In the

# Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner

v.

ROBERT LEE NOBLES

No. 74-634



Washington, D. C.
April 23, 1975

Pages 1 thru 52



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IN THE SUPREME COURT OF THE UNITED STATES

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| UNITED STATES OF AMERICA, Petitioner | : | |
| v. | : | No. 74-634 |
| ROBERT LEE NOBLES | : | |

Washington, D. C.

Wednesday, April 23, 1975

The above-entitled matter came on for hearing at 1:26 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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:

PAUL L. FRIEDMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530
For Petitioner

NICHOLAS R. ALLIS, ESQ., Deputy Federal Public Defender, 707 U. S. Courthouse, 312 North Spring Street, Los Angeles, California 90012
For Respondent

# C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-634, United States against Nobles.

Mr. Friedman, you may proceed when you are ready.

ORAL ARGUMENT OF PAUL L. FREIDMAN, ESQ.

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

This case is here on a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

The issue, as we see it, is whether a trial judge has discretion during the trial of a criminal case, to order a defendant to produce relevant portions of a defense investigator's report and specifically, we are referring to the time after the defendant has offered that investigator as a witness in his own behalf and after the direct testimony of that investigator, who was called for the specific purpose of impeaching government witnesses who already have testified.

QUESTION: Why do you refer to it as ordering a defendant to do it, Mr. Friedman? Couldn't an order be directed to the witness himself?

MR. FRIEDMAN: Well, it really is directed to the witness because of his report. He had a copy of that report more than likely, although the record is not clear on this.

Defense counsel clearly had a copy of the report at time of trial, but it is a report that was prepared by the

investigator and it is his report so it really is an order to the defense counsel or the defense witness to turn over that report.

QUESTION: Was this the southern district of CAlifornia, originally?

MR. FRIEDMAN: This is the central district of California.

QUESTION: Hmn?

MR. FRIEDMAN: The central district of California. The trial was in Los Angeles.

QUESTION: One of those areas down there, they give that stuff ahead of time to file in the Clerk's office.

MR. FRIEDMAN: Well, apparently, that does not occur in the central district of California as a matter of practice.

QUESTION: Or at least in this particular court.

QUESTION: Maybe he never looked in the Clerk's office. Maybe it was there all the time.

MR. FRIEDMAN: Judging from the transcript in this case, I sincerely doubt that.

Our position, basically, is that the cases like Jenks and Gordon and Goldman of this Court really support the view that a trial judge has that kind of discretion in the absence of any countervailing legislation or rule and we say that there is none.

QUESTION: Is this sort of a reverse Jenks case?

MR. FRIEDMAN: It is sort of a reverse Jenks case, yes. And if you look back at Jenks, I think that anyone would have to agree that Jenks -- the Jenks case -- began on the premise that judges have this kind of discretion and that the only purpose of Congress in passing the Jenks Act was to limit that discretion which existed. It addressed itself only to the problem of requiring the Government to turn over certain things to the defense because it was concerned with fishing expeditions, national security, things of that sort of interest of the Government.

It did not address the problem of this case at all.

Congress could address it, but it hasn't and we submit that the Court hasn't addressed it in Rule 16, either, because Rule 16 is a pretrial rule and it does not really govern once the trial begins.

The facts of this case, very briefly, indicate why it was necessary here, or appropriate here for a judge to exercise his discretion.

Respondent and three others were charged with federal bank robbery. Three of the robbers were captured on film during the bank robbery. One, who was later identified as Respondent in the trial, was standing under the surveillance camera and he was the only one not captured on film.

The Government's evidence against him came from two

eye witnesses, a bank teller and a salesman visiting the bank.

It was those two eye witnesses that the defense tried to impeach through the investigator. First, they cross-examined the eye witnesses asking one whether or not he had told the investigator that he had only seen the back of the robber under the camera.

The witness denied having said it.

The second witness was asked whether or not he had told the investigator that to him all blacks look alike.

The witness denied having said it.

And at that point, the prosecutor requested that he be able to see the relevant portions of the report. Respondent's counsel denied -- refused to produce them.

The court indicated its inclination to order them produced but waited for further oral argument and then later said that he would order them produced but only after the investigator testified and only the relevant portions of the report and he offered his services en camera to review the report and excise extraneous matter.

QUESTION: At what point did the court make this ruling?

MR. FRIEDMAN: The court made the ruling prior to the defense investigator being called to the stand and he said that he would require production of relevant portions

after the direct testimony of the investigator. Now, earlier --

QUESTION: How would anybody know at that time if the investigator was going to testify?

MR. FRIEDMAN: The defense had called him to the stand. Chronologically, what happened was, when the prosecution witness, Van Gemeren, testified, he was asked whether he had had an interview with the investigator.

He said he couldn't recall. He was shown a piece of paper purporting to be part of the investigator's report.

QUESTION: This is on cross-examination of that prosecution witness.

MR. FRIEDMAN: By defense counsel.

QUESTION: Right.

MR. FRIEDMAN: That's right. He said the piece of paper refreshed his recollection but that he did not recall saying that he had only seen the back of the man --

QUESTION: All right.

MR. FRIEDMAN: The second Government witness was cross-examined about whether he had had the interview. His recollection did not have to be refreshed because he remembered the interview. He denied having made the statement, to him all blacks look alike.

There was then argument as to whether or not the prosecutor would be able to see the relevant portion of the report then and there, before his redirect of the Government

witness, Hoffman.

That was never produced. The Government proceeded with its direct examination. There was then subsequent argument at which the Court ruled that if the investigator was to be called, for this purpose, that the relevant portions of the report would have to be turned over after his direct testimony.

Defense counsel, Respondent's counsel, apparently then conferred with other members of the public defender service and they concluded that there was a Fifth Amendment privilege and other reasons, Sixth Amendment privilege, not to turn this over.

QUESTION: Before that conferral with other defense colleagues, the defense counsel had agreed to this, hadn't he? Or acquiesced in this.

MR. FRIEDMAN: He gave some mild protest, but he had acquiesced, yes.

QUESTION: Right.

MR. FRIEDMAN: And so then the defense investigator was called to the stand and I believe it was the prosecutor who said, well, before we proceed with this --

QUESTION: This is now the defense putting on its case.

