OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MARC GILBERT DOGGETT, Petitioner v.

UNITED STATES

CASE NO: 90-857

PLACE: Washington, D.C.

DATE: February 24, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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MARC GILBERT DOGGETT, :

Petitioner :

v. : No. 90-857

UNITED STATES :

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Washington, D.C.

Monday, February 24, 1992

The above-entitled matter came on for oral reargument before the Supreme Court of the United States at 11:01 a.m.

APPEARANCES:

WILLIAM J. SHEPPARD, ESQ., Jacksonville, Florida; on behalf of the Petitioner.

WILLIAM C. BRYSON, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll now hear argument in No. 90-857, Marc Gilbert Doggett v. United States.

Mr. Sheppard, you may proceed.

ORAL REARGUMENT OF WILLIAM J. SHEPPARD

ON BEHALF OF THE PETITIONER

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

On September --

QUESTION: Just a minute -- all spectators are admonished not to talk until you get outside the courtroom. The Court remains in session.

MR. SHEPPARD: On September 5, 1988, petitioner, Marc Doggett, was arrested in Reston, Virginia, where he had lived with his wife for the past 5 years. During that period, petitioner had worked full-time, attended school, obtained his associates degree, bought and sold two houses, voted, paid taxes, used credit cards, attended church, and had a driver's license.

This arrest concerned allegations of illegal activity that had occurred during September through December of 1979 which resulted in indictment in February of 1980, some 8-1/2 years prior to petitioner's arrest.

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The Government takes the position that because petitioner did not know about the indictment, or was not jailed, then he must show prejudice in order to prevail on his Sixth Amendment right to speedy trial. According to the Government, the Sixth Amendment has nothing to do with it unless Mr. Doggett was arrested. In our view, the Sixth Amendment has a much broader purpose.

It, in part, serves the same kind of interest as the statute of limitations. After a while, enough is enough. This Court has consistently --

QUESTION: Excuse me, why do you say that? I mean on what do you base the assertion that that is the interest it is intended to protect? Just the language speedy trial could mean a lot of things. It could mean, for example, that a trial should not last more than a month or more than 2 weeks, or that you should have no more than half an hour for lunch.

Now that is obviously not what it means, is it? It doesn't mean that the trial shall go quickly.

MR. SHEPPARD: Respectfully --

QUESTION: Now, how do we determine which of the various meanings it might have, it in fact does have? How do you suggest we go about determining that?

MR. SHEPPARD: I think you have to take into account, somewhat, history. And I think the

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history -- the most significant part of that history -- is that commencing with the passage of the Sixth Amendment, because it departs dramatically with the language that existed prior. And a couple of things are significantly different, Justice Scalia, now, than they were in England.

One, the way we commence a prosecution in this country has been constitutionalized in the Fifth Amendment; to wit, through an indictment. Indictments, historically, were not used in England. The significant part of the precedent of this Court must be taken into account. And this Court consistently in several cases has held that the indictment triggers the right to speedy trial.

Now if Mr. Doggett had not been indicted, the statute of limitations, which was 5 years, would have run and we wouldn't be here, because his motion to dismiss, upon his arrest 8-1/2 years later, would have been granted by any judge.

But because of the fact that the indictment triggers the right to speedy trial it also tolls the statute of limitations. Respectfully, the statute of limitations has, as its purpose, the right of the petitioner to repose.

QUESTION: Well, you don't mean that across-the-board that the indictment tolls the statute of

limitations, do you?

MR. SHEPPARD: I certainly do, Chief Justice. It does -- unless it is a secret indictment, under 6(e)(2), which is a sealed indictment, in which case there is precedent --

QUESTION: You mean it prevents the statute of limitations from -- I see -- from continuing to run.

MR. SHEPPARD: Yes.

QUESTION: Yes, yes.

MR. SHEPPARD: The purpose of the statute of limitations is to protect an interest in repose. And if the Government issues an indictment which tolls that statute of limitations, I respectfully submit that historically and literally reading the Sixth Amendment that one ought to be able to find solace in that language.

QUESTION: I agree that it frustrates the purpose of the statute of limitations. Unfortunately, the statute of limitations is not in the Constitution.

If you had a statute of limitations clause in the Constitution, you could point to this situation and say, well, this is obviously frustrating the statute of limitations clause, and therefore we can't allow it to happen.

But there is no statute of limitations clause. There is only a speedy trial clause.

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MR. SHEPPARD: And there's also the Fifth Amendment which requires the prosecution of a felony by indictment. And it has consistently been held that the issuance of that indictment tolls the running of the statute of limitations. And I respectfully submit they both serve a similar interest.

QUESTION: It's right, it is frustrating the statute of limitations. There's no doubt about that. But there's no statute of limitations provision in the Constitution. A State need not have a statute of limitations on a -- on any crime.

MR. SHEPPARD: I respectfully agree that there's nothing in the Constitution about the statute of limitations. However, the same interest is served, I submit, considering the history and the precedent of this Court, with the Sixth Amendment right to speedy trial.

The indictment is significant for other reasons. At the time of the indictment, under this Court's precedent in Smith v. Hooey, the Government has a duty to do something. And it is to do something with due diligence.

I think it is important to remember in the record of this case, and typically when there is a public indictment returned, that the executive branch goes to the judicial Branch, returns the indictment, and the next

thing that happens is the issuance of an arrest warrant.

And we call can recall the typical language of an arrest warrant. To all marshal(s), singular and plural, you shall immediately bring the body of this prisoner before the court. And if you follow the Government's argument to its logical conclusion, the Government has no duty. They can sit on their hands, do nothing. And the Sixth Amendment is remediless, there is no remedy.

