In the

Supreme Court of the United States

UNITED STATES	)	
	))	
PETITIONER,	)	
	)	
V.	)	
	)	
JEFFREY R. MACDONALD,	)	No. 75-1892
	)	
RESPONDENT.	)	
	)	

Washington, D. C.
January 9, 1978

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner,	:	
v.	:	No. 75-1892
JEFFREY R. MacDONALD, Respondent.	:	

Washington, D. C.

Monday, January 9, 1978

The above-entitled matter came on for argument at 1:50 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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 R. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

KENNETH S. GELLER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C., 20530, for the Petitioner.

BERNARD L. SEGAL, ESQ., Suite 220, 536 Mission Street, San Francisco, California, 94105, 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 75-1892, United States against MacDonald.

Mr. Geller.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

ON BEHALF OF THE PETITIONER

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

The Court granted certiorari in this case to resolve two important issues of federal criminal law. The first is whether a defendant may appeal prior to trial from the denial of his motion to dismiss an indictment on speedy trial grounds. The second issue which need only be reached if the Court holds that such interlocutory appeals are permissible, is whether the period after criminal charges against the defendant have been dismissed but before the same or related charges are reinstituted against him should be considered in determining whether the defendant has been deprived of his right to a speedy trial.

The facts are as follows. In the early morning of February 17, 1970, Respondent's wife and two small daughters were clubbed and stabbed to death in Respondent's apartment on the Fort Bragg Military Reservation in North Carolina, where Respondent was assigned as a medical doctor. Respondent, who also suffered some wounds, notified the military police of the attacks, claiming that he and his family had been assaulted by

four so-called "hippies" who had, apparently, been under the influence of drugs.

Respondent, at first, was viewed as a victim, rather than as a suspect. However, after intensive but incomplete investigation of the crime had been conducted by the CID, the Army's criminal investigative unit, it became apparent that many aspects of Respondent's version of the attacks and of the subsequent actions upon discovering his family's bodies could not be squared with the preliminary laboratory analysis of the physical evidence of the crime scene.

In April 1970, therefore, Respondent was warned that he was a suspect in the murders, was advised of his rights by military authorities and was confined to the military reservation by his immediate commanding officer. Three weeks later, Respondent was formally charged by his commander with three specifications of murder. As required by Article 32 of the Uniform Code of Military Justice, an officer, Colonel Warren Rock, was appointed to investigate the matter and to recommend whether the charges should be referred by the post commander to a General Court-martial for trial. After considering the evidence in the case over the next several months, Colonel Rock recommended that the charges against Respondent be dismissed, but that further investigation of the murders be undertaken by the appropriate civilian authorities. This recommendation was accepted by the Commanding General of Respondent's

unit who dismissed all charges against Respondent in October 1970. Two months later, in December 1970, Respondent was granted an honorable discharge by the Army.

Following Respondent's release from the Military, the Department of Justice requested the CID to continue its investigation of the case. The CID did so and in June 1972 it submitted a massive, thirteen-volume report to the Department which was supplemented by further reports in November 1972 and August 1973. Respondent was eventually indicted on three counts of murder in January 1975 by a grand jury of the United States District Court for the Eastern District of North Carolina.

Respondent moved to dismiss the indictment on a number of grounds, including double jeopardy and denial of a Sixth Amendment right to a speedy trial. The District Court denied each of these motions in July 1975 and scheduled Respondent's trial to begin in August 1975.

Respondent, instead, took an immediate appeal to the United States Court of Appeals for the Fourth Circuit. That court held that it had jurisdiction over Respondent's double jeopardy claim under its decision in United States v. Lansdown, a decision subsequently approved by this Court in Abney v. United States, and that Respondent's speedy trial claim was also a proper subject for pre-trial appellate review because it involved "a fundamental constitutional right because it was

quote, "pendent" to the double jeopardy claim and closely related to it, and because the court believed that this ruling on the issue would expedite the ultimate resolution of what it viewed as an extraordinary case.

QUESTION: What cases from this Court did the Fourth Circuit cite to support its concept of pendent jurisdiction over the speedy trial claim?

MR. GELLER: My recollection, Mr. Justice Rehnquist, is that it cited none. That aspect of the Court of Appeals' decision is at page 5A of the Appendix to the Petition.

The court then concluded on the merits that Respondent had been denied a speedy trial on the merits because of the delay of more than four and one-half years between his arrest by the Army in May 1970 and his federal indictment in January 1975. It viewed as of no significance, for Sixth Amendment purposes, that Respondent had not been under any criminal charges for more than four years of that period.

Now, the threshold question in this case is whether the Court of Appeals had jurisdiction to review Respondent's pre-trial appeal from the denial of the speedy trial motion. We submit that it did not. Under the controlling jurisdictional statute, 28 U.S.C. 1291, the Courts of Appeals may review only final decisions of the district court, a phrase that this Court has consistently construed to bar piecemeal appeals before final judgment. Adherence to this rule of finality has been

particularly stringent in criminal cases because the delays and disruptions caused by interlocutory appeals are especially inimical to the effective administration of criminal law.

Respondent, of course, does not claim that the pre-trial denial of his motion to dismiss the indictment on speedy trial grounds was a final decision in the sense that it terminated the proceedings against him in the District Court. Obviously, the court's ruling only allowed the case to proceed to trial where a number of other factors may have led to a dismissal or an acquittal. Rather, Respondent contends that the denial of a speedy trial motion is immediately appealable before trial, under the so-called "collateral order exception" to the final judgment rule.

QUESTION: Could the speedy trial claim have been presented anew to the District Court in a motion for judgment NOV or judgment of acquittal at the conclusion if a guilty verdict had been returned?

MR. GELLER: Yes, it can, and it is our position that that would be the preferable way in which to present it because, as I'll get to in a moment, it's often impossible to rule on such a motion until you see what the evidence is at trial, because frequently the defendant's contentions will be that he has been prejudiced in his ability to defend himself by the delay that might have been caused by the Government. And it is only after trial that such a claim can be

intelligently assessed.

