In the ORIGINAL

Supreme Court of the United States

UNITED STATES,	)	
	)	
Petitioner,	)	
	)	
v.	)	NO. 80-1582
	)	
JEFFREY R. MacDONALD	)	

Washington, D. C.

December 7, 1981

Pages 1 thru 50

ALDERSON REPORTING

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- -:

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Petitioner, :

v. : No. 80-1582

JEFFREY R. MacDONALD :

- -:

Washington, D. C.

Monday, December 7, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:54 o'clock a.m.

APPEARANCES:

ALAN I. HOROWITZ, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Petitioner.

RALPH S. SPRITZER, ESQ., Philadelphia, Pennsylvania; on behalf of the Respondent.

C O N T E N T S

PROCEEDINGS

CHIEF JUSTICE BURGER: We will hear arguments next in United States against MacDonald.

Mr. Horowitz, you may proceed when you are ready.

ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.,

ON BEHAL OF THE PETITIONER

MR. HOROWITZ: Thank you, Mr. Chief Justice, and may it please the Court, this case is here on a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. The primary question presented here, and the one which I will devote most of my attention to in argument is simply whether the speedy trial clause applies to a period when a person is under no form of restraint and has no charges pending against him.

There are also two subsidiary questions presented here. First, if the Court rejects the government's view that the speedy trial clause is not applicable to such a period, it is our contention nevertheless that the application of the Barker v. Wingo factors in this case demonstrates that there was no Sixth Amendment violation here.

Second, Respondent contends as an alternative ground for affirmance that in any event the pre-indictment delay here violated the due process clause.

The background of this litigation is as follows.

On February 17th, 1970, Respondent's wife and two children were bludgeoned and stabbed to death. Respondent called the military police, and when they arrived at the crime scene, he told them that he had been attacked by a group of intruders and knocked unconscious, and that when he regained consciousness, he discovered the bodies of his family.

Respondent, who gave investigators a detailed account of his actions upon regaining consciousness, was originally viewed as a victim of the crime, not as a suspect. However, as the investigation proceeded, and the investigators came to realize that the physical evidence at the scene of the crime was inconsistent with several aspects of Respondent's story, he did become a suspect.

On April 6th, 1970, Respondent was advised that he was a suspect. He was relieved of his duties as a physician and confined to his quarters. On May 1st, 1970, he was charged with murder under Article 30 of the Uniform Code of Military Justice, and pursuant to Article 32 of that code an investigating officer was appointed to investigate the charges and recommend whether they should be referred to a court martial for trial.

After a hearing, the investigating officer recommended that the charges be dismissed for lack of evidence. On October 23rd, 1970, the commanding general of Respondent's unit accepted the recommendation and dismissed

the charges on the ground that there was insufficient evidence to warrant convening a court martial.

In December of 1970, Respondent was honorably discharged from the Army, and shortly thereafter he moved to California and established himself as a practicing physician.

At the Justice Department's request, the Army --

QUESTION: Does the record show whether he has remarried?

MR. HOROWITZ: I don't think it is in the record. As far as I know, he hasn't.

At the Justice Department's request, the Army Criminal Investigative Division continued its investigation. CID submitted a massive report on this investigation to the Justice Department in June of 1972, and in response to further specific inquiries for investigation from the department, it submitted supplemental reports in November, 1972, and August, 1973.

In the summer of 1974 --

QUESTION: Mr. Horowitz, is that massive report, as you referred to it, is that lodged here with the Court?

MR. HOROWITZ: I am not certain. I understand that parts of it are in the record and are lodged with the Court.

A grand jury was convened in the summer of 1974, and Respondent was indicted in January of 1975. Respondent

filed several pretrial motions in 1975 to dismiss the indictment, including motions to dismiss on speedy trial and double jeopardy grounds. When the district court denied these motions, Respondent took a pretrial appeal to the Fourth Circuit, which ordered the indictment dismissed on speedy trial grounds.

In 1978, this Court vacated the Fourth Circuit's decision on the ground that the denial of a motion to dismiss on speedy trial grounds could not be appealed before a trial. On remand, the Fourth Circuit rejected Respondent's double jeopardy claim, and this Court denied certiorari. The case was then remanded to the district court for trial.

After the district court denied a pretrial speedy trial motion, and the court of appeals denied a petition for writ of mandamus, Respondent's trial commenced in July of 1979, and he was found guilty on three counts of murder. He again filed a motion to dismiss on speedy trial grounds after the trial, which was denied by the district court, and on appeal the court of appeals held that Respondent had been denied his right to a speedy trial, and that the indictment should have been dismissed.

QUESTION: Where is the Respondent now? Is he incarcerated?

MR. HOROWITZ: No, he is free on bail and working

in California as a physician.

QUESTION: Say that again. He is free on bail, what?

MR. HOROWITZ: Working as a physician in California.

QUESTION: And who freed him?

MR. HOROWITZ: Well, the --

QUESTION: Bail was denied at one time, wasn't it?

MR. HOROWITZ: At one time, yes, but in light of the court of appeals decision, I believe the district court changed the bail conditions and allowed him out on bail.

QUESTION: Did Judge DuPree make any finding as to whether there was prejudice as a result of the delay?

MR. HOROWITZ: Yes, Judge DuPree wrote an opinion which is reprinted in the appendix to the petition. I believe it is Pages 56 to 63 that are relevant, and he found that he had been carefully watching during the trial for any signs of prejudice, and that there was no prejudice at all as a result of the delay.

I should note that the court of appeals opinion found that the primary part of the delay that it considered ground for dismissal of the indictment was the two-year period between the submission of the CID report to the Justice Department and the convening of the grand jury.

Now, the critical period here for this Court's

attention is the period between the dismissal of the military charges in October, 1970, and the return of the indictment in January of 1975. That is the period over which the parties are in dispute.

