In the

Supreme Court of the United States

ENSIO RUBEN LAKESIDE)
)
PETITIONER,)
)
V.)
)
OREGON,)
)
RESPONDENT)
)

No. 76-6942

Washington, D. C.
January 18, 1978

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IN THE SUPREME COURT OF THE UNITED STATES

ENSIO RUBEN LAKESIDE,

Petitioner,

v. No. 76-6942

OREGON,

Respondent.

Washington, D. C.

Wednesday, January 18, 1978

The above-entitled matter came on for argument at 1:24 o'clock, p.m.

BEFORE:

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

PHILLIP M. MARGOLIN, ESQ., Nash & Margolin, 555 Oregon National Building, 610 S. W. Alder, Portland, Oregon 97205, for the Petitioner.

THOMAS H. DENNEY, ESQ., Assistant Attorney General, State of Oregon, State Office Building, Salem, Oregon 97310, 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 76-6942, Lakeside against Oregon.

Mr. Margolin.

ORAL ARGUMENT OF PHILLIP M. MARGOLIN, ESQ.,

ON BEHALF OF THE PETITIONER

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

Ensio Lakeside, the Petitioner in this case, was charged with the felony crime of escape in the second degree. Because he was indigent an attorney was appointed to assist him in the preparation of his defense. At trial, he raised the defense of lack of criminal responsibility and put on witnesses, including an attorney and a psychiatrist, to support his position and explain his position to the jury.

Now, as part of his trial strategy, it was decided between Petitioner and his counsel that Mr. Lakeside would not take the stand and that no comment on this fact should be made by Mr. Lakeside's counsel during the course of the trial. Just before instructing the jury, the trial judge told Mr. Lakeside's counsel that he was going to read the following instruction. And the instruction reads: "Under the laws of this State, a defendant has the option to take the witness stand to testify in his or her own behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption

against the defendant, and this must not be considered by you in determining the question of guilt or innocence."

Mr. Lakeside's attorney objected to the giving of this instruction on the grounds that, giving the instruction would highlight the fact that Mr. Lakeside had not taken the stand and call the jury's attention to this fact. The court told counsel that he felt that it was best to give this instruction so as to protect the defendant's rights. The instruction was then given to the jury.

On appeal, we have two questions that we are presenting for the Court's consideration. First, we think that the judge's action violated the Fifth Amendment to the United States Constitution. The Fifth Amendment gives a defendant in a criminal case the right to decide not to testify. This Court has held in Griffin v. California that if the defendant decides to exercise this right the prosecutor and the judge shouldn't make a comment on it to the jury.

Now, it's our position that even though the judge was acting with the best of motives and even though the instruction was worded so as to be helpful to the defendant, nonetheless, in this set of circumstances, by reading that instruction, the judge did more harm than good and in effect commented on the exercise of the constitutional right by the defendant. Additionally, we contend that the trial judge violated the Sixth Amendment to the United States Constitution.

Mr. Lakeside had a lawyer appointed to help him out and figure out what his trial strategy should be. There was a decision made and the decision was that they weren't going to comment on the fact that he wasn't going to take the stand. And we feel that when the trial judge took it upon himself to interfere with this strategy that he was interfering with the assistance that Mr. Lakeside had been given by --

QUESTION: Wouldn't that go to every time a judge overrules objections?

MR. MARGOLIN: No.

QUESTION: Well, where would the line be?

MR. MARGOLIN: Okay. First of all, it's obvious if there is a legal basis for the judge's decision -- For instance, let's say in the course of a trial the lawyer tries to put on perjury testimony, or tries to put on testimony which violates the hearsay rule. In that case, a judge would have to interfere with the trial strategy of the defendant because that trial strategy would be illegal. In this situation, our position is that there is no legal or ethical basis for the judge substituting his opinion of the proper way to conduct the defense for the decision of --

QUESTION: And what case do you have that's real close to that?

