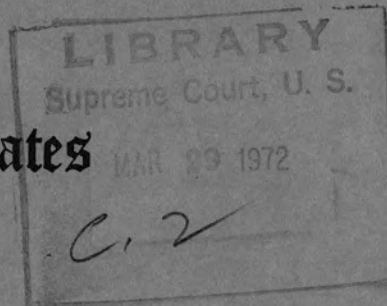


In the

Supreme Court of the United States



CHALES O. DUKES,

Petitioner,

vs.

No. 71-5172

WARDEN, CONNECTICUT STATE
PRISON,

Respondent.

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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES O. DUKES,
Petitioner
vs.
WARDEN, CONNECTICUT STATE
PRISON,
Respondent
No. 71-5172
- - - - -X

Washington, D.C.
Tuesday, March 21, 1972

The above-entitled matter came on for argument
at 1:32 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice.

APPEARANCES:

JAMES A. WADE, ESQ., 799 Main Street,
Hartford, Connecticut 06103, for the Petitioner
JOHN D. LABELLE, ESQ., 95 Washington Street,
Hartford, Connecticut, for the Respondent

C O N T E N T SPAGEORAL ARGUMENT OF:

James A. Wade, Esq.,
for Petitioner

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John D. LaBelle, Esq.
for Respondent

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REBUTTAL ARGUMENT OF:

James A. Wade, Esq.,
for Petitioner

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-5172, Dukes against Warden, Connecticut State Prison.

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

ORAL ARGUMENT OF JAMES A. WADE, ESQ.

ON BEHALF OF PETITIONER

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

I was intrigued this morning to hear the comments of the Court regarding the right to counsel and the need of counsel in the Wade-Gilbert cases, and I might say preliminarily that I am not related to Mr. Wade that this Court immortalized.

This case, I think, the issue raised here focusses on the need to have the undivided loyalty of counsel throughout every stage of criminal cases. If I could recite briefly the facts herein, because I feel they are very important to set the proper framework, my client, Mr. Dukes, was arrested in Hartford in March of 1967 and charged with a violation of Connecticut's Uniform Narcotics Law. We retained a Hartford attorney by the name of Zaccagnino of the law firm of Zaccagnino, Linardos and Delaney to represent him and indeed that office nettered appearance in the lower court for preliminary hearing on the arrest and charge.

Then on May 9, 1967, when the matter was set down for trial in the Hartford Superior Court, Mr. Dukes appeared with his attorney, Mr. Zaccagnino, and at that time Mr. Zaccagnino moved that he be permitted to withdraw from the action as counsel for Dukes, because as he put it to the court at that time, he had a slight conflict with his client. That matter was argued before the trial judge at that point, and the court denied the motion for Mr. Zaccagnino to withdraw but continued the case for 24 hours to give Dukes a chance to get another lawyer.

QUESTION: Mr. Wade, from your acquaintance with the record, what is the fairest interpretation of Mr. Zaccagnino's remark to the trial judge that he had something of a conflict with his client?

MR. WADE: My judgment would be that he was trying to convince Dukes to plead guilty and that Dukes did not want to plead guilty, and that this was the conflict vis-a-vis Zaccagnino and Dukes. I can't say fairly at that point, Mr. Zaccagnino was trying to apprise the court there was some other conflict other than that. That would be my best judgment, Mr. Justice Rehnquist.

In any case, when Mr. Dukes left the courtroom on May 9, he went out in the hallway of the court and was rearrested by the Hartford Police and taken to the Hartford Police Station on an unrelated charge.

While he was at the police station, he took some pills, became sick, was taken to a hospital and stayed there for a week and then came back into court on May 16 with Mr. Zaccagnino to court on May 16 with Mr. Zaccagnino's law partner, Mr. Delaney, and at that time entered a plea of guilty to the narcotics charge and amendment to the information charging him with larceny and receiving stolen goods.

At that time, the trial judge made inquiry about the voluntariness of the plea. The matter was set down for June 2 for sentencing, but on June 2, the pre-sentencing report was not ready on the Dukes matter, so the case was continued again.

Mr. Zaccagnino was in court with his client, Mr. Dukes, for sentencing but it went over another two weeks, but on the second, Mr. Zaccagnino appeared before Judge Devlin of the Hartford Superior Court with two girls whom he was representing on charges that were entirely unrelated to Mr. Dukes' charges. But I might say that Mr. Dukes was a codefendant in the same case with the girls and was represented by another Hartford attorney in that case.

QUESTION: Was that a narcotics case also?

MR. WADE: No, that was a conspiracy to obtain money by false premises, your Honor.

So at the time of sentencing of the girls and by the way, they had pled guilty earlier to the charge, Mr.

Zaccagnino stood up to make remarks on sentencing on behalf of the girls. If I could indulge the court a moment here, reading from page 68 of the appendix, during his remarks on sentencing, Mr. Zaccagnino speaking on behalf of the girls said that both of them came under the influence of Charles Dukes. Now, how they could get into the position of coming under the influence of somebody like him, if your Honor please, is the big problem here that I think is the cause of the whole situation, and in the last paragraph there, "as a result of their willingness to cooperate with the State Police, they capitulated Dukes into making a plea, I think, your Honor, since I was on both sides of the case, having been on the other side of the other case, I can tell your Honor it was these girls, because of their refusal, not refusal, not to cooperate with Dukes and to testify against him that capitulated him into taking a plea on which he will be shortly removed from society."

On page 70 of the appendix, once again referring to the girls and their cooperation with the police, Mr. Zaccagnino said to the court, "It is obvious from looking at the report who the most culpable person is because he had all the instruments with which to dupe these girls."

QUESTION: Was Mr. Zaccagnino referring to the plea in the conspiracy case?

MR. WADE: No, your Honor.

QUESTION: The narcotics case?

MR. WADE: That's correct. Then on June 16, two weeks later, Mr. Zaccagnino and Dukes were back before the same trial judge, Judge Devlin, who had heard these remarks about the girls. They were back in front of him at that time and at this point, Dukes himself moved the court that the guilty plea be vacated and that he wanted to get another lawyer, and he did not want Mr. Zaccagnino to continue to represent him.

Well, the court denied that motion and ordered that the case go forward and thereupon imposed a sentence of not less than five or more than ten years on Mr. Dukes.

Now, it is our contention that the conduct of counsel for Dukes at that time was such as to render the entire proceeding, including the guilty plea, invalid. It is our contention that he was denied the effective assistance of counsel--

QUESTION: Could I ask you if in the other proceeding where he was a co-defendant with some girls, had he been sentenced in that proceeding?