Now, this Court most recently applied the collateral order doctrine last term in Abney v. United States, in holding that the Courts of Appeals had jurisdiction under Section 1291 to entertain an interlocutory appeal from the denial to dismiss an indictment because of double jeopardy. In reaching that conclusion, the Court stressed that the trial judge's pretrial denial of the double jeopardy motion constituted a complete, formal and final rejection of the Fifth Amendment claim in the District Court, that the claim by its very nature was wholly collateral to and separable from the issues to be litigated at the trial, and that, most important, the protections conferred on an accused by the Double Jeopardy Clause would be significantly undermined if appellate review had to wait until after a conviction, because the Double Jeopardy Clause protects an individual not only against being punished twice for the same offense, but also against being tried twice for that offense. That aspect of the constitutional right could not be vindicated by reversal of any conviction obtained at the second trial, and would be irreparably lost unless an immediate pretrial appeal were permitted.

And, we've explained at some length in our brief why the denial prior to trial of a speedy trial motion, unlike the denial of a double jeopardy motion, is not normally a final rejection of the claim in the district court, because,

as I just explained in response to a question by Mr. Justice Rehnquist, an intelligent application of the Barker view in those standards often may not be possible before trial. For many of the same reasons speedy trial claims,again unlike double jeopardy claims, are not wholly collateral to the matters to be raised at trial, because only after the trial can it be determined whether the defendant has truly been prejudiced by the pretrial delay.

Respondent has not seriously disputed these contentions in his brief. Instead, he asserts that the Sixth Amendment Speedy Trial Clause, just like the Fifth Amendment Double Jeopardy Clause, creates a so-called "right not to be tried," a right which to be effective requires recognition of the concomitant right to immediate appellate review. But there is little to support this assertion. As the language of the Sixth Amendment suggests, its the delay before trial and not the trial itself that violates the constitutional guarantee. The concern of the Sixth Amendment is not the trial but any delays surrounding it.

If the pertinent factors identified in Barker v. Wingo coalesce in a particular case to deprive a defendant of his right to a speedy trial, that violation, by definition, must have occurred prior to the beginning of a trial. Hence, unlike the situation in Abney, proceeding with the trial itself would not cause or compound the constitutional

deprivation. By the same token, and again by contrast to the Fifth Amendment protection against double jeopardy, the effectiveness of appellate review of speedy trial claims is not diminished in any way by awaiting the outcome of the trial.

This Court has identified three interests of a defendant that the Speedy Trial Clause is designed to protect. First, to prevent oppressive pretrial incarceration. Second, to minimize pretrial anxiety and concern of the accused. And third to limit the possibility that the defense will be impaired by the loss of evidence.

It is obvious that no remedy, whenever offered, can truly undo or alleviate the annoyances or anxieties that a defendant may have suffered while awaiting trial. But the reversal of the defendant's conviction after trial would be equally as effective as the dismissal of indictment before trial, to compensate that defendant for any emotional harm he may have suffered, and would also be equally as effective as a means of punishing the Government for the delay.

Similarly, a defendant's interests in avoiding a conviction, based on lost evidence or dimmed memories, can be fully protected by a reversal of any conviction procured after a period of unconstitutional pretrial delay. Thus, deferring appeal of a rejected speedy trial claim until after trial presents a question not of rights but solely of remedies.

Any Sixth Amendment violation can be remedied as well after trial as before.

Now, since speedy trial claims, thus, do not satisfy any of the criteria of a collateral order doctrine, there is no justification for countenancing a breach of the normal rules against interlocutory appeals in criminal cases for such claims. Indeed, there are strong reasons why in our view it would be especially inappropriate to allow defendants to take interlocutory immediate appeals in the district court's denial of their speedy trial motion. That is because the Speedy Trial Clause, unlike the Double Jeopardy Clause and, indeed, unlike any other protections of the Bill of Rights, is designed as much to foster the interests of society in the expeditious resolution of criminal cases as to confer protections upon individual defendants.

As this Court observed in Barker v. Wingo the societal interest in providing a speedy trial exists not only separate from but at times also in opposition to the interests of the accused. Thus, even if some of the interests protected by the Speedy Trial Clause might be furthered by allowing pretrial appellate review of Sixth Amendment claims in an occasional case, other equally important interests protected by the clause would be severely frustrated by the often substantial delays in the disposition of criminal cases that would inevitably accompany such appeals.

QUESTION: There would certainly be pretrial review if the shoe were on the other foot, would there not? If the defendant had moved that the indictment be dismissed because to try him now would violate his right to a speedy trial, the Government could surely appeal that, couldn't it?

MR. GELLER: That's correct, but not under Section 1291, under Section 3731 from the dismissal of an indictment and that clearly is a final order. There is nothing further that would happen in the case unless an appeal were to be pursued.

This case graphically illustrates the point I was making about delay. The District Court denied Respondent's motion to dismiss the indictment in July 1975 and scheduled his trial to begin a few weeks later. Pretrial litigation over Respondent's speedy trial claims has yet to be resolved, more than two years after his trial would have ended but for the piecemeal appeal. In addition, permitting a pretrial appeal of speedy trial claims would allow defendants a ready method of obtaining a continuance of their trial, and delay is, unfortunately, not an uncommon defense tactic.

We recognize, of course, that this Court in Abney was not persuaded by the argument that defendants might take dilatory appeals in double jeopardy cases. The Court believed that the courts of appeals could easily weed out and dispose summarily of truly frivolous claims. While this is, perhaps,

true in double jeopardy cases, there are two reasons why it is exceedingly unlikely to be true with respect to speedy trial claims. First is that it is much more difficult to allege a plausible double jeopardy violation. There must be some showing that the defendant has once before been in jeopardy of federal conviction on the same or related charges. Very few defendants can make or even approach that showing. By contrast, it would be the rare defendant who could not present a colorable speedy trial claim, since there will be in every case some period of delay between his arrest or indictment and trial. And possible prejudices, this Court remarked in United States v. Marion, is inherent in any delay, however short.

Secondly, it is much easier for courts of appeals to spot and adjudicate an insubstantial double jeopardy claim quickly. It involves merely a question of law, generally on undisputed facts. Speedy trial claims, on the other hand, call for a delicate and often difficult case by case assessment of a number of variables, such as the reasons for the delay and prejudice suffered as a result of the delay. Whether these factors make out a constitutional violation in any particular case may not be possible to determine without the aid of full briefing and oral argument.

In short, we submit that speedy trial claims are precisely the type of claims that should be subject to the final judgment rule, and that the Court of Appeals erred in

hearing Respondent's speedy trial appeal prior to trial.

I'd like to turn briefly, in the few minutes remaining, to the merits of Respondent's --

QUESTION: Mr. Geller, before you turn to the merits, in this case, the District Court denied a double jeopardy motion as well as a speedy trial motion.