MR. MARGOLIN: In --

QUESTION: Any place.

MR. MARGOLIN: Well, I cited in my brief the Gedders case and the Brooks v. Tennessee case.

QUESTION: That's as far from that -- I don't know anything in that case that said that when you object to a question that's ineffective counsel.

MR. MARGOLIN: Okay. The reason I cited Brooks and the reason I cited Gedders is those situations where this Court held that when -- The Court said that --

QUESTION: That's your first point. I am talking about your second point. That was Fifth Amendment, wasn't it?

MR. MARGOLIN: No.

QUESTION: Which one do you have on the Sixth Amendment?

MR. MARGOLIN: Brooks and Gedders were both Sixth Amendment. Brooks was on Fifth and Sixth Amendment and the Gedders case was Sixth, Your Honor. And in both those situations, this Court said that the trial judge ordinarily has powers to do certain things. For instance, in Brooks --

QUESTION: Your general language is that if a judge gives an instruction over the objection of the defendant's counsel, that's a violation of the Sixth Amendment.

MR. MARGOLIN: That's correct.

QUESTION: Following up my brother Marshall's question, supposing the judge at the close of trial said, "I am going to give an instruction on reasonable doubt and that the defendant

is entitled to the benefit of the presumption of innocence," and his counsel objected to the giving of that instruction. Would you be making the same point here?

MR. MARGOLIN: Well, I think my basic position is that -- I don't know if the two situations are analogous.

QUESTION: If they are not analogous, why are they not?

MR. MARGOLIN: Our position is that the assistance that the attorney gave here was to advise the client on the exercise of another constitutional right, the constitutional right not to take the stand, and that the trial attorney and the Petitioner's position in this should be honored by the court, unless there is some legal basis for the court's intervention. The reason I cited the Gedders case and the Brooks cases is because in those cases the court said that, in Brooks that -- ordinarily the judge does have a right to figure out what the order of proof will be, and in Gedders ordinarily the trial judge can decide when witnesses should be sequestered. But then the court went ahead and said that if there is a conflict between these ordinary powers of the court and the Sixth Amendment, that the Sixth Amendment should prevail and that the trial judge shouldn't interfere with the assistance that the defendant is getting from his lawyer.

Here, I think it is really a serious situation because the defense counsel advised Mr. Lakeside on the exercise of the

Fifth Amendment right not to take the stand. And from a practical viewpoint that's about the most important decision that a defendant in a criminal case can make. If the defendant doesn't take the stand, it causes a lot of problems as far as his defense goes. And if he makes that decision and then a trial strategy is devised so as to soften that blow with the jury, I think it is wrong for a trial judge to come in at the end of the trial and interfere with the assistance in the trial strategy that's been plotted out.

QUESTION: If we rule that it's a violation of the Fifth Amendment, will you be satisfied?

MR. MARGOLIN: Oh, sure. Of course.

QUESTION: What would you say if the defense counsel had asked for precisely this instruction, and the court said, "Oh, no, I don't dare give that. The Supreme Court doesn't like that sort of thing." And then he is convicted and goes on appeal, saying he had asked for the court to instruct the jury on a constitutional right. What about that?

MR. MARGOLIN: Okay. You mean something like Bruno, except on constitutional grounds.

Our position is, with regard to the Fifth Amendment -- and this has been -- There is a split of authority as to whether what the judge did here violates the Fifth Amendment. And I think that the problem that courts that have ruled against our position have is that they cannot understand how an instruction

that supposedly is worded to help a defendant can ever hurt him. And I think the most important thing I can put across to this Court is that every criminal case has a different set of facts. You don't have the same situation in each case, and sometimes that instruction is very helpful, but sometimes it can hurt your client. And I'd like to give you two quick examples just to show you the realities of the courtroom situation and how this identically worded instruction can be good in some cases and bad in some cases.

