SUPREME COURT OF THE UNITED STATES

No. 90–857

MARC GILBERT DOGGETT, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 24, 1992]

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

Just as ``bad facts make bad law,'' so too odd facts make odd law. Doggett's 8½-year odyssey from youthful drug dealing in the tobacco country of North Carolina, through stints in a Panamanian jail and in Colombia, to life as a computer operations manager, homeowner, and registered voter in suburban Virginia, is extraordinary. But even more extraordinary is the Court's conclusion that the Government denied Doggett his Sixth Amendment right to a speedy trial despite the fact that he has suffered none of the harms that the right was designed to prevent. I respectfully dissent.

We have long identified the ``major evils'' against which the Speedy Trial Clause is directed as ``undue and oppressive incarceration'' and the ``anxiety and concern accompanying public accusation.'' *United States* v. *Marion,* 404 U. S. 307, 320 (1971). The Court does not, and cannot, seriously dispute that those two concerns lie at the heart of the Clause, and that neither concern is implicated here. Doggett was neither in United States custody nor subject to bail during the entire 8½-year period at issue. Indeed, as this case comes to us, we must assume that he was bliss-

fully unaware of his indictment all the while, and thus was not subject to the anxiety or humiliation that typically accompany a known criminal charge.

Thus, this unusual case presents the question whether, independent of these core concerns, the Speedy Trial Clause protects an accused from two additional harms: (1) prejudice to his ability to defend himself caused by the passage of time; and (2) disruption of his life years after the alleged commission of his crime. The Court today proclaims that the first of these additional harms is indeed an independent concern of the Clause, and on that basis compels reversal of Doggett's conviction and outright dismissal of the indictment against him. As to the second of these harms, the Court remains mum—despite the fact that we requested supplemental briefing on this very point.[1]

I disagree with the Court's analysis. In my view, the Sixth Amendment's speedy trial guarantee does not provide independent protection against either prejudice to an accused's defense or the disruption of his life. I shall consider each in turn.

As we have explained, ``the Speedy Trial Clause's core concern is impairment of *liberty*.'' *United States* v. *Loud Hawk,* 474 U. S. 302, 312 (1986) (emphasis added). Whenever a criminal trial takes place long after the events at issue, the defendant may be prejudiced in any number of ways. But ``[t]he Speedy Trial Clause does not purport to protect a

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[1]See 502 U. S. —— (1991) (directing the parties to brief the question ``whether the history of the Speedy Trial Clause of the Sixth Amendment supports the view that the Clause protects a right of citizens to repose, free from the fear of secret or unknown indictments for past crimes, independent of any interest in preventing lengthy pretrial incarceration or prejudice to the case of a criminal defendant'').

defendant from all effects flowing from a delay before trial.'' *Id.,* at 311. The Clause is directed not generally against delay-related prejudice, but against delay-related prejudice to a defendant's liberty. ``The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.'' *United States* v. *MacDonald*, 456 U. S. 1, 8 (1982). Thus, ``when defendants are not incarcerated or subjected to other substantial restrictions on their liberty, a court should not weigh that time towards a claim under the Speedy Trial Clause.'' *Loud Hawk*, *supra*, at 312.

A lengthy pretrial delay, of course, may prejudice an accused's ability to defend himself. But, we have explained, prejudice to the defense is not the sort of impairment of liberty against which the Clause is directed. ``Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself. *But this possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context*.'' *Marion*, *supra*, at 321–322 (footnote omitted; emphasis added). Even though a defendant may be prejudiced by a pretrial delay, and even though the government may be unable to provide a valid justification for that delay, the Clause does not come into play unless the delay impairs the defendant's liberty. ``Inordinate delay . . . may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist *quite apart* from actual or possible prejudice to an accused's defense.'' 404 U. S., at 320 (emphasis added).

These explanations notwithstanding, we have on

occasion identified the prevention of prejudice to the defense as an independent and fundamental objective of the Speedy Trial Clause. In particular, in *Barker* v. *Wingo,* 407 U. S. 514, 532 (1972), we asserted that the Clause was ``designed to protect'' *three* basic interests: ``(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.'' See also *Smith* v. *Hooey,* 393 U. S. 374, 377–378 (1969); *United States* v. *Ewell,* 383 U. S. 116, 120 (1966). Indeed, the *Barker* Court went so far as to declare that of these three interests, ``the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'' 407 U. S., at 532.

