Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

ROBERT DEAN DICKEY,

Petitioner

vs.

STATE OF FLORIDA,

Respondent

Docket No. 728

Place Washington, D. C.

Date January 21, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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STATE OF FLORIDA,

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The above-entitled matter came on for argument at 12:55 o'clock p.m. on Wednesday, January 21, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

JOHN D. BUCHANAN, JR., ESQ.
Office of Public Defender
201 South Monroe Street
Tallahassee, Florida 32302
On behalf of Petitioner

GEORGE R. GEORGIEFF,
Assistant Attorney General of Florida
Tallahassee, Florida
On behalf of the Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 278, Dickey against Florida will be the next case heard.

ORAL ARGUMENT BY JOHN D. BUCHANAN, JR., ESQ.

ON BEHALF OF PETITIONER

MR. CHIEF JUSTICE BURGER: Mr. Buchanan, you may proceed whenever you are ready.

MR. BUCHANAN: May it please the Court; The nature of this case is one where the Petition was convicted of a robbery charge, sentenced to ten years in the State Penitentiary; his trial had been delayed for a period of eight years.

The case was duly appealed to the Florida District Court of Appeals, raising the constitutional question of the Sixth Amendment.

The issue in this case for this Court is whether the Petitioner was denied the right to a speedy trial, guaranteed by the Sixth Amendment to the Constitution of the United States. To put this case in proper perspective, this is a continuation of the -- of what developed in Smith v. Hooey.

I would like todiscuss the facts first, because they are most important.

On the 28th of June, 1960 a robbery occurred in Gadsden County, Florida. On the first of July, 1960 a warrant for Petitioner's arrest was sworn out. At that time Petitioner

was in custody of the Federal authorities on related charges of bank robbery.

Petition was in the jurisdiction of Florida from July until September, 1960. In September 1960 Petitioner was transferred into the custody of the Federal authorities and subse , sent to Leavenworth Penitentiary. During the period from July until September 1960 the State of Florida made no effort whatsoever to execute the warrant, other than place it into the hands of the sheriff.

Several years expired and October 29, 1962 Petitioner filed a written demand with the Circuit Court of Gadsden County requesting that he be brought back to Florida, or that the charges be dismissed against him. The Court, in an order, denied this request, stating that there was no authority upon the State of Florida to return Petitioner to Florida to stand trial since he was detained in Federal custody and that he was there because of his own doing.

Petitioner subsequently filed two more written demands. He filed one in April 1963 and another in March of 1968. After that the Petitioner filed original mandamus proceedings in the Florida Supreme Court and the Florida Supreme Court, in a decision held that either Florida had to return Petitioner to stand trial or else drop the detainer charges against him.

Petitioner then filed a motion to dismiss in

September 1, 1967 requesting thatthe charges be dropped against him. There was no action on this motion. The State, in an ex parte order on Decemoer 15, 1967, obtained an order from the trial court having jurisdiction, which ordered the Petitioner back to Florida to stand trial on January 23, 1968. Petitioner was brought back into custody on that date and on that date an arraignment was held and he was ordered to trial on that Friday, but over objection of counsel, trial was continued until January 31, 1968.

On January 30, 1968 the Petitioner filed two motions. The first motion was a motion for continuance, based upon the factsthat he was unable to locate two defense witnesses: one by the name of Dolan, who would have cooperated certain testimony that he had been in the place that had been robbed and another by the name of Strickland, who would have testified that on the night that the robbery occurred in Florida that the Petitioner was in Waycross, Georgia.

The Court granted the motion for continuance and on the same day the Petitioner filed a motion to quash the information, based upon the fact that he had been denied the right to speedy trial. The Court withheld ruling on this motion. He also filed with the motion an affidavit stating that one of his witnesses had died in 1964. The court then continued the trial of the case until February 13, 1968.

On February 12, 1968 the Petitioner then filed

another motion for continuance, based upon the fact that One Strickland, A. Bud Strickland, still could not be located. By that time the witness Dolan had been located; had been subpoenaed for the trial.

The court, on February 13, 1968, denied the motion to quash, based upon the constitutional grounds, and ordered Petitioner to trial. During the course of the trial the deputy sheriff who testified for the State, testified that he had destroyed the notes that he had taken down in connection with the description given to him by the victim when the robbery had occurred, which brings us to the contention in this case.

As we are dealing with a Sixth Amendment case: "As in all criminal prosecutions the accused shall enjoy the right to a speedy trial." As I mentioned previously, this picks up where Smith v. Hooey left off, decided by this Court last term.

Now, the general reasoning has been that where a person can show that there is prejudice to the defense, this has been sufficient to establish that the defendant would not get a fair trial. If, in fact, he could show that witnesses were dead or missing, that witnesses couldn't be gotten in time for the trial.