Let's take a situation where it is helpful. You have a murder case and the defendant has made the statment that he was never at the scene of the crime. Then the police find a fingerprint at the scene of the crime. As soon as the jury hears that, they are going to be waiting to hear the defendant come up on the stand and tell them how the fingerprint got there. And if your defendant can't take the stand, you are going to want to have that instruction given in the hopes that the jury will follow it and not hold it against him that he didn't get up on the stand.

Now, if I can give you a different situation. You have a burglary --

QUESTION: I am not sure all defense lawyers would agree with you on that proposition.

MR. MARGOLIN: Well, I am just saying -- One point I should make here also is that because every case has a different

set of facts, I think that this Court should have faith in the attorney who lives with the case, who has prepared it for months and who conducts voir dire and gets a chance to size up the jurors who are going to be sitting on the individual case, and let him make the type of decision as to whether or not in this particular case the instruction should be given or shouldn't be given. I think the trial attorney has advantages over a trial judge who just gets the case on the day of trial. I know sometimes if you live with a case for several months you get insights into it that a person who just comes on it for one or two days never does. So I think it is really important here to put faith in the trial attorney and let him make that decision and not give the court the unfettered right, especially when we are dealing with the advice on something as important as the exercise of the Fifth Amendment privilege not to take the stand.

Getting back to the second example that I wanted to give the Court, if you have a burglary and a woman wakes up in the middle of the night and sees a man in her apartment. She subsequently identifies him in a lineup and your client is arrested. He comes to you and he tells you he is completely innocent, but he has a very bad criminal record, maybe involved in burglaries or sex crimes, something that would upset the jury. Additionally, you think he will make a very bad appearance on the stand. When you get to trial, you put on witnesses

who
/demolish the eyewitness. You show that she couldn't possibly have seen what she said she saw. She had been using narcotics that evening and was out of her mind. Additionally, you put on twenty-five alibi witnesses who say that the defendant was with them the whole time that this burglary occurred. In a situation like that, the jury probably isn't even going to expect to hear from the defendant because his witnesses have given the jury all the information that they would need to arrive at a verdict in his favor.

And I think Petitioner's case fits into that second category. He had a medical defense, a psychiatric defense. He put on witnesses who explained his position to the jury and probably had the judge not read the instruction the jurors would not have been thinking too much about the fact that he didn't take the stand.

Now, I just want to check my notes because I think that's basically our position. The only other thing I did want to go into is an argument that Respondent raised in his brief. One of the arguments that was made in the brief is that you cannot have error in a situation like this because jurors will follow the instruction. So, even if the judge shouldn't have given that instruction, once the jurors heard the instruction then they would follow it and there wouldn't be any prejudice to the defendant's position.

I don't think that is an appropriate argument for

this case. And the reason I say that is very simple. First of all, you could debate for years whether or not jurors do follow instructions or don't, but if the trial judge had honored the request that was made by the defense counsel and hadn't given the instruction then you would have eliminated the possibility that the instruction would cause any harm and you would eliminate any possibility of guesswork or any need to make guesses as to what jurors do or don't do.

QUESTION: Mr. Margolin, where does your constitutional right stop? Suppose your man did take the stand and testify. Does he have a constitutional right to request the court to instruct the jury that he didn't have to take the stand?

MR. MARGOLIN: I think that he does. I know this Court in Bruno said that in situations where -- Oh, you are asking me in a situation where he does, in fact, take the stand and then asks for it. That's a tough question. I don't know in that situation whether it would rise to a constitutional level or not, since he didn't exercise the constitutional right. I am not sure whether in that type of situation it would get to the same level. But I do think in our case --

QUESTION: -- waives the right by taking the stand.

MR. MARGOLIN: Well, sometimes you ask for the instruction, anyway.

QUESTION: You may ask for it, but haven't you waived

any constitutional right by not getting on the stand? -- By getting on the stand.

