OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1361

TITLE UNITED STATES, Petitioner V. KENNETH MOSES LOUD HAWK, ET AL.

PLACE Washington, D. C.

DATE November 12, 1985

PAGES 1 - 50

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

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -x

UNITED STATES, :

Petitioner, :

V. : No. 84-1361

KENNETH MOSES LOUD HAWK, :

ET AL. :

- - - - - - - - - - - - - - - - - -x

Washington, D.C.

Tuesday, November 12, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 o'clock a.m.

APPEARANCES:

BRUCE N. KUHLIK, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the petitioner.

KENNETH SAUL STERN, ESQ., Milwaukie, Oregon; on behalf of the respondents.

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: We will hear arguments first this morning in United States against Kenneth Moses Loud Hawk.

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

ORAL ARGUMENT OF BRUCE N. KUHLIK, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KUHLIK: Mr. Chief Justice, and may it please the Court, the defendants in this case were apprehended in November, 1975, illegally transporting dynamite and firearms. They have thus far successfully avoided trial by filing an extensive series of pretrial motions.

In 1983, the District Court dismissed the indictment on the ground that the accrued delay violated the speedy trial clause of the Sixth Amendment. A divided panel of the Court of Appeals affirmed the dismissal, and we are here on certiorari for a review of that decision.

The defendants were arrested while traveling in a motor home and a station wagon. In the station wagon were 350 pounds of dynamite, several time bombs, and a loaded revolver. In the motor home were blasting caps, more than 2,000 rounds of ammunition, several

empty hand grenades, and eight firearms with obliterated serial numbers.

The defendants were promptly indicted on charges of unlawful possession and transportation of explosives and firearms. Following their indictment, the defendants began filing numerous pretrial motions. One motion sought suppression of evidence of the dynamite which had been destroyed by state law enforcement officials.

The District Court granted the motion to suppress. The government appealed the suppression order, but the defendants in the District Court sought to force the government to go to trial without the suppressed evidence while the appeal was pending.

The defendants did not ask for and the District Court did not order a severance of the dynamite and firearms counts. When the government declined to go to trial without the suppressed evidence, the District Court dismissed the indictment with prejudice under Rule 48(b) for what it termed unecessary delay.

The government appealed, and its appeal was consolidated with that from the suppression order. The defendants were completely free of all restraints during the appeal. A panel of the Court of Appeals initially affirmed, but the Court of Appeals reheard the case en

banc and reversed the judgment of the District Court.

In comprehensive majority and concurring opinions, the Court of Appeals set forth guiding rules for cases, criminal cases in which evidence has been lost or destroyed. The defendants unsuccessfully sought rehearing and certiorari on an interlocutory basis.

When the case returned to the District Court in 1980, the defendants resumed their motion practice. They successfully required the government to reindict, and they sought a number of extensions of time in which to file further pretrial motions. At one time almost two dozen of these motions were pending.

The District Court granted the defendant's motion to dismiss the indictment on grounds of vindictive prosecution as to defendant Ka Mook Banks, and denied the vindictive prosecution motions of the other defendants. Both sides appealed. Once again the defendants were free of all restraints during the appeal.

QUESTION: Does that mean that they could have left the country?

MR. KUHLIK: During the second appeal, as far as I am aware, they were not under travel restrictions, Justice Blackmun.

QUESTION: Of any kind?

MR. KUHLIK: Of any kind.

QUESTION: Was that different for the first?

MR. KUHLIK: No, it is not. During the first appeal as well it is quite clear from the record that the bombs were exonerated.

QUESTION: What constraints are possible to be imposed on a defendant when the indictment is involuntarily dismissed?

MR. KUHLIK: The defendant can be incarcerated. The defendant can also be subject to bail, travel restrictions, reporting restrictions, and the like. The defendants were not in this case, Justice O'Connor.

The Court of Appeals issued its opinion shortly after this Court's opinions in United States versus Goodwin and United States versus Hollywood Motor Car, which were dispositive of the issues raised on the appeals.

Once again, it ruled in favor of the government. It reversed the dismissal of the indictment as to Ka Mook Banks, and it dismissed the appeals of the other defendants. Once again, the defendant sought rehearing and certiorari, entailing another several months of delay.

On remand in the District Court in 1983, the

defendants continued to file additional motions. This time the District Court dismissed the indictment on speedy trial grounds, and the government appealed. The Court of Appeals affirmed the dismissal on this appeal. It purported to excuse certain periods of the delay that had taken place, but it ultimately counted the entire 75 months that the case had been pending on appeal as part of the delay, and had found that this length of the delay was "the most weighty factor by far" in its balancing of the relevant factors.

Judge Wallace dissented from the Court of Appeals decision on the basis of this Court's second decision in United States versus McDonald, which he reasoned required exclusion of the time on appeal when the defendants were not under indictment.

There are two basic points that I would like to make. First, wholly apart from how appeal time should as a general matter be analyzed under the speedy trial clause, it would make a mockery of the Sixth Amendment to hold that these defendants have been denied their right to a speedy trial.

Nothing could be plainer than that far from seeking a speedy trial, they were doing everything in their power to avoid one. They have filed literally dozens of pretrial motions. The docket sheets alone

fill most of the joint appendix. Among these filings were a motion for appointment of a native American judge, a motion to dismiss the indictment in part on the ground that persons with hearing impairments have been excluded from the grand jury, and a motion arguing that the defendant's right to a public trial would be violated unless they were tried in a facility larger than any of the available courtrooms.

