reports.

MR. REYNOLDS: This motion was prepared by counsel.

Q By counsel? Yes, Mr. Wheaton.

MR. REYNOLDS: Yes, Your Honor.

Q But he sets out all sorts of reasons in support of his claim that to try this man would be to deny his right to a speedy trial, and he asked that the indictment therefore be dismissed.

On your rationalization, the district court faced with that should say yes. And even if you agreed that to try him would be a denial of his constitutional right to a speedy trial, under your rationalization the district court should nonetheless say, "You are going to be tried."

District courts and courts of appeals in this country have to be guided by the decisions of this Court. That is one of this Court's functions. And what may be papered over in an individual case as to what the court of appeals may have done in an individual case is something quite different from giving guidance to district courts who are faced with motions to dismiss indictments by reason of a denial of a speedy trial.

What do you propose that a district court do?

MR. REYNOLDS: Your Honor, I think a district court is able to look at the various factors, such as prejudice, such as what the reason for the delay was, and including

personal prejudices discussed in Marion and Wingo and to assess on the basis of what is claimed whether or not you can appropriately cure the prejudice by granting relief less drastic than dismissal.

Q The denial is of a constitutional right, and you have a right not to be tried except in a speedy trial; is that not correct?

MR. REYNOLDS: That is correct.

Q How could a district judge, agreeing with the defendant's claim that to try him would be a denial of a speedy trial, how can he deny the motion? And that is what you are telling us he ought to do.

MR. REYNOLDS: Your Honor, I think that district judges, often when you have a denial of a constitutional right, allow a case to go to trial and they remedy it by other means. The exclusionary rule is one example where you have that.

Q If a district judge agreed that to try you again would be to put you twice in jeopardy, he should nonetheless let you be tried and see how it comes out?

MR. REYNOLDS: No, because I think that you are talking about the type of prejudice in that situation or a right to counsel or coerced confession--well, let me exclude coerced confession because that is a little different situation. But there you are talking about a situation where

your prejudice is directly to whether or not the defendant can obtain a fair trial and--

Q No. Double jeopardy has nothing to do with a fair trial at all.

MR. REYNOLDS: Whether or not it would, whether fundamental fairness would permit putting this man to trial a second time for the same offense. I think that what we are talking about here is that there is no fundamental notion of fairness that would preclude trying this man, if you can cure the only prejudice that he claims he suffered by giving him something less drastic than dismissal of the indictment.

Q I am still puzzled as to what district courts are going to do if your position prevails.

MR. REYNOLDS: We are not talking about some broad expansive exception to the remedy of dismissal. What we are talking about is a case here that presents a factual situation permitting a remedy less drastic than dismissal, that was formulated by the court of appeals. And we think on these facts it is justified. We think that it may well be that in other cases it will be justified. As a general matter, probably in most situations you will have the type of prejudice to the defendant that will not permit the less drastic relief. But I think it is for the district court to assess in the same way that it has to make the ad hoc

determination prior to trial on the basis of the factors announced in Wingo as to whether there is a speedy trial violation.

Q Mr. Reynolds, tell me what happens if a motion is made to dismiss the indictment on grounds of denial of speedy trial; the court concludes yes, it has been denied but go to trial anyway. And if you are convicted, what? Then the judge is supposed to take it into account in fixing sentence; is that it?

MR. REYNOLDS: No, Your Honor. What we are suggesting--

Q Take what is likely to be the ordinary situation. The claim is--this is before there has been a trial--that he has been denied a speedy trial. The trial judge agrees you have been denied a speedy trial but nevertheless go to trial. In that circumstance where he tells him go ahead and go to trial and he is convicted, then what does the trial judge do?

MR. REYNOLDS: I think that that would be impermissible under the rules that we are suggesting here. What we are doing is saying that the remedy is determined by the particular nature of the prejudice claimed and shown. We are not suggesting that this is allowing district courts to forget the speedy trial question, although I think--

Q What happened in my--how in the situation I

put to you, what can a district judge do?

MR. REYNOLDS: District judges can, I believe, defer the question of speedy trial until after trial if there is some question on the prejudicial question. That has been done before.

