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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1307

TITLE UNITED STATES, Petitioner v. BETTY LOU POWELL

PLACE Washington, D. C.

DATE November 5, 1984

PAGES 1 - 36

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IN THE SUPREME COURT OF THE UNITED STATES

- -x

UNITED STATES, :

Petitioner : No. 83-1307

v. :

BETTY LOU POWELL :

- -x

Washington, D.C.

Monday, November 5, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 o'clock a.m.

APPEARANCES:

MARK I, LEVY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

JOHN J. CLEARY, ESQ., San Diego, California; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in the United States v. Powell.

Mr. Levy, you may proceed whenever you're ready.

ORAL ARGUMENT OF MARK I. LEVY, ESQ.

ON BEHALF OF THE PETITIONER

MR. LEVY: Thank you, Mr. Chief Justice, and may it please the Court, since the time of this Court's decision in Dunn v. United States, more than 50 years ago, the rule has been settled in the federal system that inconsistency in a jury's verdict is not a ground to set aside an otherwise valid conviction.

The issue in this case is the validity of an exception to the Dunn rule, adopted by the Ninth Circuit below, for the offense under 21 U.S.C. Section 843(b), of using a telephone to facilitate a drug felony.

The relevant facts are undisputed and may be briefly summarized. Respondent was charged in 15 counts with offenses rising out an extensive drug distribution operation. It was agreed by all in proceedings below, the Respondent's husband and son were the principal operators, and the Respondent was a relatively more minor participant.

Insofar as pertinent here, Respondent was

charged in one count with conspiring to possess cocaine with intent to distribute it, and in three counts, with using the telephone to facilitate the cocaine conspiracy. The jury convicted Respondent on the three telephone counts and acquitted her on the conspiracy count.

On Respondent's appeal, the Ninth Circuit set aside the three telephone convictions on the ground of inconsistency in the verdict. The court concluded that because the jury had acquitted Respondent on the conspiracy charge that was the offense alleged to have been facilitated by the use of the telephone, the telephone counts could not stand.

The Court recognized the Dunn rule. The inconsistency in a jury's verdict is not a ground to reverse its convictions; but it held that an exception to Dunn exists for the telephone facilitation offense under Section 843(b).

We submit that this was error. Our position, in brief, is that this case is controlled by Dunn and that the decision below is flatly inconsistent with both the exact holding and the fundamental rationale of Dunn.

Dunn and its progeny, to which this Court has consistently adhered over the last half century,

recognized several basic principles: First, the Dunn rule recognizes that a jury, in the exercise of its power of lenity can acquit a defendant, even though it is entirely convinced of his guilt under the law and the evidence.

Dunn thus makes clear that in the context of inconsistent verdicts, an acquittal is not to be deemed a determination by the jury that it found the Government's evidence inadequate to establish the defendant's guilt.

Because of the jury's power of lenity, Dunn establishes that an inconsistency in the verdict does not undermine or impeach the otherwise valid convictions that the jury returns.

QUESTION: Mr. Levy, can I ask you a question? Did the Ninth Circuit cite the Dunn case?

MR. LEVY: It did not cite the Dunn case in its original decision. The Government sought rehearing, and the court in denying our petition for rehearing, issued a supplemental opinion. And in that opinion, it cited to and purported to distinguish or find an exception to the Dunn decision.

QUESTION: I see; because in the first opinion, they merely said there was no evidence to support these convictions.

MR. LEVY: That's correct, and that was said in response to the Government's argument that the verdicts were not, in fact, inconsistent because the jury could have found the Respondent used the telephone to facilitate some offense other than the conspiracy of which she was acquitted.

We have not raised, separately raised that issue for review in this Court, but we did contend in the Court of Appeals that there was no inconsistency on the facts, and the court rejected that because it found there was no evidence in the record to support that theory.

QUESTION: Well, did they find no evidence in the record to support the theory, or no evidence in the record to support the conviction?

MR. LEVY: No. Our reading of the opinion, I think, makes it quite clear that they found no evidence in the initial opinion to support the Government's contention that the verdicts were not, in fact, inconsistent.

Now, the Dunn rule also recognizes, in accordance with generally established principles, that convictions are not to be upset by speculation or inquiry into the jury process for the actual reasons for the jury's inconsistency. In this way, Dunn protects

the integrity of the jury verdict and ensures that an acquittal based on leniency is not later invoked to overturn the very conviction that the jury determined to be appropriate.

In other words, Dunn prevents a defendant from isolating the portion of the verdict favorable to him and using it to challenge the remaining and unfavorable portion that was simultaneously reached by the very same jury.