QUESTION: How much time did it take the judge to dispose of those three motions?

MR. KUHLIK: I am not sure. A number of motions were disposed of --

QUESTION: You are suggesting they were obviously frivolous, I take it.

MR. KUHLIK: I am, and --

QUESTION: Well, then, if they were, it wouldn't really take much time to decide them, would it?

MR. KUHLIK: It would not take much time to decide motions such as those, Justice Stevens, but the point that I would like to make is that they have been using these motions in an attempt to avoid trial, and I would like to point to two motions, two filings in particular.

First, the completely meritless certiorari petitions that the defendants filed following the second

decision by the Court of Appeals, notwithstanding that controlling decisions had recently been issued by this Court.

Those petitions took several months to dispose of, even though they were --

QUESTION: Yes, but compare that with the time the case was pending in the Court of Appeals. Which was greater? Wasn't that several years in the Court of Appeals?

MR. KUHLIK: Several years have passed while the case was in the Court of Appeals, but I think that the defendant's motion practice clearly indicates that what they wanted was not a speedy trial, but to avoid trial, Justice Stevens, and indeed I would like to focus, perhaps most telling of all, on the motion that is the subject of this Court's review now, and that is their speedy trial motion.

On the last remand, the defendants did not ask for a speedy trial. They asked once again that the indictment be dismissed. The defendants could have fully preserved their claim of a speedy trial violation until after trial, when such claims are, as this Court has held, best considered.

But instead they raised and sought a decision on their claim before trial, adding perhaps another

three years to the delay before they can be tried should this Court reverse.

Delays such as this, we would submit, cannot be laid at the door of the government. Now, to rebut --

QUESTION: What about the delay, that long delay in the Court of Appeals on the -- when they were proceeding en banc in the first appeal? Can delay in a court ever be charged to the government?

MR. KUHLIK: It can be, Justice Rehnquist, but not under these circumstances, and I would point out that the delay on the first appeal before the Court of Appeals was something in the neighborhood of three years, and this entailed briefing an argument before a panel of the Court of Appeals, a divided panel decision, rehearing en banc, a remand to the District Court for further factfinding, and the issuance of a number of opinions that take up more than 50 pages in the appendix to the petition.

QUESTION: I think nonlawyers would think that three years was an awfully long time.

MR. KUHLIK: It was a long time, Justice Rehnquist, but I would suggest that it is not a completely unreasonable amount of time, given --

QUESTION: Well, Mr. Kuhlik, why shouldn't that at least be one of the considerations that should

be weighed under the Barker v. Wingo factors rather than some automatically excluded period of time?

MR. KUHLIK: Well, Justice O'Connor, we don't contend that time on appeal should under all circumstances be excluded under Barker versus Wingo, but under --

QUESTION: Why doesn't it make sense to just always consider it, because after all, the appellate court is an arm of government just like the trial court, and why shouldn't it just go into the factors?

MR. KUHLIK: The problem, Justice O'Connor, is that time on appeal necessarily is going to be of greater length than is time in the District Court, and it will be more routinely justifiable, and when you plug that into the test that the lower courts have developed under Barker, which generally entails a finding of presumptive prejudice after anywhere from six months to a year to a little more than that, you are inevitably going to skew the balance, and that is exactly what happened here. You are going to lead the courts to find violations when they should not be, and you are going to create a --

QUESTION: But why aren't the concerns basically the same? And maybe the Courts of Appeal need to be reminded that they should move along with these

things?

QUESTION: Did the government ever do anything about expediting movement in the Court of Appeals? We get a lot of prisoners' cases here who attempt to bring or seek writs of mandamus to get them to act. Did the government do anything at all about moving along?

MR. KUHLIK: Justice Blackmun, the government filed its appeals on an expedited basis under the Court of Appeals rules, but I would note that the defendants did not do anything either while the cases were pending, and I would think it would be incumbent upon them --

QUESTION: So your answer is in the negative.

MR. KUHLIK: Yes, Your Honor.

QUESTION: What I am trying to do is to tie this into Justice O'Connor's question of isn't it a factor to consider in the Barker and Wingo balance? It's a factor to be considered properly, and our main point, I suppose, that I would like to get across, is simply that appellate time is different from trial time. The ways that would require justification if they took place in the District Court do not require justification in the Court of Appeals, and this time also must be -- the context in which the time arises.

QUESTION: Why should that be, Mr. Kuhlik? Why should delays in the Court of Appeals not require

justification even though the same delays in the District Court were not, because District Courts usually rule faster than appellate courts?

MR. KUHLIK: District Courts, of course, have different functions, Justice Rehnquist. They do typically rule faster, and they are not required tto formulate binding precedential rules for other cases. I think the very institutional functions of the different courts would suggest that the Court of Appeals would require a more lengthy period of time.

Moreover, when a defendant files a pretrial motion such as the motions in this case, he must be taken to contemplate the amount of time that will be necessary to resolve the motion and to resolve an appeal should one be necessary, but suggests that in that context, the delay cannot be counted against the government. The defendant must be taken to have foreseen it. And the problem is, you will be creating a litigable claim of error every time there is a pretrial appeal.

I would note in this very case that the defendants have represented that if this Court reverses, they will file another speedy trial motion on remand in the District Court seeking dismissal once again. This appeal has not proceeded in an unduly slow fashion, yet

this is the kind of claim, this is the kind of problem that is created by the Court of Appeals' balancing of the factors in this case.