MR. WADE: No, not at that point, your Honor.

QUESTION: Was he later?

MR. WADE: That was later disposed of.

QUESTION: He pleaded guilty in that proceeding?

MR. WADE: If I am not mistaken, and I think Mr.

1 Mr. LaBelle can verify this, I believe it was nolle prossed
2 at a later date, after the sentencing in this case.

3 QUESTION: Nolle prossed against him?

4 MR. WADE: Yes, your Honor.

5 QUESTION: Even though he had already pleaded guilty?

6 MR. WADE: No, he had not pled at that point, you
7 see. The girls at that point had pled guilty but he had not.

8 QUESTION: Oh, I see.

9 MR. WADE: I might also point out there were several
10 charges pending against him, and most of these other matters
11 were consolidated at a later point and the State's Attorney
12 can advise you, but I think--

13 QUESTION: The reason for my question was whether
14 any elements of a bargain between the prosecutor and Dukes
15 with respect to these two proceedings--

16 MR. WADE: No question at this point. He got the
17 sentence that the state and Mr. Zaccagnino had bargained
18 about. That is one thing that is pointed out.

19 QUESTION: And was part of the bargain that the
20 other charge be nolle'd?

21 MR. WADE: That I can't answer, your Honor. I was
22 not privy to those negotiations. I was not representing him
23 at the time. I simply do not know.

24 QUESTION: Was the prosecutor the same prosecutor?

25 MR. WADE: Yes, Mr. LaBelle was the same prosecutor.

1 QUESTION: Is it reasonable to assume there was
2 some connection between the two?

3 MR. WADE: I'll let Mr. LaBelle answer that, Mr.
4 Chief Justice, rather than I.

5 QUESTION: Let's assume there was--it may be
6 contrary to fact, but let's assume there was--then there
7 would be very little that Zaccagnino could do to hurt Mr.
8 Dukes.

9 MR. WADE: Well, I beg to differ, Mr. Justice
10 White. The first reason I differ is that I don't think at
11 this point the law has reached a point where negotiations
12 between a prosecutor and defense counsel are binding on the
13 court.

14 QUESTION: Oh, I agree with that, but if Dukes
15 wasn't going to get hurt in the other proceeding anyway,
16 Zaccagnino's remarks at that time didn't hurt him, did
17 it?

18 MR. WADE: Well, I would refer the court then to
19 the reasoning of the Pennsylvania Court in Commonwealth v.
20 Cullen. That was a situation where the defendant, co-
21 defendants represented by a single counsel received exactly
22 the sentence that had been bargained for, but the Pennsyl-
23 vania Supreme Court reversed, saying in view of the preju-
24 dicial conflict of interest, they felt that you had to go
25 all the way back to the guilt plea and decide was he

1 getting adequate advice at the time he entered the guilty
2 plea.

3 Q. Did Mr. Zaccagnino have Mr. Dukes'
4 interests at heart? Was he giving him proper information?
5 Indeed with another counsel who was in there independently
6 of Mr. Zaccagnino, look at the evidence these girls might
7 be willing to give vis-a-vis Dukes and advise his client
8 that the evidence was either admissible or not admissible?
9 I think that your Honor has to look to the fact we're not
10 looking at sentence here; we are going back to the guilty
11 plea and questioning whether or not at that point he was
12 denied the effective assistance of his counsel, and we
13 submit that the on-the-record statement of Mr. Zaccagnino
14 manifests that conflict of interest that existed.

15 A. Now this court has not really spoken to this point
16 since 1942, when the Black decision was handed down and that
17 was a situation where the defendant himself was an attorney
18 and there was single counsel representing him and another
19 co-defendant. The defendant Glasser was a former Assistant
20 United States Attorney charged with conspiracy to defraud
21 the United States Government. This Court at that point was
22 very explicit to point out that in a criminal proceeding,
23 the defendant should have representing him a person whose
24 interest are untrammelled by possible conflicts of interest,
25 and the court laid down a touchstone which the lower

1 courts have all dealt with, as far as I can see, since 1942.
2 They laid down as a touchstone to determine whether or not
3 that assistance of counsel was untrammelled, was whether
4 or not it was as effective as it might have been. Was the
5 assistance of counsel as effective as it would have been
6 had there not been this conflict.

7 Now I submit in this case, clearly Mr. Zaccagnino's
8 representation was not as effective as it might have been.
9 The obvious reason is that he was appearing before a
10 trial judge on June 2 heaping blame on his client's shoulders
11 on behalf of the girls, saying that these poor girls were
12 led down the path of perdition by Dukes, and then two
13 weeks later he had to appear before the same judge and
14 implore mercy for his client whom he had just excoriated
15 two weeks before.

16 I submit at the very least that Mr. Zaccagnino had
17 a credibility problem with the trial judge who was sitting
18 listening to his arguments.

19 QUESTION: What if this was all true?

20 MR. WADE: I beg your pardon?

21 QUESTION: What if these observations of Mr.
22 Zaccagnino were all true?

23 MR. WADE: Well, if that is the case, then, Mr.
24 Chief Justice, it would seem to me the arguments of counsel
25 were meaningless.

1 QUESTION: Doesn't it often happen that in a
2 sentencing process, a lawyer in an effort to present miti-
3 gating circumstances will make a lot of disparaging state-
4 ments about his client by way of confession and avoidance?

5 MR. WADE: Yes, but this is a situation where
6 he was speaking in behalf of another client.

7 QUESTION: I am speaking of the sentencing of the
8 particular client of this particular man. What is so
9 different about making that comparison in this context as
10 it happened here two weeks earlier?

11 MR. WADE: Well, Mr. Chi-f Justice, I can answer
12 that this way. It seems to me from the reading of many
13 cases, lower court cases have dealt with this issue.
14 They've gone so far as to say that even if the trial counsel
15 ignores one of his clients, and it is a situation where a
16 lawyer representing two defendants and gets up in sentenc-
17 ing and says some nice things about one individual and
18 doesn't say anything at all about the other, the courts have
19 held that to be a conflict of interest, that the client who
20 receives no attention from his lawyer is not getting the
21 representation he is entitled to. In other words, it is not
22 as effective as it might have been had the conflict not
23 existed.

24 Now, Mr. LaBelle in his brief in this Court has
25 raised the issue of prejudice. Must you show prejudice?

1 Well, I submit that because the attorney-client relationship
2 is what it is, and that the attorney is taken into the confi-
3 dence of his client, that it should not be the burden of
4 the defendant here in the ordinary sense to have to show
5 the prejudice that may result.

