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ORIGINAL

# SUPREME COURT OF THE UNITED STATES

In the Matter of:

UNITED STATES,

Petitioner

v.

LARRY LEE TAYLOR

No. 87-573

PAGES: 1 through 41

PLACE: Washington, D.C.

DATE: April 25, 1988

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1                               IN THE SUPREME COURT OF THE UNITED STATES

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3   UNITED STATES,                               :

4   Petitioner,       :

5                               v.                               :               No. 87-573

6   LARRY LEE TAYLOR                               :

7   -----x

8   Washington, D.C.

9   Monday, April 25, 1988

10               The above-entitled matter came on for oral argument  
11 before the Supreme Court of the United States at 10:51 a.m.

12   APPEARANCES:

13   EDWIN S. KNEEDLER, ESQ, Washington, D.C.

14               on behalf of the Petitioner.

15   IAN G. LOVESETH, ESQ, San Francisco, California

16               on behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:51 a.m.)

3 CHIEF JUSTICE REHNQUIST: Mr. Kneedler, you may  
4 proceed whenever you are ready.

5 ORAL ARGUMENT BY EDWIN S. KNEEDLER, ESQ.

6 ON BEHALF OF THE PETITIONER

7 MR. KNEEDLER: Thank you, Mr. Chief Justice, and may  
8 it please the Court:

9 The question presented in this case is whether a  
10 district court may properly dismiss an indictment with  
11 prejudice when it finds a minor violation of the time limits  
12 contained in the Speedy Trial Act of 1974.

13 The Speedy Trial Act provides, in general, that a  
14 federal criminal prosecution, the trial in such a prosecution  
15 must commence within 70 days of the returning and making public  
16 of the indictment or information, or within 70 days of the  
17 defendant's first appearance of a judicial officer of the  
18 district, whichever occurs later.

19 The act, of course, contains certain exclusions from  
20 the running of the 70-day time period, some of which were  
21 applied in this case for such things as other proceedings  
22 relating to the defendant, delay attributable to the removal or  
23 transportation of a defendant from another district, and  
24 continuances of the trial for situations in which the court  
25 finds that the ends of justice would warrant such a



1 continuance.

2 Now, if the defendant is not brought to trial within  
3 70 days, taking account of any exclusions, the statute provides  
4 that the indictment or information shall be dismissed, but the  
5 act does not provide that such an indictment must be with  
6 prejudice, thereby forever closing the government from  
7 prosecuting the defendant for the conduct underlying the  
8 indictment or information.

9 Congress considered such a proposal and also a  
10 proposal that would have created at least a presumption in  
11 favor of a prohibition against reprosecution, but Congress  
12 rejected that and instead adopted what is now in Section  
13 3162(a)(2) of Title 18 dealing with the dismissal sanction.

14 There Congress provides that a balancing test must be  
15 applied in determining whether the indictment should be  
16 dismissed with or without prejudice. And Congress  
17 specifically provided that the district court, in making that  
18 determination, shall consider, among other things, each of  
19 three separate factors.

20 The first is the seriousness of the offense. The  
21 second is the facts and circumstances of the case that led to  
22 the dismissal. And the third is the impact of a reprosecution  
23 on the administration of the Speedy Trial Act and on the  
24 administration of criminal justice.

25 In this case, the Court of Appeals affirming the

1 district court found a violation of the Speedy Trial Act, a  
2 total of 14 days by which the 70-day time limit was exceeded.  
3 The Court of Appeals then affirmed the district court's  
4 decision dismissing that indictment with prejudice despite the  
5 existence of what, in our view, are a host of factors, all of  
6 which weigh decidedly against that severe sanction.

7 For example --

8 QUESTION: Mr. Kneedler.

9 MR. KNEEDLER: Yes.

10 QUESTION: What is the standard on appellate review?  
11 Is it abuse of discretion?

12 MR. KNEEDLER: That is the standard the courts have  
13 applied, and we don't dispute that as the legal test. But it  
14 is important to bear in mind several things along those lines.  
15 This is not a situation in which the district court's  
16 discretion is entirely unfettered.

17 Congress prescribed the statutory standards that are  
18 to be applied, the ones that I just recited. So it is  
19 essential for the Court of Appeals to evaluate the district  
20 court's decision to see whether those factors were in fact  
21 taken into account; whether all the subsidiary considerations,  
22 for example, bearing on the administration of justice were  
23 considered. And then in addition, whether the district court  
24 made a clear error in weighing the various considerations.

25 In this case, we believe that in fact the district

1 court erred in both respects by not giving full consideration  
2 to the relevant factors, and by committing a clear error in the  
3 balancing to the extent it did consider them.

4 QUESTION: You don't bring to us the question whether  
5 or not the clock should have been restarted for the full 70  
6 days?

7 MR. KNEEDLER: We do not. The Court of Appeals  
8 rejected that argument.

9 QUESTION: You did argue it below?

10 MR. KNEEDLER: We did argue that in the Court of  
11 Appeals.

12 In fact, we do not dispute that there was a violation  
13 of the Speedy Trial Act here. That conclusion is not free from  
14 doubt. For example, the way in which the continuance, the end  
15 of justice continuances were calculated in this case led to the  
16 scheduling of the trial on what the district court found to be  
17 the 69th day of the 70-day period.

18 As we point out in a footnote in our brief, however,  
19 the premise of that was erroneous, and we disagree with the  
20 court's failure to exclude six days of the time limit that we  
21 explained at Pages 23 to 25 in our brief.

22 But as we present the case here, we assume that there  
23 was a violation, as we counted it, of eight days. And so we  
24 are presenting the case on the question of remedy, not on  
25 whether there was a violation, although I do think that

1 certainly the length of the delay and the question of whether  
2 it was a close question as to whether the act was even violated  
3 would properly bear on the question of whether the indictment  
4 should be dismissed with or without prejudice.

