In the

Supreme Court of the United States

UNITED STATES OF AMERICA,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 79-395
	)	
HAZEL MORRISON,	)	
	)	
Respondent.	)	

Washington, D.C.
December 10, 1980

Pages 1 through 42

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v. : No. 79-395

HAZEL MORRISON,

Respondent.

Washington, D.C.

Wednesday, December 10, 1980

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 o'clock p.m.

APPEARANCES

PETER BUSCEMI, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the Petitioner

SALVATORE J. CUCINOTTA, ESQ., 12th Floor, 1314 Chestnut St., Philadelphia, Pennsylvania 19107; on behalf of the Respondent

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in the United States v. Morrison. Mr. Buscemi, you may proceed when you are ready.

ORAL ARGUMENT OF PETER BUSCEMI, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BUSCEMI: Thank you, Mr. Chief Justice, and may it please the Court:

This case presents the question of whether it is proper to dismiss a criminal indictment as a sanction for misconduct by government agents that did not affect the pending criminal prosecution. The case is here on writ of certiorari to the United States Court of Appeals for the Third Circuit. The facts and simple and essentially undisputed.

In April 1977, Respondent sold approximately one ounce of heroin to a government informant. In June, 1978, she was indicted for that offense and for another similar sale that she allegedly made to the same person in May of '77. The two-count indictment was returned in the District Court for the Eastern District of Pennsylvania. Sometime before she was indicted, Respondent retained her present attorney. He has continued to represent her throughout these proceedings.

In August 1978, while Respondent was awaiting trial, she was visited by Agents Stephen Hopson and James Bradley of the Drug Enforcement Administration. Neither one of those

agents was the agent primarily responsible for investigating Respondent's case. They visited her in order to request her cooperation in their own separate investigation of a major heroin dealer inthe Philadelphia area --

QUESTION: This was a substantial time after she had been formally charged, wasn't it?

MR. BUSCEMI: Yes, Mr. Justice Stewart, the indictment was returned on June 28, I believe, 1978.

QUESTION: And the visit was --

MR. BUSCEMI: And the visit was August, 1978.

QUESTION: And was her trial date set by that time?

MR. BUSCEMI: I think the trial date was set for about -- around the middle of September. The agents told Respondent that she faced a lengthy jail sentence on the charges against her and that if she cooperated, they would make that fact known to the U.S. Attorney. They apparently represented that by cooperating, she would improve her chances for a favorable sentence. They also advised her of the Witness Protection Plan that the government had available. Agent Hopson inquired whether Respondent was represented by retained counsel or whether she was represented by a public defender.

QUESTION: Does the record show whether the United States Attorney was aware of these visits?

MR. BUSCEMI: I think the record shows that the United States Attorney was not aware of these visits, Mr. Chief

Justice. There was a contact between Respondent's attorney and the Assistant United States Attorney responsible for the case before the indictment was ever returned, but there's nothing in the record to suggest that the Assistant U.S. Attorney knew that the agents were going to visit Respondent.

QUESTION: Didn't the agents also tell her that this judge before whom she was scheduled to be tried was notoriously tough, or --

MR. BUSCEMI: The Respondent testified at the hearing that the agents did refer to the District judge as a tough sentencer. The agent himself said that he couldn't remember whether he had made any specific comments about the judge personally, but that he certainly had told her that she faced a severe sentence.

With respect to any of these discrepancies in the testimony, Mr. Justice Stewart, there is a footnote right at the beginning of the Court of Appeals' opinion, in which the Court says that it decided the case on the basis of the undisputed facts, in addition to any other facts in the record considered most favorably to the government, because the District Court had made no factual finding. So the Court of Appeals would dismiss the indictment even before factual inferences, if you want, for the government.

Respondent told Agent Hopson the name of her attorney and Hopson asked her how much she paid him. She said $200.

He asked her whether she'd ever seen the attorney's work, and he said that he had seen it in the past and that she should think about the kind of representation she should get for $200. And he advised her that if she was interested in cooperating, she should seek the assistance of a public defender. Now Respondent gave the agents no information.

QUESTION: Well, if he was right on his premise, then he was sound on his conclusion, I suppose.

MR. BUSCEMI: I suppose so, Mr. Chief Justice. Respondent in any event, didn't say anything to the agents and they left; they left a phone number where they could be reached. She immediately called her attorney, he went to her house and at his instruction and in his presence she called Agent Hopson and said she'd like to arrange a meeting for the next day. They set a time and the agents returned, but they returned several hours later and the Respondent was home by herself, or she said she had company and therefore couldn't speak with them at the time. Agent Hopson promised to call later to set up an appointment for the following day. He did, and it's not clear from the record whether another agreement was made to meet, but in any event the agents returned for the third time on August 25th, '78, and had essentially the same conversation with Respondent that they had had two days before. Again, Respondent didn't give them any information, she told them that she only wished to speak with them in the presence

of her attorney and the agents left, saying that any future discussions would be in the U.S. Attorney's office, with Respondent's attorney present.

Now a few days after that, right at the beginning of September, '78, Respondent entered into a conditional plea agreement with the government. She agreed to plead guilty to Count I of the indictment and to drop her other pretrial motions, on the condition that she be permitted to appeal in the event the District Court denied her motion to dismiss the indictment --

QUESTION: In the reproduction of Judge Hunter's opinion for the Court of Appeals, on page -- 2A of the certiorari opinion, this is described as saying, "immediately after the announcement of the District Court's decision denying the motion, Morrison entered an opinion-conditional plea of guilty to one count of distribution, what does that mean?