6 Mr. Justice White raised the question whether
7 or not the sentence was a result of a bargain, and then
8 if he got his bargain, what is he complaining about?

9 Well, as I said earlier, that bargain was certainly not
10 binding on the trial judge. Other permissible penalties
11 could have been handed down. The whole question of how the
12 trial court looked upon Dukes before his eyes, it seems
13 to me, is something that can't be answered in this Court
14 because we don't have that trial judge before us.

15 QUESTION: Well, I suppose part of your claim is
16 that if Zaccagnino had not had a conflict, he might have made
17 a better bargain?

18 MR. WADE: That is possible. He might have to go
19 to trial. You have to remember, your Honor, that throughout
20 this proceeding, Dukes had been saying, "I am not guilty. I
21 plead not guilty. I don't want to go forward." He did it
22 in the first instance on the original trial date. He then
23 pled guilty. He came back and said, "I want to vacate my
24 plea." He kept saying, "I'm not guilty."

25 QUESTION: I see in your brief you say that when

1 Zaccagnino was talking in the other case, he pointed out
2 because of their cooperation with the state police, they
3 capitulated Dukes into pleading guilty.

4 MR. WADE: That's correct.

5 QUESTION: So he had pleaded guilty in the other
6 case.

7 MR. WADE: In Dukes' case. You see, the girls had
8 been involved with Dukes over a series of events. The girls
9 had been arrested on the particular charge that they
10 were arrested on, but they were cooperating with the
11 police not only on that case but on the one we are discussing.

12 QUESTION: You mean he had actually discussed the
13 case we have here when he was talking at the sentencing of
14 the girls in the other case?

15 MR. WADE: That is correct.

16 QUESTION: He mentioned this case?

17 MR. WADE: That is correct. As he said, he had
18 both sides of the case, Mr. Zaccagnino did. He knew what
19 the girls were going to say, he knew what they were going
20 to testify to, and how it would be utilized by the state in
21 evidence against Dukes, so he and his partner Mr. Delaney
22 kept trying to convince Dukes to plead guilty because they
23 knew that these girls were going to come and say things
24 about him on this case, and that is why, as Mr. Zaccagnino
25 says, he was capitulated into taking a plea.

1 QUESTION: Is the end result of your position that
2 there must be separate counsel for each of multiple defendants?

3 MR. WADE: That is my position, yes, it is.

4 QUESTION: In all cases?

5 MR. WADE: Yes, it is.

6 QUESTION: Even though counsel is retained and not
7 appointed?

8 MR. WADE: Yes. Campbell vs. the United States,
9 Fourth Circuit I believe it was, said there was no distinction
10 between retained and appointed counsel, that there must not
11 be the conflict. If the conflict exists, it is irrelevant
12 whether it is retained or appointed.

13 QUESTION: Well, what if two defendants want to have
14 one counsel and are fully advised?

15 MR. WADE: All right, that can be handled, Mr. Jus-
16 tice Rehnquist, by adequate examination by the trial court,
17 but he should point out to the defendant all the possible
18 ramifications that follow from that, and once again, if
19 there is knowing, intelligent waiver of his Sixth Amendment
20 rights to separate, effective counsel, then I would submit
21 the defendant can so do.

22 QUESTION: Why is it the state's responsibility
23 if the man goes and retains counsel and the counsel breaches
24 the canons of ethics in some way?

25 MR. WADE: Well, my understanding of the criminal

1 procedure is that the state is not interested in convictions,
2 they're interested in justice, and the state has the same
3 interests at heart as the defense counsel, the truth.
4 They are looking for the truth.

5 QUESTION: Well, they approach it in a somewhat
6 different way, though.

7 MR. WADE: Obviously, because of the adversary
8 state of our law, but the point is, if the state is concerned
9 only with convicting guilty persons, then they too are
10 concerned with assuring that all of his constitutional
11 rights are protected, regardless of whether that attorney,
12 that defense lawyer is, as you say, breaching the canons
13 of ethics. That is the concern of the state also to make
14 sure that that is not being done, and therefore the trial
15 judge who sits there, he is the referee and even if the
16 state does not raise it as they probably would not because
17 of the adversary circumstances, the trial court has a
18 responsibility.

19 QUESTION: Do you think the trial judge could say,
20 "I don't think this lawyer whom you paid a thousand dollars
21 to, can do the job"?

22 MR. WADE: As Mr. Justice White said in McMann
23 vs. Richardson, a year ago, which was a trilogy of cases
24 involving guilty pleas, at that time he said he would leave
25 to the trial courts the responsibility of ensuring the

standards of competence, of the trial attorney representing the defendants before the court of the various states.

QUESTION: Well, what I'm saying is if the trial judge says, "I don't think this man is competent," and the man who has hired him and paid him a thousand bucks--

MR. WADE: Yes, Mr. Justice?

QUESTION: Well, what happens?

MR. WADE: I think you have to take it on a --

QUESTION: What happens?

MR. WADE: In that situation?

QUESTION: Yes.

MR. WADE: I think if the defense counsel is incompetent and it is before a trial--

QUESTION: Well, who decides whether he is competent or not?

MR. WADE: Well, I think the trial judge.

QUESTION: Why did he take the bar exam? Does the judge pass on the qualifications of trial lawyers now?

MR. WADE: Well, all I can say in response to that, I practice in a law firm that has some 35 lawyers in it, but of that number, I would say 30 have not been in a trial court since they passed the bar exam. They are simply not trial lawyers; they don't handle criminal defense cases.

QUESTION: Well, this man has picked out this lawyer. This is his lawyer, "counsel of his choice," and he has

1 paid him good cash money and the judge says, "Uh-uh."
2 Does the judge get him a better lawyer or something?

3 MR. WADE: No, he may not do that. He might decide
4 that public defenders should get into the case.

5 QUESTION: And make the man take the public defender?

6 MR. WADE: That's correct.

7 QUESTION: But he doesn't want the public defender.
8 He doesn't want the public defender.

9 MR. WADE: Well, if on the facts as we have here,
10 the lawyer is--

11 QUESTION: We're not talking about the facts here.
12 It's not in this case, and those are the facts I'm on.

13 MR. WADE: You are saying where the counsel himself
14 is incompetent and the trial judge thinks he is.

15 QUESTION: No, I didn't say that. I said the trial
16 judge says, "I think you are incompetent, so you can't
17 defend this man."

18 MR. WADE: Yes. I would submit he has a duty to
19 assure that he's getting fair, adequate representation;
20 that it is effective representation.