MR. MARGOLIN: Well, I think you would waive the right, yes, because you are not exercising it, but sometimes you would ask for that instruction so as to bolster your client --

QUESTION: You might ask for it, but the question is: Would he have a constitutional right to claim some benefit of the privilege not to testify when he was going ahead and testifying.

MR. MARGOLIN: In that situation, I don't think it would get up to a constitutional level. I don't know whether you would have any right in that area.

QUESTION: Mr. Margolin, before you go on. You speak of the Fifth Amendment providing that a defendant is not required to take the stand. I realize that Griffin, in effect, reached that conclusion under the facts in that case. The Fifth Amendment speaks in terms of compulsion. Where is the compulsion here? You have a neutral instruction.

MR. MARGOLIN: The problem comes in that -- I mean in the Griffin case this Court held that if the person chooses not to testify that it is improper to comment on that because it is like penalizing the fellow for exercising his right.

Our position is that this instruction hurt my client because it drew attention to the fact that he hadn't taken the

stand. And it is the same thing as the prosecutor getting up and saying, "Hey, look, he didn't take the stand. Why didn't he give his side of the story?"

QUESTION: In Griffin, as I recall, not only did the prosecutor make some reference to the failure to take the stand, but the judge, himself, told the jury that it could consider that fact.

MR. MARGOLIN: That's right.

QUESTION: That was far from being neutral by the judge.

MR. MARGOLIN: That's right. Our position is that the wording of the instruction is not relevant, that it's just like --

QUESTION: Your position is that there is compulsion either to mention or not mention this constitutional right, however neutrally the mention may be. That's compulsion?

MR. MARGOLIN: Well, the problem -- What it does is it is a comment on the fact that he didn't get up and give his side of the story. And even though it's worded nicely it still creates the evil of drawing attention to that fact.

QUESTION: That's not what the Fifth Amendment says. It speaks in terms of compelling a witness to give evidence against himself.

MR. MARGOLIN: Yes, but Griffin said that once that decision to not take the stand is made you can't -- the

prosecutor and judge can't comment on it. It doesn't really have anything to do with the basis for the Fifth Amendment. It is just talking in terms of not penalizing a person for exercising his constitutional right. And it is our position that you are penalizing Mr. --

QUESTION: Mr. Margolin, is that really the whole analysis in Griffin? Isn't it the point that if the defendant, before he makes the choice of whether or not to testify, knows in advance that this kind of comment will be made by the judge and the prosecutor, there is a form of compulsion that influences his choice. And isn't the same true here? If he knows he doesn't have any choice in whether the instruction is made, he knows in advance that an instruction he doesn't want to hear will be given, that that has some influence on his choice and that is at least a modest form of compulsion. Maybe it is not as strong as saying, "Here is a subpoena, get on the stand."

MR. MARGOLIN: That may occur. It may also create a situation where the attorney has to try the case differently. And the attorney may have to, for instance --

QUESTION: Does it not influence the choice of whether or not to take the stand, if you know what kind of instruction is going to be given?

MR. MARGOLIN: It may.

QUESTION: One judge might give one type, another another.

MR. MARGOLIN: I would agree with the Court, it may. It may. And that might cause other serious difficulties.

If the Court has no further questions --

QUESTION: Perhaps you have answered this, but you have raised a Sixth Amendment question, too, haven't you?

MR.MARGOLIN: That's correct.

QUESTION: Was this raised below?

MR. MARGOLIN: I should point out to the Court that the first time that the Respondent raised any objection to any court that has heard this argument, hearing, it was in its response to petition for certiorari. This Sixth Amendment argument was argued in front of the Court of Appeals and it was argued in front of the Supreme Court, without any objection by the Respondent. If you read the Court of Appeals' decision out of Oregon, you will see that the trial strategy argument is basically what was the foundation for their opinion. And the Respondent was informed prior to oral argument at the Court of Appeals that the Sixth Amendment argument would be raised in addition to the argument on the Fifth Amendment. And I think that the court in Oregon did consider this and that it is appropriately before this Court.

