ORIGINAL

In the

Supreme Court of the United States

WINSTON M. HOLLOWAY ET AL.,	)	
	)	
Petitioners	)	
	)	No. 76-5856
vs	)	
	)	
STATE OF ARKANSAS	)	

Washington, D. C.
November 2, 1977

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Petitioners

v. : No. 76-5856

STATE OF ARKANSAS

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Washington, D.C.

Wednesday, November 2, 1977

The above-entitled matter came on for argument at 10:04 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 PAUL STEVENS, Associate Justice

APPEARANCES:

HAROLD L. HALL, Public Defender, 601 W. 2nd Street, Little Rock, Arkansas 72201
Attorney for Petitioners

JOSEPH H. PURVIS, Assistant Attorney General, State of Arkansas, Little Rock, Arkansas 72201
Attorney 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 first this morning in No. 76-5856, Holloway against Arkansas.

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

ORAL ARGUMENT OF HAROLD L. HALL, ESQ.

On Behalf of Petitioners

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

There is one question presented -- one point of law presented to the Court for consideration today and that is, whether the Petitioners were denied effective assistance of counsel by the order of the trial court appointing a public defender to represent three defendants at the same trial over their objections.

Prior to the trial, a motion for severance and separate counsel was filed by the Public Defender with the court and it was overruled.

Before the start of the trial, on the day of the trial, counsel for the Petitioners made oral motion which was denied.

The trial started and during the direct examination of one of the Petitioners, another Petitioner who was sitting at the counsel table objected to the question, to which the court overruled and said, "Your attorney will make any objections in your behalf."

Well, at that time, the Public Defender was asking the witness a question, which the witness also happened to be a co-defendant and he was unable to make an objection on behalf of the Petitioner Holloway because he was also his attorney, and attorney for the witness.

QUESTION: Was there any difference in the general nature of the defense as between and among these defendants?

MR. HALL: Well, sir, prior to going into court, there was but then when the Court says, "You will represent all three, you cannot cross-examine your own witness, which happens to be a defendant." I had to change my plans and I could not cross-examine my own witness to bring out incriminating evidence against he or the other two co-defendants.

QUESTION: Did you make any proffer that the witness was inherently a hostile witness and ask for cross-examination under the Hostile Witness Rule?

MR. HALL: No, sir. Because he was my client, also. All three.

QUESTION: Well, that would not necessarily bar that proffer with an explanation of why one witness might be hostile with respect to another.

MR. HALL: But I had been admonished by the Court not to cross-examine my own witness. I could not cross-examine. I believe his exact words were, "You have no right to cross-examine your own witness." Then he told me to

proceed like he told me to.

QUESTION: What was their defense? Was it alibi defense?

MR. HALL: They testified, over my objections -- I mean, over my advice and denied being there, which I could not state to the Court what they had told me in confidence.

In discussing the case with them, I talked to each one individually, as they requested. And so anything one of them told me was out of the hearing of the other two.

QUESTION: Mr. Hall, do I understand that the respective alibi defenses were not incompatible, however?

MR. HALL: No, sir.

QUESTION: In Arkansas, is a co-defendant permitted cross-examination of another defendant when he takes the stand?

MR. HALL: If they have separate counsel they are, yes, sir. This is the first instance that I have come across where I have been appointed to represent three over my objections where there was a conflict of interest, in my opinion.

QUESTION: But it is clear that if they have separate counsel, they may cross-examine?

MR. HALL: Yes, sir.

After the Court told me to proceed, as he had told me to, we went on. I was abiding by the ABA standards

that a lawyer should decline to act for more than one defendant if there is a possible conflict but in this case, the Public Defender -- we had to go ahead and take the three and then make our motions to the Court.

At no time did the Court ever ask me to define what the conflict of interest was.

QUESTION: Mr. Hall, do you want a per se rule? Are you asking for this, that one counsel may not represent more than one co-defendant?

MR. HALL: Well, sir, if there is no conflict and after the attorney investigates and there is no conflict, why, I have represented more than one since that time.

QUESTION: What happens? You have, how many Public Defenders Offices do you have in Little Rock? Just one, do you not?

MR. HALL: We just have one and three of us to handle the whole area, the district of two counties.

QUESTION: Does that mean that if you represented one of these co-defendants that your office could not represent any of the others?