Now, the State's contention is in this case that: (1) they gave the Petitioner a speedy trial, and (2) there was no prejudice to the defense.

It is our position that there was a prejudice to the defense because of the eight year delay, because a witness was unavailable to support the Petitioner's contention, and (3) that a witness had died, and (4) that vital evidence had been destroyed (not maliciously) by the State, but simply because as the deputy sheriff said that he didn't know when this man would come to trial.

Now, twenty years --

Q The statute of limitations, I suppose, is --

A Pardon me, Justice.

Q I suppose there is a statute of limitations for robbery in Florida; is there?

A Yes, sir, but the statute of limitations --

Q It's tolled when he's out of the state. And when does it begin to run, at the time of the indictment or at the time of what?

A The statute of limitations in Florida is tolled when the warrant is placed in the sheriff's hands, and that stops, whether he's in-state or out-state.

Q Is told when he --

A Is tolled.

Q "Told," as I understand the word, meand it's extended; it stops running.

A Yes, sir.

Q And you say it's tolled when the warrant is placed

in the sheriff's hands? I don't understand that.

A The case that we have cited in the brief, which is Rosegarten versus State.

Q Well, when does it begin to run in Florida, at the time of the indictment? Ordinarily; forget this case. Let's talk about an ordinary robbery case in Florida when the man presumably remains in Florida. What is the statute of limitations? How many years?

A Two years, on a non-capital case.

Q And when does it begin to run?

A It begins to run as soon as the offense is committed.

Q Your statute, as you describe it, the sheriff has got the power to toll the statute, just by holding the warrant and deliberately not serving it.

A Yes, sir; the way I understand the rulings in Florida.

Q Even if the defendant is in the jurisdiction?

A Even if the defendant is in the jurisdiction, because the defendant then has the availability of Florida Statute 915.01 and .02, which gives him the right to demand trial and push the case along.

Q Well, then, in the ordinary case, within two years after the offense was committed, the warrant has to be placed in the sheriff's hands?

A Now, if the defendant is out-of-state, and no warrant has been placed in the sheriff's hands, then that would tole the statute of limitations, this absence.

Q His absence from the state; right.

A Yes, sir.

Now, the --

Q You say that Florida could have had him any time they wanted to?

A Yes, sir; there was constitutional authority. Florida had on its books, 94105, which was a st tute permitting it to obtain a prisoner from another state.

Q A regular extradition process if he's a person in custody?

A No, sir. This would be a little different proceeding, 94105. Now, Florida had not -- this case went to the Florida Supreme Court. Florida had never ruled until the Dickey case went to the Florida Supreme Court, of whether the State had a constitutional duty to bring an individual back from another state who was in some type of custody. In Dickey v. the Circuit Court of Gadsden County, which is cited in the brief, the Florida Supreme Court held that the State had the constitutional duty to bring an individual back to Florida.

Q Isn't it true that they bring them back to the nearest Federal penitentiary? The Federal Government does; brings them as close to the county as possible and then lets the

county come pick him up?

A Yes, sir; that is correct.

Q And that could have been done --

A That could have been done here, even without the decision in Dickey v. the First Circuit Court of Gadsden County; yes, sir.

Now, discussing the question of prejudice in this case we have not dwelt on this in any length, because I think the decisions are apparent to this Court. There is, on pages 17 and 18 of our brief there are a number of decisions where there is shown prejudice tothe defense.

Another argument may be made that, assuming that all witnesses were present, would this still have been prejudicial in this case? We contend it would have. We contend that any time there is a lengthy delay that the guilt determination process is eroded, simply by virtue of the fact that witnesses forget as the years pass what they are supposed to remember in order to testify to.

And, obviously, the right of cross-examination is lost to the defendant. The trial itself, literally becomes a mockery, because the witnesses cannot recall events that happened many years ago.

Now, in the case of Klopfer versus North Carolina, which was decided by this Court, the commentators have said that there has been no prejudice discussed in this case, but we

do note that as noted by this Court in Klopfer that the delay which an accused is subjected to that his movement, freedom of movement is curtailed, the suspicion that he committed the crime, that the community is actually interested in an early trial; and that these factors are sufficient, among the others to show that there was prejudice in this case to Mr. Dickey.

Now, I would like to point out that the Respondent claims that the Petitioner Dickey did not comply with the Florida statutes. Florida has on its books, 91501 and 91502. In 91501 if a person is freed and he can demand trial in three terms of court and if he complies with these statutory regulations and he is not brought to trial within three terms of court then he -- the charge is dismissed completely and forever barred.

