OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1023

TITLE UNITED STATES, Petitioner V. FERNANDO ROJAS-CONTRERAS

PLACE Washington, D. C.

DATE October 9, 1985

PAGES 1 thru 53

(202) 628-9300
20 F STREET, N.W.

BEFORE THE SUPREME COURT OF THE UNITED STATES

- -x

UNITED STATES, :

Petitioner :

V. : No. 84-1023

FERNANDO ROJAS-CONTRERAS :

- -x

Washington, D.C.
Wednesday, October 9, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:58 p.m.

APPEARANCES:

MRS. PATTY MERKAMP STEMLER, ESQ., Criminal Division, Department of Justice, Washington, D. C.; on behalf of the petitioner.

MS. JUDY CLARE CLARKE, ESQ., San Diego, California; on behalf of the respondent (Appointed by this Court).

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mrs. Stemler, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF MRS. PATTY MERKAMP STEMLER, ESQ.,
ON BEHALF OF THE PETITIONER

MRS. STEMLER: Mr. Chief Justice, and may it please the Court:

The first question presented in this case is whether the Speedy Trial Act guarantees a defendant a new 30 day preparation period following the return of a superseding indictment that merely corrects a clerical or typographical error. The second question is one of remedy and need only be reached if the first question is decided adversely to the government, that is, whether the harmless error rule applies to violations of the defense preparation provision, Section 3161(c)(2).

Respondent is a Mexican national. On February 18, 1983, an indictment -- an indictment returned charged the Respondent in two counts with felony illegal entry and re-entry by a deported alien. The felony illegal entry charge required proof of a prior illegal entry conviction. The indictment alleged that judgment had been entered on that prior conviction on or about December 17, 1981. That date was a typographical error. In fact, the prior conviction had occurred on

December 7, 1981.

Approximately one month after the indictment was returned, Respondent was provided with discovery that disclosed the correct date of the prior conviction, and approximately one month after that a superseding indictment was returned that corrected the typographical error in the original indictment. In all other respects, the original indictment and the superseding indictment were the same.

At Respondent's arraignment on the superseding indictment, he demanded a 30 day postponement of trial. He claimed that (c)(2), as construed by the Ninth Circuit in United States v. Arkus, guaranteed him a new preparation period after the superseding indictment was returned. He did not claim that he was either surprised or prejudiced in any way by the correction of the typographical error. Rather, he claimed that he needed more time to prepare for trial for two totally unrelated reasons. One was that he wanted to consult a fingerprint expert, and the second was that he wanted to review his immigration file. Review of the immigration file was needed to defend the re-entry charge in Count 2.

Rather than postpone trial, the government agreed to dismiss Count 2, the re-entry charge, and Respondent himself obviated the need for a fingerprint

expert by stipulating at trial that he was in fact the same person who had been convicted of illegal entry on December 7, 1981.

QUESTION: Mrs. Stemler, do you think the case is moot?

MRS. STEMLER: Do I think the case is moot? No, I do not because he has served his sentence. If -- no, I do not. I think under this Court's decions in Cibron and Karafas, and also under the Ball decision, that the government still has an interest in re-instating Respondent's conviction. If he is ever -- if he faces any further prosecutions, the -- his criminal record will come into play at sentencing. It may influence the sentence that he receives. It can also influence parole eligibility, the number of prior convictions he has. And therefore, the government has an interest in seeing that the conviction is reinstated in this case.

The District Court denied Respondent's motion for a continuance, holding that (c)(2) did not apply to the superseding indictment in this case. The Court further found that Respondent would not be prejudiced by proceeding to trial the next day as scheduled.

Respondent was then convicted on the felony illegal entry charge and sentenced. The Court of

Appeals reversed his conviction, holding that under Section (c)(2) as construed in another Ninth Circuit decision, United States v. Harris, Respondent had an absolute right to a 30 day preparation period after the superseding indictment was returned. The Court further held that the refusal to grant Respondent a 30 day delay of trial was per se reversible error and that no showing of prejudice was required.

The decision of the Court of Appeals that the trial must be delayed for 30 days following the return of a superseding indictment is inconsistent with the very purpose of the Speedy Trial Act which is to accelerate criminal trials to protect the public by getting the criminal off the streets as swiftly as possible. It brings about the undesirable result of mandating delays where no additional preparation time is needed.

The Speedy Trial Act establishes both minimum and maximum time periods within which trial must commence. For instance, trial must start no later than 70 days after the return of the indictment or the defendant's first court appearance. That 70 day period is not measured in consecutive calendar days, but rather it is subject to expansion by periods of excludable delay. One such period is a continuance granted by the

judge to serve the ends of justice.

The Act also contains a minimum time period. That is (c)(2), the defense preparation provision that is at issue in this case. (c)(2) provides that trial shall not commence less than 30 days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se. The language of (c)(2) is unambiguous. There is only one first appearance through counsel in any case. In this case, that first appearance was on February 18 when Respondent was arraigned on the original indictment. His trial did not begin until 59 days later, and therefore he clearly was given 30 days within which to prepare for trial.

Accordingly, (c)(2) was not violated in this case.

The use of the term "first" in (c)(2) by Congress manifests Congress' intent to guarantee only a single preparation period of 30 days. There is nothing in the statute from which -- that indicates that Congress intended (c)(2) to give a defendant a second 30 day preparation period after a superseding indictment was returned. In fact, whenever Congress did want to give a defendant a second preparation period, to guarantee a defendant a second 30 day preparation

period, it did so explicitly as it did in another provision, (d)(1). In that case, where a defendant obtains -- secures a dismissal of the original indictment and thereafter an indictment is returned, the Act specifically states that both the 30 day minimum period and the 70 day maximum start again.