Respondent's contention is that his speedy trial right attached during this period, one during which no charges were pending against him. That conclusion, we submit, is at odds both with the language of the Sixth Amendment and with the policies underlying the speedy trial clause.

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial." And it then goes on to enumerate several other protections that an accused is entitled to in the course of criminal prosecutions.

Now, during the period after dismissal of the military charges, Respondent was not the subject of the criminal prosecution, nor was he the subject of a public accusation, and hence could be called an accused within the meaning of the Sixth Amendment. Thus, by the express terms of the Constitutional provision, he had no right to a speedy trial. Indeed, the right makes no sense in this context, because the government cannot reasonably be required to speedily try a person on charges that do not even exist.

CHIEF JUSTICE BURGER: We will resume there at

1:00 o'clock, counsel.

(Whereupon, at 12:00 o'clock p.m., the Court was recessed, to reconvene at 1:00 o'clock p.m. of the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Horowitz, you may resume your argument.

ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.,

ON BEHALF OF THE PETITIONER - RESUMED

MR. HOROWITZ: Thank you, Mr. Chief Justice, and may it please the Court, as I mentioned before the break, we believe that the speedy trial clause is not applicable to this period by its express terms, because Respondent was not accused within the meaning of the Sixth Amendment.

This is quite clear from this Court's decision in Marion, because Respondent was not accused within the meaning of the Sixth Amendment. This is quite clear from this Court's decision in Marion, where the Court specifically focused on the question of when a person becomes an accused such that a Sixth Amendment speedy trial right attaches.

The Court explained at Page 320 of its opinion in Marion, and I quote, "It is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engaged this protection."

Here, the government agrees that Respondent's Sixth Amendment right did attach when he was held to answer a criminal charge filed under Article 30 of the Code of

Military Justice, but the government's Constitutional obligation was completely satisfied, and the pendency of this speedy trial right was necessary extinguished by the speedy dismissal of that charge and Respondent's release from all restraints on his liberty.

QUESTION: If the government was completely free, why did they make this long report to the Department of Justice?

MR. HOROWITZ: Well, the government was freed of its obligation under the speedy trial clause, but that doesn't mean that it was freed of its obligation to try to bring the perpetrators of this crime to justice, so they continued to investigate the crime. They felt that they had enough evidence that they were still under an obligation to try to prosecute.

QUESTION: They still were considering prosecution.

MR. HOROWITZ: Yes. Certainly they were considering prosecution. As long as there was an unsolved crime, they were considering prosecution.

QUESTION: Mr. Horowitz, there is some comment in the briefs about a change in the testimony of two witnesses. Do you have any comment on that?

MR. HOROWITZ: Well, I think we have explained in our reply brief that, first of all, the one witness really didn't change his testimony, and explained why his medical

opinion had changed; the second witness explained why she could not recall what she had been asked about when she was first interviewed, and then later did recall in 1975. Neither one of these has anything to do with delay.

First of all, the speedy trial clause really doesn't protect the defendant against the strengthening of the government's case. What it protects him against is prejudice to his defense because of the passage of time.

When the charges against Respondent were dismissed, the criminal prosecution was terminated, and there was no charge left to which a speedy trial claim could attach.

Now, Respondent argues that his case is markedly similar to that of Klopfer versus North Carolina, and I think it is instructive to address this contention, because in our view it is the differences between this case, the situation of a defendant against whom no charges are pending, and the situation of the defendant in Klopfer that are significant for Sixth Amendment purposes.

Under the state procedure used in Klopfer, the defendant was subjected to an unliquidated criminal charge for an indefinite period of time. The state simply took a pause in its prosecution of the defendant, a pause that could have lasted indefinitely, and it was free to pick up the prosecution again at any time right where it left off,

simply by calling the case for trial.

Moreover, the statute of limitations was tolled during this period, and thus it was effectively eliminated as a protection for the defendant.

Here, by contrast, the government could try Respondent only by beginning a prosecution from scratch, that is, by convening a grand jury, convincing the grand jury to return an indictment, and all of this would have to be done within the statute of limitations. Indeed, the Court's opinion in Klopfer indicates that a speedy dismissal of the charges against an accused satisfies the Sixth Amendment right just as surely as if he is given a speedy trial. The Court there noted at Page 216 of its opinion, in discussing the North Carolina procedure, that the procedure provided no means for the defendant to obtain either a dismissal or a trial.

Now, the policies underlying the speedy trial protection similarly have no applicability to a period when no charges are pending. In Marion --

QUESTION: Mr. Horowizt, in this case, as I understand it, the district court found there was no prejudice to the defendant by virtue of the delay. Had there been a finding of prejudice, would you then feel that the speedy trial clause was still inapplicable, or would you reach relief under the due process clause?

MR. HOROWITZ: Well, in our view, the first question is whether the speedy trial clause is applicable. If the speedy trial clause is applicable to a period, then you look at the Barker v. Wingo factors, and one of those factors is prejudice.

QUESTION: I just want to understand your position. You would feel that it is inapplicable even if a finding of prejudice had been --

MR. HOROWITZ: That's correct. He would still have his Fifth Amendment argument. The Sixth Amendment doesn't apply.

In Marion, this Court discussed the policies that are the subject of a Sixth Amendment protection. A formal charge brought by the state is a public accusation that the government has probable cause to believe that the accused has committed a crime. This public accusation entails certain adverse consequences to the accused, and I would like to examine those adverse consequences as listed by this Court at Page 320 of its opinion in Marion, and that is reprinted in our brief at Page 20.

In our view, it is clear that these consequences are dispelled by the dismissal of the charge, just as surely as they would be dispelled if the accused had been brought to a speedy trial on those charges. Hence a dismissal must terminate the applicability of the Sixth Amendment guarantee.