MR. GELLER: That's correct.

QUESTION: And the appeals presented both issues to the Court of Appeals, but the Court of Appeals didn't decide the double jeopardy issue.

MR. GELLER: That's correct.

QUESTION: Why doesn't the appeal on the double jeopardy issue support review of the speedy trial issue?

MR. GELLER: Well, this Court in Abney was faced with a similar situation. In Abney, you will recall, not only was there an appeal of the double jeopardy claim, but the defendant also claimed that the indictment failed to state an offense. The District Court denied that motion. They took an appeal of that, also, before trial. This Court held that the Court of Appeals had no jurisdiction over that aspect of the defendant's appeal because each issue must meet its own independent appealability standards. The concept of pendent jurisdiction has no role to play under the collateral order doctrine.

Now, as to the merits of Respondent's Sixth Amendment

claim, I noted at the outset that this Court need not reach it if it agrees with us that the court below lacked jurisdiction over Respondent's pretrial appeal.

As the Court of Appeals acknowledged and, indeed, as Respondent concedes, no significant delay, and certainly no delay approaching constitutional magnitude occurred in this case between January 1975 when Respondent was indicted and August 1975 when his trial was set to begin. The Court of Appeals' holding that Respondent was deprived of his right to a speedy trial, thus, plainly rests on the premise that Respondent's Sixth Amendment right attached in the spring of 1970 when he was arrested by the Army and that his right continued unabated until August 1975, even though all of the military charges against Respondent had been dismissed and he had been released from all restraints on his liberty in October of 1970.

The court below has, therefore, reached the insupportable and quite incongruous conclusion that in the four years between the dismissal of the military charges against Respondent and his indictment, Respondent was entitled to insist upon a prompt resolution of the charges against him, and the Federal Government was obliged by the Sixth Amendment to afford him a speedy trial on those charges, despite the fact that absolutely no criminal charges were pending against him during any part of that period.

This holding, we submit, is flatly inconsistent, not only with the very language of the Sixth Amendment which talks about an accused in a criminal prosecution, but also with this Court's analysis of that provision in United States v. Marion. In Marion, the Court held that the particular protections of the Sixth Amendment did not extend to the period before an individual had been formally accused of a crime, either by arrest or indictment, even though that individual may have been aware for an extended period of time prior to his indictment that he was under official investigation, and even though he may have suffered severe, harmful emotional and financial consequences as a result of that investigation.

It is, we believe, the logical corollary of these conclusions that if defendant's Sixth Amendment rights also did not continue after a criminal proceeding against him has been terminated by a complete dismissal of the charges, at that point, just like in advance of formal accusation, the individual does not stand publicly accused of any crime and his liberty is in no way restricted. His situation, the Court observed in Marion, does not compare with that of a defendant who has been arrested and held to answer.

Now, Respondent's only response to these arguments is the assertion that his case is essentially indistinguishable from that in Klopfer v. North Carolina, in 386 U.S. Klopfer, however, presented the question -- and I am quoting from page

214 of the Court's opinion -- whether authorities, quote, "may definitely postpone prosecution on an indictment without stated justification over the objection of an accused."

The unusual North Carolina procedure in Klopfer allowed the State Prosecutor to postpone prosecution indefinitely on an indictment that he did not wish to pursue immediately. The upshot was that since the indictment was not dismissed during the waiting period the statute of limitations remained tolled and the defendant remained under formal public accusation and under the constant threat of prosecution at the option of the Government. This Court held that the state procedure violated Klopfer's right to a speedy trial, but only because, as the Court stated at page 222, the suspension of his prosecution, quote, "indefinitely prolonged the oppression as well as the anxiety and concern accompanying public accusation."

Respondent, of course, was not under any public accusation between October 1970 and January 1975. Nothing in Klopfer, therefore, supports an extension of the Speedy Trial Clause to the period when an individual is not the subject of any pending criminal charges.

I should add one final point. The conclusion that Respondent's Sixth Amendment rights were not violated by the five-year period between the murders of his family in 1970 and his indictment for those crimes in 1975 certainly does not

suggest that the propriety of that delay is beyond judicial scrutiny. There is first the protection of the statute of limitations which is, of course, the primary guarantee against the bringing of overly stale criminal charges. But there is no suggestion that the statute was violated here. Moreover, as this Court observed in Marion and reaffirmed last term in United States v. Lovasco, the Due Process Clause of the Fifth Amendment is an additional protection against unreasonable pre-indictment delay. A lengthy delay prior to accusation violates due process if it causes actual prejudice to the defense and if the Government's justification for the delay is inadequate.

Although the Court of Appeals did not undertake this analysis, we believe that the District Court and the dissenting judge in the Court of Appeals correctly found that the Due Process Clause was not violated in this case. Indeed, Respondent does not contend otherwise. Respondent has never claimed that the Government delay in this case was designed to prejudice his defense or was occasioned by tactical reasons. And, as we've set forth at some length in our main and reply briefs, there is not the slightest proof at this pretrial stage that Respondent's defense has actually been prejudiced by the delay.

We, therefore, submit that the Court should vacate the judgment of the Court of Appeals with instructions to

dismiss Respondent's speedy trial claim for lack of jurisdiction, so that this case may finally proceed to trial.

Mr. Chief Justice, I'd like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Geller.

QUESTION: Dismiss the appeal from the speedy trial claim.

MR. GELLER: That's correct.

MR. CHIEF JUSTICE BURGER: Mr. Segal.

ORAL ARGUMENT OF BERNARD L. SEGAL, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I ask the Court's indulgence, if I may, at the outset. If you will bear with me if I also pass over the facts slightly in this case. It just seems to me that the Solicitor General's argument has consciously averted some rather, I think, poignant and significant findings. Not my facts, if Your Honors please, but the facts found by the Court of Appeals and the facts found in the most extraordinary military proceeding that precipitated this case in 1970.

The case does start on February 17, 1970, with the murders of the MacDonald family, the wife and children. The wounds that Dr. MacDonald referred to, by the Solicitor, of course, were testified to at the military proceedings by both

the Government doctors and the defense doctors as being "life-threatening" wounds. The reason for it, of course, was that one of the Government's multiple theories of trying to explain the case was that these were self-inflicted by the accused, Dr. MacDonald, to cover up murders that he had committed. In fact, the records fail to support that and the conclusion of the military presiding officer in 1970 was that Dr. MacDonald had told the truth. Those were his words.