Now, 91502 says the same thing except for a person who is in custody. Now, the State of Florida contends that the Petitioner never complied with these statutes, and we will agree with that; there is no argument. But I would like to point out to this Court that when the Petitioner filed his written demand with the court having jurisdiction, the first time it was late. When he filed his second demand that, he was right on time but the court then said "We have no authority to bring you back from another jurisdiction." So he was neither fish nor fowl. He couldn't get the benefit of the Florida statutes which the other people who were incarcerated in prison

in that state were entitled to, and who could have had a speedy trial. So, I don't think the argument that he failed to comply with the statute is sufficient.

Q What is that, a waiver argument?

A Yes, sir; we're contending that there was no waiver here on the part of the Petitioner because he filed his written demands, even though he didn't track the Florida statutes.

We are also contending -- the State is contending thathe got a speedy trial; we're saying that an eight-year delay is not a speedy trial. We're saying that the factors in this case are the dead and missing witnesses; that the destruction of the notes was sufficient in itself to show a prejudice to the defense.

Q Where was he during that eight years?

A He was in Federal prison, Your Honor: Leavenworth and Alcatraz, I believe.

Q For what?

A Bank robberies which he had pled guilty to in Florida but they were Federal charges.

The State has also raised the contention that he should not have applied or gone about raising the question of a right to speedy trial after conviction. The State is contending in their brief that he should have gone the route by writ of prohibition.

The answer to this is that our office was appointed to represent the Petitioner on January 23, 1968 at the time of the arraignment, and the trial court at that time set the trial, which is a matter of eight days later and we didn't have the opportunity in which to raise these questions by writ of prohibition.

I would like to point out to the Court that already the trial court had determined that they weren't going to answer the question of whether there was prejudice in the defense when he filed his first written demand for a speedy trial.

When this case went up to the Florida Supreme Court, the Florida Supreme Court had before it the factual situation that this man had not been tried in seven-and-a-half years, and they refused at that point to answer the question of whether there was going to be prejudice to his defense, always deferring back that when you get to trial then the trial court can make this determination.

Q When was the first request?

A For a speedy trial, Your Honor?

Q Yes.

A October 29, 1962.

Q Was he already in prison at Alcatraz?

A Yes, sir; or Leavenworth; one or the other.

So, it is our position that the writ of prohibition would have resulted in the same thing, that this was too

premature in order to decide the question of whether this defendant was denied the right to a speedy trial.

I would like to point out in a few other matters, the State has alleged that one of the witnesses, Mary McAlpern was not called as a witness at this trial. I don't think this was known to Counsel for the Respondent, but that she had died in 1960.

Q That wasn't the sister to whom he allegedly made a telephone call?

A No, sir; that was the one that counsel refers to as the woman who was with him the night that he was supposed to be in Waycross, Georgia.

Q Would you say that eight years was enough time elapsed so that you wouldn't have to show any prejudice at all; the prejudice would be presumed?

A Your Honor, I think -- yes, sir; I think you can almost say that in every case that there is some inherent prejudice in extremely long delays, even assuming that every witness was there, even assuming that the documentary evidence was there, I think it's just a common-known fact that delay itself fades the memory of people.

I recall a book by Mr. Francis Worldman, "The Art of Cross-Examination," where a little maxim was demonstrated before the class, he reports, and the different conflicting reports in there was only a matter of a few minutes.

For the reasons --

Q Who do you quote that --

A Your Honor --

Q It doesn't make any difference to you; does it? I mean, to your argument?

A It really doesn't, because most of the commentators have said that the benefit inures to the defendant. I think this is erroneous. Once you get down the line you have taken a gamble. It can inure to the detriment of either the defendant or to the prosecution.

Q What if it were true that it benefitted the defendant?

A Well, if it inured to him, obviously -- let's assume that he would get off with "not guilty" type of situation, but in that case, looking at it in its broad perspective, I don't think the ends of justice are concerned. We're not getting a fair trial at that point; it suddenly becomes a gamble: who can outlast who? Whether the prosecution can outlast the defendant or the defendant can outlast the prosecution.

So, you are literally losing, the way I understand, the adversary system, the very vital thing; that this is an attempt to get at the truth. And when you get into the situation there I don't think you can say either side benefits, Your Honor.

And for those reasons we request that the District

Court of Appeals' decision be reversed and that the Petitioner be discharged from his conviction and sentence.

MR. CHIEF JUSTICE BURGER: Mr. Georgieff.

ORAL ARGUMENT BY GEORGE R. GEORGIEFF, ASSISTANT ATTORNEY GENERAL OF FLORIDA, ON BEHALF OF PETITIONER

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

MR. CHIEF JUSTICE BURGER: Since we have got the fact picture before us, just what reasons,were, if any, impediments to Florida in getting this man out of the penitentiary and bringing him back for trial. Did Florida try to do it and were frustrated?