Q No, no. My hypothesis is he finds there has been a denial of speedy trial. What is he supposed to do? This comes up on a motion to dismiss the indictment for denial of a speedy trial.

MR. REYNOLDS: And he does not feel that--

Q And he says, "Well, you have been denied a speedy trial, but I think you ought to go to trial anyway."

MR. REYNOLDS: I am going to disregard it. I think that would be an improper determination by the district judge.

Q Is the Government's position then in any instance where there is a motion to dismiss the indictment, based on the denial of speedy trial, and the district judge determines that there has been a denial of speedy trial, then he has no alternative except to dismiss?

MR. REYNOLDS: It is relevant as to what is the basis for the determination of a speedy trial violation. Barker v. Wingo require that you look to a set of factors.

Q All right, let us take this very case, because in this case the indictment was not dismissed by the trial

judge. He went to trial.

MR. REYNOLDS: I think that the trial judge in this case could have effected the same remedy that the court of appeals did here.

Q He could only have done it, though, could he not, by holding that there was no denial of a speedy trial?

MR. REYNOLDS: No, I think that he could have held that we will allow this case to go to trial. I find a constitutional violation, but that violation can be fully cured by giving the peitioner here, the defendant, credit on whatever sentence he gets in the event of a conviction.

Q I could understand, Mr. Reynolds, your position if you were saying that the district judge reached the conclusion that this is a very close question, and I cannot, he says to himself, "I cannot decide it right now. I am going to let it go to trial. And if I conclude that there was a problem about the case, perhaps deal with this remedial device." But if you have this remedial device as an automatic alternative, are you not going to have a lot of problems about deciding the basic constitutional question?

MR. REYNOLDS: That basic constitutional question is going to be decided the same way as this Court suggested in Barker v. Wingo.

Q Well, what is the constitutional--I am sorry. I apologize. You finish your answer, and then I will ask you

a question.

MR. REYNOLDS: My answer is that I think that the court, just as the court if it finds a violation under the Fourth Amendment, that the district court can cure that violation by excluding the evidence and allowing the case to go to trial. I think in this case, if the district court had found on the balancing of the factors in Barker v. Wingo that the facts of this case may have a constitutional speedy trial violation.

Q But that assumes that there are multiple remedies for the denial of a speedy trial and not just one remedy.

MR. REYNOLDS: That is right, Your Honor. In an appropriate case there can be a remedy other than dismissal. And I do not think that there is anything in the Constitution itself which says dismissal is the only remedy.

Q What possible remedy can there be other than dismissal except some kind of amelioration of the penalty imposed if there is a conviction? What other alternative is there?

MR. REYNOLDS: Here is a remedy that--

Q Take what is going to be the usual situation, not the peculiar facts of this case. The usual situation is going to be the one postulated by Mr. Justice Stewart, is it not? Someone is going to claim he has been denied a speedy

trial. He is going to make a motion to dismiss the indictment. That is the usual case that is going to come up.

MR. REYNOLDS: And there is going to be a factual hearing on that on the basis--

Q And there is going to be a determination that there has been a denial of a speedy trial. What you are saying to us is that rather than dismissal, there may be some flexibility in the joints which will permit the court to say, "Nevertheless, go to trial." But what is he going to say to the defendant? "You have been denied your constitutional right to a speedy trial, and I am going to take care of it"--how, if I am not going to dismiss the indictment?

MR. REYNOLDS: In this case the court takes--

Q I am not--

MR. REYNOLDS: It is hard in the abstract to talk about this.

Q Why do you not just say that a judge could say, "There has been no prejudice to your trial, to your defense, but you have been denied the right to concur and if there has been a denial, I will just give you a shorter sentence than I would have"? Why do you not just say that? Is there something wrong with that or not?

MR. REYNOLDS: That is what I have been trying to say, but I understand Mr. Justice Brennan tried to get away

from this case.

Q You cannot say that if the constitutional right is a right not to be tried; is that not correct?

