ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-660

TITLE UNITED STATES, Petitioner v. HARRISON P. CRONIC

PLACE Washington, D. C.

DATE January 10, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 82-660

HARRISON P. CRONIC :

- -x

Washington, D.C.

Tuesday, January 10, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:11 a.m.

APPEARANCES:

EDWIN S. KNEEDLER, ESQ., San Francisco, Cal.;
on behalf of the Petitioner.

STEVEN B. DUKE, ESQ., New Haven, Conn.;
on behalf of Respondent.

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'll hear arguments first this morning in United States against Cronic. Mr. Kneedler, you may proceed whenever you're ready.

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

ON BEHALF OF PETITIONER

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

This case and the companion case of Strickland versus Washington concern the circumstances under which an otherwise valid judgment of conviction may be set aside on the basis of asserted defects in district court by defense counsel.

This issue is one of substantial importance to the administration of justice in the federal and state courts. This is so because of the frequency with which such claims are raised and because of the often extended proceedings that some courts have ordered to dispose of those claims.

All too often, in our view, the courts engaged in a somewhat detached inquiry into the litigating judgments and performance of counsel in the abstract, rather than focusing on what we submit should be the central concern, that is, whether any errors by counsel in turn prejudiced the accused by causing a fundamental

defect in the proceedings.

In order to obtain relief on a claim of ineffective assistance of counsel, it is our position that the accused must show errors that fall below the minimum level of competence of counsel; and second, that any such errors in turn had a probable effect on the outcome of the case or otherwise undermine the fundamental fairness of the proceedings.

In this case, the Court of Appeals did not make any such findings in reversing the Respondent's conviction on the ground of ineffective assistance of counsel. In fact, it did not --

QUESTION: Mr. Kneedler, I'm troubled in this case by the fact that there are two different types of ineffective assistance of counsel claims: one where the state itself impairs the effective assistance of counsel, either by not appointing counsel at all or by taking some action that would impair the right; a second time is, assuming there's no interference by the court or the state as such with counsel, counsel simply fails to meet whatever standard it is that the court might adopt.

Now, which type of claim was litigated here?

MR. KNEEDLER: Well, the principal basis of the claim and the one that the Court of Appeals decided

was of the first type that you mentioned. The Court of Appeals held that, in effect, that it must be conclusively presumed that Respondent's attorney Colston did not have -- it was impossible for him to prepare for trial within the 25 days allowed.

QUESTION: So that it was an impairment by the state itself, in effect, of --

MR. KNEEDLER: That's correct.

QUESTION: -- the right to counsel. Now, is that the presentation that was made by the Defendant in this case, the Respondent? Or did the Respondent argue some other kind?

MR. KNEEDLER: That was the principal claim. There were passing allegations of inadequacies in the actual performance of counsel as well. There were some general assertions that counsel never objected to any evidence, without identifying particular objections.

QUESTION: In your view, did the Court of Appeals resolve only the first type of claim?

MR. KNEEDLER: The Court of Appeals plainly resolved only the first, because the Court noted the Government's objection that in fact Respondent had not identified any specific failings by counsel.

QUESTION: Is the other issue here?

MR. KNEEDLER: I believe it's not here in its

entirety, largely because most of the specific failings of trial counsel that Respondent points to were never identified in the Court of Appeals, even though there was a claim that counsel in fact had performed inadequately. The specificity with which Respondent now claims was just not reflected in the record.

QUESTION: Well, if we dealt only with the part type, do we have to remand as to the second type?

MR. KNEEDLER: No, as to the second type it's our position that the appropriate procedure would be for Respondent to raise any claims about specific defects in counsel's performance in a motion under 2255, because this was --

QUESTION: That's on the assumption that we reversed.

MR. KNEEDLER: Yes. That was, I think, the premise of the question.

QUESTION: That was the assumption, yes.

MR. KNEEDLER: That allegations of specific defects be raised under 2255, largely because they are often thought, and usually do, arise from things outside the record, so it would often be necessary to make a record, and in any event to have the trial court in the first instance to make an assessment of the impact of any errors by counsel.

QUESTION: I don't see how he could do that, Mr. Kneedler, unless we're to adopt a flat rule that assistance of counsel claims can't be raised on direct appeal.

MR. KNEEDLER: Well, if the claim can be raised on direct appeal and resolved on the basis of the record created, then there would be an appropriate occasion to dispose of the case in that instance. But if it would require an extensive hearing, that's not the sort of thing that would ordinarily be part of a direct appeal.

QUESTION: But in this particular case, supposing that the Respondent argued in the Court of Appeals specific failings and the Court of Appeals just felt they didn't have to get to that because of the shortness of time which counsel had and his lack of experience. Then if we decided that was wrong, why wouldn't we send it back to the Court of Appeals, if we didn't decide the other issues ourselves, to let them consider things that had been properly raised before them in the first instance?

MR. KNEEDLER: Well, if there were specific errors that the Court of Appeals could dispose of by assessing the record, then that would be appropriate. Part of this ties into our submission on the merits,

though, as well, and that is that the essential part of a claim of ineffective assistance of counsel is not counsel's performance in the abstract, but how it affects the conduct of the trial and the rights of the accused.

And so what the court would be doing on direct appeal, what we submit it should be doing, is determining whether the errors by counsel amounted tc plain error of the type that would warrant relief on the basis cf those errors themselves, without regard to whether counsel had caused them or not.

So on direct appeal, if counsel is said to have committed a plain -- cr caused a plain error tc result --

QUESTION: I thought the major objection of Respondent was not the actions of the lawyer, but the non-actions.

MR. KNEEDLER: Well, in either event they --

QUESTION: I mean, ycu said that he had tc show that he did some wrong. He said he didn't do anything.

MR. KNEEDLER: Well, if the error is one cf omissicn the record may provide a basis for disposing of that and it may not. But in either event, whether it's an act of commission of omissicn, the result is a defect

in the proceedings, which we submit is where the focus should be.