The first interest identified by the Court is that the public accusation seriously interferes with the defendant's liberty. This is perhaps the most important interest protected, because it is the one that is unique to the speedy trial context. Once a charge is brought, the defendant is under some restriction on his liberty. Even if he is not incarcerated, he would probably be released under certain conditions of bail.

Of course, in this case, this interest is not applicable at all, because defendant was completely released when the military charges were dismissed against him and he was honorably discharged from the Army. He had no restrictions whatsoever on his liberty.

Another interest identified by this Court --

QUESTION: Mr. Horowitz, was he aware, however, of the ongoing investigation? Does the record show that?

MR. HOROWITZ: The record shows that at some point he became aware of the ongoing investigation. I don't know at the exact time that he was discharged if he was, but certainly during this period he was aware of the investigation. Of course, that is always -- that is going to be true in many cases of pre-indictment delay, and in Marion this Court explicitly said that the fact that an accused -- that a person may have some anxiety over a criminal investigation against him does not mean that his

speedy trial right --

QUESTION: Yes, but many cases are distinguishable, because here he had been charged, and the charges were dismissed.

MR. HOROWITZ: That's true.

The public obliquy to which he was subjected, we submit, was dispelled by the equally public exoneration that he received, that is, the dismissal of the charges and his honorable discharge. This put him in the same position as if he had been tried and acquitted. Indeed, he was -- for purposes of the public obliquy interest, he was in a better position because there had not even been a finding of probable cause against him, whereas had he been acquitted, the public could reasonably presume that there had been probable cause to charge him with the crime.

QUESTION: You don't really mean he is in a better position than if he had been acquitted, do you? If he had been acquitted, that would have been the end of the case.

MR. HOROWITZ: That's right, but that is only because he would have been put in jeopardy, and he could have been -- another prosecution couldn't have been brought against him, but I think it is important to separate the interests that we are talking about. The speedy trial clause doesn't give him the right to jeopardy, to double jeopardy. Obviously, he would have preferred to be

acquitted, but as far as these specific interests that the Court has identified in connection with the speedy trial clause, I don't think the public obliquy to which he was subjected after his dismissal was any worse than if he had been acquitted.

QUESTION: Isn't there some analogy to the Bartkus against Illinois, the dual sovereignty concept of jeopardy that even though a state may try and acquit, the federal government may still prosecute?

MR. HOROWITZ: Yes, well --

QUESTION: Certainly the defendant after he has been acquitted by the state may well learn that the federal government is still investigating.

MR. HOROWITZ: Well, the rule is that the double jeopardy clause doesn't protect against a second prosecution brought by the federal government after by the state. Now, in this situation it is considered to be a single sovereign, so if he had in fact been tried by the military --

QUESTION: Well, I realize that, but I mean, as to the factual matter of anxiety and so forth.

MR. HOROWITZ: Well, as to the factual matter of anxiety, I think the only thing that is fair to say is that he is in the same position as a person who has been -- excuse me, as a person who is under investigation, and knows that he is under investigation. Now, that creates --

QUESTION: Or, as Justice Rehnquist suggests, a fellow who has been indicted by the state.

MR. HOROWITZ: Yes, or someone who has been indicted by the state. Now --

QUESTION: Or even convicted by the state.

MR. HOROWITZ: There is, of course, an additional anxiety once he is subject to a pending indictment. That is the anxiety that the speedy trial clause protects against, and that is the anxiety that has been dispelled by his public, by the dismissal of the charges. The lingering anxiety that he still has over the possibility that he may still be prosecuted is no different than what the defendant in Marion had.

I think just as the policies underlying the speedy trial clause militate against Respondent's position, so, too, do considerations of the sound administration of justice. As this Court explained in Lovasco, there are important reasons for permitting the prosecutor to exercise his discretion as to whether and when to institute criminal charges. These considerations are equally applicable if the charge has already been filed and dismissed, and as we explained in our brief, there are many legitimate reasons for a prosecutor deciding to dismiss a charge that has already been filed.

Now, the filing of a criminal charge against a

defendant, particularly for murder, is a decision not to be made lightly or hastily. As this Court stated in Lovasco, the fact that a prosecutor takes a long time and carefully considers whether to bring such a charge is an exercise of principles of fair play and decency, not in opposition to those principles.

The administration of justice is advanced if a prosecutor is free to exercise his discretion without the threat of the severe sanction of dismissal of the indictment for all time hanging over his head if he does not act with what a court with the benefit of hindsight later determines to be sufficient expedition.

Now, the Respondent has suggested in this case, at Page 19 of his brief, that he does not necessarily insist that there be a general rule applying the speedy trial clause to a period after dismissal, but he does contend that the protection should apply to this period in his special case. He does not really explain what factors justify a special exception for him, and indeed, we contend that whatever special aspects there are to this case argue even more forcefully against applying the speedy trial clause here.

First, the charges were brought by a different prosecuting authority, by the military, so there is not the same specter of the same prosecutor making a mistake,

bringing charges, and then dismissing them. Second, he was never indicted at all. And third, and perhaps most important is the extraordinary severity of the crime involved here, which should argue against a special exception for speedy trial purposes.

I would like to emphasize, however, that it is important that there be a general rule on which prosecutors can rely in this area. Prosecutors are entitled to know when making the charging decision whether the speedy trial time is running against them. They should not have to be exposed to the possibility that a court will later decide that a particular case calls for an exception, and a sort of retrospective application of the speedy trial clause to a period where the prosecutor would not have expected the time to be running.

This general rule, we suggest, is a simple one. It is the one that was stated by this Court at Page 313 of its opinion in Marion. The Sixth Amendment guarantees a person who is subject to a public accusation the right to a speedy disposition of the charges pending against him, no more.