MR. BUSCEMI: That must be a reprint, Mr. Justice Stewart. She entered a conditional plea of guilty, I don't know what the word opinion is doing there.

QUESTION: She entered a conditional plea of guilty?

MR. BUSCEMI: That's right.

QUESTION: Thank you.

MR. BUSCEMI: In any event, Respondent's plea was conditioned on her right to appeal the denial of her motion to dismiss the indictment in the event the District Court denied

that motion.

QUESTION: Is there any statutory authority or authority under the Federal Rules of Criminal Procedure for a conditional plea of guilty?

MR BUSCEMI: Well, Mr. Justice Rehnquist, the Courts of Appeals are divided on that question. Some circuits permit these conditional pleas and some circuits do not. The --

QUESTION: Do they regard it as a matter that they can decipher themselves apart from the statutes or the Federal Rules of Criminal Procedure?

MR. BUSCEMI: Well the two Third Circuit opinions that are cited in that footnote that --

QUESTION: Right.

MR. BUSCEMI: -- Mr. Justice Stewart just referred to, Zudick and Moskow, discuss the matter at some length and I don't think that -- they don't find any authority in the criminal rules for this procedure, but they point out that the appeal is from the final judgment and the sentence that is entered by the District Court and they point -- they analogize that situation to this Court's decision in the United States v. Haines, and Lefkowitz v. Newsome, they acknowledge that it's not exactly the same because there's no constitutional infirmity with the charge against the defendant. I mean, it's not a matter of --

QUESTION: Well, Lefkowitz v. Newsome too, was a case

that originally came up through the New York courts --

MR. BUSCEMI: Right.

QUESTION: -- where the New York Court had allowed this sort of plea.

MR. BUSCEMI: Yes, well the federal case that the Court of Appeals relies on is United States against Haines. In any event, I'd like to inform the Court that there is currently pending a revision of Rule 11 that would permit conditional pleas. The current version of that rule would require the consent of both the defendant and the government and it has been endorsed, I believe, by both the ABA and the reporter for the criminal rule.

QUESTION: Let's assume there's a plea of guilty that isn't conditional. Is it appealable?

MR. BUSCEMI: Well I would think that if this plea of guilty was not conditioned, this -- denial of this motion would not be appealable, no.

QUESTION: Why? I mean, why isn't the plea of guilty appealable? The judgment is entered on the plea.

MR. BUSCEMI: Well ordinarily --

QUESTION: Well, why isn't it appealable?

MR. BUSCEMI: Ordinarily, Mr. Justice White, the rule is that the plea of guilty waives any other objections to the admissibility of evidence --

QUESTION: Well what about the McCarthy case, the

original case on Rule 11, wasn't that a direct appeal? Where you challenge the procedure of the arraignment.

MR. BUSCEMI: Yes, well I think that that's just another example of the general proposition that there are some matters that remain open for appeal, even after a guilty plea. I'm not sure that an evidentiary matter would be one of those, this kind of situation perhaps falls somewhere in between the constitutionality of the statute on which the person has been convicted or just the matter of suppression of evidence.

In any event, that was the procedure that was adopted and the District Court thereafter conducted a hearing on Respondent's motion to dismiss and then he denied it, the District judge denied it without rendering any opinion. Respondent pled guilty to Count I, and at the Rule 11 proceeding that was held, she admitted selling heroin to the government informant in April 1977. She then appealed the denial of her motion to dismiss, in accordance with the agreement; the Court of Appeals reversed. The Court acknowledged that Respondent did not provide any information to the DEA. The Court said that the importuning of the government agents was unsuccessful. The Court didn't suggest that the agents' actions had damaged Respondent's relationship with her attorney in any way, or whether her criminal prosecution had been affected by the agents' visits. Nevertheless, the Court held that the indictment should be dismissed because of what the Court called the

agents' deliberate attempt to destroy the attorney-client relationship. And to subvert the defendant's right to the assistance of counsel.

Now apparently, because Respondent's conviction had not been affected by the agents' conduct, the Court concluded that this dismissal was the only sanction available that would remedy the alleged constitutional violation. But we've advanced two alternative arguments that the Court of Appeals decision is incorrect. They are parallel in many respects. First, we've argued that the DEA agents' actions did not violate Respondent's right to counsel because her criminal prosecution was not affected, and some discernible prejudice is an essential element with a Sixth Amendment violation. Second, we've said that even if the agents' conduct did infringe Respondent's constitutional right, dismissal of the indictment is not an appropriate remedy here because the violation caused Respondent no injury.

QUESTION: Does the government disagree with Judge Garth's statement dissenting -- granting en banc consideration at page 21(a) where he says "the panel's analysis reduces to the following non sequitur since the DEA agents' conduct was reprehensible, the defendant must be granted some relief and since there was no disclosure to suppress or trial to retry, a dismissal is proper."?

MR. BUSCEMI: Mr. Justice Rehnquist, I think that's

the essence of the government's second argument, that regardless of whether or not this conduct is thought to violate Respondent's Sixth Amendment rights in some abstract sense, to dismiss the indictment in this case where there's been no prejudice whatsoever, is to essentially reverse all the rules of relief and remedy that have been developed through the years, because the more effective -- I mean, the more drastic relief is given in the case where the harm is the least serious, in fact, non-existent.