MR. HALL: Well, there only being three Public Defenders in the office, our files are all mingled together. We have one secretary to type it up and that makes it kind of hard to keep one file privileged from the other.

QUESTION: So it would mean that the Court would

have to go outside your office to appoint for the co-defendants, then?

MR. HALL: Yes, sir.

QUESTION: Go back to the old system.

MR. HALL: Yes, sir.

QUESTION: But you do, I take it, insist that if the attorney requests it, that he should be relieved of a joint representation.

MR. HALL: Yes, sir, I think he should.

QUESTION: To that extent, it is a per se rule you are submitting.

MR. HALL: Yes, sir.

QUESTION: Well, should it be just a request or a request accompanied by a representation such as you did make here that there were inherent conflicts which would impair the defense of each?

MR. HALL: Your Honor, I filed a written motion and two oral motions and each one of the defendants at the trial got up and requested separate counsel and a severance.

QUESTION: But the Chief Justice asked whether you must also say that there is a conflict, in your opinion.

MR. HALL: Yes, sir, there was.

QUESTION: Well, must you then go on and detail what the conflict might be?

MR. HALL: Well, the Court did not ask me and he

told me to proceed on, like he had told me, not to cross-examine my own witness. He did not ask me what the --

QUESTION: Well, I know, but in this case, what do you think the rule should be? That you should have to reveal what the conflict is, or that just your representation is enough?

MR. HALL: No, sir, I think there should be one separate attorney for each defendant because if the attorney reveals what his clients told him in confidence to the Court or anyone, then he loses his respect from his client and the freedom there that he would go in and converse with him further in the matter.

QUESTION: Well, you have to go that far in this case -- pursuing Mr. Justice Blackmun's inquiry, is it not sufficient for you to say to the Court that in these circumstances, it was an abuse of discretion after you had represented that a conflict existed.

You said that you have since then represented co-defendants.

MR. HALL: Yes, sir, where there has been no conflict of interest to either one and both asked for it.

QUESTION: Then wasn't it enough if you show a claim, an abuse of discretion by the trial judge?

MR. HALL: In this one he pretty well had his mind made up, YOur Honor, that we was going on and I had to

go as the Court said or be in contempt.

QUESTION: Mr. Hall, are funds available in Arkansas for the retention of outside counsel in a case like this?

MR. HALL: Your Honor, at the present time we are paid a fee on each case that we try or are appointed on, which goes into a fund. When the fund fills up, they pay our salaries.

Now, that fee is $350 maximum with $100 for investigation if we use investigators.

If they was to appoint three different attorneys, it would not cost the county. Well, it would cost the county because they pay us to represent three, we still get one fee. We would, if we had additional counsel, be paid more but we are paid on a per case basis and it goes into the fund and then they pay our salaries and office expenses out of that.

QUESTION: And that fund would be available to pay an outside counsel.

MR. HALL: No, sir, the way the ordinance --

QUESTION: Well, if your motion had been granted, where would the lawyers have come from and who would have paid them?

MR. HALL: It would have come out of the county general fund.

QUESTION: The general fund?

MR. HALL: Which they have a certain amount set aside per year.

QUESTION: That answered my question.

MR. HALL: Yes, sir.

QUESTION: Mr. Hall?

MR. HALL: Yes, sir.

QUESTION: As I read the State Supreme Court's opinion in this case, they found there was no prejudice resulting from the failure to appoint separate counsel. Do you attack that finding or do you say that notwithstanding that finding you are entitled to a reversal here?

MR. HALL: I could not show them the prejudice without revealing the information my clients had told me and I could not tell the Court or bring it out that they had told me contrary to what they testified on the stand.

QUESTION: How about telling the Supreme Court of Arkansas?

MR. HALL: Well, sir, they was three men come into this cafe. It was closed. They went in a back door and went downstairs. One man stayed at the top of the stairs.

Two of the men went to the room where they were counting the money for receipts for the day and there they robbed them and two of the men raped two of the girls.

Now, there was no testimony that a third man raped them. There were just two of them. Each one was

raped twice and they testified it was by the same two.

Now, there is a question as to who was accomplice there and who was involved in the rapes downstairs. I had that information and I could not cross-examine the ones that did it.

QUESTION: But did you tell what you have said in response to my question just now, did you make that point to the Supreme Court of Arkansas when you were arguing it?

MR. HALL: No, sir, because it was not in the record. I could not bring it out from the witnesses as they testified.