In contrast, the act is structured so that where a superseding indictment is returned and the original indictment is dismissed on the government's motion, the time limits are calculated with reference to the original indictment

Congress, of course, recognized that 30 days would not always be sufficient time for a defendant to prepare. Therefore, in the Speedy Trial Act there is a second provision that protects a defendant from being rushed to trial before he is ready. That second provision is the ends of justice continuance provision. It stops the speedy trial clock, it allows a judge to stop the clock by granting a continuance of whatever length is necessary to accommodate the needs of a defendant. The length of the continuance can be one, as little as one day, and it can be as long as 40 days or 50 days or longer.

It is our position that it is this ends of justice continuance provision section of the statute

that applies where a superseding indictment is returned, but that is the section that protects a defendant from being rushed to trial before he is ready in light of any changes that have been made in the superseding indictment.

The decision of the Court of Appeals also conflicts with the legislative history of the Speedy Trial Act. The theme that pervades the legislative history both in 1974 when the statute was originally enacted, and again in 1979 when it was amended, was the desire of Congress to accelerate criminal trials. Congress enacted the Speedy Trial Act to protect the public's right to speedy justice. As originally enacted, the statute contained only maximum time limits. There was no mandatory minimum preparation period for defendants.

In 1979 Congress considered amendments to the Act. It was urged by both the Department of Justice and the defense bar to extend the maximum time limits of the Act, but Congress held fast in its view that the minimum 30 day period -- that the 70 day maximum time limit should be retained, that the public's right to a speedy trial had to be protected.

Instead, to ensure that a defendant was not rushed to trial before he was ready, Congress amended

the act in two respects. First, it included (c)(2), the mandatory 30 day preparation period which in our view applies only once in a criminal case. It also amended the ends of justice continuance provision to state specifically that a continuance could be granted to accommodate the needs of defense counsel where additional preparation time was needed. Both of these amendments were derived from guidelines that had been published earlier that year by the Second Circuit.

Significantly, the Second Circuit guidelines did not think it was necessary to guarantee a defendant a 30 day preparation period after a superseding indictment was returned. The guidelines acknowledged that not all superseding indictments increase the burdens on defense counsel.

QUESTION: What do you call a superseding indictment?

MRS. STEMLER: A superseding indictment, I haven't really -- I haven't been able to find a definition of superseding indictment, but what I would call a superseding indictment is one that replaces the original indictment that charges offenses that arise from the same transaction or series of transactions as those offenses that were charged in the original indictment.

QUESTION: And you would -- I gather from what you have said that there would be some superseding indictments where a discretionary continuance certainly should be granted.

MRS. STEMLER: That is correct. We don't dispute that. Defendants will sometimes need more preparation time.

QUESTION: But you just say the act just doesn't make it mandatory except once, just once.

MRS. STEMLER: That's right. It's not (c)(2).

QUESTION: As long as the superseding indictment relates to the same transaction, right?

MRS. STEMLER: That is correct. That's -- if the superseding indictment makes significant --

QUESTION: Even if the superseding indictment charges a violation of an additional statute?

MRS. STEMLER: That is correct. Again, it's our position that it's not the -- it's not (c)(2) that applies in that case but instead it's the ends of justice continuance provision that will protect the defendant there.

QUESTION: Even if an entirely new crime is addedS?

MRS. STEMLER: That is correct. It seems to

me that the way to --

QUESTION: You seemed to hesitate.

Would you have a question whether it is a supervening indictment or superseding indictment where a wholly new offense is alleged?

MRS. STEMLER: I think that as long as the offense is related to the other -- the offenses that were charged in the original indictment --

QUESTION: Arises out of the same transaction you say.

MRS. STEMLER: Right, that (c)(2) would not apply, that instead, the appropriate provision to protect the defendant in that case would be the ends of justice continuance provision.

The problem is, if (c)(2) applies to superseding indictments, and I think the way the statute is written, it either applies or it doesn't apply, I don't think (c)(2) was intended to apply in certain circumstances and not in others, it seems to be more of a hard and fast rule, the problem with applying it to superseding indictments is that the statute itself will not work in that situation. If a defendant where a superseding indictment is returned, the government has to bring the defendant to trial within 70 days of the return of the original indictment. If he is guaranteed

under (c)(2) a new 30 day preparation period, that 70 day limit may be exceeded. This case is a perfect illustration of that point.

When Respondent was arraigned on the superseding indictment, 57 speedy trial days had already elapsed. That meant that the government only had 13 days left within which to bring Respondent to trial. Had he been given a new 30 day preparation period under (c)(2), we would have exceeded the 70 day maximum by 17 days, and he would have been entitled to dismissal of the indictment under the mandatory sanction provision.

Congress clearly could not have intended to place the government in the predicament of either trying a case too early or too late. Instead, if the ends of justice continuance provision is used to protect a defendant after a superseding indictment is returned, this predicament does not occur. The ends of justice continuance provision, unlike (c)(2), stops the speedy trial clock so that if 57 days have already elapsed and an ends of justice continuance is granted, let's say, of 20 days, the clock will stop, the defendant will have his 20 days of preparation time, and the clock will begin running again, and then the government will still have an opportunity to try him within the 70 day limit.

Moreover, it simply makes no sense to delay

trial simply because a typographical error has been corrected in the indictment.

QUESTION: May I inquire about the relationship between the 70 day limit and the 30 day limit?

MRS. STEMLER: Yes.

QUESTION: If the -- if the government dismisses the original indictment and goes to trial on a new or supervening indictment, then the trial has to commence within 70 days of the arraignment on the original indictment --

MRS. STEMLER: That is correct.

QUESTION: -- under the terms of the statute.

MRS. STEMLER: That is correct.

QUESTION: So as a matter of common sense, maybe the 30 day preparation should run from the same date.

Does it make any difference if the original indictment is not dismissed, in your view?

MRS. STEMLER: No, it doesn't make, shouldn't make any difference. The Feldman case --

QUESTION: And why not, because the act is so specific and deals in one section with a dismissal by the government and in another on motion of the defendant.

MRS. STEMLER: If the original indictment is dismissed on motion of the defendant, the defendant does get a new 30 day preparation period under (d)(1). However, if a superseding indictment is returned and the government forgets to take care of the housekeeping matter --

QUESTION: Right.

