OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

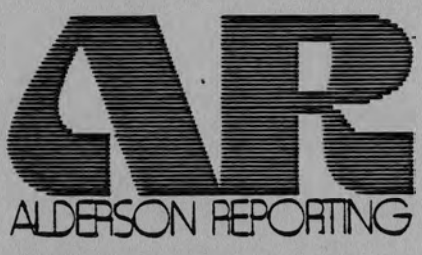
DKT/CASE NO. 83-128

TITLE UNITED STATES, Petitioner v. WILLIAM GOUVEIA, ET AL.

PLACE Washington, D. C.

DATE March 20, 1984

PAGES 1 thru 57



IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner, :

v. : No. 83-128

WILLIAM GOUVEIA, ET AL. :

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Washington, D.C.

Tuesday, March 20, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:24 o'clock p.m.

APPEARANCES:

ANDREW L. FREY, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of petitioner.

CHARLES P. DIAMOND, ESQ., Los Angeles, Cal.; on behalf of respondents.

JOEL LEVINE, ESQ., Los Angeles, Cal.; on behalf of respondents.

C O N T E N T S

PROCEEDINGS

CHIEF JUSTICE BURGER: Mr. Frey, you may proceed whenever you're ready.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: Thank you, Mr. Chief Justice, and may it please the Court:

In this case the Court has under review a judgment of the Ninth Circuit reversing respondents' convictions for brutal murders committed while they were inmates at the Federal correctional institution in Lompoc, California, and ordering dismissal of the indictments against them on the ground that they were denied their Sixth Amendment right to the assistance of counsel when they were held in administrative detention for more than 90 days after the killings, when that detention was, in the court's view, based in part on the pendency of a criminal investigation by the FBI for the murders.

Now essentially while there are differences in the case, the two groups of cases, the Gouveia group and the Mills group, followed a similar pattern. There was a murder. Either immediately after the murder or within several weeks thereafter the respondents who were inmates at the prison were confined in administrative

detention.

Within several weeks of that prison disciplinary hearings were held and they were adjudicated to have violated the prison regulations against murder. They were then confined in the administrative detention unit until the time they were indicted, some months later.

QUESTION: Were they free to communicate with the outside?

MR. FREY: They were free to make phone calls to the outside, to lawyers or to others. In fact, two of the individuals involved called the public defender and asked for their assistance and were told that they couldn't because they had not yet been indicted. So they were free to communicate with the outside world, including communicating with lawyers. They were eventually indicted, and at that point they were transferred for trial.

In the Mills case, motions to dismiss were made and although the ground that is now the issue before the Court was not raised by respondents Mills and Pierce the District Court in granting the motion said that their right to counsel had been denied and dismissed the indictment on that ground, among others. The government took an interlocutory appeal. A panel of

the Court of Appeals reversed and remanded for trial.

In the Gouveia case, the District Court denied the motion for relief in which all the grounds that had been relied on by the District Court in Mills were raised by the Gouveia group of defendants.

And in Mills there was one trial after the remand from the Court of Appeals; the defendants were convicted and appealed. In Gouveia there was a trial that resulted in a hung jury as to the present respondents, an acquittal of co-defendant Flores, and an acquittal of respondent Reynoso on one lesser count.

Those defendants also appealed. The two cases were consolidated and heard by an en banc panel of the Ninth Circuit, which held that the convictions should be reversed and the indictments dismissed.

Now as we see it, the case presents one primary and one secondary issue. The primary issue is whether respondents' right to counsel under the Sixth Amendment attached prior to the time of the commencement of judicial proceedings against them by indictment.

If this Court disagrees with the Ninth Circuit and finds, as we urge, that the right to counsel did not attach prior to that time, that would be the end of the case. If the Court agrees with the Ninth Circuit that their right to counsel attached, then there would be the

further question as to whether there was a sufficient showing of prejudice.

QUESTION: Excuse me, Mr. Frey. The time of indictment is the time for appointment?

MR. FREY: In this particular case, the time of indictment is the time that we say that the right of appointment of counsel attaches, the right to assistance of counsel and for indigents appointment of counsel.

Now given the time limitations, I'd like to focus my attention in my opening argument on the primary issue of the attachment of the Sixth Amendment right to counsel.

Now the first and most obvious point about the attachment of the Sixth Amendment right to counsel is that it does derive from the Sixth Amendment, and the Sixth Amendment says in any criminal prosecution the accused shall enjoy the right to the assistance of counsel. There must be, then, something that the Court can say is a criminal prosecution before, I think, the Court can legitimately say that the right defined in the Sixth Amendment has attached.

The second obstacle to respondents' position and the Court of Appeals position is that this Court has a consistent line of decisions in which it has recognized the significance of the need for their to be

a prosecution in existence, and it has in the context of Miranda as against Massiah rights or in the context of whether a lineup without counsel claim or presents a due process or a right to counsel claim, it has consistently looked at the question whether there is some kind of charge against the defendant charging him with the crime filed in a court somewhere.

Of course, in this case there is nothing remotely like that. The sole exception to this line of cases is the Escobedo case, which the Court has subsequently held to be limited to its facts and plainly rejected in its rationale in the later decisions.

And I would just point out about Escobedo that that was a case that at least directly involved an interference by the police between the defendant and his retained counsel, who was down at the station house trying to to get in to see him and was not permitted to see him while he was being interrogated.

QUESTION: Out in the hallway.

MR. FREY: So it's understandable, perhaps, that the Court thought the right to counsel would be relevant there, although I think subsequently doctrinally it's become quite clear that it wasn't.

Now, as I said, there is no dispute in this case that there was nothing resembling a formal judicial

charge of any kind prior to indictment, and the rule has been, I think, fairly clear and fairly easy to administer as to when Sixth Amendment rights attach.

The Court of Appeals, however, has basically thrown us into seas of uncertainty by developing a concept of the functional equivalency of a prosecution or an accusation, and stating that "whether a person stands accused" -- and I'm quoting from their opinion -- "can only be determined from the totality of the circumstances." Now I hope this Court will decline the invitation to set sail in these murky waters.

Now let's -- let me talk for a minute about what the Court of Appeals thought would satisfy the Sixth Amendment requirement that there be a prosecution in being or the functional equivalent of a formal accusation of the defendants for a crime.