MR. FRIEDMAN: The defense putting on its case. The Government had rested. There had been motions for judgment

of acquittal by all defense counsel. They had been denied. Defense had put on a number of witnesses prior to calling the investigator and then called the investigator.

The prosecutor asked to approach the bench and said, I would like a proffer as to what he is going to testify about.

Defense counsel, Mr. Allis, here, made the proffer and his proffer was that he would testify about some photographs taken in the bank, apparently relating to lighting conditions and so on, and also, he would impeach the witness, Hoffman and I believe, also the witness Van Gemeren.

The court said, well, my earlier ruling still stands. Have you turned this over? And there was then subsequent argument which Mr. Allis indicated he would not turn it over. He felt there were these privileges involved and the court then made clear, again, the limited nature of his ruling.

It was not the entire report but only the relevant parts of it relating to statements that may have been made by Hoffman and Van Gemeren's bond and that --

QUESTION: To the investigator or according to the investigator's report.

MR. FRIEDMAN: That's right.

QUESTION: Well, let's see, you'll limit it to the direct testimony, whatever it was to be, in the investigation?

MR. FRIEDMAN: Limited to the direct testimony of the investigator as it related to his interviews with those

witnesses.

QUESTION: Right.

MR. FRIEDMAN: And that if there were --

QUESTION: That's the same in Jenks and Jenks Act limitations.

MR. FRIEDMAN: I think it is the same exact Jenks Act limitation, yes.

QUESTION: Well, was he about to use those reports?

MR. FRIEDMAN: I'm sorry, sir. Was who about to use the reports?

QUESTION: The defense investigator who was going to impeach the Government witness.

MR. FRIEDMAN: It is not clear from the record whether the was going to use the reports to refresh his recollection while on the stand and it was never developed because this subject matter was not gone into.

QUESTION: Well, if it weren't shown, under the new rules of evidence when they go into effect, if that weren't shown, you wouldn't get this.

MR. FRIEDMAN: Well, I am not sure that that is entirely true and I think that --

QUESTION: Well, I'll put it this way. There is a problem -- you'd have a problem with the rules, wouldn't you?

MR. FRIEDMAN: I think we'd have a bigger problem.

QUESTION: You'd have a problem.

MR. FRIEDMAN: Yes.

QUESTION: Whether you can solve it or not is another matter.

MR. FRIEDMAN: I'll attempt to solve it.

QUESTION: Well, one of these days, you'll have to.

MR. FRIEDMAN: I think the rules, obviously, were not in effect.

QUESTION: Not in effect till July 1st.

MR. FRIEDMAN: And are not in effect until July 1st of this year.

QUESTION: Did the district court's restriction on Bond's testimony permit him to testify as to the lighting in the bank --

MR. FRIEDMAN: Yes.

QUESTION: Without showing the report?

MR. FRIEDMAN: Yes, and he did so testify.

QUESTION: Well, we are getting a little ahead of the story here.

MR. FRIEDMAN: All right, at the bench they were discussing the matter. The judge reiterated his ruling and made clear that it was limited to only the relevant portions and again made clear that the relevancies could be excised, he offered his services in camera to help in the excision of these things and defense counsel nevertheless refused to turn over any portion of the report, standing on his privileges

QUESTION: Then or ever. I mean, that was his view.

MR. FRIEDMAN: Yes. Yes, he would not turn --

QUESTION: Either then or after the investigator --

MR. FRIEDMAN: That's correct. And the court -- at some point there was some discussion about why not let him testify and then striking and the court said, well, I think we can rule on this before the witness and I want to know your intentions. You are an officer of the court and I am going to preclude this testimony if you say that you will not turn it over and that was the ruling of the court.

He testified as to other matters. Other witnesses testified and the jury returned a verdict of guilty.

The court of appeals reversed in the two-to-one decision and they found that the trial court's order was a violation of the Fifth Amendment privilege and also a violation of Rule 16C's limitation on discovery to the prosecutor by the defense.

QUESTION: And the trial court -- this material was turned over.

MR. FRIEDMAN: To the trial court. The material in the defense investigator's report --

QUESTION: Right.

MR. FRIEDMAN: Was -- what was turned over to the trial court, I believe -- it is under seal, so I have never seen it -- is a proffer as to what Bond would testify to. As

a supplement to that proffer, counsel made an oral representation in court that, in fact, the investigator had taken notes and had prepared a report from those notes of his interviews with the two witnesses and that it was that that counsel and the court had been discussing when they had made reference to the investigator's report.

He said at one point there were, in fact, two reports and I am not sure exactly what was meant by that, whether he was at one point referring to the notes and at another point referring to the report.

QUESTION: Well, I lost the thread of the story a little bit. After -- the investigator did testify, did he?

MR. FRIEDMAN: The investigator testified as to other matters.

QUESTION: But not as to these two witnesses.

MR. FRIEDMAN: But not as to these two witnesses.

QUESTION: And why not?

MR. FRIEDMAN: Because the court ruled that if he or counsel refused to comply with the order to turn over the report, that he would be precluded --

QUESTION: From testifying on that subject.

MR. FRIEDMAN: On that subject matter.

QUESTION: On that subject.

QUESTION: Well, that is more than Jenks.

MR. FRIEDMAN: No, I think that under Jenks --

QUESTION: Under Jenks, you don't get it till the fellow has testified.

QUESTION: Yes.

MR. FRIEDMAN: Well, the court's order -- the court ruled prior to his taking the stand but he made clear that his order would only apply after the direct testimony. He said, after the direct testimony you must turn over these portions of the report, but tell me now whether you are going to comply with that order.

QUESTION: And --

MR. FRIEDMAN: And if you are not going to comply, rather than let him testify and then striking, I will do the functional equivalent --

QUESTION: Right.

MR. FRIEDMAN: -- which is to prevent him from going in to this subject matter at all.

QUESTION: Right.

MR. FRIEDMAN: And I think the same thing would happen under Jenks if a trial judge was farsighted enough to deal with the problem before --

QUESTION: He was just anticipating the problem, wasn't he?

MR. FRIEDMAN: Exactly. Exactly. His ruling was made before the witness took the stand but it was to apply only after the direct testimony of that witness.