5 So to that extent, the various arguments in which  
6 the -- whether the clock should be restarted would be relevant  
7 on the question of remedy.

8 The various factors that we believe in this case  
9 weight heaving against dismissing the indictment with prejudice  
10 were, first, that the -- as both courts below conceded, and as  
11 Respondent does not contest, the offenses in this case,  
12 narcotic offenses, both conspiracy and a possession count were  
13 serious, carrying potential for imprisonment up to --

14 QUESTION: Mr. Kneedler.

15 MR. KNEEDLER: Yes.

16 QUESTION: What section of the criminal rules is it  
17 that speaks of dismissal of indictments with prejudice or  
18 without prejudice?

19 MR. KNEEDLER: Well, Rule 48 prior to the passage of  
20 the Speedy Trial Act, Rule 48 of the criminal rules provided  
21 for dismissal of cases basically for want of prosecution, and  
22 then that was -- then when the Speedy Trial Clause of the  
23 Constitution was given particular force in *Barker v. Wingo*,  
24 that and the Speedy Trial Act have to some extent Rule 48 and  
25 importance, but it would be Rule 48.



1           QUESTION: Well, for instance, supposingly we were  
2 dealing with a violation of other than the Speedy Trial Act,  
3 would a district court have authority to dismiss an indictment  
4 with prejudice?

5           MR. KNEEDLER: Ordinarily not. A dismissal for want  
6 of prosecution under Rule 48 I think would ordinarily be  
7 without prejudice. Now the statute of limitations might kick  
8 in at some point and bar reprosecution but --

9           QUESTION: But here the Speedy Trial Act itself  
10 authorizes dismissal with prejudice.

11          MR. KNEEDLER: That's correct. It's only because of  
12 the -- under the Speedy Trial Act, it's because the Speedy  
13 Trial Act authorizes the dismissal in that form. But it gives  
14 to the district court a weighty responsibility to decide  
15 whether the dismissal should be with or without prejudice,  
16 because after all, a dismissal with prejudice results in the  
17 freeing of a defendant without an adjudication of his guilt or  
18 innocence, and it's generally regarded to be in the public  
19 interest for criminal charges to be adjudicated on the merits,  
20 and not dismissed for no reason -- not no reason at all, but  
21 unless there are substantial reasons for doing so.

22          And also, Congress specifically charged the courts  
23 under the Speedy Trial Act with trying to draw the line between  
24 the serious and less serious violations of the act.

25          QUESTION: Mr. Kneedler, in deciding whether there

1 was an abusive discretion in dismissing with prejudice rather  
2 than without prejudice, do you think it's proper for us to take  
3 into account that there was a subsisting charge which was not  
4 dismissed and for which the judge imposed the maximum penalty,  
5 which he might not have done had the other count not been  
6 dismissed?

7 MR. KNEEDLER: Well, I don't think it's --

8 QUESTION: He got five years for what, what was the  
9 other offense? I forget.

10 MR. KNEEDLER: For the failure to appear.

11 QUESTION: For not showing up a trial, right; failure  
12 to appear.

13 MR. KNEEDLER: We don't think that should play a  
14 substantial role here. Congress prescribed separate criminal  
15 sanctions for these offenses, and the narcotic offenses here  
16 are serious, and carry more serious consequences.

17 And at the time the indictment was dismissed here,  
18 the district court had not yet imposed that sanction. The  
19 defendant had not yet pleaded guilty. So in terms of --  
20 Congress, in the Speedy Trial Act, requires the court to focus  
21 on the particular charges in the indictment. And I am  
22 reluctant to say that's altogether irrelevant, but we don't  
23 think that given what Congress was focusing on, the charges in  
24 the indictment and factors bearing on those charges in the  
25 weighing process, that that factor should play a substantial

1 role.

2 It's quite possible that if the Defendant was  
3 convicted, that he could get a sentence considerably more than  
4 the five years that he got on the failure to appear charge.

5 QUESTION: Mr. Kneedler, the statute was passed in  
6 order to get prompt prosecutions, right?

7 MR. KNEEDLER: Yes.

8 QUESTION: And one way to do that is to prod the  
9 prosecutor. If we say that all you can do is to dismiss  
10 without prejudice, how would that prod the prosecutor?

11 MR. KNEEDLER: Well, first of all, we're not  
12 saying --

13 QUESTION: If the only thing that will be done is to  
14 say, oops, you shouldn't have done that.

15 MR. KNEEDLER: Well, first of all, we are not saying  
16 that this Court should say that a court can never -- the  
17 district court can never dismiss with prejudice. Our position  
18 is that what the district courts are obligated to do is to try  
19 to locate the case on a spectrum between the least serious  
20 technical violations and the most serious.

21 QUESTION: And write that out.

22 MR. KNEEDLER: Well, and the court should at least  
23 focus on that question and dismiss only when there has been a  
24 serious violation of the statutory standards.

25 QUESTION: Do you want that in writing?

1 MR. KNEEDLER: Pardon me?

2 QUESTION: Do you want that in writing?

3 MR. KNEEDLER: From this Court? Well, it seems --

4 QUESTION: No, from the trial court.

5 MR. KNEEDLER: Yes. I think that --

6 QUESTION: Is that what you are insisting on?

7 MR. KNEEDLER: Well, the court -- it's not possible,  
8 and I think this case is a good example of that. A Court of  
9 Appeals is somewhat at a loss if the district court declines to  
10 address all of the relevant factors that Congress has made  
11 relevant in the statute that must be weighed by the district  
12 court.

13 QUESTION: Did the government ask him for that?

14 MR. KNEEDLER: I don't know that the government went  
15 back and asked for more. But in this case all that the  
16 district court considered, for example, with respect to the  
17 second and third factors under the statutory test, the second  
18 being the facts and circumstances of the case leading to  
19 dismissal, and the other being on the administration of the  
20 act; all the court focused on was what it termed a  
21 lackadaisical attitude of the marshall service in returning the  
22 Defendant from California to Washington. After all, he had  
23 fled to California, and the marshall service was taking him  
24 back.

