In the

Supreme Court of the United States

GARLAND JEFFERS,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

No. 75-1805

Washington, D. C.
March 21, 1977

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Washington, D. C.

Monday, March 21, 1977

The above-entitled matter came on for argument at 11:38 o'clock, a.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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

STEPHEN C. BOWER, ESQ., 202 N. 3rd Street, Kentland, Indiana, 47951, for the Petitioner.

WILLIAM F. SHEEHAN, III, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C., 20530, for the 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 75-1805, Garland Jeffers against the United States.

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

ORAL ARGUMENT OF STEPHEN BOWER, ESQ.,

ON BEHALF OF THE PETITIONER

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

Garland Jeffers became involved in dealing in narcotics in Gary, Indiana, in and around November 1971. He and about four or five of his friends who were all around his age, that is, around 21 years of age, met and began a pattern of drug-related activities. They engaged in robberies in which they stole drugs from other dope pushers on the street. They extorted money from other drug dealers for them to be able to continue in operation within the city of Gary, and they, themselves, engaged in distribution of heroin and cocaine.

Jeffers' role in this operation which lasted from November '71 through the time of the indictment on March 18, 1974, was admittedly one of at least a supervisor. He began as treasurer and after a certain period of time literally became the head of the drug operation.

QUESTION: How did he get this promotion?

MR. BOWER: I think he took it, Your Honor.

Mr. Jeffers is apparently a very dynamic and forceful

individual and had sufficient number of friends that were willing to assist him in taking over this rather hazardous position and occupation.

What happened, Your Honor, was, to focus to the Court, that all of the activities, involved in the case presently before the Court, occurred in Gary, Indiana, and part of them in Chicago.

There was one family drug ring in Gary. It ran over a period of two and a half years and at one time or another there were over fifty different individuals actively involved in the operation.

QUESTION: What do you mean by a "family drug ring"?

MR. BOWER: This was the name given to this operation, Justice Rehnquist. They called it "The Family."

QUESTION: It doesn't connote a "mom and pop" type of drug --

(laughter)

MR. BOWER: It doesn't to me, Your Honor. It was nicknamed by the press as "The Family" and basically went by that name.

The reason to point out this background, Your Honors, is to emphasize that our issue today has to do with Jeffers' multiple prosecution of separate drug violations under the federal law.

The evidence presented at Jeffers' first trial which

was for conspiracy to distribute heroin and cocaine is basically the same evidence presented in his second trial which is on the continuing criminal enterprise.

I point this out to the Court at the beginning so that there is no confusion that we are not talking about any type of multiple drug conspiracies, separate drug rings, or any confusion concerning what evidence was presented in both the lower court cases.

The Government has never contended, nor could they in fact contend, that the evidence used at the first trial and the evidence used at the second trial wasn't from the same witnesses and wasn't from the same series of transactions.

All right.

A resume of the prosecutions is like this. On March 18, 1974, Garland Jeffers and nine others were indicted in Hammond, Hammond Criminal 74-56, for conspiracy to distribute heroin.

On the same date, in a companion indictment, Jeffers, by himself, was indicted with a continuing criminal enterprise charge under 848.

All right.

The Government -- Upon request of the Government, the conspiracy case was set for trial. Objections were filed to the -- Or the Government then filed a motion for trial together of the conspiracy case and the continuing criminal

enterprise.

Objections were filed by the attorney representing all the defendants in the conspiracy case, arguing that the presence of Jeffers in the courtroom on a continuing criminal enterprise would prejudice the other various defendants in the conspiracy, and Jeffers argued that the presence of the other nine defendants in the conspiracy would jeopardize his right to a free trial.

The trial court saw fit not to allow consolidation, which left the record that Jeffers had pending against him, a conspiracy charge and pending also on a separate indictment, a continuing criminal enterprise charge.

The Government then went to trial on a conspiracy charge and convicted Jeffers of conspiracy to distribute heroin and he received a 15-year jail sentence.

QUESTION: Mr. Bower, I take it it's very clear and plain and you have conceded that he was one of those who objected to consolidation of the trial.

MR. BOWER: Yes.

QUESTION: Did he push for severance?

MR. BOWER: He pushed for no trial together, Your Honor. They were not joined. It was not a request for a severance. The Government had seen fit to return two indictments and then sought to try them together.

Jeffers and others opposed the trial consolidation.

QUESTION: Do you think the situation is different than if there had been two counts and one indictment and he, himself, moved for a severance?

MR. BOWER: I think it would. As a matter of fact, I think this situation is entirely different, for one very obvious reason. The Government at any time had the option to sever Jeffers from the conspiracy trial and try him later on the conspiracy in the continuing criminal enterprise trial at one time.

That's the big distinction here. These two indictments were not joined and the request was for the Government to join the two of them together.

In other words, the first trial took place, the Government still had an option before trying him on a conspiracy, to sever him from the conspiracy and attempt to try him together later on the continuing criminal enterprise.

QUESTION: If they had done that,could the jury have convicted him on both of those counts?

MR. BOWER: Well, my response should be no, and is no. I would suggest that we follow Justice Powell's Footnotes 17 and 18 in Iannelli and instruct the jury as follows: that they should not consider the conspiracy charge against Jeffers unless they find him not guilty of the continuing criminal enterprise, and should only consider the conspiracy charge if they find him not guilty of the continuing criminal enterprise.

Jeffers, prior to the second trial, in fact, raised the double jeopardy claim by a motion for dismissal. In that dismissal, he alleged that the evidence to be used against him would be the same and asserted, prior to the second trial, that conspiracy was a lesser included offense of the continued criminal enterprise.

It appears to me, to the Court, that the first big crucial step that must be taken by Jeffers in order to substantiate his violation of double jeopardy rights is whether or not conspiracy to distribute heroin is a lesser included offense in a continuing criminal enterprise charge.

