In the

Supreme Court of the United States

Robert E. Iannelli, et al.,

Petitioners,

v.

No. 73-64

United States.

Respondent.

Washington, D. C.
December 17, 1974

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Tuesday, December 17, 1974.

The above-entitled matter came on for argument at 11:10 o'clock, a.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 E. McLAUGHLIN, ESQ., McArdle, McLaughlin, Paletta & McVay, 618 Frick Building, Pittsburgh, Pennsylvania 15219; on behalf of the Petitioners.

MARK L. EVANS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Respondent.

C O N T E N T S

[Afternoon session - pg. 41]

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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 73-64, Iannelli against the United States.

Mr. McLaughlin, I think you may safely proceed now.

ORAL ARGUMENT OF JAMES E. McLAUGHLIN, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case involves the issue of whether the petitioners here were properly indicted for and convicted of conspiracy to violate 18 U.S.C. 1955, when they were also indicted for and convicted for the substantive violation of 18 U.S.C. 1955.

The eight petitioners here were indicted in a multiple-count indictment, with a number of other unindicted co-conspirators, and charged, among other things, with, first, with conspiring to violate Section 1955, and then charged with the substantive violation of 1955.

The petitioner Iannelli was also indicted for alleged violations of 18 U.S.C. 1302 and 1341.

All of the petitioners here were convicted of both the substantive violation of 1955 and of conspiracy. All were sentenced on both counts, and in this case, the case before the Court here, each of the defendants, aside from Mr. Iannelli, was given an additional two years' probation

on the conspiracy conviction.

Now, simply stated, the question before the Court is whether the application of Wharton's Rule in this case bars the dual conviction and dual sentencing of these petitioners.

Wharton's Rule is not at all a new rule. However, of course, it was -- when it was initially applied some 125 years ago, 130 years ago, it was mostly applied in cases involving dueling and crimes of adultery and that sort of thing.

Now, dueling is not a very --

QUESTION: It wasn't a very wide-ranging rule, was it?

MR. McLAUGHLIN: No. No, Your Honor, it was not. Dueling has somewhat fallen out of fashion, and adultery is still being prosecuted these days. So that it really hasn't been applied as often as perhaps it could have been.

But I don't think Professor Wharton ever really contemplated the congressional scheme that Congress had in mind in Section 1955. I think he would have felt that his rule would have applied.

But, as you point out, Mr. Chief Justice, it was not a widely applied rule. But it was a sound rule, and we conten it is a sound rule.

And the gist of the rule is, simply, that when an

offense requires concerted action, or plurality of agents, as Wharton speaks of it, then the crime of conspiracy cannot be added to the substantive crime.

Now, in 1955 the statute clearly states that in order to violate, be convicted, five or more persons must act in concert: own, conduct, finance, manage an illegal gambling business.

The conspiracy statute, of course, requires that two or more persons agree to do an illegal act.

Both statutes speak in terms of minimums, not maximums.

Now, Wharton's Rule has never been directly applied by this Court, but it has been adverted to in Gebardi vs. United States, which we cite in our brief, and of course it's been adverted to in a number of Circuit Court cases.

Now, in the application of Wharton's Rule to 1955, the Circuits are not in agreement, they're in conflict, and I assume that this is one of the fundamental reasons why we're here. The Solicitor General did not oppose our petition for certiorari.

The Seventh Circuit, in United States vs. Hunter, has held that Wharton's Rule clearly applies.

The Second Circuit, which was the first Circuit to consider the problem, has held that it did not.

The Third Circuit followed the Second, and the

Fourth and the Fifth sort of went off on their own; but also followed the Second.

Now, we feel that the reasoning in Hunter is in fact the proper reasoning. Because they state there that there is no element or no ingredient in the conspiracy which is not present in the completed crime.

And we think that that's what Wharton's Rule is all about.

It requires a minimum of five or more persons to own, conduct, finance, or manage an illegal gambling enterprise to constitute the substantive violation of 1955.

Now, we contend that when those five persons own, conduct, manage, or finance an illegal gambling enterprise, they are, in effect, agreeing to do so and conspiring to do so.

Now, the government takes the position, and it in part is proper, that if the substantive crime can be successfully maintained by a single individual, then Wharton's Rule in fact has no application.

And in aid of that proposition, the government cites a hypothetical situation, at page 28 of its brief, in which it indicates that it would be possible for a single person to be convicted of the substantive violation of 1955, in the situation where a single bookmaker hires ten high school students who are deluded into thinking they're involved in a

market research product, and do not realize that they're in a bookmaking operation.

Well, unfortunately, I don't represent ten high school students; and ten high school students weren't involved in the case that brings us here. That hypothetical situation, as Professor Wright points out in our reply brief, might be very interesting in a law school classroom. But this is a real case. And these kinds of cases involve real people.

QUESTION: But then the rule you're contending for, Mr. McLaughlin, would be a fact, a case-by-case application, rather than a flat rule one way or the other?

MR. McLAUGHLIN: Yes, I think so, Mr. Justice Rehnquist. I think perhaps it would have to be that way.

But I'm simply trying to point out that the hypothetical posed by the government is just so hypothetical that it has no basis in reality at all.

QUESTION : Well, I took the government's point to be that if they could demonstrate some instances in which Wharton's Rule wouldn't apply in the administration of this statute, then it shouldn't apply at all.

MR. McLAUGHLIN: Well, I think that's the position they take. But the position we take is that they would have to demonstrate some practical, possible hypothetical.

In point of actual practice, any bookmaker who employed ten high school students as an aid to -- or in an

effort to operate a gambling business, probably wouldn't even be mentally competent to stand trial.

QUESTION: Now, to convert that into some dangerous drugs, you might have a more commercially feasible illustration, might you not?