Unless this Court provides a workable rule that does provide a remedy to individuals who are -- who suffer from 8-1/2-year delays, or significant delays, such as have occurred in this case.

The indictment clearly triggers Mr. Doggett's right to a speedy trial. It was a public indictment. And this Court has, in the past, indicated that the Sixth Amendment is unique from the other first ten amendments in that it not only protects the rights of the accused, but the public has an interest here. And the public's interest is to have individuals who have been indicted, and for which the judicial branch has issued a warrant, and commanded the executive branch to bring them before the court, to have that done.

And it's -- it's important for a couple of reasons: one, it's to prevent someone who is not brought

before the court to continue to commit crimes; secondly, it is important in order for deterrence. As the Government states in its brief, on several occasions citing Mr. Wilson, that the best punishment comes on the heels of the commission of an offense. It doesn't say the best punishment comes on the heels of an indictment, but on the commission of an offense. You've got to give meaning to the Sixth Amendment. Because I respectfully submit that the framers of the Constitution did not put it in the Constitution as surplus, as the Government would have you believe.

I respectfully submit that the indictment further places a duty on the Government -- as I've indicated -- that if an individual cannot invoke his right to repose under the statute of limitations because the indictment tolls the statute of limitations, he should be able to seek solace in the Sixth Amendment. Otherwise, the statute of limitations can be totally subverted -- and it is a legislative pronouncement, it is an important pronouncement. And I think a significant difference historically, in this country than in England, is that there were no statute of limitations.

Even today, there are very few statute of limitations in England. But consistently, for every Federal crime, there is a statute of limitations, with

very few exceptions.

QUESTION: Well, I don't know that we should say that the speedy trial clause is kind of a substitute for a statute of limitations -- which sounds like part of your argument.

Certainly Congress could provide, at the same time it enacts a statute of limitations, that there should be only such a, perhaps, a 3-year delay after the issuance of an indictment things should be dismissed. But Congress hasn't done anything like that here.

Congress controls the statute of limitations.

MR. SHEPPARD: Most definitely. However, the Sixth Amendment is analogous to the statute of limitations in order to protect the right to an indictment. We have the right to be indicted under the Fifth Amendment. And if the Government, knowing that there's a statute of limitations, can obtain an indictment and do absolutely nothing to bring the person before the court, then they subvert the purpose -- we respectfully submit -- of the right to speedy trial, as well as the statute of limitations.

QUESTION: Well, in the absence of a statute of limitations -- which is an act of legislative grace, so to speak -- you could indict someone 20 years after they committed the offense.

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MR. SHEPPARD: If there were no statute of limitations.

QUESTION: Yes, and there -- so that there's nothing inconsistent between the speedy trial clause and an indictment returned 20 years after the offense.

MR. SHEPPARD: If there were no statute of limitations.

QUESTION: Right.

QUESTION: Let me ask -- the Government says that you can't be right in saying that the Government didn't do anything. They said they've done all they're supposed to.

MR. SHEPPARD: Respectfully, the Eleventh Circuit, and the magistrate in the district court found that the Government was negligent.

QUESTION: Right, all right, all right.

MR. SHEPPARD: And in simple --

QUESTION: They didn't do enough.

MR. SHEPPARD: They didn't do enough, which results if you want to leave it at the --

QUESTION: So part of your case is that you have to find the Government at fault.

MR. SHEPPARD: If the Government --

QUESTION: You don't win just by saying 8 years.

MR. SHEPPARD: Absolutely, I don't think that I

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could succeed in prevailing in this Court with the Court's precedent with Barker. What I'm trying to submit --

QUESTION: Yes, exactly. So you have to make out your case that the Government should have brought him to trial.

MR. SHEPPARD: It has been our position --

QUESTION: And that they could have, and they blew it.

MR. SHEPPARD: Absolutely, and they didn't blow it just once; they blew it on several occasions.

They blew it by not leaving process at the -- at the -- at the petitioner's home; they blew it for an 8-month period when he was in the custody of the Panamanian Government, where the State Department of this country knew where he was and could have walked across the street, two blocks down the street, and notified Mr. Doggett of the indictment. And with notice, then he would have failed because he didn't assert his right to a speedy trial.

QUESTION: And you think the Government's position is that, is that they should win, even if they knew precisely where he was?

MR. SHEPPARD: They knew where he was.

QUESTION: Let's assume -- just assume the Government knew precisely where he was and didn't do

anything about it. Do you think the Government says that it still wins this case?

MR. SHEPPARD: The Government would, yes. Because they want the Sixth Amendment to be nothing but a ceremonial statement to be neglected at will in the interest of their expediency. And I respectfully submit that in this case, if you read the Eleventh Circuit opinion, on several occasions the court notes the negligence of the Government -- significantly, by not picking Mr. Doggett up when he came back into this country 2-1/2 years after the indictment. He went right through Customs and they did nothing.

And then after his return to the United States, the United States Government, doing absolutely nothing at all for 6 years -- not anything to effect his arrest. And I think it is significant that the Government was under the order of a court to arrest this man. And they did nothing. And without the negligence, Mr. Justice White, maybe our case wouldn't be as strong.

But with it, even if you apply traditional Barker v. Wingo, the four-factor analysis: we have the delay, it's presumptively prejudicial; and the second factor, the reason for the delay is in favor of Mr. Doggett; his assertion of the right is neutral. And I respectfully submit, and have tried to articulate that

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there are more reasons for prejudice than those three that are traditionally articulated by the Court.