Jeffers submits and argues to the Court that it is.

The standard definition of a conspiracy, briefly stated, is simply an agreement between two or more that by concerted action to accomplish a criminal purpose.

It is Jeffers' contention that the continued criminal enterprise charge under Section 848 means that a person has to undertake a series of violations of the Federal Drug Law and that they have to be undertaken in concert with five or more people with whom he occupies a position of supervisor-manager and for which he derives substantial income.

The crucial statutory definition that Jeffers contends is controlling is that the continuing criminal enterprise statute requires that the series of drug violations be taken in concert with five or more.

I submit to the Court that "in concert" can only mean that there has been an agreement in design and plan and that this is a basic definition of a conspiracy.

QUESTION: How many do you have to have to sustain the first charge that you have described here?

MR. BOWER: Two, Your Honor.

QUESTION: How many for the second?

MR. BOWER: Five, Your Honor.

Well, five or six. Jeffers, himself, with five others.

The Government has taken a position that Iannelli controls this case and the fact that this Honorable Court found in Iannelli that the gambling offense was also -- was not phrased in terms of the conspiracy statute or that the gambling offense did not require an agreement, therefore they were separate, the slight difference in phraseology, as appears in the continuing enterprise statute should not be controlling.

I submit, Your Honor, that it is controlling. The reason why is that if the Government's position is correct this Court is going to have to find that the phrase "in concert," as appears in the continuing enterprise statute, must be interpreted to mean not in concert.

It is Jeffers' position that a conspiracy is an essential basic element of a continued criminal enterprise, and, as such, if the continuing criminal enterprise charge is

proven a conspiracy, in fact, will be proven.

Therefore, Jeffers contends that if he is tried and convicted on the lesser included offense of conspiracy, he may not be prosecuted subsequently on the greater offense of a continuing criminal enterprise.

QUESTION: There are really three basic issues in this case, aren't there?

First of all, is conspiracy a lesser included offense of this new statutory offense?

MR. BOWER: Right.

QUESTION: Secondly, if so, does the double jeopardy clause prohibit the prosecution on the greater offense after conviction of the lesser included offense?

MR. BOWER: That's right.

QUESTION: And, thirdly, if so, was that waived in this case by your client's motion of insisting upon severance of the trial?

MR. BOWER: Yes.

QUESTION: Those are the three basic issues, aren't they?

MR. BOWER: Yes.

QUESTION: And you are now directing yourself to the first, or have been.

MR. BOWER: To the first and to the second.

QUESTION: Is it a lesser included offense?

MR. BOWER: Yes, it is.

QUESTION: I mean that's the issue to which you are now directing yourself.

MR. BOWER: That's right.

It is lesser included, Your Honor, because of the standard definitions concerning lesser included, to the effect that the greater offense cannot be committed without, in fact, having the lesser offense committed.

What I am saying is that Section 848, continuing criminal enterprise section, in its definition, when it says, "A series of drug violations must be undertaken in concert with five or more of necessity requires" --

QUESTION: Mr. Bower, isn't there one possible exception to that? The Government suggests that the five or more persons could be innocent dupes of Mr. Jeffers.

If one can read the statutory language "in concert with" as including innocent employees, innocent dupes, then your argument would fail, would it not?

MR. BOWER: Justice Stevens, I see no way that that can be done because when you use the phrase, "in concert," there has got to be an agreement in design or plan. Not only joint action, but they have to agree as to the end. The end is the illegal drug distribution.

QUESTION: Mr. Bower, just so -- you would agree that if the statute were read as an innocent dupe statute, then there

would be no lesser included offense. Your point, as I understand it, is that is a manifestly unreasonable reading of the statute.

MR. BOWER: Yes. Yes to both questions.

The concept of in concert, perhaps, best can be pointed out by an analogy, in that if you called the Boston Pops Orchestra together for them to play in concert they are all jointly acting, but you wouldn't expect each individual musician to be playing a different song.

The in concert requires not only joint action, but agreement as to the end, agreement as to design or scheme.

The argument that innocent dupes, such as hired messenger boys to make delivery, they are not part of any conspiracy or drug ring at all, unless they are aware of what the goals are. If they are aware that they are delivering heroin, then they are part of the agreement and they are part of the continuing criminal enterprise.

So, I think that even though the Government contends that Jeffers could be convicted if there were five innocent dupes, I would say that this could not be under the meaning of the statute.

It requires five other individuals actively participating in the drug operation. And, in fact, Your Honor, that's exactly what was present in this case. There were no innocent dupes. The prosecutions against the variety of the Family

members, the drug ring members, all showed that they were aware and participated in it.

QUESTION: Tell me again how a criminal act under a statute that requires at least five is the lesser included offense in the number one, which requires only two. I know you have gone over that but it would help me if you would --

MR. BOWER: Well, because, in fact, a conspiracy could be committed with only two people, as opposed to five, Your Honor. I would say that, basically, that was an election of Congress when they outlined --

QUESTION: Mr. Bower, which is the lesser included offense under your theory?

MR. BOWER: The conspiracy is the lesser included. The continued criminal enterprise is the greater, for several reasons.

One, the continued criminal enterprise has a great amount of additional elements that require to be proven, besides the conspiracy. Besides the in concert action with five or more, they have to show he was a supervisor, they have to show he received substantial income.

I would point out, too, what supports this is the fact that the continued criminal enterprise statute carries by far the heavier penalty. On first offense, it is ten years to life, non-suspendable.

On the conspiracy charge, if it is conspiracy to

distribute, it is up to the same as the substantive offense, or fifteen years.

So, it seems evident that Congress in writing 848, continued criminal enterprise statute, in imposing such a heavy penalty, intended to cover the evils that are present from conspiratorial behavior.

So, not only do the penalties, but the language of the statute strongly suggest that conspiracy is, in fact, included.