I would note in particular that the federal courts have had relatively little experience with the speedy trial clause since the effective date of the Speedy Trial Act, and believe that that inexperience is demonstrated in the Court of Appeals opinion in this case.

The court purported to exclude certain amounts of time to excuse it, to weigh it neutrally, to weigh it against no one, but in the end, it simply put all of the appeal time back into the balance, and the amount of time that is typically taken on appeals will, I think, inevitably skew the balance in this fashion toward a finding of a violation.

The very least reasonable amounts of time on appeal must be excluded when the balance is undertaken under Barker versus Wingo. We note as well that under this Court's decision in United States versus McDonald once the indictment has been dismissed, and once the defendants are not actually held to answer a criminal charge, the speedy trial clause does not apply.

That was the situation in this case.

QUESTION: Yes, but certainly McDonald is

distinguishable, isn't it?

MR. KUHLIK: We believe the principle of McDonald, the guiding principle, Justice Blackmun, is that once the indictment has been dismissed --

QUESTION: That was a voluntary dismissal by the government.

MR. KUHLIK: I don't believe --

QUESTION: Here is an involuntary one.

MR. KUHLIK: I don't believe that that is quite accurate. The indictment was dismissed in McDonald by a quasi-judicial military officer for -- on a finding of lack of evidence to prosecute. The government military prosecutor in that case did want to go forward, and the charges were dismissed over his opposition.

So we do not believe that that distinction is a viable one, nor would we think that there is any policy reason to distinguish on that basis. Certainly, as the Court noted in United States versus Marion, the very fact that the government's desire to proceed with charges against a defendant is a matter of public record, as it was in Marion, and I believe may have been in McDonald as well, is no reason in itself for the speedy trial clause to apply.

QUESTION: When an indictment is dismissed, as

it was in this case, is the defendant then completely free or isn't he still being held to answer a criminal charge?

MR. KUHLIK: In this case he is not being -- the defendants were not being --

QUESTION: Could you have rearrested him?

MR. KUHLIK: We could have arrested, and we could have --

QUESTION: Was that -- a little while ago you said that he could have been put on bail.

MR. KUHLIK: That is right, Justice White.

QUESTION: How can you put him on bail if he isn't -- unless he is being held to answer for a criminal charge?

MR. KUHLIK: If he is put on bail, then he is held to answer. The fact is --

QUESTION: Well, how do you put him on bail? Arrest him again?

MR. KUHLIK: I believe that is what would be done, or required him to appear before the Judge. The fact is --

QUESTION: Well, I --

QUESTION: You think he is absolutely free in this case. He wasn't under arrest --

MR. KUHLIK: He was not under arrest. His

bonds had been exonerated. It is quite clear in the record that that is what had happened. The truth is, the case is pending, and if the government prevails on its appeal, the indictment will be reinstated, but the fact is, during the appeal itself, there is no indictment, and these defendants were not being held.

Now, in many circumstances --

QUESTION: But at least there is an appeal pending.

MR. KUHLIK: There is an appeal pending.

QUESTION: Which was not true in McDonald.

MR. KUHLIK: That is true, Justice Blackmun, but I am not sure that the distinction makes any difference. After all --

QUESTION: Well, to use your misused word, I don't think it is viable.

MR. KUHLIK: Had the indictment been dismissed on some technicality in terms of the indictment process itself, the government would have had the choice of returning to the grand jury and seeking a new indictment, in which case, under McDonald, the speedy trial clause indisputably would not have applied, but going to the Court of Appeals and seeking reinstatement of the old one, we do not think that there is any functional difference between those two courses of

action for purposes of the speedy trial clause.

These defendants were free of their restraints. They were not under indictment at the time. And --

QUESTION: May I just get one thing clear in my own mind? During the period the appeal was pending, would the district judge have had the statutory authority to impose some kind of restraints?

MR. KUHLIK: Yes, he would, Justice --

QUESTION: Which he would not have had in McDonald?

MR. KUHLIK: That is true.

QUESTION: So your argument is that unless he actually imposes the restraint, you should not count the time at all.

MR. KUHLIK: That is my argument, and I believe that is a fair reading of the Court's cases, Justice Stevens.

QUESTION: What would the Court do if just some minor restraint were imposed, you can't leave the country, or you can't leave the state, or something like that? Then we would have to go through a long period of inquiry as to how many restraints make it different, wouldn't we?

MR. KUHLIK: No, I think, Justice O'Connor,

once any sort of restraint has been imposed to hold the defendant to answer a criminal charge, that that would trigger the speedy trial clause's applicability under --

QUESTION: Any restraint, no matter how small?

MR. KUHLIK: I believe that that is the result of this Court's decision in Dillingham, in which the defendant was released. But that is simply not this case, and for the reasons that I suggested earlier, even where the speedy trial clause does apply, we do not believe that times such as this can normally lead to a speedy trial clause violation.

What I would suggest as the general rule for the Court is that in the absence of exceptional circumstances, more than just time, more than just delay, something more must be required to trigger the full balancing test under Barker versus Wingo. It can't just be the amount of time that has taken place on an appeal.

If the defendant is incarcerated, if the defendant can make a showing of prejudice, if the defendant has attempted to obtain a ruling from the Court of Appeals, those are the sorts of factors the courts should look at first, not just the amount of time, because when you just look at the amount of time,

you are going to have a problem as you did in this case.

If there are no further questions, I would like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Mr. Stern.