Most extraordinarily, which the Government has referred to at great length, are the facts from this 1970 military proceeding that nowhere in the Solicitor General's brief, nowhere in the Solicitor General's argument does he share with the court the two and the only two findings that were made by --

QUESTION: How does the military establishment's findings bear on indictment later brought by civil authorities?

MR. SEGAL: If Your Honor pleases, both of these proceedings, both the military proceeding in 1970 and the proceeding of the federal district court were proceedings by the same sovereign, the United States. There was not a seperate sovereignty situation here. It is a continuum. This is a continuous prosecution of Dr. MacDonald by the United States. As a matter of fact, if I may, when I get into --

QUESTION: They are under two fully different systems of justice, are they not?

MR. SEGAL: That's right, if Your Honor pleases, and I might --

QUESTION: Military code is one and the civilian code is quite another, isn't it?

MR. SEGAL: Yes, Mr.Chief Justice.

I might just point out that, as a matter of fact, it was the election of a government as to which of these two systems it might go to. At the very outset of the case, the investigation was being pursued by both the FBI and the Justice Department and the military authorities. And it was the Justice Department that participated in the ultimate decision that the prosecution should be brought, initially, in the military system rather than in the civilian court.

If I may, though, if Your Honor please, I do want to share with the Court -- and I don't mean to prolong the discussion of the facts, though I think they are essential to an understanding of this case -- there are only two findings at the end of the Article 32 proceedings. This was the longest Article 32 proceeding in the history of the military justice system.

QUESTION: It was not a trial, was it?

MR. SEGAL: We do not, because of the special circumstances, consider it to be a trial, no, Your Honor. That is an issue, of course, which is developed in the double jeopardy argument which the Court of Appeals said had

merit, but reserved any decision on, and therefore has not been decided and is not before the Court at this time.

QUESTION: Then what bearing does it have here, if it was not a trial? It was just an investigation.

MR. SEGAL: No, if Your Honor pleases, the --

QUESTION: It was just an investigation, wasn't it?

MR. SEGAL: Your Honor, I do not think that is a correct characterization, Mr. Justice Marshall. I do not think so.

QUESTION: Was he at any time subject to be sentenced by this hearing?

MR. SEGAL: No, Your Honor, not the Article 32 proceeding.

QUESTION: Is that the only one we are talking about?

MR. SEGAL: If I may respond, Your Honor, in this way, the Article 32 proceeding encompasses more than the phase that I am now referring to. The proceeding encompasses then an adjudication at the conclusion of it by the convening authority. Again, we are talking about issues that relate to double jeopardy.

QUESTION: And the conclusion is that we shall not call a general court. That's all it said. Either it says we will or we won't have a general court. Has it changed, or is that what it does?

MR. SEGAL: The language of the formal order at the conclusion of the military proceedings was to dismiss the charges. But that was a formal piece of language that we did not take cognizance of what the Uniform Code of Military Justice required to be found by Colonel Rock.

If Your Honor please, at the end of a proceeding that spanned something nearly six months, with a two thousand page record, with ninety pages of findings and summary of the evidence, Colonel Rock made two findings. First of all that the charges were not true. Those are the words of the findings. This is not like a civilian court in which probable cause or the lack thereof is the issue. It is a different and unique standard in military system, and his findings were the charges against Dr. MacDonald were not true. The second finding was, contrary to what the Solicitor suggests, that there be further investigation by the civilian authorities, the finding was that a named woman uncovered by the defense as being specifically involved and present at the murder scene should be the person investigated by the civilian authorities, not Dr. MacDonald, as I think is the seamy implication the way the Solicitor presented this morning.

QUESTION: Is that any more than a conclusion of an investigatory authority, as Justice Marshall has suggested? That's not a trial. He was not exposed to jeopardy, was he?

MR. SEGAL: Not by virtue of being before Colonel

Rock, no. Jeopardy attached, Your Honor -- again, it is the argument that we think has not been decided by the Fourth Circuit. Clearly, it has not been reserved. Jeopardy attached when Major General Flanagan entered his final order. He was the authority. He was the equivalent of a district judge entering a final order. But, again, that is beyond, I think, the scope of the case before this Court.

Let me pass, if Your Honors please, to the other part of the facts that I wanted to make reference to, and that is --

QUESTION: Do these facts shed light on why your claim of denial of speedy trial was appealable to the Court of Appeals?

MR. SEGAL: No, if Your Honor please, I can proceed --

QUESTION: No, you shape your own argument which is certainly your privilege. I hope you will address that point sometime during the thirty minutes that's allotted to you.

MR. SEGAL: I thoroughly intend to, Your Honor, and I appreciate your suggestion.

I do think that it is necessary to understand the case because even the Government, itself, has said in prior memorandums filed with this Court that this is a unique case, an extraordinary case on its facts. And I think the facts require some touching.

If I may then proceed to the question, though, of the appealability of the denial of Dr. MacDonald's motion for a speedy trial prior to trial; it seems to me that what the Court of Appeals did in accepting this case was neither extraordinary or out of line with the prior decision that it rendered itself in Lansdown and, in fact, the concepts that were approved by this Court originally in Cohen v. Beneficial Loan Corp in 1949 and reaffirmed by this Court in Abney. Conceptually, they are the same.

If Your Honors please, I think that the Court of Appeals, Judge Busner, writing for the majority, made the point very clear when it said: "This is one of the small classes of rights that must be reviewed in criminal cases pretrial."

The claim in this case is clearly collateral. The order in this case -- and I am not necessarily saying that every order in every speedy trial case, but clearly the order in this case -- was a final order. There was a need, and the Court of Appeals so found, for an immediate appellate review of this case because the right would probably be lost forever. And, clearly, the Court of Appeals found as in Cohen, and we set forth one of the criteria, that the right was too important to be denied an immediate review.

Now, on the issue of the collateralness of the speedy trial issue, which I think is a special question, I don't ask

the Court to accept my words. I ask the Court to accept the words of the Government, because in United States v. Marion it was precisely the words of the Government to this Court in arguing why the Government should be allowed to appeal the granting of a motion by a defendant to dismiss an indictment for denial of a speedy trial, where the defendant on appeal to this Court challenged the ability of the Government to seek review here --

QUESTION: The Government also cited the statute, didn't it?

MR. SEGAL: Yes, Your Honor, the Government cited the statute, but the argument --

QUESTION: Where is your statute?