Now, this case has a narrow focus, and that is the applicability of the speedy trial clause. Of course, we recognize that a person has legitimate interests concerning the possibility of prosecution even when no charges are

pending against him. But our system of justice provides other protections for those interests, not the speedy trial clause.

For example, a person has an interest in repose against the possibility that charges will eventually be brought against him, or that stale charges will be brought. The statute of limitations, as this Court has said many times, is the protection for that interest.

He also is entitled to protection against unfair pre-indictment delay or government misconduct, but the due process clause protects him against that. And, of course, he is entitled to protection against a second prosecution once a first prosecution has advanced to a certain stage, but the double jeopardy clause is the source of that protection.

These protections are adequate to serve their purposees, and there is no need to supplement them here by wrenching the Sixth Amendment from its proper context to apply to a situation when no charges are pending against the accused.

I would like to turn briefly, if I could, to the subsidiary questions that are raised by this case. On Respondent's contention that he is entitled to a dismissal under the Fifth Amendment, we think this contention is insubstantial. There is clearly, by Respondent's own

admission in this case, no intentional or unfair government delay in this case, and therefore there can be no Fifth Amendment violation.

Moreover, as discussed in our brief, there was no actual prejudice to the accused's defense at trial.

With respect to the Sixth Amendment question, which this Court need reach only if it rejects the government's primary contention that the speedy trial clause does not apply to this period, we suggest that the delay between the dismissal of the charges and the return of the indictment was justifiable, and should not be held against the government.

It must be remembered that this was an extraordinarily complex case that required detailed analysis of the evidence. The court of appeals itself recognized that there was no undue delay in the preparation and submission of the CID report up until 1972, and it took the Justice Department time to digest the material in this report and to decide whether a case could be made against the Respondent.

Moreover, a murder charge is a very serious matter, and it was the government's position, as it should be, that it did not want to charge the Respondent with the murders unless it felt it could obtain a conviction.

There were certain -- There were obviously certain

factors which Respondent has pointed to in his brief that made it at least questionable whether a conviction could be obtained in this case. They had to worry about the decision made by the Article 32 hearing already, which had held there was insufficient evidence to convene a court martial, and the fact that the case was essentially circumstantial, and that there was no obvious motive.

Finally, I should point out that, contrary to Respondent's suggestion, this careful consideration and time that the department gave to the case was not in -- excuse me, was not in opposition to the desires that they expressed for a prompt resolution of the case.

Now, there are letters that Respondent's counsel sent to the Department of Justice asking about the case, asking about its status, asking that it be dismissed because of his innocence, and wondering what was happening.

QUESTION: Do you mean before the indictment?

MR. HOROWITZ: Right. During the period --

QUESTION: Then that wouldn't be a matter of dismissing the charges --

MR. HOROWITZ: No.

QUESTION: -- but abandoning them.

MR. HOROWITZ: I am sorry. That the investigation be terminated, and that the department abandon its efforts to establish a case against him.

Now, Respondent's counsel did not ask that the government go forward promptly and indict him. Rather, they asked that it give careful consideration to all the factors before deciding to proceed with an indictment, and unfortunately, these letters were in the record. They are not reprinted in the joint appendix in this appeal. They were reprinted in the joint appendix in this Court in MacDonald One, and I would like to read one portion from Page 94 of that joint appendix.

This was written by Mr. Malley, Respondent's counsel, to Mr. Snead, the Deputy Attorney General, and he asks the department, "...if at all possible to take whatever steps you feel appropriate to ensure that Dr. MacDonald's case is carefully evaluated."

This letter was written in April of 1973, which was already into the time period that the court of appeals suggested the government should already have indicted him. The court of appeals' suggestion essentially is that as soon as the government got this report, it should have run in, convened a grand jury, and indicted him, but here you have, in the middle of this period, Respondent is still asking for careful consideration by the government before reaching such a decision.

Another factor in the Barker analysis is the prejudice. I think the prejudice to the defense is

adequately discussed in the briefs. I would just like to point out that there is no support in the record for Respondent's assertion that publicity and expense to which he was subjected continued unabated.

Now, I think it is important to step back and consider what the Court of Appeals has done here. A man has been convicted of a brutal crime, the murder of his wife and two children, after what this Court must assume to have been a fair trial. Nevertheless, he has been set free forever, never to answer for that crime. This has been done because the government took great care and time to consider his case before deciding to charge him, and an appellate court has determined with hindsight that the decision could have been reached in less time.

The Sixth Amendment does not require such a miscarriage of justice.

I would like to reserve the remainder of my time.

QUESTION: Mr. Horowitz, the court of appeals did not reach the due process argument. Is that right?

MR. HOROWITZ: That's correct. The Respondent has raised it, and I think it is properly before the Court.

QUESTION: Well, if the Court were to agree with you on the Sixth Amendment claim, then what should this Court do with the due process argument? Does it require any fact finding?

MR. HOROWITZ: I don't think so. The Respondent -- I mean, there is the matter of prejudice, but the Respondent has never tried to put any evidence in. There have been -- because of the Sixth Amendment claims, there have been whatever evidence there would be on prejudice. He says that the record is adequate to decide it, and we agree with that.

QUESTION: Certainly Justice Harlan's concurrence in Klopfer suggests that it is just -- was to him, at any rate, almost a matter of semantics.

MR. HOROWITZ: Well, Justice Harlan was resistant to the idea of incorporating the Bill of Rights into a -- to apply to the states, so he wanted to decide the case on due process grounds, but it was decided on Sixth Amendment grounds.

QUESTION: Did I understand you to say, Mr. Horowitz, in answer to Justice O'Connor, that if you prevail there are still other issues open in this case?