Before we even get to that point, however, the government's position is that the Respondent's Sixth Amendment rights weren't violated at all. The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. Resondent had the assistance of counsel for her defense at all stages of the prosecution. She doesn't suggest that her counsel's assistance was in any way impaired and therefore the literal command of the amendment seems to have been satisfied.

The Court of Appeals' error was that it focused on the impropriety of the agents' conduct, rather than on the effect of the conduct on Respondent. And that's not to say that these attempts by the government's agents to interfere with the attorney-client relationship should be condoned; it is only to say that the attempt in and of itself is not enough to violate the right to counsel. The Sixth Amendment comprises

a number of these procedural guarantees to ensure fairness of criminal prosecutions. If a government agents' attempt to deny a defendant of those guarantees fails, the defendant's right is fully exercised, the fairness of the proceeding is not affected and no constitutional violation has occurred.

QUESTION: Well suppose, suppose someone to whom this happened wants some kind of vindication and brings a civil suit, claiming that the agent violated his or her constitutional right to counsel and he wants a declaratory judgment to that effect and a penny. He just wants the people to know that they shouldn't do that sort of thing. And your submission is that unless she can show some interference at the trial that there's just been no violation whatsoever? That's your first argument, that there is no violation of the right to counsel, so the case would be dismissed on a motion for failure to state a cause of action.

MR. BUSCEMI: Well, assuming that there was no prejudice alleged --

QUESTION: That's all she says. She just says these things happened and she says, "P.S. there was no intereference with a fair trial."

MR. BUSCEMI: That's right, Mr. Justice White. The burden of this first argument is that no constitutional violation has occurred. Again, that's not to say that this was right, it's just to say that the constitutional rights haven't been

violated.

QUESTION: Or you say it was constitutional for them to do what they did?

MR. BUSCEMI: Well, that's an affirmative statement; I wouldn't put it that way. I would say that it was improper but it didn't violate the Constitution.

QUESTION: Well, that's saying the same thing.

QUESTION: Can we rule on the remedy point without the Sixth Amendment point? And you still win it?

MR. BUSCEMI: Well Mr. Justice Marshall, I think you certainly could say that whether or not this violated the Sixth Amendment, this remedy was inappropriate, yes.

QUESTION: Or we could say whether or not it violated the Constitution, this remedy was appropriate, because --

MR. BUSCEMI: Yes.

QUESTION: --of the flagrantly, outrageously improper conduct.

MR. BUSCEMI: Well that's essentially what the Court--

QUESTION: Even though it didn't violate any provision of the Constitution.

MR. BUSCEMI: That's what the Court of Appeals' panel said, -- the Court of Appeals' panel said that the Constitution had been violated. Now if the Constitution hasn't been violated, and no statute has been violated, we've run into the kind of problem that's raised in a case like Jacobs, for example,

where we're trying to decide what the power of the federal courts is, to dismiss criminal charges in the absence of any constitutional or statutory violation. And that's -- at least, as the case comes to this Court that situation is not presented here.

QUESTION: Well this action on the part of the Third Circuit has to be justified under supervisory power, doesn't it?

MR. BUSCEMI: Well, I don't believe so, Mr. Chief Justice.

QUESTION: Well, I'm not saying it is justified, it must be justified in order to have it stand. That's -- isn't that your position?

MR. BUSCEMI: Well, it depends on how you use the phrase supervisory power. The Court of Appeals said that this action was necessary in order to vindicate Respondent's rights under the Sixth Amendment. It rested the decision on the constitutional provision. As I understand supervisory power, it ordinarily is a phrase used in cases where no statutory or constitutional violation is involved but the Court nevertheless desire to adjust certain conduct that it believes is inappropriate for one reason or another.

QUESTION: Well, isn't supervisory power basically the power that any Appellate Court has in formulating a body of law and deciding cases that it reviews from lower courts?

MR. BUSCEMI: I think that's probably a good way to look at it, Mr. Justice Rehnquist, because it really is no different than the general decisionmaking power that the Court has to decide the case or controversy before it. I mean, supervisory power, seems to me to be little different in many ways from the common law development of cases.

QUESTION: Are they a little different from the ordinary power of a reviewing court to correct an unconstitutional error?

MR. BUSCEMI: Well, Mr. Justice Stewart --

QUESTION: I never thought there was any magic in the phrase supervisory.

MR. BUSCEMI: I agree that there's no magic in that word, the question of whether the supervisory power should be used to dismiss indictments when --

QUESTION: Well that's something else again.

MR.BUSCEMI: Exactly.

QUESTION: But the federal Appellate Courts have a supervisory power, called by whatever name, which they would not have over state courts, is that not so?

MR. BUSCEMI: Right. That's correct, that's right.

QUESTION: So that there is something in a supervisory category that is different and distinctive from constitutional?

MR. BUSCEMI: Yes, but --

QUESTION: But they have it by virtue of the right given by Congress to any litigant who loses in the District Court to appeal to the Court of Appeals, and to anyone who loses in the Court of Appeals to petition for certiorari here, do they not? I mean --

MR. BUSCEMI: Well that's right. I mean, there's no question that the Court's supervisory power is dependent upon the acquiescence of Congress. I mean, this Court has recognized that in the absence of any -- if Congress decides to change this Court's supervisory power in some way, it can do so. I mean that point was discussed at some length in our brief last term in the Japan case.