QUESTION: But the burden is not on the lawyer, is it?

MR. KNEEDLER: The burden on the defense counsel?

QUESTION: Yes.

MR. KNEEDLER: Yes, we submit that the burden --

QUESTION: The burden is on him to show that he is inefficient?

MR. KNEEDLER: Oh, no. I'm sorry, I misunderstood. No, the burden is on the convicted Defendant to establish that his counsel committed errors of sufficient seriousness to warrant setting aside the conviction.

QUESTION: Well, he starts off with one that he always asserts, which is that he was convicted; ergo, counsel must have been ineffective.

MR. KNEEDLER: Well, we are concerned that --

QUESTION: You don't need that, do you?

MR. KNEEDLER: No. We are concerned that there is often a tendency for a person who is convicted to blame the conviction on the lawyer, and we think that and a variety of other considerations support our

position that there should be a showing of a substantial defect in the proceedings in order to get relief on the basis of the lawyer's performance.

QUESTION: But there is one exception, the Powell case.

MR. KNEEDLER: The Powell case, that's correct.

QUESTION: That's an exception?

MR. KNEEDLER: That's correct, and this comes back to Justice O'Connor's position. Respondent in effect tries to put this case into the category of Powell. In Powell the Court did set aside a conviction on the ground that the Defendant did not have effective assistance of counsel, arising out of the circumstances of the appointment of counsel, without bothering to inquire into how counsel actually performed.

But the circumstances of Powell are quite different from those here. In Powell the lawyer effectively assumed responsibility for the case on the day of trial, and the Court pointed out that counsel was precluded from consulting with his clients absolutely and was precluded from conducting an investigation of the case.

QUESTION: There was one other one: They appointed the whole bar.

MR. KNEEDLER: That's right, initially.

QUESTION: They didn't make an appointment.

MR. KNEEDLER: And then when counsel finally did assume responsibility, it was too late and he had no opportunity.

And the Court reiterated this point in Avery versus Alabama, in which the Court said that the principle of Powell is whether the attorney had an opportunity to consult and prepare. And yet, in Avery the Court rejected a Powell-type claim, even though defense counsel had only three days to prepare a capital case.

QUESTION: But it was in a small town.

MR. KNEEDLER: It was.

QUESTION: And it was limited to a small town, the Avery case.

MR. KNEEDLER: The Court did take into account the need for conducting the trial promptly, but that is an interest that exists today. Congress' judgment under the Speedy Trial Act reflects the importance of bringing cases to trial promptly. Now, granted the time limits are much longer under the Speedy Trial Act. 30 days is the rule between arraignment or appearance through counsel and trial, to allow counsel to prepare.

But in this case, this case does not even

remotely resemble Powell versus Alabama. Attorney Colston was tentatively appointed in this case on June 12th and finally assumed responsibility for the case on June 19th, 1980. At that point the trial was scheduled to be held eleven days later. He requested a continuance to allow himself 30 days to prepare for the trial.

The court granted that request for continuance, but cut it, what the court said, a few days short, five days short, to 25 days, in order to fit the scheduling of the case into the court's docket.

QUESTION: Does that mean, Mr. Kneedler, we're down to the difference between 30 and the 25 days?

MR. KNEEDLER: As I understand Respondent's complaint, that's essentially what the case boils down to. Now, he also argues that perhaps even more than 30 days was required, but there's no indication in the record that that's so and neither Respondent himself nor Colston renewed a request for continuance. And at the close of the trial the trial judge commended Colston on the quality of his performance.

So there's just no basis for believing that the difference between 25 and 30 was of constitutional significance, let alone that more than 30 was required.

QUESTION: Does the record show how long Mr.

Colston had been admitted to the bar?

MR. KNEEDLER: The record does not show. Martindale Hubbell indicates, I think, that he had been admitted to the bar five years previously, if I'm not mistaken.

QUESTION: Did the Defendant argue that his experience as a real estate lawyer fell below any required standing? Is that an argument made?

MR. KNEEDLER: That he knew that he was not a competent real estate lawyer?

QUESTION: Well, no, that he was not a criminal lawyer.

MR. KNEEDLER: Because he was a real estate lawyer --

QUESTION: He was a real estate lawyer.

MR. KNEEDLER: Yes.

QUESTION: And that somehow fell below a constitutional standard?

MR. KNEEDLER: He did argue that, because his lawyer did not have prior experience in criminal cases, that that was a factor to be considered under what the Tenth Circuit in this case devised to be a five-part balancing test in which experience is one. But even in this Court, Respondent doesn't contend that he was entitled absolutely to a lawyer with more experience,

and we submit that that concession is well founded.

The Constitution speaks of the assistance of counsel, and there's no reason to believe that the framers of the Sixth Amendment had anything in mind in using the term "counsel" other than a person admitted to the bar and admitted to practice before the Court, as Colston was.

QUESTION: On the day when the case was called for trial, did he ask for more time, defense counsel ask for more time?

MR. KNEEDLER: No, he did not, and when the trial court made the inquiry as to whether counsel was prepared to proceed defense counsel pronounced themselves ready.

I would also point out that Colston was not alone in this case. There was another attorney, Mr. Rivas, who appeared with him, and according to an affidavit filed by the Government in the Court of Appeals Mr. Rivas had extensive prior experience in criminal cases. So that even assuming that an inexperienced counsel standing alone might be a substantial factor, here, to the extent you recognize that it might be good to get some assistance, he in fact got it here.

Now, one other factor Respondent does mention

in this Powell-type argument suggests or asserts broadly that mail fraud, which is what we had here, is an arcane and complex area of the law. But that generalization simply won't stand up. There are simply two elements to the offense: one is the existence of a scheme to defraud; and the other is the use of the mails to accomplish the scheme.