And if you go back to Beevers and to Pollard and to Elwell -- those early cases on the Sixth Amendment right to speedy trial talk about circumstances. And I respectfully submit --

QUESTION: Well, on the other side of the coin, what if your client knew he had been indicted, and had known it forever?

MR. SHEPPARD: Then I respect --

QUESTION: And he did not turn himself in, he didn't do anything.

MR. SHEPPARD: He would have waived his right to speedy trial by not asserting it, number one. The second point --

QUESTION: All right, so he would lose the case if he knew.

MR. SHEPPARD: Absolutely.

QUESTION: Yes.

MR. SHEPPARD: And we -- we did not know. And that is unequivocal. As the Eleventh Circuit says in the second paragraph of its opinion, it's undisputed. And what we're asking for is a rule where the individual remains responsible for his conduct, and the Government remains responsible for its conduct.

QUESTION: Do you suppose this hasn't -- is this just a sport, this case, is it really worth two arguments?

(Laughter.)

MR. SHEPPARD: To the Court or to me?

(Laughter.)

QUESTION: Or to your client, or to your client.

MR. SHEPPARD: When I say me, I mean my client.

Respectfully, Your Honor, what concerns me as a lawyer who practices, as we've all heard, in the trenches, if this Court doesn't do something about this novel case -- and it's novel; and I concede it's novel -- it will become the commonplace type of case. In the day and age of computers, which the framers of our Constitution did not envision, it is very easy to track cases. We can track them.

And going back to the statute of limitations, let's indict everybody that we can, 4 years 11 months into the statute of limitations so that we toll it; pump it in the computer; and don't worry about it. We don't have to do anything because the Court didn't require us to fulfill our good-faith, due diligent effort to bring someone before the court -- which this Court has articulated in Smith v. Hooey.

And that's why we have articulated, and continue to articulate, a bright line rule that will give meaning

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to the Sixth Amendment, provide a practical solution to these unique, old-time cases. And that bright line rule is that where an accused has no knowledge of the indictment pending against him and the time period equivalent to the applicable statute of limitations has run, the Government should bear the burden to establish that the accused has not been prejudiced by the delay.

Respectfully, they will not be able to prove -- carry their burden on prejudice any more than any citizen of this country can carry his burden to show that he's prejudiced from an unknown allegation brought to his attention 8-1/2 years later.

QUESTION: That's not a very bright line, Mr. Sheppard. You want a bright line, a bright line is that your right to a speedy trial begins to run when you're arrested. Not that -- your line is it begins to run when you're indicted, if it's the Government's fault that -- that you haven't yet been arrested, though you've been indicted.

If it's not the Government's fault, then your right to a speedy trial has not been affected. That's not very bright to me. I can see us having a lot of trouble in, in, in many cases. Maybe this case is a sport, but I -- but I can imagine a lot of defendants coming in and saying the Government should have found me sooner.

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MR. SHEPPARD: But the issue of knowledge is provable, and from a practical standpoint can be proved. And if that person knew it -- it's like being -- if I knew I was indicted and I became a fugitive, and I hid, I could not find solace in my bright line rule. The problem, Mr. Justice Scalia, with your bright line suggestion is that you would have to reverse Marion, Dillingham, and several other cases that unequivocally say that the right to speedy trial commences for an accused either by indictment or arrest.

QUESTION: But --

MR. SHEPPARD: And I respectfully think that's good precedent.

QUESTION: But those are questions of fact -- whether, in fact, the defendant was a fugitive and went and hid. In fact, that's one of the controverted facts in the present case. I mean as I recall, it was told to his mother that there was an indictment and that they were seeking to arrest him. And the Government thinks it's very logical that his mother would have told him.

But you say that his mother didn't tell him. And that has never been -- I mean all of these cases are going to raise questions like this. And that's not a bright line, to my way of thinking.

MR. SHEPPARD: But that question was resolved as a result of a hearing. And you've got to recall the record.

DEA Agent Driver testified at the hearing, based on what he was told by Agent Overton, a State agent in North Carolina, told him on a telephone, 8 1/2 years later about what Mr. Doggett's mother had said. Mrs. Doggett, the mother, got on the stand. We were not dealing with double hearsay garnered 8 1/2 years later. We had the person there. And it wasn't a difficult issue for the court to resolve.

The court of appeals upon review of their record, affirmed that the defendant -- or that the petitioner had no knowledge.

QUESTION: But do we -- do we want these sort of contested factual hearings based on things that happened 8 years ago, in any number of speedy trial claims?

MR. SHEPPARD: In light of the fact that Mr. Justice Scalia appropriately points out that we do not have a constitutionalized statute of limitation, I do not see how you can develop a bright line rule unless you get in the business of saying 5 years is enough if the person is not a fugitive.

But in all of these speedy trial cases, there is going to be some factual resolution that is going to have

to be accomplished by the trial court. But I respectfully submit, on those unique cases where the delay is extreme, and the defendants do not know, I think it would provide a great deal of guidance. Because these are going to become the commonplace cases if you don't provide that guidance, I respectfully submit.

And after all, really, is this asking the Government to do anything that they're not already obligated to do? Absolutely not. The citizens of this country expect the executive branch of Government, if they know someone has committed a crime, and a grand jury of citizens has indicted them, that the Government is not going to do nothing.

And the reason that that's important -- it goes to rehabilitation, it goes to the deterrence of crime.

QUESTION: Well, the way the citizens impose duties on the executive branch, or dissatisfaction, is to vote people in the executive branch out of office, not to come to court and say to the court, you do it.