I would direct the Court's attention to Iannelli and suggest to the Court that this Court's treatment in the Iannelli case warrants Jeffers' double jeopardy claim being sustained.

In Iannelli, Justice Powell's opinion in Footnotes 17 and 18 discusses the concept of Blockburger and the concept of whether or not, in the Iannelli case, the gambling offense, 1955 gambling offense, required an agreement or conspiracy as part of the offense.

This Court specifically found in Iannelli that the gambling offense did not require conspiracy.

Jeffers' case is the other side of that. In Jeffers' case, the continuing criminal enterprise does, in fact, require conspiratorial activity. It requires action in concert.

Therefore, applying Iannelli to Jeffers, it is logical to come to the conclusion that Jeffers' rights of

double jeopardy had been violated by the multiple prosecution.

I would reserve --

QUESTION: The Government, in its brief, says that even if you are right the conspiracy is a lesser included offense of this new statutory offense, nonetheless, the law is not all that clear that it violates the Double Jeopardy Clause to try somebody for the greater offense after conviction of the lesser included offense.

MR. BOWER: The Government takes that position, Your Honor.

QUESTION: Yes, and you haven't, I don't think, directed yourself very much to that, have you?

MR. BOWER: I simply comment that I do not feel that that is the current status of the law before this Court. I know of no case holding in which they have allowed conviction of the lesser followed by a subsequent prosecution for the greater, except in those rare instances such as Diaz in which there was a conviction for some type of an assault, the victim later died and then a reindictment on, I believe, manslaughter.

QUESTION: Is there any case from this Court in which it has been prohibited on grounds of double jeopardy?

MR. BOWERS: Well, Jeffers contends Robinson v. Neil and Waller v. Florida impliedly state that this Court has adopted a lesser included offense rule. This Court's action in both those cases, remanding for purposes of determination

whether or not it was the same offense, impliedly accepts the lesser included offense rule because in Robinson you had destruction of public property and then a subsequent theft charge, and in Waller a similar situation.

QUESTION: We didn't say to see if it was a lesser included offense. We said to see if it was the same offense.

MR. BOWER: Well, Your Honor, it is obvious they were not identical by title. In other words, the same exact offense.

QUESTION: Neither of those opinions in this Court discussed this issue, precisely, did it?

MR. BOWER: No.

I would point out, and I have in my brief at length, that Robinson v. Neil on remand from this Court did discuss it at length and basically stated that the lesser included offense rule should control the --

QUESTION: That was the decision of the Court of Appeals?

MR. BOWER: No, that was the District Court, Your Honor.

QUESTION: You call it a rule. I was wondering where you get the rule. Certainly not precisely from any cases in this Court, do you?

MR. BOWER: No, Your Honor.

QUESTION: And the Diaz case kind of looks the other way. That case, of course, being distinguishable on the grounds

you mentioned.

MR. BOWER: Yes.

If it has not clearly been held, I urge the Court do do so in this instance.

It seems that to allow stair-step prosecution from the lesser to the greater offense --

QUESTION: It isn't a question of double punishment, though, in this case, is it?

MR. BOWER: No, it is not, Your Honor. It is double prosecution.

QUESTION: That's what you are focusing on in the double jeopardy --

MR. BOWER: Right. Only on multiple prosecution.

QUESTION: Do you think you would have an easier case if there had been an aquittal?

MR. BOWER: Certainly.

QUESTION: Do you think the -- The Court has held that, hasn't it? Has the Court held that if there had been an aquittal on the lesser included offense?

MR. BOWER: Well, I don't know if you could stretch Ashe to that, or not. It would depend. Quite frankly it is very difficult to apply that case because you wouldn't know for sure the reason for not guilty. Especially in a complex conspiracy trial, you would have no idea.

QUESTION: Well, if there had been an aquittal in the

conspiracy case and then later a prosecution for the continuing criminal offense?

MR. BOWER: I would have filed the same motion, Your Honor, double jeopardy.

QUESTION: Would you have an easier case?

You think you have an easy case right now, don't you?

MR. BOWER: Yes. I really doubt it. It may even be more difficult because you wouldn't be able to identify. If you tried to apply Ashe to it, you would have a difficult time because how would you show to this Honorable Court the reason for the not guilty?

MR. CHIEF JUSTICE BURGER: We will resume, then, at 1:00 o'clock, Mr. Sheehan.

(Whereupon, at 12:00 o'clock, noon, the argument in the above-entitled matter was recessed, to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Sheehan.

ORAL ARGUMENT OF WILLIAM F. SHEEHAN, III, ESQ.,

ON BEHALF OF THE RESPONDENT

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

In this case, we have made several arguments in the alternative, any one of which is, in our view, sufficient standing alone to warrant an affirmance of the judgment of the Court of Appeals.

In the early part of our brief, we explain why we believe that under this Court's analysis in the Iannelli decision a conspiracy is not a lesser included offense but a continuing criminal enterprise.

Those arguments which are essentially matters of statutory construction are laid out fully in our brief. And, with the Court's permission, I'll move on directly to some of our arguments which are perhaps more conceptually difficult.

QUESTION: In your brief is the phrase "in concert" or acting in concert with --

MR. BOWER: In concert with, yes, Mr. Justice Stewart.

We have urged that that phrase does not use -- that that statute does not use the language of conspiracy. It does not use the language of agreement. Congress knew in creating

this act how to use those words. It did so in Section 846 and it did so in Section 849. It did not do so in Section 848.

QUESTION: And if you are right in terms of strictly statutory interpretation then you say it follows without any doubt that there is no double jeopardy violation?

MR. SHEEHAN: That's correct, Mr. Justice.

QUESTION: Your argument in the second statute is based on the difference between the word "in concert with" and "in agreement with." If the statute said "in agreement with" you'd concede you are wrong, I assume.