We are thus confronted with two conflicting lines of authority, the one declaring that ``limit[ing] the possibility that the defense will be impaired'' is an independent and fundamental objective of the Speedy Trial Clause, *e.g., Barker, supra,* at 532, and the other declaring that it is not, *e.g., Marion, supra*; *MacDonald, supra; Loud Hawk, supra.* The Court refuses to acknowledge this conflict. Instead, it simply reiterates the relevant language from *Barker* and asserts that *Marion, MacDonald,* and *Loud Hawk* ``support nothing beyond the principle . . . that the Sixth Amendment right of the accused to a speedy trial has no application beyond the confines of a formal criminal prosecution.'' *Ante,* at 7. That attempt at reconciliation is eminently unpersuasive.

It is true, of course, that the Speedy Trial Clause by its terms applies only to an ``accused''; the right does not attach before indictment or arrest. See *Marion, supra,* at 313–315, 320–322; *Dillingham* v. *United States,* 423 U. S. 64, 64–65 (1975) *(per curiam).* But that limitation on the Clause's protection only confirms that preventing prejudice to the defense is not one of its independent and

fundamental objectives. For prejudice to the defense stems from the interval between *crime* and trial, which is quite distinct from the interval between *accusation* and trial. If the Clause were indeed aimed at safeguarding against prejudice to the defense, then it would presumably limit *all* prosecutions that occur long after the criminal events at issue. A defendant prosecuted 10 years after a crime is just as hampered in his ability to defend himself whether he was indicted the week after the crime or the week before the trial—but no one would suggest that the Clause protects him in the latter situation, where the delay did not substantially impair his liberty, either through oppressive incarceration or the anxiety of known criminal charges. Thus, while the Court is correct to observe that the defendants in *Marion, MacDonald*, and *Loud Hawk* were not subject to formal criminal prosecution during the lengthy period of delay prior to their trials, that observation misses the point of those cases. With respect to the relevant consideration—*the defendants' ability to defend themselves despite the passage of time*—they were in precisely the same situation as a defendant who had long since been indicted. The initiation of a formal criminal prosecution is simply irrelevant to whether the defense has been prejudiced by delay.

Although being an ``accused'' is necessary to trigger the Clause's protection, it is not sufficient to do so. The touchstone of the speedy trial right, after all, is the substantial deprivation of liberty that typically accompanies an ``accusation,'' *not* the accusation itself. That explains why a person who has been arrested but not indicted is entitled to the protection of the Clause, see *Dillingham*, *supra*, even though technically he has not been ``accused'' at all.[2]

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[2]In this regard, it is instructive to compare the Sixth Amendment's speedy trial right to its right to counsel, which also applies only to an ``accused.'' The right to

And it explains why the lower courts consistently have held that, with respect to sealed (and hence secret) indictments, the protections of the Speedy Trial Clause are triggered *not* when the indictment is *filed,* but when it is *unsealed*. See, *e.g., United States* v. *Watson,* 599 F. 2d 1149, 1156–1157, and n. 5 (CA2 1979), modified on other grounds *sub nom. United States* v. *Muse,* 633 F. 2d 1041 (CA2 1980) (en banc); *United States* v. *Hay*, 527 F. 2d 990, 994, and n. 4 (CA10 1975); cf. *United States* v. *Lewis,* 907 F. 2d 773, 774, n. 3 (CA8 1990).

It is misleading, then, for the Court to accuse the Government of ``ask[ing] us, in effect, to read part of *Barker* right out of the law,'' *ante,* at 7, a course the Court resolutely rejects. For the issue here is not simply whether the relevant language from *Barker* should be read out of the law, but whether that language trumps the contrary logic of *Marion, MacDonald,* and *Loud Hawk*. The Court's protestations notwithstanding, the two lines of authority cannot be reconciled; to reaffirm the one is to undercut the other.

