ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-374

TITLE ROBERT FLANAGAN, JAMES KEWESHAN, JOSEPH LANDIS AND THOMAS McNAMEE, Petitioners v. UNITED STATES

PLACE Washington, D. C.

DATE November 30, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT FLANAGAN, JAMES KEWESHAN, JOSEPH LANDIS AND THOMAS McNAMEE, Petitioners

v. No. 82-374

UNITED STATES

- -x

Washington, D.C.

Wednesday, November 30, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

EDWARD H. RUBENSTONE, ESQ., Philadelphia, Pa.; on behalf of the Petitioners.

ANDREW L. FREY, ESQ.: Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Flanagan v. United States.

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

ORAL ARGUMENT OF EDWARD H. RUBENSTONE, ESQ.,
ON BEHALF OF PETITIONERS

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

Some 40 years ago in Adams v. United States this Court cautioned that the procedural safeguards provided to an accused by the Constitution must not be turned into fetters and recognized that to deny a criminal defendant in the exercise of his free choice the right to dispense with the constitutional safeguards which have been provided for his protection is to imprison a man in his privileges and call it the Constitution.

If the decisions below disqualifying Petitioners' counsel of choice from presenting their common defense at trial are permitted to stand, the caution so perceptively expressed by Justice Frankfurter will become a reality. This Court has repeatedly confirmed both the propriety and the efficacy of multiple representation in criminal matters.

This Court has never questioned the right of persons accused of crimes jointly to present their common defense through counsel of their choice, and this Court has expressly recognized that a defendant has the right to determine the manner in which his case shall be conducted. If the decisions below are permitted to stand these precepts will not survive in any meaningful form.

This case presents in the clearest possible terms the question of whether four police officers jointly charged will be permitted to determine that they wish to have their defense presented by one lawyer in whom they have great trust and great confidence, that they have the right to determine that the one lawyer shall present a common defense, and that their decision is based upon the fact that their positions are completely and totally consistent and that each is willing to waive their rights to separate counsel.

In this case four police officers learned in the spring of 1981 from newspaper articles that they were under investigation. They were under investigation by various federal, local and police authorities.

They were confronted with this tangle of legal complexities. Civil and criminal potential was facing them, and they made the decision at that time to come to

the firm of Sprague and Rubenstone, in particular to come to the firm because of the firm's senior partner, Richard Sprague, who is a highly skilled and experienced defense lawyer.

They came to the firm and they said to the firm "We are coming to you as a group. We have common interests and we want you to protect them."

After they came each of the defendants was interviewed individually, and it was determined as a result of these individual interviews that the facts which they related were not inculpatory to them, were not inculpatory to any other defendant and indeed were consistent among themselves.

QUESTION: How do we know all this?

MR. RUBENSTONE: These facts, Your Honor, did not come out during the course of the District Court proceedings. They are set forth in our appeal brief. They are set forth in the brief to this Court.

QUESTION: But they have never been found by anybody.

MR. RUBENSTONE: They have never been found, but I do not believe they are disputed by anyone.

QUESTION: Well, they are disputed by the indictment surely.

MR. RUBENSTONE: Excuse me, Your Honor?

QUESTION: They are disputed by the indictment. You say there are no inculpatory facts. Your clients have been indicted.

MR. RUBENSTONE: But there are no inculpatory facts which the clients represent. The clients profess innocence, Your Honor.

QUESTION: I understand, but I do not think -- You must assume the possibility that there is some evidence of guilt that will surface sooner or later.

MR. RUBENSTONE: No, I must assume the possibility with all due respect that there may be evidence which the government believes demonstrates wrongdoing, but I need not assume that there will be evidence of guilt nor need I assume in making my determination as to whether or not I can represent all four that anything they tell me is incorrect unless I have something to present me with a doubt.

In this entire proceeding I think it is important to note since the time of the Rule 44 disqualification hearing right up to today there has been not one shred of evidence, not one piece of information presented by the government which gives any claim to any assertion that they might make that there is anything inconsistent as between the stories which the defendants tell.

QUESTION: At some time are you going to discuss the question of whether this order was appealable?

MR. RUBENSTONE: I would be happy to discuss that right now.

QUESTION: At your own time.

MR. RUBENSTONE: Let me turn to it very quickly.

The decision to disqualify counsel is a final and irrevocable decision. It has an immediate and an intense impact upon the trial.

It has an immediate and intense impact upon the defendants and every action which they take during the entire course of the trial, and it destroys ultimately and utterly the defendants' right to counsel at the most critical stage of his life.

As a result to use the language of Cohen, the decision to disqualify counsel is too important and too independent to defer review. Now if we turn to the specific test which was laid out in Cohen and in Cooper I think it is clear that of the three-prong test for appealability as a collateral order the disqualification of counsel decision meets the first two.

It is a decision which conclusively determines the question, and it is a decision which is totally

separate and apart from any question involving the guilt or innocence of the defendant. The only area which I think does raise some discussion is the question of whether or not the decision to disqualify counsel is effectively reviewable.

Seven circuits have passed on this issue both in the criminal and in the civil context, and each of them has rejected the argument that such a decision is effectively reviewable. Basically every court including the Ninth Circuit which has said that this is not an order which is appealable in an interlocutory fashion has said any attempt to prove prejudice by a defendant who has his counsel denied to him at the inception of the case would be an insurmountable burden and we cannot imagine any way that he could go about showing that, meeting that burden.

QUESTION: Well, I suppose if some per se reversal rule were adopted you would not have difficulty.