QUESTION: But the other way of going about it is to have him testify and then order him to turn it over.

MR. FRIEDMAN: That is right.

QUESTION: Isn't that the ordinary Jenks procedure?
QUESTION: Yes.
MR. REIEDMAN: That is the ordinary Jenks procedure.

QUESTION: I know that. I gather the practice has grown up of turning over so-called "Jenks statements --"

QUESTION: Well in advance.

QUESTION: -- to the defense counsel before the trial begins, but under the statute itself, with no obligation to anything on the part of the Government --

MR. FRIEDMAN: That's right.

QUESTION: -- until the witness has completed his direct testimony. Is that right?

MR. FRIEDMAN: And by the trial judge's order, there was no obligation to turn it over until after he completed his direct testimony.

QUESTION: Well, what I am wondering is, if you had a Jenks Act situation, a judge couldn't say, I won't let you testify to anything as long as the Government now tells me they are not going to turn it over.

MR. FRIEDMAN: I am not at all sure that is true, Mr. Justice Brennan, because it seems to me that if a prosecutor were to make that kind of a statement in advance of the witness being called at all, for whatever reason, it just

doesn't happen that much. The judge could --

QUESTION: Well, I know it doesn't happen. I am just wondering, though, whether the judge would have that authority.

MR. FRIEDMAN: When?

QUESTION: When the prosecutor did say, I am not going to turn them over to you.

MR. FRIEDMAN: I don't think he would be required to let him testify and then strike it. I just --

QUESTION: Certainly, under the Jenks opinion, what would have happened is, he would have to dismiss the indictment.

MR. FRIEDMAN: That's right. I mean, there are additional sanctions that can be forced against the Government that cannot be enforced against the defense. It is certainly a much lesser sanction than dismissing the indictment.

QUESTION: At some point, will you tell me why we should decide this case when 613A is going to become effective on July 1?

MR. FRIEDMAN: Well, other than the fact that 613A didn't govern, but it may govern on the retrial, it is our position that 613A does not deal with the precise problems and --

QUESTION: So this will survive 613A, will it?

MR. FRIEDMAN: I think it will survive 613A because if you look at the history --

QUESTION: Because otherwise, I don't see. This will just be a decision for this case. We wouldn't be settling any major question of law.

MR. FRIEDMAN: Well, I don't think that refreshing recollection has to be a precondition to the trial judge exercising his discretion in this kind of a circumstance.

QUESTION: But that will be an issue under 613-A.

MR. FRIEDMAN: Yes, it will be, because 613, as it originally came from the court, required -- did not provide judge's discretion, but said whether refreshing was done while testifying or prior to testifying, it would be turned over.

Congress modified the second one, before testifying. But they did not deal with what we contend is the third situation, which is this situation here.

QUESTION: Well, do you see the scope of the trial judge's order here requiring a turnover as being necessarily tantamount to allowing the prosecution to offer this and have it admitted into evidence?

MR. FRIEDMAN: Well, I don't think so. I think it can be used for purposes of cross-examination and then the normal rules of evidence would apply. If it turns out to be a prior consistent statement of Hoffman and Van Gemeren, the question then would be whether you could introduce it to

buttress their testimony.

If it turns out to be a prior consistent statement of the investigator, the same question would result and maybe after July 1st, 1975, Rule 801D would answer that question.

QUESTION: But I would think it is not precisely the same for the trial court to say, you must make available to the prosecutor this document and to say, I order this document admitted in evidence as exhibit soandso.

MR. FRIEDMAN: The two questions are clearly distinguishable. I think Jenks said it. I think Palermo said it. I think Campbell said it, that production, for the purposes of cross-examination, the prerequisites for that are only to show that it is relevant and relates to the direct testimony. It can be used for all sorts of purposes, ommissions from the report might be relevant. A different order of presentation in the report might be relevant.

Whether it is a statement consistent or inconsistent that would be admissible in evidence is a question the judge would rule on somewhere down the road and that has nothing directly to do with its producibility and with its usefulness on the issue of testing credibility and getting at the truth which is what we think this case really is about.

And our basic position is that, under prior decisions of this court, the same kinds of principles that apply to the prosecutor when he has a prior statement and he calls a

witness who has made that prior statement or prior report, ought to apply to the defense. When they call a witness for the very purpose of impeaching government witnesses whom they have interviewed and whom they have taken statements from and the only --

QUESTION: Mr. Friedman, now, this is a statement allegedly made to an investigator. Suppose Mr. Allis himself had been his own investigator?

MR. FRIEDMAN: Mr. Nobles, the defendant?

QUESTION: The attorney.

MR. FRIEDMAN: Oh, the attorney. Well --

QUESTION: And he made a note, would the case be any different?

MR. FRIEDMAN: I don't think so. We -- and, in fact, the state cases which we cite, Damon, Sanders and Montague, are cases where attorneys acted as their own investigators.

We are not talking about attorney-client privilege. The privilege rule that had been proposed which would have expanded attorney-client privilege to also encompass representatives of the attorney was not passed by Congress and the common-law privileges prevail and therefore, even the Court of Appeals in this case said that the attorney-client privilege would not protect this material.

Secondly, we submit, it is not confidential in the sense that communications covered by the attorney-client

privilege have protection, certainly not --

QUESTION: It would be protected from discovery in a civil action by Hickman against Taylor, wouldn't it?

MR. FRIEDMAN: The statements would be protected pretrial.

QUESTION: Yes.

MR. FRIEDMAN: From discovery in civil actions. I doubt that they would be protected in trial from production if the person who had made the statement of the report had been called as a witness. If, in a civil action, someone is hired as a representative of the attorney to do some investigation or to do a statistical study or whatever else, this may be governed by the work product rule in Hickman. It may be governed by the protection for statements in HIckman pretrial, but if he is called as a witness to testify about those very matters --

QUESTION: But I mean, by Justice Blackmun's hypothesis that where the lawyer himself did the interviewing. Now, that is clearly protected from pretrial discovery itself.

MR. FRIEDMAN: From pretrial discovery, yes, under Hickman.

QUESTION: How about in this very case, if a man walks in off the street and tells a lawyer that I heard soandso say this and I took some notes on it and he calls him as a witness, same rule?