MR. SHEPPARD: Unless the right that we seek to articulate is embodied in the first ten amendments. That isn't to be changed by the casting of a ballot.

QUESTION: But those are individual rights.

MR. SHEPPARD: Respectfully, Mr. Chief Justice, this Court -- speaking through Mr. Justice Powell -- said

that the right -- in Barker -- said the right to a speedy trial is generally different from any of the other rights in the Constitution. Apart from the rights of an accused to repose, there is a societal interest in providing a speedy trial which exists separate and, at times, in opposition to the rights of the accused.

And he goes on to articulate this: for the purpose of eliminating the possibility of an accused committing more crimes while he is not being apprehended, or secondly -- and secondly -- the impact on the deterrent effect of the punishment, which should follow closely on the heels of the commission of the crime; and thirdly, Mr. Justice Powell pointed out, if we don't provide some acceleration in the criminal justice system, it becomes backlogged. And I can assure you, in a backlogged court I can negotiate a more favorable plea agreement for my client than in one --

QUESTION: Well, as I understood the quotation you just read, it doesn't say there is a societal right. It says there is a societal interest.

MR. SHEPPARD: Interest. I concede that.

QUESTION: Which I think is a little bit different.

MR. SHEPPARD: I concede that. I didn't say right, I said interest. But I respectfully submit that it

is an interest that can be facilitated by adopting our bright line rule. Otherwise, I respectfully submit that literally, the language of the speedy trial clause of the Sixth Amendment becomes nothing but an ornament with no meaning. And I respectfully ask you to reverse the Eleventh Circuit.

And I reserve the remainder of my time.

QUESTION: Very well, Mr. Sheppard.

Mr. Bryson, we will hear from you.

ORAL REARGUMENT OF WILLIAM C. BRYSON

ON BEHALF OF THE RESPONDENT

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

First let me address one of the suggestions in this case, that the practice that occurred here would become commonplace; that there is -- the suggestion is that there is some incentive for the Government, or any prosecutorial agency to delay for an extended period of time --

QUESTION: Mr. Bryson, I'm not hearing what you're saying. Would you repeat it again, please?

MR. BRYSON: Certainly.

Let me address first the suggestion that there is an incentive on the part of a prosecutorial agency to delay bringing people to trial after they've charged them.

The suggestion is made that this will become a commonplace event.

Our answer is that that simply is not so; that we have every incentive as prosecutors to bring these cases to trial quickly -- because as has been pointed out on several occasions by this court, typically the passage of time hurts the prosecution, which has the burden of proof, much more than it hurts the defense.

Cases grow stale, witnesses become unavailable, and these kinds of events tend to hurt the prosecution. And typically, defendants are benefited by the passage of time.

But --

QUESTION: How do you explain the delay in this case?

MR. BRYSON: Well, the delay in this case, Your Honor, was that we went to the home where this person was residing; we advised the person who was there, the mother, a member of the family, that there were charges against the individual; we sought him.

We then discovered, after she advised us that he had gone to Colombia, we discovered that he was in Panama. We took steps at that point to ensure that after he was released from custody in Panama that he would be immediately turned over to the United States for return to

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the United States and prosecution.

And as a matter of fact, the findings below were that everything that we did, up to and including that step -- which is a 2-1/2-year period -- was reasonable. There's no suggestion of unreasonable conduct prior to that time.

Now, there were two events that occurred during that time that, in one case, there was a delay in putting his name into a computer because the agent had assumed that he was in a different computer system.

QUESTION: But there are --

MR. BRYSON: But those were found, specifically --

QUESTION: But there are 6 more years to account for.

MR. BRYSON: That's right.

After he was released from Panama, we had assumed that he would be turned over to us; the Panamanians did not do that. Instead, they released him. He went, as we discovered later, immediately to Colombia.

At that point, when the agent found out that he had gone to Colombia, he assumed that he would be in Colombia for some extended period of time. And if he returned to the United States, he would be found at the border.

Now, the magistrate found that it was reasonable, a reasonable assumption that he would be found when he came back across the border. In fact, he came back through JFK Airport, which is an airport that is so crowded that it is very difficult to catch everybody that comes through -- even if they're on the NCIC computer system. And we didn't catch him.

Now, the suggestion -- the finding, in fact, of the magistrate, upheld by the court of appeals, was that we should have done more after that time to find him in this country. We should have checked.

And, in fact, it was several years before we did a sweep -- one of these general fugitive sweeps -- that uncovered him.

Now, we suggest in our brief, two points with respect to the alleged negligence: first of all, we think that we were not under a continuing obligation, for all time, to take every step that was possibly available to us to find him. Because we think that when we went to his home, and sought him out, and advised the people there, that -- that we had an indictment for him, that we had acquitted our responsibilities to seek him out, since we didn't know at that point where he was.

QUESTION: Mr. Bryson, you say you were not under a duty to every possible step --

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MR. BRYSON: That's right.

QUESTION: -- of course, that's obvious. But were you under any duty to do anything?

MR. BRYSON: I think as -- when we went to his home --

QUESTION: No, I mean -- forget the first 2-1/2 years.

MR. BRYSON: Sure.

QUESTION: And you missed him at Kennedy.

MR. BRYSON: Right.

QUESTION: Did you have any surviving duty, or could you then just forget about it in total?

MR. BRYSON: I think we could leave in place what amounts to a passive system which is, his name's in the computer, we are expecting, if he ever comes through a border, we've got a reasonable chance of catching him, and if he's ever arrested again, we've got a very good chance of catching him.

We had, I think, no continuing duty --

QUESTION: So your answer is no, except if he crosses the international border.