MRS. STEMLER: -- of dismissing that original indictment, that should have no effect on whether or not the defendant gets a new defense, new mandatory preparation period under (c)(2). The Feldman case from the Seventh Circuit attempts to make that distinction.

QUESTION: Right.

MRS. STEMLER: But in my view, that's an irrational distinction. A defendant's preparation needs, and there is nothing in the statute itself that seems to support the distinction of giving a defendant 30 days where we remembered -- where we forget to dismiss the indictment but not giving him 30 days where we remember to dismiss the original indictment.

Superseding indictments are also returned for purposes like dropping defendants or dismissing certain counts, in which case it is clear that a defendant would not need additional preparation time, that in those instances the preparation task of defense counsel is

simplified. If (c)(2) is read to apply to superseding indictments, there will be mandatory 30 day delays in those situations where clearly no additional preparation time is needed. This mandatory delay of trial not only gets into the -- gets us into the predicament that I had described earlier, but also is contrary to the very purpose of the Speedy Trial Act.

The act was enacted to accelerate trials, to protect the public, and therefore it should not be construed in a manner that would be antithetical to that purpose by mandating unnecessary delays.

To reiterate, it is not our position that a defendant never is entitled to a continuance after a superseding indictment is returned. Certainly some superseding indictments will substantially alter the charges in a way that will require the defendant to do additional preparation, but the defendant is adequately protected by the ends of justice continuance provision in those situations. The due process clause and the Sixth Amendment right to counsel also will ensure that a defendant is not rushed to trial before he is ready.

Even if the Court disagrees with our construction of the defense preparation provision, the Court below erred in holding that the viclaton required reversal. There is nothing in the Speedy Trial Act that

says that violations of (c)(2) should be exempt from the harmless error rule. Indeed, the Speedy Trial Act is filled with various sanctions for violations of its provisions. It requires dismissal if the 70 day limit is exceeded. There are disciplinary sanctions for attorneys who intentionally delay trial. In each instance that -- in which Congress has provided a specific sanction, Congress was punishing delay rather than speed. Therefore, there's no -- no reason to believe that Congress intended to mandate reversal where the defendant has not been prejudiced by a violation of (c)(2).

In this case there can be no doubt that the return of the superseding indictment shortly before trial did not prejudice Respondent in any way. He had been provided with discovery a month earlier disclosing the correct date of his prior conviction. He claimed no surprise or prejudice by the change that had been made in the superseding indictment. The claim --

QUESTION: Let me ask this question on the harmless error situation.

Supposing you had a violation of the 70 day requirement and they didn't get to trial soon enough, and the statute says there must be a dismissal of the indictment.

MRS. STEMLER: Right.

QUESTION: And say there's some argument about whether there's a violation or not, and the District Court decides there's not, that the trial was in time, there's an appeal, and the Court of Appeals concludes that the 70 day requirement was violated. Would the government then be in a position to argue that the violation was harmless, under your submission?

MRS. STEMLER: No. I think we could not. The way the statute is written, dismissal is mandatory where the 70 day limit has been violated. I think by including that mandatory dismissal sanction, Congess has preempted the harmless error rule for that situation.

The statute does provide, however, that the dismissal can be with or without prejudice. If it's without prejudice, the government can reindict and then try the defendant again. That's -- that is, I don't know if you want to call that a version of harmless error or what you want to call that, but if we get a dismissal without prejudice, we do have the opportunity to start the case over by reindicting.

QUESTION: Why wouldn't under the -- a fair reading of the language of the harmless error rule, a Court of Appeals be able to say, well, it seems sort of silly to us, they can dismiss without prejudice, go

through a whole trial again. He's obviously guilty, and 71 days didn't prejudice him at all. Sure, the statute says shall be dismissed. There's just -- it's a clear error, but why couldn't that be harmless?

MRS. STEMLER: In other words, say that the remedy the defendant would have been entitled to is dismissal without prejudice, and therefore why --

QUESTION: There would have been another trial, and the same evidence would go in, and you prove him guilty all over again, just spend a lot of money to carry out a --

MRS. STEMLER: It's possible that the courts could do that. There aren't any decisions doing that yet, but that has been done in some analogous --

QUESTION: Well, on the other side of the coin, are there any decisions ever holding a violation of the Speedy Trial Act harmless?

MRS. STEMLER: Not a violation --

QUESTION: The 30 day rule or any other provision of the statute?

MRS. STEMLER: No. There -- nc. There have been --

QUESTION: It's a brand new contention, isn't it?

MRS. STEMLER: There have been -- there have

been -- yes, there have been. There have been harmless error -- I believe that there have been some cases saying that violations of the -- there's sort of a detainer section, 3161(j) in the statute, that provides for giving notice to defendants who are incarcerated elsewhere, serving sentences elsewhere, that they have a right to a speedy trial, and I think the Courts of Appeals have held that violations of that provision have been held harmless. Also I think -- well, I think that may be the only situation that has generated a harmless error ruling.

The -- as far as the violations of the 70 day limit, the courts have always held that harmless error does not apply, and it's simply a matter of determining whether the dismissal is with or without prejudice.

If the Court has no further questions, I will save the balance of my time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Ms. Clarke?

ORAL ARGUMENT OF MS. JUDY CLARE CLARKE, ESQ.,
ON BEHALF OF THE RESPONDENT

MS. CLARKE: Mr. Chief Justice, and may it please the Court:

By the use of the word "superseding" in front of the term "indictment," the government in reality is

asking this Court to allow the government to have control over the defense preparation period. That's not what Congress did.

Prior to the mandatory defense preparation period being inserted into the Speedy Trial Act, Congress became convinced that the courts were not capable because of the pressures of the Speedy Trial Act of exercising the necessary discretion to adequately protect the rights of the defendant to be prepared, and that's why we cannot turn the mandatory defense preparation period into a discretionary period.