MR. SHEEHAN: Yes, that's probably correct.

QUESTION: Is there any case that you know of that construes the words "in concert with" as not meaning "in agreement with"?

MR. SHEEHAN: Well, I know of no case that has squarely faced that issue. There are decisions in the Court of Appeals which have upheld convictions of defendants on both Section 846 conspiracies and Section 848 continuing criminal enterprise convictions.

QUESTION: I haven't read those, other than Judge Sprecher's opinion in this case because he did so on the theory that they were the same.

MR. SHEEHAN: He did, indeed.

QUESTION: Do those others adopt your statutory theory or did they adopt his theory or are they unclear?

MR. SHEEHAN: They are unclear. They adopt neither.

The first of the remaining arguments I would like to touch on in our brief is perhaps the narrowest of those arguments, and that is that the petitioner, having insisted that the charges against him not be tried in one case, cannot now complain that they were, in keeping with his wishes, tried in two trials.

If the Court agrees with our position in this regard, then it will be unnecessary to decide whether a conspiracy is, in fact, a lesser included offense of a continuing criminal enterprise.

QUESTION: Even if we decide it is.

MR. SHEEHAN: Yes, that's right. You can decide this issue even assuming that it is a lesser included offense.

The indictment charging Petitioner with a conspiracy and the indictment charging him with a continuing criminal enterprise were returned on the same day by the same grand jury.

The Government then moved to consolidate those two indictments for trial in one case. The Petitioner, however, objected. He argued -- I am reading from page 15 of the Appendix -- This is his objection to the Government's motion to consolidate -- that consolidation of these indictments would be improper in this case for the reasons that neither the parties nor the charges are the same. He said, at page 18 of the Appendix, that the Government was attempting to consolidate a conspiracy of ten defendants with a substantive offense of

only one defendant.

He said to add a substantive defense to the conspiracy charge would only confuse the jury. And he concluded, on page 23 of the Appendix, that consolidation would be wrong since there is "neither an identify of defendants nor an identity of charges" in the two indictments.

His arguments, of course, prevailed. The District Court denied the Government's motion and ordered that the indictments be tried separately as they were.

Prior to trial, in the instant case, the Petitioner moved to dismiss the indictment, completely reversing his position and now arguing that the Government was at fault for not joining all the charges against him in one case. This is at page 29 of the Appendix.

Petitioner also argued that once the District Court had heeded to his request that the indictments be tried in two trials, then the Government was obliged, Petitioner said, by the Double Jeopardy Clause,to elect which indictment it would bring to trial against him and to forego prosecution on the other.

That motion, of course, was not granted.

In his reply brief, for the first time in this case, Petitioner now takes yet a third position. He argues that his objection to the Government's motion to consolidate has been misinterpreted all this time. He says, at page 5 of his reply

brief, that he was objecting not to trial of both charges together in a single trial but to the presence of the other conspiracy defendants in the same case with him.

The suggestion, in short, is that the Petitioner actually wanted all of the charges brought against him in a single case involving him alone.

The record flatly refutes this.

It is true that in the objection -- in his objection to the Government's motion to consolidate, the Petitioner said that he feared that the evidence of overt acts of his co-conspirators which would be admissible against him in the conspiracy case would carry over and prejudice him, in the jury's mind, on the continuing criminal enterprise charge.

But the remedy, said Petitioner, was to try the charges separately, not to try him alone, free of all the other defendants. Indeed, if the charges had been tried separately that very same evidence would have been admissible -- the evidence of his co-conspirators' overt acts -- whether or not they were named as co-defendants in a case charging him with both conspiracy and a continuing criminal enterprise.

Furthermore, the docket entries in the two cases show the Petitioner never wanted both charges tried together. The indictments were returned on March 18th. Trial on the conspiracy charge was set first for May 20. Trial on the continuing criminal enterprise charge was set for June 24th.

In early April, the Government moved to consolidate. On April 29th, Petitioner filed his objections to that motion and a hearing was held on April 30th. That hearing was inconclusive. It was continued over to May 7th.

In between the first part of that hearing on April 30th and the second on May 7th, the Petitioner moved to postpone the continuing criminal enterprise from its initial date of June 24th over to August 12th. That motion was granted.

That was not, we submit, the action of one who wanted to go to trial on both charges in a single case.

QUESTION: Mr. Sheehan, just help me a little bit on this argument. Are you arguing estoppal or waiver, or what is exactly the legal significance of the fact that he opposed the motion to consolidate and delayed the trial?

MR. SHEEHAN: Well, we think that the Petitioner stands in the same relation to the Double Jeopardy Clause as does a defendant who secures in the middle of his trial a mistrial, or who consents to a mistrial.

Indeed, we think the Petitioner stands roughly in the same posture vis-a-vis the Double Jeopardy Clause as a defendant who appeals his conviction and gets a new trial.

Now, the reason that a new trial is permitted, notwithstanding that jeopardy is already attached. Whenever a defendant requests mistrial, or consents to one --

QUESTION: If you are making that argument, you are

saying then jeopardy for this offense did attach at the other trial.

Is that what you are saying?

MR. SHEEHAN: No. It isn't important that jeopardy attach. What's important is that the Petitioner retain primary control over the course to be followed.

That is the reason why, for example, when a case has already started before the jury and the defendant requests a mistrial, he can be tried again.

This Court has said that -- has explained that result not so much in terms of waiver which the Court has held that traditional waiver concepts are not particularly relevant under a double jeopardy analysis. What is important is that the defendant, in this case the Petitioner, retains primary control over the course to be followed.

In this case that happened. The Government wanted one trial. Petitioner wanted two. He retained primary control.

QUESTION: Did he ever say he wanted two trials, or did he just say he didn't want both trials on the first occasion?