MR. BRYSON: No, that's right -- or if he's arrested.

QUESTION: Doesn't the department do some kind of regular sweeps for fugitives?

MR. BRYSON: We do, and in fact, we haven't always done it --

QUESTION: But you don't think you have a duty to do it, you just do it.

MR. BRYSON: Well, I don't think we do have a duty to do it.

Your Honor, the regular sweeps have been a fairly recent innovation, thanks largely to enhanced computer capacity that we have -- only in the last few years.

In fact, it wasn't until 1988 that DEA transferred to the Marshal Service the responsibility for trying to pick up DEA fugitives. And the Marshal Service does these routine, regular sweeps -- which do, in fact, catch people as they caught Mr. Doggett.

QUESTION: Let's just assume you have a duty and you didn't live up to it, and you were -- and the Government was negligent. I take it your second point was that doesn't make any difference?

MR. BRYSON: Exactly. Under Barker, we think that even if we were negligent in violating a duty that we had to continue to search for this man, that our negligence in that regard, under the Barker test, would not justify dismissal of the charges.

QUESTION: Because no prejudice.

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MR. BRYSON: Because no prejudice. That's right.

QUESTION: And why?

QUESTION: No prejudice because just an interest in repose is not the kind of prejudice that Barker's talking about?

MR. BRYSON: That's correct.

QUESTION: And what is Barker talking about?

MR. BRYSON: Barker is talking about prejudice of three different sorts, Your Honor: one, the detention -- the prejudice that results from pretrial detention or its substitute, the restraints imposed by bail; two, the kind of anxiety and concern about the pendency of charges -- which this man could not possibly have suffered, because he, by his claim, is that he wasn't aware of the charges; and three, the possibility of prejudice at trial.

QUESTION: So you accept the fact, for making this argument, you accept the fact he didn't know.

MR. BRYSON: Well, he either knew, in which case --

QUESTION: I mean you can't have it both ways.

MR. BRYSON: Well, we think we, in a sense we can have it both ways. If he knew, then, as he's conceded, he's waived his speedy trial claim. If he

didn't know, then he can't have suffered any of this anxiety.

QUESTION: All right, and what's the third?

MR. BRYSON: Possible prejudice at trial.

QUESTION: Yeah.

MR. BRYSON: Now, with respect to prejudice at trial -- and we argue this at some length in the brief -- there is no suggestion here. There was a specific finding by the district court that there was no prejudice on this record. And the court of appeals found -- upheld that finding. There is no suggestion of any serious claim of prejudice here.

So what we've got is a case in which there is, at most, negligence on the part of the Government -- which the Barker case described as a more neutral factor than, for example, bad faith on the part of the Government.

QUESTION: Well, suppose -- just suppose that the Government knew exactly where he was and didn't arrest him.

MR. BRYSON: Well, we did, of course, know where he was while he was in jail in Panama. And that demonstrates that we didn't have access to him.

QUESTION: Well, I know, but, I know -- now let's say, in these last 6 years you knew exactly where he was. And for some strange reason he wasn't arrested.

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MR. BRYSON: Well, I think that if we knew where he was --

QUESTION: Your theory should still say -- you should still say that doesn't make any difference.

MR. BRYSON: Well, I think at that point you could construe that as an act in -- a bad faith refusal to proceed with the case. So I think that would -- would --

QUESTION: So you say the speedy trial right then would attach.

MR. BRYSON: I think it could very well attach. Because I think that would be the equivalent --

QUESTION: Of an arrest.

MR. BRYSON: -- of not having made an effort in the first instance, even to seek him out in order to give him notification of the charges and to bring him before the court.

QUESTION: Mr. Bryson, could there be some due process limitation applicable in these cases?

MR. BRYSON: Certainly. There certainly is a due process protection against bad faith refusal to proceed against the person, where the consequence of the bad faith is prejudice to the person. That's the Marion case, and we suggest that that right is present at all times.

What -- it's clear that there was no such due

process violation in this case, because there was neither bad faith nor prejudice. But the due process protection does continue to be available to the defendant in all events.

QUESTION: Why do you make your concession on the basis of the Eighth Amendment, then, rather than simply making it on the basis of due process? Because if I understand what you're saying, the due process protection would be at least as great as the Eighth Amendment protection. And you would at least have a clean theory under the Eighth Amendment to the effect that you have no obligation at all, absent one of the -- one or more of the three Barker concerns.

MR. BRYSON: Well, I think that as I read Barker, and the Court's decision in More against Arizona, that a refusal to proceed with the case when the State has easy access to the defendant, would be a Sixth Amendment violation; that Smith against Hooey is a case, for example, in which --

QUESTION: You don't' take the position, then, that the right just accrues at arrest?

MR. BRYSON: No, we don't.

QUESTION: You don't.

MR. BRYSON: I think there is a substantial historical basis for that. But I think that you would

have to, as counsel suggests, you would have to go back and substantially alter your jurisprudence that you've established in cases like Marion, Dillingham, Lavasco -- you've said, on a number of occasions, it's either the time of indictment or the time of arrest, whichever comes first. And we don't think -- we're not asking the Court to modify that rule.

QUESTION: How can we consistently say, though, that the Sixth Amendment imposes at least the bad faith criterion, and say as a matter of principle it can't possibly impose a negligence criterion? Why do we draw that line?

MR. BRYSON: Well, because -- and I think it's just a common sense notion that I would describe in this way: that the Government has an obligation, if nothing else, then to not attempt to subvert the person's right to a speedy trial.

QUESTION: And it would have that obligation under due process anyway, wouldn't it?