25 But there are other consideration that are relevant



1 both to the facts and circumstances of the case and to the  
2 administration of justice. And the district court did not  
3 address those other considerations.

4 QUESTION: Frankly, what worries me is if we are  
5 going to have to take every one of these cases.

6 MR. KNEEDLER: No, what we would hope is --

7 QUESTION: I would hope not.

8 MR. KNEEDLER: And we would hope not to have to  
9 present the Court with an occasion in the future.

10 What we would help is that the Court would make clear  
11 that the district courts in this case really should apply two  
12 principles that we think would give a lot of guidance to the  
13 lower courts.

14 The first one is the one that I just mentioned, and  
15 that is that the court must consider all of the factors that  
16 Congress made relevant for the purpose of making the ultimate  
17 determination. And that is whether offsetting those that weigh  
18 in favor of dismissal with prejudice against those that weigh  
19 against, the net circumstances of the case are sufficiently  
20 aggravated that dismissal with prejudice is an appropriate  
21 remedy after offsetting one against the other.

22 And the other principle that we think would provide  
23 useful guidance to the lower courts, in fact, it's generally  
24 applied by the Courts of Appeals now, is that where you have a  
25 serious offense as it's conceded here, an indictment should not

1 be dismissed with prejudice absent a correspondingly serious  
2 violation or delay past the 70-day period, especially where,  
3 again as here, there is no prejudice to the defendant resulting  
4 from that delay.

5 QUESTION: Do you think the district court  
6 disregarded that principle?

7 MR. KNEEDLER: Yes, we do, because in the --

8 QUESTION: But not the first.

9 MR. KNEEDLER: The district court conceded that this  
10 was a serious violation of the act.

11 QUESTION: Yes, but your first principle, consider  
12 all of the circumstances.

13 MR. KNEEDLER: We think the district court violated  
14 that too, because under the second and third factors in this  
15 case, the district court, as I said, only focused on what it  
16 termed the lackadaisical attitude of the marshall service which  
17 we think is in fact a considerably overdrawn view, but it did  
18 not consider the other circumstances under the second and third  
19 factor.

20 QUESTION: Mr. Kneedler, are you saying that we  
21 should send the case back and ask him to reconsider all the  
22 facts and write a more elaborate opinion before he comes to the  
23 conclusion, or are we to decide that the --

24 MR. KNEEDLER: No, I think this Court can properly  
25 reverse outright, and that's --

1                   QUESTION: We can weigh those facts and say it's  
2 perfectly clear that the five-year sentence shouldn't have been  
3 taken into consideration and all the rest of it, and evaluate  
4 this history of events and say --

5                   MR. KNEEDLER: On your first point, the district  
6 court did not rely on the five-year sentence.

7                   QUESTION: Well, maybe he did and maybe he didn't.  
8 He didn't put it in the opinion, but I wonder if in the back of  
9 the district judge's mind wasn't the fact that I know this man  
10 is guilty of what happened in this courtroom and I'll slug it  
11 to him on that, because five years is a pretty severe sentence  
12 for that. I take it that's not the guideline sentence, is it?

13                  MR. KNEEDLER: That I don't know, Justice Stevens.

14                  QUESTION: But say he did in fact take that in, you  
15 say that would be impermissible for him to take --

16                  MR. KNEEDLER: No, I didn't say it was impermissible.  
17 I just don't think it was a substantial --

18                  QUESTION: Well, if he writes an opinion and he  
19 says, if he had pleaded guilty to the narcotics offense, I  
20 think I would have given him five years based on guidelines or  
21 other considerations, and I think I can give this man adequate  
22 punishment by giving him five years for the flight, and I also  
23 can clean up a problem in the marshall's office if I enter this  
24 remedy.

25                  Would that be an impermissible exercise of his

1 discretion?

2 MR. KNEEDLER: Yes, I think that would be, because  
3 again the escape was a separate offense, separately provided  
4 for by Congress, and --

5 QUESTION: But in some of your filings I think you  
6 rely on the escape as something that justifies on the other  
7 side of the coin, don't you?

8 MR. KNEEDLER: Well, but it does factor in directly  
9 to the second and third parts of the balance of test.

10 QUESTION: Even though he got adequately punished for  
11 it.

12 MR. KNEEDLER: Well, but it also goes directly --  
13 yes, yes, definitely, because it goes directly to, for example,  
14 the facts and circumstances of this case. The trial here was  
15 scheduled on the 69th day. In fact, probably even the 69th,  
16 but within the 70-day period, and it was Respondent who didn't  
17 show up, and thereby undermined, seriously undermined the  
18 purposes of the Speedy Trial Act.

19 QUESTION: But does that go to the question of  
20 whether there was a violation of the clock?

21 MR. KNEEDLER: No, they also go, in our view, to the  
22 question of whether the indictment should be dismissed with  
23 prejudice, because one of the factors is the facts and  
24 circumstances of the case leading to dismissal. The triggering  
25 event here was the Respondent not showing up for his trial. It



1 was a "but for" cause and he precipitated the occasion for the  
2 subsequent violation.

3 QUESTION: In any event, the real thrust of your  
4 argument is not that he should take another look at all the  
5 facts that you describe. But rather, that the facts are so  
6 clear that we can examine the record and decide --

7 MR. KNEEDLER: Yes.

8 QUESTION: -- as a matter of law in this case it had  
9 to be without prejudice.

10 MR. KNEEDLER: Right, and there are two reasons why I  
11 think that would be proper.

12 First, the question of whether the district court's  
13 discretion was abused under the standard of review that I was  
14 describing as a question of law.

15 And, second, we think, in partial response to Justice  
16 Marshall's question, that it would provide useful guidance for  
17 this Court, to the lower courts to describe this case as one  
18 that was outside of, in our view, any reasonable ambit of  
19 discretion the district court would have in a situation like  
20 this.