MR. REYNOLDS: If the speedy trial right means that absolutely nobody can be tried and there must be--

Q Except in a speedy trial. Is that not the constitutional right, the basic right? And, if it is, what choice does the district judge have he is convinced that too much time and prejudice has taken place since the indictment except to dismiss? The right is a right not to be tried.

MR. REYNOLDS: But I do not think, Your Honor, that the constitutional right is an absolute one that requires dismissal of the indictment whenever a violation is found.

Q Has not part of the purpose, though, been to prevent oppressive incarceration?

MR. REYNOLDS: I think that is right.

Q Also part of the purpose is to prevent an unfair trial.

MR. REYNOLDS: That is right. But if you have neither of those situations involved--

Q What if you have one of them, oppressive incarceration but no proof of any prejudice to a fair trial?

MR. REYNOLDS: I think in those circumstances,

for example, if you have a demand by the accused and it was not adhered to, the dismissal would be perhaps the appropriate remedy in that situation.

Q Are you saying that since the only prejudice that could conceivably result in a Smith v. Hocey type or this type of case goes to the length of confinement, that in that particular case you carve out a special remedy and you deal with the delay by this special remedy; is that your argument?

MR. REYNOLDS: Yes, Your Honor, that is what we are saying. In that actual situation that this remedy is an appropriate one and that it does cure the prejudice resulting from the delay.

Q Perhaps inherent in your position is the idea that there may be some delays which are not quite constitutional but ought to be remedied. Perhaps that is inherent in the facts of this case.

MR. REYNOLDS: And that, of course, goes back to why we did present the argument, Mr. Justice Brennan, that we thought this factual situation was one where--I think that prior to Barker v. Wingo that the courts would not have found a speedy trial violation on the facts of this case. I think that Barker v. Wingo added a great deal of flexibility in terms of what exactly was a speedy trial violation.

Q Incidentally, Mr. Reynolds, I have forgotten, does your brief cite us any cases of, there having been a finding of a denial of speedy trial, any redress except dismissal of the indictment?

MR. REYNOLDS: No, Your Honor, it does not.

Q This is the first time it has ever happened?

MR. REYNOLDS: I do not know of any. And I think that Barker v. Wingo is one of the main reasons why we had this develop.

Q One of the things that concerns me, if what you are proposing were to become the rule, what happens in most of the metropolitan districts where motions are heard by one judge and he finds a denial of speedy trial itself is before another judge who then has to sentence?

MR. REYNOLDS: If the judge who hears the motion--for instance, in this particular case--had ordered that there would be credit given, that the sentencing judge would have to adhere to that order.

Q He would be bound by it, would he?

MR. REYNOLDS: [No response]

Q How can one judge hearing a motion bind the trial judge?

MR. REYNOLDS: Because his rule is a matter of constitutional law that the way to redress this speedy trial violation, the only appropriate way, is to give him credit

on the sentence. I think that ruling would be binding as a constitutional ruling. It would be binding on the trial judge to the same extent that a ruling for excluding evidence by one judge on a motion would be binding on the trial judge who heard the trial.

Q It is a lot different from interfering with a trial judge's discretion to sentence. I do not see how anybody can interfere with it.

MR. REYNOLDS: I think here you have got a ruling--

Q I think it is a technicality, but I just do not--

MR. REYNOLDS: I think they would be bound by the prior constitutional ruling of the district judge who heard the motion.

Q Can we really be sure that this remedy and ride business is as watertight as some of the discussion has indicated? As a practical matter, if the Seventh Circuit had not thought it had this discretion, is there not some possibility that it might have found there was no speedy trial violation?

MR. REYNOLDS: It indicates that that is one of the dangers, that the courts, feeling that the remedy is so severe, might be inclined not to find a speedy trial violation. And I think that the court of appeals, faced with that possibility, made a very conscientious and careful effort to

deal with the subject in light of Barker v. Wingo and that with the new flexibility it did devise a remedy which was warranted on the basis of the prejudice here.

Thank you.

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

Do you have anything further?

MR. WIDEIKIS: No.

MR. CHIEF JUSTICE BURGER: Very well, the case is submitted.

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

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