ORAL ARGUMENT OF KENNETH SAUL STERN, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. STERN: Mr. Chief Justice, and may it please the Court, it was nine years and 363 days ago that this case began, and it has been pending in the federal courts ever since. The issue --

QUESTION: Do you think the accused persons had anything to do with that?

MR. STERN: Your Honor, the facts of this case show that these accused people were ready for trial on May 12th, 1976. It demanded a speedy trial on that date. The government refused to proceed, and that resulted in a dismissal that was upheld on appeal. The sanction of the dismissal --

QUESTION: What has that got to do with what has happened after that, after the new indictment?

MR. STERN: Well, after the new indictment, there was a government appeal and a defense appeal, and that consumed time also, but the real result in this case is that we were ready for trial back in 1976, and

the government was not, and that was the Act that gave all the resulting delay.

The issue for this Court today as I see it is whether the appellate court should be held immune from the speedy trial clause of the Sixth Amendment. The Sixth Amendment provides that any person charged with a crime shall be given a trial without undue delay, and the government urges that this Court hold that appellate delay, no matter how long, no matter in what circumstance, is incapable as a matter of law from being undue or unnecessary.

We believe such an unflexible standard is incompatible with the test announced by this Court in Barker-Wingo and is irreconcilable with the protections of the concerns underlying the speedy trial clause, that a speedy trial be provided to defendant because lack of such a speedy trial will harm him, his defense, and the courts, and society as well.

The government seems to suggest to this Court that the Barker test is incapable of accurately balancing the interests in a case of appellate delay. We disagree. We think that the appellate delay is not so different from any other type of delay that it cannot be adequately considered under the reasons for delay factor.

QUESTION: Mr. Stern, may I ask you a question?

MR. STERN: Certainly, Justice Powell.

QUESTION: Let's assume that for this case in the long process you are discussing had been appealed to this Court and argued in October, and we finally brought a decision down on the 30th of June. How much of that time would you charge to the government?

MR. STERN: I think that there -- under the Barker test, a District Court judge is going to make the determination can --

QUESTION: A District Court judge would decide what part of that time we were delaying and should have brought the case down --

MR. STERN: I think a District Court judge would say that there is a valid reason for the delay of a case in front of this Court, and that that amount of time, I would submit, is appropriate.

QUESTION: Would the District Court have to make that inquiry if we delayed it for two months?

MR. STERN: I don't think that that type of --

QUESTION: Or six?

MR. STERN: I think when you get to the point of a delay in this case, which is sometimes one part almost two years --

QUESTION: You are asking us to lay down a general standard.

MR. STERN: Right. I am saying that a District Court judge can look at the circumstances of the case. I don't think that anybody can say that a particular case six months is okay, eight months isn't. But I think you can say that under the District Court's discretion they could look at the length of delay and the circumstances of the case and balance the factors with all the other circumstances.

QUESTION: And every defendant would ask that that be done.

MR. STERN: No, I think if there was a circumstance with more than enough delay to raise the issue, District Court judges would weigh that delay in the particular case and that particular circumstance.

QUESTION: Mr. Stern, either you are putting District Judge -- Judge Burns or whoever it was in a very awkward position to have them say in adjudicating a speedy trial motion that the Court of Appeals which regularly reviews their decision took too long to decide this case.

MR. STERN: I think it is a hard decision to make in some close cases, but I think in a case like this where you have had two appeals in some six and half

years, it isn't so hard.

QUESTION: Do you suppose the District Court could mandate the Court of Appeals to get on with the business?

MR. STERN: I think the ruling from -- the holding from this Court hopefully will make it so that it need not happen. I don't know. I think it is a hard thing as a practical matter for a District Court judge to do that. But I think the appellate courts on their own could make that ruling quicker so that it need not happen.

I don't know if a District Court judge could do it as a practical matter. I think it would be a very, very rare District Court judge that would try to do that.

QUESTION: Mr. Stern, the government attempted to expedite the appeal on the vindictive prosecution aspect, didn't it?

MR. STERN: What happened under the Ninth Circuit rule is, anything that the government did --

QUESTION: Did it not?

MR. STERN: No, the rule did, Your Honor. What happened is, neither side has to expedite it, and according to the Ninth Circuit Rule 20, when you file an appeal, a government appeal or a defense appeal of any

criminal case that took less than three days to try, or a pretrial appeal, it is automatically expedited. There is nothing either party needs to do --

QUESTION: My real question is, did you oppose that?

MR. STERN: No, we didn't. It was an automatic rule. We knew from the get-go by reading Rule 20 that the appeal was going to be expedited. Both sides got their briefs in on an expedited schedule. The calendaring of the argument was done expeditiously, and then the case sat in the Court of Appeals for years thereafter. It is just the operation of the rule. It is nothing that the government did.

QUESTION: There is an indication, is there not, in the record that there were a number of instances in which counsel for the defendants below indicated less than a sincere desire to push on for trial. Although language was articulated on occasion that we want to go to trial, it was sometimes done in the context of when the appeal was pending, so it couldn't go to trial.

How do you justify that part of the Barker-Wingo factors?

MR. STERN: Justice O'Connor, let me take a minute and --

QUESTION: Because it doesn't look too sincere

at times and in places in the record.