MR. FRIEDMAN: If the witness himself took the notes of what the other person had said.

QUESTION: And, he comes in to the lawyer. The lawyer doesn't know a thing about it.

MR. FRIEDMAN: But the lawyer chooses to call him as a witness.

QUESTION: That's right.

MR. FRIEDMAN: Well --

QUESTION: To use our phrase, "Seeking the truth."

MR. FRIEDMAN: Well, isn't that what the criminal trial is all about?

QUESTION: That's what I say, assuming that.

MR. FRIEDMAN: And --

QUESTION: Well, would the rule apply if this man walked in off the street?

MR. FRIEDMAN: I think if he had taken written notes and he testified about the content of those notes, the substance of those notes, that the prosecutor ought to be able to see them for purposes of cross-examination.

QUESTION: And that would go if he walked into the courtroom and volunteered himself as a witness?

MR. FRIEDMAN: And the defense attorney --

QUESTION: No. If the judge called him as a witness.

MR. FRIEDMAN: If he was the court's witness? Then perhaps both counsel are entitled to see the notes.

QUESTION: What you are really doing, you are trying to get this case reversed so you can put the new rule on.

Isn't that what you are doing?

MR. FRIEDMAN: No. I -- I mean, the purpose, whether the new rule applies or not, we think that decisions of this Court in cases like Jenks and Gordon say the judges have discretion.

We are not asking for a rule that says that judges must order this stuff turned over in every single case. What we are talking about is whether, in the circumstances of a particular case -- and these circumstances point it up so well, where a man is called for the very purpose of impeaching the Government's key witnesses, which is perfectly legitimate, obviously, and yet, says, I've got something here which would help you to impeach me. He can't be impeached.

QUESTION: Are you concentrating on -- apparently you are saying that it is because they were going to put the defense investigator on that you were entitled to have his notes of his interviews with the Government witnesses.

MR. FRIEDMAN: That's right.

QUESTION: Did you object to defense cross-examination of the defense witnesses at that time, about that prior statement without the defense giving you a copy of any notes they made of their statements?

MR. FRIEDMAN: You mean the defense cross-examination

of the Government witnesses?

QUESTION: Yes.

MR. FRIEDMAN: There was a request by the prosecutor at that time for the notes and --

QUESTION: Wasn't there a rule -- a commonlaw rule of evidence that if you are going to cross-examine the witness about a prior statement of his, especially if it were written, that you were supposed to show it to him?

MR. FRIEDMAN: We think, and we make this argument in our brief, too -- although it is not necessary for a decision in this case because of the way it comes up -- that under rule 613A --

QUESTION: That's right.

MR. FRIEDMAN: -- of the new federal rules of evidence, we would have really been entitled to those statements earlier.

QUESTION: Well, when the Government witnesses were being cross-examined.

MR. FRIEDMAN: That's right.

QUESTION: Did you ask for them then?

MR. FRIEDMAN: In the case of Van Gemeren, the prosecutor made the request that the witness be shown the statement and that he, too, the prosecutor, be shown it.

That was done.

QUESTION: Well, if there were a retrial and the

rules were in effect and they apply -- let's assume they apply -- you would demand these statements, I take it, under 613 at the time of the cross-examination.

MR. FRIEDMAN: I would think so, yes.

QUESTION: But if you were just concentrating on getting the documents because the defense investigator was going to go on the stand, then you would be faced with Rule 612.

MR. FRIEDMAN: That's right, which creates more problems, I agree --

QUESTION: Yes.

MR. FRIEDMAN: Than does Rule 613.

QUESTION: Yes.

MR. FRIEDMAN: So it may be that the prosecutor would be entitled on a retrial for these documents earlier on but we still think that the --

QUESTION: Well, I thought you just said, Mr. Friedman, I really have trouble seeing what anyone gains by our deciding this case.

MR. FRIEDMAN: Well, for one thing, Respondent makes a whole slew of constitutional arguments that would stand in the way of commonlaw Jenks case-type doctrine that we are talking about -- if he is right -- and we also stand in the way of the new federal rules --

QUESTION: The Jenks case was not a constitutional

decision.

MR. FRIEDMAN: That is right and my point is that we -- our position is that the same principles of Jenks apply unless there is some constitutional privilege that stands in the way because the Government is different from --

QUESTION: You speak of the defendant as distinguished from the Government.

MR. FRIEDMAN: Right. And the same concept applies in terms of the federal rules of evidence. We can be completely right on what the federal rules of evidence mean and yet, if there is a constitutional impediment to them working in favor of the Government -- so I think that the case is important, even if the evidentiary and procedural questions are somewhat murky because of the transitional period we are in, to deal with some of his constitutional claims so that we know, in this case, on retrial -- if there be a retrial -- and in the future, if there are constitutional impediments to the Government's getting this kind of material in this kind of situation.

QUESTION: So far as the Court of Appeals judgment went, there will be a retrial.

MR. FRIEDMAN: That is right. So, one way or the other there will be one.

We would ask that the opinion of the Court of Appeals be reversed. We think the constitutional claims are

without merit, but because there are so many of them that we think are without merit, I'll defer to my opponent at this point and reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Allis.

ORAL ARGUMENT OF NICHOLAS R. ALLIS, ESQ.

ON BEHALF OF RESPONDENT

QUESTION: Before you get started, let me put one question to you. In the dissenting opinion of Judge Kilkenny in the Ninth Circuit, he made the statement, "We can assume that Appellant's counsel was not playing games and that the memorandum, that is, the notes that were taken, probably made no reference to the impeachment questions propounded to the witness, Hoffman. Otherwise, there would be no logical reason for the refusal to produce them." That's the end of the quote.

Now, can you suggest any hypothesis why, if this statement was, in fact, as impliedly represented to the Court, that it would not help the Defendant to have it made available?

MR. ALLIS: Yes, your Honor, I'd like to, if I may --

QUESTION: You can deal with that any time you want in the order of your argument. No need to take it up right now if you don't want to.

MR. ALLIS: Well, I appreciate that, if I could reserve it for a little bit later.

QUESTION: Fine.

MR. ALLIS: I'd like to say at this time, though, your Honor, that the statement of Van Gemeren and the statement of Hoffman, which was the written report of the investigator, were placed under seal for the Court of Appeals.