Here there is no dispute about the use of the mails in the scheme, and the scheme itself was a simple one. It involved check-kiting, which this Court described in simple terms just two terms ago in Williams versus United States. It involves the Defendant taking advantage of the float created when checks are sent back and forth from one bank to another. The mechanics of that sort of scheme would not be difficult for any attorney or anyone who maintains a checking account to figure out.

There were a number of transactions in this case, but they were part of one overall similar course of conduct, and the defense counsel had available to him the full records in the case and in fact a reconciliation of the accounts of the banks by his company's own CPA that disclosed that the bank in Oklahoma had lost a half a million dollars or that there was a net overdraft of a half million dollars.

Respondent does not dispute any of those facts regarding the sending of checks back and forth or the net overdraft that resulted, and he concedes in his brief that there was overwhelming evidence of his control of the company involved and that he directed the check-cashing activities.

QUESTION: Mr. Kneedler, what do you say about his argument that the best defense was the absence of criminal intent, and that the lawyer didn't raise that defense?

MR. KNEEDLER: Well, with all respect, Justice Stevens, I believe that defense would be quite far-fetched in these circumstances, largely because of -- or in part because of the overwhelming nature of the Government's case. But the business involved here -- there was testimony at trial that there was just $150,000 a year annual sales. Respondent's Co-Defendant testified to that. She was his secretary. And yet, there were $5 million deposited in the two accounts over a period of four months, the checks going back and forth without any, even to this day, explanation of what sort of legitimate banking practice would have been going on.

I think in these circumstances for Respondent to suggest that if there was a swindler it was the

Norman Bank is unfair. And in fact, although Respondent contends that the bank ultimately recovered the proceeds and that there was no fraud, that's also beside the point.

First of all, it's not necessary that a scheme to defraud be successful under the mail fraud statute. But in any event, the facts here just do not establish that the bank was repaid, much less that it was repaid voluntarily by Respondent in a way that could refute the existence of criminal intent.

QUESTION: Well, it would be repaid, would it not, if the two directors who signed the note made good on the note?

MR. KNEEDLER: Well, that's true, although unless they in turn recovered somebody was defrauded, unless the assets --

QUESTION: Well, we don't know.

MR. KNEEDLER: We don't know. All I'm saying is that it can't be said on the face of this record that there was in our view anything approaching an argument that this was a substantial avenue of defense in the case.

QUESTION: In your experience, do you know of many real estate lawyers that have experience in federal courts?

MR. KNEEDLER: Speaking from personal experience, I simply cculdn't say.

QUESTION: Well, doesn't real estate law invclve state law?

MR. KNEEDIER: That's correct, although a real estate lawyer could have litigation experience. It's not clear from this record whether Colston had pricr trial experience.

QUESTION: Did he kncw anything abcut the Jencks Act?

MR. KNEEDLER: The record simply doesn't show what Colston knew or what he didn't know. It may have been in this case unnecessary to require the statements -- cr to request the statements under the Jencks Act, because he already had them. We simply don't kncw. There's certainly no basis in this record for concluding that Colston made a Jencks Act error or any other. And I should reiterate: He had the assistance of another attcrney who in fact was experienced.

Another point that I would like to make in this regard is that an attorney who does not have extensive prior experience in a criminal case will cften compensate for that lack of experience by unusual or atypical zeal in preparing the case and doing perhaps more research and more preparation than another lawyer

might do. Perhaps he would have more time to do so.

But in any event, we submit that it would be illogical under the Sixth Amendment to set aside a conviction on the basis of ineffective assistance of counsel solely on the basis of counsel's experience when -- or if that attorney performed in exactly the same way an experienced lawyer would do. In those circumstances there could be no claim that the right to effective assistance of counsel had been abridged.

The last point I'd like to make on this, the first prong of Respondent's argument in this case under Powell, is that the Court of Appeals' approach in this case seems to us to be directly contrary to the Court's decision last term in Morris versus Slappy, in which the Court recognized that the scheduling of trials presents a considerable problem for district courts and that the court's scheduling of a trial will not be set aside except in the face of an arbitrary action.

And in these circumstances, where the court in fact granted the continuance rather than denying it, as in Morris versus Slappy, we think it follows clearly that there is no basis for setting aside the conviction. Basically what the Tenth Circuit has done in this case, then, is simply to second-guess the district court's ruling on a continuance under the guise

of adopting a five-part balancing test on the ineffective assistance of ccunsel, and we think that that's inconsistent with the approach in Morris.

I would also like to briefly address Respondent's second argument in this case, going tc allegations of specific defects in attorney Colston's performance at trial. As I mentioned before, most cf these specific claims were not raised in the Court of Appeals, including the claim of a lack of criminal intent, and we therefore don't think it would be necessary for this Court to review the record and go thrcugh all of the myriad claims that Respondent has raised for the first time to determine whether there has actually been a specific error. We have addressed several of those claims in our brief.

But we do think in this case that the nature of the claims Respondent is making is instructive and in fact vividly illustrates the problems that will be created if this Court does not adopt a test as to reviewing claims of ineffective assistance of counsel that requires a look to see whether there was a fundamental defect in the prcceedings that resulted from the attorney's actions, rather than looking at the attcrney's actions in their own right.

What Respondent has done is tc comb the record

to second-guess the counsel's performance as if the purpose were to grade the lawyer, rather than to see what happened to the client. And I think it's important to stress that there are a number of difficulties with this approach, a number of things that should give a court pause before it engages in this sort of post hoc review of counsel's litigating strategy.

First, it requires an unseemly probing in many cases of the lawyer's thought processes and communications with his client. In the long term, this could have a very disheartening effect for defense counsel, knowing that they would be routinly exposed in their litigating judgments to scrutiny after the trial, and this could have the effect of deferring people from accepting appointments in criminal cases.