MR. SEGAL: If Your Honor please, 1291, we think, is the correct statute in this case. This is a final order, appealable under that statute. The Court of Appeals so found. And I think the Court of Appeals' reasoning is clearly consonant with the reasoning of this Court in Abney.

Now, if I might just simply refer though, Your Honor, I think it is important to understand whether or not this issue is collateral to simply what the Government said in describing collateralness in the Marion case. In Marion, the Government used exactly -- and if I may from the Government's brief in Marion use precisely these words. It said: "The defendant does not deny that he has committed the acts

charged or that those acts constitute a crime, but nevertheless he urges that he cannot be prosecuted because of some" -- and the word used here is "extraneous" -- "factor, such as the tolling of the statute of limitations or the denial of a speedy trial."

In its reply brief, the Government returns to a description of the speedy trial claim and says: "Such a plea sets up by way of defense a claim that bars conviction whether or not the defendant is guilty."

And this Court, Mr. Justice White, writing for the Court in Marion echoes exactly the same language. It said: "It is independent of the issue of guilt or innocence. The question of speedy trial is not in any way connected with the trial evidence. It is connected simply with the issue of whether or not the Government has improperly delayed for an excessive period of time --

QUESTION: Mr. Segal, may I interrupt you for just a moment.

Under your analysis, if I understand it, every speedy trial claim would be appealable, that argument could always be made. But the Fourth Circuit didn't take that view. They said usually you should wait until after trial, but this case is different.

I don't understand what the Court of Appeals was saying, and maybe you can -- Are you taking the position that

they are always appealable, or just sometimes? And if so, when?

MR. SEGAL: In view of the decision of this Court, Mr. Justice Stevens, in Abney, I think that speedy trial claims are appealable as a matter of right, as being part of the small class of criminal cases referred to in Cohen and referred to again in Abney.

I would suggest to the Court that the bugaboo raised that somehow we are going to open the floodgates to a lot of frivolous speedy trial claims is, again, unsupported by the facts or the rationality.

Let me point out several things. First of all, there have been 29 years that have elapsed since the Cohen doctrine was first articulated. Which means that for 29 years defendants and defense lawyers in criminal cases apparently are presumed to be aware that they could have sought interlocutory appeals under denial of speedy trial claims by district courts.

As the Government points out in its brief, there are only two reported cases that we can find in the 29 years of the Cohen case. It does not indicate some great landmark abuse by district courts, by lawyers, or by courts of appeal reviewing these matters.

QUESTION: Would you be interested in knowing about how many petitions for certiorari we get raising speedy trial

claims?

MR. SEGAL: I would think, Your Honor, that that would not be changed in any way by the ruling of this case.

QUESTION: I'd like to cut it down.

MR. SEGAL: May I point out, Your Honor, that, in fact, there is no floodgate to be opened in this case because the floodgate is opened already. The truth of the matter is that any defendant who is denied his or her motion for a speedy trial by a district court, under the procedures presently in tact and which will not be affected by any decision in this case, can go to the court of appeals with a writ of mandamus. The only difference between that and what we are talking about now is the notice of appeal is a shorter form. There is less to be said. It does not take much for the defendant or defendant's lawyer to propose a writ of mandamus.

QUESTION: I had assumed that the bar would not be interested in trying out everything on a writ of mandamus. I would assume that. I hope I'm right.

MR. SEGAL: I also assume something else, Mr. Justice Marshall, which is, namely, that I don't think that if this Court carefully articulates the type of speedy trial claims that are worthy of pretrial consideration -- does it meet the Cohen standard? -- I think the bar would also be perceptive enough to see that. But I am assuming, as did the Government's

dark view of this case, if I may. And the dark view is something --

QUESTION: Has this Court ever sanctioned review of a denial of speedy trial claim by writ of mandamus?

MR. SEGAL: There is no case that I am aware of, Your Honor, but there is nothing in the law of mandamus that prohibits a defendant -- It's clear a defendant can file a writ of mandamus and seek --

QUESTION: I don't think there is anything in the law that prevents a lawyer from filing a writ of mandamus to stop a judge from breathing. You have a right to file anything you want to file, but I assume that it is done with reason.

MR. SEGAL: Yes, Your Honor.

QUESTION: And I assume that if you want to have mandamus you can show us a case on it.

MR. SEGAL: What I am suggesting, Your Honor, is that mandamus, in fact, does lie and the fact that lawyers --

QUESTION: And your case is which?

MR. SEGAL: I do not have it in my brief. I will be glad to submit --

QUESTION: You have a mandamus case on speedy trial?

MR. SEGAL: I think the law, mandamus clearly is there.

QUESTION: You have a case on that?

MR. SEGAL: Not at my fingertips and if I may and with

Your Honor's permission, I would appreciate an opportunity to submit authorities after the argument. But I do suggest to the Court that mandamus lies. Even in the most frivolous, even assuming Your Honor's position that mandamus doesn't lie, what does stop the lawyer from doing it?

QUESTION: In mandamus, the question would be one of law, whether the judge had the authority to deny the motion. He always has the authority to deny it. You wouldn't review the question with the merits on mandamus.

MR. SEGAL: Perhaps, I have inadequately stated my position, Mr. Justice Stevens. All I am suggesting to the Court is not that mandamus may or may not be the proper form, what I am suggesting is that if lawyers want to badger appellate courts they already have the format to do it. Let's assume that mandamus doesn't lie. It doesn't mean that lawyers may not erroneously proceed that way, and being denied by courts of appeal may not erroneously petition this Court for certiorari.

What I am simply trying to respond to is not to argue the merits or lack of merits of mandamus as a form of relieving this problem, but what I want to point out is essentially the specious nature of the suggestion that if this Court were to conclude that the rationality --

QUESTION: You are seriously arguing that if we hold that such an order is appealable that there won't be a lot of

appeals? Do you really think that?

MR. SEGAL: I think in a seminal period, until the courts of appeals handle the cases I would suggest to you. I don't think every speedy trial argument, every speedy trial claim merits a full argument. The court is perfectly capable, all courts of appeals are perfectly capable of reading the papers and without argument determining which are without merit. I have practiced, if Your Honors please, in federal criminal courts for something like 18 years. I didn't need the Cohen case to tell me it was unwise to take interlocutory appeals in criminal cases. We knew that the courts of appeals, we all have experienced the courts of appeals, the filing of a paper, the filing of a Government's one and a half page motion to dismiss on the law or the merits, and an answer from the court throwing out an unmerited appeal. All I am saying is I would hope this Court would not be led astray by the Government's --

QUESTION: Just one more question, if I may, Mr. Segal.