MR. RUBENSTONE: That is what the Ninth Circuit said in Greger, Justice O'Connor, and I do have a difficulty with per se reversal because there is too much which can occur during the course of a trial which is not reversable. There is too much that can occur during the course of a trial which is irremediable and

which is denied to a defendant if he is forced to go to trial with counsel other than his choice.

For example, at a trial, the first trial, a lot of people are going to testify. Now subsitute counsel may be competent, but he may not be the counsel that the defendant selects, and his ability to direct or cross examine that witness may not be the same level as the ability of counsel of choice.

Likewise the strategy or the tactics which he might adopt in cross examining or direct examining that witness may have been different and may have been injuricus to the interests of that defendant. Now if that witness is subsequently unavailable his testimony is admissible in the event of a retrial, and I submit that that is prejudice.

The very decision as to whether or not the defendant will testify may be made one way by counsel of choice, may be made the exact opposite way by substitute counsel. If substitute counsel decides to put that man on the stand and have him testify then his testimony is going to be forever etched in stone, and that will not be reversable.

QUESTION: Mr. Rubenstone, the Cobbledick case says that the policy especially in criminal cases is against piecemeal appeals, and there is no doubt that an

appeal like this first in the court of appeals and conceivably here if certiorari is granted does delay the start of the criminal trial.

MR. RUBENSTONE: Yes, especially if, as has occurred in this case, the District Court entered a stay. I do not think that there is necessarily an automatic stay as a result of an appeal under 1291.

Somebody has got to stay the proceedings, and I think that at that point there is a certain degree of discretion in both the district court and the court of appeals as to whether or not this is a matter which does require review or whether this is a matter which is frivolous. We do it in the double jeopardy situation all the time.

QUESTION: Mr. Rubenstone, are there any cases to your knowledge in which a Faretta situation if a defendant is denied the opportunity to represent himself for whatever reason that that has been held to be immediately appealable on an interlocutory basis?

MR. RUBENSTONE: I am not aware of any, Your Honor, but I would imagine that if a state --

QUESTION: Would that be a similar situation?

MR. RUBENSTONE: I would think so. I mean if the state or federal government would refuse to provide counsel to an indigent in connection with his criminal

defense I would imagine --

QUESTION: No, well let's say he wanted to represent himself and for whatever reason the court determined, for instance, he was not capable of doing it and appointed counsel and the defendant insisted on an interlocutory appeal on that question.

MR. RUBENSTONE: Well, what I am saying is really just the flip side of the Gideon situation where the government does not comply with Gideon. This Court has found that there is a constitutional right and that that right cannot be impinged upon absent extreme circumstances. So I think there would be absolutely a right to take the appeal, but I am aware of no cases that have raised that issue.

QUESTION: But you have found no case?

MR. RUBENSTONE: No.

QUESTION: But your suggestion in response to Justice O'Connor that if there is a constitutional right involved there must be a right to an interlocutory appeal certainly is not supported by our cases.

MR. RUBENSTONE: No. I do not mean to suggest that at all. I believe, and maybe I made an improper assumption, but I believe that the denial of the right to represent one's self following the Faretta decision would have the same effect and would meet the same

criteria as are set down in Cohen and as this Court has accepted for an interlocutory appeal.

So I think it would be appealable under 1291. I do not mean to suggest that just because there is a constitutional right that there is automatically a right to appeal.

QUESTION: You do not think one of the criteria for immediate appeal is that the issue would not otherwise be reviewable?

MR. RUBENSTONE: I am sorry, Your Honor, I do believe.

QUESTION: Well, certainly if the criminal trial had gone on and there had been no appeal you could still have raised the issue and had the issue reviewed at the end of the -- at least the defendant could have.

MR. RUBENSTONE: The defendant --

QUESTION: The defendant could have if he had been convicted in an appeal. He could have raised this issue that he was denied counsel of his choice.

MR. RUBENSTONE: Of course, he can. But how can he -- He can raise the issue --

QUESTION: Well, if he was right there would be a new trial.

MR. RUBENSTONE: Well, but there has been no decision that I am aware of other than the Ninth Circuit

decision that says that if you prove that the denial of counsel of choice was erroneous you are automatically entitled to a new trial. The other courts which have addressed this queston have all said that you have got to show, we believe, in order to get a new trial you have got to show some prejudice and because that showing --

QUESTION: My question really was do you think that it is one of the criteria for immediate appeal that the issue that you want to appeal is not otherwise reviewable?

MR. RUBENSTONE: It is hard to answer that question directly so let me try it this way.

QUESTION: Well, you went quite a ways toward answering just a minute ago. You said you really could not get the relief you wanted.

MR. RUBENSTONE: The Cohen court does not say otherwise reviewable. It says effectively reviewable. That to me means that the defendant essentially has to be in the position to be put back in the same place he was if he had had the right to take that appeal and get the relief immediately.

QUESTION: You think if there is any real doubt about your ability to get a new trial even if you show that your right had been denied that it is not

effectively reviewable?

MR. RUBENSTONE: Absclutely. Indeed the government's position in this issue is that you do not really even look at the question of whether there has been an erroneous disqualification or not. That question is subsumed tc a much more significant question according to the government of whether or not you have got effective assistance. If you have got effective assistance --

QUESTION: Is your position grounded in the Constitution? I take it it is.

MR. RUBENSTONE: Which position, Your Honor?

QUESTION: The position that you should have been entitled -- that your client should have been entitled to joint representation?