Secondly, the nature of the inquiry is in some respects as perversion of the adversary process. A hearing such as that required to determine why the lawyer did what when has the effect of putting the lawyer in the awkward position of defending himself, while not wanting to undermine his client's claim for relief. And at the same time it puts the prosecutor in the position of defending his former adversary's actions, to say that they were reasonable and effective.

Third, it's often a highly subjective inquiry, because it requires predictions about the state of the law, what the attorney perceived in the case at the time.

Fourth, it undermines the independence of defense counsel, independence that this Court held just two terms ago in Polk County is constitutionally mandated; that once the lawyer is freed of the external restraints that Justice O'Connor referred to, that is effectively the assistance of counsel to which the Sixth Amendment refers.

But under a rule that did not require a substantial showing, the result could be to have courts and prosecutors oversee defense counsel's actions at trial in order to prevent the conviction from later being set aside.

And also, under our adversary system, the heart of it, the premise of it, is that the attorney, either retained or appointed, who assumes responsibility in a criminal case, is, as the Court said in Polk County, performing an essentially private function, and the integrity of the adversary process depends on the presumption that the attorney will perceive his duties and will conscientiously perform them according to his ethical responsibilities. So the Court should give

effect to that presumption.

And last, to have too quick an inquiry into counsel's actual performance would detract from the trial itself, because our adversary system attaches finality to a judgment of conviction and it presupposes that a trial of the Defendant himself will not automatically be followed by a trial of the attorney, as Justice Brennan observed in his dissenting opinion in Wainright versus Sykes.

Therefore, we believe a substantial showing should be made before these sorts of inquiries are made, and in our view the appropriate objective criterion for this is whether there is a substantial defect in the proceedings that resulted from counsel's action. This is an anchor, something rooted in the proceedings themselves, rather than in counsel's actions, to be guided by the Court -- to guide the Court.

It must be remembered that a party in litigation cannot ordinarily get a valid judgment set aside by saying his attorney made a mistake. The usual relief that a client has in those circumstances is against his attorney for malpractice, not to set aside a conviction and impose the burdens on his opponent. And we suggest -- and in that malpractice action, the client would have to show more than that the lawyer didn't

perform reasonably; he'd have to show that there was some prejudice as a result and in fact, under malpractice law, that the client would have prevailed.

We suggest that a similar showing of prejudice is appropriate where what the lawyer seeks is to -- or what the Defendant seeks is to have his conviction set aside. This follows also from the text of the Sixth Amendment and the decision in Gideon. The text of the Sixth Amendment refers to the assistance of counsel. If counsel is denied or effectively denied, as in Powell, then a conviction is set aside.

But where the claim is that the lawyer committed specific errors, it's our submission that those errors must be of comparable severity, comparable seriousness or gravity to an outright denial of counsel in order for relief to be granted. And because the purpose of the Sixth Amendment, as stated in Gideon and other cases, is to guarantee the fairness of the proceedings, the fundamental fairness of the proceedings, we suggest that the inquiry therefore is whether counsel's errors affected the fairness of the proceedings.

This is reflected in this Court's decision in McMann versus Richardson 13 years ago, which addresses this area, in which the focus of the Court's concern was

not simply on how the lawyer performed, but what effect it had on the client. Did it render his guilty plea an unintelligent act? If so, then few would dispute that the conviction resting on that sort of guilty plea would be unfair.

It also directly corresponds to this Court's decision in Agurs, where the Court said that the purpose of the inquiry is not to find fault or to award relief on the basis of fault of the prosecutor, the other attorney in the case, but to guarantee fairness to the accused. By the same token, we think where the defense counsel's conduct has fallen into question that same parallel applies.

I'd like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Very well.

Mr. Duke.

ORAL ARGUMENT OF STEVEN B. DUKE, ESQ.,

ON BEHALF OF RESPONDENT

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

In its main brief in this case, the Government argues that this was a case of unimpaired counsel and that the issue before the Court is the appropriate test for relief of an unimpaired counsel. Now Mr. Kneedler concedes the decision below was based on quite different

considerations, namely judicial impairments in counsel's ability to prepare and present the case, and that is the case, that is the decision below, and that is the case before this Court.

Of course, Powell against Alabama is distinguishable. But the basic principle of Powell against Alabama applies in this case. The Court in Powell said that the court's obligation to appoint counsel is not discharged by a formal appointment, but the appointment must be made at such time and under such circumstances as will enable the giving of effective aid in the preparation and the trial of the case.

That obligation was not discharged by the trial judge. Mr. Colston --

QUESTION: Do you mean by that that 25 days was not enough time to prepare for trial?

MR. DUKE: 25 days under the circumstances of this case was manifestly not enough.

QUESTION: But 30 were?

MR. DUKE: 30 were? No, I think clearly not.

QUESTION: He didn't ask for any more.

MR. DUKE: At the time Mr. Colston asked for a minimum of 30, he knew nothing, virtually nothing about the case. That was the day he was being appointed and entering his appearance, and at that time he said: Your

Honor, I need a minimum of 30 days. And in fact he was cut off by the judge. He was attempting to explain his need and the judge cut him off.

QUESTION: Well then, 25 days later, however, he -- we must presume he knew something more about the case, and he didn't ask for more time.

MR. DUKE: That's correct, Mr. Chief Justice, he did not ask for more time.

QUESTION: It must be your position that that's incompetent also.

MR. DUKE: Yes, I think -- well, either that or that he was not incompetent in concluding that the judge had made a final ruling and that he was not going to reconsider. It seems to me, particularly in the case of an inexperienced lawyer, Mr. Colston might well have concluded that the judgment, the final judgment on the question of a trial date, had been made. And indeed, I would think many lawyers would, or many judges, trial judges, would be surprised if on the day of trial counsel came in and said, Your Honor, I need a week more to prepare. I think most judges would be incensed if counsel came in on the day of trial and said --

QUESTION: Do you think that does not happen regularly in the courtrooms, trial courtrooms, Mr. Duke?