MR. McLAUGHLIN: Yes, well now -- traditionally now, for instance, in the drug cases, Wharton's Rule does not apply, because a single person can clearly be involved in the sale of drugs or, you know, transfer of drugs.

But here the statute specifically requires a minimum of five.

Now, we just say that the hypothetical posed by the government is so unreal that it's not demonstrating an instance where a single person could do it.

The actual, practical fact of the matter is that a single person can't do it. And there has never been a single case brought under 1955, and there have been many, many cases brought under 1955 where a single person was charged with the substantive offense.

Throughout the government's argument, and this of course is a twofold argument; one, we contend that Wharton's Rule in fact does apply, and it applies in two ways in this case:

One, it bars dual punishment; and, two, it in fact requires a new trial in this case.

Now, throughout the government's argument there is almost implicit in their argument and in their brief, a tacit admission that probably there is something wrong about the concept of dual punishment in this area. And they keep saying, Well, if Wharton's Rule applies, then of course it only bars dual punishment.

And I think the government senses, as certainly we do, that there is something definitely offensive about the concept of dual punishment in this area.

I think perhaps even more graphically --

QUESTION: Well, I gather, Mr. McLaughlin, the government says they made that a constitutional source. I don't see that -- you haven't suggested that Wharton's Rule has a constitutional source; the government seems to feel it does.

MR. McLAUGHLIN: Now, I haven't suggested that, no. I --

QUESTION: A double jeopardy source.

MR. McLAUGHLIN: It verges on that.

QUESTION: You don't argue with that?

MR. McLAUGHLIN: No. I don't think I have to go that far.

QUESTION: What are you doing? Asking us to apply Wharton's Rule just as a matter of supervisory authority, or what?

MR. McLAUGHLIN: Well, yes. And as a matter of -- there is a conflict in the Circuits, and the Solicitor General recognizes this conflict, and recognized in his memorandum in respone to our petition that the problem is a recurring one, and is of considerable importance.

And it is of great importance because even more graphically than in our case, the problem of dual punishment is demonstrated in the case of Grosso vs. United States, at 73-1412, which petition is here in this Court and is being held pending the action of the Court in this case. I happen to be counsel in that case, too.

And in that case the defendants were given the maximum sentences -- the one defendant was given a maximum sentence, consecutive sentences, for the conspiracy and the substantive crime. And fines. So that in that petition it's very graphically demonstrated that you can end up with ten years instead of five.

Now, as I say, I think the government almost concedes that there is something offensive about this idea of dual punishment, but they take the position, of course, that there is no -- in this case, no new trial should be required, because the Court can simply just straighten everything out by straightening out the concept of the punishment.

QUESTION: Is it your contention, Mr. McLaughlin, that charges of conspiracy and of the substantive offense cannot

be brought, or that the jury must be instructed that they cannot find guilt of both, even if they are brought?

MR. McLAUGHLIN: It is not our position that they cannot be brought, because in this particular case, in Iannelli, there were two other substantive offenses charged, and the conspiracy related --

QUESTION: Covered those, too.

MR. McLAUGHLIN: -- to those as well.

So it would have been clearly improper for the District Court, even though we ask him to do so -- and perhaps we improperly ask him to do so -- but he was not that easily misled.

QUESTION: Unh-hunh.

MR. McLAUGHLIN: He refused to do so prior to trial, because he said it was untimely.

It's our position that if the conspiracy, if Wharton's Rule applies, and conspiracy is not a punishable offense, then it should not be submitted to the jury if that's all there is is the conspiracy and the 1955.

QUESTION: Well, I'm not sure I follow you. You do concede, as I understand your answer now -- and you tell me if I'm wrong -- that a person, or necessarily two or more persons, can be charged with conspiracy as well as with the commission of the substantive offense at the same trial. But that the jury must be instructed that they cannot find

them guilty of both; is that it?

MR. McLAUGHLIN: I don't think the jury should be instructed on conspiracy at all. I think it -- at the point when the government rested and the case is ready for charge, if the Court has determined that the plaintiffs are not entitled to a directed verdict of acquittal, he should not submit the conspiracy to the jury at all; he should just submit the substantive offense.

QUESTION: You could have, of course, just the conspiracy case, in the case where the gambling operation was never in fact set up. You could have a conspiracy plus an overt act, and --

MR. McLAUGHLIN: That's possible.

QUESTION: -- but frustration of the object of the conspiracy, for one reason or another, and you could have people guilty of conspiracy.

MR. McLAUGHLIN: That's right. But the Court can make that determination at that time, I think, and he doesn't have to submit it.

What we're objecting to, and the reason we think that we're entitled to a new trial, is that if you can't mete out dual punishment for the conspiracy, then why is the jury permitted to consider that you may have committed two crimes when in fact only one is punishable?

So it's giving the government two targets, when they

should only have one.

QUESTION: Well, I still don't know that I understand the answer to my question; and maybe my question isn't clear. But as I understand your answer, you do not contend that the prosecution cannot charge these people with both the conpiracy and with the substantive offense.

MR. McLAUGHLIN: That's correct.

QUESTION: You concede that?

MR. McLAUGHLIN: That's correct, Justice Stewart.

QUESTION: All right. Then let's assume that the proof at the trial shows that there was a conspiracy, and that there was a commission of the substantive offense by the five or more -- because five or more people were engaged in it.

I don't mean that's -- and there's evidence in rebuttal of that. And so there is enough to go to the jury.

Now, does the trial judge have any duty, in your submission, to instruct the jury that they may not find the defendants guilty of both?

MR. McLAUGHLIN: Yes. that's -- that's at a minimum.