Your point, if I understand it, is that the speedy trial claim is appealable if it has merit.

MR. SEGAL: No, Your Honor, my point is that speedy trial claim, within the meaning of Cohen, as rearticulated in Abney, is that speedy trial is one of what I would say [illegible] are only three claims that are appealable in an interlocutory

phase in criminal cases.

QUESTION: Always appealable?

MR. SEGAL: Yes, Your Honor, the three aspects --

QUESTION: Those three are double jeopardy, speedy trial and what's the third?

MR. SEGAL: Bail. Stack v. Boyle.

QUESTION: Why would --

QUESTION: What about (inaudible)

MR. SEGAL: No, Your Honor, that is clear it is not. It is not an issue --

QUESTION: You may have have an allegation that the grand jury was not properly impaneled and no member of the grand jury was a live person. You can't get that to the court of appeals no way. Am I right?

MR. SEGAL: I do not think as it stands now, Your Honor.

QUESTION: Suppose a defendant purports to appeal a denial of his motion which has two parts to it, one, there was inordinate pre-indictment delay which violated his constitutional rights. There was inordinate delay after indictment, between indictment and trial, which violated his right to speedy trial. Wouldn't you say both of those are appealable under your submission?

MR. SEGAL: No, if Your Honor pleases, that was not my submission. I would offer a lesser submission. What I am

talking about here is a Sixth Amendment issue, pre-indictment delay.

QUESTION: I know, but his due process motion is also based on the proposition that the trial shouldn't take place at all.

MR. SEGAL: The difficulty is though, Your Honor, the finality issue. If we are using the Cohen standard, Cohen requires there would be a finality. In this particular case, there was finality because the district judge entered a very specific order and wrote an opinion. And his opinion was that in this case the -- in order to be a speedy trial right under the Sixth Amendment there had to be a public accusation. On that score the judge was right and it was upheld and that language was correctly found by the court of appeals. But he erred and the court of appeals found he erred when he said the public accusation in this case had not taken place until January 1975 when the indictment was returned. As Judges Busner and Russell found in the court of appeals, the public accusation had taken place in April of 1970, in May of 1970 when the Government called a press conference and announced the formal charges. In this case, there is nothing further that a trial can add. There is nothing that can be shown by a trial, nothing will happen before Judge Dupre, the District Judge, in any way can alter the speedy trial claim, because he has held as a matter of law that the speedy trial claim in

this case ran only from January 25, 1975.

We have no argument, no quarrel with that date and proceeding of the district court. Our quarrel is the five years' delay found by the court of appeals to be absolutely unjustified, absolutely without rational explanation, except, if Your Honor pleases, the one offered by the Government below. The court of appeals found and quoted at length the statement by Government's counsel in January of 1975 at preliminary proceedings in this case. When asked by the United States Magistrate: What is it that took five years to restart this case again, it having started back in April of 1970? --

-- In a moment of candor all too often not heard, Government counsel said it was bureaucracy. "What happened was," he said to the magistrate, and it was repeated again later on: "What happened, Your Honor, was we needed the FBI laboratory to do some of the laboratory technical work and bureaucracy prevented us from 1970 to '75 from getting the FBI laboratory." That is the reason.

Now, I might say in its brief to this Court, the Government has shifted now to what is now its third position on what caused the delay in this case. I must say something. I am profoundly surprised that counsel for the Government would get up to this Court and say, see, the MacDonald case, itself, is an absolute example of the delay that defendants could bring.

I have set forth at page 40 the proceedings in which the Government has dragged its feet, been late, extended time and doubled extended time after unprecedented extensions of time to file motions and briefs that are not allowed in the court of appeals, and asked for double time to file petitions for extensions with this Court. It is set out in the footnote on page 40.

Why, in the name of Heaven, in this of all the cases, where the Government has really nothing to say for its delay except the words of the Government's attorney who said, "bureaucracy," they would suggest that the MacDonald case is the one which is an example?

To the contrary, the court of appeals found that there were two and a half years in this case in which absolutely nothing of significance took place in the Justice Department.

The chronology of this case was that the charges were finally dismissed in October of 1970. Now, we contend -- It is our position, if Your Honors please, that that dismissal by General Flanagan constitutes double jeopardy. But, since that's not the issue here, arguendo, we will take the Government's position that it was not final.

The Government, in fact, proceeded reasonably promptly after that dismissal to restart the investigation. In January of '71, which is less than two and a half months later, a new team of military investigators were assigned.

As a matter of fact, ten investigators were assigned full time for one year. They worked until December of '71. We find no fault with that proceeding. In the course of those eleven and a half months, they re-interviewed every witness in the case. They interviewed 699 witnesses. They did a re-investigation job. We don't find any fault with that. Neither did the Court of appeals. But from December of 1971 until the return of the indictment, there is no significant activity by the Government, nothing that justifies it. The investigators took about six months to write a report. That was in the hands of the Justice Department in June of 1972. Again, the court of appeals thought it was interesting to read the Government's own words -- not only the bureaucracy explanation, but the Court of Appeals made reference to the affidavit given by the Government of Kevin Moroney, an Assistant Attorney General in the Criminal Division. Moroney was purporting to explain why, once this massive data, two complete sets of investigations, thorough work by every member of the military involved, why the Justice Department then did nothing, from June of 1972 until the grand jury was convened in August of '74. And in the affidavit of Mr. Moroney, the Court of Appeals cited. "We had this report and we assigned it to lawyers and we reassigned it." Those are Mr. Moroney's words, "We assigned it and we reassigned it." Who reviewed it and re-reviewed it, and nobody made a decision. No one did anything.

As a matter of fact, the Solicitor General concedes in his argument, and he noted the fact that we note the fact, only two pieces of investigative work took place after December 1971. They are explained in their brief. They are trivial and have nothing to do with the merits of the case. Nothing was happening. What really was the explanation was that no one wanted to make a decision. That's clear from the finding.

We can tell you we know that's the reason it was possible to make a decision by three independent pieces of evidence. When Colonel Rock had to make a finding in this case, Your Honors, he had sat through six months of proceedings, he had a two thousand page record. In five weeks, he prepared a 90-page summary of findings and conclusions in detail which has never been challenged, which the Government accepts. He made a decision in five weeks.