21 QUESTION: Mr. Kneedler, suppose I agree with you on  
22 that that it is beyond the bounds of discretion, and suppose I  
23 also agree with you that it would have been improper for the  
24 court to make up for one mistake by making a second mistake,  
25 giving too high a sentence on the flight charge, where does

1 that leave me?

2 That means I can correct one mistake, but leave the  
3 other mistake there. I mean what if the district judge knew,  
4 well, gee, if this thing isn't going to be dismissed with  
5 prejudice and he's going to get some time on this drug charge,  
6 I really wouldn't have given him five years.

7 MR. KNEEDLER: There are two responses to that, at  
8 least.

9 The first is we don't know that it was a mistake, or  
10 that the judge would have responded differently. But the  
11 second --

12 QUESTION: We don't know it wasn't either, though.

13 MR. KNEEDLER: No, that's true.

14 But the second point is that if the judge feels  
15 that's true, the judge -- all we're talking about is  
16 reinstating the -- or allowing the reindictment. If the  
17 respondent is convicted, the district judge could make the sort  
18 of adjustment you are talking about in imposing a sentence on  
19 the narcotics offenses. So it's not now or never in terms of  
20 taking into account any possible interplay between the two  
21 offenses.

22 QUESTION: Do we know it will be the same judge? It  
23 won't be the same judge. It will be in a different -- it will  
24 be in a different court now, won't it?

25 MR. KNEEDLER: No, the escape and substantive

1 offenses were both -- were both in the Western District of  
2 Washington. Ordinarily it would go back to the same judge.  
3 But anyway there would be that occasion for making an  
4 adjustment if the district court imposed a sentence on an  
5 erroneous premise.

6 QUESTION: Mr. Kneedler, when the trial judge  
7 considered this matter, did she take testimony for the marshall  
8 service?

9 MR. KNEEDLER: No, the finding was based on  
10 affidavits. There was an affidavit submitted by a DEA agent  
11 explaining the basis for the transportation delay. There were  
12 actually three periods of delay that the court found in terms  
13 of finding of violation.

14 In terms of the remedy, the district court -- the  
15 record doesn't indicate the district court considered anything  
16 beyond that. And I think what you bring up I think raises  
17 another important point. And that is that the statute  
18 3162(a)(2) specifically provides that the defendant bears the  
19 burden on a motion to dismiss.

20 And in the Melguizo case, which is pending on  
21 certiorari here, the Court of Appeals in that case said that  
22 that includes the burden of showing that there is a systemic  
23 problem in the government's handling of prisoners or bringing  
24 cases to trial that warrants some sort of didactic sanction.  
25 And the defendant in that case came forward with no evidence

1 showing that there was some general problem in the  
2 administration of the Speedy Trial Act.

3 Similarly here, the Respondent didn't come forward  
4 with any general evidence, or at least the record doesn't  
5 indicate that there was a problem with the marshall service  
6 transporting prisoners.

7 QUESTION: Well, the judge was obviously disturbed  
8 about something the government said or did in order to make the  
9 finding that the government had a lackadaisical attitude.

10 MR. KNEEDLER: Well, all the district court said was  
11 that, and in fact that is --

12 QUESTION: But there is no evidence in the record to  
13 support that; is that your position?

14 MR. KNEEDLER: Well, all the -- no, all the district  
15 court relied on was the sequence of events in California before  
16 Respondent was returned to Washington State.

17 QUESTION: There was an affidavit from DEA. No  
18 affidavit from the marshall, affidavit from the United States  
19 Attorney?

20 MR. KNEEDLER: On this point, no. And there was a  
21 declaration by Respondent's counsel. But on this question I  
22 think it was just the two affidavits from the DEA agent and I  
23 guess two declarations from Respondent's counsel.

24 QUESTION: I thought it was in the record that the  
25 reason for the delay in sending him back up to Washington was



1 the marshall was waiting to get together a bunch of prisoners  
2 so that the cost of transporting them would be less.

3 MR. KNEEDLER: Right, that appears --

4 QUESTION: That's in the record, isn't it?

5 MR. KNEEDLER: That appears in the affidavit. That  
6 goes to one of the three periods. It took 14 days. The  
7 statute provides a rebuttable presumption that anything in  
8 excess of 10 days is unreasonable.

9 Here the affidavit stated that the -- that four of  
10 the days were while the marshall was waiting to assembly a  
11 group of prisoners to take up to Washington and Oregon in order  
12 to save money.

13 Another period of the delay in this case are the six  
14 days that we say shouldn't have been included at all was the  
15 six days between February 22nd, when the federal case in which  
16 Respondent was to testify was over, and February 28th, when the  
17 state charges in California in which Respondent was being held  
18 was dismissed.

19 Well, during that period the marshall service was  
20 under no responsibility to take Respondent back to Washington  
21 because the state charges were still pending, and in fact he  
22 was being held in a state jail in San Francisco. So during  
23 that six-day period there wasn't even a violation at all, in  
24 our view.

25 The remaining time is the period from March 1 of '85

1 to March 6th of '85, the time between when the marshall service  
2 was told that the state charges against Respondent were  
3 dismissed and Respondent's first appearance before a magistrate  
4 for a removal hearing under Rule 40(e). And we think that that  
5 period certainly doesn't warrant dismissal on an indictment  
6 with prejudice.

7 For one thing, as soon as Respondent had his initial  
8 appearance, there were then three continuances, all either  
9 agreed to or asked for by his counsel to keep him in California  
10 for another month. Respondent was not interested in going  
11 back, so far as the record shows, and these transcripts -- let  
12 me add that, Justice Kennedy.