MR. HOROWITZ: Well, Respondent has raised the Sixth Amendment issue as an alternative ground for affirmance. I think that issue is before the Court. It wasn't decided below, and the Court could remand, but I am not sure it would serve any purpose to remand it. We think it is a pretty straightforward --

QUESTION: But otherwise?

MR. HOROWITZ: No, the actual Sixth -- application of the Sixth Amendment to these facts would no longer be before this Court.

QUESTION: But trial error is still open on remand, wouldn't it be?

MR. HOROWITZ: Oh, yes. On remand, yes.

CHIEF JUSTICE BURGER: Mr. Spritzer.

ORAL ARGUMENT OF RALPH S. SPRITZER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. SPRITZER: Mr. Chief Justice, Your Honors, as counsel has indicated, the Respondent supports the judgment below on alternative grounds. First, we support the holding of the court of appeals on two occasions, the occasion of the interlocutory appeal and the present appeal, that the Sixth Amendment guarantee of speedy trial was violated in this case.

Alternatively, and independently, we urge that the trial prejudice which was found by the court of appeals after its very full examination of the record warrants a finding that there was a violation of due process as well, though it is quite true that the court of appeals, having decided as it did the Sixth Amendment question, stated that it was not necessary for it to decide the Fifth Amendment isuse. It did make findings with respect to the issues of trial prejudice.

QUESTION: Which were contrary to the district court's.

MR. SPRITZER: The district court concluded that it had conducted a fair trial. That is quite so, Your Honor.

QUESTION: That it and the jury.

MR. SPRITZER: Pardon?

QUESTION: It and the jury.

MR. SPRITZER: It accepted the jury's verdict, certainly.

I would like to address first the Sixth Amendment issue of a speedy trial guarantee.

QUESTION: Before you do, Mr. Spritzer --

MR. SPRITZER: Yes, sir.

QUESTION: -- is it your submission that if you don't prevail on the Sixth Amendment that we ought to reach the other issue?

MR. SPRITZER: Yes, that the findings made by the Court of Appeals as to trial prejudice would warrant an affirmance on that ground.

QUESTION: And if we did address it and didn't agree with you about that, what is left for determination?

MR. SPRITZER: There are numerous claims of trial error which the court of appeals never reached.

QUESTION: So it will have to go back in any event to the court of appeals for the resolution of those

questions?

MR. SPRITZER: If there was a reversal of the judgment, yes.

QUESTION: Yes.

MR. SPRITZER: I think counsel has indicated the sequence of events in this case, that the military made charges in the spring of 1970, they were investigated for a period of some six months by an Army investigating officer, charges having been brought by the military. He made an elaborate report, finding that the charges were not true and recommending that the civilian authorities investigate the involvement of one Helena Stokley, of whom I will say more later, in connection with the issue of trial prejudice.

QUESTION: Would your case be any different, Ms. Spritzer, if no charges had ever been brought by the military process, and the doctor had resigned his commission in the Army and gone back into civilian life, and then all of these other events occurred?

MR. SPRITZER: Yes. Under the Marion case, the public accusation makes the difference. That triggers, as the Court there held, the speedy trial provision of the Sixth Amendment. I think the Court put it that arrest triggers the provision even though there has been no formal indictment, and so our case so far as the Sixth Amendment is concerned rests upon the proposition that there had been an

arrest, that Dr. MacDonald was held under restraint, that this public accusation caused wide notariety and public obliquy.

QUESTION: But if there had been no formal arrest, and the Army had spent six months investigating it, would not that have been essentially the same with or without an arrest?

MR. SPRITZER: It is certainly true, Your Honor, that suspicion may attach to somebody who is under investigation, who hasn't been arrested, who hasn't been formally charged. As with many other Constitutional protections, so also, I think, of the Sixth Amendment guarantee of speedy trial, when a public act is taken by the sovereign, protections that weren't previously available come into play, and I think Marion makes quite clear, I think the government doesn't disagree, that the speedy trial provision was activated by the arrest and the restraint. Rather, it contends that it was deactivated during an interim period between the dismissal of the initial indictment by the military and the re-indictment by the civilian authorities.

Now, I should say that the Department of Justice monitored this case from its very beginning. It was hardly a case of a dual prosecution in any sense.

QUESTION: Why shouldn't it be deactivated, Mr.

Spritzer? I suppose you are going to get to that.

MR. SPRITZER: Yes, I am. Let me first, if I may, point out what the findings of the court of appeals were with respect to the four factors in Barker against Wingo.

As to the substantiality of the delay, it was a delay of close to two and one-half years after the investigation and the re-investigation and a sixth month period to report the result of the investigation had taken place. As to that two and a half year period, both panels of the court of appeals found that it was inexcusable, that nothing was taking place, that the department was letting the case lie on the shelf, that it reflected, in the words of Judge Murnaghan below "a calloused and lackidasical attitude" and was irresponsible.

QUESTION: Counsel, doesn't the Lovasco case permit that kind of a delay, while the state weighs the evidence, or the prosecuting authority?

MR. SPRITZER: Certainly when any legitimate prosecutorial purpose is being served, that would justify delay. What the court of appeals found is that nothing was being done, and it found that on the basis of evidence that was submitted to it. The United States Attorney responsible for this case, when asked why this had been delayed more than two years, said, just bureaucracy.

QUESTION: Are you suggesting, then, that in every

murder case brought by the United States or any prosecution brought by the United States, that the courts are free to weigh the diligence of the government in bringing the case?

MR. SPRITZER: I am suggesting that where a prosecution is initiated and then dismissed, and then there is a continuing investigation in which the same person is the target, and that is accompanied by wide notariety, and he is on notice that he is still an accused person because MacDonald through his counsel was requesting throughout this period that the department make a resolution of the matter, I am saying in those circumstances the interests implicated by the Sixth Amendment continue to play a role --

QUESTION: Then you want a rule just for this case, basically.