QUESTION: Well, what is your -- I don't --

MR. McLAUGHLIN: Frankly, I don't -- if he has determined that there is sufficient evidence --

QUESTION: Of both.

MR. McLAUGHLIN: Of both. Then I do not think that he should submit both to the jury.

QUESTION: Well, which one must he eliminate?

MR. McLAUGHLIN: I would think that he would submit the substantive offense, because it carries the more grievous penalty.

QUESTION: Well, that's not a very defendant-minded answer.

MR. McLAUGHLIN: No, it's not. But I think that that's probably a more palatable choice for the District Court, because I think that they probably would feel that the more serious charge would be the one that should be submitted.

QUESTION: Well, conspiracy is a pretty serious charge. Generally -- often it has been considered to be more serious than the substantive offense.

MR. McLAUGHLIN: Right.

QUESTION: The Court has often said so.

MR. McLAUGHLIN: But in terms of penalty, Congress has elected to make the substantive offense the more serious crime.

QUESTION: Well, then, would you try -- would you answer my question. It's the duty of the trial judge in his instructions to the jury, assuming people charged with both conspiracy and with the substantive offense, assume sufficient

evidence of both to go to the jury, now what is the trial court's -- trial judge's duty, under your submission under the Wharton Rule, as to his instructions to the jury?

MR. McLAUGHLIN: Well --

QUESTION: Or is it his duty to dismiss at the end of the prosecution's evidence, on one or both of the charges?

MR. McLAUGHLIN: We feel it is hist duty to --

QUESTION: So, which one?

MR. McLAUGHLIN: -- to dismiss the conspiracy.

QUESTION: Why?

MR. McLAUGHLIN: Because the conspiracy is an integral part of the substantive offense.

Without the conspiracy, the substantive -- the substantive offense requires a conspiracy.

QUESTION: Yes, but the conspiracy doesn't always result in a substantive offense.

And the jury may -- might or might not reject the incriminating evidence with respect to the substantive offense. It might hold, if both went to the jury, that there was a conspiracy but that there was not a substantive offense. And shouldn't a jury be free to so hold?

MR. McLAUGHLIN: Well, perhaps the --

QUESTION: Shouldn't both, therefore, go to the jury?

MR. McLAUGHLIN: Then perhaps maybe they should,

Mr. Justice Stewart. But at that point, then, the Court should clearly instruct the jury that they can't find them guilty of both.

Now, in this case, of course, the jury was instructed just the opposite.

QUESTION: Unh-hunh.

Well, I didn't know if that was your position, or if it was your position that in the event there were a finding of guilt as to both, then it became incumbent upon the District Judge to do something about it.

MR. McLAUGHLIN: No, as a matter of fact, I think that's totally the wrong approach to what you proposed last.

QUESTION: Well, that's what I'm trying to get at: what is your position?

MR. McLAUGHLIN: I think -- I think he has to cure the matter by his charge, the minimum, before it goes to the jury, but not wait until afterwards.

QUESTION: And say what, by his charge?

MR. McLAUGHLIN: That they may not find the defendants guilty of both offenses.

If you're going to give them the election -- if you're going to submit both the conspiracy and the substantive offense, I think he should charge then that if they find the defendants guilty of the substantive offense, they should not consider the conspiracy. Or should find him not guilty of the

conspiracy.

QUESTION: Unh-hunh. And the instructions should be that way, rather than that you can't find him guilty of both? You'd have to say: if you find him guilty of the substantive offense, then you must -- what? Find him not guilty of the conspiracy?

MR. McLAUGHLIN: Not guilty.

QUESTION: Or not consider the conspiracy?

MR. McLAUGHLIN: Or not consider it.

It really would be foolish to have them consider it, only to find them not guilty.

I think just not consider at all.

QUESTION: Unh-hunh. And only -- would the instruction be only if you find him not guilty of the substantive offense are you permitted to consider the conspiracy charge? Would that be the instruction, in your submission?

MR. McLAUGHLIN: Yes. Yes, Mr. Justice Stewart, I believe it would, or that it would.

But if I had my druthers, I'd rather the District Court make --

QUESTION: Well, I want to know what your submission is here, that's all.

MR. McLAUGHLIN: Well, what you said is correct, you understand it.

We understand each other.

QUESTION: Unh-huh.

QUESTION: On your thesis, ten men, or ten men and women, could not engage in conspiracy and then have it develop that only five of them were participants in the substantive offense, the two, you said, are all bound together, you can't separate them?

MR. McLAUGHLIN: Well, yes, they are bound together, I can't really conceive of a practical situation -- I can't conceive of any practical situation where the question you pose would occur in a gambling --

QUESTION: Well, then what you're saying here is that there can't be any offense of conspiracy, to commit the offense?

MR. McLAUGHLIN: I guess that's really what I'm saying --

QUESTION: It must be consummated in order to have any criminal act.

MR. McLAUGHLIN: That's right, because the statute requires the five or more people actually be an operation. In other words, they can't be prosecuted unless they have gotten the thing off the ground. The statute doesn't speak in terms of theoretical gambling operations, it speaks of actual ones that have attained a certain plateau of economic success, and have operated for thirty days or more.

So that the conspiracy is complete when you have enough to lay the substantive charge.

You see, under the government's theory they sort of think that these people sort of drift into these things. Gambling enterprises don't operate by drafting employees. They only have voluntary enlistments. And the people that enlist in these operations understand what they're doing. They aren't high school kids, who think they're doing market research.

Because those situations wouldn't even be prosecuted. Because they would never be successful enough.

In the actual, real world of bookmaking, the conspiracy would be consummated when the substantive offense is consummated.

So that, actually, what I'm saying is that the conspiracy really doesn't -- is such an integral part of the substantive offense, it really doesn't exist.