MR. SHEEHAN: Well, there were two trials that were scheduled, one for May and one for June. The Government moved to consolidate them. The Petitioner opposed that consolidation. That's pretty close to saying he wanted two trials, it seems to me. He wanted the status quo maintained, that was two trials.

QUESTION: So you don't contend that there is either a waiver or an estoppel?

MR. SHEEHAN: Well, I don't use either of those labels.

QUESTION: Is there any established legal doctrine that you say applies, is what I am trying to find out.

MR. SHEEHAN: Yes, I think that the established legal doctrine that permits, for example, a retrial after a defendant requests a mistrial.

QUESTION: What do you call that doctrine?

MR. SHEEHAN: Well, this Court has declined to call it a waiver or an estoppel, although the concepts are quite similar.

The word "waiver" connotes, for example a Johnson v. Zerbst standard, and the Court has consistently refused to adopt that standard in cases involving the Double Jeopardy Clause.

But I think the result and the concept is essentially the same. The defendant got what he wanted. For him now to say that he is immunized from prosecution on the second charge when the Government wanted to go forward with both charges together in one trial perhaps that can be said to have stopped him or that he waived. In any event, his control over the proceeding now disables him from claiming protection by the Double Jeopardy Clause.

QUESTION: But at no time did he say he wanted two trials. --

MR. SHEEHAN: Well, he was going to go to two trials.

QUESTION: -- As a matter of fact, he said he didn't want any trial. He pleaded not guilty, didn't he?

MR. SHEEHAN: He pleaded not guilty and he would have preferred to have no trials, but that certainly is not a protection granted by the Double Jeopardy Clause.

QUESTION: You could punish him for asking for two trials. --

MR. SHEEHAN: No, we are not punishing --

QUESTION: -- If you are saying that he is saying I don't want to be tried on both of these at the same time.

MR. SHEEHAN: We are not punishing him. We are trying to avoid the Government's being punished for the District Court's granting his motion to try these cases separately when the Government wanted to try them together.

QUESTION: If you had originally said that you were going to go for two trials and you had not made the motion to consolidate, wouldn't he be in the same position he is in now?

MR. SHEEHAN: If we had not moved to consolidate would he be in the same position he is in now?

QUESTION: Uh, huh.

MR. SHEEHAN: No, I don't think so.

QUESTION: You said it was his action and I think it

probably was your action because you made the motion to consolidate. That's all I am saying.

MR. SHEEHAN: Well, the Government could have returned these two charges against the Petitioner in one -- in a two-count indictment, presumably, and presumably, at that point the Petitioner would have moved to sever the counts. And, presumably, the District Court would have been persuaded by his arguments.

QUESTION: But the record, as we have it, is, one, two indictments; two, two dates for trial, one on each indictment; three, your motion to consolidate and his opposition to the motion to consolidate.

MR. SHEEHAN: That's exactly right.

QUESTION: So it wasn't his volition. It was yours. You made the motion.

MR. SHEEHAN: No, we made the motion for one trial.

QUESTION: Yes.

MR. SHEEHAN: We tried to bring these two counts -- these charges against him -- in a single trial. The only reason they resulted in two trials was because Petitioner insisted that they take place in two trials.

QUESTION: What was the practical consequence of the two trials rather than the one?

MR. SHEEHAN: I am not sure I understand your question, Mr. Justice.

QUESTION: Well, if I understood more about your argument, perhaps, I could articulate the question better.

Is the result of all this that the Government had to go to trial first on a lesser offense and when it got a guilty verdict on that it was prevented from trying for the greater offense?

MR. SHEEHAN: Well, I think that's his argument. That is his argument.

QUESTION: Is that, in fact, what happened?

MR. SHEEHAN: Well, we don't think the Government was prohibited from going to trial on the continuing criminal enterprise, even assuming it is a greater offense.

QUESTION: Was he, in fact, tried for the lesser offense first?

MR. SHEEHAN: He was tried for the conspiracy first.

QUESTION: Which the defendant contends is the lesser offense?

MR. SHEEHAN: That's correct.

QUESTION: And you say that had the Government had its druthers and known of these contentions at the time they would have tried him for both offenses jointly, or else would have tried him for the greater offense first?

MR. SHEEHAN: Well, the Government sought to bring these cases -- tried to bring them jointly. The Government has never taken the position that they are lesser and greater

included offenses. They tried to bring them together.

Now, let's assume they are greater and lesser offenses. Then the result of Petitioner's argument is that whenever a defendant is charged with an offense that can be broken down into a lesser included offense and can persuade the District Court to order the Government to try the lesser included offense separately from the greater, and the lesser included offense first, then he is thereafter immunized from prosecution on the greater offense.

We submit that --

QUESTION: I suppose the Speedy Trial Act might give the defendant in a particular situation some ammunition to force the District judge to do that.

MR. SHEEHAN: I don't know why speedy trial considerations -- No, I think speedy trial considerations would militate in favor of both charges being tried in a single trial together rather than separating them.

QUESTION: If there were different dates. If there was a substantial lapse of time between the two indictments it certainly would enter into it.

MR. SHEEHAN: Well, I think if there were substantial lapse of time in the two indictments, even in that case,to try both charges together would bring both charges to trial and to culmination at the soonest available -- at the soonest moment possible.

QUESTION: Who made the decision as to which -- after it was decided the two cases would not be consolidated, who decided which should go first?

MR. SHEEHAN: I am not -- The record doesn't show that, but I think that we can make some inferences from the record. The conspiracy trial was set first, for May 20th, and the continuing criminal enterprise for June 24th.

On May 7th, when the District Court refused to grant the Government's motion to consolidate, by that time the continuing criminal enterprise charge had been pushed off to August 12th. Now, by that time, also, there were some 75 docket entries in the conspiracy case, involving ten defendants, involving all of those defendants. Substantial pre-trial activity had already taken place. That trial was always scheduled to go first and it involved ten defendants. It made sense --

QUESTION: Did the Government ever request that the greater offense, assuming the other side's characterization, that that trial go forward first?