MR. BRYSON: Well, except that due process would not only apply -- at least as the Marion and Lavasco Court cases describe the test -- would only apply in the event that there was both an attempt to subvert and success in that effort -- that is to say, prejudice at trial.

Due process is a limited protection in this

area. I think the speedy trial clause may go farther than the due process clause in that respect.

But again, what we're saying is that if the Government seeks to simply say to you we're not going to proceed with this, we're not going to give you any protection, any -- to your interest in having a speedy resolution of these charges -- then I think you have a problem, under this Court's decisions in Barker and More against Arizona.

QUESTION: As I understand it, then, the Government concedes that it is a Sixth Amendment violation if the Government intentionally does not proceed with an arrest that it could make. And all we're arguing about is whether it is also -- that's the limit of the Government's contention. The limit of the Government's contention is that it is not a Sixth Amendment violation if the Government is merely grossly negligent in not arresting.

MR. BRYSON: That's correct, right.

QUESTION: And what is the interest that's protected by the prohibition against the Government's bad faith delay? Is it repose?

MR. BRYSON: Well, the interest is that we want to ensure that the person gets a speedy trial, gets a quick trial after indictment -- which is the triggering -- trigging -- triggering event. And it's a

balance of interests --

QUESTION: But isn't one of the --

MR. BRYSON: -- I think the balance of interests at the point at which the Government is saying we're not even going to try. We're simply going -- we know we can get you, we know we can bring you in, we're going to simply disregard your interests in having a speedy resolution of the charges.

QUESTION: But can't you summarize or describe the interest of the defendant that's protected in that situation as an interest in repose?

MR. BRYSON: Well, no. I think it is -- the real interest that's at stake there is the defendant's right to have -- among other things -- a trial at which there would be no prejudice, no possible prejudice to his defense because of the passage of time, that there will be no anxiety because of the passage of time.

Now, in this particular case, of course, there's no anxiety because of the -- the lack of knowledge of the charges. But in the general run of cases, there will be anxiety that the defendant suffers as a result of those --

QUESTION: But Mr. Bryson, those interests would be considered under Barker anyway. How do those interests support drawing the line between bad faith and negligence?

MR. BRYSON: Well, I think -- and I feel that what the Court has said in Barker drives us to this position, that bad faith is --

QUESTION: So you're really saying -- and I think maybe you're being polite with us -- you're saying look, the Court did not have a principle basis for saying what it said in Barker. But we're going to draw the line right there, and we're not going to -- we're not going to try to buck against Barker. But we're not going to concede anything more. That's really the nub of what you're saying, isn't it?

MR. BRYSON: It is my understanding of what -- of what Barker said. In talking about bad faith as an element that is distinguishable from negligence, that it is a very powerful factor that counts against the Government.

QUESTION: Say that or hold that. Did Barker hold that? I mean, you come in here with a history of the Sixth Amendment that you say does not support this contention. And yet you nonetheless say the Government has to try to draw this line between -- between bad faith and good faith negligence, or however gross it might be -- because of what? Because of a dictum in Barker?

MR. BRYSON: Well, it's technically dictum, because in Barker in the Court found that the failure

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to -- to request a speedy trial on the part of the defendant in that case was dispositive, or virtually so.

QUESTION: Because in a sense, most of Barker is dictum, anyway.

MR. BRYSON: Well, that's true.

I think, though --

QUESTION: May I ask this question, John? Barker's been on the books for about 20 years, I guess, with these four factors that we always balance.

Do the defendants ever win these claims?

MR. BRYSON: Oh, yes, Your Honor.

QUESTION: They're very real --

MR. BRYSON: Several of -- several of this Court's cases the defendants have won. The defendants won in the Dickey against Florida case; of course, More against Arizona.

QUESTION: That was before -- wasn't that before Barker?

MR. BRYSON: Well, More against Arizona, I think, was after. Dickey, I think was before, you're right.

QUESTION: And More is the only one, I think, isn't it?

MR. BRYSON: Um --

QUESTION: How about in the courts of appeal?

MR. BRYSON: -- Dillingham was one --

QUESTION: They very rarely win in the courts of appeal.

MR. BRYSON: -- but I think Dillingham was after Barker.

In the courts of appeals, it's rare. But I think that's because --

QUESTION: I mean that --

MR. BRYSON: -- by and large, indeed almost universally, we are not out there doing what Mr. Sheppard suggests that we will do as a commonplace matter, which is waiting around intentionally and letting the clock run on these cases. That's not -- we have no incentive to do that, and we don't do it.

Although there are a number of cases, of course, in which we lose track of the person and in which it's true we don't make continued efforts. Let me give you an example of that phenomenon. You may know of the case back in 1971, a fellow named -- alias D.B. Cooper jumped out of an airplane, a Northwest Airlines airplane, with $200,000 of Northwest's money, parachuted over Oregon, and has never been found.

He was indicted on the last day of the statute of limitations, in Oregon, for airline hijacking. And initially, of course, substantial efforts were made to

find him.

Since then, of course, we put less and less energy into the search, because it's less and less likely to be productive. But if he were to be found, I'm confident that he would be prosecuted, and I'm equally confident that a court would not find under the Barker factors, that our failure over the last -- say -- 10 years to make consistent efforts to find him was chargeable against us to the extent that the indictment would have to be dismissed.

This case bears some of those same similarities. because what happened here is sure. Our efforts decreased after a period of time. But --

QUESTION: Yeah, but you're talking about a decrease on the one hand, and a zero on the other. In this case you've got 6 years of nothing.