MR. DUKE: I think it is --

QUESTION: And that frequently continuances are granted under precisely those circumstances?

MR. DUKE: I don't think it's common where a firm date has been set and it is in a district or in a courthouse where dates mean something and a jury pool is gathered for that case. For example, in most federal courts I think it is most unusual for counsel to come in on the day set for trial and get a continuance. Certainly, I've never found that to be a successful motion.

Now, what in effect the trial judge did was impose upon the defense and on Mr. Colston particularly the obligation of in 25 days learning the Rules of Evidence, learning the Rules of Criminal Procedure, learning the principles of criminal law, learning how to try a case, understanding thousands of documents, fitting those documents into the framework of a defense, and interviewing or attempting to interview two dozen witnesses that were scattered throughout the southern states. And to do that --

QUESTION: Mr. Duke, I guess there was a second experienced criminal lawyer also appointed to assist, was there not?

MR. DUKE: Justice O'Connor, that is partially

correct. Mr. Rivas was appointed as an investigator, for which he received -- submitted an invoice for $300, for which he was paid. That was the nature of Mr. Rivas' obligation to the court.

QUESTION: But he was an experienced criminal lawyer who remained available?

MR. DUKE: I have no reason to dispute what is in his affidavit, that he had substantial criminal experience. There is nothing in his affidavit to suggest that he ever tried a federal case, civil or criminal. All of the experience that he mentions is state court experience.

QUESTION: Mr. Duke, is there anything in the record that shows how much federal experience Colston had? I mean, had he ever been in a federal courtroom before? Is it in the record?

MR. DUKE: The only thing in the record is the Respondent's statement on June 19th to the court saying: Your Honor, I've just been informed by Mr. Colston that this is his second experience in a federal case. And then Mr. Colston when he read his opening argument to the jury said, this is my first trial. If he was telling the truth, that means it was his first trial of any kind in any court.

So Mr. Colston had these burdens, which I

submit were impossible even if a fact which --

QUESTION: Well, Mr. Duke, every lawyer is going to have his first trial. Are you suggesting that that trial must necessarily be a civil trial, so that one never tries a criminal case having to admit that this is your first criminal case?

MR. DUKE: No, Justice Rehnquist. What I'm suggesting is that a lawyer who has never tried a case doesn't try a complicated mail fraud case involving thousands of documents, a 15-page indictment, 24 witnesses, and do all of that in 25 days. That's all I'm suggesting.

A lawyer -- certainly a lawyer has to try his first case, and I would think trying misdemeanors would be the appropriate place to start if the beginning is in the criminal process. But prosecutors don't turn -- don't hire a lawyer and put them in a complicated mail fraud prosecution.

QUESTION: You were in Arizona in the late fifties, weren't you?

MR. DUKE: Yes.

QUESTION: Do you remember the practice of the district courts there? The federal district judges appointed fairly newly admitted lawyers, and that's where a lot of people get their experience. Now, some

of them were said to have a whole cell block at Leavenworth named after them --

(Laughter.)

QUESTION: -- because perhaps they didn't render absolutely first-rate assistance. But do you think that system is just patently unacceptable under today's standards?

MR. DUKE: I think that we do not contend that it is unconstitutional to appoint inexperienced lawyers, even in felony cases. But if a judge -- I think that is undesirable. It's a bad practice.

If a judge is going to do that, it is possible to bring an inexperienced lawyer along, to supervise that lawyer, and in a relatively simple case obtain a reasonably competent presentation. One thing that may be important, that is important, is look at the lawyer's training. A lawyer doesn't have to take evidence, a lawyer doesn't have to take criminal law, a lawyer doesn't have to take criminal procedure in order to be a lawyer. He doesn't have to attend any training courses.

So in determining the appropriate lawyer to appoint on a case, the court should take into account precisely the factors that the court below said should be taken into account. And incidentally --

QUESTION: Do you know of any law schools, Mr. Duke, that do not teach criminal law?

MR. DUKE: No.

QUESTION: Of the 180 law schcols in the country?

MR. DUKE: I think mcst of them, probably all of them, are required to teach it. But no student is required by the American Bar Association tc take the course.

QUESTION: Are you saying that criminal law is not a required course in law schools today?

MR. DUKE: In some law schools it is not a required course, not in my law school. Evidence is not required in my law school.

QUESTION: Well, Mr. Duke, is it your position that the Defendant has a constitutional right to an attorney with more experience than Mr. Colston had?

MR. DUKE: Not a defendant. This Defendant, under the peculiar circumstances of this case, had a constitutional right to a more experienced attorney or more time to prepare and such supervisicn as was necessary to make a real lawyer out of a real estate lawyer.

I don't know exactly how that could have been done. I'm just saying that there is no -- we're not

asking for any absolute ruling. The court below said, we're not holding that inexperience is necessarily ineffective, even in a mail fraud case. But when you combine the inexperience, the complexity of the case, the seriousness of the case, and the total lack of supervision, you have something that is fundamentally unfair. You have a virtual guarantee of inadequate preparation and presentation.

QUESTION: Are you suggesting by that by analogy that this Court's holding in Faretta has created an inherently unfair situation, where the Defendant may waive the lawyer and try the case himself, even though he has never seen a courthouse?

MR. DUKE: Well, I do think I rather preferred the dissent in that case, but the distinguishing factor about Faretta is free choice.

QUESTION: Flattery will get you nowhere, Mr. Duke.

(Laughter.)

MR. DUKE: There was no free choice in this case.

Now, incidentally, I'd like to focus a little bit on what the trial judge did wrong, because that ultimately is the basis of the decision below. The Government concedes in its brief: "A trial court should

assure itself that the attorney assigned to represent a Defendant is capable of doing so."

QUESTION: Mr. Duke, you said you want to focus on what the trial judge did wrong, was what you said. Is that what you meant?