It's mandatory, it must be read as mandatory, and the fact that the government places an adjective in front of the term "indictment" cannot change the meaning of the word "indictment."

QUESTION: But it is mandatory, as I read it, from the date on which the defendant first appears through counsel.

MS. CLARKE: That is correct, Justice Rehnquist, and the definition then that this Court must look to is what does the term "first appears through counsel" mean, and we have to look at the history and how that language got into the statute.

The Department of Justice and the Judicial Conference of the United States submitted to the

Congress language for the defense preparation period that read something similar to this: Unless the defendant consents in writing to the contrary, trial shall not commence less than 30 days from the date specified in paragraph 1.

Now, paragraph 1 referred to the 70 day activation provision.

QUESTION: You are paraphrasing -- you just paraphrased what the Conference submitted to Congress?

MS. CLARKE: That's right. But then what Congress did to that, it was, Congress said the defendant really is not in a position to adequately take advantage of the mandatory defense preparation period until counsel comes onto the scene, and that's when they liberalized, they did not restrict, they liberalized the mandatory defense preparation period to say that it begins from the first appearance through counsel.

And the only cornerstone that you can hook that first appearance into is an indictment. Otherwise, you are building in discretion into the act. The act would then become confusing as to the application of the 30 day period, would begin to litigate, it fosters litigation over what's material, what's typographical, what's a change in the indictment --

QUESTION: Well, but the Congress could so

easily have said from the date on which an indictment is first returned if it had meant what you said.

MS. CLARKE: But Congress did hook it in to the filing of the indictment, and Congress went a step further. They just didn't want to limit the defendant to the time of the filing of the indictment. They wanted to give the defendant that opportunity for counsel to enter the scene on that indictment.

Now, the government argues, and it is implicit in your question, that Congress could have said first appearance post-superseding indictment. That would fly in the face of the history of the entire federal criminal code because superseding indictment is just not used. Congress did not restrict the defendant's rights, Congess liberalized the defendant's rights by placing the words "first appearance through counsel."

QUESTION: But first appearance through counsel could be at an arraignment, couldn't it?

MS. CLARKE: It could be at an arraignment. It could be -- it couldn't be at the time the indictment is filed, but it could be at the defendant's arraignment on the indictment.

The evidence before Congress at the time --

QUESTION: So they just didn't tie it to indictment at all.

MS. CLARKE: I would disagree with the Justice --

QUESTION: If it can be at an arraignment --

MS. CLARKE: What happens at an arraignment? The indictment. The defendant is arraigned on the indictment.

QUESTION: But it's not the date of the indictment -- I mean, the arraignment doesn't necessarily take place on the date of the indictment.

MS. CLARKE: No, no. The arraignment would take place after the indictment was filed. To consider the significance of a superseding indictment, consider, the Court must consider what happens when a superseding indictment is filed, and that goes again to your question, Justice Rehnquist. An indictment is returned by the grand jury, signed by the foreman, filed in the District Court. The defendant appears on the indictment, is arraigned on the indictment, given a copy of the indictment, notice of the specific charge, and called upon to plead.

Now, what happens when a superseding indictment is filed is the exact same thing. The grand jury foreman signs the indictment, it is filed in the District Court, the defendant is arraigned on the indictment, he is given notice and a copy of the

indictment and called upon to plead.

So the exact same processes, the significance to the defendant is that he is being given notice of what the charge is, the charge that is the only significant charge to him at all, and that is the charge upon which he is going to go to trial. Otherwise the indictment process, the formality --

QUESTION: Well, counsel, suppose the superseding indictment merely changed the date from the 3rd to the 4th of August?

MS. CLARKE: As is similar in this case, Justice Marshall. The indictment was --

QUESTION: I realize that.

MS. CLARKE: The superseding -- I'm sorry.

QUESTION: So what is the need for a whole lot of time on that?

MS. CLARKE: Well, then we go back --

QUESTION: Because I'm going to take it to when they change the time from 12:15 to 12:16.

MS. CLARKE: Then the problem becomes the super -- the defense preparation period becomes discretionary at the hands of the government.

QUESTION: What additional weight does that put on the defendant?

MS. CLARKE: Well, the problem is this Court

is interpreting (c)(2).

QUESTION: What additional weight does that put on the defendant?

MS. CLARKE: Well, I would be speculating, but I will be happy to answer your question. For example, in Mr. Rojas' case, when the date was changed to the proper date, Mr. Rojas lost the defense, a defense to the charge, completely obliterated any plausible attempt at asking for a lesser included offense verdict in the case. Mr. Rojas was charged with a felony illegal entry which requires as a predicate to that felony that the date be proven of his prior conviction. If the government didn't prove that, and the jury believed the argument that the government did not prove their case beyond a reasonable doubt because the date was wrong, which the jury would be in their power to do, then Mr. Rojas would have been convicted of a misdemeanor. But the more --

QUESTION: Wouldn't that be up to the judge?

MS. CLARKE: I'm sorry, sir.

QUESTION: Wouldn't that be up to the judge to decide that?

MS. CLARKE: To decide whether or not --

QUESTION: Whether or not you needed more time to change from the 5th to the 6th.

MS. CLARKE: That's precisely why Congress enacted the mandatory defense preparation period, because the judges, because of the pressures of the outer time limits of the act --

QUESTION: I thought the decision was that it was automatic. If you changed the indictment in any form or fashion, for example, if you corrected a word, the misspelling of a word, you get 30 more days.

MS. CLARKE: That's right.

QUESTION: That's your position.

MS. CLARKE: That's right. I couldn't have said it better, and that's exactly --

QUESTION: Oh, I think you could have.

MS. CLARKE: That's exactly what Congress did because what happened when the Speedy Trial Act came in in 1975 is it created an extreme artificial pressure on the trial courts of this nation to try cases fast. They said to the trial courts we know you don't want it, but here's the Speedy Trial Act, and you've got to try this case within 60 or 70 days, whatever the time period was at that time. And the courts were saying, yeah, we know we've got to try it, so we're going to try it now because we've got a day open, and we've got time to try you, and we're going to make you go now.