And what I'm also saying is, of course, that in view of the substantive statute, in view of the fact that it requires every ingredient of a conspiracy, then we feel that Congress -- the court should not countenance dual punishment.

We don't think that these petitioners should be punished twice for the same crime. And we feel that here they have been punished twice for the same crime.

And I would --

QUESTION: In your submission in response to Mr. Justice Stewart, do I understand you correctly to say that if both offenses are submitted to the jury, the jury can take its choice, but they must -- they are mutually exclusive?

MR. McLAUGHLIN: They are mutually exclusive. As I said, that certainly as a minimum, I would feel the District Court would have to tell the jury that they may not find the defendant guilty of both, that if they find the substantive offense, then they must disregard --

QUESTION: Right.

MR. McLAUGHLIN: -- not regard the conspiracy also.

QUESTION: You agree, however, that they are not necessarily mutually exclusive, that there could be a conspiracy without any evidence at all of the ultimate commission of the substantive offense?

MR. McLAUGHLIN: That's a hypothetical possibility, Mr. Justice Stewart.

QUESTION: Well, before the hypothetical -- there may be no reported cases, but it's certainly not an Alice in Wonderland idea. People can plan to set up a gambling operation and then, by reasons of death or illness or competition or various other reasons, they can be -- it can be frustrated.

MR. McLAUGHLIN: I would certainly --

QUESTION: And that would be a conspiracy without a

substantive offense.

MR. McLAUGHLIN: I would certainly concede that it is possible. Surely, that five persons could agree, say, Let's start a gambling business, and make one phone call to another fellow and say, you know, Let's do something.

QUESTION: Unh-hunh.

MR. McLAUGHLIN: And that really is a conspiracy.

QUESTION: That's right.

QUESTION: If I followed you, that's a different answer from the one you gave me a few moments ago.

MR. McLAUGHLIN: I don't think it's -- I don't think it's a probable situation; and in the instance where you have the substantive offense and the court is satisfied that there is sufficient evidence to submit the substantive offense to the jury, then, clearly, there is a conspiracy, too. Because the substantive offense requires one.

If, in Mr. Justice Stewart's hypothesis, there could -- as there could be a conspiracy without the substantive offense, the District Court shouldn't submit the question of the substantive offense to the jury, because it's probably so clear that there's no evidence to support it. But they shouldn't be permitted to consider it anyway.

QUESTION: You're analogizing this in a sense to having a jury find a man guilty of a given crime and a lesser included offense under the same statute?

MR. McLAUGHLIN: It's somewhat similar, yes, sir.

I think I have a few minutes left, and I'll save it for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Evans.

ORAL ARGUMENT OF MARK L. EVANS, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The government has four contentions in this case.

First, Wharton's Rule has no application at all to Section 1955.

Second, even if it does have application, this case comes within a standard exception to Wharton's Rule, because there were more persons involved in the conspiracy in this case than the minimum number required to commit the substantive offense.

QUESTION: Would that mean that if you had a case where there were exactly five people, who conspired and who then carried out their conspiracy by conducting a gambling operation, that Wharton's Rule would be applicable?

MR. EVANS: Well, in our contention --

QUESTION: I mean just with respect to your point two, now.

MR. EVANS: As to point two, that's right.

Third, when Wharton's Rule does apply, its effect is solely to prohibit double punishment for the conspiracy and the substantive offense; it does not bar an indictment, either alone or together with the substantive offense, and it does not bar submitting both counts to the jury under proper instructions along the lines that Mr. Justice Stewart was discussing with Mr. McLaughlin a little earlier.

Finally, even if Wharton's Rule applies to this case and does bar an indictment, petitioners still would not be entitled, in this case, to a new trial, as Mr. McLaughlin suggested at one point as an alternative disposition. There would be no need for new trial. All that would be necessary would be to vacate the sentences that were imposed on the conspiracy convictions.

And I'd like to start, if I may, just by briefly addressing that final point, because it can be taken with the assumption that everything that Mr. McLaughlin has said about Wharton's Rule's application to Section 1955 in this case is true.

Now, he has suggested in his brief, and he alluded to it again at argument, that a new trial would be necessary here apparently because the presence of the conspiracy count during the course of the trial and in the jury's deliberations has so tainted the jury's verdict on the substantive count that there can -- that there must be a new trial to eliminate

this taint.

As we understand the argument, if it rests upon a notion that in the absence of the conspiracy count all the hearsay declarations that were admitted at this trial would have been excluded, and they would not be admissible on a retrial only of the substantive -- only on the substantive count.

We think this is wrong for several reasons.

First, as we show in our brief, the admissibility of hearsay declarations of co-conspirators does not depend upon the presence of an indictment -- of a conspiracy count in the indictment. It depends only upon a showing by non-hearsay evidence that there was in fact a joint venture in crime, of which the defendant was a member.

QUESTION: This argument leads you right into Mr. McLaughlin's cave, doesn't it? You're saying that they're the same.

MR. EVANS: No. No, we're not saying they're the same. We're saying that -- well, I'm not sure --

QUESTION: You're saying that the substantive offenses are basically the same because they support the same exceptions to the hearsay rule.

MR. EVANS: Well, we're -- in a sense, if Wharton's Rule applies, I'm here taking everything he has said as given -- if Wharton's Rule applies, yes, there is inherent in the sub-

stantive offense the very conspiracy to which he objects, in terms of a separate count.

QUESTION: I see. You're beginning this argument by --

MR. EVANS: I'm just beginning by accepting everything, just to discuss only what should be done with this case if everything were accepted.

QUESTION: I see.