13 The transcripts of the removal proceedings in  
14 California are also in the record. And they do show one  
15 additional important thing in the excerpts of record, and that  
16 is that at the removal --

17 QUESTION: Well, don't you agree that there was eight  
18 days over?

19 MR. KNEEDLER: For purposes of this case here, we are  
20 not challenging that, yes; there were eight days beyond the 70  
21 days.

22 QUESTION: I don't understand what you're talking  
23 about.

24 MR. KNEEDLER: There were only eight days past the  
25 70-day period, and in our view that is so minimal that it

1 cannot --

2 QUESTION: Eight days is minimal? Have you ever  
3 tried in jail for eight days?

4 MR. KNEEDLER: Well, Respondent was held during the  
5 relevant period in custody on the bench warrant for his failure  
6 to appear at trial in Washington when it was scheduled, and  
7 there was not Speedy Trial Act problem with that, and he was  
8 held in custody because he had escaped, or had fled to  
9 California.

10 So there was no prejudice relevant for purposes of  
11 this case by virtue of the fact that he was held in custody  
12 during that period.

13 QUESTION: Well, are you asking us to announce the  
14 general rule that any delay of less than two days, five days,  
15 10 days shall not give rise to a dismissal with prejudice?

16 MR. KNEEDLER: Well, I don't think that there is a  
17 magical point, but the courts have generally, and we state some  
18 of these cases in our brief.

19 QUESTION: We should superimpose a secondary line in  
20 addition to the 70-day deadline, we have sort of a second  
21 deadline where you are eligible for dismissal with prejudice?

22 MR. KNEEDLER: Well, not an absolute deadline  
23 because, again, it might well depend on the circumstances of  
24 the case. But where in the context -- in the overall of the  
25 case the excess period is minimal --

1           QUESTION: Would it be permissible in your view for  
2 a trial judge to say, this is the fifth time I have had a 72-  
3 day delay, two days over, and normally I don't think two days  
4 is very much, but the U.S. Attorney has done it three times in  
5 a row. I think I will dismiss this with prejudice to let him  
6 know.

7           MR. KNEEDLER: Well, I would be reluctant to say on a  
8 72-day one, but some period --

9           QUESTION: Well, say 10, 10 72-day ones. Say the  
10 internal procedures in the U.S. Attorney's Office just seemed  
11 regularly to not meet the 70-day one, but they always got in  
12 within 75 days. Could the judge sooner or later say I think  
13 I'll dismiss it?

14          MR. KNEEDLER: At some point, yes, I think --

15          QUESTION: And he can rely on what happened in other  
16 cases as a basis for doing that.

17          MR. KNEEDLER: At some point, I think the court  
18 probably could. But again, I think the court would want to  
19 look to see what the nature of the failing in the individual  
20 cases was. It may be that they all had individual explanations  
21 that wouldn't lend themselves to a systemic solution.

22          QUESTION: May I ask you a question that doesn't seem  
23 to be covered by the briefs, and I'm not sure that there is  
24 anything -- The states also have equivalent requirements of  
25 prompt trial within a fixed number of days, at least a number



1 of states do.

2 Do you know if the normal remedy that applies in the  
3 states is dismissal with prejudice or without prejudice?

4 MR. KNEEDLER: I don't know the current status.  
5 There was some discussion of the comparable state laws at the  
6 time the '74 act was passed. And my recollection is that  
7 California was cited as the leading example, and California had  
8 dismissal without prejudice.

9 Now I don't know what the general state of the law --  
10 but, of course, here Congress prescribed the bottom line.

11 QUESTION: I understand. It wouldn't be controlling  
12 anyway. My recollection of Illinois was the other way around;  
13 that it was a flat prohibition --

14 MR. KNEEDLER: Yes, and there might have been  
15 variation. In fact, the ABA had recommended that in 1974, but  
16 Congress declined to adopt it.

17 QUESTION: Mr. Kneedler, if you should prevail here,  
18 is there any statute of limitations problem for the government  
19 that exists with all of the additional passage of time when --

20 MR. KNEEDLER: No, not if the case is decided this  
21 term. I believe the statute of limitations would be -- the  
22 offenses were charged in December of 1983. So if the case is  
23 disposed of this term, there would be time for a reindictment  
24 prior to December of 1988.

25 QUESTION: I take it you don't defend the position of

1 the marshall service that they were waiting to get a bus for a  
2 group of prisoners, that they had the absolute duty to  
3 transport this one prisoner immediately; is that your  
4 understanding?

5 MR. KNEEDLER: No, we don't believe that they have a  
6 duty to do it immediately. The statute in fact sets up a  
7 rebuttable presumption that any time in excess of 10 days is  
8 unreasonable. We don't say that --

9 QUESTION: Is there a provision in the statute which  
10 allows delays for transportation purposes?

11 MR. KNEEDLER: Yes, there is an exclusion under the  
12 Speedy Trial Act, Paragraph H, which excludes time involved in  
13 the transportation of the defendant from one district to  
14 another, and that exclusion establishes a rebuttable  
15 presumption that any time in excess of 10 days is unreasonable.

16 I think the import of that is that just because it's  
17 over 10 days doesn't mean that it's automatically unreasonable,  
18 and the assembling of prisoners to transport prisoners in an  
19 economical fashion is certainly a permissible goal.

20 We just aren't raising here -- we aren't challenging  
21 the finding below that that was a violation in the  
22 circumstances of this case, because we think the remedy  
23 question is of broader importance.

24 If there are no further questions at this point, I  
25 would like to reserve the balance of my time.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kneedler.

2 We will hear now from you, Mr. Loveseth.

3 ORAL ARGUMENT BY IAN G. LOVESETH, ESQ.

4 ON BEHALF OF RESPONDENT

5 MR. LOVESETH: Mr. Chief Justice, and may it please  
6 the members of the Court:

7 In this case there was a series of delays in handling  
8 a person who had initially escaped from custody and was brought  
9 back into the system. Now that particular situation was  
10 brought to the attention of Congress at the time that the  
11 Speedy Trial Act was passed. And it was actually brought to  
12 their attention that in that situation the way the Congress had  
13 orchestrated the act, it was going to require that people in  
14 this situation, post-indictment fugitives who are caught  
15 subsequent to their flight, were going to have to be given  
16 priority because they were not going to restart the clock.  
17 They were going to only give them, in terms of the Speedy Trial  
18 Act, as much time as was remaining on that speedy trial clock  
19 at the time that they failed to appear.