The statement of Van Gemeren was Defendant's Exhibit A and was before the court marked as an exhibit at the time he testified.

I made that known to the Court of Appeals in my brief but apparently the dissenting judge did not look at those statements.

QUESTION: Do we know that any of the judges did, if they were under seal from the District Court?

MR. ALLIS: I do not know, sir. I had asked the District Court at the end of the trial to place them under seal for the Court of Appeals. Last week I checked and they were still in the safe in Los Angeles. If it is at all pertinent, I'll do my best to see that they get here.

QUESTION: Now, by the statement, you mean the investigators' reports of their oral statements to him?

MR. ALLIS: The investigators' reports, that's correct.

QUESTION: Is that what, in fact, it is?

MR. ALLIS: Yes.

QUESTION: Did this panel sit in San Francisco or

Los Angeles?

MR. ALLIS: Los Angeles. It is in the safe in Los Angeles, sir.

I was the trial counsel in this case. Before the trial I sent out our investigator, John Bond, to interview Government witnesses. It turned out at the trial that the only evidence against Respondent Robert Lee Nobles was the testimony of two eyewitnesses, Van Gemeren and Hoffman.

The Court of Appeals itself recognized that that eyewitness testimony was far less impressive than the eyewitness testimony against the other two defendants.

There was a lot of other evidence against the other two defendants as well.

During deliberations, the jury had the entire testimony of the eyewitness Hoffman read back to it so that the jury also had problems with the eyewitness testimony but the defendant was not permitted to put on his most compelling evidence and that was the evidence that John Bond would have testified to, that one of the eyewitnesses had told him that all blacks look alike prior to trial and the other had told him that he had only seen the robber from behind.

QUESTION: Both of those versions were suggested through cross-examination, of course, weren't they?

MR. ALLIS: Yes, sir.

QUESTION: By the two prosecution witnesses in the

form of, didn't you tell the investigator that?

MR. ALLIS: Yes, they were, Mr. Justice Stewart.

That testimony of John Bond would have completely destroyed the credibility of these two eyewitnesses. The damage to the defendant was exascerbated beyond repair by the comments of the prosecutor in closing argument.

He said, although he well knew that the -- that John Bond did not testify because of a legal disagreement as to the privileged status of the reports, nevertheless he told the jury that the reason Bond had not testified was because the witnesses had never told him those things and that defense counsel was merely trying to inject a racial element into the trial.

The preclusion sanction ordered by the trial court judge in these circumstances, your Honors, was much too harsh. There was no statute or rule which could have forewarned defense counsel or defendants that he would have to turn over these reports.

This isn't a case like, for example, such as Williams where you have a statute which may include with it a preclusion sanction, the possibility of such a sanction.

This is a virtually unheard-of procedure by a trial court judge who punished the defendant for his good faith refusal to obey the order by precluding the testimony of the most important witness for the defendant.

QUESTION: May I ask this question? I am sure I don't understand the posture of the case. But if the statement in the possession of your witness corroborated his testimony, why did you object to that being presented to the jury?

MR. ALLIS: Your Honor, I objected to it being presented to the jury because it, in my belief at that time, it undercut two of the most fundamental interests in favor of the defendant in our criminal justice system.

I'd like to, perhaps, discuss those just for a minute and with reference to this case.

QUESTION: Well, were you representing defendants generally or representing this Defendant? Where was your primary obligation?

MR. ALLIS: It was with this Defendant, your Honor and this case presents the exact problem, it seems to me.

QUESTION: Well, if, as suggested by my earlier question and now by Justice Powell's question, if the representation made by inference were contained in the report, why wouldn't that help your client?

MR. ALLIS: The exact words would have helped the client because the exact words were in the reports, as those reports in the safe now can show. But what the trial court judge ordered in Petitioner's viewpoint -- and I think it is a reasonable interpretation -- was that all relevant material

be turned over.

Now, once all relevant material in the report is ordered turned over, there becomes the problem of what is relevant. Both of the statements of these investigators -- of these eyewitnesses -- had to do with the quality of the investigation without referring to the specific case, because we have, all along, contended that the information is confidential.

May I suggest a couple of hypotheticals?

Supposing the one witness said, I only saw the robber from the back, but he also told the investigator at the line-up, I wasn't sure it was him until I heard his voice and then I was sure.

Now, arguably, that statement about hearing the voice is relevant to the quality of the identification of the eye-witness.

It is our position that facts such as that should not be made available to the Government. There is no duty on the part of the defendant to make that known to the Government.

QUESTION: Didn't the judge say that he would excise all matter that was not relevant to the precise issue?

MR. ALLIS: He did, sir, but --

QUESTION: Well, couldn't that be a subject of excising and not open you to this problem?

MR. ALLIS: Yes, sir, if the judge decided that that was not specifically relevant to the issue, but --

QUESTION: How could he decide that from what you -- under your hypothetical?

How could he decide other than that it was relevant?

MR. ALLIS: Sir, I think it is at least arguable and I certainly believe that a judge could decide as you suggest, that it is relevant and that it should be turned over and that would violate the underlying principle of our system of justice in the accusatory system, whereby the Government must bear the entire burden.

The Government has a duty and this is relevant to the Jenks Act, it seems to me, not only to prove the defendant guilty, but to make sure that he has any evidence that is material to his defense.

The Jenks Act is part of that duty as is this Court's decision in Brady versus Maryland. But there is no reciprocal duty on the part of the defendant to help the Government prove guilty people guilty.

QUESTION: Even when the defense opens up the subject on cross-examination?

MR. ALLIS: Well, sir, Mr. Justice Powell, we were willing to have Bond cross-examined. The only protest we had was that a report which was never going to be utilized by us, produced by us at the trial, should be produced. WE

contended that that was basically an internal defense document so that Bond was open to complete cross-examination and, moreover, the Government could have called back in rebuttal the two eyewitnesses who had testified for them in direct.

QUESTION: Was this report in Bond's handwriting or had it been typed by his typewriter?