A No, they did not. They made no attempt whatsoever to secure his return until after the decision in Dickey, rendered by the Florida Supreme Court. None whatsoever. At that time Mr. Dickey petitioned on a mandamus proceeding to say, "Look, make it or miss; either get me back down there and try me, or get this detainer off my back so that I can get parole from the Federal authorities." Now, that's the posture in which he put his pleadings and in light thereof, they issued their opinion which is a part of the record here.

On that occasion, Mr. Hopkins, the State Attorney, secured an order to have Mr. Dickey returned for purposes of trial. He was brought back and, as Mr. Buchanan explained, the

results that followed did follow.

Now, on the first occasion when an attempt was made with the Federal authorities to get him back, they complied and we did get him back, tried and convicted him, and he sits in Raiford.

Q Did that suggest, Mr. Georgieff, that if the authorities had tried earlier that it would have been the same results?

A Yes, I'm back home again, I guess. Yes, it does. Now --

Q Can you suggest any hypothesis as to why this was not done?

A Only because there was no duty to do it, constitutionally, either at the State or Federal level. Until Dickey, in Florida and Klopfer here, there was never any commandment that you do this. Now, there were times when you approved cases in which a complaint was made regarding a speedy trial at the Federal level; there were times when you disapproved them, but you never did it under a constitutional mandate. Florida never did it until Dickey.

That's why I took the position of Judge Taylor, to whom these complaints were brought, and I call them complaints, because they weren't demands for a speedy trial. I call them complaints and I say that he was not in error because, as occurred with Gideon, many people bore the brunt of that, who,

perhaps properly didn't deserve it. But that's neither here nor there; it's done. But, it's a little unfair to say to somebody, "You should have done this because you were compelled by law to do it," when even you haven't said that that was the case.

Now, I am sure that Judge Taylor doesn't need my personal protection; don't misunderstand, but if we're talking about the man having a right, I say that it came into being, first, when you rendered your decision in Klopfer and then when Dickey acknowledged that, out of our Supreme Court, and said, "In light of Klopfer it is now a situation where, when you do make a demand, we are saying --

Q What year did we decide Klopfer?

A '68.

Q '68.

A Yes.

Q And is this, in effect, an argument that Klopfer should not be retroactive?

A Oh, yes. Oh, yes. I am not going to mislead you about that. I can't hide behind it --

Q You don't think there was any such thing as a due process right?

A Well, I can't say that, Mr. Justice Harlan, because how do I explain those situations in which you did grant relief before Klopfer, you see. Now, let me put it this way:

Suppose we have a gross situation of a man who committed a crime some 20-odd years ago, and through some dodge of one kind or another, and he lived a Simon Pure life in between and it was brought to you on very painful circumstances. I remember, myself, from losses that I suffered here myself, that as often as not, these things have an effect on the decision-making process.

After all, when it is a gross situation the State is fair game, and perhaps they should be, since they do have the power, but when you do have situations like that you haven't backed away from it. I simply submit that Klopfer was not retroactive and ought not to be, because if we don't go to that situation then the situation becomes one in which everybody will say, "Well, look, you got me in jail as a four-time loser and the last three times it was four-and-a-half years before they tried me. I have a right to be out and you've got to remove the stigma of a four-time loser and the life sentence, by the way, which is --

Q Well, there wouldn't be this case because he asked --

A Counsel says he asked and it may be that you will decide thathe did. I contend that he did not.

Q Well, didn't the judge say that "I will not do this because you have absented yourself from the state voluntarily?

A That was a part of the order, Mr. Justice Marshall, but that's not the predicate for his conclusion.

Q Is it in the record, the statement where he requested it?

A I beg your pardon, sir?

Q Does the record contain a written request from him or the trial at any time?

A It contains three writings, Mr. Justice Black, and I don't call them demands because I don't think they are --

Q Are they requests?

A No. He puts it in the alternative.

Q What is his alternative?

A Bring me back or take away the detainer. In one of them he says, "Try me or release me."

Q Where is that?

A On page 9 of the appendix, Mr. Justice; the next to the last paragraph, reading: "

Q Is that the only one?

A That's the one thatwould be pertinent to your inquiry, I think. I'll read you the others if you like, but --

"Your Petitioner now moves and prays this Honorable Court to cause Petitioner to be brought to appear before it by means of a proper process of the law, namely: a writ arising out of this Court ordering the Petitioner before it for a trial by jury or that an order be issued dismissing said charge."

Q What date was that?

A That was on the 29th of October, '62. That was his first one, thirty months after he went to jail.

Q That was a pretty clear request for a trial.

A Beg your pardon, sir?

Q Wasn't that a pretty clear request for a trial?

A Oh, yes; it is.

Q I thought you said that you didn't think he had made the request.

A I said there was one of the three.

Q How about the one in '55?

A '55? This didn't occur until 1960, sir.