20 This was something that was considered. This was a  
21 duty, an affirmative duty that the court, the trial court found  
22 that the United States Attorney failed.

23 She felt that with this duty it was his obligation to  
24 show prosecutorial initiative, make sure the marshals did it  
25 correctly, make sure the marshals were aware that there was a

1 short amount of time left.

2 Now there is no reason why the Speedy Trial Act  
3 should be violated because a person does what Mr. Taylor did in  
4 this case.

5 QUESTION: Mr. Loveseth, do you think that the trial  
6 court though has a duty to consider any prejudice to the  
7 defendant in making a decision whether to dismiss with  
8 prejudice to the state?

9 MR. LOVESETH: I think it is permissible for the  
10 trial court to consider prejudice. I don't think it's  
11 mandatory.

12 QUESTION: Do you think the trial court should be  
13 required to consider them?

14 MR. LOVESETH: Not when she finds that the -- I don't  
15 think she would be required to consider it, or give it as much  
16 weight, particularly in a situation whereas here. She found  
17 culpable conduct on the part of the government.

18 QUESTION: Well, in this case, I gather the Defendant  
19 would have to remain in jail in any event because of the new  
20 charge of leaving before the trial and so forth?

21 MR. LOVESETH: Well, I would like to think maybe I  
22 could get him bail, but I would agree that it would  
23 substantially increase, and I think in all probability he would  
24 have stayed in.

25 But there is an additional prejudice here that I'm



1 not sure anyone has recognized so far. And that is, he was  
2 being moved from one place to another as he made his little  
3 route from San Francisco to Seattle. A person, any person who  
4 has been in custody will tell you the most dangerous and the  
5 most heart-rending moments of any custody are the first periods  
6 of time when you go into a place.

7 As I calculated both is trips up and down, he was in  
8 12 different institutions. He came in.

9 QUESTION: Well, I guess none of this would have  
10 happened if he hadn't fled the scene in the first place, would  
11 it?

12 MR. LOVESETH: Well, I think that may be true, except  
13 that Congress intended that a person who flees would not  
14 restart the clock, and that that would be taken care of by  
15 excluding the time.

16 His flight did not contribute to the violation of the  
17 act. It didn't force the government in any way to lose track  
18 of what was going on, when he was going to go in front of a  
19 magistrate. I mean there was no causation there.

20 QUESTION: Well, except he wouldn't have to be  
21 returned from California had he not left Washington.

22 MR. LOVESETH: Well, I mean I will just say this. He  
23 was caught in his home. This case emanated out of San  
24 Francisco. They were caught on an airplane. He went back  
25 home. I mean --

1 QUESTION: Well, surely you don't suggest that his  
2 deliberate flight is an irrelevant circumstance to a --

3 MR. LOVESETH: No, not at all.

4 QUESTION: All right.

5 MR. LOVESETH: I don't think it's -- it didn't lead  
6 to the dismissal. So I don't think it's considerable under the  
7 second required statutory fact, or the facts and circumstances  
8 that led to the dismissal.

9 It is clearly something that the Court can take into  
10 account. The Court of Appeals acknowledged that it would be a  
11 proper factor in making a determination as to whether or not it  
12 would be dismissed with prejudice. But she chose to focus on  
13 the conduct of the government. They had an affirmative duty.  
14 She also knew that the co-defendant in this case, the one that  
15 was argued was co-equally culpable and with a similar record  
16 and a similar background, had gotten three years already. That  
17 was his sentence.

18 And I think when the court took into account all of  
19 the factors in this case, she felt, look, the co-defendant gets  
20 three years. This guy ran away. I've got to make sure the  
21 marshals, I've got to make sure the United States Attorneys  
22 understand their obligations under the act, so I am going to  
23 dismiss it with prejudice. But I am going to give him five on  
24 the bail jump.

25 QUESTION: That really is imputing an extraordinary

1 amount of discretion to the district court to say that sort of  
2 shifting back and forth is permissible, it seems to me.

3 MR. LOVESETH: Well, I think that one of the aims of  
4 this Speedy Trial Act was to give the court a lot of discretion  
5 to deal with the act and its application in their district.  
6 And there as a systemic problem that was recognized back in --  
7 I mean it's in the legislative history about marshals trying to  
8 assemble prisoners and move them in an economical fashion.

9 And I'll point out that when the writ of habeas  
10 corpus ad testificandum that was served on him. after he had  
11 begun his journey back to Seattle was served on him, they had  
12 him down here in a couple of days, three, four days.

13 I mean when they want to move fast, they can move  
14 fast.

15 QUESTION: You say there was a systemic problem, but  
16 you say that was what Congress -- you are not saying that Judge  
17 Rothstein thought there was a systemic problem in the marshall  
18 service here. What I read of what she wrote, it does not  
19 indicate she did.

20 MR. LOVESETH: Well, she felt that -- she felt that  
21 the marshall was going to do what it normally did, and that is  
22 wait until prisoners get -- wait until they get a substantial  
23 number of prisons and then move them along.

24 She felt that the prosecutor, the United State  
25 Attorney's Office was lackadaisical in not making sure that

1 they understood that if they took longer than 10 days, I mean  
2 the act gives them 10 days to make the move.

3 QUESTION: Well, it gives them 10 days, and then it  
4 creates a rebuttable presumption after that. It doesn't give  
5 them a flat 10 days with everything cut off after that.