QUESTION: So what you're really saying is that there's no constitutional violation as long as all -- that this was just an attempt?

MR.BUSCEMI: That's the burden of the first argument, is there's an attempt to violate the Constitution but it didn't succeed and so there's no violation. Now --

QUESTION: And that even if there is -- even if it's a violation, you say the remedy is just excessive, and I suppose you say, even though there's no other remedy?

MR. BUSCEMI: Yes, I would, although in this case, I -- I mean, as we informed the Court in our reply brief, there has been civil recovery of a substantial nature, but in any event --

QUESTION: I suppose that the fact of violation would be not open to relitigation, in a civil suit?

MR. BUSCEMI: Well, I don't see how there could be a civil suit, because as part of the terms of the settlement there's been a waiver of all future claims against the government or its agents as a result of the conduct that's involved in this case.

Now, I think I'd like to turn to the government's second argument. The only other point that I thought I'd make on the first argument, to refer the Court to Massiah, which I think is instructive because of the way in which the Court decided the case focusing on the use of the evidence at trial rather than the way in which the evidence was obtained. I recommend -- I commend that part of Massiah to the Court's attention, I think we quoted from it at some length in the brief.

Now on the second point, to pick up where Mr. Justice Rehnquist left off in his question earlier, it seems to us that this remedy is thoroughly disproportionate to what actually happened in this case. As Judge Garth observed in his dissent, the panel's decision effectively puts Respondent in a better position because she wasn't prejudiced by the agents' conduct than she would have been in if she had suffered some harm. Because in that event, the existing more common remedies would have relieved her of any unfairness in the criminal prosecution;

evidence that had been obtained could have been suppressed, or a new trial could have been ordered, if her trial had been tainted, but in this case, since she suffered no prejudice she winds up better off and the charges against her are completely dismissed.

Even in Gideon, where there was no attorney at all, at any time, in the prosecution, the remedy was a new trial with an attorney, not dismissal of the indictment. And I think that, as we say in our brief, it would be inconceivable for this Court to hold that a Fourth Amendment violation that resulted in no -- in the acquisition of no evidence, should result in a dismissal of the indictment for that reason, rather than the suppression of any evidence that might have been found.

Even in, in the Fifth Amendment context, in United States against Blue, where there allegedly was some evidence obtained in violation of the privilege against compulsory self-incrimination, the Court specifically said that dismissal of the indictment was too drastic a remedy; the only remedy to which the defendant would have been entitled was suppression of that evidence.

Now, I think that in this respect the Court of Appeals' main error is that it assumed that whatever remedy there could be had to be a remedy in this criminal proceeding. This criminal proceeding involves events that occurred 16

months earlier, that had nothing to do with this agent's visit. The agent's visit was wrong, but it didn't affect that proceeding and there's no reason to think that any relief awarded has to be awarded in the pending criminal proceeding.

QUESTION: There has been a civil recovery, I think there's a reference to that --

MR. BUSCEMI: Yes, there's been -- the reply brief describes the civil recovery at the very beginning, I think, on pages 1 and 2. Respondent received, I believe, $4500, 25% of which was to be paid to -- was designated for attorneys fees.

QUESTION: Did the attorney get something in addition to that, or was that --

MR. BUSCEMI: The attorney in the criminal case filed an independent lawsuit against the DEA agents, charging them with defamation in the course of their conversation with Respondent and he did recover $2,000, again, 25% of that to be paid to his attorney in the civil suit.

Now, I'd like to conclude by addressing myself for a moment to the Court of Appeals' asserted need for prophylactic action in this area. I want to emphasize as I've said before that this was not proper conduct and no one for the government has ever asserted that it is proper conduct, it's also not the law enforcement policy of the DEA or any other federal agency. And I'd like to refer the Court in that connection to the letter from Deputy Attorney General that

we've printed in the Appendix to the brief, which discusses the general problem of agents contacts with represented defendants in the absence of their attorney. And it states unequivocally that the government's general rule is that there should be no such contact without the consent of the attorney.

There are some peculiar situations that may arise that might necessitate such a contact, and they are discussed in some detail in that letter. But the general rule is that there should be no such contact.

QUESTION: The $4500 settlement in the civil suit has some tendency, does it, do you think, to suggest that the Court of Appeals was wrong saying that there was no other remedy available for the misconduct of the agents?

MR. BUSCEMI: Well that's certainly true as to the second prong of our argument, Mr. Chief Justice. Of course, if this Court rules in accordance with the first part of our argument that there was no constitutional violation here, there would be nothing to remedy, and the unavailability of another procedure would not be a problem. But at least if there was a violation I think that this civil recovery is very significant, with respect to the availability of an alternative remedy.

Finally, even if -- we've cited some Court of Appeals cases in our brief that generally support the government's position here, but leave open the possibility that dismissal of an indictment may be permissible if the Court finds itself

-- as a last resort, unable otherwise to change a longstanding repeated pattern of government misconduct, even if that is correct, there is no allegation or evidence of any such pattern of government misconduct in this case and we think that that's an inappropriate basis on which to affirm the Court of Appeals' dismissal.

I'd like to reserve the remainder of my time for rebuttal, if the Court has no further questions.

MR. CHIEF JUSTICE BURGER: Mr. Cucinotta.