Q Oh, that's right; October of '62.

A That's the one I just read, sir.

Q Well, did you read that he asked that the above-named Respondent to permit an immediate trial in order to enable your Petitioner to properly protest his right as guaranteed under the Constitution of the United States?

A Yes, but it wasn't guaranteed until Klopfer.

Q Well, was there any doubt when you read this that he's asking for a speedy trial?

A Well, sir, I've got to be allowed to go back to 915.02, and if I am, there was considerable doubt.

Q Really?

A After all, let's say we have a paid defendant

and he's hired counsel who's very expensive and very good and very efficient. No court would suffer the man to complain about a demand for a speedy trial unless he met the requirement of 915.02. I submit that Dickey is not a super-class just because he didn't have a lawyer.

Q Where was he in '62?

A He was in Leavenworth, or Alcatraz; I'm not sure.

Q Well, wasn't one of them filed while he was still in Florida? In the Federal penitentiary?

A No, sir.

Q Would you say that is the only explicit demand for a jury trial or release he made?

A I think so.

Q Well, what's this at page 17? This, apparently is another petition he swore to on the first day of April, 1963 and that has much the same language; doesn't it? "To be brought to appear before it by means of the proper process of law, namely: a writ arising out of this court ordering Petitioner before it for trial by jury, or that an order be issued dismissing such charge."

A He copied that paragraph.

Q Well, whether he copied it or not, the second time he explicitly demanded either trial or release, wasn't it?

A That's correct. That one was right on the-- button, on the first day of the term. The second one was 28

days late. The third one spanned 36 months before he made it after having made the second one. Now, I ask you, he talks about prejudice. I don't mean to question you, of course, but I ask the question: where is the prejudice if he waits 30 months before he makes his first demand, if the passage of time is what we are asked to believe is the predicate.

Q Well, if he got it then he might not be complaining now.

A That is a fact and he had done it the third time running he certainly wouldn't have had any trouble coming here, or if he had raised it by prohibition he wouldn't be sitting in Raiford today.

Q Maybe he didn't know about it.

A Didn't know about what, sir?

Q The law.

A He had counsel at that time.

Q Maybe his counsel didn't know about it.

Q In referring to the time factor, counsel, I thought I remembered one English case which was cited in the Court of Appeals in recent years, in which they held that two years was an inherently oppressive time beyond which there could be no delay without per se prejudice. Here you've got eight years.

A Well, I understand --

Q Does the State of Florida have any hypothesis as

to why they should not have brought him back and tried him promptly?

A Well, sir, I don't put it on the basis that they had no way in which they could. Obviously, if they didn't we wouldn't even be here.

Q I know but, apart from the 14th Amendment, due process clause, and the speedy trial provisions, isn't it just simply basic, sound administration in prosecution to try these cases promptly and get them out of the way? I am, frankly, very puzzled by the delay of that length.

A Well, it depends on whether we call it a delay.

Q Well, eight years looks like delay.

A Well, it's an interval with which I'd rather not be saddled, but I am. Now, I didn't make it, just as Mr. Buchanan inherited the situation as it came, but --

Q I wasn't undertaking to tax you with it, but I asked you to offer a hypothesis.

A Perhaps I can put it this way and make it a little more palatable; I don't know.

By all means go ahead, Mr. Justice.

Q When was the charge filed against this gentleman?

A Well, now, that's a good question. December 15 of 1967 is when the information was filed by the State Attorney. That means that he was tried within 55 days of that charge.

Now comes the question of what are we talking about? Are we talking about July 1, 1960 or are we talking about December 15, 1967? I cannot resolve that for you. All I can do is tell you that if Dickey had been brought back in 1963 what he have been brought back to? I'll tell you what, to a warrant that had never even been served on him by the U. S. Marshal.

Now, Mr. Justice Stewart inquired, I think, of Mr. Buchanan as to the statute of limitations. Well, all the replies are accurate, except that when it's served is when the thing goes into effect for purposes of tolling the statute. Now, they gave it to the U. S. Marshal. He declined to take it at Marianna where they were keeping him as a Federal prisoner on the Malone Bank robbery. He said, "Wait until we get him assigned to a Federal institution after his plea then you send it in; then we'll serve it on him."

Lo and behold, that's what they did but nobody ever served it on him. They simply put it in his file as a detainer and that made the predicate for the complaint that he wanted to get out from under the detainer and subject himself to parole if the Federal authorities were going to give it to him.

Q That's what I was thinking about: when he was at Marianna the State could have taken him then --

A No, they could not, sir.

Q -- with the permission of the Federal authorities.

A No, sir.

Q Why not?

A Well, because he was being held for trial by the Federal authorities on the Malone Bank robbery.

Q Yes, but where was he tried?

A On that charge?

Q Yes, sir.