QUESTION: Why can you bring it out to us in a way that you cannot --

MR. HALL: I have not mentioned any names.

QUESTION: Well, but could you not have done the same thing in the Supreme Court of Arkansas?

MR. HALL: I am just answering your question, sir, the way you asked me. Now, the judges did not ask for oral argument in the Arkansas Supreme Court.

QUESTION: This was not orally argued.

MR. HALL: No, sir, and they did not ask me the point. Had they asked me, I would have explained like I have here.

QUESTION: Mr. Hall, I am rather bothered the way my brother White is. You are presenting a constitutional

issue here and that means that we have to evolve some standards. I take it in your colloquy with the other justices that you are really asking for a per se rule. Am I not correct?

This Court has never gone that far before. We certainly did not do it in the Glasser case.

MR. HALL: No, sir.

QUESTION: But you feel this is the only way to handle it here.

MR. HALL: Yes, sir.

QUESTION: But only if the attorney demands separate representation.

MR. HALL: Yes, sir.

QUESTION: Representing that there is a conflict.

MR. HALL: Yes, sir.

QUESTION: Is it enough, then, that he demands it? Or do you think he should --

MR. HALL: The attorney and the defendants also.

QUESTION: Yes, but do you think he should come up with something more than an allegation of conflict?

MR. HALL: Well, if they was proof. I mean, you had to put on that it was of the confidential information class. I do not think it should be to the trial judge.

QUESTION: Well, in this case the trial judge did not ask for it, did he?

MR. HALL: He did not ask for it --

QUESTION: He did not ask for anything.

MR. HALL: No, sir.

QUESTION: And if he had asked for it, you would have told him what you told us.

MR. HALL: Yes, sir.

QUESTION: But you see, I am coming back to standards. Is it enough merely to make the request? Or must the request be accompanied by at least a proffer, as the Chief was indicating?

And I would be interested in where you think the perimeters of this constitutional issue should be drawn.

MR. HALL: Well, if there is a proffer of proof, it would have to be kept where the defendants' communications, privileged communication to his attorney would be kept mute and it is hard to -- with different trial judges, it is hard to -- one of them will discuss a matter and let something slip where another one would not.

QUESTION: Well, one way out would be this in camera hearing before the judge and I take it you do not go for that?

MR. HALL: No, sir, not with the trial judge and if it was a different judge, a judge that is not hearing the case.

QUESTION What was to prevent you from representing

to the trial judge, with or without an invitation from the trial judge, exactly what you have responded now, without naming the names, precisely what you have stated to us?

MR. HALL: I feel that the Court would remember that in some of his rulings there. He might be prejudiced as to one of them there. He would be wondering which one was the one that stayed at the top of the stairs.

QUESTION: Well, somebody will remember it now if you get a new trial, if you get what you are after.

MR. HALL: Well, I still have not mentioned any names. I was never asked by the trial judge or the --

QUESTION: My question to you now was, why could you not make that representation to the judge but decline to identify which person was at the head of the stairs and so forth? Just as you have not disclosed that to us.

Was there anything to prevent you from doing that?

MR. HALL: No, sir.

QUESTION: But Mr. Hall, the record does show that the first time any judicial officer asked you, you gave it.

MR. HALL: Yes, sir.

QUESTION: That was right here.

MR. HALL: Yes, sir.

QUESTION: And if you had been asked before, you would have given it.

MR. HALL: I would have told the same thing I have

told here this morning.

QUESTION: It is not the role of the defense counsel to be bashful in presenting his points in either this Court or a trial court -- do you think?

MR. HALL: No, sir.

QUESTION: Mr. Hall, you did, if I understand the record correctly, you did represent to the trial judge -- you did not just ask for a separate lawyer -- you did represent to him that you had conversed with the three clients and in your professional judgment, there was a conflict of interest.

MR. HALL: Yes, sir.

QUESTION: You made that representation as a member of the Bar.

MR. HALL: Yes, sir.

QUESTION: So your rule that you ask for is one that would only apply where the lawyer puts his professional reputation on the line in that way.

MR. HALL: Yes, sir.

QUESTION: You have referred to the American Bar Standards on this subject. In those standards, is there not also a standard that if the Public Defender -- one Public Defender in a Public Defender office is presented with the problem that you have, that then none of the members of that same staff would be in the case.