MR. RUBENSTONE: Absolutely.

QUESTION: Is it in the Sixth Amendment?

MR. RUBENSTONE: I find it in the Sixth Amendment, Your Honor.

QUESTION: Sixth. On the ground that you have the right to choose the counsel of your choice?

MR. RUBENSTONE: I believe that the Sixth Amendment --

QUESTION: Or just to have counsel?

MR. RUBENSTONE: No, I believe that the Sixth

Amendment -- Inherent in the Sixth Amendment if not implicit and inherent in our society is the right of an individual defendant to select who he wishes to represent him in a criminal trial.

QUESTION: What did Faretta decide? What constitutional issue did Faretta decide?

MR. RUBENSTONE: Faretta decided that the individual had the right to represent himself.

QUESTION: Based on what provision?

MR. RUBENSTONE: Based upon the Sixth Amendment assistance of counsel clause.

QUESTION: We have not given indigent defendants a right to select their own lawyer have we?

MR. RUBENSTONE: I do not think you have to give it to them, Your Honor. I think they have it.

QUESTION: We have not recognized the right of an indigent defendant to select a nonpublic defender, for example, or even in the private sector a lawyer of the defendant's choice that the public will pay for. We have not done that. We have provided counsel, but not counsel of choice. Is that not so?

MR. RUBENSTONE: That is corect, but I think there are different considerations, the consideration being that here you are imposing upon the state and in imposing upon the state your rights are going to be

limited. I am not suggesting that the Sixth Amendment right to counsel of choice is an unlimited right, but I do believe --

QUESTION: Well, you were speaking of it as though it was a right to choose.

MR. RUBENSTONE: It is a right to choose. It is a right to choose who you want whether you are a millionaire or an indigent.

The fact is that it takes two to tango. The fact is that if an indigent goes up to Edward Bennett Williams who charges I have no idea for his services, but if he can convice Edward Bennett Williams that his case is interesting enough and important enough Mr. Williams may take the case.

So I think the focus in that analysis is not upon the individual's right to choose. The indigent has the right to choose just as you or I do, but the question is will his choice be accepted by the lawyer who is going to provide him his representation.

QUESTION: You have not mentioned the First Amendment. How about the freedom of association?

MR. RUBENSTONE: Well, I would be willing to take any help I can get, and if freedom of association fits into this, Your Honor -- I do not really see the application in as clear a sense as I do the Sixth

Amendment.

I believe that courts have the right to impose certain limited limitations upon the right to counsel of choice, and if I, for example, decide to contract for representation with a lawyer from another state or a lawyer who is disbarred I do not believe that I have the right to insist upon that he be permitted to represent me. But within certain specified general limitations I do believe that I have a Sixth Amendment right to select the lawyer of my choice to present my defense.

QUESTION: Well, Mr. Rubenstone, getting back to the interlocutory appeal queston have we not normally treated violations of a Sixth Amendment right or even a due process right as being in criminal cases not reviewable by way of interlocutory appeal?

MR. RUBENSTONE: Yes, but I do not believe that any of those decisions, for example, the denial of the jury trial or the denial of proper notice has the same kind of irreversible impact that denial of counsel has. Denial of counsel impacts upon the entire process.

The denial of a jury trial does not do that. It only results in a finding, for example, and if the denial was improper the remedy is simple, a new trial. But I think that there is a world of difference between

the two both as to their nature and as to their effect.

Moving past the facts except to emphasize that the defendants all expressed both before and after the indictment that it was their intention to present a common defense through one lawyer, and the attorney likewise made a decision in this case. He decided, our firm decided that it was proper for us to represent those defendants.

QUESTION: Would this foreclose a later claim that he should not have been permitted to do what you suggest by him if he wound up with a conviction?

MR. RUBENSTONE: Would it foreclose a collateral attack on the conviction? I believe that the waiver proceeding itself forecloses a subsequent attack on the conviction to the extent that any matters were brought to the attention of the defendants during that proceeding.

QUESTION: Even if he came in and said that his counsel did not make a complete disclosure and he did not understand what he was doing and the trial judge should have conducted a hearing to determine whether that was a sound decision?

MR. RUBENSTONE: My answer, Your Honor, was with regard to the fact that there was a hearing. I believe that the hearing serves that effect, that the

hearng itself in front of the court on the record effectively bars the defendant from raising at a subseguent time ineffective assistance of counsel based on a conflict of interest.

QUESTION: Without the hearng would your position be the same?

MR. RUBENSTONE: No. No, it would not.

QUESTION: You mean the judge must conduct a hearing before he can in effect intervene between the defendant or defendants and his or their choice of counsel?

MR. RUBENSTONE: In the federal system as I read Rule 44 the judge must conduct a hearing in any case of multiple representation. I do not believe it is disrectionary any longer.

QUESTION: May I ask, Mr. Rubenstone -- I take it you are ready to go to the merits now?

MR. RUBENSTONE: Yes.

QUESTION: Supposing if while the trial is in progress some evidence comes out that persuades you that one of your clients was lying to you -- Sometimes we are all disillusioned by our clients. It happened to me I know -- and you come to the conviction that one of them has much greater possible culpability than the remainder and at the same time the government offers some kind of

a deal with respect to one not involved in the culpability.

How do you handle that situation if it should arise? You do not expect it, but should it.

MR. RUBENSTONE: I believe, Your Honor, that if an actual conflict of interest arises at any point in the proceeding I have an absolute obligation to withdraw from representing that client. I believe that if the government comes and makes an offer which the client accepts that I can likewise no longer --

QUESTION: Let's leave out the first half of my suggestion. Supposing the government merely offers a separate arrangement with one of your clients on condition that the others -- just that one. Has a conflict developed?