And then when the Department of Justice and

the Judicial Conference went back to the Congress and said haste is equally as bad as delay, the Congress gave to the defendant a mandatory defense preparation period.

The problem with reading the (c)(2) provision, the defense preparation period, as other than mandatory when the government chooses to file a superseding indictment is that it creates a great deal of uncertainty in the system, will be fostering a great deal of litigation over what's material, is there really a need for this defense preparation period. You'll have the criminal defendant back in the position of having to say to the trial judge I really need this period of preparation, and again you have the outer time limits crushing down on the trial judge, and the trial judge is going to say, criminal defendant, Congress told me to try this case within 70 days. I've got time for you now.

QUESTION: But isn't it true that if the defendant says I need 30 days and therefore extends the time, that automatically extends the 70 day period, too.

MS. CLARKE: That would extend the time under the excludable --

QUESTION: So the crushing pressure isn't

there if there's a need for it. You've got to assume the judges are going to listen to these motions.

MS. CLARKE: A need is a tad bit different than requiring the court because what is going to weigh most heavily in the court's mind? What's going to weigh most heavily --

QUESTION: I imagine if the defendant asked for another 15 days, he's normally going to say I'll give it to you because it extends -- it relieves them of the 70 day pressure as well.

MS. CLARKE: Mr. Rojas didn't get it. Mr. Guzman in the Second Circuit, United States v. Guzman, didn't get it.

QUESTION: Well, and according to the government, he was not prejudiced by the failure to get it, either.

MS. CLARKE: Well, Guzman's 15 year drug conviction was reversed by the Second Circuit because of the failure of the trial court to grant the miniscule continuance that was requested.

If the Court employs a simple certain final rule, what will happen is that we won't have the litigation we did in Guzman, we won't have the litigation we did in Gallo, in the Sixth Circuit, United States v. Gallo where the Sixth Circuit said you didn't

have time to prepare for that RICO count, we're going to reverse that conviction. and that is the kind of litigation that I think that the courts of this nation are going to see.

QUESTION: But under, under what you propose, you can have a situation where the 30 day period no longer relates to the original indictment, but the 70 day period continues to relate back, and it would be impossible for the government to go to trial at all, and that is obviously an absurd result.

So to make the 70 day period and the 30 day period co-exist, you pretty much have to adopt the rule that the government espouses here, don't you?

MS. CLARKE: I disagree, and I disagree with the basic premise that the question is founded upon.

First, a superseding indictment is not -- does not neatly fit within the provision that you referred to earlier and that you referred to now, the (h)(6) provision where the government dismisses and refiles and the time limit is then connected to the original indictment and not the refiled indictment. The superseding indictment traditionally, as I understand them, although they are not defined in the code, comes in, the original indictment exists and the superseding indictment comes in, and in fact, in Mr. Rojas' case, it

wasn't forgetting. The government did not move to dismiss the first indictment until the time of sentencing of Mr. Rojas.

QUESTION: Well, what difference does it make whether the government dismisses or doesn't, in your view?

MS. CLARKE: Well, one, it makes a great deal of difference because the statute is very, very specific, and the statute does not talk about indictments that overlap. The indictment talks about the government dismissing and refiling. The purpose behind (h)(6), that provision that regulates government conduct --

QUESTION: Well, isn't that a purely perfunctory act in the circumstances of this case?

MS. CLARKE: No, because --

QUESTION: And why should anything turn on that?

MS. CLARKE: Had the government dismissed, Mr. Rojas would have been freed from bondage. Now, let's say that of course -- from custody because there would have been no charge pending, and I think that's what (h)(6) goes to.

But let's say that the government had dismissed one instant before the superseding indictment,

and I can address your question. (h)(6) was put into the act to restrict the government, not the defendant. (h)(6) was put into the act to prevent the government from filing, going to day 69, dismissing and filing and then forever extending the Speedy Trial Act. (h)(6) was not put into the act to hurt the defendant. (h)(6) was not put in there as a burden to the defendant.

The government when they dismiss and they refile outside of 30 days --

QUESTION: But that's not this case. I mean, you -- here the government filed a supervening indictment to change by a very small margin what apparently was a typographical error on the date.

MS. CLARKE: Well, the record reflects that the prosecutor said that there's a typographical error. The record does not reflect in fact it was a typographical error, and we should assume that grand juries sign indictments that they mean, and they sign indictments based on the evidence that they hear. So I'm not sure that I'm necessarily willing to concede that it's a typographical error.

But Justice O'Connor, you do bring up the critical statutory construction problem with the issue that's before the Court. But because the purpose of (h)(6) was to restrict the government and not to hurt

the defendant, it's very consistent to read into (h)(6) that any time the government would be in the position of violating the 70 days by its late filing of a superseding indictment, that (c)(2), the defense preparation period, acts as its own continuance provision, its own exclusion, and activates the ends of justice, or there's nothing wrong with saying to the government you are the party that delayed in filing the superseding indictment. You are the party that should have known what your indictment should say. You are the party that's made this deliberate choice. Place the burden on the government to obtain the ends of justice exclusion provision because I think that when the government files outside of the first 30 day period, they are going to run into some trouble with 3161(b) which requires that any indictment filed in a criminal case must be filed within 30 days of the arrest of the defendant.

So if the government files outside of the 30 day period, I think they're going to be running into a violation of the (b) provision, and they're going to have to justify to the Court the late filing of that superseding indictment anyway.

QUESTION: Ms. Clarke, do you think a superseding indictment was necessary in this case at

all?

MS. CLARKE: Well, that's questionable. I think that the government -- and the position they took before the District Court is that they could have requested an amendment or the striking of the surplusage, and that the District Court could have done that. Had they done that, I do not think that the defendant would be entitled to a second (c)(2) provision.