MR. HALL: That is right.

QUESTION: Is that not true in most standards?

MR. HALL: Yes, sir.

QUESTION: In other words, for those purposes, the Public Defender's staff is treated just as though it were a law firm.

MR. HALL: One firm, yes, sir.

That is all I have.

MR. CHIEF JUSTICE BURGER: Very well, thank you, Mr. Hall.

Mr. Purvis.

ORAL ARGUMENT OF JOSEPH H. PURVIS, ESQ.

ON BEHALF OF RESPONDENT

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

The State of Arkansas here would submit that there are really but two issues. The first is whether, in fact, a conflict of interest did exist here and the second or broader issue is, if the issue of conflict arises, who bears the responsibility for making that decision?

The Glasser decision that this Court in 1942 merely stated that ineffective assistance of counsel was given where an attorney was representing conflicting interest and the majority of jurisdictions in this country have held that it is not an imaginary conflict that is spoken of, but

that it must be shown that there is, in fact, some real conflict, something more than a possibility of conflict.

The State of Arkansas submits that the defense counsel here submitted a petition for separate counsel that stated merely that the "possibility of conflict existed."

Prior to trial, the trial court held a hearing on this motion in an effort to ascertain what, if any, conflict existed.

We are not blessed in the record with a transcript of that hearing. However, the Court did find at the conclusion that there was no conflict.

QUESTION: Where is that ruling that there was no conflict? Where the judge said there was no conflict.

MR. PURVIS: The judge denied his motion for.

QUESTION: But where in the record is it that the judge said, "There is no conflict"?

MR. PURVIS: I don't know, Mr. Justice Marshall, I don't know that the Court elucidated those exact words, but the Court -- the Trial Court continually stood ready to hear evidence of some conflict and there was none that really existed here.

The defendants were not precluded any defense. They all alleged alibi defenses that were certainly not inconsistent. They testified to this effect.

There is no indicia that the defense counsel

could not have gone forward and made such a proffer.

Now, the defense counsel has set forth some very nice standards dealing with confidentiality and lawyer confidences but it seems to me that he overlooks the fact that, number one, this case in particular involved no conflict, that he very easily could have outlined to the Trial Court the general nature of the conflict and did not have to divulge confidential information to the Court in order to show that a conflict existed but apparently the defense counsel never made that impression or conveyed that to the Court and the state would certainly submit that there was no conflict that existed here.

Counsel made a great deal of the fact that he was unable to cross-examine his witnesses. Indeed, there was nothing to be gained by the cross-examination of them.

QUESTION: Mr. Purvis, let me ask you a question about the practical preparation for the trial.

MR. PURVIS: Yes, sir.

QUESTION: Supposing that one of the men was at the top of the stairs.

MR. PURVIS: Yes, sir.

QUESTION: And the lawyer made the judgment that it would be better for that particular defendant to tell the whole truth, explain that he was there at the top of the stairs, the other two men were at the bottom of the stairs

and did the other things.

Could the lawyer, consistently with his obligation to the other two people, advise that defendant to take that posture at the trial?

MR. PURVIS: I think had defense counsel done so, sir, he certainly would have made a case of conflict and he could have merely outlined the --

QUESTION: Could he have done that while he was representing all three? Could he have said, "I advise you, who was the man at the top of the stairs, I think you ought to tell the whole truth."

MR. PURVIS: I think he should have gone to the Court when he perceived this conflict. That is the nature of the state's position, that asking for an early hearing and explaining this without dealing in the specifics of confidential information.

QUESTION: But in order to go to the Court, would he have not found it necessary to explain to the Court that these men were really guilty? Would that not have been necessary in order to tell the Court about the problem?

MR. PURVIS: No, sir, I think he could have gone to the Court and explained, "Your Honor, I have one of my three clients who wishes to testify and his defense is -- or the essence of his testimony would be totally antagonistic. It will be exculpatory and it will cast the shadow of doubt

and try to thrust the guilt on the other two."

I do not think that he has divulged or has conceded that any or all are guilty. He has merely spoken of what his client will testify.

I think then, if the Court knows this -- and I think certainly here, had the Trial Court known this, it would have granted the motion for separate counsel.

QUESTION: This would be before the trial?

MR. PURVIS: Yes, sir.

QUESTION: Well, what would happen if that developed in the middle of the trial?