MR. SPRITZER: No. No, I think in any case where there is the triggering of the Sixth Amendment, and where there is a subsequent dismissal of the indictment, and that is followed by an inordinate delay, that the government has the burden of establishing some plausible or legitimate reason for that delay, and the court here found twice over that the government had not been able to do that.

QUESTION: Aren't you suggesting, in effect, that any time there is an ongoing investigation, the subject of the investigation is a de facto accused under the Fifth Amendment? Or Sixth Amendment?

MR. SPRITZER: No, I am relying on the fact that I think is a critical fact on the basis of the Marion decision, that here there had been a public accusation, there had been a charge, an arrest and an idictment which was dismissed. Seven of the federal circuits have considered in speedy trial cases periods that fell between the dismissal of an initial indictment and a re-indictment, and several of those courts of appeals have pointed out that if a prosecutor could avoid all of the requirements of the speedy trial guarantee by the expedient of nol prossing or requesting a dismissal without prejudice, and then re-indicting at leisure, that the interests protected by the speedy guarantee would be thereby defeated.

In this case, the court of appeals found that there was an inordinate delay, that there was no justification for it, that the effects of the initial charge continued unabated, that they caused stress and obliquy, and further, and I mean to develop the question of prejudice, that the long delay resulted in serious impairment of the defendant's ability to defend against the charges.

QUESTION: Well, you wouldn't suggest that there aren't countervailing societal interests in the solution of a crime such as this, would you, Mr. Spritzer?

MR. SPRITZER: Of course, there is a societal interest in the solution of all crimes, Your Honor. I

wouldn't suggest otherwise. I do suggest that there is not a societal interest in neglect, in inordinate delay, and that is what the court of appeals found to have taken place here, because that exposes the individual to all the dangers, the pressures and the dangers of impairment of his defense against which the speedy trial guarantee is designed to safeguard one.

I wanted to conclude my reference to the Barker against Wingo factors. I have mentioned the substantiality of the delay, the court's findings as to reasons for delay. It also found, as I think the Court is aware, that Dr. MacDonald persistently asserted his right to have the matter promptly resolved, and that brings me then to the question of prejudice, and I am going to turn now to the question of prejudice at trial, quite apart from the factors of pretrial prejudice, the matters of stress, anxiety, financial expenditure.

Dr. MacDonald's account of the crime was that his home was invaded by four intruders. No motives for charging him with this crime have ever been suggested or shown. Dr. MacDonald stated that he was first attacked. He in fact was found to have suffered 17 wounds, one that penetrated to the lung. The government's theory when it finally brought the case by going to the grand jury almost five years after the crime had occurred was based entirely upon a hypothetical

reconstruction of the crime.

The government produced experts who testified that in various particulars, physical artifacts, laboratory tests showed inconsistencies between Dr. MacDonald's account and their findings.

Let me refer the Court --

QUESTION: Was part of that related to the difference in the nature of the wounds on the deceased people and the nature of the wounds on the defendant?

MR. SPRITZER: No, there is no indication of that, Your Honor. Dr. MacDonald was initially attacked, and --

QUESTION: Well, there is one ultimate indication, that the three people died of the wounds and one didn't.

MR. SPRITZER: I thought Your Honor was referring in the nature of the wounds to the kind of instrument that might have been used.

QUESTION: Or whether they could be self-inflicted.

MR. SPRITZER: There was testimony that the wounds that Dr. MacDonald suffered, like those that were true of the wounds suffered by the other members of the family, had been caused by a sharp instrument.

Dr. MacDonald's account was that he was severely attacked, whether the intruders, we don't know. He was rendered unconscious, thought that he had likewise been killed. We don't know. Certainly the wound that penetrated

to the lung was a life-threatening one which raised serious questions as to whether that could have been or would have been self-inflicted.

I want to refer the Court, if I may, to the court of appeals finding based upon its full examination of this lengthy record, and it was a six or seven-week trial. The court found there was almost certain memory erosion on the part of the government's investigators.

QUESTION: Where do we find that, Mr. Spritzer?

MR. SPRITZER: It is in the court of appeals opinion. Do you want me to locate that, Your Honor?

QUESTION: If you would just give me the page. Unless you don't have it handy.

MR. SPRITZER: Pardon?

QUESTION: Unless you don't have it handy.

MR. SPRITZER: I will provide the reference. I think -- well, if I may, I will provide the reference in a moment, Your Honor.

It said "almost certain memory erosion," and this is a quotation that I am reading from in my brief, "on the part of the government's investigators," and that this, and I quote again, "rendered it virtually impossible" for the defense to probe their recollections and to test the premises and assumptions upon which their "scientific speculation", and "scientific speculation" is again the

language of the court, rested.

Now, in a case in which the government's whole case rests upon a hypothetical reconstruction, I think a finding that the defendant's ability to test that case effectively by cross examination was rendered virtually impossible is certainly a finding of severe prejudice which goes to the issue of due process, as well, of course, as to the issue of prejudice if the Court decides that the Sixth Amendment here applies.

But I would like to talk about a more concrete instance of trial prejudice to which the trial court -- I am sorry, the court of appeals also adverted.

QUESTION: May I ask you, Mr. Spritzer, what was the vote on the petition for rehearing in the court --

MR. SPRITZER: It was a divided court.

QUESTION: Equally divided?

MR. SPRITZER: Yes. I think that reflects a division on the court as to the Sixth Amendment issue. The opinions don't indicate that they were seriously addressing the alternative claim that I am now advancing.

Dr. MacDonald, when the military police arrived following his call for help, gave a description of the four intruders. One of them, he said, was a woman; the other three, males. He described the woman as having blonde hair, wearing a white floppy hat -- this was February, mind you --

and boots. He described one of the other men as a black male wearing an Army type field jacket with sergeant stripes.