ORAL ARGUMENT OF SALVATORE J. CUCINOTTA, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. CUCINOTTA: Mr. Chief Justice and members of the Court:

My name is Salvatore Cucinotta, and I am really counsel for the defense. I have not been planted here by the government because if that really did occur, if the government attempts were successful, then I wouldn't be here. And to a very large degree, there would be no other adversary system like we have now.

I am here in a sense, not only representing Hazel Morrison, I am representing the adversary system of which we all are members. To allow this behavior to go unchecked when there are known attempts permits the government to do away with their adversary. In the trial courtroom, to that extent, it is a violation of the Sixth Amendment; of

course, it is a violation of due process.

QUESTION: Don't you regard the $4500 as some sort of a remedy?

MR. CUCINOTTA: Of course not, Your Honor.

QUESTION: What was the $4500 for?

MR. CUCINOTTA: The $4500 is -- was a settlement, Your Honor, but how can that pay for selling the adversary system or avoiding the adversary system? Does that not allow the government to make purchases for heroin and then use a little more money to pay the individual for the attempt of avoiding the adversary system, all they're going to do is ask for more funds to do away with trials. If they are allowed to pay when they get caught. No, you are in a situation that is kind of like Mapp v. Ohio.

QUESTION: Well, I thought the Court of Appeals would refer you to the remedy for this person, not a broad-scale remedy for society?

MR. CUCINOTTA: Well --

QUESTION: So the $4500 was the remedy for what the Court of Appeals thought that no remedy existed.

MR. CUCINOTTA: Mr. Chief Justice, I thought that the remedy as far as the system was concerned, and as far as Hazel was concerned, was the dismissal of the prosecution and also, together with that dismissal, it was an additional remedy. It was not an either/or, because if it becomes an either/or then

we have the -- a mockery of justice, to a very large extent. As I said, you will allow the government to make these attempts -- if they are successful we will never know about it; you'll have litigants passing in front of trial judges, and he'll never know who represents which side. But now, when we've discovered --

QUESTION: I'm not sure I follow that argument. Well, if he'd been successful she would have fired you and gotten the public defender.

MR. CUCINOTTA: And --

QUESTION: And I don't think, you're not implying the public defenders are faithless to their clients, are you?

MR. CUCINOTTA: Well you know, the government agents, although the factual rendition was given to you by --

QUESTION: Well are you implying that? Are you --

MR. CUCINOTTA: I don't agree with that as the facts.

QUESTION: Pardon me?

MR.CUCINOTTA: I don't agree with that as the facts. Those are not the facts. She was only told she could get a public defender after she cooperated with the government. So she really was asking for her attorney to be present, and she was told by the government agents that it was only them and not her attorney or any attorney who could help them get through that S.O.B. in federal court who hates black people. It was

the government agents and not through her right to counsel, and when she asked for her right to counsel, she was told that she would face a harsher jail sentence and she stood with five years as the first conviction. To this day, Hazel Morrison and the public, more importantly, does not know whether or not indeed the agents really were successful in their threat. And that is the analysis which --

QUESTION: What are you talking about?

QUESTION: That's what I don't follow. What are you saying, what would have happened if the worst had happened? What would have happened?

MR. CUCINOTTA: If the worst would have happened, is exemplified, is lying -- you'd have to go on and imagine -- use your imagination, as exemplified in cases like People v. Moore and People v. Mora, out of California. There it was found, a reported situation where an individual went along with the government overtures, dismissed his counsel and wound up not getting the kind of relief -- because the bargain that he struck he could not enforce.

QUESTION: What about this case? What do you say happened at this trial?

MR. CUCINOTTA: In terms of --

QUESTION: Were you stopped at anything you tried to do at this trial?

MR. CUCINOTTA: In terms of prejudice, my relationship

with my client was --

QUESTION: What did the judge or anybody else do to prohibit you from doing what you wanted to do in this trial?

MR. CUCINOTTA: In this particular trial, Your Honor, I can't speculate because I can't get involved in nice calculations as we said in Glasser.

QUESTION: Well try.

MR. CUCINOTTA: Pardon me, Your Honor.

QUESTION: Try and find something that you were deprived of doing, or denied the right to do.

MR. CUCINOTTA: There is a taint --

QUESTION: Just anything, I mean, not letting you go to the john or something, anything.

MR. CUCINOTTA: If you're referring to the government's argument regarding the lack of prejudice --

QUESTION: No, I'm not -- I'm not referring to the government's argument at all. I'm talking about what I'm asking you. You say that you -- something the government did deprived this appellant, this Respondent, of a fair trial and association with counsel.

MR. CUCINOTTA: Yes, Your Honor.

QUESTION: Now what?

MR. CUCINOTTA: To rely on the -- on the confidentiality of our communications, to not --

QUESTION: How would that hurt her?

MR. CUCINOTTA: -- not have the fee understanding between us known to the government --

QUESTION: Well how did that hurt her?

MR. CUCINOTTA: -- to the extent --

QUESTION: How did it hurt her at the trial?

MR. CUCINOTTA: All of these things, I cannot speculate --

QUESTION: I thought she pleaded guilty?

MR. CUCINOTTA: She pleaded -- she pled guilty because when the government did this and went along and attempted to decimate this attorney-client relationship --

QUESTION: Well, did they do it?

MR. CUCINOTTA: No, they didn't.

QUESTION: Did they succeed?

MR. CUCINOTTA: They didn't succeed. Because if they succeeded, I would not be here.

QUESTION: Well, what did you get this $4500 for?