MR. PURVIS: I think if it develops in the middle of the trial and the state does not refute the position, if at any time during the trial it can be shown that a conflict actually exists, then I think the Trial Court has the duty to declare a mistrial if it is in trial --

QUESTION: Then what do you do with double jeopardy?

MR. PURVIS: Arguably, due to --

QUESTION: Then it would be arguably?

MR. PURVIS: Yes, sir.

QUESTION: All right.

MR. PURVIS: It is a very grave danger here but I think the Court would have no duty but -- or no choice but to declare a mistrial.

QUESTION: Do you contend that the motion made at the opening of the trial, which was a renewed motion, was untimely?

MR. PURVIS: No, sir, I simply think that --

QUESTION: And you think the Court correctly said that the inability to cross-examine a co-defendant who wants to testify is an insufficient reason for separate counsel?

MR. PURVIS: Mr. Justice White, there was no indication, and the Court had no indication -- the Court was not advised as to even the real nature of the potential conflict here.

QUESTION: All right, so your answer is no -- that the Court was told that the defendants were going to testify.

MR. PURVIS: He was told that there was a possibility, yes, sir.

QUESTION: A possibility? They got up and said they were going to testify.

MR. PURVIS: Now, that was at the close of the state's case.

QUESTION: Well --

MR. PURVIS: But the Court had no information --

QUESTION: That is right. That is when it was but you do not say that that motion was untimely, do you?

MR. PURVIS: Not necessarily, no.

QUESTION: The Court did not say it was.

MR. PURVIS: No, sir.

QUESTION: But he just denied it.

MR. PURVIS: That is right, because the Court --

QUESTION: And he said, apparently the inability to cross-examine is insufficient reason to --

MR. PURVIS: Because the Court had no information before it that there would be anything that would be antagonistic or indicative of conflict at that time.

QUESTION: Well, he did say, the Court did say, "That is all right, let them testify. There is no conflict of interest." That is what the Court ruled.

MR. PURVIS: Based on the information that the Court had at that time, which was miniscule -- merely that there was a possibility of a conflict of interest.

QUESTION: You do not think it would be an appropriate rule that a court would be obliged to accept the representation of a member of the Bar, if he tendered that as a member of the Bar and as an officer of the court; that is not enough?

MR. PURVIS: I think, Your Honor, Mr. Chief Justice, that the trial court bears a very grave responsibility and any such decision such as this needs to be made by an independent authority.

The state contends that the burden for bringing

up conflict of interest certainly lies with the members of the Bar but it is the ultimate responsibility of the trial judge, the impartial, independent trial judge, to receive the information outlining the nature of the conflict and then to make a decision as to whether a conflict does, in fact, exist and if one does exist, then I think the duty is to appoint separate counsel.

QUESTION: But there is no question that he did deny him the right to cross-examine the other defendants.

MR. PURVIS: Yes, sir, but there was nothing --

QUESTION: But he did it.

MR. PURVIS: He did do that but there was nothing to show that there was anything antagonistic and in fact, their allied defenses were entirely compatible.

QUESTION: I cannot reach that conclusion as rapidly as you can because I do not know what information defense counsel has and I submit, I do not think you do, either. You do not know what he wanted to cross-examine on because he was never allowed to.

MR. PURVIS: No, sir, but this goes -- the state would continue --

QUESTION: Do you know what he wanted to cross-examine on?

QUESTION: Well, we do now, do we not? After his representations.

MR. PURVIS: I think we do now, Mr. Justice Marshall and I think that, had defense counsel made a disclosure of this nature at the motion hearing, the Court would have known.

QUESTION: And if he had been asked, he would have made it.

MR. PURVIS: Asked?

QUESTION: The first time any judge asked him the reasons was Justice Rehnquist and he immediately gave him the answer and two, he stood there and said, if any other judge would have asked him, he would have told him.

MR. PURVIS: Yes, sir, but we unfortunately are not blessed with the hearing on the motion.

QUESTION: But you are blessed with the record which says you cannot cross-examine.

MR. PURVIS: Yes, sir.

QUESTION: We are blessed with that.

MR. PURVIS: Yes, sir. But we would say that there is nothing in there to indicate that the judge or anyone knew of any reason why cross-examination would prove that issue.

QUESTION: He was not interested. The judge said, quote -- what did he say, now?

As I remember it, the judge said, "You know you cannot do it." That is all he said. The judge did not give

any reason for it. Am I right?