MR. EVANS: Now, even if, for some reason, the hearsay testimony would be inadmissible if there were only the substantive count at trial, the District Judge here, contrary to the suggestion that Mr. McLaughlin's brief makes, specifically instructed the jury that they could consider that hearsay testimony -- those hearsay declarations only in connection with the conspiracy count, on page 61 of the Appendix. He made a very elaborate effort to direct the jury's attention to the conspiracy count only last, and he stated that this is why I start off with the other counts and work towards the first count.

That evidence, the hearsay evidence, would not be admissible in proving guilt under the second count, the section 1955 count. But it could be admissible under the circumstances I just enumerated with you in proving the guilt of conspiracy.

So even if, for some reason, the hearsay declarations

could not be admitted -- should not have been admitted in this trial, there is no reason to believe that the jury disregarded the explicit instruction -- disregarded with respect to the substantive count.

Our contention, in essence, is that there has been no taint attached to the substantive conviction in this case, and no reason to remand for a new trial on that count, in any event.

The heart of this case is the question whether Wharton's Rule applies at all, in the context of section 1955; and before I address the statutory question I think it would be helpful to outline our theory of Wharton's Rule.

We start with two principles, consistent principles, we believe.

First, that a conspiracy ordinarily is separate and distinct from its substantive aim, because each requires proof of a fact that the other does not.

For example, a conspiracy to commit a bank robbery requires proof of an agreement between the two robbers to commit the crime.

But it does not require proof that the robbery was actually consummated.

On the other hand, the substantive charge of bank robbery requires proof that the crime was consummated, but not that there was any agreement to commit it.

And this Court has accordingly held, in many cases, that cumulative sentences may be imposed upon convictions for both the conspiracy and its substantive aim.

That is so because a conspiracy is thought to pose dangers beyond those posed by the commission of the substantive offense itself.

And, unlike an attempt, for that reason, the conspiracy does not merge within the completed substantive offense.

Now, the second principle, as I say, that's consistent with this, is the -- basically an application of the constitutional protection against double jeopardy.

When one offense is necessarily included within another, a person may not be given cumulative sentences for a single act that violates both.

For example, assaulting a federal officer is necessarily included within the greater crime of assaulting a federal officer with the use of a deadly weapon. It is impossible under any circumstances to commit the greater offense without also committing the lesser.

QUESTION: What case is that? What authority are you relying on for that, Mr. Evans, that double jeopardy forbids that?

MR. EVANS: Well, I'm inferring it from decisions of this Court, most particularly North Carolina v. Pearce, in

which the Court stated that --

QUESTION: Well, there are others, too.

MR. EVANS: And there may be others, too. That --

QUESTION: Well, you seem to make these rather flat statements in your brief as being straightforward applications of the double jeopardy clause.

Such as the conviction of the greater offense bars later prosecution of the included offense.

I would suppose you're just not saying anything more than, in what you just said.

MR. EVANS: That's right.

Oh, well, I cite some cases on this point.

QUESTION: Exactly. Right, yes. Nielsen.

MR. EVANS: Yes. Well, there are several in the footnote there.

QUESTION: So you're --

MR. EVANS: We're looking for a constitutional --

QUESTION: The counselors of your Wharton Rule, as you put it out in your brief, are just straight double jeopardy.

MR. EVANS: That's right. That's right. It rests, in our view, upon --

QUESTION: It may not agree with your views of these cases, but at least you seem to -- you feel you are just explicating the double jeopardy clause.

MR. EVANS: This, we think, is the source of Wharton's Rule, properly understood. It's no broader -- I mean, in a sense we're giving it a constitutional footing so that its scope can be appreciated.

QUESTION: Well, did Wharton think that when he evolved it?

MR. EVANS: No, Wharton -- Wharton did not. Wharton's Rule, in my view, is an anomaly. It developed, as we explain in our brief, from what we view as a misreading of an 1850 Pennsylvania State Court decision. There's no comparable rule in England, and the leading British commentator, as I indicated in the brief, thinks that the rule is unnecessarily subtle.

Well, we've thought about it a great deal, and we concluded that it has an application as part of the broader rule that we think would be applicable in the case of a lesser included offense in the greater offense.

We do think that the double jeopardy clause would bar an imposition of two punishments for assaulting a federal officer, for example, with a deadly weapon and for the crime that necessarily was included within it, namely, the assault upon the officer.

QUESTION: Well, how about the reverse: punishment for assault on a federal officer, and punishment for assault with a deadly weapon on a federal officer? And the former

necessarily being included in the latter.

Would you say conviction for the included offense would bar prosecution for the greater?

MR. EVANS: Well, we think that --

QUESTION: You say that in the --

MR. EVANS: Yes. It's not obviously this case. We're not -- this has no application to it. We mention that only in passing.

QUESTION: Well, it may not be involved in this case because -- assume there's a conviction for conspiracy and then an indictment for the substantive offense.

Now, if the rule was that conviction for the included offense is -- precludes conviction for the greater offense, then the issue is involved here.

MR. EVANS: Well, Mr. Justice White, I believe that we're inferring that rule from a combination of the cases we've cited, but Waller is basically the case.

As I recall it, that was a conviction on a local ordinance that was -- the court stated that the offense was included within the --

QUESTION: Well, that really was -- that was just a two sovereignty rule there. It left open this whole question of --

QUESTION: Well, what about Blackledge v. Perry last term?

MR. EVANS: I'm not familiar with it.

QUESTION: Well, that's pretty much on the point here.

MR. EVANS: But, in any event, I really don't think we have to struggle with this issue, it's not really presented here. We only mention it in passing, to suggest the contours of what would be the rule with respect to lesser included offenses and greater offenses.

QUESTION: Well, your friend was saying that this is analogous, this case is analogous to a lesser included offense situation. I take it you don't accept that?

MR. EVANS: No, we do not.

QUESTION: You seem to be coming a little close to the edges of it there, though.