Based on that description, a Fayetteville police officer who was called into the case prompted by the military police decided that he thought he knew who that woman was. That officer, an officer named Beasley, had used Helene Stokley as a drug informant. Helene Stokley was the daughter of an Army colonel at Fort Bragg who had left home promptly after graduating from high school, had entered the drug culture in Fayetteville.

Beasley went to Stokley, because he knew that the description that Dr. MacDonald gave seemed to answer her description, and he knew further that her close friend and associate was a black male who typically wore an Army type field jacket with E-6 stripes.

Promptly when he went to see Stokley, she admitted -- I said in the brief it is a hedged admission, and I think that is a fair characterization. She said, I had it in my mind that I was there, but I was heavy on mescaline, which is, of course, a narcotic.

Two or three days later, Helene Stokley's neighbor, one Posey, who had seen her returning to her home at about 5:00 a.m. on the morning of February 17th, and the crime took place during the hours between midnight and 5:00

a.m., Posey spoke to Helene Stokley, and she told him that she had held the light during the commission of the crime, but that she herself would not kill anybody.

Dr. MacDonald had told the military police when they arrived on the scene that the female intruded had a flickering light on her face as if she were holding a candle.

Some time later, Stokley was interviewed by an Army CID agent named Brisentine. She told Brisentine that she had been involved, and she spoke of blood on the bed, and the words "kill the pigs" had been written on the headboard of the bed in the MacDonald home. She told him further that she would name the participants in this crime if granted immunity. She was not granted immunity, of course.

Stokley in all made admissions to seven different out of court auditors, acquaintances, friends, law enforcement officers. Many of these admissions, in fact I think I might say all of these admissions, were fragmentary, and she would immediately equivocate for reasons that are obvious. She would make an admission, apparently impelled by the feeling that she needed to relieve herself of her feelings, and then she would promptly turn around and say, well, I won't say any more, I have already said too much.

Let me now turn to the finding of the court of

appeals with respect to Stokley's testimony. The court said that the failure of Stokley to verify, because Stokley when she took the stand claimed she no longer remembered what had happened on the night in question, the failure to verify Dr. MacDonald's account from the witness stand may well have been disastrous to the defense. Had she testified, Judge Murnaghan goes on, "as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculably great." And then he adds that the reason she asserted under oath was failure of memory, and finally, that the government's inexcusable delay was a probable cause of the defendant's inability to get an account from her when she took the stand.

Stokley, incidentally, did acknowledge that she remembered where she had been at midnight on February 17th.

QUESTION: Doesn't the court of appeals also say that the possible reasons why Stokley did not so testify are several, and then in the footnote say a likely one is that she was not on the scene of the crime at all?

MR. SPRITZER: I am going to deal further in a few moments, if I may, to some of the circumstances which corroborate, independent circumstances that corroborate Stokley's admissions. Of course, there are other possibilities, but the credibility of Stokley's story was for the jury, had she testified, and the Court has made a

finding here that a probable cause of her not appearing to testify before the jury, at least as to these matters, was the long delay for which the government was responsible.

Now, it is perfectly true also that there is another possibility, that she may have been feigning when she was called into the public forum a lack of memory as to these events, because she did remember where she was at midnight, and she did remember returning to her home at 5:00 a.m., so it appears that she was abroad during this five hours when the crime took place, and nobody has ever offered any innocent explanation of that activity.

QUESTION: In that subculture that you have described she was part of, was there anything unique about roaming and prowling around in those hours, as there might be for some other people not part of that subculture?

MR. SPRITZER: No, I wouldn't suggest it was unique. I think it was probably commonplace. It also appeared from the -- one of Stokley's admissions that she had testified -- I am sorry, she had stated out of court that one of the parties to this crime had been driving a blue Mustang, and she was seen by Posey returning at 5:00 a.m. in a blue car with several men.

So, there is a loss of Stokley's testimony. She was called a a witness, and she claimed she could no longer remember ten years later what had taken place, and she

denied any recollection of all the out of court statements that she had made to the various auditors who heard those admissions against interest.

I was about to say, Justice Rehnquist, that there is also the possibility that she was feigning loss of memory on the stand. I don't think that would alter the conclusion that the defendant was seriously prejudiced, because it is not possible to say that she would have had the temerity to deny recollection if this trial had been promptly held, or that the jury in that circumstances would have credited her denial of recollection.

QUESTION: But those general types of questions are left to juries in criminal cases subject to the motion for new trial, et cetera, are they not?

MR. SPRITZER: Yes. The concern here is that the Stokley story never got to the jury.

QUESTION: Well, and that, too, is a factor that is generally weighed by the jury.

MR. SPRITZER: They never heard the story. They never heard what she could have testified to, would have testified to had she testified in court as she had spoken out of court.

QUESTION: But she did take the stand in court, didn't she?

MR. SPRITZER: She took the stand, and then when

questioned denied she had any recollection of the relevant five-hour period.

QUESTION: But she remembered why she didn't have any recollection. At least she testified as to why she didn't have a recollection.

MR. SPRITZER: She certainly said she had been on drugs.

QUESTION: Well, she remembered that.

MR. SPRITZER: Yes.

QUESTION: Well, if she had testified in court the day after the event, and she had said the same thing, the jury would have --

MR. SPRITZER: We don't know that, Your Honor.

QUESTION: Well, we don't know that she wouldn't.

MR. SPRITZER: No.

QUESTION: If you believe her ten years later, that is what she would have testified to the day after.

MR. SPRITZER: The prejudice that Stokley was unavailable and the prejudice resulting from the fact that one could not determine how she would have testified had she been promptly brought to the witness stand, could have been cured, if the jury had been permitted to hear, as we think it should have been permitted to hear, the admissions against interest that she made.