In my view, the choice presented is not a hard one. *Barker*'s suggestion that preventing prejudice to the defense is a fundamental and independent objective of the Clause is plainly dictum. Never, until today,

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counsel, we have held, does not attach until ```at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.''' *United States* v. *Gouveia*, 467 U. S. 180, 188 (1984) (quoting *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (plurality opinion)). In other words, for purposes of the right to counsel, an ``accused'' must *in fact* be accused of a crime; unlike the speedy trial right, it does *not* attach upon arrest. See, *e.g., Gouveia*, *supra*, at 189–190; *McNeil* v. *Wisconsin,* 501 U. S. ——, —— (1991).

have we confronted a case where a defendant subjected to a lengthy delay after indictment nonetheless failed to suffer any substantial impairment of his liberty. I think it fair to say that *Barker* simply did not contemplate such an unusual situation. Moreover, to the extent that the *Barker* dictum purports to elevate considerations of prejudice to the defense to fundamental and independent status under the Clause, it cannot be deemed to have survived our subsequent decisions in *MacDonald* and *Loud Hawk*.[3]

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[3]Our summary reversal in *Moore* v. *Arizona*, 414 U. S. 25 (1973) *(per curiam),* is not to the contrary. The petitioner there was tried for murder in Arizona ``[a]lmost three years after he was charged and 28 months after he first demanded that Arizona either extradite him from California, where he was serving a prison term, or drop a detainer against him.'' *Ibid.* The Arizona Supreme Court denied him speedy-trial relief on the ground that ``a showing of prejudice to the defense at trial was essential to establish a federal speedy trial claim.'' *Ibid.* We rejected that reasoning, emphasizing the contextual nature of the speedy-trial analysis set forth in *Barker* v. *Wingo,* 407 U. S. 514 (1972).

To hold that a speedy-trial claim can succeed without a showing of actual trial prejudice is not, of course, to hold that such a claim can succeed without a showing of *any prejudice at all*. *Moore*, like *Barker*, is clearly premised on the assumption that the defendant invoking the protection of the Speedy Trial Clause has been subjected to the evils against which the Clause was designed to protect. Indeed, *Moore* makes this assumption quite explicit, observing that prejudice is ```inevitably present in every case to some extent, *for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty*.''' *Moore, supra,*

Just because the Speedy Trial Clause does not independently protect against prejudice to the defense does not, of course, mean that a defendant is utterly unprotected in this regard. To the contrary, ```the applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges,''' *Marion,* 404 U. S., at 322 (quoting *Ewell,* 383 U. S., at 122). These statutes ``represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they `are made for the repose of society and the protection of those who may [during the limitation] . . . have lost their means of defence.''' 404 U. S., at 322 (quoting *Public Schools* v. *Walker,* 9 Wall. 282, 288 (1870)). Because such statutes are fixed by the legislature and not decreed by courts on an ad hoc basis, they ``provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced.'' 404 U. S., at 322.

Furthermore, the Due Process Clause always protects defendants against fundamentally unfair treatment by the government in criminal proceedings. See *United States* v. *Lovasco,* 431 U. S. 783 (1977). As we explained in *Marion,* ``the Due Process Clause . . . would require dismissal of [an] indictment if it were shown at trial that [a] delay . . . caused substantial prejudice to [a defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.'' 404 U. S., at 324. See also *MacDonald,* 456 U. S., at 8 (``The Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is

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at 27 (quoting *Barker*, *supra*, at 537 (WHITE, J., concurring)) (emphasis added). While accurate in the vast majority of cases, that observation is not inevitably true—as this case shows.

protected primarily by the Due Process Clause and by statutes of limitations'').[4]

Therefore, I see no basis for the Court's conclusion that Doggett is entitled to relief under the Speedy Trial Clause *simply* because the Government was negligent in prosecuting him and because the resulting delay may have prejudiced his defense.

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[4]The result in the case may well be explained by an improvident concession. While the United States argued essentially that a defendant's speedy trial rights cannot be violated where he is neither incarcerated nor subject to the anxiety of known criminal charges, it did not claim that this was invariably so. Instead, the United States conceded that a defendant whose liberty was in no way impaired by a pretrial delay could nevertheless succeed in a speedy trial claim if the government had intentionally caused the delay for the specific purpose of prejudicing the defense or injuring the defendant in some other significant way. The defendant in *this* case is not entitled to relief, the United States asserts, because the delay in bringing him to trial was, at worst, caused by negligence.