MR. STERN: Let me take a couple of minutes and try to put you in the picture where this case was in 1976, and you can see that the record is otherwise. What happened was that Judge Boloney ruled on a suppression motion that evidence ought to be suppressed. The government three weeks thereafter, approximately four weeks before the trial date, noticed an appeal. After they did that, they came into the District Court and the record of the transcript of April 19th shows that they came into court and said we may want to ask for a continuance of the trial date. The defense lawyers at that point said, Judge Boloney, we want a speedy trial. We are prepared to go to trial on May 12th. We have all our machinery set to go. You have got to remember that these were indigent defendants that had a following, that were helping them prepare their trial. There were people going out and doing jury surveys. They had people donating money for their telephone bills, and so forth. They were set to go.

The judge said, I am prepared to try this case on May 12th. Then what did the government do? The government asked for continuances. We opposed them. The government thereafter asked the Ninth Circuit to order the District Court to stay the proceedings, and to

say that this was necessary, by the way, for all consideration of the suppression motion is erroneous because two of the counts were not even concerned with the suppressed evidence.

Both the Circuit Court and the District Court denied any stay. We demanded a speedy trial at that point. The only reason there was a dismissal order that needed to be appealed in the first instance is, on May 12th, 1976, in the face of the defendant's demands, and in the face of the orders of both the District and the Court of Appeals denying any stay, the government said, we refuse to proceed.

QUESTION: What was the government's reason, that they wanted to appeal the suppression?

MR. STERN: They wanted to appeal the suppressed evidence not only as to the three counts, but also as to the two remaining counts. They are correct in saying that the counts were not severed, but it was the government's duty to come in and sever, not ours to make or the judge to make.

QUESTION: Well, but maybe if you are demanding a speedy trial on counts that aren't affected by the suppression order, maybe you have a duty to move to set.

MR. STERN: I don't think so. I think what we

were looking at was the circumstance where we wanted the case to proceed to trial or any part thereof, and we thought it was the government's duty because it was their case and their motion to make.

In any event, one thing that permeates the government's brief that really sincerely bothers me is a belief that no defendant ever really wants a speedy trial, and that if he asserts that right, he is basically lying. And what I am suggesting in response to your question, Justice O'Connor, is, we were there, we made the demand, and it is not the government's position to either believe or disbelieve us. That should not determine whether we get our speedy trial or not.

If we demand it, and the government stands in the face of that demand and says you are not going to get it in the face of court orders, the order would be a sanction of the Barker-Wingo before that recalcitrance, and that is what the Court of Appeals has held and the District Court has held.

QUESTION: Is the government's attorney correct that if you should lose in this case before this Court that then there would be an intention to file a motion for another speedy trial violation because of the time taken by this Court?

MR. STERN: No. I believe he is misreading a footnote. There is one issue that the District Court decided on. The District Court found sufficient prejudice in the record to, in addition to dismissing the case for violation of speedy trial, also on the due process clause was there a dismissal, and we merely put in a footnote that if this case came back for trial, we would also ask for dismissal under the due process clause.

As a matter of fact, during the pendency of this appeal, another witness has died. So we have suffered more prejudice, and if we were left with the due process clause, we would ask for a dismissal under that.

Let me for a minute address the government's contention that somehow we wanted to delay this trial by filing a number of motions. I don't think there is any waiver of the demand for a speedy trial by filing the motions. The District Court rejected that. The circumstance is not one motion in this case delayed the trial by one day. The ones they are talking about, specifically the native American judge motion, for instance, that was filed at the behest of a defendant, Russell Regner, argued by him before Judge Boloney. He took it under advisement and, of course, denied it

expeditiously.

The record reflects that over two-thirds of the defense motions in this case were actually granted in whole or in part when they were ruled upon. The government can say that for less than a third of their motions.

QUESTION: What about the government's position that if you file a number of pretrial motions, you are in effect opening the way for very likely appeals pretrial?

MR. STERN: I think the difference between the government's position and ours is, the government is saying, once you start the ball in motion, you can't complain about all the delay that happens thereafter, and what we are saying is that under Barker-Wingo a judge should be able to realize that a valid reason for delay justifies appropriate delay, not endless delay, appropriate delay.

So, if we file a motion that is going to result in some delay, or if the government exercises a right that is going to result in some delay, that delay should be reasonable and associated with the justification for the delay. It should not be unlimited.

QUESTION: And where is the unreasonable delay

here, in your view, in the appellate process?

MR. STERN: Okay. There are two rounds for the unreasonable delay. One is the government's refusal to proceed to trial, and that is weighed heavily against them, and the second is just the length of time that it took this case to be resolved on appeal. It took six and a half years to decide two appeals.

QUESTION: Well, do you just want them together kind of en bloc that way and say that two appeals divided into six and a half years means three and a quarter years per appeal, and that is too much?

MR. STERN: No, I think the circuit senses of each have to be looked at. I think that they have yet to basically take the view of what is necessary under the circumstances and whether the Court has evidenced a desire to provide a speedy trial for a defendant.

I think that is perhaps one of the problems that we have to address here, is that the Court of Appeals evidenced absolutely no understanding that this case was a pretrial case that deserved some expedition beyond the other cases, and in doing research, I found that the statistical analysis done by the U.S. administrative offices does not even keep separate statistics for pretrial appeals. It is just something that seems to me to go through the system without

anybody realizing that these cases desire and need some expedition, because there are some people waiting for their trial, and that the system is being hurt by the delay in this case. Also, there --

QUESTION: Of course, you filed the motions, and they were ruled on by the District Court, and the government thought they were erroneously ruled --

MR. STERN: Correct.

QUESTION: And they were.

MR. STERN: Excuse me? They weren't?

QUESTION: They were.

MR. STERN: Well, not --

QUESTION: They were, so at least it could be said that you talked the District Court into error.