The trial court excluded the testimony of the

seven witnesses who heard all of these out of court admissions. That, we submit, was an -- that was an indefensible ruling, we believe, and one which the government urged upon the court. The district judge's reason for that ruling, as he stated it, was that Stokley was a pathetic figure, and she had equivocated.

QUESTION: Was that passed on by the court of appeals?

MR. SPRITZER: Yes, in this sense. Perhaps I should modify that. The court of appeals said, the government may rule, having objected to the admission of the out of court declarations, but we find it unnecessary to decide definitively that evidentiary issue.

QUESTION: Well, if it was an indefensible ruling, and if we agreed with the government and reversed this judgment, that issue would be open.

MR. SPRITZER: That issue would be open, and I am referring to the substance of these out of court declarations --

QUESTION: Yes.

MR. SPRITZER: -- for two reasons. One, to show the prejudice resulting from the unavailability of the Stokley story which the court of appeals attributed as a likely consequence of the government's delay. Secondly --

QUESTION: Well, you are assuming the truth of

what the out of court statements would have -- you are assuming the truth of what those witnesses would have testified.

MR. SPRITZER: I don't have to prove what of course can't be proved here in this court, the truth of those out of court declarations, to say that --

QUESTION: If they were inadmissible, it is because they are unreliable.

MR. SPRITZER: Well, the rules of evidence say that there must be corroborating circumstances. The rules of evidence do not say that the declarant must be a person of good character and habits rather than a pathetic figure. And here there were repeated corroborating circumstances. The fact that the very description that MacDonald gave when the police first arrived led the police directly to somebody who in turn made an admission that she had been there --

QUESTION: I take it your judgment would be that if the case only involved this evidentiary issue and you won on it, the judgment would be reversed, I mean, the conviction would be set aside.

MR. SPRITZER: No, I think if that question did not go also to the question of due process, a new trial would be mandated by --

QUESTION: That's what I meant, a new trial. Yes.

MR. SPRITZER: What I am suggesting is that the

unavailability of the Stokley testimony because of her asserted loss of memory resulting, as the court of appeals said, was likely to be the consequence of the long delay, that that was compounded when it could have been allayed or cured had the government not insisted and successfully insisted upon the exclusion of this critical evidence. Here was the one identified living person other than the defendant who could have spoken to the question whether there was any truth in his account, evidence, I think, that any observer of this case would regard as the most critical in deciding whether there was truth to Dr. MacDonald's account, and the jury never heard a particle of that testimony.

Thank you, Your Honor.

CHIEF JUSTICE BURGER: Mr. Horowitz?

ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HOROWITZ: A couple of points, Mr. Chief Justice. I don't think it serves any purpose to really discuss here whether Helena Stokley committed these murders or not. I would like to say one thing, though. This contention was never raised in the district court at all, or on the first appeal. It was raised for the first time on appeal in 1979, before the court of appeals. I suggest to you that it is not quite the obvious prejudice that the

Respondent suggests.

In fact, I think, as we pointed out adequately in our brief, and as the dissenters in the court of appeals suggest, there was absolutely no prejudice at all in this regard. She testified shortly after the crime, she stated, rather, shortly after the crimes that she didn't remember where she was because of drugs, the same thing that she said at the trial. There is just no support in the record for any finding of prejudice to the defense.

Second, there is also no support in the record for finding that the Justice Department was indifferent during this period when it was deciding whether to prosecute. In fact, the record indicates that the case was always under active consideration by the department. Of course, nothing happened in the sense that an indictment wasn't brought until it was decided, but that is because there was an internal dispute in the department as to whether the evidence was sufficient to get a conviction, and the department took its time in deciding that -- until it decided that it finally could get a conviction and to bring the charges.

In response to what Mr. Justice Brennan said before, there are grounds for remand to the court of appeals, but if this Court decides the due process question there are no grounds on which the indictment could be

dismissed by the court of appeals, the only grounds on which a new trial could be ordered.

With respect to -- getting back to the Sixth Amendment question, I think it is important to point out that the prosecution does not avoid the speedy trial guarantee by the expedient of dismissing the indictment and then reindicting. The period during which the indictment is pending is always countered with the speedy trial guarantee, so you can't just dismiss the indictment and then go in the next day and get a new indictment, and evade the speedy trial clause that way.

I suggest the prosecutors have better things to do than to go out and get indictments and then dismiss them and then wait ten years and get another indictment. That just doesn't happen unless there is a good reason for it.

Finally, I would like to point again to this letter from Mr. Malley with respect to Respondent's contention that the adverse effects of the charge were continued unabated during this period when no charges were pending against him. In this letter, as I pointed out, he asked the government to consider, carefully consider before bringing an indictment against him, and he points out that during the period since the military proceedings ended he has been getting his life back together, and then he goes on to say, "Some of the things you must consider is any sort of

formal attempt to accuse him again will result in devastating publicity, enormous financial loss, and personal humiliation to him."

Thus, Respondent himself has recognized that there is a big difference between the period when no charges are pending, after they have been dismissed, and a period when a formal charge is pending. This is at Pages 101 to 102 of the joint appendix.

QUESTION: Mr. Horowitz, how many judges who wrote opinions in this case found no prejudice?

MR. HOROWITZ: Well, the dissenters on rehearing addressed the prejudice issue, so there it was --

QUESTION: It started with the district judge.

MR. HOROWITZ: The district judge found no prejudice, so that makes it six to five, I guess, in favor of no prejudice. I think the dissenters' opinion is quite adequate in this regard.

QUESTION: And only two actually joined an opinion of prejudice, as I recall.

MR. HOROWITZ: That is correct. The other ones, we don't know what they did. They just didn't vote for a hearing.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:55 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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UNITED STATES V. JEFFREY R. MacDONALD # 80-1582

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BY Sharon Lynn Connelly