Not surprisingly, the Court seizes on this concession with relish. See *ante,* at 8, 9 (citing Brief for United States 28, n. 21, Tr. of Oral Arg. 28–34 (Feb. 24, 1992)). For if defendants can bring successful speedy-trial claims even though they have not been ``incarcerated or subjected to other substantial restrictions on their liberty,'' *United States* v. *Loud Hawk,* 474 U. S. 302, 312 (1986), then the Clause's protections necessarily extend beyond those core concerns. If the Clause does not protect a defendant whose liberty has not been impaired by a delay, then it simply does not protect him; its protections cannot be triggered solely by the government's bad motives. The Speedy Trial Clause provides no basis for the line

It remains to be considered, however, whether Doggett is entitled to relief under the Speedy Trial Clause because of the disruption of his life years after the criminal events at issue. In other words, does the Clause protect a right to repose, free from secret or unknown indictments? In my view, it does not, for much the same reasons set forth above.

The common law recognized no right of criminals to repose. ``The maxim of our law has always been `Nullum tempus occurrit regi,' [`time does not run

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the United States advances between negligent governmental conduct, on the one hand, and bad-faith conduct, on the other. As noted in text, the *Due Process Clause* is the proper recourse for an accused whose defense is materially prejudiced by bad-faith governmental behavior. See *United States* v. *Lovasco,* 431 U. S. 783 (1977); cf. *Arizona* v. *Youngblood,* 488 U. S. 51 (1988).

The Court, thus, is certainly entitled to decide *this particular case* adversely to the United States on the ground that the concession undercut the Government's entire argument. But the Court goes much further. It affirmatively endorses the point conceded, thereby embedding in the law the mischievous notion that a defendant is entitled to the protection of the Speedy Trial Clause even though he has suffered none of the harms against which the Clause protects, as long as the government's conduct is sufficiently culpable. I would disregard the concession, for much the same reasons that we sometimes consider an argument that a litigant has waived. See, *e.g.*, *Arcadia* v. *Ohio Power Co.*, 498 U. S. ——, —— (1990) (slip op., at 3); *Kamen* v. *Kemper Financial Services, Inc.,* 500 U. S. ——, —— (1991) (slip op., at 8); *United States* v. *Burke,* 504 U. S. ——, —— (1992) (slip op., at 5–6) (SCALIA, J., concurring in judgment). I see little sense in elevating an unwise concession into unwise law.

against the king'], and as a criminal trial is regarded as an action by the king, it follows that it may be brought at any time.'' 2 J. Stephen, A History of the Criminal Law of England 1, 2 (1883) (noting examples of delays in prosecution ranging from 14 to 35 years). See also F. Wharton, Criminal Pleading and Practice §316, p. 209 (8th ed. 1880) (``While . . . courts look with disfavor on prosecutions that have been unduly delayed, there is, at common law, no absolute limitation which prevents the prosecution of offences after a specified time has arrived'') (footnote omitted); 1 H. Wood, Limitation of Actions §28, p. 117 (4th ed. 1916) (``At common law there is no limitation to criminal proceedings by indictment'').

That is not to deny that our legal system has long recognized the value of repose, both to the individual and to society. But that recognition finds expression not in the sweeping commands of the Constitution, or in the common law, but in any number of specific statutes of limitations enacted by the federal and state legislatures. Such statutes not only protect a defendant from prejudice to his defense (as discussed above), but also balance his interest in repose against society's interest in the apprehension and punishment of criminals. Cf. *Toussie* v. *United States,* 397 U. S. 112, 114–115 (1970). In general, the graver the offense, the longer the limitations period; indeed, many serious offenses, such as murder, typically carry no limitations period at all. See *e.g.,* Note, The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution, 102 U. Pa. L. Rev. 630, 652–653 (1954) (comparing state statutes of limitations for various crimes); Uelmen, Making Sense out of the California Criminal Statute of Limitations, 15 Pac. L. J. 35, 76–79 (1983) (same). These statutes refute the notion that our society ever has recognized any general right of criminals to repose.