21 QUESTION: Maybe the judge should represent him,
22 himself.

23 MR. WADE: I think at some point we have to have
24 someone there that is going to--

25 QUESTION: I think you have gone mighty far afield

1 on this case. I am just speaking formyself.

2 MR. WADE: Yes, all I can say is--

3 QUESTION: Is there any charge here that this
4 man's lawyer is incompetent?

5 MR. WADE: No, no. Far from that.

6 QUESTION: Well, where do we get to the incompetent
7 point?

8 MR. WADE: All I am saying--he's a very competent
9 lawyer--all I'm saying is that in this case, he had a conflict
10 of interest that destroyed his effectiveness. Not that he
11 is incompetent, but his effective assistance of counsel went
12 out the window when he had the interests of these girls
13 co-equal with the interests of his own client, Mr. Dukes.
14 Now could he, Mr. Zaccagnino, stand up and lay his burden
15 of blame on the man that he himself was supposed to represent?
16 That's all I'm saying in this situation.

17 QUESTION: What if this were a civil action, Mr. Wade,
18 and a breach of ethics had taken place? Would the client who
19 was a victim of that breach of ethics have a constitutional
20 plan to go beyond the state court and come here?

21 MR. WADE: Well, that would be a constitutional
22 claim because I don't think the Sixth Amendment protection
23 there would apply, simply because the Sixth Amendment guarantees
24 as I understand it, is intended to protect a citizen from
25 activities by the state against him, so in a civil claim,

1 there the client might have a civil remedy against
2 his attorney, assuming he could show some sort of activity
3 on his part that denigrated his own case, and thereby remove
4 the attorney from the sphere of proper representation.

5 QUESTION: He wouldn't have a due process claim under
6 the fourteenth Amendment just because the state conducted
7 the trial?

8 MR. WADE: No, I don't think there would be suf-
9 ficient state action there in order to bring it; that's my
10 opinion. I have no law to support that, but I don't think
11 there would be a sufficient state action simply because the
12 state permitted its facilities to be utilized and its judge
13 to hear the matter, to raise a due process argument in that
14 situation.

15 Now, Mr. LaBelle in his brief has also raised the
16 issue of the types of conflict that might exist and that the
17 true conflict of interest cases arise where there are the
18 same defendants being represented out of the same arrest.
19 Well, I submit to the court cases in which it has been held
20 that simply isn't true. There are situations where a lawyer
21 has represented a defendant in a burglary case and quite
22 parenthetically he represented the victim of this burglary
23 in an entirely unrelated civil transaction which had nothing
24 to do with the particular burglary in question, and there the
25 court held that was a conflict of interest, for that lawyer

1 to be in that case representing this particular criminal
2 defendant when he had represented the victim of the burglary
3 elsewhere.

4 QUESTION: Did the court hold it a constitutional
5 violation?

6 MR. WADE: Yes, relying on Glasser, effective assist-
7 ance of counsel once again, the Sixth Amendment right.
8 Similarly a case I cited, Whittaker against the State,
9 in which the defendant was charged with statutory rape and
10 the complainant was the mother of the girl in question from
11 a separate marriage, previous marriage. She brought a
12 complaint against her own husband. Having done so, she went
13 out and hired a lawyer and an aunt of hers was going to
14 pay the lawyer's fee. Well, they went to the lawyer and
15 they said, "Look. We want this case taken care of as
16 quickly and as quietly as possible, with no fuss." The
17 lawyer said fine. He took a retainer, appeared in a
18 criminal action, pled the man guilty. At the time of sen-
19 tencing, he said virtually nothing about his purported client
20 who had not hired him. There the court once again looking
21 to another interest, other than his own client for
22 his retainer, for his responsibility, for his duty. Obviously
23 in the Whittaker case, the lawyer was doing what his retainer
24 had told him to do, handle it quickly and quietly with no
25 fuss.

1 But that isn't the point. The point is the
2 defendant is entitled to representation vis-a-vis himself,
3 because he's the one who stands before the bar of the state
4 with the state bringing action against him. He's not
5 answerable to his wife in the criminal sense. He's
6 answerable to the state in the criminal sense.

7 QUESTION: If a parent retains counsel, I suppose
8 under your theory there would be a conflict of interest
9 there? Maybe the father wants the thing hushed up, thinking
10 that is in the best interests of the juvenile, yet the
11 juvenile's/^{separate}lawyer might come along and say, "Well, this man
12 should have had a trial," and possibly might have been found
13 not delinquent.

14 MR. WADE: That possibility does exist, I don't
15 quarrel with that, and it happens frequently on the civil
16 side obviously, when civil litigation takes place and a child
17 is, say, injured in an automobile accident. Then a guardian
18 ad litem is appointed for the child and not infrequently
19 if one of the defendants happens to be a parent, then
20 that child has a particular financial interest that is
21 represented throughout. Indeed, under our practice in
22 Connecticut, a probate court has to intervene in cases of
23 settlement above certain figures, to ensure that the
24 settlement is proper, so it is a possibility that in a
25 juvenile action, the court would have to scrutinize with more

1 care to make sure that conflict is not present.

2 QUESTION: The doctrine would have far-reaching
3 implications.

4 MR. WADE: Very clearly. I don't quarrel with that
5 at all, but as I said earlier, this court has not really
6 dealt with this subject since 1942.

7 QUESTION: I suppose Dukes knew that Zaccagnino rep-
8 resented the girls when he hired him?

9 MR. WADE: Oh, yes. Oh, yes, we don't quarrel with
10 that.

11 QUESTION: And Zaccagnino in one of the early
12 proceedings tried to withdraw before the Judge?

13 MR. WADE: Yes.

14 QUESTION: And at that time, Dukes objected to the
15 withdrawal?

16 MR. WADE: No, no. He wanted him to get out. At
17 that time, Dukes was saying, "I don't want Mr. Zaccagnino."
18 He stood up in open court and said it himself. "I want
19 another lawyer," and the trial judge--

20 QUESTION: Wasn't that enough?

21 MR. WADE: Right. He said, "I'll give you 24 hours
22 to get another lawyer. I'll be ready to start this case
23 tomorrow morning." That is when Dukes went out, on his way
24 to getting another lawyer, and wound up back in the Hartford
25 jail on another arrest, you see, so that is the key here.

1 QUESTION: And Zaccagnino said at the time that
2 there was a conflict between his client and himself, and
3 it was not financial?