MR. BRYSON: Oh, I suspect if we looked at the D.B. Cooper case, you'd find the last 6 years of virtually nothing -- if not nothing.

QUESTION: I wonder if the public will be delighted to learn that.

(Laughter.)

MR. BRYSON: But the thing is, Your Honor, Your Honor, the public has a choice. The Government has a choice. And if the public were told what the choice was,

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would you rather have the agents that would be looking for D.B. Cooper out there trying to solve crimes that are going on today, or would you rather having them -- have them look for D.B. Cooper, who will probably never be found?

QUESTION: No, but isn't it true that these sweeps that you make don't involve a great deal of time?

MR. BRYSON: They involve a huge amount of time and agent allocation. The sweep in this case happened to have found Mr. Doggett very early in the process. And counsel has suggested that that means that it must have been very easy.

But that's like say -- asking the person who just won the lottery is it a hard way to make money. He says, of course not. I just put a dollar down and I'm a millionaire. We got very lucky in this case. This was an 8,000-person sweep, 8,000 fugitives. And we found 225 of them. One of them happened to be Mr. Doggett. It takes a lot of time, it takes a lot of effort. And they produce modest gains.

QUESTION: In any case, Mr. Bryson, the Government concedes that it is appropriate for courts to look into these kind of matters under the Sixth Amendment to see how efficient the executives of fugitive-catching operation is. That's the Government's position.

MR. BRYSON: Our initial position is we are not obliged to do that kind of search, as I explained to Justice White. Our initial position is when we went to his home, explained that we had charges outstanding against him, we had acquitted our responsibilities. But if the Court thinks we were required to do more by way of continuing, then we think that what we did was sufficient in this case.

Now, we certainly think -- even if we were negligent -- that that negligence, under the Barker case, should not be charged against us so heavily that it would overcome the fact that there was no prejudice in this case.

I think, if I may just very briefly talk about the question of prejudice, the -- as I explained -- the district court and the court of appeals both found no prejudice in this case. And, in fact, there is no basis for supposing any prejudice at all.

First of all, with respect to the missing tapes, it's true that some tape recordings were missing. But those were tape recordings which, in the main, were a telephone conversation of which the defendant was a party.

Now, the defendant has not suggested that those telephone conversations contained anything other than what, in fact, we say they contained -- which were a

series of conversations setting up a meeting that occurred in November of 1979, in which a drug deal was made.

There is no suggestion that, gee, we were just discussing baseball or something else. This was -- he has just suggested, it's his whole contention on this score is, well maybe they would have been exculpatory; maybe they would have been helpful. That is, as the courts below specifically found, entirely speculative.

What's more, there is -- in Government Exhibit -- excuse me -- Defense Exhibit E there is an account of each of the tapes which is consistent with the Government's theory. That exhibit was prepared -- that's a report prepared well before the charges were brought in this case, at a time when the DEA would have had no incentive whatsoever to misdescribe the conversations.

So the clear import of that evidence is that there was no -- there was no deviation between what's on the tapes and what the Government alleges happened in those conversations.

What's more, the main meeting in this case, which was the November 24 meeting in which the drug transaction occurred, was an in -- face-to-face meeting in which there was no tape. So the tape recordings -- loss of the tape recordings wouldn't affect the basic thrust of the Government's case against the defendant, anyway.

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The second point that he made in the lower court was that there was an informant who was missing, and therefore a witness -- who knows -- might have been able to give helpful evidence to the defense.

That informant, in fact, as we pointed out in our court of appeals brief and as the court of appeals found, was found in advance of the time of the plea. We had him listed on our witness list, which is in the record, and we had subpoenaed him at his home address prior to the time of the plea.

And finally, the suggestion is made that there would have been some kind of procedural advantages to the defendant from his early arrest, if we had managed to bring him into this country earlier. But, in fact, as both courts below found, he was not eligible, for example, for the Youth Corrections Act treatment after he turned 26 -- which he did while he was in -- still outside of the country and before he had returned to this country when he was in a Panamanian jail.

So throughout the period in which we acted in a way that the lower courts found to be reasonable, we had no access to him. And therefore, he lost nothing under the Youth Corrections Act.

If the Court has no further questions.

QUESTION: Nothing further.

QUESTION: Thank you, Mr. Bryson.

Mr. Sheppard, you have 8 minutes remaining.

REBUTTAL ORAL REARGUMENT OF WILLIAM J. SHEPPARD

ON BEHALF OF THE PETITIONER

MR. SHEPPARD: Briefly, Mr. Chief Justice -- the court below has found that we were not prejudiced in the ability to prepare for -- to defend this case because of the loss of these 17 tapes and the missing confidential informant, Mr. Cifuentes. So I'm not going to belabor that.

I would call the Court's attention to the fact that even the DEA agent at the hearing in this case, 8 years -- it was then 9 years later, 9-1/2 years later -- read the transcript. He can't recall a lot of the events that occurred back then. And I asked him, is it true that the reason you can't recall these events, DEA agent, is because of the passage of time? And his answer, uniformly, was yes.

Now the Government says that these cases -- this is just a sport case, it's a frolic case, this isn't ever going to happen again. Well, I assure you that if you leave the Sixth Amendment without some sanctions, it will become a commonplace event. It is the nature of -- what the magistrate called the negligence in this case -- bureaucratic negligence.

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The Government would say we would rather be out solving current crimes, rather than prosecuting those that have occurred -- committed historical crimes. Respectfully, the nature of the bureaucracy is such that these types of cases, the numbers will get bigger and bigger if you leave the Sixth Amendment remediless, and without a sanction.