MR. SHEEHAN: No.

And, in fact, if a defendant wanted to have a lesser included offense and a greater offense tried separately in most cases it would make sense to try the lesser first because if you tried the greater first that would, by definition, include trial of the lesser, unless the jury got some sort of special

instruction.

I was saying that Petitioner's action in this case puts him in the same position as one who requests a mistrial. I also --

QUESTION: Just let me ask one other question.

How far does your position go on trying the lesser and later you are free to try the greater?

Supposing you have, as in your bank robbery statute, the series of four or five series, each one a little bit larger than the one in the preceding subparagraph?

Would you say the Constitution would not present any obstacle to a series of, say, five or six trials? You get what you can the first time, then you come back and try for a little more the second time.

MR. SHEEHAN: I say the Double Jeopardy Clause would not prohibit successive trials, so long as the defendant was never twice in jeopardy on the same offense.

He would have the protection of the Due Process Clause if it appeared that successive prosecutions by the Government were for no good reason but to harass the defendant, something along that line.

QUESTION: What if there were an indictment for manslaughter and a trial and conviction of manslaughter? Could a federal or state government then indict him for first degree murder for exactly the same killing and try him for that

despite the Double Jeopardy Clause?

MR. SHEEHAN: I think if he is then -- I think that the Double Jeopardy Clause does not prohibit the trial of a defendant on a greater offense after he has been convicted on a lesser included offense, provided that at neither trial is he twice in jeopardy for either of the other offenses.

QUESTION: The whole issue is whether or not he is twice in jeopardy. That's a question begging answer.

MR. SHEEHAN: I certainly didn't mean it to be.

In the example that you put, at the trial on, I think you said, manslaughter --

QUESTION: Yes, a trial and conviction of manslaughter and then a subsequent indictment, trial and trial of murder for the same killing. Is that permissible under the Double Jeopardy Clause?

MR. SHEEHAN: It would be in these circumstances: At the trial for manslaughter, the defendant was not in jeopardy of conviction or punishment on the first degree murder charge.

QUESTION: That's right, because he was only charged with manslaughter.

MR. SHEEHAN: Right. And in the trial on the first degree murder charge, the defendant could not be allowed to be placed in jeopardy for conviction of the lesser included offense of manslaughter, and if he were convicted on the greater any punishment that he received on the lesser would have to be given

credit.

This, I think, is the Diaz case.

QUESTION: I am not talking about somebody who -- the trial of assault and then that person subsequently dies. I am talking about a homicide.

MR. SHEEHAN: I understand. I think that the Diaz case stands for the broader proposition than the narrow facts on which it was decided.

QUESTION: Well, then, what's your answer to my question?

MR. SHEEHAN: Yes, provided that -- Yes, he could be tried on the indictment for first degree murder.

QUESTION: Let me get this straight. You said he would get credit for the time he served on the lesser offense.

MR. SHEEHAN: Yes. You would have to avoid a double punishment.

QUESTION: The man is charged with manslaughter and given five years, then he is charged with second degree murder for the same killing and he gets fifteen years, but he gets the five taken off the fifteen, right? And then he is sentenced to die. What credit does he get there?

MR. SHEEHAN: I don't know the answer to that. I think it would be hard to give him any credit there. I do say that the Due Process Clause would protect the defendant against --

QUESTION: You mean that a man robs a federal bank and

he is charged with receiving stolen goods and then he is charged with robbery, then he is charged with robbery with force and then he is convicted of robbery with deadly weapon.

MR. SHEEHAN: I think probably the Due Process Clause would prohibit that series of prosecutions.

QUESTION: But you don't think that's double jeopardy?

MR. SHEEHAN: Not so long as he is never twice placed in jeopardy on the same offense.

QUESTION: What if a defendant is first indicted for robbing a bank which had federal insurance, under the appropriate federal statute, that bank being located in Hammond, Indiana, and then charged with transportation of the proceeds of a bank robbery across state lines, assuming there was a federal statute prohibiting that?

Do you think that punishment after trial and conviction on both of those charges, even though they involved precisely the same acts, would violate the Double Jeopardy Clause?

MR. SHEEHAN: No. I think those are not the same offenses under the Blockburger test. I think that prosecution would be perfectly permissible. I think the situation you just hypothesized does not involve greater and lesser included offenses.

QUESTION: Well, do you think -- The Blockburger test, by its terms, doesn't refer to the Double Jeopardy Clause,

does it?

MR. SHEEHAN: That's correct, it doesn't. It is --

QUESTION: Intent of Congress.

MR. SHEEHAN: -- It is a formula for identifying the identity of the offenses.

Well, I said a moment ago that I thought that the Diaz case stands for the broad proposition that I have just advanced. At the very least, I submit, it stands for the narrower proposition that prosecution on the greater offense can be had following conviction on a lesser included offense, whenever at the time of the trial of the lesser included offense the Government, for good reason, was not able to charge the greater offense.

Thus, for example, if the greater crime has not yet actually been committed when the lesser is tried, as in the Diaz case, or, for example, if the defendant can conceal the full extent of his crime from the Government, so that the Government does not know the greater offense has been committed when the lesser is tried, or, as in the present case, if the Government is prohibited by order of court from trying both cases together, then, we submit, the Double Jeopardy Clause does not bar prosecution for the greater offense, provided, of course, that there was a conviction on the lesser included offense and provided that any punishment that he has suffered on the lesser offense be credited.

QUESTION: Although the Government was prohibited, by order of court, from trying them both together, it was not prohibited by order of court from trying the greater offense first.

MR. SHEEHAN: No, it was not, but since the Government did not believe it was a greater offense there would be no -- Well --

QUESTION: At least it was aware there was a possibility it might be so considered, I suppose.