MR. CUCINOTTA: The $4500 was an additional remedy, Your Honor, I suggest that Hazel Morrison's right to an adversary, due process hearing is worth $4500.

QUESTION: Were you intimidated in any way?

MR. CUCINOTTA: Oh yes, Your Honor, I've been intimidated for several years, in a sense.

QUESTION: In this -- this case?

MR. CUCINOTTA: In this case.

QUESTION: Yes.

MR. CUCINOTTA: In this case, because you never know which way --

QUESTION: Well, you'd know whether you are intimidated or not, don't you? Don't you?

MR. CUCINOTTA: All I have to do, Your Honor, is read that they can come into Court with search warrants and accuse me of criminal activity, tell me to go get a lawyer, in a adversary proceeding --

QUESTION: Was that this case?

MR. CUCINOTTA: That was this case, Judge.

QUESTION: Yes. And that intimidated you?

MR. CUCINOTTA: It sure did, Your Honor.

QUESTION: How?

MR. CUCINOTTA: When I have a federal court which I respect telling me, threatening me with possible contempt and disciplinary action --

QUESTION: You know --

MR. CUCINOTTA: -- because all I was trying to do was prove the truth, Your Honor.

QUESTION: You know you're not guilty, don't you? You know, I'm looking at you and to me, you don't appear to be the person that's easily intimidated. Then, maybe I'm wrong.

MR. CUCINOTTA: No, Your Honor, but I --

QUESTION: I'm not wrong, am I?

MR. CUCINOTTA: No, Your Honor.

QUESTION: That's right, I thought so. I thought so.

MR. CUCINOTTA: Your Honor, I believe that once you find the government involved in this kind of activity, which is the most egregious kind of record that this Court has ever seen, is not lying on search warrants, it is not lying to the Grand Jury, it is not -- and in fact, you've got some lies in this particular case. You've got them lying on the search warrant, you've got them lying at least on three occasions in their answer to my motion to dismiss, when they said oh no, we didn't discuss counsel's effectiveness and we didn't tell her anything about a sentence, et cetera.

And then they came into Court and they really hedged and hawed, until finally they realized that possibly they had to tell the truth. They had to tell the truth about an attempt to decimate, an attempt to terminate an individuals' right to counsel, and in that sense, we're talking about terminating all of our right to counsel, because if you let it go here then nothing's going to stop them, as far as a going on to the next case and the next case after that. And -- Yes, Your Honor.

QUESTION: Mr. Cucinotta, if I might interrupt you for a moment, certainly the adversary system of which you -- which you champion is important, albeit -- but it's a part of the administration of the system of criminal justice, and your client had been indicted by a grand jury for possession of

drugs and certainly society has an interest in seeing that she is punished as prescribed by Congress if proof can be produced in the normal way, and under standards prescribed by the Constitution and the statutes.

MR. CUCINOTTA: Society has a greater interest in protecting their own right to counsel.

QUESTION: Well, society -- it's not just one right as opposed to nothing on the other side, it's the system of how the laws shall be enforced in this country. And as certainly society, as a whole, if it's going to be governed by the majority of the people and by the legislative branch, has an interest in seeing conduct that is proscribed as penal by the legislative branch, punished as prescribed by the legislative branch so long as the Constitution is not violated, does it not?

MR. CUCINOTTA: Yes, I agree with the Court. And I'm --

QUESTION: I'm not the Court, I'm only one ninth of it.

MR. CUCINOTTA: I would respectfully suggest to Justice Rehnquist that the interest of each of one us is what the lower court and all the judges down there were seeking to protect. They weren't really interested in the fact that my client pled guilty or did it, or didn't do it. That wasn't really as important as the fact that you have to protect society's interest to make sure that this activity doesn't occur

again. To say that a civil remedy that has been argued in briefs by the government, would be some sort of alternative relief, I wish it would be that easy. Because I'm asking for some real drastic relief. But it's not really that easy, because civil remedies lead -- first of all, they allow it to occur, they say -- set forth, as I said earlier, you can pay it, pay it, and then the next question is well how much money do we think Hazel Morrison's rights were infringed upon monetarily? How do you put a price on the adversary system and how do you go to a jury and tell them how valuable that is? Unless we have a blue-ribbon panel of lawyers.

QUESTION: What did she allege were her damages in her civil suit?

MR. CUCINOTTA: Not -- being her counsel, I would be forced to speculate as -- just compensatory --

QUESTION: Those complaints aren't -- of course, they are of public record, I suppose?

MR. CUCINOTTA: Oh yes, they are.

QUESTION: Do you know what's in them, or not?

MR. CUCINOTTA: Peripherally, I am sure that there are punitive and compensatory damages requested. I can't go any further than that, Mr. Justice.

QUESTION: And they were ultimately settled?

MR. CUCINOTTA: Yes, and I -- urge the Court to find that whether they were settled, whether the right exists and

whether it doesn't exist, does not treat the problem here. It's merely an extra form of relief.

If I felt in any way that exchanging certain amounts of money would be selling out the adversary system, I'd feel sort of like Judas, giving up Christ. Because without him it would be all over. In the -- in fact, in the release -- I can tell the Court that in the release, there's a statement that says that this release has nothing to do with the criminal case. But that's getting out of the record, so once again I suggest to the Court, that's not part of the record.

QUESTION: What isn't part of the record?

MR. CUCINOTTA: The civil -- the civil relief, the civil case. It was not only -- Via v. Cliff, said that the civil remedy was an extra remedy not an alternative remedy--

QUESTION: Well, they are a matter of public record, though?