MR. ALLIS: It had been typed by a secretary later, after -- subsequent to the interview. We are not dealing with a statement that was written, signed or approved by the witnesses and that would be the situation, Mr. Justice White, I believe, when the report would have to be shown to the witness. This was a --

QUESTION: Would your position here today be different if you had had, in your possession, statements signed by the prosecution witnesses that had been referred to in the cross-examination?

MR. ALLIS: Yes, yes, if the statements --

QUESTION: It would be different?

MR. ALLIS: Yes, it would because --

QUESTION: You would agree that those statements could be demanded by the trial court?

MR. ALLIS: Yes, sir, they could.

QUESTION: And tell me again why you draw the distinction between a statement signed by a witness and the

recordation of the witness' statement by your investigator?

MR. ALLIS: Your Honor, it is based on the commonlaw rules of evidence. The rule in the Queens case, which is followed by a number of courts, as I understand it, would require statements signed by a witness or approved by the witness or written by the witness to be shown to him.

That is sensible in that the witness has actually seen the statement and agreed that it reflects his contemporaneous remarks but this was a report written by somebody else not to be produced at trial and written subsequent to the actual interview.

QUESTION: You are saying this is work product, the lawyer's work product?

MR. ALLIS: Yes, your Honor. Yes, your Honor. We make three arguments with regard to privilege. We think that any document like this is privileged, under our adversary system and its interest in effective assistance of counsel--it has always been held that confidentiality in the preparation of a defense case is essential to the furtherance of that.

We have two privilege arguments that come under that confidentiality heading, the one the Sixth Amendment, one work product.

Our third privilege argument is based on the Fifth Amendment. But aside from the privilege, we think this was simply a matter of the Court of Appeals exercising its

supervisory jurisdiction to correct a mistake of the trial court in interpreting those rules of evidence which govern disclosure of documents at trial.

QUESTION: The rule of the Queens case is a rule governing cross-examination, isn't it?

MR. ALLIS: Yes. Yes it is, Mr. Justice Rehnquist.

QUESTION: And it is followed some places and not others?

MR. ALLIS: That is correct.

QUESTION: You were talking about witnesses in terms of the two prosecution witnesses. Focusing upon Bond as a witness, this statement certainly had been prepared by him and had been, therefore, adopted and authorized by him, even though it might have been typed up, I assume, hadn't it?

MR. ALLIS: That is right, but Bond was my witness and the rule in the Queens case would not apply in a situation such as that.

QUESTION: But you weren't required to produce it until the prosecution was going to examine him.

QUESTION: Right.

MR. ALLIS: That is right.

QUESTION: And that is a clear case of the Queens case rule.

QUESTION: Thinking of Bond, now, as the witness.

QUESTION: Yes.

MR. ALLIS: No, sir, I respectfully disagree. The rule in the Queens case is specifically applicable when the direct examiner is examining an opposing party's witness.

QUESTION: You are talking about -- you are confusing terms. What do you mean by a "direct examiner examining an opposing party's witness"?

QUESTION: There is no such thing.

QUESTION: There is direct examination and there is examining an opposing party's witness.

QUESTION: There is no such thing.

QUESTION: There is direct examination and there is --

MR. ALLIS: I beg your pardon. I beg your pardon.

The rule in the Queens case would apply to me as the examiner of the Government's witness. That is, I would have to turn over statements of the Govenment --

QUESTION: When you are going to cross-examine --

MR. ALLIS: When I am cross-examining but it would not apply to make me turn over to the Government statements in my possession when my own witness has completed his testimony.

The rule in the Queens case would apply to Bond insofar as any statements of Bon in the possession of the Government would have to be turned over to me during their cross-examination of Bond.

QUESTION: Well, to him rather than to you.

MR. ALLIS: To him, yes.

QUESTION: Mr. Allis, when the Government undertook to -- had Mr. Bond testify, the Government would then be entitled to cross-examine him, you agree.

MR. ALLIS: Yes, sir.

QUESTION: Could the Government ask him whether he had refreshed his recollection about the interview by reference to his notes that were made?

MR. ALLIS: Certainly.

QUESTION: Well, isn't it quite an old established rule that notes used to refresh recollection of witness may be examined by the opposing counsel?

MR. ALLIS: Yes, it is, Mr. Chief Justice.

QUESTION: Well, then, what is the problem here?

MR. ALLIS: There was no evidence in the record and the Court of Appeals specifically found this, to support any contention that his recollection was refreshed.

QUESTION: Well, but you can't know that. This man is a regular investigator for the public defender's office, is he not?

MR. ALLIS: That is correct.

QUESTION: He is inquiring and interviewing dozens of people in many, many cases, I would assume. Is that not so?

MR. ALLIS: That is true but I would like to make

the caveat, really --

QUESTION: Just like the counterpart of an investigator for the law enforecment agency.

MR. ALLIS: That is correct.

QUESTION: And isn't it reasonable -- wouldn't it be reasonable for a court to assume that any careful lawyer would require his investigator to refresh his recollection from his own reports before appearing in the courtroom?

MR. ALLIS: Perhaps, your Honor, I don't think it is necessarily true in all cases, where you have a case of a very important trial and the witness has just been interviewed and because of some items in other parts of the report not relevant or not specifically connected with the statements he would testify to -- if the defense counsel didn't -- wanted to make sure they wouldn't be turned over to the Government to provide it with information, it might not have the investigator refresh his recollection with the report.

In any case, I don't think that that is an issue in this case because there is absolutely nothing in the record to support any finding that he did refresh his recollection.

The Court of Appeals found --

QUESTION: And he wasn't asked on cross-examination whether he had?

MR. ALLIS: No, he was not, your Honor.

Our contention is that the rules of disclosure of

documents that are in effect at the time of trial are composed of the commonlaw rules of evidence, Rule 16 of the Federal Rules of Criminal Procedure and the Jenks Act.

The Rule 16C of the Federal Rules of Criminal Procedure sets aside in the last sentence a certain number of items of the defense which are immune from Government discovery.

This document falls within that last sentence in two different phrases of it. One, it is a report of an agent of the Defendant. Secondly, it is a statement of a Government witness made to an agent of the Defendant.

Now, the Petitioner argues that Rule 16 is only applicable pre-trial. If one looks at Rule 16B, the preceding subsection, at its last sentecne, one finds that that subsection carves out a certain number of items belonging to the Government which cannot be discovered by the defense.