QUESTION: You wouldn't be here at all.

MS. CLARKE: We wouldn't be here on (c)(2). We might be here on (h)(8)(B)(iv), but we would not be here on (c)(2). The basic response to that is that (c)(2), the mandatory defense preparation period, just is not the answer to all of the ails of the criminal defendant, and that's precisely why Congress injected the discretionary continuance provision.

Congress gave us two, two preparation periods. One they said is mandatory, and one they said is discretionary. And the mandatory one they had to give to the courts to relieve the pressures of those outer time limits and to inject balance into the system. To hold otherwise makes that (c)(2) period discretionary solely at the hands of the government, solely based on when the government decides to file a

superseding indictment.

The real problem that we face is that there's a great inertia running. The Speedy Trial Act compels the trial courts to set a trial date early on, and once that trial date is set, that's sort of like cast in stone, and as you get closer to it and the -- because the trial court, what they do is they clear their calendar for everything else. They are going to try your case that day. And the government comes in with their superseding indictment no matter how minute the change.

The defendant's not going to be able to get a continuance on the regular basis that he's going to need the continuance.

QUESTION: But if the change is minute, why would he need a continuance?

MS. CLARKE: Well, that would be up to the defendant to decide, and of course, under (c)(2) the defendant can waive that 30 day preparation period, and of course, in regard to Mr. Rojas, he had to make a difficult decision whether to assert it or not because he's sitting in custody, and certainly he's making the decision that hurts only, only himself.

The need for the --

QUESTION: Well, to say he makes a decision

that hurts only himself, if 30 unnecessary days are consumed between the time of indictment and the time of trial, the public is hurt.

MS. CLARKE: Well, who made that decision though? Could the government not have brought their superseding indictment in a timely fashion? In San Diego, in the Southern District of California, the grand jury meets on Wednesdays and Fridays, regularly. The indictment could have been filed.

The government in its reply to the Respondent's brief said something to the effect of the grand juries don't meet regularly enough, and you have to schedule your superseding indictments with the workload of the grand jury. Well, in Guzman, they superseded the indictment beteen mistrials, and in Hawkins, a case that is now pending cert before this Court, they superseded between changes of venue.

QUESTION: Well, that varies from district to district.

MS. CLARKE: That varies from district to district, and --

QUESTION: In New York they have about six running every day.

MS. CLARKE: Right, and that's about like it is in San Diego.

But the government knows that, and they can seek a continuance to file a proper indictment.

If the Court allows the government behavior to be condoned, really --

QUESTION: The court allows them sometimes to correct an indictment during trial.

MS. CLARKE: I would think that that would --

QUESTION: To conform to the evidence.

MS. CLARKE: I think that would cause a great deal of problems under the Fifth Amendment, to change an indictment during trial. Of course, this Court in the United States v. Miller said you can prove less than you allege, but that is certainly different than conforming the indictment or changing the indictment --

QUESTION: But any change at all, under your rule, the government's out.

MS. CLARKE: A superseding indictment --

QUESTION: Any change at all.

MS. CLARKE: Any change at all. A superseding indictment is an indictment, and it has to be the cornerstone, it has to be the only logical touchstone for the 30 day period to run from. Otherwise there's litigation, there's confusion, there's discretion injected back into the act.

QUESTION: What confusion is there in

requiring the defendant to file a motion and say that you haven't complied with the rule?

MS. CLARKE: I'm sorry, Justice Marshall.

QUESTION: They file a superseding indictment, and the defendant says you have not given me my extra 30 days and I need my extra 30 days for the following reason.

MS. CLARKE: Right.

QUESTION: That I'm injured.

MS. CLARKE: There's no --

QUESTION: I'm harmed by it.

MS. CLARKE: There's no requirement under the defense preparation period that the defendant show anything --

QUESTION: Well, what would be wrong with such a requirement is my quesdtion.

MS. CLARKE: Congress, Congress simply did not require such. Congress created a real rigid statutory --

QUESTION: Well, could we require it?

MS. CLARKE: I don't think so because I think this Court is stuck with interpreting the legislation before it --

QUESTION: Stuck?

MS. CLARKE: Well, maybe that's not the right

word, but in a sense, that's where we are because this Court really needs to interpret what Congress said and not create the legislation. This Court refused in Barker v. Wingo to say anything about rigid time limits under the Sixth Amendment in the speedy trial clause, and Congress took the bait that was left open from that decision and said we're going to give the courts a Speedy Trial Act, and they did, and I think whether the courts like it, whether the government likes it, whether the defendants like it, we have it, and we ought to construe it in a manner that's easy to apply. We ought to construe it in a manner that does not create litigation --

QUESTION: May I just ask this again? You may have already covered it and I'm a little fuzzy on it, but Justice Rehnquist has emphasized the fact the statute doesn't refer to indictment, it refers to the date through which counsel appeared, and you say that date refers precisely to what, the date of the arraignment or the date of the return of the superseding indictment?

MS. CLARKE: The date that the defendant appears on the superseding indictment.

QUESTION: By that -- does that mean the arraignment date or when he's --

MS. CLARKE: In all practical --

QUESTION: He's got -- an appearance, if they file a written appearance, as they do in some courts, may well have been filed in advance.

MS. CLARKE: Appears through counsel on the superseding indictment.

QUESTION: But it doesn't say on the superseding indictment.

MS. CLARKE: Well, it doesn't say indictment either, but if you look to the history of the language "first appears through counsel," what Congress did was they liberalized the language which connected this defense preparation period to the indictment by saying we're not going to just tie it to the indictment, we're going to tie it to when counsel appears on the indictment because then a defendant is in a position to more fully protect his basic due process rights.

I --

QUESTION: Because he has a lawyer.

MS. CLARKE: That's right, and he knows the charge.

QUESTION: But if he already had the lawyer for a couple of weeks, why isn't that satisfied?