MR. DUKE: Yes.

QUESTION: Well, if there are a number of things that the trial judge did wrong, why wouldn't that be reversed by the Court of Appeals without getting to the ineffective assistance of counsel issue, just on the grounds of errors of the trial judge?

MR. DUKE: Well, I think that is the fair reading of this opinion, is that this was judicial error. This is not a case of finding ineffective assistance in the usual sense.

QUESTION: Well, you agree that that was the basis on which it was litigated below and that that was the Court of Appeals' holding, do you not? And that's apparently what Mr. Kneedler agrees today. So we don't even have to talk about the actual effective assistance or lack thereof of Mr. Colston. We just have to look at what the trial court did, right?

MR. DUKE: On my first point, point one of my brief, yes. However, both issues were argued below. They were divided into two arguments: one, that the

defense should have had more time to prepare; and two, that counsel was ineffective, and the essence of the argument about ineffectiveness was that counsel was pervasively incompetent.

What the court below apparently did is combine these two, and it presumably read the record. It heard the arguments on both sides on both issues and concluded there was inadequate representation.

But my point is that the inadequate representation that the court found was the result of impairments imposed on the defense by the trial judge.

QUESTION: You do have to end up finding that counsel was ineffective, don't you?

MR. DUKE: Ineffective in the Powell against Alabama sense.

QUESTION: Well, let's assume that a lawyer had had only three or four days time to prepare a case, and that the record were reviewed by experienced counsel who said he conducted the trial flawlessly. Now, the judge probably made a mistake in appointing some novice to try a case on five days notice, but if he tries the case well do we have to reverse? Is it a per se rule?

MR. DUKE: The wisdom of the approach of the court below is the Holloway against Arkansas wisdom, that where a defense is substantially impaired, as in

your example appointing an inexperienced attorney in a complex case and giving him four days, it doesn't answer the question of ineffective assistance to look at the trial record and conclude, boy, he really looked good, he knew how to ask questions and he knew how to object to questions. That doesn't tell you much.

QUESTION: So we really try the judge first?

MR. DUKE: Where the judge has created, as in this case over numerous objections, the impairments, then the question before the court is: Did these impairments unfairly undermine the defense's opportunity to prepare and present the defense?

QUESTION: Even though the record shows he tried the case flawlessly?

MR. DUKE: The record cannot show that he tried the case flawlessly.

QUESTION: You mean if he loses there's a per se rule?

MR. DUKE: No. The record can show that he knew how to ask questions, and that he knew some of the Rules of Evidence, and that he was articulate. It can't show whether he presented the right defense. It can't show whether he ignored a much better defense. It can't show his failures to prepare, as in the conflict of interest case.

The burdens if inadequate time and inadequate experience and knowledge force the lawyer not to do a lot of things that a lawyer ought to do. And a look at the trial record will not tell you whether he did them or he didn't do them.

A look at this record establishes quite conclusively, I submit, that many of the basic functions that are expected of a lawyer could not have been performed by Mr. Colston under the conditions that he faced, including his own inexperience. And therefore, some fundamental obligations of an attorney, that we expect of an attorney, were not performed by Mr. Colston.

Now, the court below had the trial record. It had the argument on both sides as to the performance of Mr. Colston, and it apparently thought that what it saw in Mr. Colston's performance either confirmed the inferences that it drew from the circumstantial evidence, the pretrial burdens, or in any event did not refute it. It didn't explain which of those particular positions it took.

QUESTION: Mr. Duke, one of my problems is what you just mentioned, going over the record. In your own experience, have you gone over a record and read it and said, oh, my goodness, I couldn't have done that?

Haven't you?

MR. DUKE: I couldn't have done such a stupid thing?

QUESTION: Yes, haven't you said that?

MR. DUKE: Yes.

QUESTION: We all have.

MR. DUKE: Yes.

QUESTION: So is that ineffective assistance of counsel?

MR. DUKE: A mistake is not ineffective assistance of counsel.

QUESTION: I see.

MR. DUKE: But this case -- first of all.

QUESTION: Let me ask another question similar to the same sort of problem that Justice Marshall identified. I'm not suggesting this is true of this case, but suppose defense counsel interviews his client and, with the privilege attaching, the client says to his lawyer: Well, I did it. I don't know, there's just no doubt about it. I guess they caught me, or I'm guilty. He makes it perfectly clear.

And so the lawyer then makes a judgment there really isn't any point in going out and interviewing a lot of witnesses. And later on the man is convicted, and he later files a post-conviction proceeding

attacking the competence of counsel for failure to interview witnesses. There might be 18 people he names.

And the lawyer says, I didn't. You ask him why. What's he going to say?

MR. DUKE: You ask the lawyer why?

QUESTION: Yes. I don't think he can reveal what the client told him, do you?

MR. DUKE: Well, he can if his client is attacking his competence. Certainly the privilege is gone.

QUESTION: Is it gone?

MR. DUKE: Yes.

QUESTION: I see.

MR. DUKE: And he can say, I didn't do it because he said I'm guilty.

I don't think that should satisfy the court, and the ABA is quite clear that what your client tells you about his or her guilt or innocence doesn't discharge your obligation to investigate the case.

QUESTION: No, but it may give you some idea of what is, you know, a useful way to allocate your time.

MR. DUKE: It certainly will do that.

QUESTION: You normally don't have 25 full

days to prepare for any trial.

MR. DUKE: That's true.

QUESTION: What your client tells you can have a crucial role to play, could it not, in your duty to investigate and the extent of it?

MR. DUKE: Yes, it certainly could.

QUESTION: In what way? He tells you he's guilty and there are 14 possible witnesses you might interview. You mean, can he just then not interview the witnesses?

MR. DUKE: Well, no. But suppose he says, I'm guilty, he did it, but there are three witnesses that will say I was elsewhere.

QUESTION: Yes.