4 MR. WADE: Yes, that is correct, and in fairness
5 to the state and Mr. Zaccagnino, I don't believe at that
6 point he was trying to say to the court, "I have this
7 conflict of interest vis-a-vis the girls." I think what
8 he was trying to say was that "My client and I are arguing
9 over whether or not he should plead guilty, and therefore
10 he wants me out of the case."

11 QUESTION: Isn't it true you were arguing about who
12 was going to pay what money?

13 MR. WADE: No, I don't believe so, because this is
14 not in the record of course, but the money had been paid.

15 QUESTION: By whom?

16 MR. WADE: By himself.

17 QUESTION: Did the girls pay?

18 MR. WADE: I've no knowledge of that. I have no
19 knowledge of that. In summary, what I would urge upon this
20 Court is that if, as you said this morning, that the right to
21 counsel and the duties of counsel are important throughout
22 every stage of the criminal case, what we had missing in
23 this case was that very important element. We had a lawyer
24 who did not have his own client's interest exclusively at
25 heart. He had the interest of another client in there and

1 to me this is as pure a case of conflict of interest as
2 this Court may ever see. I can't conceive of a situation
3 where on the record you'll have a lawyer in one case
4 standing up before the trial judge and pinning the blame
5 on his own client in another action because of the conduct
6 of another client. It seems to me that if the Court in this
7 case finds no conflict of interest, then indeed in no case
8 would you ever find a conflict of interest, and therefore
9 we would urge that the guilty plea that Mr. Dukes entered
10 be set aside, and that the matter be remanded back to the
11 state court for whatever proceedings are appropriate.

12 MR. CHIEF JUSTICE BURGER:

13 Mr. LaBelle.

14 ORAL ARGUMENT OF JOHN D. LABELLE, ESQ.

15 ON BEHALF OF RESPONDENT

16 MR. LABELLE: Mr. Chief Justice, may it please the
17 Court:

18 The petitioner here presupposes two things; he
19 assumes that there is a conflict of interest and that he
20 bases his whole argument on that, and he also presupposes
21 that there was prejudice to the petitioner. Neither of these
22 exist. In order to have a conflict of interest, it requires
23 more than just joint representation. It also requires that
24 there be antagonistic interests between the people jointly
25 represented.

1 Now, you don't have that where you have two separate
2 cases, one a narcotics-larceny case, one the girls' case.

3 Now let me give you the factual background here
4 so the Court will understand just what happened, and you'll see
5 there is no conflict of interest here and never was. In
6 the check case with the girls, Dukes was involved. He was
7 using these girls going all over the State of Connecticut
8 cashing checks. The girls would cash the check he would
9 furnish to them. Some were travelers checks, some were money
10 orders, some were stolen checks with names imprinted.

11 He gave driver's licenses and other identification
12 and this went around in most of the towns of around Hartford
13 and in Hartford and county, into New Haven County, into
14 New Haven County.

15 Now the state carried out this investigation in
16 November and December 1966 and as a result of it, the girls
17 were picked up and when they were picked up, they told the
18 state police the whole story verse by verse. They gave
19 affidavits, the whole thing, and as a result of that, of course
20 they were arrested and by the way, there were four girls
21 and another man involved in this besides Dukes. Conse-
22 quently, a warrant was issued for the arrest of the girls
23 in December of 1966 and a warrant was issued for Dukes.
24 Now, in the warrant for the arrest of Dukes, one of the
25 affidavits supporting that warrant was a statement from one

1 of the girls about Dukes' involvement in the check case,
2 so Dukes knew it from the arrest warrant. In Dukes' case,
3 also there were two other charges added to his warrant that
4 had nothing to do with the check case, two other narcotics
5 sales.

6 All right, that case gets into the superior court.
7 The girls had cooperated, they get Mr. Zaccagnino to represent
8 them. He was representing the girls and Dukes knew it.
9 Dukes also knew his involvement with the girls. While
10 Mr. Zaccagnino was representing the girls in the check case,
11 Mr. Dukes went to him and said, "Will you represent me in a
12 narcotics case," a new narcotics case, not the one that was
13 involved in the bench warrant, because on March 14, Dukes
14 got arrested again for selling narcotics and this is the
15 case that is in the appendix. This is the case that is
16 in the appendix, where the search warrant is there, where
17 they went in with a search warrant. They had made a purchase
18 from Dukes immediately before the warrant was executed.
19 They went to his house and found all kinds of narcotics,
20 a perfectly good, solid, thorough case; and also found
21 stolen goods. That's the two counts that he pleaded to.

22 Now, when these cases all came to the court and I
23 had some more cases in superior court against Dukes, I looked
24 in the files and I said the case to try is the last narcotics
25 case, the one where there was a search warrant, where we had

1 a cold case. Dukes was a second offender, he was warned,
2 and I set the case down for trial and told Mr. Zaccagnino
3 to be ready as soon as we got to court. The records show
4 that Mr. Zaccagnino was there and this, by the way, was
5 the week of the second of May 1967.

6 Mr. Zaccagnino was there, he hung around for that
7 week and on May 9, it came on. We got a courtroom, and now
8 you come to the proceedings in the court on May 9.
9 Meanwhile, the girls' case had been going along separate.
10 There wasn't any connection with this narcotics case. The
11 girls were not witnesses in it, they had nothing to do
12 with it. It has never been claimed they had anything to do
13 with it. The girls pleaded guilty, and their cases
14 were waiting to be sentenced, and there was no connection
15 whatsoever with this case that was ready for trial.

16 Now, when he got ready for trial, he had to be
17 pinned to the mat in order to get the plea and that's when
18 this conflict originally came up between Mr. Zaccagnino
19 and Mr. Dukes, and it says in the colloquy on May 9,
20 "There's a slight conflict between my client and me,"
21 because Mr. Zaccagnino in his best judgment was advising
22 him, "You've got to plead guilty. You've got all these
23 cases pending against you." He had warrants outstanding on
24 the check charges in New Haven and Fairfield County.
25 He had this good case we were getting to try which was a

1 old case, and Mr. Zaccagnino knew it, and so he was saying
2 to Dukes, "Your only chance here is to plead guilty
3 and wipe up all of these cases at once, and I'll go to the
4 State's Attorney and get a recommendation," which he did.
5 It didn't go on May 9 because it was continued because of
6 Mr. Zaccagnino advising him and his not taking his advice
7 and it was continued for one day. Then it was postponed
8 for a week and went over to May 16.