It held that the retention in administrative detention unit for more than 90 days, where part of the reason for that detention is the pendency of a criminal investigation. Now respondents Mills and Pierce, perhaps fearing that the Court would find the breadth of that rule somewhat difficult to accept, have proposed a considerably narrower principle.

They assert that the rule of the Ninth Circuit is only that where people are detained more than 90 days

with no legitimate security purpose but solely because of the pendency of a criminal investigation by the FBI, then they should be considered accused within the meaning of the Sixth Amendment.

QUESTION: But fear was part of the administrative detention for the security of other inmates and staff of the prison?

MR. FREY: Well, I think our position, of course, is that that is exactly what the administrative detention is for, is for purposes of security, and I do --

QUESTION: Well, wasn't that expressed in the process?

MR. FREY: Well, there is some -- there is some controversy over exactly what the record shows or what the Court of Appeals could decide.

I might point out that the time that Mills and Pierce made their motions in the District Court the only Sixth Amendment right to counsel claim that they made was a claim that they were entitled to have counsel there the day that they were arrested, when their physical wounds were examined, and when evidence was seized from their person.

There was no claim that they were deprived of their right to counsel during the period of detention,

and there was really no focus during the hearings on the pretrial motions on the question of why they were being detained, although there was considerable focus in both cases on the consequences of detention in terms of the difficulty of ultimately mounting a defense.

The result is that the record contains very little as to why they were detained, but it does contain forms that state that the reason that they were detained was for the security of the institution and the safety of inmates within the institution. Some of those forms also indicate that they were -- there are boxes that can be checked off and the pendency of a criminal investigation was also a reason given on those forms.

Now, when the case went up to the panel of the Court of Appeals on the government's appeal, that was the first time that this question of why they were being detained, whether it was for security purposes or others, was brought into focus by the parties, and at that point the panel simply said the evidence shows that they were kept in for security purposes.

And, more than that -- and this is a point where I think the Court of Appeals made a fundamental error -- the Court of Appeals misconstrued the Bureau's regulations and the regulation that's relevant is at Section 541.22 of Title 28, CFR.

The regulation says that people can be retained, placed in administrative detention when the inmate's continued presence in the general population poses a serious threat to life, property, self, staff, other inmates, or to the security or orderly running of the institution, and when the inmate -- and then it lists six factors, including the pendency of an investigation or trial for a criminal act, the pendency of a transfer, and several other factors.

These regulations mean that an inmate cannot be held in administrative detention except where there is a finding that releasing him into the general population would be inconsistent with the security of the institution. The only exception for that holdover is inmates who are in transit from one institution to another and are being held waiting for the next bus, and they can be held and customarily are in administrative detention without a finding of security need.

So under the regulations they cannot be held except on the basis of a security need. And I might say that in this case it does not take a great deal of imagination to see the security reasons. The prison authorities had found that these people had committed brutal murders.

To return these inmates to the general

population at Lompoc was, I think, totally out of the question both in terms of the safety of these inmates themselves, who might be subject to retaliation by friends of the deceased, and in terms of the safety of potential government witnesses or informants or people who they might think are government witnesses or informants.

QUESTION: Mr. Frey --

MR. FREY: So the one thing that I think clearly was not going to happen ever with these people was to return them to the general population at Lompoc.

QUESTION: May I ask you, you make a very major point out of the reason for the detention being security rather than investigation. Would the issue before us be different if it were for investigative purposes after the 90 days?

MR. FREY: No, of course --

QUESTION: The issue -- I mean, is this critical to your case?

MR. FREY: Let me put it this way. Certainly in our view it is not critical to our case. In our view, our first argument -- and we think the precedents of the Court clearly support it -- is there has to be in some court somewhere something that resembles a charge of a crime before the Sixth Amendment attaches, and all

of the rest of this is irrelevant -- functional equivalent analysis or symbolic --

QUESTION: It seems to me your argument would be very relevant if there were a suit for damages for being detained for too long or something like that, but under your Sixth Amendment analysis I'm not quite sure why it makes any difference why they were detained.

MR. FREY: Well, I am responding to the rationale of the Court of Appeals and the rationale of my brother who you will hear from.

QUESTION: But your central response, as I understand it, is that no Sixth Amendment right attaches no matter what the reason for the detention.

MR. FREY: That is true, but I am now in this portion of the argument trying to address the question whether if there were a some functional equivalency or symbolic accusation rationale that would be acceptable, whether this case would satisfy the requirement.

QUESTION: Well, these prisoners weren't going anywhere anyway, were they?

MR. FREY: Well, they were going somewhere. They were going to the control unit in Marion.

QUESTION: Well, they were going to remain in custody somewhere.

MR. FREY: There's no question that they were

going to be in custody. The question is whether they were going to be in custody in the general population at Lompoc, the administrative detention unit at Lompoc, or someplace else.

QUESTION: Was there a claim of some constitutional right to be in a particular part of the prison on the part of these people?

MR. FREY: No, that's not the issue in this case.

QUESTION: Did the Ninth Circuit give any hint that there was some right to be in a particular part of the prison?

MR. FREY: No. That would be an issue -- I mean, if we are talking about it as a matter of due process liberty interest, that would be an issue that would require application of the principles of Hewitt v. Helms, decided last term, to the particular regulations of the Bureau of Prisons.

But that's not the basis of the Ninth Circuit's ruling. The basis of the Ninth Circuit's ruling is that they were held in administrative detention. One of the reasons, and that's why I emphasize that it was conjunctive -- you have to find that they are a threat to the security of the institution, but the Bureau has framed the regulations

in such a way as not to give the warden simply essentially standardless authority. He must find not only that they are a threat, but also that one of six other conditions exists.

One of them is that he is pending criminal investigation or trial. One of them is that he is pending transfer. Now in the case of all these inmates, and I have to emphasize that the record is incomplete, we have supplied certain forms that we have retrieved from the Bureau of Prisons recently and lodged them with the Clerk.

But I think it is fair to say that if there were a hearing on this question it could be established that these inmates were being held both -- always for security reasons, always because there was a determination that it was dangerous to return them to the general population. But, in addition, in order to meet the other second independent requirement because they were awaiting transfer and because there was a criminal investigation.

But the point that's relevant to this case is if there had been no criminal investigation pending, they would not have been released into the general population at Lompoc. They were still awaiting transfer to the Marion facilities.