MR. RUBENSTONE: I believe that I misspoke myself just a moment ago, and I did not mean to go as far as I did. Once I am advised -- Again, during the trial, before the trial. It does not make any difference in my analysis -- once I am approached by the government and advised that they wish to speak to one of my clients I believe I have an obligation to adivse the client of that fact, and I believe I have a duty to withdraw from any discussions relating to that client and that client's discussions with the government. If

the discussions are successful then --

QUESTION: On whom would the client rely for advice?

MR. RUBENSTONE: I would have to advise the client to get separate counsel to represent him, and I would make myself available to him to relate to him any nonprivileged information I might have. But as to the discussions themselves I do believe that my involvement would put me in a conflict situation.

Now if the discussions fail, if there was no agreement reached between the government and the defendant I would be available for the defendant to come back in if he wishes to rejoin the common defense.

QUESTION: How about the first half of my question? Supposing you just get information that develops during the trial that persuades you that one client has much greater exposure than the others?

MR. RUBENSTONE: Well, Your Honor, I do not mean to quibble, but I am not sure what you mean by greater exposure.

QUESTION: Well, there is a pretty good chance he will be found guilty and there is a pretty good chance the others would be not guilty and you can assure it by taking a plea of some kind or getting the charges dismissed against one if he would fill out the facts

with respect to --

MR. RUBENSTONE: I believe I would be under an obligation to advise him of my analysis and to advise him that he has to get separate counsel to have those discussions with the government. I do not believe I could represent him in that context.

QUESTION: So it is entirely possible that in this case the facts may develop later on in which you might have to withdraw?

MR. RUBENSTONE: There is no question. I would never suggest for a moment that the potential for problems -- I do not even want to use the word "conflicts" because I think they used the word incorrectly below -- the potential for problems are always present, but the potential, the speculation --

QUESTION: But your answer -- The solution is to meet them when they arise?

MR. RUBENSTONE: Absolutely.

If the lower court's decisions in this case are upheld based as they are upon what the lower court called potential conflicts -- and I will use that word for the purpose of this moment -- if that decision is permitted to stand then on the facts of this case there can never be multiple representation because as this Court has recognized in every case of multiple

representation inherent in it is a potential for a conflict.

All that the lower court did was to identify the potential, to ignore the waiver, to ignore the defendants' professions of innocence, to ignore the defendants' determination to present a common defense and to focus on the potential for the conflict.

QUESTION: Mr. Rubenstone, why is it do you suppose that the government would take such an active role in trying to seek disqualification? Is it a factor in part of a feeling that the defendants are less likely to break up and negotiate separate pleas if they are represented by one attorney?

Why is the government pressing?

MR. RUBENSTONE: It is clear to me from my experience that where defendants are jointly represented there is a lesser likelihood that any of them will break away and plead.

QUESTION: And turn state's evidence?

MR. RUBENSTONE: Absolutely. But I think that there is even a more significant aspect to the government's position. If you are a prosecutor the best thing to happen -- If you are a plaintiff in a civil case the situation that you want to create is finger pointing.

If you can create fingerpointing, if you can create inconsistencies, if you can create disparities then you can sit back. Your job is more than halfway done.

That is what the common defense prevents. The defendants' decision to present a common defense especially through one lawyer where there is not even going to be inadvertent consistencies that decision severely impacts the probability of the government ultimately succeeding in getting a conviction.

I am not suggesting they will not, but I am suggesting that it makes their job harder. So I do think the government has an interest which may not be completely objective in their approach in this case.

QUESTION: Let me ask you --

QUESTION: Mr. Rubenstone, you say that the court below went off on what you call potential problems and what they may have called potential conflicts. Supposing that the facts here had been far more dramatic than are revealed by this record where the government had indicted two people and one was clearly liable as perhaps an aider and abetter and another as a principle but the government's witnesses could not identify which was which so there was just almost a built-in conflict from the beginning as to who was going to get the bigger

rap.

Would you say that the district court had no authority to disqualify joint representation in that situation where you would have no problems but just almost a demonstrated conflict?

MR. RUBENSTONE: I have no problem in seeing a district court enter a disqualification order where there is a demonstrated conflict.

QUESTION: So what we are talking about here is really what this record showed as respecting whether there was a demonstrated conflict or whether the standard is potential conflict?

MR. RUBENSTONE: Right. Let me just -- To be very clear a lot of the actual conflict cases involving diqualification of counsel have arisen involving third parties and a defendant. There I do not believe that it is essential that the district court disqualify.

In those instances I think Rule 44 tells the district court to take appropriate measures, and a lot of the circuits have gone around and done that. For example, where there is problems of the attorney-client privilege of a prior client, the Second Circuit, the Eight Circuit has said "Well, let's take a look at this. Let's see what this involves. Let's see if it really does impair the ability of the defendant's lawyer

to cross examine or maybe let's see if the prior client will waive." They have gone to extremes to avoid the extreme action that was taken by the court in this case.

That is not directly analogous here obviously because it involves third parties, but I think it does indicate that appropriate measures under Rule 44 is not some kind of reflexive disqualification if you have a problem.

CHIEF JUSTICE BURGER: Your time has expired now, counsel.

MR. RUBENSTONE: Thank you, Your Honor.