QUESTION: Certainly, the Supreme Court didn't mention it, did it?

MR. MARGOLIN: The Supreme Court didn't mention it and that's why I wrote the petition for rehearing which is in

the Appendix. But the arguments were made in front of the Oregon Supreme Court. I don't know if this Court gets as part of the record the taking of the oral argument, but that would contain the arguments. Additionally, the Supreme Court when it granted a review in this case -- this was also in the petition for rehearing -- the question that it asked was whether it was error for the judge to give the instruction over objection and then what the basis for such a rule was. And it didn't limit the basis to the Fifth Amendment. So I do think that the question is appropriately here.

MR. CHIEF JUSTICE BURGER: Mr. Denney.

ORAL ARGUMENT OF THOMAS H. DENNEY, ESQ.,

ON BEHALF OF THE RESPONDENT

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

Like Mr. Margolin, I think my argument will not be a lengthy one. But I'd like to start it, since Mr. Margolin spoke a little about the nature of the case, I'd like to flesh out the actual facts that came out on the trial and that were developed in the presence of the jury. I do this for no other reason, not because I am questioning Mr. Margolin's specific trial strategy in this case, but to illustrate that reasonable men at least could differ as to whether or not an instruction not to draw an inference from the defendant's failure to testify was proper in this case. And that in any case the judge's action

in doing so was not an arbitrary or capricious one. In addition, perhaps the facts themselves as they were developed in this case,and they are not in any of the printed portions of the record that the court has, but they are in the record which was transmitted.

I might begin by saying that the Defendant Lakeside does have quite a background of an unhappy family history. He was a heroin addict and an alcoholic. He had a prior conviction of attempted murder dating from about 1972. He was sent to the Oregon State Penitentiary, paroled after about nine months, violated his parole and was returned.

QUESTION: Am I correct that the reason he didn't take the stand was because he didn't want all of this known?

MR. DENNEY: Mr. Justice Marshall, that seems to be the argument, but the fact is it all came out --

QUESTION: Then why are you just flaunting it around?

MR. DENNEY: I am not flaunting it around improperly, Mr. Justice Marshall, I believe, because my point is the jury heard all of this. All of this came in in the testimony of the state psychiatrist, one Dr. Kolbak, who told the jury all of this.

QUESTION: I didn't realize that.

MR. DENNEY: That's my point. He was then charged in about April of 1975 with the convictions that led to his incarceration from which he escaped. They were charges of

disorderly conduct, theft in the second degree, criminal mischief and harassment, all of them misdemeanors under Oregon law. They arose out of three separate incidents and alcohol was involved in at least one of these cases.

As a result of a plea bargain negotiated between the District Attorney and the Public Defender of Portland, who was representing Mr. Lakeside at the time, the agreement was that Lakeside would plead guilty to three of these charges. The fourth one, the harassment charge, was dismissed. He would be placed in the Multnomah County Correctional Institution which is a minimum security place primarily for work-release people, rather than being sent to the more maximum facility for misdemeanants in Multnomah County, Oregon, that is Rocky Butte Jail.

Oh, and the other -- and this was the important part of the condition, as far as Lakeside was concerned -- and history of the case was that he would be required to take antibuse for his alcohol problem while he was in the correctional institute. He was somewhat reluctant to do so, as he told his counsel at the time, because he had had been made sick by having taken antibuse before. At least that was what he told his counsel.

Anyway, he was received in Multnomah County Correctional Institute on May 9, 1975. He started on antibuse on May 21st. He received some five or six dosages of it, the

last time being on June 15th. On June 16th, he was given a sign-out pass from 6:00 a.m. on June 16th to terminate at 10:00 p.m. on June 17th. And he did not return from this sign-out pass. And under Oregon law, failing to return from a temporary leave situation constitutes an escape.