MR. EVANS: Well, I was outlining, Mr. Chief Justice, what our view is of the proper application of Wharton's Rule. We think it applies only where it can be stated that the conspiracy is a lesser included offense of the substantive crime, so that one could not possibly, in any circumstances, commit the substantive crime without also conspiring to do so.

And the example that we use in the brief, and we think is the clearest example, is the case of dueling, which is defined in terms of an armed combat between two persons pursuant to an agreement to do so.

Now, in order to commit a duel under that definition,

you must agree to do so, you must, in effect, commit each of the elements of a conspiracy.

Now, in that context we have no question that this is the appropriate case in which to apply this general -- whatever the general double jeopardy rules may be, with respect to lesser included offenses and greater offenses.

When we come to section 1955, however, this is not a -- this is not anywhere, anything like dueling.

I think, looking at 1955, and recalling the central question, I think that our theory of Wharton's Rule is whether it would be possible under any circumstances to commit the substantive crime of conducting an illegal gambling business, without also conspiring to do so.

Now, the statute defines illegal gambling business as one that involves five or more persons who conduct it. But it does not state and it does not apply, in our view, that all five must be knowing and wilful participants. The purpose of the five-person requirement, like that of the other requirements in the definition, was to limit the allocation of federal resources to large gambling operations. The requirement is one of size, not one of culpability.

This is confirmed, we think, by the form that was used by Congress in drafting the statute, which is set out at page 2 of our brief.

QUESTION: Well, I suppose the purpose of that was

to get some federal nexus, wasn't it, some effect on interstate commerce?

MR. EVANS: Mr. Justice Blackmun, the Congress found that gambling generally has an impact upon interstate commerce. It specifically stated, however, that it declined to prohibit, although it thought it was within its reach to do so, it declined to prohibit all gambling operations, because it wished to limit federal resources to the major operations, of major proportions.

I don't think this is an essential link for federal jurisdiction, but it's the one Congress picked for policy purposes.

QUESTION: Well, wasn't part of the policy theory that they were going to leave these small operations to the States?

MR. EVANS: That's exactly right, Mr. Chief Justice. Now -- but in doing so, the Congress specifically recognized in its legislative reports that while it normally assumed that more than five persons would be involved in the kind of operations it had in mind, that it recognized that it's very difficult to prove the full extent of most gambling operations. And for that reason it chose five as a number.

And again I believe it chose the number in terms of the size of the operation, it did not specify, and there's no reason to believe it had in mind --

QUESTION: It might just as easily have decided to cut the line at ten.

MR. EVANS: It might just as easily have decided to cut it at ten. I believe it was a legislative choice, that this would be an appropriate limit to permit prosecutions of large gamling operations in which not everyone could be proved to be involved, without having the federal courts burdened by peewee prosecutions.

QUESTION: Let's see if I understand you. Had they set it at two, you're suggesting there would be no attack on basic federal jurisdiction?

MR. EVANS: Well, I -- there may be an attack upon it, I'm just pointing out that Congress believed that the reach of its authority extended beyond the limit that was chosen in the statute.

We believe that Congress deliberately left open in the statute the possibility of prosecuting a sole bookmaker, to use the hypothetical we use in our brief, who hires innocent persons to help him operate his gambling business. And it did so because it realized that it may be that there were other people involved, but -- guilty persons involved, people who were culpable, but it's not always easy to prove their involvement. It's enough to prove that there is one culpable individual operating a business large enough to merit federal attention.

Now, we think that this demonstrates, or it answers the question I started with, that is, whether it is possible in any circumstances to commit the substantive offense without conspiring to do so. The answer is, it is possible.

It's a theoretical inquiry, granted, and there probably will never be such a case. There may or there may not be such a case. I know of none.

But this is a question of what would be possible, and we believe that in this circumstance in which one guilty, culpable person hires enough persons to operate his business to bring it within federal -- the scope of federal jurisdiction, that he would be guilty of the substantive offense, but he could not be convicted of a conspiracy, because there would be no proof that he conspired with any other culpable person involved in the operation.

Now, one might properly ask, I think, in these circumstances, whether Congress really intended that a person who violates Section 1955 should be subject to the additional punishment for a conspiracy, which probably would be connected with the large operation. But we think that this Court's decision in Callanan is an answer to that question. That was not a Wharton's Rule case, but an analogous argument was made.

Callanan argued that Congress could not have intended to subject him to multiple punishment for conspiracy and

obstructing commerce by extortion, because both crimes were created by the same section of the statute.

The Court stated, however, that the historic distinctiveness between a conspiracy and its substantive aim gives rise to a presumption that Congress intended to maintain that distinction, and to maintain the separate punitive consequences of each.

And the Court stated, in a sentence that I think is worth quoting -- it appears on page 42 of our brief -- "To dislodge such conventional consequences in the outlawing of two disparate offenses, conspiracy and substantive conduct, and effectuate a reversal of the settled interpretation ... would require specific language to the contrary."

Well, there is no such specific language to the contrary in this statute, and we believe that the presumption established by Callanan should be applied in this case as well.

QUESTION: Mr. Evans, I'm not sure I understand the argument you're making, a moment or two ago.

It's your submission, is it, that at least theoretically, a single individual could be guilty of violating Section 1955?

MR. EVANS: That's correct.

QUESTION: Because he would be the only one with mens rea or with knowledge of what was going on --

MR. EVANS: Correct.

QUESTION: Is that it? And he could -- he would hire four or more people who just didn't know what was going on upstairs; is that it?

MR. EVANS: That's right.

QUESTION: In a gambling operation?

MR. EVANS: Well, we're not suggesting that this is likely, we're just suggesting that --

QUESTION: Oh.