Later on, a new U.S. Attorney took over this case in the Eastern District of North Carolina. Now, he took over a whole office. He was not even in the office prior to his taking that position. In a matter of four months, he not only took control of the office, he finished a 56-page report to the Justice Department and said, "I want to go ahead and prosecute MacDonald. Send me a trial lawyer."

What, in March of 1972, did the Justice Department do? It sent it to another lawyer to review the report. He

had just finished a 56-page evaluation to the Justice Department. He said, "Send me a lawyer. We will do something." The Justice Department did nothing but review it again. In all the affidavits, there was no action by anyone.

Finally, in May of 1974, the case finally wound up in the hands, now, some four years after the crime, nearly two years after the CID had finished its reinvestigation, in the hands of Victor Warhight, another staff attorney. In one month, he was able to read the entire file, or all the evelopes -- or all the drawers of it, interview the judge from North Carolina, interview CID investigators, talk with other attorneys in the case and conclude that he wanted to convene a grand jury investigation. He did that all in a month and a month later a grand jury was impaneled. The case was susceptible of resolution. The Court of Appeals found there was no adequate explanation for two and one-half --

QUESTION: Mr. Segal, do you realize that neither you nor I can decide how the Department of Justice is going to run?

MR. SEGAL: If Your Honor pleases, if you are suggesting --

QUESTION: Do you agree with that?

MR. SEGAL: I suppose we don't have any direct influence, but I think the words of this Court have influence.

QUESTION: After all this, an indictment was had and

the case was tried and the jury returned a verdict. Isn't that -- I'm not sure what these matters you are discussing have to do with the issue that you are presenting here.

MR. SEGAL: There are two issues, Your Honor, and I must say that the argument has gone to the merits of the speedy trial argument. I do not want to leave the podium without an opportunity to express some of the facts of the matter.

I will just return, then, to the appealability issue and say Your Honor's own words, in the Strunk case, I think, are very instructive. This case must be -- All speedy trial cases must have the right to the appeal. Not all deserve a full hearing and argument. But in Strunk a court of appeals attempted some solution, short of dismissing indictment, which this Court has held to be the only relief. They attempted to shorten the defendant's sentence by 292 days to accommodate what they found to be an unreasonable 10-month delay. Your Honor set forth that you cannot correct a speedy trial defect by somehow playing games with the numbers. The only correction for the defect of a speedy trial, that is, the denial of a trial that is less than speedy, once it has been denied, cannot be re-given to defendant.

QUESTION: How does that -- appealability of the order denying such a motion?

MR. SEGAL: If Your Honor pleases, the --

reiterated in Abney, says: Is this the kind of matter which requires, will a right be lost, if it is not, in fact, allowed to be appealed at pretrial?

And my suggestion to the Court is as follows: Number one, the speedy trial right means, if it means anything, the right not to be given a trial other than one that is speedy, that is, once the Government has delayed inordinately and without justification, there is nothing more the Government can do to correct the defect. You cannot do anything to change the situation. If that is correct, if Your Honor pleases, then the defendant's right, the right of the accused, is not to be tried by a court which, in effect, has no capacity to correct in any way the wrong that had been done to him.

QUESTION: Do you think it corrects it if six months, twelve months, eighteen months later the court of appeals decides there was no denial of a speedy trial and then you are back where you were with the loss of eighteen months more. How, conceivably, could the concept of speedy trial be advanced by allowing interlocutory appeals, if that's the only issue? Nothing in Abney, on which you seem to rely, would give the slightest hint.

MR. SEGAL: I think the criteria, if Your Honor please, in Abney are perfectly in synchronization with the facts and the circumstances of speedy trial.

May I just say this -- and my time, I see is running out, but I think it is important I share with the Court the following. If you were to accept the Government's concept that speedy trial, and I am talking only now about Sixth Amendment speedy trial, I am not talking about Fifth Amendment due process issues. Because in this case, the judge's decision is complete, there is nothing that can be changed in regard to the speedy trial decision by a trial --

QUESTION: Just so I make it -- just so it is straight, I gather now that you are saying that an order denying a motion to dismiss on speedy trial grounds is appealable, both when the judge denies it on the grounds that this really isn't a speedy trial claim at all -- as in this case, I take it -- or -- but also if he denies it on the ground, yes, it is a speedy trial claim, but it is without merit. Do you think both are appealable?

MR. SEGAL: I must confess, Mr. Justice White, I did not perceive Judge Dupre's order as saying there was not a speedy trial --

QUESTION: I know, but you seem to think that if you say that you measure the time in this case only after the '75 indictment, between then and trial, there isn't any speedy trial claim here at all.

MR. SEGAL: That's correct, Your Honor.

QUESTION: And it's just a due process claim.

MR. SEGAL: We haven't even contended that at this stage. It's not even before the Court.

Our contention -- It is the Government brief that has foisted upon the Court the suggestion that somehow we had to prove prejudice.

May I just finishwith one sentence, Your Honor?

That is,to accept the Government's contention that the speedy trial claim must wait after trial is to say that only the guilty will have the benefit of the speedy trial claim, because only a person who has been convicted may then have the right to speedy trial vindicated by the reversal of that conviction. We say in a case, such as this one, where, in fact, there has been an extraordinary proceeding in which the finding was that the charges were not true -- We say in a case such as this one that a person who goes to trial and is even acquitted is not a vindication of the Sixth Amendment speedy trial right to say there is nothing more you can do.

I think an argument by the Government is somewhat disingenuous which says the only vindication for the right is you have to be convicted and then an appellate court will tell you that you should never have been tried in the first place.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Geller?

REBUTTAL ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

ON BEHALF OF THE PETITIONER

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

First, I would briefly like to address the suggestion that the Government somehow has been inconsistent in the position we are taking in this case and the position we took in Marion about whether speedy trial claims are collateral. The threshold issue in Marion was an appealability issue whether the Government could appeal under the old version of Section 3731, and that, in turn, depended upon whether the district court's dismissal of the indictment had resolved any issues going to the general issue in the case.

Of course, a speedy trial issue is collateral to the issues to be litigated at trial, in the sense that a resolution of the Sixth Amendment question does not require an inquiry into the truth of any of the allegations in the indictment. But we think the Court must have meant something more than that when it used the term "collateral" in Cohen and Abney or else virtually any pre-trial motion to dismiss would be collateral, as Mr. Justice Marshall stated.