Efforts were made to locate him and on the 23rd of June the defendant's mother called the police. They said he was at home and the police went and found him passed out and very drunk and they returned him to the institution and that is --

QUESTION: I take it this is all in the record.

MR. DENNEY: This is all in the record.

QUESTION: As part of his defense.

MR. DENNEY: No. All that I've said so far was brought out in the prosecution's case. The defense, as I've said, did go to a mental disease or defect, also attempting to make some use of the fact that this was aggravated by the use of antibuse. And the only real dispute of fact that occurs, I think, in the whole case was that -- was whether or not the antibuse really did, indeed, make him sick, or whether it was a combination of alcohol and the antibuse which led to the condition that was observed. Two guards, at least, at the correctional institute said that he never complained to them about having any reaction from the antibuse even though it was administered to him several times. His mother and his sister testified in his behalf that he complained to them constantly about the

reactions he was having from the antibuse.

QUESTION: All of this is leading up to the suggestion that it was an assistance, an aid and help to him to get this instruction.

MR. DENNEY: Yes, Your Honor. I am not insisting on overriding trial strategy. I am saying that the trial court could reasonably have concluded the instruction was proper in this case. In the first place, as Mr. Justice Marshall was asking, and as I tried to point out, his prior criminal record came out anyway, so this is not one of those cases in which you say he kept off the stand not to get the criminal record before the jury. There was an insanity defense in this and while reasonable minds can differ on this point, too, it seems to me that in an insanity defense, normally, you would want to see -- you, as defense counsel, would want the jury to see your client and evaluate him, if there is any merit to the insanity defense at all.

QUESTION: Mr. Denney, I suppose the issue is who should make the decision, defendant and his lawyer or the judge. And suppose the judge concludes, after hearing all the facts you've described, that the defendant would really be much better off if he took the witness stand, you know, to explain the whole thing. He can't make him do it, can he?

MR. DENNEY: No, of course, he can't make him --

QUESTION: In this area, it's up to the defendant to

decide for himself whether to take the stand.

MR. DENNEY: Whether or not to take the stand.

QUESTION: Why shouldn't he also decide for himself whether he wants this instruction or not? He may be wrong. He may be wrong about not getting on the stand, too.

MR. DENNEY: Yes, that is the argument.

QUESTION: There is no doubt, is there, that the judge's charge was a correct statement of the law?

MR. DENNEY: Oh, absolutely not.

QUESTION: And there is no doubt that in Oregon the judges have the right and the obligation to charge juries as to the law governing their deliberations in a particular case?

MR. DENNEY: Yes. That is -- Those are the two countervailing factors, I suppose, on who actually makes the choice in this.

QUESTION: But the question is what the law is in this case. Must the judge or must he not give the instruction over the will of the defendant?

MR. DENNEY: Yes, that's the question before this Court. We talked about two of the factors that are involved in making that decision. Another is the question, I think -- and these are the points that I've made in the brief -- where, if this is, as Mr. Justice Powell said, a neutral instruction, and we submit that it is -- where is the possibility of the instruction having been given for reasons determined by the

trial judge, where is the possibility of harm?

One answer of this -- and I set it up as a straw man in my argument, of course -- is to say that you have to assume that telling a jury not to do something means that they may just go ahead and do it. We submit that that is an argument that should not be espoused by this Court because it is not a good idea and it is contrary, I think, to our basic notion of what a jury system is all about, to assume that jurors are incapable of following such an instruction.

QUESTION: Mr. Attorney General, how is the State hurt by a rule which says that if the defendant doesn't want this instruction he shouldn't have it? How is the State injured?

MR. DENNEY: The State, itself, as prosecutor, is not injured, I don't believe.

QUESTION: And you don't think due process or the people or anything -- You don't think justice is injured duly?