MR. STERN: Well, it could be said, but I think --

QUESTION: Well, it proved out that the court was wrong.

MR. STERN: But the point is that either side has a right to exercise certain rights in the proceeding, and that --

QUESTION: Exactly, and the government has a right to appeal a ruling that it thinks erroneous.

MR. STERN: That's right, and I think a reasonable time is permissible. I think unreasonable

time is not asscciated with --

QUESTION: How long?

MR. STERN: I don't think we could set a standard. I think we have to allow the District Court judge to look at the circumstances of each case, and if I am correct, Your Honor, on one point they were not correct as to the dismissal on the first instance. That was never overturned on appeal. It was the sanction because the Court found that the judge did not properly give the government forewarning of a sanction, but the dismissal itself was upheld, and the Court of Appeals has always been exceptionally clear that the government had no reason not to try this case on May 12th, 1976, when the defendants were found to be ready.

Additionally, I would like to point to the Court that the experience of the amicus in this case of a defender service is such that the government's reasons for wanting such an exclusion from the Sixth Amendment has no basis in fact. There is no problem that needs to be addressed. The government engages in a rather prolific pretrial appeal practice in the D.C. courts, and they have not lost one case from unnecessary delay in the appellate process.

And the amicus experience in the D.C. courts is that the calculus of the length of delay in the

Barker-Wingo analysis is the only impetus that keeps those cases moving with any speed at all. So, I suggest to the court that it is a fiction that appellate delay is so different from any other type of delay that Barker-Wingo can't analyze it correctly, and it is a fiction to say that that delay cannot harm the fundamental interests protected by the speedy trial clause.

As to the second issue in this case, the MacDonald case, I think that there are a number of important distinctions, but the one I would like to focus on here is that in MacDonald, once there was a voluntary dismissal, once the government formerly dropped charges, there was no case pending. There has always been a pending case of U.S. v. Loud Hawk.

QUESTION: Well, how do you define a pending case? Obviously, your definition doesn't include an outstanding indictment.

MR. STERN: Well, our definition includes a time not only when we feel that we have been defending our clients against a government prosecution, but Congress has determined that. They can have jurisdiction on appeal on these orders. They are in continuing jurisdiction in the District Court over the defendants, and for litigations of motions which

happened while this case was dismissed. We litigated bail motions.

We litigated government motions to depose their witnesses during the dismissal. We litigated motions for a contination of government subpoenas during this dismissal in the District Court. Their presence was required. Defendants' presence was required during the remand hearing in 1978 from the Ninth Circuit, and even though that was --

QUESTION: Was that after the reversal of the dismissal?

MR. STERN: That was while the case was still dismissed. That was after the panel decision, and while it was en banc, while it was consideration en banc, and in fact they did not appear because they had filed waivers, but they still had to appear by order of the court in the District Court.

They also had appointed for them lawyers. Congress has determined that these people that are the subject of an involuntary dismissal need lawyers appointed for them if they are indigent, and they had those lawyers, and Congress in other statutes also refers to people in this situation, people whose case has been dismissed and is on appeal as defendants and as persons charged with crime, and Congress has also

determined under Federal Rule of Criminal Procedure 48(a) that when the government formally drops charges of voluntary dismissal, like in the MacDonald case, the prosecution shall thereupon terminate.

Under 48(b), the dismissal for unnecessary delay, there is no such statement, and I think as a practical matter what happens in a case like this is not that it evaporates, not that it goes away when the judge dismisses it in the District Court, but that merely a defendant wins on the ground of first persuasion in the first instance, and the government thereafter takes that case, and the issue with the same defendant based on the same facts and the same indictment, the same parties, and merely moves it to another forum, and the litigation continues. It is not some separate case. It is this case, and it continues.

I think to focus on the technical nature of the dismissal on this case rather than on the actuality of the prosecution would create a grave injustice. As I mentioned to the Court before, it was in 1976 that these defendants stood ready for trial, demanding their trial. The only reason they moved to dismiss is because the government violated court orders to proceed.

If the government had -- let's look at it this way. If we had desired delay, as the government

suggests, what greater opportunity? Here was the government coming into the District Court saying continue the trial. We could have had delay --

QUESTION: Was the reason they wanted to continue was, they felt that the suppression order was damaging to their case, and that they have a right to appeal it.

MR. STERN: That is correct, but the reason they refused to proceed was because they felt that the evidence that was suppressed would be helpful for the remaining counts. It was not substantial proof of a fact material to those remaining counts as 3173 requires for an appeal, and that was the basis of the dismissal.

Judge Boloney said on that date that he couldn't understand why the government wouldn't proceed because the evidence was not material to the two remaining counts.

QUESTION: But the Ninth Circuit reversed that determination.

MR. STERN: The Ninth Circuit reversed the determination because the judge gave no forewarning. It upheld the dismissal because they didn't proceed to trial on that date on those two counts. That is why they severed the -- that is where the two counts are different, because the firearms and the dynamite counts

were viewed separately, and there was never held to be any excuse why the government didn't proceed on that basis.

So, if we had desiring to --

QUESTION: But as to the other counts --

MR. STERN: As to the other counts, that is correct. So if we had desired at that time to have unlimited delay, what would we have done? We would have sat there and said, fine, take your continuance. There is no question under this Court's case law, and as the government concedes, we would have had the right to a speedy trial applied to us under MacDonald and under that circumstance, because there would have been a "live indictment."