QUESTION: Then I take it that according to the Court of Appeals there wouldn't be any right to counsel either if the day that this prisoner asked for the appointment of counsel they just let him out of the control unit.

MR. FREY: That's clear, or indeed they said he could be held for 90 days and then let out of the control unit.

QUESTION: Yes. They let him out and his right to counsel claim fails even though the investigation goes on.

MR. FREY: The investigation against him goes one. But their point is that the detention is like an arrest.

QUESTION: I understand. I understand.

MR. FREY: And they rely on the Sixth Amendment speedy trial cases that discuss arrest.

Now there is, I think, some language that is debatable in some of those cases, but you have to recognize that in speedy trial cases -- Marion originally formulated in terms of the attachment of the speedy trial right is when you are arrested and held to answer criminal charges.

Subsequent cases like Dillingham talk about arrest, but the point is that arrest alone, as MacDonald

makes clear, is not enough to trigger Sixth Amendment rights or, if it does, they get untriggered the minute you're let out with no criminal charges pending against you.

It is the pendency of criminal charges that activate, that satisfy the Sixth Amendment requirement that there be a prosecution. An arrest is not a prosecution. That's what Kirby held.

QUESTION: So the Court of Appeals in effect said if you hold him beyond 90 days it is equivalent to a --

MR. FREY: It's a symbolic accusation or a functional equivalent of an accusation, and --

QUESTION: Well, the Court of Appeals really pretty well repudiated the reasoning of the plurality opinion in Kirby, didn't it?

MR. FREY: Well, it would be our view I don't think it can stand against the plurality opinion in Kirby or the later cases that draw this distinction -- I mean, Ash and --

QUESTION: Kirby really rejected this kind of functional equivalent type of analysis in this particular situation.

MR. FREY: Well, it's true that Kirby must stand for the proposition that an arrest doesn't cause

the attachment of Sixth Amendment rights, but what Kirby is relevant to is a somewhat different point.

The respondents have a quite different reason for saying the Sixth Amendment attached here, and that is a reason that says it would be awfully helpful to have a lawyer in terms of preparing a defense.

QUESTION: But don't you think what they really meant was it would be helpful to have a private investigator.

MR. FREY: Exactly.

QUESTION: And the Sixth Amendment doesn't guarantee any right to a private investigator.

MR. FREY: Well, if you were to affirm the Ninth Circuit --

QUESTION: Then you would.

MR. FREY: Then the next claim would be that if you have a right of preindictment investigation you have to then have a constitutional right to enforce that through court orders requiring access to the prosecution's evidence.

A lot is made in this case of the lack of access to physical evidence being prejudicial to the preparation of the possible defense in the event these people are indicted. Well, I can assure that unless a court orders it the defendant's lawyer would not be

given access to the bag with the name Sanchez that was found in the victim's cell, the blood samples, all those other things.

QUESTION: Mr. Frey, how much of that material was used? There were disciplinary hearings, weren't there, and they went through some kind of determination that they were involved in the murder?

MR. FREY: There were disciplinary hearings and they were found to be involved in the murder.

QUESTION: So some of the evidence was disclosed to them.

MR. FREY: No.

QUESTION: Wasn't it? They didn't participate?

MR. FREY: No. That's one of the features that is the -- perhaps the most salient feature about prison disciplinary hearings is the non-disclosure of evidence that Wolff v. McDonnell allows, I mean, for instance, the non-disclosure of witnesses.

One reason why the prison authorities can in many cases promptly determine the guilt of somebody but the prosecuting authorities it may take them a long time, if ever, to make a prosecutable, indictable case, is because the prison authorities can rely on informants whose identity is never disclosed, so they don't have to

deal with the right of confrontation.

And they do not disclose to the defendant the physical evidence. They give him an opportunity to be heard. They give him an opportunity to call witnesses, which was declined in this case by and large. So they give him an opportunity to present some kind of a defense. They give him a prison staff assistant.

But they do not give him access to the evidence, and if he had a lawyer appointed and the lawyer came to the prison door, to the FBI, and said I'd like to look at the evidence --

QUESTION: Of course, even though they don't make the evidence available to him they have formed a judgment that there is at least probable cause to believe he committed the murder in order to impose discipline.

MR. FREY: They may be quite certain that he's committed a murder.

QUESTION: Then if they know this, I guess this doesn't relate to the constitutional issue, but what would be wrong with giving him a lawyer at that point then they know they are going to indict him for murder?

MR. FREY: What is wrong with giving him a lawyer at that point?

QUESTION: Yeah. You know you're going to indict the man for murder.

MR. FREY: No, no, wait a minute. You've made a very important step inadvertently.

QUESTION: Well, if you don't indict him for murder, no harm would be done.

MR. FREY: We know --

QUESTION: If there's a strong probability, if you've had all these informants and you've made a judgment in the disciplinary proceeding that he killed the person, there's a likelihood that he'll be indicted for murder and a probability he's going to need a lawyer. Why not appoint him?

MR. FREY: Well, I think it's difficult for me to answer that question. If this were a legislative committee, I would be, I think, better prepared to respond to that question. We've had some material adduced by our opponents which is properly addressed to a legislative committee about the problems of lawyers in prison.

The question here is whether the Constitution requires it.

QUESTION: I understand.

MR. FREY: And --

QUESTION: So basically your argument is well,

it might be a good idea, but the Constitution doesn't require it?

MR. FREY: Well, it's difficult for me to say -- I don't think giving them a lawyer would be of a great deal of use to them. I don't agree with the basic assumption that it's no good to have a lawyer later on and you need one.

In fact, going back to the point that Justice Rehnquist made, it can't be that the Court of Appeals is saying you need the specialized talents of a lawyer in this situation, which is what the Sixth Amendment right to counsel is about, if it would be a satisfactory substitute for that to let them just back into the prison population to conduct their own investigation.

Just as you would not say if you had a defendant who was arrested and indicted and released on bail and then his lawyer became ill and no substitute lawyer was appointed for him until the morning of trial, nobody would entertain a claim that he was out and he could conduct his own investigation, he didn't need a lawyer.

The point is that once he is going to be tried he needs a lawyer and we supply him a lawyer at critical stages of the investigation. But prior to that time he does not have a right to a lawyer. It might be helpful,

although our --

QUESTION: Mr. Frey, wouldn't it be truthful to say that a lawyer can't do him much good under the rules in the institution?