But the last phrase is, "Except insofar as provided in the Jenks Act." The Jenks Act only comes into effect at trial and therefore it is clear that the rulemakers had in mind that Rule 16 should be applicable to trial as well as pretrial.

QUESTION: What if on cross-examination you would ask the Government's witness whether they were aware of a bloody shirt that had been found in connection with this thing and their answer was no and then your investigator sitting at

counsel table waiting to be called as a witness simply pulled the bloody shirt out of his pocket and puts it in front of him on the table in full view of the jury.

Is it your position that the District court would have to find some justification in one of these rules of evidence in order to order that shirt at least brought before the court for inspection to see what light it would shed on the trial?

MR. ALLIS: If the shrit were thrown on the table, your Honor, it would, in effect, be produced at the trial. The is the situation where the report was never produced at the trial.

Am I directing myself to your question?

QUESTION: Yes, you certainly are. Is there no evidence, then, that if either you, in your cross-examination suggested that there had been a report either by looking at it or otherwise?

MR. ALLIS: Well, your Honor, in my cross-examination, I had the report or a copy of that part that I wanted to question the witness about so that I could make sure that I was restating the exact words which he had told John Bond but it has never been referred to at all and it had never been brought out before the jury that there was a report written.

It was never shown to the jury, never introduced into evidence.

Now, a trial court judge has discretion when there is a rule, to fill in the gaps to solve problems not considered by the rule-makers or to interpret text in a manner which achieves statutory justice. But as the Court of Appeals in the Wright case here in the District of Columbia stated, this kind of a rule, depending on one's perspective, would expand or narrow specific rights and privileges granted by statute and rule.

QUESTION: Of course, Judge Craft's order in the Wright case was a good deal broader than the District Court's order here, wasn't it?

MR. ALLIS: Yes, it was, in the sense that the entire report was ordered produced, but it was not ordered produced until the defense was in its case.

Our contention is that the basic principles of the Wright case do indeed apply, that it was an investigator's report in that case ordered discovered.

Now, Rule 16 is compatible with the underlying principle of our accusatory system that the Government must bear the entire burden.

Any suggestion that the Government must have at least as good a chance as the Defendant would to prevail would seem to violate the basic principle favoring the Defendant in order to avoid conviction of the innocent.

The other underlying principle of our system which

I referred to earlier which is involved in this case and which certainly influenced me in refusing to obey that court's order was the interest in confidentiality and I might add, if I may, that although, under my view of the documents, they might not have damaged in this specific instance, perhaps on sur-rebuttal, if that was necessary, at a retrial, if there were a hung jury, or a reversed verdict, if there was a rule like this that had been made and followed during the trial, what could that mean in terms of my defendant and what I would have to turn over at a later trial concerning other witnesses.

That privilege of confidentiality, this Court has recognized in the context of Hickman versus Taylor, is essential in our system of justice. Historically, lawyers have worked as officers of the court to protect the interests of their clients.

Now, the way that is done, this Court said in Hickman, is with a certain degree of privacy.

QUESTION: Hickman wouldn't protect a statement made to an investigating agent, would it, as opposed to a statement made to a lawyer in Mr. Justice Blackmun's hypothetical?

MR. ALLIS: This is the Petitioner's viewpoint and it is true that Hickman did deal with a statement made to the attorney as opposed to an investigator.

QUESTION: There is a lot fo district court law that

says that statements to investigators are not protected under Hickman.

MR. ALLIS: Your Honor, we have cited in our brief a number of cases which say that Hickman does apply, so I think that although there are some which say that it doesn't apply, there are many which say that it does apply.

QUESTION: Well, see, if you are right on your Rule 16 argument, it is irrelevant.

MR. ALLIS: That is correct. That is absolutely correct, your Honor. I am just moving now into our three privilege arguments.

QUESTION: Yes, all right.

MR. ALLIS: We basically rest on the contention that this is merely an exercise of the Court of Appeals supervisory discretion to challenge a completely new rule fashioned by a district court judge against the defendant in a criminal case.

The Court of Appeals in the Third Circuit in a unanimous en banc decision in Hickman, later affirmed by this Court, recognized that that policy of confidentiality is open to the gibes of the cynical but we believe it is sound.

We know it is irrefutably established in the law, although it is not capable of laboratory demonstration.

Only that principle of confidentiality will assure that a defense counsel can get all the facts, both favorable

and unfavorable, which he is going to need to direct what is going to happen to the case, whether it should be disposed of before trial, whether it should go to trial, who should take the stand and what other witnesses should testify.

Your Honors, I should like to suggest that the --

QUESTION: Mr. Allis, what would you do if the witness had the notesin his own pocket while he was up there testifying? Would that be a little different?

MR. ALLIS: It would be if he had refreshed his recollection with the notes and conceivably it would be different if he in some way indicated -- although I would argue not -- to the jury by waving the report or somehow relying on the fact that --

QUESTION: Well, I am trying to see how you get your confidentiality of what he has in his pocket.

MR. ALLIS: The confidentialtiy, your Honor, protect all internal documents of the defense made by the defense team. This was a report from one member of the defense team, the investigator, to the attorney, FROM ONE ___

QUESTION: No, no, not in my case. My case was, he just got some notes in his pocket. I don't know what they are.

MR. ALLIS: Mr. Justice Marshall, you are correct in suggesting that that would be different then, in the sense that it is certainly not a communication by one member of the

defense team to --

QUESTION: It wouldn't be necessarily a work product, but it could be later but you take the position if it is in your hands, it is obviously a work product. Is that your position?

MR. ALLIS: That is correct, Mr. Justice Marshall.

QUESTION: What if I am representing a condemnee and I employer an appraiser and he makes a report to me as to the value of the property. Can I say that he is one of the condemnee's team and therefore, the report is not discoverable?

MR. ALLIS: I think that this certainly would be much more arguable that something like that could be produced for two reasons. One, it is a scientific kind of a statement and, number two, it is not a criminal case.

I think that there are extra reasons in a criminal case which protect documents.

And, thirdly --

QUESTION: You can be wrong on Hickman and still prevail because this is a criminal case, I take it.

MR. ALLIS: Yes, your Honor, we contend that.