We think that the Court meant that an issue is collateral if it would be no easier to resolve the issue after trial than before. In other words, would it be affected in any way by the decision on the merits of the case?

And speedy trial claims would be, as I mentioned earlier, if the defendant is acquitted, then, not only is there no need to resolve the claim, but it goes a long way toward suggesting that his allegations of prejudice were insubstantial.

More importantly, if he is convicted, then the record -- the trial record -- is generally indispensible in determining whether or not his Sixth Amendment rights have been violated,and no better proof of this need be offered than that the courts of appeals almost always resolve post-conviction appeals raising speedy trial claims, by reference to the evidence educed at trial, as, of course, this Court did in Barker v. Wingo, in analyzing Barker's speedy trial claim.

Now, secondly, it is true that the remedy for a speedy trial violation is dismissal of the indictment, but that doesn't indicate that the Sixth Amendment creates a so-called right not to be tried. The difficulty with Respondent's reasoning, once again, is that dismissal of the indictment is the remedy for a wide range of violations, both constitutional and non-constitutional, such as all those involving defects in the indictment. If interlocutory appeals were to be allowed in each of these cases, under the theory that the nature of the remedy implies a right not to be tried, then the collateral order exception would swallow up the final judgment rule in criminal cases.

In addition --

QUESTION: Mr. Geller, if you would just refresh my recollection. Marion, the appeal was by the Government, wasn't it? --

MR. GELLER: That's correct.

QUESTION: -- The motion to dismiss had been granted.

MR. GELLER: That's correct, but --

QUESTION: So it would be under a different statute. That case is entirely different from this.

MR. GELLER: That's another reason to distinguish it, but even there we had to show that the Sixth Amendment -- the district court's resolution of the Sixth Amendment question did not implicate any issues going to guilt or innocence.

QUESTION: Well, it was because there was a plea and abatement within the meaning of the old Criminal Appeals Act.

MR. GELLER: Secondly, the argument that the nature of the remedy in Sixth Amendment cases implies the right not to be tried is inconsistent with this Court's decision last term in Abney. As I mentioned in response to a question Mr. Justice Stevens asked me, initially, in that case, in addition to a double jeopardy claim, the defendant also raised the claim that their indictment failed to state an offense. If they had been right, of course, the remedy would have been dismissal of the indictment. Nonetheless, the Court held that

that's not the type of claim that can be appealed prior to trial.

Finally, I'd like to discuss the reason for the delay in this case, because Mr. Segal has used a large portion of his argument trying to explain why the delay was unfair.

I think it is fair to say that much of the delay in this case was attributable to the strong feeling on the part of many persons in the Criminal Division in the Justice Department that charges as serious as the ones in this case simply should not be brought unless the Government was absolutely convinced that they would ultimately prove successful. To begin with, we are not talking about a five-year delay. No one has ever claimed that the Department of Justice unduly delayed before June of '72, when it received the CID's report of its reinvestigation of the crimes. And a decision to go to the grand jury was made in the summer of '74 and Respondent was indicted in January of '75, so we are essentially talking about a two or two-and a half-year period.

Now, during that two or two and a half years, there were two prevailing views within the Government. One group of attorneys thought that the case should be brought to a grand jury immediately, with a view toward bringing charges against Respondent. Another group of attorneys, while also convinced that Respondent was guilty, frankly, couldn't believe that we could convince the jury of that.

QUESTION: Would this be a part of an ordinary argument on a speedy trial claim, Would the differing views or schools of thought within the Criminal Division?

MR. GELLER: Well, both in resolving a Sixth Amendment speedy trial claim and a Fifth Amendment pre-indictment delay claim, the Court must, of course, analyze the reasons for the delay.

QUESTION: But they are not before us on any record, Mr. Geller, the fact that your friend elected to use some of his time going perhaps outside the record is no reason the Government should.

MR. GELLER: I think that there is a record to support some of the statements I am about to make. These statements were made in oral argument before both of the lower courts in this case.

One of the reasons I might say that there is no record in this case is that we think the district court -- and correctly -- analyzed this case as not raising any Sixth Amendment issues at all, because of the four-year delay between the crime and January 1975, Respondent was not under any formal accusation. So he quickly dismissed any Sixth Amendment argument without inquiring --

QUESTION: You defend that position, don't you?

MR. GELLER: Yes, we do.

I just want to give the Court the impression that

this is not a case in which the files lay in some dusty cabinet for four years, with no one looking at the case at all. That's certainly the impression that Respondent tries to give. During every moment, from June of 1972, until an indictment was procured in this case, someone in the Department of Justice was trying to push this case further, but, for reasons that I was about to get into, a number of the superiors in the Department thought that the case should not be brought unless they could be absolutely certain that a jury would convict, and they had trouble believing a jury would convict. Not because they didn't think Respondent was guilty, but because of the nature of the crimes, who the victims were, plus the fact that the Government's evidence --

QUESTION: Mr. Geller, I repeat the cogitations within the Department of Justice really aren't relevant to this issue.

MR. GELLER: I merely wanted to give the Court the impression that there is, in our view, no substance to the allegation that the Fourth Circuit made that the Government proceeded at a leisurely pace, or Respondent's suggestions that the Government was guilty of negligence or ineptitude.

A point I wanted to make, and I will close by saying that in our view the delay here was intended to protect Respondent's rights by not bringing unfair charges.

QUESTION: Mr. Geller, the factual matter that you

do try to develop was presented in the oral argument to the Court of Appeals?

MR. GELLER: And District Court.

QUESTION: In just the same way that the factual justification was presented in the Lovasco case, wasn't it?

MR. GELLER: Well, Mr. Justice Stevens, the facts that I was about to present were not disputed by anyone in the District Court or in the Court of Appeals.

QUESTION: No, but this is not the first time that the Government has justified delay by having the advocate state to an appellate court the reasons for the delay.

MR. GELLER: Well, it's not just in appellate court --

QUESTION: Exactly the same thing in the Lovasco case.

MR. GELLER: Well, without defending what happened in the Lovasco case, Mr. Justice Stevens, these allegations were made to the District Court. If the District Court had thought they were in any way contested, he could well have held an evidentiary hearing, but, as I was about to say, there has been no allegation --

QUESTION: I am just suggesting the Court has approved the procedure you are following today.

MR. GELLER: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon at 2:52 o'clock, p.m., the case in the above-entitled matter was submitted.)