CHIEF JUSTICE BURGER: Mr. Frey.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I would like first by way of background to ask that the Court in thinking about disqualification issues keep in mind that joint representation of codefendants is not the only context in which this issue can arise. There are other cases in which a defense lawyer can be disqualified including a successive representation situation where the lawyer formally represented a person who is now a prosecution witness, situations where the

lawyer formally was a prosecutor who had some arguable connection with the investigation that led to the indictment of his now client, situations where the third party is paying the fees and exercising some degree of control over the representation of the defendant, and even we've seen cases where there is the lawyer's potential involvement in the underlying offense or his potential role as a witness which may call for his disqualification.

Now I would like to say just a few words now about the jurisdictional issue and come back to it later if I have time. I think the first thing I would like to say is that if I was told that we could win only one of the two issues in this case we would rather win the jurisdictional issue and lose the merits issue.

Now the reason for this position is the potentially devastating effects of delay in criminal prosecutions as this Court has repeatedly recognized in Cobbledick, DiBella, Hollywood Motor Cars and other cases in which it has turned down interlocutory defense appeals. This case illustrates the potential damage.

The alleged victims in this case are street people who are hard to locate -- We hope we will still be able to locate them -- who are hard to -- whose will to testify against the police when they have to go back

on the street again is sometimes hard to nerve them up. There are problems that are caused by the delay in this and in other cases, and those problems are an important part of the reason why in criminal cases it is only on the strongest most compelling kind of showing that the court should permit a pretrial appeal.

There is also I might add --

QUESTION: Mr. Frey, may I ask you this? If we were to agree with your friend and agree with his proposition would it mean that in a Faretta case after the judge had conducted a hearing on the qualifications of the defendant to act as his own counsel and then decided that he was not qualified and appointed standby, would that be appealable?

MR. FREY: Well, Justice O'Connor asked that of my colleague, and I think the answer is clearly that would not be appealable. The reason that would not be appealable is I think it is quite clear that there would have to be an automatic reversal for a Faretta violation.

That is the kind of violation that does not call for an analysis of specific prejudice in the trial of the case. Therefore, it would be treated as effectively reviewable on appeal and, therefore, it would not meet one of the requirements of interlocutory appeal. So I would say that that, or we have situations

where a defendant seeks appointment of counel claiming that he is indigent and is denied by the district court. He may be forced to proceed the trial without an attorney if he is unwilling to pay himself.

I assume that that would be reviewed after final judgment. If that determination were erroneous the defendant would be entitled to a reversal of his conviction and a new trial.

QUESTION: Do you think if there had been a trial here and the trial judge denied -- if he did just the reverse and held the trial and there was a conviction and appeal and one of the issues was he should have been entitled to joint representation and the Court of Appeals decided exactly -- The Court cf Appeals said there should have been --

MR. FREY: Should not have been disqualification.

QUESTION: Yes. Should not have been, exactly.

MR. FREY: Well, I --

QUESTION: Would there have been automatically a new trial?

MR. FREY: Our argument in this Court is that there would not automatically be a new trial. This is not the same as saying as my colleague suggests that the

appellant would have to show ineffective assistance of counsel as though the disqualification --

QUESTION: Well, does that not mean then that the issue really is not effectively appealable after --

MR. FREY: That is true of any pretrial ruling that turns out not to have been prejudicial. It may not get review. That alone cannot be enough to justify an interlocutory appeal.

QUESTION: Well, it may not be effectively reivewable on appeal, Mr. Frey. I mean that is the point that Judge Friendly made in his opinion that this particular kind of order simply is not effectively reviewalbe.

I notice the Second Circuit has adopted a split rule that orders denying disqualification of counsel are not immediately appealable but orders granting them are. What do you think about that?

MR. FREY: I would I think favor the opposite, the result.

(Laughter)

MR. FREY: I think the answer to this problem is not to allow interlocutory appeal. You may conclude and this is all tied into an assessment of how important this right is which is one of the relevant factors and that is why I want to get to the merits shortly.

QUESTION: Is the appealability not a factor in part of how you decide the merits? If it is a per se rule then maybe it should not be immediately reviewable on appeal. If it is some other rule on the merits then maybe --

MR. FREY: That would be true although if it were a per se bar against disqualification, for instance, there would be no need for an interlocutory appeal. It would hardly ever come up.

I think the point I was going to make is that the conclusion if you find that the effect of the error is not reviewable because you cannot assess it on appeal is that you give a reversal and a new trial. That is what is done in a case like Guiterrez, for instance, with the overnight continuance during which the defendant was barred from consulting with his counsel.

Once you find that there has been a substantial impairment, erroneous impairment of a right and it is not possible to assess its impact on a trial then you may order a reversal. Now we say that we think that that is not necessary, but I must say that I would prefer the conclusion that there be an automatic reversal if the disqualification order is erroneous to the conclusion that the defendant should be permitted to take a pretrial appeal.

I wanted to mention in that connection that I do not suggest that that is all true in this case, but this business is subject to manipulation by defendants who want to buy continuances and who can retain attorneys who have conflicts of interest. They will get disqualified and then the defendant will have six months or a year extra before he goes to trial.

QUESTION: What is the government's motive since we are talking about motives here apparently? What is the government's motive in trying to disqualify in a case such as this?

MR. FREY: That is an obvious question in this situation. Our first motive in this situation, and I come back to the fact that there are different kinds of cases.