MR. EVANS: -- the statute permits -- would permit a prosecution in those circumstances.

The Court of Appeals rested its decision in this case on a ground that this Count needn't consider, unless it first finds contrary to our contention, that Section 1955 does necessarily include a conspiracy. That ground is that this case falls within the standard exception to the rule that permits prosecution for a conspiracy when it involves more persons than the minimum number essential to the commission of the substantive offense.

This exception has been recognized, even by this Court, in the Gebardi case, and it's now accepted by the current edition of Wharton's Treatise.

We think it's consistent with the rationale of the rule itself. Separate punishment, in our view, is precluded by Wharton's Rule on the theory that Congress took into account, in establishing the punishment for the substantive

offense, all the dangers inherent in the commission of the substantive offense, including the dangers involved in any necessarily included conspiracy.

But when the conspiracy exceeds in number the minimum number necessary to the commission of the substantive crime, its dangers are likely to be increased also.

And there is no reason, in these circumstances, to presume that Congress intended to limit the punishment where the conspiracy is greater than -- or creates dangers greater than those inherent in the substantive crime itself.

QUESTION: Let me suggest a hypothetical to you to pursue Mr. Justice Stewart's proposition, that you might have four innocent and one guilty: Would this situation do it, if you had a mountain resort up on the borders of Nevada, and four people were hired and told that it was in Nevada and that it was perfectly legal to be running the gambling operation, being professional gamblers from Las Vegas or some place, but the one man who was running the show knows that it is in whatever State -- in an adjacent State which makes it illegal. What would be the situation then?

MR. EVANS: Well, that might be a situation --

QUESTION: It's a pretty strained example.

MR. EVANS: I think, Mr. Chief Justice, that while only the one who knows would be guilty of the substantive crime, that he might well be guilty of the conspiracy as well.

Because while the four --

QUESTION: Would he not if he deceived --

MR. EVANS: Well, I guess it may -- it may fit. I'm not sure. It may be the same thing.

QUESTION: It isn't likely that --

MR. EVANS: It may be the same thing. Any example you hypothesize is bound to be an unlikely one, because this is not the normal situation, but what matters is that even in those hypothetical situations it seems to me clear -- seems to us clear, that the statute would permit prosecution of the one individual. And we believe there are circumstances and this may be another one in which the -- there would be no prosecution for conspiracy.

QUESTION: Of the four, you mean?

MR. EVANS: Of any.

Now, on my hypothetical, at least, and perhaps on yours, too, Mr. Chief Justice, the -- in order to be convicted of conspiracy, there must be at least two persons --

QUESTION: You mean there on all the parties --

MR. EVANS: Well, not -- well, there has to be at least two persons who share in the guilty knowledge.

Now, to the extent that the four here do not share in the guilty knowledge, I would say that their agreement with him was not a meeting of the minds sufficient to constitute the kind of agreement that's punishable as a conspiracy.

To conclude, I think it's worth recalling Mr. Justice Holmes' statement that was quoted in this Court's decision in Callanan, he said, "To rest upon a formula is a slumber that, prolonged, means death."

Well, we think that for many years Wharton's Rule has been applied by the courts uncritically, and we urge the Court in this case to reconsider the formula and to apply it, if at all, only consistent with its proper rationale.

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: You may continue, Mr. Evans.

ORAL ARGUMENT OF MARK L. EVANS, ESQ.,

ON BEHALF OF THE RESPONDENT - Resumed

MR. EVANS: Mr. Chief Justice, I didn't quite get out my conclusion, and during lunch it occurred to me that it might be worth clarifying some points that were raised during the pre-lunch point.

Mr. Justice White, to address further the question that we were discussing earlier about double jeopardy: We don't mean to suggest that it is beyond the power of Congress or a legislature to prescribe that although a crime includes another that both should be punished separately. We think this is within the power of Congress.

We think, however, that once it is determined that Congress did not intend separate punishment, that is, it was intended -- in other words, that if nothing was said about it at all, we believe the presumption should be that single punishment is what was intended, and we believe that the decisions of this Court make it clear that in those circumstances it would be improper to --

QUESTION: Would you say that Congress may define an offense that includes another offense, and it may prescribe

punishments for both and in the same or separate conviction they may be separately punished?

MR. EVANS: Now, whether they could -- whether -- it would depend upon the will of Congress.

QUESTION: Well, let's say the will of Congress is perfectly clear that you can punish for both the included offense and the greater offense in the same prosecution. You may charge and convict and punish for both.

MR. EVANS: I think that that would be constitutionally permissible.

QUESTION: You think it would?

MR. EVANS: Yes.

QUESTION: Although --

MR. EVANS: And I think it's the functional equivalent of Congress saying -- let's just take a concrete example, take the assault on a federal officer. The statute, as I remember it, says that it's three years for assaulting a federal officer. It's ten years for assaulting a federal officer with the use of a deadly weapon.

Now, if Congress were to say these punishments -- that the ten years for assaulting a federal officer with a deadly weapon shall be in addition to the three years that would be otherwise imposed for simply assaulting a federal officer, I think that's constitutionally permissible.

The same thing as if Congress said, three years for

assaulting a federal officer, thirteen years for assaulting a federal officer with a deadly weapon.

QUESTION: What about murder and manslaughter? You wouldn't suggest that they could make -- punish for both in one crime --

MR. EVANS: Well, I think Congress could, or a legislature could, but it would be the same thing as saying -- I mean it would just be an awkward way for the legislature to have imposed simply a higher punishment for the greater crime by saying that you can cumulate the greater and the lesser, is just another way of saying the greater shall be --

QUESTION: Well, do you have to go that far in this case?

MR. EVANS: No, it's not really -- I just wanted to clarify some of the --

QUESTION: Well, you've clarified some of the things you may have said in your brief.