MS. CLARKE: Well, what good is the lawyer in the vacuum of not knowing the precise charge? The

indictment tells the lawyer --

QUESTION: Well, but we're -- by hypothesis, we are dealing with cases where there is no prejudice. It is a miniscule change in the indictment, and you are saying Congress commanded even in the non-prejudice situation to avoid the risk of prejudice there shall always be this 30 day delay.

MS. CLARKE: That's right, and that's the only simple way to read the rule because you're not always going to have --

QUESTION: Well, why do you suppose they didn't refer to the Your Honor then?

MS. CLARKE: Because I think Congress didn't want to --

QUESTION: You see, the other thing that's interesting is in the, in (c)(1) as I remember it, they carefully differentiate between the date of the indictment and the date of appearance through counsel, and say the latter of the two dates shall control.

MS. CLARKE: No, it says from the filing of the indictment or the appearance of the defendant on the indictment.

QUESTION: Right.

MS. CLARKE: It doesn't refer to the appearance of counsel. So (c)(1) can activate before

counsel even comes into the scene.

QUESTION: Right.

MS. CLARKE: And that's why they didn't want (c)(2) to activate precisely at the time that (c)(1), the 70 day period, activated.

QUESTION: But (c)(1) says the latter of the two dates.

MS. CLARKE: The latter of the two dates, but (c)(1) in no way --

QUESTION: The later of --

MS. CLARKE: -- connects itself to the appearance of counsel. It connects itself to the appearance, the arraignment of the defendant on the indictment, which can happen in the absence of the --

QUESTION: Not necessarily arraignment, appearance of a judicial officer in which the charge is pending.

Could that be a preliminary hearing? I was thinking that contemplated a situation in which there might be a hearing in advance of indictment, appearance before a judicial officer.

MS. CLARKE: Has appeared before a judicial -- well, that's for the arraignment. That would not be the -- that couldn't be construed, I don't think, to be the preliminary hearing which I am sure this Court knows

we very rarely have in the federal criminal system anyway because of the return of the indictment moots that issue out.

But I think (c)(1) refers to the appearance of the defendant on the indictment or the filing date of the indictment, whichever occurs later.

QUESTION: Why did they say, I wonder, judicial officer of the court rather than a judge?

MS. CLARKE: Because of the magistrates.

QUESTION: They take arraignments.

MS. CLARKE: Yes, the magistrates who take arraignments, and I think they're referred to throughout the code as judicial officers and not judges of the court.

The second basic issue that the government raised in its brief and to which we respond is that of harmless error, and in reality, the harmless error argument is again the same argument, just couched in different terms, because if the harmless error concept applies to a mandatory time limit such as the 30 day time limit, then the time limit is gone, in reality. And Congress gave a rigid statutory scheme, they created the 30 day defense preparation period because of the demands placed on the courts. We can't determine the harm that would arise from the failure to comply with

the act.

This Court earlier, in an argument previous to this argument, was concerned about what nonconstitutional error has not had the harmless error standard applied to it, and I would suggest that the statute of limitations provision is a nonconstitutionally based statute that does not provide for its own sanction, that does not provide for any analysis, whether it says whether it is subject to harmless error or not, but it just has not been made subject to the harmless error analysis, and in reality, defense preparation period is a mirror image of that statute of limitations because courts lose jurisdiction after five years or whatever the statute of limitations is in any given case. And in a sense, what Congress said to the courts is you don't have the authority to try a criminal defendant within 30 days.

QUESTION: I'm still not sure what your response was, Ms. Clarke, to Justice Marshall's inquiry about what the prejudice to Mr. Rojas-Contreras was in this case by virtue of the change. It sounded to me like you said her lost the benefit of a windfall defense had the indictment not been amended.

MS. CLARKE: First, prejudice is not the consideration that we can apply to the (c)(2) provision

because, again, injecting prejudice into it --

QUESTION: I understand your argument. Now try to answer this question

What was the prejudice?

MS. CLARKE: First, there was no -- there was no showing of prejudice made by counsel below because counsel below was relying on the governing law of the Ninth Circuit and the language of the Speedy Trial Act. The prejudice -- and I'll have to speculate, as I did for Justice Marshall -- is that the defendant, when the date was changed, lost the defense to the charge, and at that point had no opportunity to go back and re-evaluate his position, had no opportunity to go back and reopen plea negotiations in the case. The defendant had no opportunity to determine whether there was some other defense to the charge.

And what -- Justice O'Connor refers to it as a windfall defense or a windfall victory for the defendant. Illegal entry, the crime of illegal entry is a very technical crime, and it is not a malum in se, in that sense, it is a malum prohibitum, and it has its own specific elements, and as any defense counsel knows, you've got to meet the elements as you see them. It's not your burden to tell the government how to prove them, and when the government figures it out and takes

away your defense, you've got to jump back into position and begin to consider where you are.

QUESTION: Well, on that score, it's true, it's not malum in se, but here's a man who's repeating precisely the act that he had previously performed.

MS. CLARKE: He's coming back into the ccuntry --

QUESTION: Making two illegal entries.

MS. CLARKE: More than two, more than two, and I would predict, if I could, before this Court, that he'll probably be back because Fernando Rojas-Contreras is a man who's going to try to come into the United States to work, and I don't think that's really the issue before the case, but we're not talking about a very serious crime.

QUESTION: Well, it's not an issue, I quote agree, but I was merely having an observation on your point that he really hadn't done anything very seriously wrong.

MS. CLARKE: Well, in --

QUESTION: He's had repeated, repeated performances.

MS. CLARKE: In the realm of the federal criminal cases -- and I do not mean to demean the fact that Congress has made illegal entry illegal, and I do

not mean to condone that as it's okay because it's not really that bad, but in the realm of criminal cases it's not up at the top of the chart.

QUESTION: The way you spell out all these things you have to do, I marvel that you could do it realy in 30 days.

MS. CLARKE: Well, I think so, too, and if Congress would give us a little more --

QUESTION: Well, then, 30 days wouldn't help you.