The joint representation case looks on the surface at least as though the concern is with the defendant's interests, and it may look somewhat paternalistic, but we may want to disqualify defense counsel because is going to use privileged information to cross examine a prosecution witness, because he is breaching his own duty to us as a former government attorney. But even in the case of joint representation our first and most obvious interest, the government qua prosecutor qua adversary in the case, is that we must

have a waiver and as good a waiver as we can get in order to insulate any conviction that we have from collateral attack.

Secondly, in this case what happened essentially was we brought the matter before the District Court by the motion. The hearing was held, and the District Court took the ball and ran.

I am here today I think not just representing the government as adversary to these defendants in the prosecution but also representing the interests of the court which saw that in its view the public interest was not satisfied by allowing lawyers to appear before and in this joint representation situation where it found there was unethical conduct or significant potential for unethical conduct.

QUESTION: Well, it does make it easier in a case of codefendants to get a plea agreement out of one of them, does it not, if they are not represented by just one lawyer?

MR. FREY: It may indeed be easier in some circumstances. On the other hand, it is harder to try a case against four lawyers than against one in terms of the length of time it takes.

QUESTION: But it is a lot easier if you have one of them who has confessed and testifying against the

other.

MR. FREY: Yes, but it is rather odd. It is rather odd to say that it should be all right for the defendants to all be represented by one lawyer in order to keep the government assuming the government is acting in good faith in these circumstances from offering a favorable arrangement for one of the defendants. That is part of the problem that is build into the joint representation is that it is impossible for the lawyer to plea bargain.

I might say that plea bargaining is not always initiated only by the government. It can be initiated by the defendant, and if you can imagine how somebody representing four defendants in a situation like this could initiate plea bargaining for one of them your imagine surpasses mine.

QUESTION: But, of course, if there has been a valid waiver what public interest is served by the failure to initiate a plea bargain on behalf of one defendant when his counsel does not recommend it?

MR. FREY: Well, the question is whether there is an interest that the courts may serve in not having unethical practice occuring in their courtroom, and the question is also whether the court has the power to protect the defendant who is not necessarily getting

advice that is looking only to his interests. He is certainly not getting advice from somebody who is solely committed to his interests.

QUESTION: Yes, but I think to defend the order that was entered by the District Court here you would have to say that the District Court at any time it wants to is going to be able to disqualify an effort at joint representation because it makes plea bargaining less likely. I think that --

MR. FREY: That was certainly not the basis of the disqualification order in this case and nobody has suggested that that is -- That is simply pointed to by the authorities who have written on this subject as one of the problems that is associated with joint representation, but this case is not -- The problem that the District Court saw had nothing to do with plea bargaining. The problem had to do with the fact that these defendants had potentially inconsistent defenses.

QUESTION: Mr. Frey, on the other hand the district judge here disqualified these lawyers from representing any of the four. Do you have any comment about that? They were not allowed even to represent Mr. Flanagan.

MR. FREY: Well, assuming Flanagan was -- I

mean the surmise in your question was that Flanagan was the person whose interests they were principally protecting in this situation because he was the one who was in the most exposed position.

QUESTION: Well, he was the one from whom the others --

MR. FREY: Sought to divorce themselves although there are also problems, for instance, with Landis because some of these charges involve dog attacks on the alleged victims and Landis was the officer who controlled the dog. He was the one who had the involvement so that he also stood out from the other defendants.

My view on thinking about the question of the total disqualification is that it would not -- It is valid until such point as each defendant has an opportunity to consult with a lawyer committed to him, with his own lawyer.

At that point they may choose to waive their attorney-client privilege having to validly waive it, and at that point I think Sprague and Rubenstone could stay in the case for one of the defendants. In any event I do not view that as the principle problem in this case, and we never sought disqualification for all until the District Court suggested it and asked that

that matter be briefed. We wanted to prohibit multiple representation, that is, representation of all defendants by one lawyer.

Let me come back to this question. I would like to start by what the model rules of professional conduct just adopted by the ABA the comment on multiple representation. It says "The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant", and the Code of Professional Responsibility which is what is applicable here says "The lawyer should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests."

QUESTION: Mr. Frey, let me interrupt you right there if I may. Do you think that interest which surely is a strong interest would be strong enough so the District Court could adopt a local rule, say the Northern District of Illinois, something like that, that in all cases of multiple defendants we will insist on separate representation for every client. We just will not bother with these hearings because it is so hard to get the right answer.

MR. FREY: That would raise a question in my

mind only about the rule making power of the District Court.

QUESTION: Assume it is within the rule making power of the court. Would it be a valid rule?

MR. FREY: Let me make this point. I have no doubt that if Pennsylvania, for instance, after what happened in Cuyler v. Sullivan said "We don't want these problems any more. We are going to pass a law that says each defendant has to be represented by a separate lawyer", I cannot conceive that such a law would be unconstitutional although that is I think what the Petitioners' argument is forced to assert.

In this case we do have a law. We do not need a rule for the District Court. I mean we have Rule 44(c).

QUESTION: Well, it does not go quite as far as the rule I proposed. It sets up a procedure but it does not say you must always answer the question -

MR. FREY: If my hypothetical statute is constitutional then it seems to me difficult to say that a statute which has the force that goes so far as to say the judge shall make an inquiry but he can allow the multiple representation if it is demonstrated that there is no likelihood that a conflict will arise.

QUESTION: Is it not true that there are some

cases where you have four defendants and there is no conflict at all?

MR. FREY: Well, the difficulty is that at the point of time at which --

QUESTION: You then have to appoint four lawyers.