MR. DENNEY: The only point I would make on that is that I think that it should remain as a matter of general policy and certainly as a matter of constitutional law, a matter that is the province of the judge rather than of the defense counsel. I would just prefer to see -- and it is simply, perhaps, more a matter of philosophical views about which we may differ -- to see the matter --

QUESTION: It pretty well could go under --

MR. DENNEY: Yes, it does.

QUESTION: Well, we are dealing with a constitutional right, though, you know. Maybe you should err on one side if you are going to err.

MR. DENNEY: That is a possibility, too. It's just that we are of the position, for the reasons that I am arguing here and for the reasons that I stated in the brief, that there is no possibility of erring in this matter.

Mr. Justice Stevens spoke about the matter knowing whether or not the instruction would be given or not would in some way, directly or indirectly -- well, more directly than indirectly -- would create a matter -- would be a matter of compulsion. It would be a matter which would influence one way or the other the decision of the defendant to take the stand.

There are two answers to that, neither of which -- one of which I know is not very good. That is, it may not be known in advance whether or not the judge in any particular case is going to give that. Presumably, of course, the defendant could inquire and would get an answer from the judge, but there may be judges cantankerous enough not to answer a question along those lines.

QUESTION: It wouldn't be binding on him, would it?

MR. DENNEY: No, that's true, too. The other thing is -- it occurred to me as I thought about that, though -- I think that analysis might present some problems in the future because

that could be said of almost any instruction which the trial court might give. That might, again, have some influence on the defendant. I appreciate the fact that this particular instruction goes directly, more directly than most, to the question of whether or not -- What's to be said about whether the defendant takes the stand or not may go more directly to the issue of compulsion than some others. But to some extent I should think they all would.

QUESTION: You've been asked what the State's interest is. Isn't its primary interest a fair trial?

MR. DENNEY: Yes.

QUESTION: Is there any question about that?

MR. DENNEY: I think not. That's basically my position.

QUESTION: Doesn't the judge have responsibility for instructing a jury as to what the law of the State is?

MR. DENNEY: As I think I answered Mr. Justice Marshall, not as articulately and not as directly as that put it, yes. I think the power to do that and the right to do that remains with the judge and should remain with the judge in preference to defense counsel.

QUESTION: Suppose a defendant requested the judge to give no instructions whatever on his behalf.

MR. DENNEY: I wonder about that.

QUESTION: Do you think the judge would be justified

in sending a case to the jury with no instructions as to State law?

MR. DENNEY: I most certainly do not. Mr. Margolin would have another view of it, though I rather doubt it when you state the matter as bluntly as that.

QUESTION: It would also be true there if he pleaded guilty the judge wouldn't have anything to do but put him in jail, would he? He could give them all up if he wanted to.

MR. DENNEY: The judge might not accept the guilty plea, for that matter. As a matter of fact --

QUESTION: You mean a judge wouldn't accept a guilty plea to the maximum crime?

MR. DENNEY: Your Honor, after the first twelve jurors were chosen in this case and before --

QUESTION: I am not talking about jorors being chosen.

MR. DENNEY: Well, the defendant offered to plead -- The defendant stated he wanted to plead guilty to this charge.

QUESTION: No, it was to a minor charge, wasn't it?

MR. DENNEY: No, sir, it was to escape in the second degree.

QUESTION: What he was charged with.

MR. DENNEY: Which is what he was charged with.

QUESTION: And you say --

MR. DENNEY: The judge refused to accept the guilty plea because the insanity defense had been raised in this case.

QUESTION: That's right. That's what I said.

MR. DENNEY: I am not sure what our difference is.

QUESTION: My point was you say that for justice, regardless of what the defendant says, the judge can still do so. I am saying the general rule is that if a man wants to plead guilty to the maximum offense it will be accepted.

MR. DENNEY: It generally will be.

QUESTION: Well, that's what I said, generally.

MR. DENNEY: Very well.

Unless there are any questions, I really have nothing further to add to this oral argument.