I think also that --

QUESTION: Is your position that the Government has an obligation as long as it has an indictment pending -- a positive obligation -- to search for the fugitive?

MR. SHEPPARD: Mr. Justice Scalia, I absolutely do. And if you read the Federal Speedy Trial Act, if you read all of the State speedy trial acts, if you read the American Bar Association project on the speedy administration of justice -- every one of them have a due diligence provision in them, every one of them.

So that the courts that passed procedural laws -- in our State the supreme court passes procedural laws -- or the legislatures and congresses that pass these procedural laws, when it comes to speedy trial, they all have imposed that --

QUESTION: What would you do in a case like this if -- if in the usual case, this fellow is a fugitive --

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MR. SHEPPARD: I'm not --

QUESTION: -- he doesn't want to be found --

MR. SHEPPARD: Absolutely agree.

QUESTION: You wouldn't win -- and so this business of a duty to hunt, I don't know about that.

MR. SHEPPARD: I think the --

QUESTION: An ongoing duty to hunt for a fugitive?

MR. SHEPPARD: I think if you look at the facts of this case, this sweep consisted of a U.S. Marshal putting Marc Gilbert Doggett's name in a credit bureau computer, and in 5 minutes of doing that, located him at his home in Reston, Virginia where he had been for years.

QUESTION: Well, that is the -- that is the crucial fact in the case, that he should have been easy -- he was easy to find.

MR. SHEPPARD: And, during an 8-month period --

QUESTION: And he wasn't a fugitive --

MR. SHEPPARD: At all. And I'm not urging this rule for fugitive. The absolutely essential ingredient of all requested, brightline rule, if you will, is lack of knowledge. And this record is clear, that Mr. Doggett had no knowledge.

But I think if you look at the scenario, at the very outset the Government says that he went to the last

known address. And I think there's some question in the record whether that's so. Detective Driver in Joint Appendix, at page 88 --

QUESTION: But as the case comes to us, I think we -- I guess we don't have to accept the finding of negligence. But as the case comes to us, it sounds to me like we decided on whether or not negligence makes any difference.

MR. SHEPPARD: And I would respectfully submit that this negligence was the product of a conscious decision on the part of the Government when Mr. Doggett was in Panama, to not communicate to him that he was indicted, so that he could assert the right -- and thus they could then argue he'd waived it; and failing to -- he dropped in and out of the computer networks that were available back then, that have become much more sophisticated in the last 6 years --

QUESTION: Was the equivalent of a detainer put on, down in Panama?

MR. SHEPPARD: Absolutely not.

QUESTION: Because usually, the people who are in jail and there's a detainer on them, they are notified.

MR. SHEPPARD: Absolutely. But there wasn't. This was all done informally. The DEA had an informal request to expel Doggett upon his release from the

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Panamanian jail. And you know how informal requests go.

QUESTION: Does Panama have a formal system whereby you could put a detainer on somebody, the United States could?

MR. SHEPPARD: It is our research that there was an extradition treaty; that the detective --

QUESTION: That doesn't answer the question that I just asked you.

MR. SHEPPARD: If there's an extradition treaty, all extradition statutes and extradition laws that I'm aware of, Mr. Chief Justice, require notification to the defendant, so that he can assert his rights under the Interstate Agreement on Detainer, that way; the International Act with Regard to Detainer -- is that way, that you communicate it to that person so that he can assert his rights.

And many of the later cases of this Court in the Sixth Amendment are --

QUESTION: But a detainer also suggests that it goes to the authorities, and that the authorities, in response to that, will hold the person.

MR. SHEPPARD: Correct.

QUESTION: Can you say that that was true of Panama?

MR. SHEPPARD: It is my understanding that it

was. However, it was Agent Driver's opinion that it didn't work too good, and you got better results by doing it informally.

It was our argument below that he had a right to assert the right to be transferred to this country to serve the time that he had received in Panama, in a treaty exchange for service of sentence.

And you have to remember that anything that DEA Agent Driver says has to be taken with a great deal of suspicion. He testified that only in 1985 when he went to Panama, by coincidence, by transfer, did he find that Mr. Doggett had been released 3 years before. And in that 3-year period he fabricated, I respectfully submit, three reports saying he was still in Panama.

So a lot of what he said causes one a great deal of concern. We respectfully submit that there is another prejudice beside the three that are articulated in Barker. And that is the right of a citizen to have the right to repose, or the interest of repose when he has conducted a law-abiding life for a substantial period of time, and others have relied on that law-abiding life in making their life decisions, it is an interest that this --

QUESTION: Do you think Barker was then open to modification of that, sir?

MR. SHEPPARD: I do, if you go back and read the

early cases, Beevers, and -- and -- Elwell -- they talk -- it's a quote that is -- that trickles through all of the cases; it depends on the circumstances.

And I respectfully submit the circumstances in this case are --

QUESTION: But in a way, the whole Sixth Amendment speedy trial right, when it is found to favor the defendant, is in the interest of repose. So to say that in Barker was an attempt to break down all the subsidiary factors that would justify repose, to incorporate repose among the subsidiary factors really is kind of a double counting, isn't it?

MR. SHEPPARD: Respectfully, I think that the interest that I'm suggesting needs protection is for those individuals who, because of their lack of knowledge, and because of the Government's negligence in bringing them before the bar of justice, that they ought to have protection because of their actions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sheppard.

MR. SHEPPARD: Thank you, Mr. Chief Justice.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:53 a.m., the case in the above-entitled matter was submitted.)

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No. 90-857 MARC GILBERT DOGGETT, Petitioner v. UNITED STATES

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BY Michelle Sanders

(REPORTER)