MR. CUCINOTTA: Oh yes, yes. What I'm saying, I'm -- in this case in the Court's record down in the Clerk's Office, you're not going to find the papers associated with the civil suit.

QUESTION: That doesn't quite bind us, does it?

MR. CUCINOTTA: Nothing binds the Court, Your Honor.

QUESTION: Okay. Thank you.

QUESTION: You know, the reference to the civil litigation brings to mind other situations which are not ones

the bar is terribly proud of, but there are occasions when claim adjusters, for example, go to a plaintiff in a personal injury suit without telling counsel and make the same kind of slanderous remarks about counsel. Has there ever been a suggestion that the appropriate remedy in that case is to make some kind of a ruling on the merits in the litigation?

MR. CUCINOTTA: I'm not familiar with any --

QUESTION: Since it's exactly the same threat to the adversary system.

MR. CUCINOTTA: Particular cases like that, Mr. Justice, I know that that situation exists if only in discussions with my colleagues in the civil bar. Perhaps the time has come --

QUESTION: Maybe by analogy what you should do is enter judgment against the insurance company in those cases?

MR. CUCINOTTA: You can get into all sorts of speculations. I sometimes speculate about how, what would happen if Hazel went to Steve Hopson and said if you don't get a new prosecutor who is a little more easy on me, then you are not going to see your kids anymore. So, -- but one of the points I want to raise with the Court is that when you see this kind of activity in a record, that it's up to the government to show whether or not the prejudice has been harmful or not. It's not up to me to go around and say we've been prejudiced because of Fact (a), (b) or (c), with all that discussion

regarding motions to suppress, illegal evidence, tainted evidence, the fact that a new trial here would not be the appropriate remedy because that would particularly allow the situation to go on, to give you two bites out of the apple. A civil remedy doesn't help it. There's only one remedy, and that is dismissing the prosecution.

QUESTION: Well why do you say the burden is on the government? Certainly on a motion to suppress, the burden is on the party desiring suppression.

MR. CUCINOTTA: Well, when you file a motion to suppress, if the burden is on the government to show that the evidence has been constitutionally gleaned, whatever it may be, whether it be the statement or it would be the fruits of the evidence.

QUESTION: I thought the law was the other way?

MR.CUCINOTTA: No, it's not the burden on the defendant, or the defense counsel, to show that the item has been unconstitutionally acquired. But be that as it may, Mr. Justice, it is when you have situations such as this, which are really violations of due process, you don't want to get involved in what I call nice calculations as to the extent of the denial, of the right to counsel. It's up to them, to suddenly turn around and say well, it hasn't been denied for this, this and this reason. Well, they haven't said that.

QUESTION: Well, whatever burden -- whoever has got

the burden, I thought the Court below ruled that -- one of two things: either there wasn't any prejudice whatsoever, or that whether there is or not, whether there is or not the indictment should be dismissed. Which did the Court say, no -- there is no prejudice?

MR. CUCINOTTA: I think they said both. They said there has been an infringement --

QUESTION: Well then, whoever had the burden carried it?

MR. CUCINOTTA: In terms of the motion to dismiss the indictment, --

QUESTION: If the government had the burden, they must have carried it, because the Court concluded that there wasn't any prejudice.

MR. CUCINOTTA: If the Court please, I suggest in terms of the motion to dismiss the indictment, the Respondent did carry the burden, he did prove his case.

QUESTION: Since you put this so heavily in your argument, on exposition and defense of the adversary system, what if this Court had said the next five drug cases are all to be dismissed as a result of this misconduct of the government? Would that be an excessive remedy?

MR. CUCINOTTA: I think that really comes to the next part of my argument, Mr. Justice. And that is, I wouldn't go along with that sort of opinion. I would respectfully ask the

Court to decide that it's time to dismiss them now, and not wait -- and to a certain extent, look at what the government is telling you in this case, when they tell you that we even have regulations controlling this very kind of activity. And the only difference between what happened here and what happens when we have these regulations, is that we allow a U.S. attorney to make the decision that Stephen Hopson did. Stephen Hopson went to my client and he wasn't interested in the adversary system, he raced through his mind, he had a jury, a trial, litigated, all the process went right through his head, and he decided that he was going directly to my client. And indeed, they told my client and said, we'll give you a dismissal or we'll give you -- we'll really be harsh against you. Well what I'm asking you is for what Steve Hopson told my client, that he was going to be able to get her, not -- the U.S. Attorney wasn't going to do it, the judge wasn't going to do it. You can't wait for the next time. There may be no next time, Mr. Chief Justice, and if you wait for the next five cases you may not see them. But I think they're already there. And if there's 500 cases like this, and suddenly you get the floodgates argument -- like I saw in their petition for cert, then please bring the floodgates on, because doesn't this Court want to know if this behavior is prevalent in this country?

QUESTION: If there is no next time, as you hypothesized

earlier, then there really is no problem.

MR. CUCINOTTA: The Court dismisses the indictment, there will be no next time. There may have been past occasions that the activity has occurred and people are languishing in prison who were afraid to raise this issue because they struck a deal, told their lawyer to go -- to go somewhere else, who couldn't raise it because they couldn't prove it. Or, were afraid that they would be sentenced harsher if the Court thought that they were lying. And look what happened in my case. We had -- we tried --

QUESTION: You know, there are actually some innocent people in jail. So I don't know what all this argument's about.