MR. PURVIS: No, sir.

QUESTION: He just says, "You cannot cross-examine your own witness."

MR. PURVIS: He said, "You cannot cross-examine your own witness." That is correct.

QUESTION: Well, when he said that, was he articulating the traditional rule about examining your own witness?

MR. PURVIS: I think that is what he was referring to, Your Honor, because Arkansas had not adopted the Uniform Rules of Evidence until July 1st, 1976, which was approximately ten months after this trial date.

QUESTION: Does Arkansas in the state courts permit examination of a witness even when the witness has been called by counsel, if there is some representation of his being or her being a hostile witness?

MR. PURVIS: Yes, sir.

QUESTION: It is the usual rule.

MR. PURVIS: Yes, sir.

QUESTION: Well, did that apply here?

MR. PURVIS: There was no --

QUESTION: He says, "You cannot cross-examine."

MR. PURVIS: There was no showing of --

QUESTION: So he denied him that right, did he not?

MR. PURVIS: Yes, sir. At the time of this trial, Arkansas was operating under the old, traditional rules of evidence that unless you could show or have the Court declare your witness to be a hostile witness, you were not entitled to cross-examine your own witness.

The Court, it is our position, stood ready at all times to receive sufficient information to let it be able to declare him a hostile witness and show that there was a conflict.

QUESTION: Your brother's point is that he was charged with representing that defendant, that witness.

MR. PURVIS: Yes, sir.

QUESTION: Lastly, it would have been wholly inconsistent with his representation of that defendant for him to set out to cross-examine him and show that he was a liar.

MR. PURVIS: Yes, sir, that is what --

QUESTION: So he was put in -- his claim is -- an impossible dilemma. He was representing that defendant. It would have been wholly inconsistent with his defense of that man to cross-examine him and show that his testimony was untrue, would it not?

MR. PURVIS: Yes, sir, but apparently --

QUESTION: That was the dilemma that he pointed out to us.

MR. PURVIS: Apparently, we are not given and do not know and certainly cannot tell from the record what line of defense the defense would have taken, had there been separate counsel or had there even been allowed cross-examination.

There was nothing to show any inconsistency.

QUESTION: Well, his point is that -- not that it was not allowed, but that, forced as he was to represent all three, he could not, conscientiously, cross-examine any single one of them and try to -- which would have been damaging to his own clients.

MR. PURVIS: Yes, sir, but I think in order to do that, you have the presumption that there is a conflict which would necessitate or give benefit from the cross-examination. And there was nothing in the record to note that such existed at that time.

QUESTION: Does Arkansas traditionally follow the rule followed in many places, that if the client testifies falsely, then counsel -- even his own counsel must not pursue or aid that witness in any way?

Is that accepted in Arkansas?

MR. PURVIS: I cannot answer that, Your Honor. I do not -- I believe that it is.

QUESTION: But you do recognize that at that stage whatever flaws there may have been in the conduct of the defense counsel in not pressing the matter in the first

instance, when he got into trial, that he was presented with an extremely difficult set of alternatives, was he not?

MR. PURVIS: Yes, sir.

QUESTION: If he was going to try to help the man who was the look-out man at the head of the stairs -- and presumably that is the man he was primarily concerned with.

MR. PURVIS: Of course, then, too, under the Arkansas law, the mere fact that he was at the head of the stairs instead of the actual rapist would have had no bearing on his guilt of the two crimes or the two charges -- actually three rapes -- because he was just as guilty as those who perpetrated the --

QUESTION: That may be true as a matter of law but a jury might have taken a different view, for example, and found the look-out man guilty of lesser charges than finding such to the others. Is that not so?

MR. PURVIS: That is true, Your Honor, but here again, there is no indication that any of the defendants in this case had any -- or obeyed any inkling of ever choosing to confess and turn state's evidence or admit to any facet of this crime and the state would contend that were there some indicia in the record that one wished to do so --

QUESTION: But there again, when these three men had one common counsel, that counsel, the Public Defender, was in pretty difficult position to go and negotiate with

the prosecutor for a guilty plea on a lesser included offense for the man at the head of the stairs.

Is that not so?

MR. PURVIS: Yes, sir, but there have been decisions from the various circuit courts that hold, merely because the evidence is stronger as to one or merely because the defense counsel is precluded one particular line of questioning or defense, that that does not necessarily give rise to a conflict.