9 On May 16, Dukes came back into court with Mr.
10 Delaney. Mr. Zaccagnino's partner, now, and the same thing
11 happened all over again. I was ready in court with a court-
12 room and jury and the witnesses to put the narcotics case on,
13 and finally, after a lot of negotiations during the morning,
14 Mr. Dukes pleaded guilty and the proceedings of May 16
15 show that, and this is when Judge Johnson now was the judge.

16 QUESTION: Well, at that time had you had some con-
17 versations with Zaccagnino?

18 MR. LABELLE: Sure, and the recommendation was to be
19 made, this was an agreed recommendation--

20 QUESTION: Were the other cases--

21 MR. LABELLE: All the other cases.

22 QUESTION: Including the girls' case?

23 MR. LABELLE: It was concurrent sentences including
24 the New Haven and Fairfield County cases. So he pleaded guilty.
25 Now, Judge Johnson made the inquiry, "Now, you were here

1 last week with Mr. Zaccagnino, and there seemed to be some
2 doubt in your mind about whether you wanted Mr. Zaccagnino
3 and you were looking to get other counsel. Are you satisfied
4 today with his partner, Mr. Delaney," and you can see all
5 this in the May 16 transcript; and then the questions,
6 you know, you're giving up your right to trial now, the
7 state is ready to go forward today, you know that, and so on.

8 The guilty plea was accepted, and it was referred
9 for a pre-sentence report. It was assigned for June 2 for
10 disposition.

11 Mr. Zaccagnino in accordance with the plea bar-
12 gaining arrangement with me asked me to get the cases
13 consolidated from Fairfield County and New Haven County
14 plus all the cases we had in Hartford County, and you will
15 note from the appendix in the Respondent's brief that
16 in order to consolidate those cases, it is required that
17 the guilty pleas be entered. Both state's attorneys have
18 to agree to the consolidation, and the statute says that he
19 must plead guilty to all cases, which he was going to do.

20 It went to June 2, the day it was assigned for
21 disposition, and you will see there is a short proceeding on
22 June 2, where Mr. Zaccagnino says, "This case, your Honor,
23 has to be postponed because the consolidated cases from the
24 other counties haven't got here." Also, the pre-sentence
25 report was not ready. So it was put down for disposition now

1 to June 16.

2 Now that morning in court on June 2, Mr. Zaccagnino
3 then appeared with the girls in the check case because it
4 happened to be that the check case was set down for disposition
5 of the girls the same day. I don't say that Mr. Dukes was in
6 court when the girls were sentenced; he probably wasn't
7 because he could have been there for the continuance and not
8 stayed for the girls' part, but on June 2, when the girls
9 were sentenced, Mr. Zaccagnino made these remarks about the
10 girls in the girls' case, about their involvement with Dukes.

11 Now, this is what happened: those remarks were
12 before the court in the pre-sentence report on the girls.
13 The whole thing was laid out to the judge. The prosecutor
14 when he got up said these girls got into this thing because
15 of Dukes. The girls' statements were attached to the proba-
16 tion reports, so Judge Devlin, the sentencing judge, had
17 before him everything about the girls in the check case, and
18 in that information, it said that Dukes had used them to cash
19 these checks. No secret. These are the facts that Mr.
20 Zaccagnino had, and he didn't do anything about manufacturing
21 them; he didn't do anything about them at all. He simply said,
22 your Honor, this is it.

23 QUESTION: Do we have the probagion report?

24 MR. LABELLE: For the girls? No, but it's in the
25 record that the Supreme Court of Connecticut looked at them

1 and it said in its opinion specifically that this whole
2 thing was laid out before the court in the girls' probation
3 report, so what Mr. Zaccagnino was saying to Judge Devlin
4 about the girls was before him anyway.

5 Now let's look at this. Is this a conflict of
6 interest? Suppose the girls were represented on that day
7 by another lawyer, nor Mr. Zaccagnino? Wouldn't that be
8 said about Dukes that he is responsible for the girls' trouble?
9 He would have said it, wouldn't he? You can't say in that
10 situation two weeks later, Judge Devlin couldn't have sen-
11 tenced Dukes.

12 QUESTION: At that time was the agreement crystal-
13 lized?

14 MR. LABELLE: Yes, it had been crystallized back
15 on May 16 when Dukes pleaded guilty.

16 QUESTION: But if he didn't have that arrangement,
17 if Dukes' punishment in the girls' case was still in question,
18 Zaccagnino representing the girls and Dukes, in another
19 case, wouldn't be about to say that about Dukes. I mean,
20 he shouldn't anyway, should he?

21 MR. LABELLE: Yes, that's correct, your Honor.
22 If, for instance, we came in and put Dukes on in the check
23 case later on and Zaccagnino was representing him there,
24 then he would have had a conflict, of course, but it didn't
25 happen that way; and it hasn't happened. There was an

1 arrangement there was to be concurrent sentences. That is
2 in the record, page 120, 123 of the Appendix that this was the
3 agreed recommendation to get concurrent sentence wrapping up
4 all of these cases.

5 QUESTION: But that was only on your recommendation.

6 MR. LABELLE: Oh, yes. Judge Devlin wasn't bound
7 by it of course but it is significant that on June 16,
8 when Dukes was sentenced in the narcotics case, Judge
9 Devlin followed the recommendation. Now on June 16, it
10 is significant that there was nothing before Judge Devlin
11 to remind him about Dukes being involved with the girls.
12 It wasn't in the probation report, Dukes' probation report--
13 it wasn't mentioned. No one mentioned it to Judge Devlin,
14 and now counsel says, "But Judge Devlin heard it two weeks
15 ago, and he probably remembers it."

16 QUESTION: But didn't your argument include working
17 out or doing something with Dukes' penalty in the girls'
18 check case?

19 MR. LABELLE: Yes, it did, and on June 16--

20 QUESTION: Well, did that take judicial concurrence?

21 MR. LABELLE: No, because we never brought those
22 cases up before Judge Devlin for disposition.

23 QUESTION: You nolle prossed them?

24 MR. LABELLE: I did afterwards because on June 16,
25 Dukes refused to plead to the cases that were being

1 consolidated and refused to plead to anything else.
2 He changed his mind. Then he asked to have his case post-
3 poned and get new counsel, and Judge Devlin said, "You've
4 had a whole month to make up your mind about this, from
5 May 16 to June 16. You haven't done anything about it. This
6 is simply a ploy to get delay in your sentencing.."

7 QUESTION: Did you nolle prosee all the other cases?

8 Mr. LABELLE: After the direct appeal was finished
9 I nolle prossed all my other cases and asked the States
10 Attorney in Fairfield and New Haven County to nolle prosee
11 theirs. This is after direct appeal in this case, and this
12 was some two years after this, I agree, but I carried out our
13 bargain completely.