MR. FREY: I think it would be hard for a lawyer to do him a great deal of good unless you're not only going to give him a right to a lawyer but you're also going to say that the Constitution requires that the lawyer be allowed into the institution to wander around, talk to people, that he be allowed to see the physical evidence, that he be allowed to do a lot of things.

So you may be biting off a little more than you can chew if you start down this road. Now maybe that would be a good idea, but I --

QUESTION: And perhaps give the lawyer the right to confer immunity on witnesses?

MR. FREY: Well, I mean I'm sure there's no limit to what the lawyers could imagine they could have that would be useful, and I don't deny that in many instances a lot of these things would be useful.

QUESTION: One thing he might do, as sometimes happens, he negotiates a plea agreement, so the whole thing --

MR. FREY: There is such a thing as --

pre-indictment plea negotiation does go on, not in a case like this. I don't think that's very practical.

What -- in the real world, what happens is it's very important to have that indictment or information or charge because that's when the lawyer knows what the government's case is. At that point he does get some discovery, gets physical evidence. He gets his client's prior statements.

If he starts doing a very active investigation before then, one of the reasons why it's not common is he may only put himself in a position where he is handicapped in representing his client once he knows what the government is actually charging him with and what his case is.

So even where the Sixth Amendment right to counsel attaches for purposes of a preliminary hearing, a bail hearing, and so on, it is simply not the fact that the lawyer immediately goes out and starts investigating the case. They may or they may not. It may or may not be helpful.

Our position here does not depend on any conclusion that it would have been useless to these respondents to have lawyers, but I think they greatly exaggerate the value that it would have been to them.

Now I wanted also to make just one other

point, which is that their emphasis on the utility of a lawyer, even if you accept it, does not put them in any different position from lots of other people, such as people who get in a serious automobile accident and are in a hospital for six months while the government is investigating their case, people who are arrested on other charges.

And I believe Mr. Levine is going to argue this morning. I am told he had a client who was in precisely that situation -- arrested on state charges, put in a state prison, and meanwhile a federal investigation was going on.

Or if we had let these folks out of jail. If their mandatory release date had come, they would not have been held in administrative detention. They would have been released. They would have been just as unable to conduct an investigation.

One other point I wanted to make, and that is that the whole code of guilt rationale falls down if you look at what they did with respondent Gouveia. He was transferred within 90 days out of ADU in Lompoc and sent to Levenworth. There was no question that he was being held in ADU as some kind of symbolic accusation of the crime of murder. He was transferred to Levenworth, and they still dismissed the indictment against him.

I'd like to reserve the balance of my time.

QUESTION: Mr. Diamond.

ORAL ARGUMENT OF CHARLES P. DIAMOND, ESQ.

ON BEHALF OF RESPONDENTS

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

In the time alloted to me to address the right to counsel issue I would like to make four principal points concerning the decision below.

First, the decision does not limit the right of the government to order an inmate into segregated confinement or to hold him there indefinitely. It simply recognizes that under limited circumstances an inmate can be rendered an accused by that confinement and under limited circumstances is entitled to counsel. The government does not point to any adverse consequences which could flow from that decision.

Point two, the decision of the Court of Appeals fully accommodates the interests of the government in responding promptly to disruptive events. Indeed, it only pertains to those who have been held under Bureau of Prisons' own regulations to answer in a pending criminal indictment.

In that respect, the decision of the Court of Appeals is far less rigorous than standards that have

been promulgated by the American Bar Association and other legal groups.

Point three. The Court of Appeals did not require the appointment of counsel for all inmates confined in admistrative detention for more than 90 days. Contrary to what Mr. Frey says about this case, this case concerns only inmates who have been detained to answer in pending criminal charges and thus who in a constitutional sense have been accused of a crime.

Point four. The decision below does not represent any radical departure from anything. It simply stands for the proposition that those arrested within the walls of a prison are as much entitled to legal representation as those who are arrested outside the walls of an institution.

In light of Mr. Frey's comments, I'd like to diverge from the order in which I was going to cover these points and plunge right into the constitutional basis for what the Court of Appeals did. That really goes to the third point that I wanted to cover this morning in that the Court of Appeals recognized a right to counsel only in inmates who have been held in a constitutional sense because they have been accused of a crime.

What the Court of Appeals looked to were the

Bureau of Prison regulations which state an inmate can be detained indefinitely -- and in this case we have up to 20 months of detention -- without a lawyer while he is pending criminal investigation and trial for a criminal act committed in the institution.

QUESTION: Where would he have been had there been no murders or other injuries?

MR. DIAMOND: He would have remained within his general population at the Lompoc Penitentiary. He would not have been confined, or these individuals would not have been confined in three by five-foot cells for 23-1/2 hours a day for 20 months without anyone to do anything about the charges that everybody knew was coming down the pike.

QUESTION: You say he couldn't do anything. They did make telephone calls.

MR. DIAMOND: In limited circumstances they had limited access to make telephone calls.

QUESTION: They did, right. Is there anything else?

MR. DIAMOND: That was the extent to which they could communicate with the outside world, coupled with the potential of having visits, if a visitor showed up to see them.

QUESTION: No letters?

MR. DIAMOND: I'm sorry. Also they had the right to communicate with the outside world by mail.

QUESTION: And receive?

MR. DIAMOND: Yes.

But with respect to communications within the inmate population, and that is where the body of witnesses that would have been available to build a defense on their behalf resided, they had absolutely no means of communication with the possible exception of the illustrations that Mr. Frey points out.

QUESTION: Mr. Diamond, Kirby was arrested, wasn't he, before charges were preferred against him, and the holding of the Court was that even though he was arrested it did not bring into effect the Sixth Amendment right to counsel. So even though you establish that this person was detained pending criminal charges, if you don't show that there was some sort of commencement of criminal prosecution it seems to me you're contrary to the Kirby case.

MR. DIAMOND: Justice Rehnquist, we don't believe it is at all contrary to the Kirby case. Indeed, Mr. Kirby, in the Kirby case, was arrested, but the crucial fact, in our opinion, that makes Kirby much different than this case is that he was not detained to answer, and I'd like to come back to Kirby in greater

depth.

But I want to refer to --

QUESTION: What do you mean by the term "detained to answer"?