QUESTION: Would you agree that the Arkansas Supreme Court did not explore these questions as extensively as they have been explored here this morning?

MR. PURVIS: Yes, sir and I think simply because the Arkansas Court did not have the information before it that this Court has.

QUESTION: And did not have oral arguments. Is that right?

MR. PURVIS: No, sir, they did not. In Arkansas, oral argument is not a matter of course. It generally must be sought by the party who is the Appellant, or one of the two parties. They usually have the right to do so but --

QUESTION: Mr. Attorney General, I understood you to say that none of these defendants confessed. But I thought Campbell did confess.

MR. PURVIS: No, sir, I did not say that none

confessed. But Mr. Campbell vehemently denied making the statement, committing the crime or ever having even been in the restaurant.

QUESTION: But his confession was introduced into evidence.

MR. PURVIS: His oral statement, yes, sir.

QUESTION: Yes. And in that statement, although he implicated the co-defendants, their names were stricken from the confession --

MR. PURVIS: That is true, sir.

QUESTION: -- as introduced.

MR. PURVIS: And then he took the stand and vehemently denied, as he had done at the de novo hearing and previously.

QUESTION: Should he receive -- should it occur that he would receive a new trial now, I suppose some of them may have opened themselves up to charges of perjury in their original trial.

MR. PURVIS: Presumably so, sir. Yes, sir.

QUESTION: At least it is a possibility.

MR. PURVIS: It is a possibility, but the charge of perjury is one that is rarely applied -- or rarely tried in the State of Arkansas, at any rate. I am not meaning to cast any doubt on the jury system or the system of the people in the State of Arkansas, but in a matter such as this

I think certainly they would be.

If this Court reversed, I think certainly they would be retried for their crimes but the state would once again contend that there really was no reversible error here because there was no conflict and if counsel might speak further as to the per se rule advocated by the amici and apparently by the defense counsel, the state would reiterate that it wholeheartedly opposes such, because such a per se rule is premised on the idea or on the belief that there is conflict every time multiple defendants are represented by sole counsel --

QUESTION: Well, that is not what the contention is, as far as I can see and he does not ask that there is any flat rule against multiple representation.

MR. PURVIS: I think in one of the amici briefs, such was --

QUESTION: Well, you said that you attributed the same view to your colleague, here.

MR. PURVIS: Yes, sir, I did.

QUESTION: And I do not understand his submission that way. His submission is that if the attorney makes a representation and in his view, in his professional judgment, there is a conflict, then there should be separate representation. That is not a per se rule.

MR. PURVIS: Well, the state would oppose that

rule as well, Your Honor because I think, in addition to the other summary, it certainly places in the hands solely -- in other words, it divests from the Trial Court the making of a constitutional decision and it removes the Trial Court or divests it from the supervising protectionary power that it exercises as to the defendant.

QUESTION: You think that the Trial Judge should be entitled to require counsel, in supporting his judgment, to reveal confidential information imparted to him by a client.

MR. PURVIS: Mr. Justice White, I do not think that such confidence revelations are necessary in but a very, very few miniscule cases.

QUESTION: Well, how about answering my question?

MR. PURVIS: Yes, sir, I think, if necessary, if a counsel strongly believes that there is a conflict and it would necessitate, I think, disciplinary rule 1-104(c)(2), I believe it is, would allow for that for the revelation of confidences when so ordered by the Court.

QUESTION: Mr. Attorney General, what is so wrong with having individual counsel?

MR. PURVIS: Oh, I see nothing that is wrong with it, Your Honor.

QUESTION: The way you keep arguing it and you keep resisting it, it seems like it is something horrible.

MR. PURVIS: No, sir, I do not. In fact, I think -- certainly I know if I --

QUESTION: You think it is good?

MR. PURVIS: It is good.

QUESTION: All right.

MR. PURVIS: But by the same token, I do not think that you have done anything wrong, I do not think that the Constitution has been violated by the multiple representation until you can show some actual conflict.

And I would simply close by saying that the state's position as to what should be the rule as to the determination of conflict is outlined in the conclusionary part of our brief.

Are there any further questions by the Court?

MR. CHIEF JUSTICE BURGER: Apparently not.

Mr. Hall, do you have anything further?

MR. HALL: No, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:41 o'clock a.m. the case was submitted.]