So, to focus on the technicality of the dismissal really punishes these defendants for wanting a speedy trial was that desire for a speedy trial required the government to proceed and give them that speedy trial, and when they refused, the case was dismissed.

In addition -- well, basically, I would like to say at this point that I think that what we have here is a situation where their needs and message come from this Court to both the government and to the appellate courts to decide more expeditiously through the appellate courts, and if there is not sufficient

machinery, which I don't know that to be the case, but if there is not sufficient machinery for them to make those expeditious rulings, and parenthetically it may be, because in 1976 and '77 and '78 the Ninth Circuit was understaffed by 13 judges, the Congress should give them that machinery so they can act expeditiously, but in any event, that they should go and recognize that the cases are pretrial, that people and the system suffers when there is no speedy trial given in that circumstance.

And secondly, I think there needs to be a clear message to government that it need not believe a defendant when he says that he wants a speedy trial, but when he says it and they have an opportunity to give it, and they are ordered to provide it, they had better provide it.

QUESTION: Mr. Stern, will you refresh my recollection please --

MR. STERN: Sure.

QUESTION: -- as to when the defendants requested on the record that the trial be proceeded with?

MR. STERN: They requested -- the circumstances --

QUESTION: When did they first make a request

for a speedy trial?

MR. STERN: The government came in in mid-April and said --

QUESTION: Of what year?

MR. STERN: Of 1976.

QUESTION: Yes.

MR. STERN: And they said -- what happened is, it was a switch of prosecutors, because they thought that they might have the case on appeal, and it might not go, and they might ask for a continuance, so they shifted prosecutors, and this was on April 13th, actually. They came in and said, here are the new prosecutors in this case. We may not want to be able to proceed on May 12th. The first word out of Dennis Roberts, who was the lawyer for Dennis Banks at the time, said, before we go on to the other business we are scheduled to do here today, I want the record to reflect my absolute opposition to any continuance in this case on behalf of myself, my cocounsel, my defendant and codefendants. We hereby demand a trial on May 12th, 1976. Judge Boloney said there has been no motion for a continuance filed. I, too, want to try this case on May 12th.

QUESTION: And what happened then?

MR. STERN: What happened then is that the

next hearing -- well, they filed a motion for a continuance. That was denied. Then they filed a motion for a stay in the Ninth Circuit, and that was pending on April 26th, when the next hearing was held in the District Court.

That was the first time the government came in and said, Your Honor, probably what will happen in this case is, we are not going to proceed, because we think the evidence will be helpful to the two other counts. And Judge Boloney said, no, I want to have this case tried on May 12th, 1976, and they said, well, we are probably not going to go and proceed at that time. We made our opposition exceptionally clear, and we filed in fact, and it is in the appendix, a very strong opposition from the Ninth Circuit on that same date while they were considering that.

QUESTION: Were there further motions on the record for a speedy trial?

MR. STERN: The motions for speedy trial or the requests for speedy trial when the government was requesting continuances were all on the record, open court, as a matter of fact, including up to the day of trial, when we stood demanding our trial, and the government said we refuse to proceed, and thereafter, too, I might point out that at the future time, too, in

1983, on the March 9th, 1983, transcript, on Pages 2 through 18, it reflects again this case came --

QUESTION: They always want a speedy trial when they have had a case pending on appeal?

MR. STERN: We have always wanted a speedy trial, yes.

QUESTION: When they -- primarily because they had a case pending on appeal in the Ninth Circuit?

MR. STERN: When the case was pending in front of the Ninth Circuit, we still obviously wanted a speedy trial. There is not much neither the government nor we can do to expedite the procedures, but I might even suggest that when this case came down after the cert petition was denied on the second appeal, the government would suggest that we filed that just for delay, but the record reflects just the opposite.

We came back down March 9th, 1983. We demanded a speedy trial. The government came in saying we don't know where our witnesses are. We haven't been on top of them for years. We have to go and find them. It is going to take us a couple of months to get ready for trial, and we said basically that is nonsense. We have had the responsibility of keeping this case prepared for many years.

We know where our witnesses are. We want our

speedy trial. So it has been throughout the litigation that there has been a demand. The major crunch time happened in 1976 in terms of the government's irresponsible refusal to proceed, but there has always been a demand for a speedy trial on the record, as the District Court so found.

Unless there are any further questions, I think I am finished. Thank you.

QUESTION: Is there a federal Speedy Trial Act?

MR. STERN: There is a Speedy Trial Act, but it does not address the delay in the appellate system.

QUESTION: Well, how doesn't it?

MR. STERN: It excludes the time --

QUESTION: Well, why do you suppose it excludes it?

MR. STERN: I suspect that Act was promulgated to speed up the proceedings in the District Court.

QUESTION: Well, Congress didn't think that they ought to subject the appellate time to the Speedy Trial Act.

MR. STERN: I don't know if that is true, but if it is --

QUESTION: Well, it doesn't apply, does it?

MR. STERN: It doesn't apply, but --

QUESTION: And it is expressly excluded, isn't it?

MR. STERN: It is expressly excluded.

QUESTION: Why do you suppose that is?

MR. STERN: I suspect because they were addressing themselves to the District Court rather than to the appellate system, and I think that the Congress certainly could. It would have the power if it so decided tomorrow --

QUESTION: But you think that we ought to on a constitutional basis do what Congress has expressly not done.

MR. STERN: I think it is up to this Court to rule whether appellate delay can violate its right to a speedy trial, yes. I don't think that this Court --

QUESTION: Do you think we ought to take into consideration the fact that Congress has not seen fit to impose the Speedy Trial Act on appellate time?