MS. CLARKE: Well, then, then -- but Congress didn't give us any more, Judge. What Congress did was it said if you need more than 30 days, you've got to go over this discretionary continuance provision, and you've got to act --

QUESTION: Well, I think the real problem is you're making this argument here and it wasn't made below.

MS. CLARKE: It did not need to be made below, it was asserted.

QUESTION: Well, why is it made here?

MS. CLARKE: The 30 day provision was asserted below. I think that the argument was made below. I would disagree with you, Justice Marshall, with all due respect.

QUESTION: Did the government argue harmless error below?

MS. CLARKE: No. The government did not.

What we really ask this Court for is an interpretation of a rule of Congress that is simple, that is certain, and provides finality to an already chaotic system.

QUESTION: Haven't some of the other circuits already done that?

MS. CLARKE: There are two. There's the Seventh Circuit and half of the Ninth, I can say at this point, has followed this rigid interpretation that I urge upon this Court. The other half of the Ninth, and the Sixth and the Eleventh have not. They have found that the provision is discretionary, and I think perhaps that goes to the question of mootness. It is probably an issue that needs to be resolved, even though we opposed the granting of cert on the ground of mootness, Justice Blackmun.

QUESTION: Am I correct in my understanding that the Ninth Circuit decided this case without oral argument?

MS. CLARKE: Yes, they did, and it was a memorandum decision, and it was based on United States v. Harris, which was an opinion in the Ninth Circuit,

and in which the superseding indictment changed the offense and added substantive charges to it, was not just typographical.

But the rule that this Court will interpret from Congress will go to everybody. It will cover not only typographical errors, which are not the significant number of superseding indictments, but it will cover Mr. Guzman and Mr. Gallo who face additional substantial counts, and it is the only realistic way to read the language of Congrss. It provides the balance we need; it's efficient, and it places the burdens equally.

I ask that you affirm the judgment of the Ninth Circuit.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mrs. Stemler?

ORAL ARGUMENT OF MRS. PATTY MERKAMP STEMLER, ESQ.

ON BEHALF OF PETITIONER -- REBUTTAL

MRS. STEMLER: Just a few points, Your Honor.

Before responding to the arguments that have been made by Respondent, I would like to address a question that Justice Stevens had asked me. The case that has found a violation of 3161(j) to be harmless is United States v. Anderton. It's from the Fifth Circuit, ands it's cited on page 41 of our brief, I believe in a

footnote.

If I understand the thrust of Respondent's argument, it is that unless you guarantee a defendant 30 days preparation time after a superseding indictment is returned, defendants won't get the time they need because we can't depend on the District Courts to grant continuances to accommodate the actual needs of defense counsel.

Of course, we've been depending on the District Courts to do that for two centuries, certainly long before 1974 when the Speedy Trial Act was enacted and before 1979 when (c)(2) was put into the statute. And in any case, wherever a District Court improperly denies a continuance, the defendant has an appellate remedy. That's exactly what happened to Mr. Guzman to whom Respondent referred, in the Second Circuit. The Second Circuit found that Mr. Guzman should have been given a discretionary continuance after the superseding indictment was returned, and therefore his conviction was reversed.

Therefore, there's no need to construe (c)(2) to apply across the biard to all superseding indictments to mandate delays in every case simply because some judge somewhere might make a mistake on granting a discretionary continuance.

Respondent also argues that (c)(2), that the predicament that I had discussed in my argument can be eliminated if (c)(2) is considered to be a period of excludable delay where it is triggered after a superseding indictment is returned. There is simply no basis for that argument in the statute. All the periods of excludable delay are enumerated in subsection (h). They are all put in together. The 30 day mandatory preparation period is not a period of excludable delay, it doesn't stop the speedy trial clock. The clock continues to run while the defendant gets that first 30 day preparation period.

And finally, Respondent suggests that he was prejudiced in this case by the return of the superseding indictment because it deprived him of a defense. That's not so. The indictment in this case could have been correct -- the typographical error could have been corrected by way of amendment, but even if we had gone to trial on the original indictment --

QUESTION: Why wasn't it? Why does the government choose a supervening indictment instead of the amendment?

MRS. STEMLER: I think it's just the choice of the individual prosecutor, and there is nothing to reflect, in the record that reflects why in this case

they chose to get the superseding indictment rather than to ask the Court to amend the indictment. But even --

QUESTION: What would the government do about the problem of the subsection (b) requirement of a date relating to arrest?

MRS. STEMLER: That's right. The Courts of Appeals have addressed the question of whether a superseding indictment has to be returned within 30 days of arrest and have uniformly held that it does not, that only the original indictment has to be returned within 30 days of arrest.

So we don't get into any problem with subsection (b) where we return superseding indictments after those 30 days have elapsed.

At worst, had we gone to trial in this case on the original indictment an the proof had shown that the prior conviction was on December 7 rather than December 17, that would have been an immaterial variance, and Respondent could still have been convicted of the felony illegal entry charge. So Respondent was not deprived of a cognizable defense.

There is simply nothing in the record that shows that the defendant was prejudiced in any way, and therefore it's completely at odds with the purpose of the Speedy Trial Act to reverse the conviction in this

case simply because a needless delay was not given, that the delay was -- that the trial was not unnecessarily delayed for 30 days.

QUESTION: I don't recall what the rule provision is, if any, on amending indictments. What rule governs that?

MRS. STEMLER: I don't know, Your Honor. It's -- Respondent says Rule 7, but I am not sure, Your Honor.

Therefore, we ask the Court to reverse the judgment below.

Thank you.

CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

We'll hear arguments next in Heath v. Alabama.

(Whereupon, at 1:56 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

lderson Reporting Company, Inc., hereby certifies that the ttached pages represents an accurate transcription of lectronic sound recording of the oral argument before the upreme Court of The United States in the Matter of:

#84-1023 - UNITED STATES, Petitioner V. FERNANDO ROJAS-CONTRERAS

nd that these attached pages constitutes the original ranscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)