MR. EVANS: Well, I think our brief -- our brief states that, Mr. Justice White, that -- reading from page 21 and 22 of our brief -- that -- We say that "This aspect of the double jeopardy protection is, of course, subject to the legislative will." Because "the severity and allocation of punishment for criminal conduct 'are peculiarly questions of legislative policy'." And we cite Gore for that proposition.

QUESTION: Suppose you had, as indeed some States do, felony murders, you may not try the murder and the felony -- robbery, let's say -- in the course of which a death occurred -- together.

And the State tries for murder, felony murder, proves facts of the robbery and the death in the course of the robbery, gets conviction, imposes a mandatory life sentence, let us say. For the murder.

After that, they try him for the robbery.

May they do that?

MR. EVANS: I think --

QUESTION: And robbery carries fifteen years.

MR. EVANS: I believe it would depend upon an understanding of what the intention of the legislature was. If it were -- if the legislature intended --

QUESTION: Well, the legislature said, in so many words, you can't try these two offenses together. They have to be tried separately. And the case of the felony murder, the sentence shall be mandatorily life; and in the case of the robbery it shall be fifteen years.

They try him, convict him for the felony murder, he gets the mandatory sentence of life.

MR. EVANS: Well, I --

QUESTION: May he now be tried for the robbery?

MR. EVANS: -- I can't answer it, because I don't

know what's -- what policy lies behind the proscription of a joint trial in the two. If the proscription is --

QUESTION: The States have such proscriptions. I don't know why they have them; they have them.

MR. EVANS: Well, I can't answer that question, Mr. Justice Brennan, --

QUESTION: Do you think double jeopardy-wise that can be -- do you think double jeopardy-wise that can be done?

MR. EVANS: I really haven't thought about it. I think it would depend on analysis of the legislature --

QUESTION: What about the Nielsen case that you cite in your footnote?

MR. EVANS: Well, Nielsen was not that --

QUESTION: Nielsen was cohabitation, conviction, later prosecution for adultery, conviction; and this Court set it aside, because that was an included offense.

MR. EVANS: In Nielsen there was a -- it was a conviction of a greater offense, and there was then an attempt to prosecute --

QUESTION: That's right, but in what I gave you --

MR. EVANS: Well, what I'm suggesting is that it's within the power of the legislature to provide --

QUESTION: But the legislature in that instance, in Nielsen, did that.

MR. EVANS: Well, the legislature --

QUESTION: The Utah Legislature did precisely that. They tried him first for cohabitation, which was a federal statute. He was convicted. And then he was tried for the adultery, which was also a federal statute; and he was convicted. And this Court set it aside and said it couldn't do that.

MR. EVANS: Well, what I'm suggesting -- there's nothing in Nielsen, as I recall Nielsen, that indicated that there was an express determination by the legislature that both crimes should be punished and punished separately; that one who commits both should be punished for both separately.

What I'm suggesting is that in the absence of such a determination, that's right, that I would think the double jeopardy probably does prohibit it. But --

QUESTION: I know, but if this Court held, as I understand Justice Bradley's opinion -- I never saw the case until you cited it -- if I understand his opinion, at page 191, that's double jeopardy.

MR. EVANS: Well --

QUESTION: And what can a legislature do, in the face of the double jeopardy?

MR. EVANS: Well, I believe that this aspect of the double jeopardy protection depends upon a threshold analysis of what it is that the legislature has determined.

QUESTION: You mean the legislature in that instance, if it had said, Yes, and we mean even if convicted he may be tried a second time?

MR. EVANS: Yes.

QUESTION: If it said that in many words, notwithstanding the double jeopardy clause, the adultery conviction would have been --

MR. EVANS: That's correct. I believe that's correct.

QUESTION: What authority do you get for that?

MR. EVANS: Well, there's no -- there's never been a case that I can point to. As a matter of fact, the issue may be raised in a peripheral way in the case that's pending. But that's my view of what the double jeopardy clause -- how it works in the context of double punishment for the same acts that violate two provisions.

It may be different, where you're talking about success of prosecutions, but this is my understanding of how it works in this context.

QUESTION: And here you're talking about -- we're talking about a case, I thought, of planning it and doing it.

MR. EVANS: That's right.

QUESTION: And Congress has said that they are two separate crimes.

MR. EVANS: That's our position, right.

So, in our view, this issue doesn't even come up in the case.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Evans.

You have about three minutes left, Mr. McLaughlin.

REBUTTAL ARGUMENT OF JAMES E. McLAUGHLIN, ESQ.,

ON BEHALF OF THE PETITIONERS

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

I will address myself solely to one point, and that's the point of a proper relief.

The government, at page 14 of its brief, has conceded that if Wharton's Rule applies, and we of course contend that it does, that the proper procedure would have been to instruct the jury to consider the conspiracy count only if they have found the defendants not guilty of the substantive offense.

The government further conceded, at page 14 of its brief, that this procedure, proper procedure was not followed in this case.

Where we depart from the government is then what is the proper relief for the petitioners here; and we submit that we are entitled to the relief that Mr. Justice Stewart found required in the case of Milanovich vs. United States?, which, unfortunately, we did not cite in our brief.

QUESTION: That was receiving stolen property and --

MR. McLAUGHLIN: That's right, Your Honor.

QUESTION: -- the conviction for both.

MR. McLAUGHLIN: Right.

QUESTION: And for larceny.

MR. McLAUGHLIN: It's found at 365 U.S. 557. And that remedy is a new trial.

In closing, we submit that Professor Francis Wharton was buried 85 years ago; I trust that his rule will not be buried in this term.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:08 o'clock, p.m., the case in the above-entitled matter was submitted.]

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