MR. DUKE: I would think a lawyer could say, I'm not going to bother with those witnesses unless --

QUESTION: Why couldn't he dispense with any witness then, because the fellow says, I'm guilty? I mean, what good will any witnesses do?

MR. DUKE: Well --

QUESTION: They can only testify, they'd only testify, maybe not as clearly as in your alibi case, but nevertheless they will be attempting to establish a non-fact.

MR. DUKE: Well, if it's a case of identity,

perhaps. But in many cases Defendants don't know whether they're guilty or not. There are questions of mens rea, there are mitigating factors, there are questions of their possible defenses that can be raised.

QUESTION: And they also may be crazy.

MR. DUKE: Yes.

QUESTION: But in a complicated scheme such as is involved in a massive check-kiting case, ignorance of the consequences would hardly be something suggested by the Defendant here, do you think? This arrangement had to take a great deal of planning and timing.

MR. DUKE: It did indeed, Mr. Chief Justice. But as I have tried to point out in my brief, what was done in this case is not that different from what major corporations and banks do. The arrangement was slightly different, but what the Respondent attempted to do was to take advantage of the float. He wanted some free credit, like -- in other words, a big company on the East Coast and the West Coast will write an East Coast check for West Coast services.

The Respondent had expenses in Florida and, instead of writing an Oklahoma check for those expenses, he accomplished the same thing by writing a Florida check, but drawing against the Oklahoma bank,

essentially accomplishing the same thing.

I very much disagree with the Government in its suggestion that there was not a viable defense in this case. There was no dispute about the basic facts. Interestingly enough, the two Co-Defendants in this case testified for the prosecution and they testified to all these banking transactions and they testified to the fact that the Respondent gave the orders and decided what was going to be done and so forth.

Neither of them suggested that they had any criminal intent, and nothing in their testimony suggested the Respondent had any criminal intent. And the Respondent's behavior after the overdraft was entirely consistent with a mistake.

QUESTION: Well, were there some guilty pleas here?

MR. DUKE: There was one guilty plea, yes, and one dismissal, a guilty plea following probation.

QUESTION: What specific intent do you think the statute requires?

MR. DUKE: An intent at least to deceive in a material way, at least that much. And there was no deceit concerning the floating of checks. It was quite obvious that the Tampa bank and the Oklahoma bank were being used to float checks, quite obvious to any banker

that looked at those checks.

The only real question, the only possible deception, could have been Respondent's deception in his intention to make good on these checks, and on that issue everything he did following the overdraft was consistent with his intent to make good on the checks. He did make good on the checks. He turned over to the bank a business, a growing business with 20 employees, that the bank paid $504,000 for and turned around and sold to its directors for $504,000.

QUESTION: Mr. Duke, you say that the banks must have been aware of this. But in most check-kiting schemes, doesn't it turn out that if the banks had actually canvased the particular ebb and flow in a particular account they would have been aware of the kiting operation, but banks just generally don't do that until something goes wrong?

MR. DUKE: Well, that may very well be, Justice Rehnquist. On the other hand, the amounts of the checks in this particular case were very large indeed, particularly compared to the size of the bank. I mean, this company was one of the bank's major customers and it seems unlikely to me that the bank was entirely unaware of the volume or the nature of the checking transactions.

And what the bank probably or apparently decided to do was to trust that it wouldn't get hurt, because it was very much in its interests to have these transactions going through the bank.

QUESTION: Mr. Duke, isn't it also true that the amount of this flow of checks was also grossly larger than the actual cash flow of the man's business?

MR. DUKE: That is true.

QUESTION: So that it's kind of hard to treat it as an ordinary float, like you characterize the corporations.

MR. DUKE: Well, it is true that it's different in that obviously more checks were deposited than would normally be deposited in a typical business.

QUESTION: But I mean, grossly so. Weren't there millions of dollars worth of checks and about $100,000 of gross revenues?

MR. DUKE: There were a total of $5 million, approximately, deposited over a period of five or six months, and the revenues of the business were estimated to be -- one witness said $30,000 a month, another said $150,000 a year. But of course, that was the one business, and there were two businesses. A second business was acquired during the latter part of this period.

QUESTION: Those are kind of tough facts to work with, I think.

MR. DUKE: Well, but it seems to me Respondent's explanation is quite credible. What he was doing in running all these large checks through was impressing the bank and pleasing the bank, because that helped the bank increase its deposit power. So he was acquiring some kind of a reputation with the bank as an important customer, that was very helpful to the bank.

The point is that none of this defense was mentioned by Mr. Colston. I'm not saying this was a defense as a matter of law. I'm not suggesting that the victim must lose money in order for there to be mail fraud. I am suggesting that there are a number of legal principles and a number of favorable charges to the jury that applied to the facts of this case, and that the facts were very supportive of a defense of no intent to defraud.

Instead, Mr. Colston made a defense that is a non-defense, an utterly absurd defense that if Mr. Cronic did not write the checks he was not responsible. I don't see how any lawyer that took criminal law could make that argument.

QUESTION: Maybe that would impress a lay jury, however, even if it didn't appeal to a lawyer.

MR. DUKE: Well, possibly, possibly. It seems to me not to give the jury very much credit.

But I would -- I'm not suggesting that that would be incompetent behavior if there was no defense available. If the lawyer wants to try to bamboozle the jury and try jury nullification, that's quite appropriate where there is no defense. But here there was a very viable, strong defense that was apparently never even recognized by Mr. Colston.

QUESTION: Or by his experienced colleague?

MR. DUKE: Or by his experienced colleague.

Now, the Government suggests that there ought to be a hearing. They don't want a remand. They want Mr. Cronic --

QUESTION: Was this argument made to the Court of Appeals?

MR. DUKE: Which?

QUESTION: This very argument you just made.

MR. DUKE: About the remand?

QUESTION: No, about the adequate defense.