MR. STERN: I don't think that that is relevant one way or another. I think that it is clear even in the circumstances where the Speedy Trial Act is applied clearly to things that happened in the District Court. The fact that Congress seems to apply in a certain circumstance and not --

QUESTION: Have you looked at the legislative

history?

MR. STERN: Oh, I know. I know. Congress felt that -- in fact, in MacDonald, in the footnote, this Court held that the Act was made to promulgate the concerns of the Sixth Amendment, but the point is that Congress by not acting cannot decide for this Court whether appellate delay hinges upon the defendant's right to a speedy trial.

Thank you.

CHIEF JUSTICE BURGER: Mr. Kuhlik.

ORAL ARGUMENT OF BRUCE N. KUHLIK, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. KUHLIK: Thank you, Mr. Chief Justice. In response to Justice White's question, it is quite clear why Congress excluded appeal time under the Speedy Trial Act. We cite the legislative history at Page 20 in our brief. Congress said it would indeed be anomalous to permit the defendant to benefit from delay properly undertaken to protect his interest in a fair adjudication of the charges against him by allowing dismissal without exclusion of that time. That is quite clear. The lynchpin of the defendant's argument here is that they said on May 12th, 1976, we are ready to go to trial.

We are ready to stand or fall under Barker

versus Wingo on this Court's analysis and interpretation of that request. The dynamite had been suppressed. The defendant sought to force us to go to trial without that evidence. That is a trial that would have taken about two minutes. A jury would have been empaneled, and judgment of acquittal would have been entered. As far as --

QUESTION: Mr. Kuhlik, can I just interrupt for one factual question? You say the dynamite had been suppressed. Hadn't the dynamite been destroyed?

MR. KUHLIK: The dynamite had been destroyed by state officials who had custody of it.

QUESTION: What exactly was suppressed?

MR. KUHLIK: Secondary evidence of the dynamite.

QUESTION: Oh, I see.

MR. KUHLIK: There were photographs of it and the like. The defendants did not want a severance. They made clear at Page 9 of their brief in Footnote 13, they say, "As in 1976, these indigent defendants did not want their resources taxed by the need to defend two separate trials." They wanted us to go to trial, one trial, without that evidence. Plainly that is something we could not have been in a position to do. I think their hypocritical statements that they wanted to go to

trial at that time plainly are unworthy of any weight under Barker versus Wingo.

I want to emphasize as well that regardless of how appeal time is treated under Barker, as far as the analysis of the four factors goes, cannot be plainer that these defendants -- that the speedy trial clause was not violated in this case. When you examine the absence of requests for a speedy trial, absence of a true desire for a speedy trial, the absence of prejudice, any prejudice at this time is wholly speculative. They refer to the deaths of witnesses. They don't mention that these are government witnesses.

I think that -- and the reasons for the delay here, the need for the appellate court to have an en banc ruling determination of a very important issue involving the loss and destruction of evidence, I think you can't be clear that the balance comes out that way.

QUESTION: Mr. Kuhlik, can I ask you to address just one more point? Your opponent argues that the District of Columbia Court of Appeals has a rule that counts appellate time and that has not resulted in any losses of prosecution, and he also mentions the fact in the Ninth Circuit in the late seventies there was a shortage of judges, and they were way, way behind in their work.

To what extent do we have a problem of general significance, or is it just one case that is at stake?

MR. KUHLIK: I think you are going to have a real problem with general significance, Justice Stevens, if you affirm the manner in which the Court of Appeals in this case undertook the balancing test. The District of Columbia Court of Appeals does not balance the factors in the same manner.

This is the first case we have seen that has in our view wholly misread the balancing test, and I believe if you --

QUESTION: Well, that goes to the question of whether they properly counted the time, but you are -- you are sticking with your argument, though, that even the D.C. Court of Appeals rule was quite wrong?

MR. KUHLIK: We do believe it is incorrect, Justice Stevens. I point out another important aspect of the defendant's argument seems to be that the Court of Appeals should as a general matter truly expedite, truly hurry through the pretrial appeals. And I point out that especially under the new Bail Act that defendants in post-conviction appeals are going to typically be under far greater prejudicial restraints than are defendants in pretrial appeals such as the ones in this case.

And to totally neglect them simply to hurry through on the pretrial appeals I think would be a big mistake.

I would also point out that out of the six years or so that this case was on appeal, one year of that time has to be attributed solely to the defendants, their completely frivolous rehearing and cert petitions after the second appeal, and indeed, their cert petitions after the first appeal. At that point, the case was in precisely the same posture it would have been in had the District Court denied their motions to suppress. It was interlocutory. Those are claims just like the speedy trial claim that is the subject here that can be preserved until after trial.

They did not move on this last remand for a speedy trial. They moved again for a dismissal. I also point out that the -- on the first appeal, the Court of Appeals certainly did rule in favor of the government. It reversed the with prejudice aspect of the dismissal, which of course was the only thing that really mattered.

And finally, on the remand for an evidentiary hearing in the District Court, we would simply submit, as we explained in our reply brief, that being ordered to appear at a hearing like that is not the kind of

restraint that we think would implicate the speedy trial clause of MacDonald.

If there are no further questions.

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

(Whereupon, at 10:51 o'clock a.m., the taking of the instant deposition ceased.)

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1361 - UNITED STATES, Petitioner V. KENNETH MOSES LOUD HAWK, ET AL.

---

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)