14 Now you must remember that he took a direct appeal
15 and he never mentioned any conflict of interest. He had another
16 lawyer at that time and he didn't mention conflict of interest.
17 He brought habeas corpus into the federal court and he
18 didn't mention conflict of interest, and when you look at the
19 transcript in this case, to this day Dukes doesn't claim
20 that Mr. Zaccagnino gave him anything but good service.
21 As a matter of fact, the plea bargain he got, if you look
22 at the record of all these cases, he got a good result.
23 Mr. Zaccagnino did a fine job for him.

24 Now that is the situation that comes up. Now,
25 let me suggest one or two things why we don't have a Sixth

1 Amendment violation or a Fourteenth Amendment violation.

2 In the first place, there isn't this showing of an
3 antagonistic interest between the parties here that was
4 represented by Mr. Zaccagnino in the particular case, because
5 there was nothing to do in the narcotics case in which Dukes
6 pleaded and was sentenced, with the girls. They did not
7 appear in it, they never appeared in it, and there's no
8 connection to it, nothing at all. Mr. Zaccagnino never
9 bargained off the girls saying, "I'm going to say to Dukes,
10 if you don't plead guilty to the narcotics case, these
11 girls are going to testify against you." That was long
12 since known by Dukes. It was known back in December they
13 were going to cooperate and Mr. Zaccagnino--

14 QUESTION: May I respectfully suggest that the
15 judge did not know it until the lawyer told him?

16 MR. LABELLE: Right. Now, on the other element,
17 if Mr. Dukes wanted to claim this conflict of interest on
18 the day he was sentenced on June 16, he should have said
19 something to the court. He asked for other counsel, he was
20 given plenty of opportunity by the judge to say something,
21 he asked him why he wanted other counsel, what was the matter
22 with Mr. Zaccagnino. He never got this out of him. He didn't
23 ever say to Judge Devlin, "I had a bad deal by Mr.
24 Zaccagnino," or any complaint and he doesn't complain of it
25 to this day. He didn't even in the testimony in the habeas

1 corpus trial.

2 QUESTION: Your colleague there a moment ago said
3 that on page 7 of his brief he says that on June 16, that
4 Zaccagnino said, he pointed out because of their cooperation
5 with the state police, they capitulated Dukes into plead-
6 ing guilty. Now if the girls didn't know anything about the
7 narcotics case, could they have capitulated him into pleading
8 guilty in the narcotics case?

9 MR. LABELLE: No, that is not-- I don't know what
10 he meant by that except for the fact he had asked for the
11 other check cases to be consolidated from Fairfield and
12 New Haven County.

13 QUESTION: He wasn't talking about the narcotics
14 case?

15 MR. LABELLE: He couldn't be because there was
16 never any connection, no.

17 Now, I went into that with Mr. Dukes on the cross-
18 examination in the habeas corpus and I asked him, were
19 you talking about the narcotics case, and he said, well, I
20 don't think I could have been, looking at my remarks, but
21 there wasn't any discussion.

22 QUESTION: What case did he plead guilty to?

23 MR. LABELLE: He pleaded guilty to the narcotics
24 and larceny case.

25 QUESTION: At that time?

1 MR. LABELLE: At that time. He never pleaded
2 in the check case.

3 QUESTION: When he was making that speech to the
4 judge, he was talking of what, of the girls' persuading
5 him to plead guilty in the narcotics case?

6 MR. LABELLE: Well, that is what he seems to say--

7 QUESTION: And he pleaded guilty to anything
8 else?

9 QUESTION: No, just the narcotics case.

10 QUESTION: Well, he had agreed to plead guilty?

11 MR. LABELLE: He had agreed and then changed his
12 mind the last day, June 16. In this whole case, you will
13 see that both Mr. Delaney and Mr. Zaccagnino were interested
14 in wrapping up all the charges. It is indicated that States
15 Attorney was going to recommend concurrent sentences.
16 That appears.

17 QUESTION: What was the aggregate if you know it
18 offhand?

19 MR. LABELLE: Not less than five nor more than ten
20 years on the narcotics count, two years on larceny count,
21 making effective sentence of not less than five nor more
22 than twelve. Now it is significant that in the narcotics--

23 QUESTION: he had some other cases too, didn't he?

24 MR. LABELLE: Yes, but all the other cases had been
25 nolle prossed.

1 QUESTION: What is the maximum exposure he had?

2 MR. LABELLE: Well, he was a second offender and on
3 the narcotics case, there's a mandatory minimum of five years,
4 and a maximum of ten, if he's a first offender, and as a
5 second offender, that was doubled, so he had on the narcotics
6 case alone an exposure of not less than ten nor more than
7 twenty, and he had in addition to that, what could be added
8 on five more years for the larceny, so he had an exposure
9 at that point, when we were going to trial in the narcotics
10 case, of two to twenty on the narcotics if he was convicted,
11 and charges as a second offender, plus the ten years on
12 larceny.

13 QUESTION: So you didn't charge him as a second
14 offender?

15 MR. LABELLE: I had him warned and I didn't charge
16 him because he pleaded.

17 QUESTION: He got five-ten?

18 MR. LABELLE: He got five-ten and the five was a
19 mandatory minimum under the narcotics charge, under our
20 statute on the narcotics charge it was required he get at
21 least five, unless it was suspended, but he had to get five and
22 with this kind of case of course it could not be suspended.

23 Now there is one other key to this whole case.
24 I might respectfully ask the Court to bear with me. There
25 is a duty on the Petitioner here if he was not satisfied

1 with his counsel, to have told Judge Devlin about it.
2 He didn't do that and counsel has said for the Petitioner
3 that he did not do that because he didn't know what Zaccagnino
4 had said about him the day that the girls were sentenced.
5 Now, that's bothered me all through this case. Now, that
6 But I finally found it out a few days ago.

7 In the first place, when this habeas corpus was started, long
8 after the direct appeal now, and after a federal habeas
9 corpus, and nothing was said, he started a habeas corpus
10 from the prison and he mentioned the conflict of interest.
11 Well, I began to wonder how could he have known about
12 that at this time in prison? And then after he started
13 the action and before Mr. Wade was appointed for him, under
14 our post-conviction proceedings, he wrote a letter to the
15 Clerk of the Court. He wrote a letter to the Clerk of the
16 Court--this is in the files--he said, "Would you please send
17 me a transcript of what Mr. Zaccagnino said about me in the
18 girls' case?"