6 MR. LOVESETH: I understand that, but the government  
7 had an opportunity to rebut that presumption, had an  
8 opportunity to come in and talk about the marshall's problems,  
9 and they didn't do it. There was no particular problem here.  
10 And I think it's shown by the fact that they moved them down in  
11 four days when they wanted him back down here for a trial.

12 The marshall moves at the request of other agencies.  
13 You know, if left to their own devices, they'll take their own  
14 time. But I've had cases involved where the United States  
15 Attorney wanted someone transported, and they chartered a plane  
16 and moved him in two hours.

17 QUESTION: Well, Mr. Loveseth, it is, after all,  
18 somewhat of a burden for the state if the case is dismissed  
19 without prejudice. It requires them to start all over again.  
20 So it isn't as though there isn't some penalty being imposed by  
21 virtue of just dismissing it without prejudice; isn't that  
22 right?

23 MR. LOVESETH: I would agree that it is a burden on  
24 the state to proceed again. I think that what this court did  
25 was remove that burden by taking the total conduct of the



1 Defendant, both his flight and what could be attributed to the  
2 drug case, assuming he was guilty; figured that she could cover  
3 all of that conduct with a five-year sentence, based on the  
4 fact that the co-defendant got three. But she felt it was  
5 important to send a message to the marshall, send a message to  
6 the United States Attorney that just because a guy runs away  
7 does not mean that he loses all of his speedy trial rights, and  
8 that the system itself needed to be shaken a little bit to make  
9 sure that they were going to fulfill their responsibilities.

10 QUESTION: In future cases when you represent the  
11 defendant in sentencing, will you concede the fact that -- that  
12 the fact and circumstance that an indictment has been dismissed  
13 without prejudice should be considered adversely to your client  
14 on the remaining charges?

15 MR. LOVESETH: I argued that at the time of the  
16 sentencing for Mr. Taylor. I told the judge at that time that  
17 for him to live in custody, and he was going to do time on the  
18 bail jump, with the knowledge that this case might result in a  
19 reversal and he might face additional time, or not know whether  
20 he was going to face additional time, and I argued to the court  
21 that she should sentence him for the total conduct so that he  
22 would know, even if it got reversed, that he was not going to  
23 have to spend a bunch of time.

24 I mean he got out about two weeks ago. I mean he  
25 served a substantial amount of time, because they took into

1 account in terms of the parole the fact -- they assumed the  
2 underlying offense was there, and that he was guilty of it, and  
3 so his guidelines were adjusted upward, and he served a  
4 substantial amount of the time that he was sentenced to. I  
5 think he served three and a half to four years, which would be  
6 much more than a normal person would on a five-year sentence,  
7 with no essential criminal history.

8 Now I think this court was focusing a lot on the  
9 number of delays. They talked about the state court  
10 proceedings. Well, I mean they didn't even honor the state  
11 court's order that he be returned to the state -- to the court  
12 where that state proceeding was occurring. That judge on the  
13 20th of February said, and sent them an order, I demand the  
14 presence of this man in my court. We have a pending cases  
15 against it. It was a petty theft case.

16 The marshals ignored it. They never produced him.  
17 Yet, later on they argued that he was in state custody for the  
18 purposes of the act and it shouldn't be excludable. I mean  
19 they can't really have it both ways. He was -- I mean he spent  
20 maybe a month in custody before they got him in front of the  
21 magistrate. I would say five or six of those days he was about  
22 300 feet from the magistrate's office in the holding cell  
23 upstairs in the federal building in San Francisco. Yet, he  
24 never made it over to be arraigned. He never made it over to  
25 get the process started.

1           And, you know, that was the kind of conduct that the  
2 court felt she couldn't countenance, and it was not -- it was a  
3 hollow remedy or a hollow sanction to say that you took too  
4 long, you didn't fulfill your responsibilities under the act.  
5 So what are we going to do to you? We're going to give you  
6 another 70 days in order to do all of this again.

7           QUESTION: Mr. Loveseth, do you know where your  
8 client is now?

9           MR. LOVESETH: The client is in a halfway house in  
10 San Francisco, Your Honor.

11          QUESTION: So you do know where he is.

12          MR. LOVESETH: Sure, sure.

13          And I think the trial court is the one who is in a  
14 position to make these kinds of evaluations. She is the one  
15 who has to live with the way the Speedy Trial Act is going to  
16 be administered in her district, what the attitude of the  
17 prosecutors are in these various kinds of situations. She can  
18 evaluate all the competing interests. She has all of the kinds  
19 of nuances in a case that a trial court knows about that don't  
20 really filter up: what she is going to give the guy later on,  
21 what the co-defendant got, what was the attitude as expressed  
22 by the United States Attorney.

23          I mean this United States Attorney was recalcitrant,  
24 just absolutely was not willing to accept any responsibility to  
25 actively assure that this man was brought back. He knew there

1 was only one day left of the speedy trial time, and yet he did  
2 nothing to make the system work a little faster, and that was a  
3 concept that was discussed in the legislative history. It was  
4 brought to the attention of Congress by Mr. Snead from the U.S.  
5 Attorney's Office. And he says, we're going to have to give  
6 these guys priority if you don't restart the clock.

7 Now, I will agree that maybe Congress ought to change  
8 that, and restart the clock and give it a little extra time,  
9 but they didn't. The statutory scheme is as it is, and the  
10 duty was -- the duty was on the prosecutor to make sure that  
11 the system responded quickly and gave this guy a chance to get  
12 back up before the Speedy Trial Act was violated.

13 And then in terms of the remedy, she did exactly what  
14 the statute told her to do. She said, look, it's a serious  
15 offense, but, too, I believe it was the government's conduct  
16 that led to the dismissal and that requires a stern response.  
17 And that if I'm going to administer the act and justice in this  
18 court and in this district, I have to respond sternly;  
19 otherwise the Speedy Trial Act is just a hollow guarantee and  
20 it doesn't really mean anything.