MR. DIAMOND: That is the words that this Court used in United States v. Marion, reaffirmed four years later in Dillingham v. United States, to define when for purposes of the Sixth Amendment a criminal prosecution commences.

QUESTION: But they're talking there about the constitutional right to a speedy trial. They weren't talking about the right to counsel.

MR. DIAMOND: What the Court was talking about in that decision was the following clause of the Sixth Amendment: "In all criminal prosecutions the accused shall enjoy the right." The Sixth Amendment proceeds to list and identify various rights that are enjoyed by an accused, but Marion dealt with what does it mean to be an accused, what constitutes an accusation during the course of a criminal proceeding.

QUESTION: Well, supposing one were to conclude that perhaps the language in Marion pointed one way and the language in Kirby pointed another, Kirby having dealt with right to counsel and Marion having dealt with speedy trial? Wouldn't Kirby govern here?

MR. DIAMOND: Justice Rehnquist, they're not at all inconsistent, and let me explain why. Let me first state that the reason the Court of Appeals found these individuals entitled to counsel or at least accused in a constitutional sense was because they were detained to be held to answer in a pending charge.

What was the situation --

QUESTION: Well, how do you know it was then pending? That's just language.

MR. DIAMOND: We conducted -- that was the principal issue, Justice White, that was litigated in the District Court before Judge Gray, who dismissed the indictments in this case originally. What we had were detention orders which recited the fact that these individuals were committed to administrative detention on the nights of the crimes, and this pertains to my clients, Mr. Mills and Mr. Pierce; we have an analogous proceeding in the other case.

But those detention orders recited the fact that the individuals had been put in ADU because of the pending criminal investigation and the pending criminal trial.

QUESTION: Well, I know, but they weren't being -- the only time they would be held to answer a charge is if the charge was filed.

MR. DIAMOND: Marion -- I'll try to answer this question then I'd like to return to Justice Rehnquist's question.

Marion's use of the term "holding to answer" does not mean that there has to be a charge, a formal charge, on file. In fact, the Court, in Marion, stated --

QUESTION: Well, what about Kirby, like Justice Rehnquist says? What about Kirby?

MR. DIAMOND: Kirby is readily explained by a number of facts. Number one, it dealt principally with the question of whether to extent the Wade-Gilbert exclusionary rule to retain police show-ups conducted upon arrest.

In a constitutional sense --

QUESTION: Now that is not the thrust of Justice Stewart's opinion, as I recall the case. That is just Justice Powell's concurrence.

MR. DIAMOND: That is correct. But Justice Stewart's comments, as I recall, commanded four votes. But I would like to deal with Justice Stewart's comments and the result reached by Justice Stewart as they would apply to this case.

Marion tells us that if one is accused in a constitutional sense, that the Sixth Amendment becomes

operable in the first instance if one suffers the imposition and actual restraints, and the holding to answer. Marion makes clear that -

QUESTION: What does that mean -- "holding to answer"?

MR. DIAMOND: A decision to bring the guy into the stationhouse and not cut him loose and let him go home, to hold him there --

QUESTION: That's just arrest.

MR. DIAMOND: It's an arrest and a decision to keep him there until something happens.

QUESTION: So you say the language in Marion doesn't mean that he's being held to answer a charge that's been filed? You think it means that he is being held to answer a charge if it's ever filed?

MR. DIAMOND: He has been held to answer a charge that the prosecutors are preparing to bring against him.

QUESTION: Well, that's certainly contrary to the normal meaning of "hold to answer" that we learned, at least we learned in the days when I was in law school, that being held to answer is going before a magistrate to see if there's probable cause. If the magistrate says there's probable cause, you are held to answer and bail is set.

MR. DIAMOND: But, Justice --

QUESTION: It is inconceivable you would be held to answer without there being a charge to which you are held to answer to.

MR. DIAMOND: Justice Rehnquist, I understand the Solicitor General tries to tie the concept of holding to answer into the procedure that we have.

QUESTION: Well, I speak out of my experience, not what the Solicitor General is trying to do.

MR. DIAMOND: I understand that. But my point is how could Marion have referred to a procedure in which a magistrate determines probable cause and binds someone over when it was decided in 1971 and wasn't until 1975 in Gerstein v. Pugh that this Court for the first time recognized that one arrested had a right to go through that process.

Beyond that, what that argument reduces to is that the police can go out on the street and they can throw somebody in the hoosegow, and if they decide not to bring him before a magistrate or, in this case, since the rules don't apply, don't have to, he has not been held to answer.

QUESTION: Well, Kirby says that no Sixth Amendment right to counsel is implicated in those circumstances. Now maybe some other constitutional

right is.

MR. DIAMOND: Let me attempt to distinguish Kirby, because I think it is distinguishable from the situation that Marion addressed, it's distinguishable from the situation here.

The problem in Kirby or what happened in Kirby was an individual was, Mr. Kirby was taken off the street, largely because the police thought he was somebody else, and he was in possession of, as I recall, traveler's checks with somebody else's name in it, and they thought that was suspicious and they brought him to the station house for further investigation.

They get to the station house and for the first time the police learn that the man whose traveler's checks he was carrying was the victim of a robbery. Well, it's not unlawful to carry those traveler's checks and in fact Mr. Kirby had an explanation for that.

They had made no decision to hold him to answer. The police went out and got the victim, brought him in, and conducted an uncounseled lineup. It wasn't until after that uncounseled lineup that they decided to hold Mr. Kirby for the robbery charge. At the time Kirby was subjected to the uncounseled lineup, he had --

QUESTION: You mean it wasn't until then they

decided to file a charge against him?

MR. DIAMOND: No, it wasn't until then that they decided to hold him until a charge could be filed.

QUESTION: Mr. Diamond, when should he have counsel in this case? What point in time?

MR. DIAMOND: Justice Marshall, we believe that an inmate detained under these circumstances plainly is entitled to a lawyer sooner than 20 months after he is isolated.

QUESTION: When?

MR. DIAMOND: We seen the principle emerging from the Sixth Amendment cases that an individual must be afforded representation within a reasonable period of time following arrest.

QUESTION: What is a reasonable time in this case?

MR. DIAMOND: In this case, the Court of Appeals --

QUESTION: Well, for example, the government says when he was indicted.