MR. SHEEHAN: No, it certainly was not. The defendant had argued quite strongly that they were different cases.

QUESTION: It doesn't accept its understanding of the law on the basis of the defendant's arguments, does it?

MR. SHEEHAN: No, but we continue to believe that they are not greater and lesser included offenses.

QUESTION: But you knew there was an issue, is all I am saying. At least you should have known there was an issue, I would think.

MR. SHEEHAN: Let's assume that we knew there was an issue. It would still make sense to try the lesser first, I submit, especially since the lesser offense involved ten defendants. But there was no issue raised about which trial would go first. The conspiracy was always set to go first.

Furthermore, when the District Court ruled that the

cases could not be consolidated, it had already ruled against us that the cases were even -- bore such a close resemblance to each other that they were appropriate for consolidation.

QUESTION: Well, in that respect, it had ruled in your favor. It had held that they were separate offense, hadn't it?

MR. SHEEHAN: That's right.

QUESTION: And that's your claim now. It ruled that one was not a lesser included offense. In that respect, it had ruled favorably to you.

MR. SHEEHAN: That's correct.

Our position, I think, fully respects the policies that underly the Double Jeopardy Clause.

Two prosecutions, in a situation such as I've just described, do not represent judge shopping by the prosecution in order to secure a sentence that the Government seeks that appears to be appropriate from the point of view of the Government alone. Nor do they represent an effort by the Government to try a defendant repeatedly until a conviction is obtained contradicting earlier acquittals and perhaps casting doubt on the integrity of earlier trials.

It is true that the defendant may live in a continuing state of anxiety that he will some day be tried for the greater offense, but if the defendant has concealed the full extent of his crime, or if, as here, he himself requests

two trials, that anxiety cannot be said to have been caused by any misconduct on the part of the Government.

As I mentioned earlier, our position does not leave the defendant at the mercy of a prosecutor who would carve up an offense into a series of underlying offenses and bring a series of vexatious prosecutions up the ladder, as it is said.

The Due Process Clause fully protects the defendant from such governmental conduct, even if, because he is never twice put in jeopardy, he cannot claim protection under the Double Jeopardy Clause.

QUESTION: Mr. Sheehan, help me, if maybe I missed it. The Government could have indicted in one indictment with two counts, right?

MR. SHEEHAN: Yes, that's correct, Mr. Justice.

QUESTION: And for some reason that you don't know and I don't know they decided to do it in two indictments.

MR. SHEEHAN: Yes, that's correct.

QUESTION: And if they had put it in two, there is no way he could have challenged that?

MR. SHEEHAN: If they had put both counts in the single indictment? Yes, I think he could have moved to sever the counts.

QUESTION: He could have?

MR. SHEEHAN: Yes, I think -- I would presume that he would have. I presume his objections to going to trial on

both those charges together would have been the same.

QUESTION: So we come out the same way.

MR. SHEEHAN: So we come out the same.

Indeed, for example, suppose the District Court had granted our order and it had gone on up to the Court of Appeals and the petitioner in the Court of Appeals had argued that the motion to consolidate had been improperly granted by the District Court and the Appellate Court accepted its position and sent it back for a new trial, separate trial, on the continuing criminal enterprise? I think the defendant would be hard put to say that the Double Jeopardy Clause barred that trial.

I think he is in the same position as he would have been in persuading the Court of Appeals to order two trials, as he is today, having persuaded the District Court to order two trials.

QUESTION: I wonder if that follows, because isn't one of the reasons for his position that they should be separate trials the fact that there were a lot of defendants in the conspiracy trial with respect to whom prejudicial evidence would be introduced, who were not defendants in the continuing criminal enterprise trial?

MR. SHEEHAN: Well, he said he feared that the evidence of his co-conspirators' overt acts would come in and that would carry over. But that evidence would be admissible

if he was tried in one trial on both the conspiracy and the continuing criminal enterprise. The evidence of his co-conspirators' overt acts would be admissible against him on the conspiracy charge, even if they were not named as co-defendants. That requires an instruction by the District Court to the jury that they should not consider the evidence of overt acts on the continuing criminal enterprise charge.

QUESTION: I see.

MR. SHEEHAN: Now, the Petitioner argues that our position is foreclosed by this Court's decisions in Waller v. Florida and Robinson v. Neil.

Those cases, in our view, do not hold that prosecution for greater offense is always barred by an earlier conviction on a lesser included offense.

Indeed, that issue was not raised or argued in those cases. They involved the question whether a municipality and a state were dual sovereigns under the Double Jeopardy Clause. And, holding that they were not, the Court cannot be said to have passed upon or resolved the questions presented here.

If those questions had been presented and passed -- If those questions had been resolved in Waller or in Robinson, then, presumably, the Court could have decided Blackledge v. Perry on double jeopardy grounds. And, perhaps, the Court would not have granted a writ of certiorari in the case to be argued next, Brown v. Ohio.

I think that the issue is an open one. I think this is the first time it is presented to the Court. And I would repeat, in closing, that the Due Process Clause is available to prevent the prosecutor from carving up crimes and bringing a series of prosecutions for no good reason.

The Double Jeopardy Clause, however, applies only when a defendant is twice put in jeopardy for the same offense.

MR. CHIEF JUSTICE BURGER: Mr. Bower.

REBUTTAL ORAL ARGUMENT OF STEPHEN BOWER, ESQ.,

ON BEHALF OF THE PETITIONER

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

I direct my rebuttal time directly to the alleged waiver issue.

I must agree with Justice Stevens when he queried the Government's representative as to whether or not this, in fact, is an estoppel or a waiver argument.

QUESTION: What would you call it when a defendant moves for mistrial after he has been exposed to jeopardy and mistrial is granted and then he is tried again? Would you call that waiver or estoppel, or what?