MR. FREY: For instance, that is the principle under the Criminal Justice Act. The problem is the difficulty of prediction in this area, Justice Marshall.

The District Court is acting prospectively at a time --

QUESTION: I at one time represented nine defendants, and I did not have any trouble.

MR. FREY: There are cases in which it may happen. It may happen that as the matter plays out no conflict ever emerges. In fact the Court of Appeals said in this case that it was not saying that the disqualification could be based on mere speculation, but that in this case there was either an actual or a sufficiently potential conflict as to support for the disqualification order.

Obviously there are a lot of rules that restrict or practices that restrict the criminal defendant's right to choose his lawyer. He cannot

select a layman or a disbarred lawyer to represent him. He cannot select a lawyer who is not willing to represent him, for instance, one who believes that this representation will be unethical.

He cannot select a lawyer who is not -- He has no right to have a lawyer who is not admitted to the bar of the court. He has not right to have a continuance in order to be represented by a particular lawyer if the court otherwise justifiably determines that the trial must go forward.

Most importantly for this case he has no right of indigent to choose his own lawyer except in this very remote sense that he might persuade somebody to do it for nothing. I think that was fairly clear from Morris v. Slappy.

In my mind it is very difficult -- This would be the only Sixth Amendment right I have ever heard of that is available not to indigents but only to nonindigents. We have said in our brief, and I am convinced that the nature of the right is more of a Fifth Amendment due process kind of a right to be able to choose your lawyer which is subject to reasonable regulation.

It cannot be arbitrarily interfered with. I think there can be little doubt that here there is not

an arbitrary or unreasonable interference.

QUESTION: Are you going to get back to the appealability matter or not?

MR. FREY: Well --

QUESTION: You hope so.

(Laughter)

MR. FREY: I hope so, but if you prefer I am happy to --

QUESTION: You can do it on your own time. I wanted to ask you a question.

MR. FREY: My own time may not get me to it so let me get back to it now since you are interested in it.

QUESTION: Well, what if we agreed with you on nonappealability? We should vacate?

MR. FREY: Vacate and remand.

QUESTION: So there would be no decision on the merits in the Court of Appeals?

MR. FREY: There would be no decision on the merits in this case. That is correct. There is a decision on the merits by the District Court. There would be no review of the decision on the merits.

QUESTION: Until later.

MR. FREY: Until later, yes.

QUESTION: Because of conviction.

MR. FREY: If there is a conviction, that is right.

QUESTION: Mr. Frey, Rule 44 refers to conflict of interest without really defining it in any greater length. Would it be the government's position that even if the kind of specific potential for conflict found by the District Court and summarized by the Court of Appeals here did not exist there was a potential for conflict under the provisions of Rule 44 every time you have joint representation because of the difficulty of individual plea bargaining?

MR. FREY: No, I am not sure that that factor alone -- There is much more than plea bargaining. I hate to have you fix your mind on that one aspect.

QUESTION: Because of your discussion of it. It had not occurred to me until you mentioned it.

MR. FREY: I was asked about that by Justice O'Connor which is why I discussed it.

(Laughter)

QUESTION: Don't blame it on Mr. Frey.

(Laughter)

MR. FREY: My opinion is that the rule gives the District Court broad discretion in a situation of joint representation and that it would be the extraordinary case in which an appelate court could find

that disqualifying a lawyer in that circumstance would be an abuse of that discretion. In fact the rule says that unless it appears that there is good cause to believe that no conflict of interest is likely to arise the court shall take such measures as may be appropriate.

From the advisory committee notes it is absolutely clear that they contemplated that the appropriate measures included disqualification, and it is hard indeed in this situation to think of much else that would be an alternative to deal with the problem. So I do think there is broad discretion.

QUESTION: But that virtually rules out joint representation.

MR. FREY: No, the District Court can permit joint representation.

QUESTION: But if the District Court said no you say the Court of Appeals should never reverse for an abuse of discretion.

MR. FREY: Rarely.

QUESTION: So any district court that wanted to just disqualify across the board would never reverse.

MR. FREY: After all the ethical propriety of joint representation is tenuous in the best of

circumstances it seems to me. We are concerned about the adequacy of the waivers that we get in terms of our interest as prosecutor, our selfish interest rather than our broader interest in the administration of the system.

We have a waiver here in this case, but the problems with waivers -- We know that if there is a conviction there will be an attack on that waiver in an effort to set the conviction aside on the basis of the joint representation because it happens repeatedly, and there are a lot of problems with waivers.

Obviously it is very difficult for a lay defendant to appreciate the problems that are involved in multiple representation. The advice as to whether or not he should go with one lawyer or multiple lawyers is given by a conflict-ridden attorney who may himself have a pecuniary interest in continuing the joint representation.

It may be extremely difficult for the defendant to say in open court I want my own lawyer. There are tremendous pressures operating on him, and this is not necessarily typical of the cases that we are concerned about. We have narcotics cases frequently where there are major and minor offenders being represented by the same lawyer or where the lawyer is

being paid by someone in the background.

QUESTION: What about four defendants above the idigency line but not too much above it? I suspect there are lots of times they can affect some savings if they retain a firm for joint representation. That dces not strike me as an ethically unworthy goal.

MR. FREY: Well, I do not think it is -- From the standpoint of the clients they may have an interest in saving money, but I do not think when weighed against all of the other interests that are at stake that the court can assert that they have this constitutional right to conflict-ridden counsel which is the claim in this case.