Doggett, however, asks us to hold that a defendant's interest in repose is a value

independently protected by the Speedy Trial Clause. He emphasizes that at the time of his arrest he was ``leading a normal, productive and law-abiding life,'' and that his ``arrest and prosecution at this late date interrupted his life as a productive member of society and forced him to answer for actions taken in the distant past.'' Supplemental Brief for Petitioner on Reargument 2. However uplifting this tale of personal redemption, our task is to illuminate the protections of the Speedy Trial Clause, not to take the measure of one man's life.

There is no basis for concluding that the disruption of an accused's life years after the commission of his alleged crime is an evil independently protected by the Speedy Trial Clause. Such disruption occurs *regardless* of whether the individual is under indictment during the period of delay. Thus, had Doggett been indicted shortly before his 1988 arrest rather than shortly after his 1980 crime, his repose would have been equally shattered—but he would not have even a colorable speedy-trial claim. To recognize a constitutional right to repose is to recognize a right to be tried speedily *after the offense*. That would, of course, convert the Speedy Trial Clause into a constitutional statute of limitations—a result with no basis in the text or history of the Clause or in our precedents.

Our constitutional law has become ever more complex in recent decades. That is, in itself, a regrettable development, for the law draws force from the clarity of its command and the certainty of its application. As the complexity of legal doctrines increases, moreover, so too does the danger that their foundational principles will become obscured. I fear that danger has been realized here. So engrossed is the Court in applying the multifactor balancing test set forth in *Barker* that it loses sight of

the nature and purpose of the speedy trial guarantee set forth in the Sixth Amendment. The Court's error, in my view, lies not so much in its particular application of the *Barker* test to the facts of this case, but more fundamentally in its failure to recognize that the speedy trial guarantee cannot be violated—and thus *Barker* does not apply at all—when an accused is *entirely unaware* of a pending indictment against him.

I do not mean to question *Barker*'s approach, but merely its scope. We have long recognized that whether an accused has been denied his right to a speedy trial ``depends upon circumstances.'' *Beavers* v. *Haubert*, 198 U. S. 77, 87 (1905). By setting forth a number of relevant factors, *Barker* provided this contextual inquiry with at least a modicum of structure. But *Barker*'s factors now appear to have taken on a life of their own. Instead of simply guiding the inquiry whether an individual *who has been deprived of a liberty protected by the Clause* is entitled to relief, *Barker* has become a source for new liberties under the Clause. In my view, application of *Barker* presupposes that an accused has been subjected to the evils against which the Speedy Trial Clause is directed—and, as I have explained, neither pretrial delay nor the disruption of life is itself such an evil.[5]

Today's opinion, I fear, will transform the courts of the land into boards of law-enforcement supervision. For the Court compels dismissal of the charges

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[5]To recognize that neither of these considerations provides an independent ground for speedy-trial relief, of course, is not to say that neither of them is *relevant* to speedy-trial analysis. Both may be appropriate considerations in the highly contextual inquiry whether a defendant who *has* been deprived of a liberty protected by the Clause is entitled to relief. See *Barker*, 407 U. S., at 530–533.

against Doggett not because he was harmed in any way by the delay between his indictment and arrest,[6] but simply because the Government's efforts to catch him are found wanting. Indeed, the Court expressly concedes that ``if the Government had pursued Doggett with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail.'' *Ante*, at 9. Our function, however, is not to slap the Government on the wrist for sloppy work or misplaced priorities, but to protect the legal rights of those individuals harmed thereby. By divorcing the Speedy Trial Clause from all considerations of prejudice to an accused, the Court positively invites the Nation's judges to indulge in ad hoc and result-driven second-guessing of the government's investigatory efforts. Our Constitution neither contemplates nor tolerates such a role. I respectfully dissent.

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[6]It is quite likely, in fact, that the delay *benefitted* Doggett. At the time of his arrest, he had been living an apparently normal, law-abiding life for some five years—a point not lost on the District Court Judge, who, instead of imposing a prison term, sentenced him to three years' probation and a $1000 fine. App. 114–115. Thus, the delay gave Doggett the opportunity to prove what most defendants can only promise: that he no longer posed a threat to society. There can be little doubt that, had he been tried immediately after his cocaine-importation activities, he would have received a harsher sentence.