In addition, an attorney for a criminal defendant is really a close agent, really an extension of the defendant. There is a much closer --

QUESTION: Don't you think an attorney for a

condemnee is prettymuch of a close agent, too?

MR. ALLIS: Yes, sir.

QUESTION: Mr. Allis, what do you normally do? I am not talking about you personally, but what do defense counsel normally do when they send an investigator out? Do they prefer to have him obtain statements from witnesses, which is what is customarily done in civil practice, statements that are signed by witnesses and that can be used effectively to cross-examine witnesses?

Or do you instruct your investigators never to take a statement because the statement might be used against them but the investigator should write up his own report which, under your submission here today, can never be used against him.

What is the normal practice?

MR. ALLIS: I would certainly prefer that -- and it is my normal practice to have the investigator get a written statement signed by the witness or approved by him. Then it is much more effective in examining the witness.

But I think that the problems of the defendant interviewing Government witnesses is illustrated by this case.

Here, the most important Government witness refused to meet with the investigator, finally agreed to talk on the telephone and the report was made subsequent to that

conversation on the telephone. There is a great --

QUESTION: Was that one of these two witnesses?

MR. ALLIS: Hoffman.

QUESTION: Hoffman.

QUESTION: But in many cases you have no idea whether the witness is going to be pro-Government or pro-defense or just as neutral as he can be.

MR. ALLIS: Your Honor, bank tellers, after a bank robbery, in my experience, tend to be prejudiced against the defendant, assuming that the Government is right in bringing them to trial.

QUESTION: Well, they are prejudiced against the robber.

MR. ALLIS: Your Honor, I beg your pardon, prejudiced against the robber.

QUESTION: It depends on whether or not this defendant was one of the robbers. That was the whole issue here.

MR. ALLIS: That is correct. What I am saying is, is that Government witnesses too often assume that the Government is right in the man they have and therefore are immediately prejudiced against that man.

That has been one of the problems in really seeing that our adversary system works.

In other words, the adversary system presupposes

theoretically two equally strong sides. That has not been true.

This Court, in Wardius versus Oregon, recognized that the Government as special advantages in investigating a case but beyond that, there has been a problem with effective assistance of counsel for defendants.

The relationship of trust and confidence between a client and his defendant, which the ABA has recognized is a a cornerstone of the criminal justice system and something particularly hard to achieve in criminal as opposed to civil cases, is going to be affected, we contend, once the defendant sees his counsel giving to the Government material conceivably favorable to the Government.

Now, the literature is replete, of course, with instances of defendants not trusting their public defenders, thinking that those counsel are just another arm of the Government so the problem of trust and confidence is even greater because of that.

The other problem with confidentiality is of course that outlined in Hickman, the problem of the investigators not investigating as thoroughly, not -- perhaps not writing reports at all.

QUESTION: Now, suppose Bond had got on the stand and you were asking him the questions that would impeach the Government witnesses by saying that they didn't tell him

soandso and Bond had a piece of paper in his hand and was looking at it. Now, would you show that -- would you say you could show that you would have to show that to Government counsel?

MR. ALLIS: In my understanding, Mr. Justice White, your question is assuming a situation where the report has been shown to the jury although not actually verbally referred to.

QUESTION: No, it hasn't been shown to the jury at all. Your man is on the stand and you are asking him the questions that you think will impeach the Government witnesses.

MR. ALLIS: While he is looking at the report?

QUESTION: He is looking at a piece of paper.

MR. ALLIS: Certainly that report should be turned over to the Government because he is refreshing his recollection with it.

QUESTION: Well, what difference does that make in terms of your privilege?

MR. ALLIS: My answer to that, your Honor, is that the refreshing recollection doctrine has traditionally been a matter of common law trial practice and has, therefore, been an exception to any privilege argument. I think it is a question of waiver, perhaps.

QUESTION: Well, at least you think Rule 16 doesn't

forbid that.

MR. ALLIS: Absolutely not, if there is a specific --

QUESTION: It is the same piece of paper that you say Rule 16 would protect you from producing if he weren't looking at it at the trial.

MR. ALLIS: Your Honor, our contention is that the common law rules of evidence of which the rule of refreshing recollection is one, are complementary to Rule 16. If there is a rule of the common law evidence, specifically making an exception to Rule 16, then it should be followed.

But here, there is no specific rule. There is no rule of evidence which would either authorize -- which would authorize the Government to produce this under any circumstances -- would authorize the Government to get hold of it under any circumstances.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Friedman?

REBUTTAL ARGUMENT OF PAUL L. FRIEDMAN, ESQ.

MR. FRIEDMAN: Just very briefly.

On the Queens case, the purpose of Rule 16 was to get rid of the Queens case so that you don't have to show it to the witness you are cross-examining but 1613 applies equally to oral statements and to written statements so that whole argument, we think is not very sound.

Finally, I think the point that came through from Mr. Justice White's last question, we call it "waiver" in our brief. If there is a constitutional right involved, whether it is a Sixth Amendment one or work product privilege of some sort which we discussed at length in our reply brief, or the Fifth Amendment one which we discussed in our initial brief, refreshing recollection makes no difference and the kind of discretion we are talking about and the trial judge in this case makes no difference.

If there is no constitutional right or whatever kinds of privileges may exist prior to calling that witness, once the subject is opened up by defense counsel himself, the same principles of Brown versus the United States, Raffel, other cases of this Court make clear that they cannot open it up only partway. There has got to be cross-examination and all we are asking for is a decision of this Court which provides trial judges with the kind of discretion they need.

QUESTION: Are you still insisting that it is quite all right to keep the witness off the stand entirely rather than letting him testify and then demanding that you get this statement and having the court order them to produce it.

MR. FRIEDMAN: All I am saying is, is that in a situation like this, where the problem is flagged early

enough and it can be discussed and there can be legal argument on it, the judge does not have to let the witness testify and then strike the testimony if counsel refuses to turn it over.

If counsel as an officer of the court says that he had made the decision alreay, that he is not going to turn it over, if that happens, I don't think the judge has to permit the direct testimony.

It doesn't come up very often just because of the normal course of things, but it happened that way in this case and it doesn't make any difference in terms of our argument.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:26 o'clock p.m., the case was submitted.]