MR. CUCINOTTA: Your Honor, that's what I'm suggesting to the Court, there could be innocent people --

QUESTION: Do you suggest to the Court that because something happened in some case 80 years ago, in the state of Washington, that your client should go free in Philadelphia?

MR. CUCINOTTA: I'm not familiar with --

QUESTION: Well you're talking about all these people in prison. Clients of yours?

MR. CUCINOTTA: No, Your Honor.

QUESTION: Well how do you know about them?

MR. CUCINOTTA: I'm saying to the Court if this --

QUESTION: One situation in this case?

MR. CUCINOTTA: Yes sir. I respectfully submit to this Court --

QUESTION: Somewhere, will you -- if you've done it, I missed it, will you give me your answer to Judge Garth's observation in his dissent and denial of the rehearing en banc, that your position is such that when there is prejudice such as by the admission of illegal evidence, there is a new trial. But here where there is no prejudice, that the indictment was dismissed, how do those things square?

MR. CUCINOTTA: I separate in my mind the concept of the Fourth Amendment and the Sixth Amendment as it applies -- as the Fourth Amendment applies to real physical evidence. Here, we were talking about outrageous government activity it is not up to the Respondent to show the extent of the prejudice, but it is up to the government to show that I have not been prejudiced by it. I am also indicating to the Court that there is -- can be found prejudice here, that there was a violation of the privilege of communication between me and my client, that has been infringed. It was infringed, it still is infringed. It chilled her confidence in me.

QUESTION: Under your argument, wouldn't -- in Morrisey v. Brewer, wouldn't the logical result have been for this Court to order the indictment dismissed and not just reverse the conviction and say you are having a new trial.

MR. CUCINOTTA: I'm not familiar exactly with the

facts of Morrisey v. Brewer, but I will -- I do know that there's no other case that involved disparaging counsel of a person's particular free choice, that it would be private counsel that makes it even worse. So to that extent, then, the remedy in that particular case is different and distinguished from the kind of relief I'm asking here, in terms of what has occurred, the -- counsel had no way of determining the validity of those offers of negotiation that were made to my client, when they said to my client, we can give you X-Y-Z if you do A, B and C. If -- there was a deal that was struck, how could she enforce it? She lost that. Of course, she was sentenced harshly, which has been indicated in the reply brief that these overtures by the government were actually genuine, uses the word genuine on page 3, says there was nothing in the record to show that the overtures of the government agents were actually anything but genuine. Indeed they must have been genuine, but we today don't know whether or not she was sentenced so harshly because of what the agents said that they could do.

QUESTION: What was the sentence? I didn't --

MR. CUCINOTTA: Five years, to a girl who had never been convicted of a crime before, and --

QUESTION: What was the minimum sentence?

MR. CUCINOTTA: Minimum sentence could have been from -- could have been a suspended sentence. The -- there is

also --

QUESTION: For some of them it's a five-year minimum.

QUESTION: Mandatory.

QUESTION: Some have -- are you --

MR. CUCINOTTA: I'm not familiar with that, Your Honor.

QUESTION: I think he might know.

MR. CUCINOTTA: Now I also believe that in this case you will find fear in the Petitioner of any further communications with counsel of her choice. She --there are indications that there were phone calls made to her on the third meeting, that Russ was coming. And Russ was the investigator. And the person who really showed up was not Russ, but it was the DEA agents. This is a case that's replete with wiretaps. You begin to wonder who's trusting who. If the Court please, this is a case that does not involve the kinds of lies that you've seen the government get involved in, in the past, in terms of some of these other cases. They are just misstatements of the truth, you're involved in what I consider extreme serious lack of understanding as to the requirements of the Sixth Amendment.

If the Court please, my client pled guilty to the best deal that she could receive in light of what occurred, in light of what the government did. To say that there was no problem -- it's kind of similar to the situation when you show

a gory picture to a jury and you tell the jury to forget about it, it didn't happen. Well it did happen, and as I said earlier, she will never know whether had she cooperated, she would have received a lesser sentence. And as we've discussed earlier, the question of the remedy is only involved in one thing and that is dismissal of the charges, and I just want to make sure that next year, that some DEA agent isn't out in West Philadelphia saying to somebody, do you want your lawyer, the lawyer that's going to defend you next week, come down here at plea negotiation time and she says yes, and he'll say well you know, there was a lady by the name of Hazel Morrison and she wanted her lawyer too. Well you know what, she's in jail. Thank you.

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

ORAL REBUTTAL ARGUMENT OF PETER BUSCEMI, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BUSCEMI: Thank you, Your Honor. I'd just like to answer, I think, Mr. Justice Marshall's question is how -- what the maximum and minimum sentences are under 21 U.S.C. 841(a)(1), and I think it's zero to 15 years. There's no minimum sentence under that --

QUESTION: And there could be a suspended sentence?

MR BUSCEMI: And there could be a suspended sentence, that's right.

QUESTION: Well, isn't there one that's a five-year minimum?

MR. BUSCEMI: I'm not sure that there is anymore, anymore minimum at this time, Your Honor, but it's not under this provision.

QUESTION: Well there was.

MR. BUSCEMI: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon at 1:51 o'clock p.m. the case in the above matter was submitted.)

CERTIFICATE

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No. 79-395

UNITED STATES OF AMERICA,

v.

HAZEL MORRISON

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BY: Lill G. Ch