21 She had enough time to make it -- I mean this is not  
22 a miscarriage of justice. This man got five years in a  
23 situation where had it just been the bail jump, I don't think  
24 she would have even considered giving him that much. It was  
25 the co-defendant, who they argued was of equal culpability, the



1 same record, got three. She had enough time to work with. She  
2 balanced all of the factors. She was the one charged with the  
3 responsibility to evaluate all of these considerations. And I  
4 thought she came up with the perfect result.

5 It saved the government the expense of retrying him.  
6 It saved the government the expense of going back before the  
7 grand jury. It gave him an opportunity to get out of his pre-  
8 trial situation and start serving his time. And yet it took  
9 into account and was responsive to what justice demanded in  
10 that situation.

11 He shouldn't be rewarded for running away, and he  
12 wasn't. He didn't get one extra day that counted towards the  
13 speedy trial time. And he was punished severely for what he  
14 did, and that was the scheme that Congress intended when they  
15 passed the Speedy Trial Act and noted that when a person runs  
16 away it doesn't restart the clock.

17 His flight didn't lead to the dismissal. The  
18 culpable conduct of the government, the lackadaisical attitude,  
19 the recalcitrant attitude, that's what led to the dismissal.  
20 And I think to put into the hands of the trial courts the  
21 discretion to deal with these complicated situations and  
22 competing interests is the best thing that this Court could do.

23 Thank you.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Loveseth.

25 Mr. Kneeder, you have three minutes remaining.

1 ORAL ARGUMENT BY EDWIN S. KNEEDLER, ESQ.

2 ON BEHALF OF THE PETITIONER - REBUTTAL

3 MR. KNEEDLER: Thank you, Mr. Chief Justice. There  
4 are several points I would like to make.

5 First, Respondent is wrong that his flight did not  
6 contribute, or was not one of the facts and circumstances  
7 leading to the dismissal in this case.

8 As the record makes completely clear, trial was  
9 scheduled on November 19, 1984, and if Respondent had shown up  
10 like he was supposed to, the trial would have been held within  
11 the Speedy Trial Act 70-day period and there would have been no  
12 occasion for a violation at all.

13 And secondly, Respondent contributed by virtue of the  
14 fact that the delays found by the district court here were all  
15 involved in returning Respondent from the place to which he had  
16 fled back to the place in which he was supposed to be tried.

17 So Respondent cannot avoid all culpability for the  
18 Speedy Trial Act violation simply by saying he was separately  
19 prosecuted for the failure to show up. His flight directly  
20 ties in to one of the statutory purposes on the remedy, and  
21 that is the effect of a reprosecution on the administration of  
22 the Speedy Trial Act. Respondent undermined the purposes of  
23 the Speedy Trial Act and a reprosecution of Respondent would  
24 demonstrate that a defendant who deliberately flouts that act  
25 will not get away with it, and will be -- and the charges that

1 he sought to to avoid will in fact be prosecuted.

2           The second point I would like to say is that counsel  
3 says that the marshall service ignored an order of February  
4 20th requiring the marshall to return Respondent to state  
5 custody. In fact, that order, which appears at the excerpt of  
6 record on page 20, is directed to the sheriff of San Francisco  
7 County, not to the marshall service. And there was no doubt  
8 that if the San Mateo Court had wanted Respondent for an  
9 appearance, it could have gotten him from the sheriff. There  
10 is no indication in fact that the marshall service was aware of  
11 that order.

12           The third point is that as the record shows the  
13 Assistant U.S. Attorney in fact believed the clock restarted  
14 when Respondent was brought back to Washington. And far from  
15 being recalcitrant, he was operating on a misunderstanding of  
16 what the act requires.

17           And the fourth point I wanted to make is that  
18 although the district court --

19           QUESTION: Is that in the record, Mr. Kneedler?

20           MR. KNEEDLER: There is a district court brief filed  
21 by the Assistant United States Attorney and the brief in the  
22 Court of Appeals he argued that the entire period was -- or the  
23 clock restarted.

24           The last point I wanted to make is that although the  
25 district court recited the second and third facts, the facts

1 and circumstances and the effect on the administration of the  
2 act and justice, she only focused on the marshall service  
3 conduct. She didn't focus on the other facts and circumstances  
4 and the effect on the adminstration of justice that weigh  
5 strongly against dismissal of the indictment with prejudice.

6 QUESTION: What about the severe sentence in this  
7 case? Is it appropriate for a trial judge to increase the  
8 sentence on the remaining count in view of the dismissal of the  
9 other ones? That's appropriate, isn't it?

10 MR. KNEEDLER: I don't know that it's prohibitive,  
11 but that should not -- I mean if it was a totally unrelated  
12 charge, should that entitle a district court to dismiss an  
13 indictment with prejudice?

14 We think not.

15 QUESTION: That's what I'm asking you.

16 MR. KNEEDLER: We think not. The court, in deciding  
17 whether to dismiss the indictment, should focus on the charges  
18 in that indictment and the government's conduct with respect to  
19 those charges, not on some unrelated offense, a state offense  
20 or some unrelated federal offense.

21 Here it happened to be related, but we don't think  
22 that that has any bearing on the court's requirement to focus  
23 on the seriousness of the charges carrying 15 years offenses,  
24 narcotics offenses, and the fact that the Defendant's flight  
25 undermined the purposes of the act.



1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kneedler.  
2 The case is submitted.

3 (Whereupon, at 11:37 o'clock p.m., the case in the  
4 above-entitled matter was submitted.)  
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REPORTER'S CERTIFICATE

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DOCKET NUMBER: 87-573

CASE TITLE: United States v. Larry Lee Taylor

HEARING DATE: April 25, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence  
are contained fully and accurately on the tapes and notes  
reported by me at the hearing in the above case before the  
Supreme Court of the United States.

Date: 4-29-88

Margaret Daly  
Official Reporter

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