MR. DIAMOND: Certainly it can't be indictment, because that means the door is limitless and there's no right to counsel under these circumstances. I think a proper benchmark might well be the rules that apply outside the prison population.

In virtually -- in all the states --

QUESTION: I don't see how you can apply outside the prison population.

MR. DIAMOND: Well, I think --

QUESTION: Well, when?

MR. DIAMOND: Within 90 days after the inmate is confined.

QUESTION: On the 89th day? You're putting it on time now, not on condition.

MR. DIAMOND: Justice Marshall, that is what this case is about. It's about time, in part. It's about 20 months of isolation.

QUESTION: If he had been released on the 89th day, you wouldn't be here?

MR. DIAMOND: That is correct under the Ninth Circuit decision.

QUESTION: That's what you are urging us to --

MR. DIAMOND: That is the rule of the Ninth Circuit decision and in that respect we endorse that principle.

What this case is analogous to, not Kirby, because Kirby is distinguishable on the constitutional basis that there was not a holding to answer. The case is analogous to situations which rarely arise in this nation of an individual arrested and then detained for

an unconscionably long period of time without a lawyer. Those cases are indeed rare under our system of justice because nowhere in this country can an individual be arrested without in a reasonable period of time having a lawyer appointed for him.

But in the rare case in which that has arisen the courts have uniformly condemned that result. One example was Chism v. Koehler, and only one of two examples in the Federal system that we were able to find, in which Mr. Chism was arrested and then forced to litigate for the next 15 months as to whether he had the right to appointed counsel in the first place.

The Court there in reversing the convictions -- and this is the Sixth Circuit adopting the language of the District Court -- noted in three sentences the unfairness of the situation.

The Court said: "During the 15 months that petitioner was incarcerated without the assistance of trial counsel there was no one to gather and preserve evidence which might have been favorable to the defense. Meanwhile the state was proceeding in the case with all the investigative expertise and resources at its disposal. Such an imbalance strikes the very essence of even-handed criminal justice."

It is precisely that situation of which we are

complaining in this case. There was no question but that within hours in the case of Mills and within weeks in the case of the Gouveia prosecution that there would be a criminal prosecution -- no question whatsoever. And we contend that within a reasonable point an individual has to be recognized for what he is under those circumstances. He has in effect been arrested. He has been held to answer a criminal charge.

One point that I think must be understood in response to Mr. Frey's comments, there were no security rationales applicable in this case. We had a District Court finding which was concurred in by the Court of Appeals.

Thank you.

QUESTION: Mr. Levine.

ORAL ARGUMENT OF JOEL LEVINE, ESQ.

ON BEHALF OF RESPONDENTS

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

I am going to attempt to address my comments for the most part to what Mr. Frey has referred to as the secondary issue, and I will attempt to first agree with one thing that he said. It is a secondary issue, the issue being the remedy that was fashioned by the Ninth Circuit, only in the sense that if there is no

right to counsel, as has been discussed by Mr. Diamond, then there is really no need to discuss what the remedy should be.

However, I think as a prefatory remark I should state to the Court that if there were no prejudice as pervasive as existed in this case there would be no need for us all to be standing here discussing whether the right to counsel should apply.

And as we weave our way through ten appellate briefs and the oral arguments that have been heard here today I think that one thing becomes apparent, and that is throughout all those arguments nobody has suggested an alternate remedy that works.

There are cases which this Court has considered down through the years, where the --

QUESTION: What do you mean "works" -- that avoids a conviction?

MR. LEVINE: Well, hopefully so, Your Honor, but what I'm specifically speaking about is remedies such as suppression of a statement or suppression of part of a government's -- of the government's evidence. That was briefly spoken --

QUESTION: How would you have a remedy that affects that?

MR. LEVINE: Well, my point is that there can

be no other remedy on this type of a case other than dismissal of the indictment. These other remedies that I am attempting to just illustrate to the Court would not work.

QUESTION: You mean if there's been a denial of the right to counsel?

MR. LEVINE: That's right. That's right. My argument presupposes --

QUESTION: In other words, it doesn't help you to prove that there's a right to counsel when you say you don't get these kinds of remedies.

MR. LEVINE: Well, Your Honor, in a sense you do. Really the attempt to bifurcate these two issues is probably a little unfair to this Court. The lawyers in this case, all of us who are seated here today, when we came upon the scene of these cases -- and this is in the record -- it is our contention that we were faced with an insurmountable burden in attempting to build a defense and defend our clients.

Now some of the highlights of that are contained in the record of this case. By way of example, one of the laywers in his brief discussed the fact that there were 67 inmates who could have had some knowledge of the murder which occurred in a certain unit at Lompoc.

QUESTION: Could they have telephoned you with respect to these matters?

MR. LEVINE: If they knew us.

QUESTION: Could the clients that you're now representing have telephoned you and got advice over the telephone or by visits which were allowed?

MR. LEVINE: Well, that would have been the case had somebody who was associated with them retained an attorney such as myself, and if these defendants, we have to assume, had the ability to pay for an attorney. But we are dealing with defendants who are indigent, who did not have the ability to retain an attorney either at the time of these murders or 20 months later.

They all established their indigency and, Your Honor, in the opinion by Judge Sneed, the majority opinion of the Ninth Circuit, that was one of the requirements of his rule, was that the inmate, in order to be afforded the right to counsel needed to establish indigency. He further needed to ask for an attorney.

And if he was held outside the general prison population for a period in excess of 90 days then Judge Sneed said, with the majority of the court, that he would either have to be released to the population of the prison or afforded an attorney. He gave the Bureau of Prisons a choice.

QUESTION: How much better off with respect to being able to prepare his defense would he have been in the general prison population than in the control unit?

MR. LEVINE: Well, in the control unit --

QUESTION: Because I guess you can see that if he had been released to the control unit he could have asked for counsel forever and wouldn't have been entitled to it, even if he was indigent.

MR. LEVINE: Well, Your Honor --

QUESTION: Until there had been a charge filed.

MR. LEVINE: I understand that.

QUESTION: Isn't that right? Isn't that right?

MR. LEVINE: I think he has a tremendous advantage by going to the general population. First of all, let's say for the sake of argument --

QUESTION: Well, he's not going to get an attorney appointed for him, so what does he do to help himself?