MR. BOWER: I would call it, Judge, Your Honor, a waiver with a small "w." I don't think there has been a name for it. I must agree with Mr. Sheehan in this instance. And I find no problems with a retrial after a granted motion for a

mistrial when made by the defendant.

And, quite frankly, I don't see how it is controlling here.

And the reason why is that in this case there was a ten-defendant conspiracy indictment and the objections to the consolidation were filed by all of the defendants. The pleading is in the file -- is in the Appendix. Much of the argument in there is by the other remaining defendants in not wanting to be tried with Jeffers on the continuing criminal enterprise trial.

Jeffers' argument, also, may it please the Court, on page 20, points out that the -- He is talking about a steamroller effect upon the minds of the jury. The sheer aggragate of evidence amassed by the Government and provided to the jury would create an inference of criminal disposition based upon mere association with other defendants with whom the evidence is stronger.

So, what we have is a standard assertion that all of the defendants will not receive a fair trial by this prejudicial joinder or this trial together.

I submit to the Court that the United States v. Simmons holds that you cannot penalize the exercise of a constitutionally protected right by requiring in order to exercise it you must waive another right.

The Government would ask this Court to rule that when

Jeffers, including the other nine defendants in the conspiracy -- when Jeffers sought to prevent the trial together, which is a Sixth Amendment right to have a fair trial, he, of necessity, had to waive Fifth Amendment rights.

And this goes back to Justice Stevenson's comment, or question to the Government: Is this a waiver of constitutional rights?

I submit that for the Court to rule there is a waiver -- there has been a waiver of double jeopardy rights, of Fifth Amendment rights, and that the record is simply absent in showing the type of knowing, intelligent and voluntary waiver that is required of a basic fundamental constitutional right.

QUESTION: Do you think each of these indictments required exactly the same proof or is there some proof required for each that was not required in the other?

MR. BOWER: The continuing criminal enterprise required more proof, especially concerning income, Your Honor, but the conspiracy evidence was identical. As a matter of fact --

QUESTION: That's not the issue, whether it was identical. Was the Government required to prove something as to each indictment that was not required to prove the other? Not whether they did, in fact.

MR. BOWER: Concerning Jeffers, no, Your Honor.

The Government, of course, with a multi-defendant conspiracy, would have to prove a tie-in of each defendant into the conspiracy. That wasn't required in Jeffers' case, but, of course, Jeffers had to be tied in.

QUESTION: Isn't it almost a definition of a lesser included offense that the lesser included offense involves the same proof as the greater included offense, but that the greater included offense -- but that the greater offense involves the proof to the lesser offense, plus X, plus something more?

MR. BOWER: Yes, that's correct.

QUESTION: That's what it means, isn't it?

MR. BOWER: That's right.

QUESTION: Like manslaughter and first degree murder.

MR. BOWER: Right. You've got a question of intent.

In this instance, if I may go back to the waiver, we do not know why the trial court refused to grant the motion for trial together.

And I must point out that Jeffers did not object, or did not take a stance that there could never be a trial together. What he claimed was that there would be a prejudicial joinder if the ten-denfendant conspiracy was tried with the continuing criminal enterprise.

When the trial court granted his objection, the Government was in this position: They had a pending conspiracy charge against him and a pending continuing criminal enterprise.

The Government, then, was the one that proceeded the trial on the conspiracy first.

Jeffers did not cause, demand or was responsible for the conspiracy trial being tried first.

The Government had a very simple option. They could have moved to sever Jeffers from the conspiracy trial and tried him with the continuing criminal enterprise later.

What I am submitting to the Court is that Jeffers' actions in seeking a fair trial, free of prejudicial joinder, in no way can be interpreted, or should in no way be interpreted to mean that he forever waived double jeopardy rights.

QUESTION: If the Government had followed the option that you just suggested, could it have properly requested a lesser included offense instruction in the trial?

MR. BOWER: Most assuredly. I would suggest that Justice Powell in Iannelli, Footnotes 17 and 18, pointed out the proper procedure in that, and I reiterate it to the Court that that's the way to handle it. And that's a very practical, sensible way to handle it, because the penalty for continued criminal enterprise, obviously, covers the evils sought to be prohibited by a conspiracy.

I would submit that the -- at least Justice Burger has recognized that the same evidence rule is a matter of constitutional import.

I would suggest, also, to the Court, that if this

Court recognizes the same evidence rule, it must of necessity follow along with the lesser included offense rule, because by the definition set forth in Blockburger, applying it to the case at bar, the conspiracy was proven, both in the conspiracy case and the continuing criminal enterprise.

The only additional elements in the continuing criminal enterprise had to do with Jeffers' position as manager and the fact he received substantial income.

So, I submit to the Court that the first trial and conviction on the conspiracy as a lesser included offense and the continuing criminal enterprise should, under the rules of double jeopardy, bar subsequent prosecution for the continuing criminal enterprise.

QUESTION: But Blockburger was not rested on the Double Jeopardy Clause.

MR. BOWER: Correct.

QUESTION: Then why do you cite Blockburger for the proposition that you just said?

MR. BOWER: I cite it because it has traditionally been viewed and used by lower courts for these purposes.

QUESTION: Are those decisions binding on us?

MR. BOWER: No, but I think if there is any doubt, I urge this Court to adopt it, to make it clear that we have this constitutional protection, the double jeopardy, and that the way that we apply it is through the same evidence test.

For years, cases have been coming before this Court concerned with same evidence versus same transaction, and the Court has repeatedly held that the same transaction rule is not what the Double Jeopardy Clause was meant to cover.

If it isn't the same evidence rule, I would submit we have no viable double jeopardy provision.

So I would urge the Court that the lesser included offense rule is simply an extension of the same evidence rule, and that,if not elevated to constitutional standard by this Court,should be elevated to such standard.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:37 o'clock, p.m., the case in the above-entitled matter was submitted.)