A I would assume in Marianna.

Q Well, after that couldn't the State have asked: "Let us try him?"

A Well, they asked to serve the warrant on him, Mr. Justice --

Q No, no; I mean the petition for writ of habeus corpus; they could have asked it right then and there.

A Well, now you're talking about within 10 days.

Q Well, I think speedy means speedy.

A Well, how about one day. I'm not being funny, but really we've got a statute that says three times in court. Presumably, unless you strike it down as being oppressive, if we meet that we are in business.

Q Well, my point is: the whole question is that you rely on the fact that he was taken out of the State by the Federal authorities. And I'm asking you: couldn't the State have said to the Federal authorities, "Leave him here so we can try him on our charge."

A I understand, sir, but they didn't because of the Federal authorities wouldn't even accept the warrant for service on the man.

Q Well, they don't have to accept the warrant. I understand that the local procedure which is set out in Smith and Hooey of how you get a Federal prisoner, and it's undisputed that whenever asked for the Federal authorities have turned the prisoner over.

A Well, I'm stuck with the fact that that wasn't done, no matter what our position. It clearly becomes: Is what we did a constitutional deprivation of a right that you recognized in Klopfer, or isn't it?

Q Well, as I understand it you are allowed -- I hate to use the word "allowed," but the Federal people took it out of the state and that threw him under .01 instead -- .02 instead of .01?

A That's right. WEll, no it would have been .02 all the same if he were a prisoner not in Federal custody. It simply has to do with one at liberty and one in custody, you see. And I point that up because we have a case called Loy versus Grayson. It's possibly eight or nine years old, maybe a little older, in which a man out on bond complained because he hadn't been tried in 25 terms of court and they said, "Look, man, if you didn't make a complaint about it and you were out enjoying your liberty in the custody of your bondsman, you can't

be heard to complain about it. I don't rely on that, but you know --

Q Of course, here he did ask three different times.

A Yes, but he did it badly in not in accord with law. Now, I've got nothing left but that. Now, either he's required to follow that or he is not. I contend that just because he's in a Federal penitentiary, doesn't excuse him from complying with it, especially since he waited 30 months to bring a complaint --

Q What is it he didn't do? He didn't come there in person?

A No, sir; no, sir. 915.02 says: "Within 30 days of the first day of each term of the court in which you are to be tried you file a demand for a speedy trial, serving acopy on the prosecution for each of three successive terms and if they don't do it, you are home free."

Now, he didn't do that. Now, that's not an oppressive requirement, not of him or anybody else. Nobody said you have to do it in beautiful words, in this or that setting; just do it.

Q WEll, all that is to let this Court know that you were pushing it.

A No; the prosecution, not the court.

Q Oh, the prosecution.

A Yes, sir. The court doesn't decide when he's to be tried; the prosecution does. The State Attorney has the option of doing it or not and the court can't force him to do it, at least in Florida. Now, that may sound peculiar, but in the last analysis he functions pretty much as a grand jury does. Suppose they don't want to indict. No court can make them indict. And that's why we have the peculiar situation. That's why we have to have the individual advise the State Attorney or the Solicitor, as the case may be, "Look, I'm pressing for a trial and I want it now or I want out from under it." That puts him on notice.

But that didn't happen here.

Q Well, he has three notices.

A Well, spanning some seven years, sir.

Q What?

A Spanning a total of seven years.

Q Yes, spanning over that total he has got three of them; hasn't he? Who did those notices go to?

A They went to the Circuit Court, to the judge.

Q Circuit Court to the judge?

A That's correct. In all three instances, Judge Taylor.

Q By writ of habeus corpus?

A Yes, sir; and I'll tell you why that's not the proper vehicle.

Q Whether it's a proper one or not, that's about as good as a layman would know: isn't it?

A Well, here we go. We are saying that whether it was proper or not or whether it was timely or not, why are we bothering with that since we are talking about eight years.

Q Well, it was signal to the court that he wanted a trial, each time they heard from him; was it not?

A Oh, yes.

Q And you say the prosecutor has the control. You say that there isn't an inherent power and corresponding duty on the court to see that cases are tried promptly, no matter what the prosecutor does?

A Well, I know of no way in which a charge can be filed by the court, Mr. Chief Justice.

Q The court has quite a bit of power over the prosecutor; doesn't he? Just by calling him and saying, "Put this case down next term or I'll dismiss it."

A They can lean on him; of course they can.

Q And they do.

A On occasion I am sure they have. At least I know that I've been done and properly so most of the time, but I don't back off and out of that. The point is here is the man complaining and he says, "Look, I ought to have a speedy trial."

The first thing he didn't do was to move for it when he could have. He had 30 months within which he would have --

Q But he did do it three times, didn't he?