MR. LEVINE: Okay. In the general prison population there are perhaps 15 times as many inmates as there are in control unit, if we assume there are 15 units in the prison. In that inmate population are going to be, especially if he is released within a

relatively short period of time from the murder, are going to be persons who may know something about the murder, who may know something about the witnesses the government is going to call, and who may also know something about other persons who, let's say, had a grudge against the decedent.

Now that's an important point, the last one I made, because in each of these two prosecutions there was an alternate theory of who may have committed this murder, as opposed to the defendants who were on trial.

In the Gouveia case --

QUESTION: So he's -- when he's in the general prison population he is going to be conducting, gathering these facts himself?

MR. LEVINE: He has the right to do it and maybe the potential --

QUESTION: He also has the right to be killed.

MR. LEVINE: That's absolutely true, Your Honor, and unfortunately in a prison setting that occurs more often than not. We're not here to condone that kind of activity, but we're trying to give a defendant who is on trial for his life -- and these defendants, at least in the Gouveia case, when you talk about prejudice --

QUESTION: Well, let's back up a minute. You said that if he could afford a lawyer he could get one, right?

MR. LEVINE: Even if he were in isolation.

QUESTION: Yes, sir, is that right?

MR. LEVINE: That's absolutely right.

QUESTION: Would a lawyer be able to go out and talk to all the prisoners?

MR. LEVINE: He would have a right to attempt to do so.

QUESTION: Would he be able to do so?

MR. LEVINE: I think within certain limitations, yes.

QUESTION: Like two or three?

MR. LEVINE: Well, Your Honor, maybe two or three a day. There are opportunities to make arrangements with prisoners.

QUESTION: There are opportunities, but I mean every prisoner out there is going to have a lawyer going around talking to the prisoners? Who is going to run the jail?

MR. LEVINE: Well, not the lawyers, Your Honor. The opportunity exists and in this particular case I think there has been a record made.

QUESTION: I agree with what was said

earlier. You don't want a lawyer, you want an investigator.

MR. LEVINE: Well, Your Honor, I think the --

QUESTION: Am I right?

MR. LEVINE: If I were an accused in that position, I would prefer to have a lawyer. I -- that's perhaps just one --

QUESTION: Do you know of a lawyer that would go down into the prison yard and talk to prisoners at random?

MR. LEVINE: We did it in this case, Your Honor.

QUESTION: What?

MR. LEVINE: We did it in this case and it's a matter of record in this case.

QUESTION: You did?

MR. LEVINE: Yes, Your Honor.

QUESTION: But you weren't paid?

MR. LEVINE: No, this was after indictment. This was after --

QUESTION: This was done by the paid lawyer?

MR. LEVINE: I don't see why a paid lawyer would not do it.

QUESTION: Let me see if I understand you. You said out in the yard? I thought these people were

in administrative detention.

MR. LEVINE: No. The lawyers went to the prison.

QUESTION: You mean those who were not your clients?

MR. LEVINE: That's right. The lawyers attempted to interview people who knew something about these murders, and they went to Lompoc, and this is a matter of record in this case, and they attempted to find people who might have known something about the alternate theories of the murders or who might have known something about the government's witnesses.

And to a limited degree we were able to interview some people, but the use of the word "limited degree" is the important distinction here, because we weren't there until 20 months had expired. By that time the potential witnesses and the use of evidence of an alternate theory had evaporated, and our hands were if not tied completely at least tied to a very large extent in attempting to build a defense for these defendants.

QUESTION: Well, Mr. Levine, you succeeded in producing a large number of witnesses, did you not, at the trial?

MR. LEVINE: I --

QUESTION: How many witnesses from the former

prison population were you able to produce?

MR. LEVINE: Justice O'Conner, in response to your question, that comes up in the government's brief time and time again. There is the allegation that the Gouveia defendants -- and I participated in that trial -- called 14 alibi witnesses and 31 witnesses in all to defend themselves.

That issue came up in the oral argument before the Ninth Circuit as well, and I think it should be pointed out here, as it was pointed out there, you are dealing with 14 alibi witnesses for five different people in a trial, and 35 witnesses or 31 witnesses for five different people, and it's not the quantity of witnesses alone which should determine whether a person has had an adequate defense.

It's the quality of those witnesses. For example, on behalf of Mr. Segura, who I represented at the trial, I called five people who could be characterized as alibi witnesses, and of those five -- and maybe this is just a quantitative or qualitative evaluation of my own -- there was really only one who established his alibi or who attempted to do so.

The other persons, their memories were so dimmed by the passage of 20 months, by that time 27 months, that their ability to relate facts to a jury was

severely limited, and we attempted in our pretrial motions to delineate other witnesses who might have known where these people were but had either disappeared into the world outside prison or who had been transferred to other prisons and we couldn't locate because we only knew them by nicknames. They were no longer at Lompoc.

It's those kinds of problems that really make this case a nightmare for a trial lawyer.

QUESTION: Well, how did you get into this case?

MR. LEVINE: Appointed after indictment, Your Honor.

QUESTION: And suppose there had been a release after 90 days into the general prison population. You don't claim then there would have been any right to an appointment of a lawyer?

MR. LEVINE: Not according to Judge Sneed's opinion, there would not. Judge Sneed gave them the choice.

QUESTION: And so he would then have had to proceed on his own?

MR. LEVINE: That's correct. Or, if they kept him in isolation beyond that date, then he would have a lawyer.

QUESTION: I understand.

MR. LEVINE: The choice was being given to the Bureau of Prisons. I guess what Judge Sneed was saying was that if any given prisoner is such as threat to the security of the prison that you have to keep him past 90 days, then give him a lawyer, and if he isn't such a threat and you're holding him for trial past 90 days, then let him out into the prison population where at least he can attempt to do something to establish or build his own defense.

QUESTION: Even with the risks that might be attendant and were thought to attend such a release into the general population?

MR. LEVINE: Well, there would have been a risk with every prisoner being released. With some of them the risk would be smaller than with others. I think what Judge Sneed was doing was giving the Bureau of Prisons the opportunity to make that evaluation, which they -- they're the ones that should.

Justice Marshall asked -- he doesn't like the fact that the lawyers would be running the prisons. Judge Sneed's opinion gives that right to the Bureau of Prisons. They should make the determination and either choose point A or point B, whichever one they felt is better in their own discretion.