MR. CHIEF JUSTICE BURGER: Mr. Margolin, do you have anything further?

REBUTTAL ORAL ARGUMENT OF PHILLIP M. MARGOLIN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MARGOLIN: Yes, Your Honor, just a few short things.

First of all, I think that this Court can confine itself to the very narrow issue of whether in this particular case, if you have a petitioner or a defendant who gets advice concerning the exercise of the Fifth Amendment right, whether in this type of situation a judge can give instructions over objections. I don't think you have to go in and ask yourselves how this would affect other situations where the right that is being exercised is not a constitutional right, because I think

different considerations might arise. So I think the Court can confine itself to that very narrow issue.

Secondly, I don't think the reason why a defendant in a particular case doesn't take the stand or whether the trial strategy is correct or incorrect is relevant. I think the interesting question that is raised here is: How far is a judge permitted to go in deciding how a defense will be run?

QUESTION: What if a judge in precisely the situation that the circuit court judge was here and presented with your client's attorney's objection to giving this instruction said "I know that there will be a claim of constitutional violation if I don't give the instruction.-- If I do give the instruction" -- the claim that you are now making here --"I fear if I don't give it, there will be a claim of incompetent assistance of counsel."

MR. MARGOLIN: Well, I think you weigh that type of a defense -- pardon me -- that type of a post-conviction claim or appeal, if there is a specific request made not to give the instruction. I mean we are dealing with a waiver situation, under those circumstances, so I don't think that is a real genuine problem.

QUESTION: It would be in the hypothetical case put to you earlier in the argument by my brother Rehnquist. What if a defendant's lawyer affirmatively requested the trial judge not to charge, not to instruct the jury on the presumption of

innocence and the duty of the prosecution to prove guilt beyond a reasonable doubt? And the attorney said, "Please do not instruct the jury on that subject," and the judge said, "Okay, you're the lawyer and you're the boss," so he didn't. Wouldn't that be -- Would that be a valid conviction?

MR. MARGOLIN: I think what would happen is that, either in post-conviction or appeal, what the question would be is: Was the decision not to have those instructions given a knowing and voluntary decision --

QUESTION: The lawyer was a member of the bar. He wasn't a phoney and he was validly representing this client and he thought for some strange reason that it would hurt his client to have that instruction given.

MR. MARGOLIN: I think that if the defendant knew what he was doing -- I certainly wouldn't advise it -- but if he knew what he was doing, and he voluntarily and intelligently made that decision to not have those instructions given --

QUESTION: Another difference between that case, as you point out, just a strange reason could motivate that request, but the request involved here, a substantial number of State Supreme Courts think it is a very sensible request. It's hard to say that that's malpractice. But if you give the example that Mr. Justice Stewart gives, it is only a strange request.

MR. MARGOLIN: That's --

QUESTION: Well, let's get away from malpractice. Suppose he is either representing himself, as they have a right do do, and he made this request.

MR. MARGOLIN: Again, I would prefer to keep this on the very narrow issue of the situation where there is assistance of counsel, because I think you can keep this in this area without going into situations like what happens with different types of instructions or what happens with a person representing himself.

QUESTION: Well, we have to get away from any malpractice claim or any incompetency claim.

MR. MARGOLIN: In the Faretta case the Court said that a person has the right to represent himself and if he does that and he foregoes the assistance of counsel and then he makes that type of a decision, he may just be in a situation where he has done himself a lot of injury, but if he is doing it voluntarily and knowingly and he understands the consequences, that might be the situation. But, again, I don't think that that type of situation should affect the Court's decision here because here it is a defendant who is getting advice from an attorney who supposedly has some training and experience in these matters, and it is being made through discussion and then it's being presented to the court as a particular way that the defendant wants to run his case. I don't think the decision in this case would affect that type

of situation.

There is nothing further.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon at 2:05 o'clock, p.m., the case in the above-entitled matter was submitted.)