A Well, suppose, Mr. Justice Black, he had waited 25 years to do it three times?

Q But he's got to do it at a certain particular date and certain hour of the day and certain day of the month?

A No; just within 30 days of the first term -- first day of the term.

Q Just within 30 days and then he can't do it again? Can he?

A Yes, he can.

Q Would you mind telling me when the warrant was sworn out?

A July [illegible], 1960 -- June 28th; I'm sorry. And it was served to him --

Q What happened to it then?

A It was lodged with the U. S. Marshal's office in Marianna.

Q U. S. Marshal's office?

A That's right.

Q And never was filed in the state court office? was it?

A No, because there was no return made on it; it hadn't been served.

Q Are you arguing that as a defense that it was not filed in a state court?

A Well, I'll argue anything I think I can use.

Q I understand it, but are arguing it?

A No. I'll tell you this very --

Q What is your defense?

A My defense is, very simply that he waived his right to complain about it because he didn't meet the requirements of 915.02.

Q By filing a certain notice under 915.02.

A Three times running; yes.

Q Three times running?

A That's what the statute says, sir.

Q Well, he did it three times running. They ran over several years.

A They ran over quite a few years and I might add--

Q Wouldn't he get discouraged if he got nowhere in '62 and '63.

A It's possible that he didn't want to go to trial until somebody else died.

Q I asked, though, do you suppose?

A I don't know.

Q He might have been discouraged.

A I don't think so, sir.

Q I guess the essence of your position, as I understand it is that up until Klopfer there was no Federal compulsion, no Federal right.

A That is correct, sir.

Q That all he had up to Klopfer was the state right and he didn't comply with the terms of the state right.

A Exactly.

Q And then following Klopfer your court moved into action pronto; is that it?

A Virtually immediately. They acknowledge what you said in Klopfer as their predicate and said, "All right, Mr. Hopkins, either make it or miss." He made it.

Q What did Klopfer hold?

A Well, it was literally an automatic reversal. You didn't discuss prejudice. You said -- I would have to assume you were talking about the delay in time -- "It becomes a command under the Sixth Amendment." What you did was extend the protection --

Q The Sixth Amendment was in effect all that time wasn't it?

A I beg your pardon?

Q The Sixth Amendment was in effect from the time the warrant was sworn until he finally filed this last notice, wasn't it?

A Well, certainly the Sixth Amendment was there, but I don't understand what you mean by "in effect," sir.

Q Well, it was on the books, wasn't it?

A Of course.

Q Your point is that although it was on the books it was on the books against the Federal Government; not against the State.

A That is a fact, and I think that's what I said in my brief, that Klopfer makes no difference except as to those states which had no state provision regarding a speedy trial. That gave a complaining individual a right to come to you ala the Federal violation as you enunciated it in Klopfer. Until you did, all that can be said is the Sixth sat there until you decided it was going to be applied to the states, through the 14th.

Now, I don't mean to be evasive, but that's what I understand you did in Klopfer.

Now, if he didn't meet Florida's requirements at a time when he could have and secured his release, and didn't have the option of doing it under Klopfer, because all of his moves had been made by then, and I submit that our court was not in error and his demand for a speedy trial was made at a time when he had no assurance without compliance with the state law or guarantee under the Federal that he was going to get it simply by the passage of time.

Q One other point: the judge never mentioned the fact that this piece of paper didn't comply with the law, did he?

A Once again I say like the last time I was here

in November: "It doesn't make any difference that he did or didn't, Mr. Justice Marshall. The outcome was correct, whatever his reasoning. And I don't like to say that on one side and talk about him on the other, but I have to take the order as I can support, without regard to what he said. Conceivably he could have said something which simply didn't make any legal sense and it might, nevertheless, have been a good order.

So, very simply I say: we talk about Bud Strickland. He talks about prejudice. Do we have to assume that if Bud Strickland was there to testify that he wouldn't be complaining about the loss of memory? I don't think so. I thinkhe waited and he waited conveniently.

Now,his sister died --

Q But, he sent these notices. He didn't wait that long, did he?

A Until his third one?

Q Well, when was this?

A The first one was in '62, 30 months after he was jailed.

Q That's two years.

A About 29 months, 30 months. So he wasn't so much interested in a speedy trial then.

Q Well, he asked for one.

A Yes, but 12 months after he would have been out from under it, you see. Three terms of Circuit Court run --

Q Well, that is if he had known the state law. He probably didn't know it.

A I beg your pardon?

Q He probably didn't know the state law.

A He sure did know it.

Q He did.

A He filed within 28 days of the first; dead on the button on the second and almost dead on the button on the third.

Q Did he cite the state law?

A No, sir.

Q Well, how do you know he knew it?