19 Now it's obvious he had to know what he said
20 because he started his habeas corpus action before this,
21 because he says in the letter, "I want to use this trans-
22 cript in my habeas corpus hearing that is coming up."
23 So that meant that he had to have known about it himself.

24 Now, since he had to have known about it, he must
25 have known about it on June 2, and that's the day, two

1 weeks later on June 16, if he had known about it, he
2 should have told Judge Devlin, "I'm not being properly
3 represented because of a conflict of interest."

4 QUESTION: Can you mathematically rule out the possi-
5 bility that he could have found out about it on June 16?

6 MR. LABELLE: I agree, your Honor, I said earlier
7 that I couldn't guarantee he was in the courtroom when it
8 happened, and I can't yet but I finally found it and it is
9 on page 163 of the Appendix and I am asking him about
10 being in court on June 2, I was trying to establish that he
11 might have heard the girls when they were sentenced.

12 He says he wasn't but no listen to this, at the
13 top of page 163, this is his answer: "I'm trying to think
14 of the date the girls got sentenced because I was not in
15 court on the day they got sentenced, because I know I wasn't
16 in court that specific day because that's when I was told
17 what was said about me," so there it is, that's the key
18 to the whole case. He knew what was said about him.
19 He knew when it was said about him. He never complained,
20 he never told Judge Devlin about it on June 16, and if he
21 wanted to, he should have raised it then and he had plenty
22 of opportunity because the record indicates Judge Devlin
23 gave him every chance to speak and tell what his trouble
24 was.

25 Now, it is clear that if you are going to allege

1 this kind of conflict of interest, there is a duty to
2 notify the trial court and give the trial court a chance
3 to rule on it. Here you have what we're saying in this
4 case, if this case is reversed we are going to reverse
5 Judge Devlin for something that he never knew about and
6 he didn't know anything about.

7 QUESTION: Well, he certainly knew the fact that
8 Zaccagnino was representing both the girls and Dukes?

9 MR. LABELLE: I think so. You must presume that if
10 he remembered what happened two weeks before. I'm not sure
11 of that. I don't know. This was a busy court. He had a lot
12 of cases. Whether or not he remembered the girls' case
13 and that this was the same Dukes, I don't know.

14 QUESTION: On June 2, he heard from Zaccagnino,
15 from Dukes, and on June 2 he heard from Zaccagnino about the
16 girls.

17 MR. LABELLE: June 16 was two weeks later and a lot
18 of things happened in between.

19 QUESTION: Now but there was this short proceeding
20 on June 2 in this case. Zaccagnino was there.

21 MR. LABELLE: Yes, Just continuance.

22 QUESTION: All right, then either before or after
23 that on the same day, Zaccagnino is representing the girls?

24 MR. LABELLE: Right.

25 QUESTION: And makes these remarks?

1 MR. LABELLE: Yes. I'm not saying Judge
2 Devlin may not have remembered, but what is done here, if
3 it isn't specifically called to his attention, his presuming
4 that he took into consideration in sentencing Dukes on the
5 narcotics case, some other information he had from outside
6 and you can't presume that a trial judge is doing something
7 wrong unless he's been notified about it, and in this
8 instance, Judge Devlin certainly didn't do anything other
9 than follow the state's recommendation, the agreed recommenda-
10 tion, the plea bargain recommendation, so that you can't
11 say even if he remembered the Dukes case, that he had done
12 anything improper by following the recommendation. He
13 doesn't say one word about it in his remarks at the time
14 of sentencing, Judge Devlin doesn't.

15 So the key to the case is that Dukes knew
16 about the remarks by Zaccagnino on June 2 in the girls'
17 case. He didn't think there was anything about it or tell
18 the judge about it at any time, and you're asking this Court
19 to overrule Judge Devlin in a matter that he never even had
20 a chance to rule on, when it was never called to his
21 attention when there was a duty on counsel and on Petitioner,
22 if he wanted to raise it, to say so.

23 MR. CHIEF JUSTICE BURGER: You have just one
24 minute left, Mr. Wade.

25 REBUTTAL ARGUMENT OF JAMES A. WADE, ESQ.

ON BEHALF OF PETITIONER

1 MR. WADE: Mr. Chief Justice, if I may address
2 myself to two remarks that Mr. LaBelle raised, the
3 first is he said everything was in the pre-sentencing report
4 and Judge Devlin had it all before him anyway, so what
5 difference did it make what Mr. Zaccagnino said? I say in
6 response to that, that's when you need your own lawyer.
7 If he's got all that information before him, you should have
8 your own lawyer there who is at least answering those
9 charges in the pre-sentencing report to the trial judge, and
10 that Mr. Zaccagnino did not do. Indeed, what he did
11 do was compound the--

12 QUESTION: Let's suppose, to take your hypothetical,
13 that there had been two separate lawyers, are you suggesting
14 that day that this man was entitled to have a lawyer there to
15 hear what was being said about him?

16 MR. WADE: No, I don't claim that at all.

17 QUESTION: I wouldn't think so.

18 MR. WADE: What I am saying, obviously, is that
19 the Pennsylvania court said you've got to go back to the
20 date of the guilty plea itself, to examine the type of
21 advice that the defendant is getting from his lawyer at that
22 point, not at the time of sentencing; the time of sentencing
23 is merely symptomatic. What happened two weeks earlier when
24 by Mr. Zaccagnino's own admission and Mr. Delaney's own
25 admission, they were working on Dukes to convince him to plead

1 and Dukes kept saying, "I don't want to plead. I'm
2 not guilty." So here was a lawyer who did not have the
3 exclusive interest of that individual at heart but instead
4 was pressing for some other reason for him to plead.

5 I would submit that the Court has to look care-
6 fully at the precedent that would be created if you do
7 not find a conflict of interest in this case.

8 QUESTION: I take it that the Court can assume that
9 you fully advised this man if he wins this case, he may be
10 back and have four or five cases with an aggregate, as I cal-
11 culate it, up to 25 years?

12 MR. WADE: He is cognizant of that. At the time
13 of the habeas hearing there was on the record examination
14 by the trial judge at the habeas hearing as to the implica-
15 tions of seeking to have his guilty plea overturned, and I
16 have talked to him about it as well, Mr. Chief Justice.

17 MR. CHIEF JUSTICE BURGER: Very well. Thank
18 you, gentlemen.

19 The case is submitted.

20 (Whereupon, at 2:29 o'clock, p.m. the case was
21 submitted.)
22
23
24
25