No one in this case, neither Respondent nor the Ninth Circuit below, takes issue with the general validity of the Dunn rule. However, it is contended that an exception to Dunn should be made here.

In arguing for such an exception, Respondent emphasizes the compound predicate nature of the telephone charges on which he was convicted; that is, the telephone convinctions, which are the compound offense, rests on the use of the telephone to facilitate another, or predicate, offense.

This factor provides no basis to depart from Dunn.

First, the jury lenity rationale of Dunn is just as applicable in cases of compound predicate offenses as in any other case. Indeed, in this case, for example, Respondent, who concededly was a more minor

participant in the drug operation, could well have been acquitted on the conspiracy count because the jury concluded that that charge, although supported by the evidence, was disproportionate to Respondent's involvement and culpability. And the convictions, based on the telephone calls in which she personally participated, were both adequate and more appropriate.

In addition, Dunn itself involved inconsistent verdicts on compound predicate offenses. There, the defendant was convicted of maintaining a nuisance which required the jury to find as one of the elements, that liquor was unlawfully kept for sale.

However, the jury acquitted the defendant on the possession and sale counts that served as the predicate for the nuisance charge. On this record, and over a lengthy dissent that stressed the interrelation of the offenses, the court affirmed the nuisance conviction and held that consistency in the verdicts is not necessary.

QUESTION: That was Justice Holmes's last epitome, wasn't it?

MR. LEVY: That's correct, as this Court noted in Harris v. Rivera.

QUESTION: You said over a lengthy dissent. Are you implying that the longer a dissent, the better?

MR. LEVY: No, not at all. We're only saying that the court was well aware of the interrelation of the offenses in reaching its holding in Dunn that consistency was not necessary.

Since those offenses were, in fact, compound and predicate offenses, very similar to what we have here, we think that the precise holding in Dunn controls this case. And Dunn directly forecloses an exception to the inconsistent verdict rule for compound predicate offenses.

Now, beyond the applicability of the jury lenity rationale here and the precise holding in Dunn itself, there is simply no analytical basis for carving out an exception to the Dunn rule for compound predicate offenses.

Two closely related theories have been suggested; first, that the inconsistency renders the evidence insufficient to prove the compound offense; and second, that the inconsistency estops or precludes the Government from establishing the compound offense. Neither of these theories is persuasive.

Let me discuss, first, the insufficency of the evidence. Under this theory, which is advanced both by Respondent and by the Ninth Circuit below, the argument is that a jury's acquittal means that it rejected the

Government's evidence and found that the Defendant did not commit the predicate offense.

And, therefore, the Government's proof of a compound offense is necessarily insufficient, because it fails to establish the required predicate element.

This argument is squarely inconsistent with Dunn, which specifically recognizes that an acquittal does not establish the Defendant's innocence, but instead should reflect the jury's exercise of its power of lenity, even though it believed that the Defendant, in fact, was guilty.

Moreover, nothing in this argument limited the compound and predicate offenses. Rather, the proof supporting the convictions will always be inadequate if, as Respondent urges, one disregards or subtracts from the record the evidence that a court believes the jury did not accept, as shown by its acquittal.

If this were not so, the verdicts would not have been inconsistent in the first place. Indeed, under this theory, Dunn itself was incorrectly decided, because the nuisance conviction in that case could not be supported without the evidence relating to the possession and sale counts on which the Defendant was acquitted.

Thus, contrary to Respondent's

characterization, this case involves a narrow and unique exception to the Dunn rule. Acceptance of our insufficiency of the evidence argument would be a fundamental repudiation of Dunn.

Now, of course, entirely irrespective of Dunn, the evidence must be sufficient to support the conviction. But Respondent's argumment confuses the quite separate issues of the sufficiency of the evidence and the consistency of the verdicts. The former involves the evidentiary record. The latter involves the reliabilty or rationality of the jury process.

The sufficiency question asks whether the Government adduced adequate proof under traditional standards to establish every element of the offense beyond a reasonable doubt, as the jury must have found in returning its convictions.

That depends upon the totality of the proof in the record and is unaffected by the other counts that were brought or the jury's disposition of those counts.

Respondent's argument is unavailing because it blurs the analytically distinct issues of sufficiency and consistency and is simply an attempt to reformulate in the guise of the insufficiency of the evidence the inconsistent verdict argument that was rejected in Dunn.