A Well, look, now, I'm assuming -- I take the position that he did by virtue of the fact of the time of his filing, but I'll go better than that. Suppose he didn't know it, does he enjoy a better status because he doesn't?

Q Well, I just wanted to get how he knew it.

A Well, he certainly knew enough to make a demand for a trial, in whatever fashion he did it.

Q But he used the words of the constitution; didn't he?

A Yes, but I don't think that's quite enough until what you said in Klopfer. We can always --

Q That's your position, that this right didn't really attach or put any duties on the State of Florida until

the Coutt spoke in Klopfer?

A That's correct, at the Federal level. Now, in order for him to have a right to complain about a Federally-assured right to a speedy trial, I contend Klopfer first put it into effect.

If we go back to Florida's time, then he didn't comply comply with 915.02 and the court so stated in Dickey and just as soon as they said, "Now is the time, Mr. Hopkins, for you to move,"he did move, and he got him back. And 55 days later he was tried.

But about the prohibition, I can't stress that too strongly. If it was a fact that this man was not going to be stuck with flagging memories or anything like that, why didn't he bring prohibition, which is available to him. He says the result would be automatic; what was the point in bringing it? Well, if it is automatic then that's exactly what he should have done.

There is no point in him sitting in Raiford right now under a criminal conviction when he knew what the outcome would be and could come to you and say, "Well, now, look here. They denied me my prohibition and on the face of it I was entitled to a speedy trial because I made these demands. He took a chance and he lost and he doesn't like it. That, I understand, but it doesn't qualify him for relief under the status of the cases in existence at the time.

Q Where is he incarcerated now?

A Raiford, Florida; the state penitentiary.

Q The Federal sentence is terminated and --

A I don't know that it's terminated.

Q Your friend doesn't seem to agree with you. Perhaps we can clear that up later with him.

A It's possible that they sent him back to the Federal penitentiary; I don't know.

Q And what was the sentence in Florida?

A I think he got 20 years.

Q Do you think that if Klopfer had never come on the books, that Florida could have continued along keeping this fellow in jail without subjecting -- giving rise to any constitutional claim in his --

A No, sir, considering the majesty of their order in Dickey, and I was on the short end of that one, I can guarantee you that it wouldn't have been without regard to Klopfer.

Q But that was after Klopfer.

A Oh, yes.

Q Well, all I'm suggesting is that your argument leaves out one very important factor, and that is the due process right that this man had to a speedy trial or some kind of a trial in the state courts, independently of Klopfer.

A Yes, he did. All I say is we must measure it on

a pan with all of what he did and all about which he complained. If you take it isolated, of course, he qualifies. Who wouldn't like to come to you and say, "Eight years, come on"--

MR. CHIEF JUSTICE BURGER: I think we have your point on that. We have your point all clear.

A All right, I contend that the action of the District Court below should be affirmed, or at least that this case should not be reversed.

MR. CHIEF JUSTICE BURGER: Mr. Buchanan, will you clear up the matter of where is the defendant now?

A Yes, sir. Petitioner is presently incarcerated at Leavenworth. His sentence expires in 1971. He was given a ten-year sentence to run consecutively to any presently existing sentence, so he will not be back in the State of Florida until 1971.

Q And then he will begin to serve --

A The Florida sentence.

Q -- nine more years minimum?

A For good time, but his sentence is ten. The order read: "Consecutively to any existing sentence."

I would like to clear up one point here: Counsel has made the statement that he did not comply with the statutes. The way I read the order of the trial judge on December 1, 1962 even assuming that the Petitioner had complied with 915.02,

judge would not have returned him to Florida; that it wasn't until Dickey versus the Circuit Court, which came out in June 14, 1967, did Florida say that created a third statute, in a sense, and that statute was that people who were incarcerated outside the territorial limits of Florida could be brought back in for trial.

Q Do you think before that, this judge, even if he had complied with the Florida statutory provisions, would have said, "Well, they don't apply to you because you are in prison outside the state."

A Yes, sir; that is my position.

Counsel has made reference that he had counsel during this period while he was at Leavenworth. He did not have counsel.

And for those reasons we --

Q Are you going to say anything about this last case in point --

A Your Honor, yes at Court, this is a fundamental right. This Court has said that the Sixth Amendment right is as fundamental as the right to Counsel. I think it was always there, Your Honor.

Q So, by that you mean it is retroactive?

A Yes, sir.

Q Klopfer is retroactive.

A Yes, sir.

Q Well, is it Klopfer that's retroactive, or the constitution itself in the sense that if Klopfer had not been decided, he had this right.

A He had this right; yes.

Q I don't know whether this is a semantic difference, but in this Court it's important matter.

A Yes, sir; I understand.

I have nothing further.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Buchanan. Case is submitted.

(Whereupon, at 2:20 o'clock p.m. the argument in the above-entitled matter was concluded)