In closing, Your Honor, let me just make this comment about this entire case. When we talk about the potential prejudice or prejudice, as the Morrison case discusses, when you have six people who are serving life plus 99 years in prison, the claims of prejudice begin to get your attention.

And in this particular case I think the Solicitor General's office is beginning to take a rather inconsistent position when you hear them argue in the case immediately preceding this that it is the government's interest to bring people to trial while the evidence is new and the memories of witnesses are clear and in this particular case they seem not to have very much concern for that position, and that's our position, Your Honor.

Unless there are any further questions, I am through.

QUESTION: Do you think that there are some rather unusual difficulties in investigating this kind of case, as you have said it was for you, and that those difficulties would also attend the government's inquiry to try to get information from these prisoners?

MR. LEVINE: Your Honor, the way one of these cases is typically investigated -- and I know in the brief that I supplied the Court with I outlined a

step-by-step approach to how they found their evidence in this case, and the dates upon which they found it.

And I think it's a very, very good illustration of how fast the government really does come up with their evidence in one of these cases. Maybe they don't do it within 90 days, maybe they don't do it within 45 days, but when they -- when a murder occurs at an institution such as Lompoc what happens is the FBI goes out and interviews perhaps half, if not more than half, of the prison population.

Of that number of people -- and this is in the record, too, in Mr. Wilkins' affidavit, he was the FBI agent -- perhaps 98 or 99 percent of those prisoners are going to tell the FBI I know nothing about this case. And they do that because that's the credo within the prison.

QUESTION: It's also safer, isn't it?

MR. LEVINE: Absolutely. There is a one, two or three percent part of the prison population who are always looking to be informants or to get a favor out of the government and maybe, in the government's view, to tell the truth about what happened.

Those people immediately come forward, are immediately interviewed. Their interviews are memorialized in FBI documents. And those people are

taken away from the general prison population and placed into protective custody.

From that point on the government puts together its physical evidence, however long that takes. But they have their case on ice. They have the defendants on ice in isolation, and the defendants cannot do what the government is doing.

I was in court when Judge Gray dismissed the Mills case the first time, and those were his comments in dismissing that indictment. His attitude was well, the government can develop its case right away, and then keep the defendants on hold indefinitely while they have no opportunity to build a defense for themselves.

And here we're dealing with a murder prosecution. And there's no statute of limitations. So if there is no right to counsel, when does it end? It could go on forever. In this case, it went on 20 months and we claim the prejudice was pervasive.

QUESTION: Well, do you have anything further, Mr. Frey?

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.

ON BEHALF OF PETITIONER - REBUTTAL

MR. FREY: A couple of things. I would like to emphasize with Mr. Levine that we are dealing with a murder case here, which makes the seriousness of the

remedy of dismissal a concern.

QUESTION: How many of these defendants charged with murder had these long life sentences?

MR. FREY: I think they all. I'm not certain what the sentences were. I assume they all got life sentences for these murders. No, Pierce in fact was, after the indictment was dismissed and while the government was appealing, his mandatory release date came up and he was let out. He robbed some banks in northern California and he's in state custody now. So if the mandatory release date comes, this symbolic accusation evaporates and they are let out of prison.

It's the prison authorities who decide to put them in administrative detention. It is not the FBI and not the prosecutor. It is not a foregone conclusion that there will be a prosecution. In this case, we have a statement by the assistant that as to Mr. Levine's client, Mr. Segura, it was only several months before the indictment was returned that he felt he had a prosecutable case.

They have based much of their argument on a witness named Giffin, an individual named Giffin, who gave us information about the murders, who was going to be our main witness, and he didn't testify at trial. Fortunately Mr. Kinard, one of the co-defendants did,

but we would not have had a case.

These cases are very fragile. We may be quite confident that people are guilty, but that is not enough to justify returning an indictment. We have to be able to secure convictions.

I wanted to make one point about the District Court's finding with regard to the lack of a security basis for the detention of these people. That is tucked away in a conclusion of law, not a finding of fact. It was not an issue in this case at all until the Court of Appeals, when it was really raised by Mr. Diamond, refuted by us in our reply brief in the Court of Appeals.

The panel of the Court of Appeals ruled in our favor and said there was a security basis, which, as I say, under the regulations has to be there, and under the -- what evidence there was showed that there was a security basis.

Now it is true that they were under investigation for a crime. We don't deny that. We do deny, however, if there were a hearing I think we could plainly establish that that was not a necessary condition for their detention.

QUESTION: Mr. Frey, if one of these people had plenty of money and apart from prison regulations,

would he have had a constitutional right to retain counsel of his choice before indictment?

MR. FREY: Well, I kind of discussed that a little bit back in December in the Flanagan case, but that would sound to me something like a substantive due process right, and I am not sure what this Court would find. There would be a decent argument, I think, that if somebody wants to retain a lawyer it is the kind of associational interest in running one's own affairs that the government could no arbitrarily interfere with or prevent.

The point about the Gulag business, about holding people indefinitely without a lawyer, of course, raises a due process claim. You can't hold people indefinitely, not because of their right to counsel but because they can't be deprived of their liberty without due process. So, therefore, in order to hold them there must be a charge and a judicial findings and a judicial proceeding. There is none of that --

QUESTION: Or some other reason to hold them in confinement -- I mean, in control units.

MR. FREY: Well, it could be confined in a mental institution.

QUESTION: Or under the control unit. I suppose the security problem could exist for a long

time.

MR. FREY: Well, I want to make a point. The Court of Appeals said in its opinion that holding them in ADU was equivalent to an arrest because it serves the important need of investigative officers to protect witnesses and evidence, facilitate an effective investigation, prevent further criminal activity by the suspect.

And it said these are the interests that lead to an arrest. Well, the Court of Appeals, I think it forgot about bail. That is not the purpose of an arrest. That is preventive detention. We don't generally have that in this country. Most arrests are not for the purpose of preventive detention, but they may lead to the institution of a judicial proceeding. That is a different story.

In this case we do have preventive detention which is perfectly legitimate in the context of the prison situation. It is not an accusation of a crime. There is no prosecution. No right to counsel.

MR. FREY: Thank you.

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

(Whereupon, at 2:24 o'clock p.m., the case was submitted.)

CERTIFICATION

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#83-128 - UNITED STATES, Petitioner v. WILLIAM GOUVEIA, ET AL.

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