They should at least be advised at the outset by their own lawyers. Now one thing I want to make absolutely clear is that there is no obstacle to mounting a common defense, and there is no obstacle after consultation each with their own lawyer to giving the lead role to one of the lawyers and accomplishing many of the same efficiencies to which you refer.

QUESTION: Well, there is no obstacle except human nature. Three lawyers do not always think alike.

MR. FREY: Well, human nature is, but part of the problem we are dealing with here is human nature in terms of what the position of these defendants is. I do

not mean these as individuals, but you have to consider the class of defendants who are subject to multiple representation.

It is by no means uncommon for us to have a defendant come in to us and say I would like to talk to you about cutting a deal but don't tell my lawyer. This is no a joke because telling his lawyer could have very serious consequences in some instances.

QUESTION: What sort of serious consequences?

MR. FREY: Well, it can have fatal consequences because the lawyer is often nominally his lawyer but actually -- As I say this is not this case at all but it is a class of circumstances that we have to be concerned about with he waiver.

QUESTION: Nc one is saying there should never be disqualification in joint representation, but it seems to me the government's position it is fair to say there can never be joint representation if the district court says otherwise.

MR. FREY: It may come close to saying that if the district court -- That is I think the decision that underlies Rule 44(c) which is designed not if a conflict actually exists but if there is any possibility or likelihood that a conflict will arise.

Now if you had -- There are cases in which it

can be imagined where the likelihood of conflict is a great deal less than in this case and where joint representation might be permitted, and I think the district court could take into account in dealing with people just above the indigency line, the kinds of economies that you are concerned about in deciding when it is dealing with a potential conflict in assessing how serious it is. It has the discretion to do this.

I am not sure what the answer is except that the principles of the bar are very much against this kind of representation of trying to serve people who may have conflicting interests at the same time.

QUESTION: Mr. Frey, what can the district judge to in this case? Of course, he has disqualified him. Assuming he let the lawyer represent one of the four on the theory that you do not have to all get out and the other three say "Well, I'll exercise my Faretta rights" and just assume that generally that the lawyer for the one defendant will keep things in hand. Is there any way that the judge can prevent that so that there would end up with being just one lawyer on the defense side of the table?

MR. FREY: No, I suppose if the judge -- I mean, my first reaction to that question is that the judge probably could not prevent that although he would

then have to make special efforts to try to get them to explain or make sure that they understand that at least they can consult with a lawyer after which they may choose to go forward with their joint defense, but it would be quite strange for them to be even unwilling to talk to another lawyer.

Now there is the problem in these cases of the figure behind the arras, the third party paying the fees, and that is a factor in this case. The fee is being paid by a third party. There is no assurance that if one of these defendants wished to cooperate with the government that their fees would any longer be paid.

That was not the ground of the disqualification in this case, but it is a source of concern in many of these conflict cases. Also we have another interest because my colleague said that if in the course of a trial a conflict emerged, a actual conflict, he would naturally have to disqualify himself.

Well, we have an interest in not having that happen in the middle of a trial, and the District Court has an interest in not having that happen in the middle of a trial.

QUESTION: It might lead to some very severe problems of severance would it not?

MR. FREY: It might lead to severe problems of severance. It might lead to having to retry a case that may have gone on four or five weeks.

QUESTION: Or a mistrial of the entire case.

MR. FREY: Yes. That is probably what it would lead to if you had one lawyer in this situation. There is no way to prevent as you mentioned earlier the claim later on that the waiver of conflict free counsel was either coerced or not intelligent or the product of ineffective assistance on the part of the lawyer with the conflict of interest.

It is impossible to predict what will occur during the trial, and it is very difficult for the judge who knows the detail of neither the prosecution's case nor the defense case to be the agency for making sure that the defendants really appreciate the risks. Even defense counsel cannot necessarily appreciate the risks because they do not know what the government's evidence is.

This concern about -- I mean it is said here that this is nothing but a potential conflict. There is no actual conflict. There is not going to be any conflict.

Yet here we have a situation where Flanagan was out on the street. According to the severance

motion the other three defendants were in places of hiding from which they could not see what was happening.

They responded only to Flanagan's signal and, therefore, they could not be accused of having illegally arrested the victims in this case. Yet I understand that in other court proceedings these same people have testified that they were in a position to see Flanagan being mugged by the victims.

Now from Flanagan's standpoint that is much better evidence if that could be and would be their testimony. From the standpoint of the other three defendants it is obviously much better that they were off around the corner and could not see.

Now I do not know how one lawyer develops a strategy that deals with this. In the charges of assaults in these cases the witnesses may be able to clearly identify some, poorly identify others and not at all identify yet others. How does one lawyer represent all these defendants fairly?

Now the question is -- I think part of the argument is well maybe he cannot but the defendants have the right to waiver their right to fair and effective representation, conflict-free representation. Now this question came up before. Where does this right to have

a lawyer come from? Where did the Faretta right come from?

The Faretta right came from the Sixth Amendment, but it did not the Court said come from the assistance of counsel clause of the Sixth Amendment. This situation is really like Singer.

You have a right to conflict-free counsel. It does not mean that you have the right to insist on counsel burdened with a conflict of interest.

I do not think in short that the right that we are talking about is a right of such a magnitude that it overrides the normal principles that govern the practice of law. The small restriction on the eligibility -- This is essentially an eligibility requirement that Rule 44(c) has allowed the District Court to impose upon lawyers practicing in the district that they not undertake representation where there is a conflict of interest or a potential conflict of interest.

I do not see how that small additional restriction can raise a serious constitutional problem.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:00 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

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