MR. DUKE: Inadequate defense --

QUESTION: Yes, that there was a perfectly sound defense available that was ignored.

MR. DUKE: If it was made, it was made mushily. I believe it was made by the Respondent in the

--

QUESTION: Obviously, then, it wasn't you who argued the case?

MR. DUKE: That's correct, that's correct. It was made -- the Respondent filed a pro se brief in which he predicated upon his newly discovered evidence. He claimed --

QUESTION: He was pro se in the Court of Appeals?

MR. DUKE: He had court-appointed counsel and he also had leave to file his own brief pro se.

QUESTION: Are you the first lawyer in this entire case who's discovered that there was a perfectly adequate defense available that was ignored?

MR. DUKE: I can't say. I really don't know whether counsel below really focused on --

QUESTION: Any lawyer who didn't recognize it would have been incompetent, in your view?

MR. DUKE: Yes. What is not clear is that the record was carefully read and absorbed by court-appointed counsel below.

QUESTION: Well, of course, the lawyer trying a case doesn't have the benefit of a nice record unfolding that you can look over afterwards and say, well, gee, that was here all the time. I don't think

any lawyer who has tried a case ever figures that he knows the case, even on a day by day basis, the way he should.

So I think some things that look clear from the record after the thing is over may not have been quite as apparent while the case was being tried.

MR. DUKE: Well, that is correct. But if Mr. Colston had interviewed the witnesses or seen statements of the witnesses, either one, if as the Government claims they had turned over essentially an open file, he would have seen that it was absolutely hopeless to question that the Respondent Mr. Cronic was in control of these banking transactions.

There were at least a dozen witnesses, some of them unimpeachable, that would have established that Mr. Cronic was the owner of these companies and that he called the shots and that Ms. Cummings, the nominal president, was in fact his secretary. If he had simply looked at the statements, he would have known that what he set forth as a defense was tantamount to a plea of guilty.

Thank you.

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

REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

ON BEHALF OF PETITIONER

MR. KNEEDLER: Yes, several points, Mr. Chief Justice, thank you.

First with respect to the discussion during Mr. Duke's argument about what the client may have told the attorney, I think that issue is highly relevant, as is -- and Respondent concedes this, too -- the information that counsel receives from the Government. In this case the investigative file is relevant as to counsels' duty in the circumstances of the case, his professional obligation to assess -- after all, that's what counsel's for, to assess the circumstances facing the Defendant and try to make some judgment as to what's worth pursuing and what isn't.

And again, I think it's useful to draw on the analogy in the Agurs decision, where the Court determined the materiality of the evidence that should have been turned over to the defense in terms of how it would have appeared to the prosecutor, its materiality, the weight of whether it was a close case or not a close case.

We think precisely the same rule applies with respect to judging defense counsel's performance, including the weight of the Government's case, and that's the very reason why we believe it is appropriate

in judging the element of prejudice in a case like this to see whether in fact what the lawyer would have done would have had any effect on the outcome, given all the circumstances of the case.

And in this case, I submit that, while Mr. Duke has come up with a defense that might be theoretically plausible, to suggest that this sort of defense in the circumstances of this case would have had any effect on the jury's determination of Respondent's guilt or innocence is, we submit, quite incredible.

QUESTION: Of course, that submission is -- it seems to me really goes to counsel's actual performance, rather than to this Powell-type invalidation of this trial or setting aside of this conviction.

MR. KNEEDLER: Well, I think that's right, but I understood Mr. Duke to be mixing the two of them. I did not understand --

QUESTION: Oh, I know he is, I know he is.

MR. KNEEDLER: I did not understand the Court of Appeals to mix the two of them.

QUESTION: No, they didn't, I agree. I agree with that. But when he gets down to saying, here's what counsel ignored, it's a performance standard.

MR. KNEEDLER: Yes.

QUESTION: And I suppose because it is, that's

why you're saying there wasn't a showing of prejudice.

MR. KNEEDLER: With respect to the performance standard --

QUESTION: Yes.

MR. KNEEDLER: -- that's right. With respect to the Powell versus Alabama sort of argument, where the time doesn't even approach the one day, we think that Respondent should at least identify something that his clients were prohibited from doing that had some realistic effect on counsel's preparation. But there's no suggestion here.

QUESTION: Well, you wouldn't say that if the Defendant asked for a lawyer and the judge said, sorry, you don't get one, there's just nothing a lawyer could do for you.

QUESTION: No. Under Gideon, the presence of a lawyer is deemed essential to fundamental fairness, as is some minimal period or opportunity to prepare. But that is not this case, we submit.

And lastly, with respect to the question of whether there's a per se rule being suggested here with respect to 25 days, 30 days, it's a little hard to tell precisely what rule Respondent is arguing for, what amount of time would have been sufficient. But to the extent there are going to be legislative-type rules as

to when the case is brcught to trial, that would seem tc be appropriate for either legislation or rules, not a decisicn by this Ccurt cn a case by case basis in the Court of Appeals approach, second-guessing the trial court's approach to the case.

The trial court acted responsibly in these circumstances and there's no indication that it had any effect cn the lawyer's preparation.

QUESTION: Could this case have gone to collateral relief?

MR. KNEEDLER: Yes.

QUESTION: And tried cut the question of counsel's actual performance?

MR. KNEEDLER: Yes.

QUESTION: Would it have done any good, for example, to interview all of these witnesses and sc cn?

MR. KNEEDLER: Well, that would be the purpose --

QUESTION: Could it still go there?

MR. KNEEDLER: Yes, we'd say it could still gc there for Defendant to make his showing that there was some effect.

QUESTION: Well, unless there were something decided here, because under the habeas statute the habeas court can't review anything that's been decided

on the merits here.

MR. KNEEDLER: That's correct.

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

(Whereupon, at 11:14 a.m., argument in the above-entitled case was submitted.)

* * *

CERTIFICATION

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