Now, the other and closely-related line of argument for an exception to Dunn, which is advanced primarily in the Third and Eleventh Circuit decision cited in our briefs, is that the jury's acquittal on the predicate counts estops or precludes the Government from establishing the compound offense.

This argument, too, is without merit, for much the same reasons. First, as for the insufficiency of the evidence argument, the estoppel argument is fundamentally at odds with Dunn and the recognition of the jury's power of lenity to acquit against the evidence.

So, too, the estoppel exception is not really an exception at all, though it would essentially eviscerate the Dunn rule. Nothing in the estopple argument limits at the compound and predicate offenses. Rather, this --

QUESTION: How did those Circuits try to distinguish Dunn, Mr. Levy?

MR. LEVY: Those Circuits relied on a passage in Dunn that dicussed res judicata. The court, in Justice Holmes's opinion, said that if -- analogized the separate counts in an indictment to separate indictments tried successively.

The court said that if the counts had been

brought in successive indictments, there would have been no res judicata problem, and therefore it followed there would be no problem with the inconsistent verdicts in the single indictment.

As we demonstrate in our brief, that res judicata discussion was of doubtful correctness at the time, for the court had previously indicated that res judicata does apply to criminal cases. But in any event, that discussion has long since been repudiated by subsquent decisions of this Court, such as Sealfon and Ashe v. Swenson.

Nevertheless, the Dunn rule remains of continued and full vitality, based on the rationale of jury lenity.

QUESTION: But the Court has never held that res judicata can be used in a criminal case to attack verdicts on counts rendered at the same time and submitted to the jury at the same time.

MR. LEVY: Absolutely not. Dunn is the only discussion of that point. To the contrary, as we indicate, Dunn was neither correct at the time, nor is it sound in that respect now.

Indeed, the general law of estoppel is that there is no internal or single case estoppel. It has never been thought that the law of estoppel applies to

single proceedings, and the purpose of the doctrine of estoppel, to prevent needless relitigation and promote judicial economy, is simply inapplicable to a joint trial of different counts.

In addition, it would be wholly unjustified to pick out one part of an inconsistent verdict and use that to override another part that was simultaneously returned by the very same jury. That simply doesn't make any sense, to pick and choose among the parts of the verdict and give priority to one over the other.

So, for those reasons, we don't think either the general law of estoppel or the res judicata discussion in Dunn itself gives any support to the estoppel exception, as urged.

QUESTION: May I ask, though, directing your attention to this paragraph, I suppose one can argue that there were alternative grounds, alternative holdings in Dunn, and that if Justice Holmes really intended to rely on the res judicata analysis, which Justice Butler disagreed with violently, that the statement about inconsistent verdicts is really what is dicta.

MR. LEVY: Well, I suppose that is always the case when there are alternative grounds for decision. But the fact of the -- the basic point here is that

whatever was intended at the time, it is clear that the res judicata discussion simply does not stand up. And the Dunn rule, nevertheless, has continued to be followed.

QUESTION: Well, it would stand up, wouldn't it, if he was right, that one of those would not be -- would not bar the other and the facts of that particular case?

MR. LEVY: Well, it's correct that successive prosecutions would have been permissible --

QUESTION: Right.

MR. LEVY: -- then the inconsistency of verdicts seems an easier case.

QUESTION: He wouldn't have needed to make the inconsistent verdict point at all.

MR. LEVY: He wouldn't have needed to, although, again, it could have been an entirely independent and indeed equally mor more important part of the decision. It's hard to know from the very brief opinion.

But the point on the res judicata discussions, we think it was not correct that those counts could have been brought in separate prosecutions; that is, if the Defendant had first been charged with possession and sale and acquitted, we think it would not have been

permissible to bring a second prosecution on the nuisance charge, assuming that the verdicts were, in fact, inconsistent.

QUESTION: Yes, assuming they are inconsistent.

MR. LEVY: Right. Now, the Government had argued in that case, as we did in the Court of Appeals in this case, that in fact there was no inconsistency. And we think that was a substantial argument in Dunn, as it is here.

But the Court's opinion, I think, does make it quite clear in Dunn that it did not rest the decision on that narrow ground that the verdicts were not inconsistent, but rather assumed for purposes of decision that they were inconsistent, and went on to decide more broadly that consistency in the verdicts simply had not --

QUESTION: How often has this Court actually rested a decision on the second point of the Dunn case?

MR. LEVY: The second point being the res judicata discussion?

QUESTION: No, the inconsistent verdict point, which was the last point of the opinion.

MR. LEVY: Well, we think every time that the Court has considered the inconsistent verdict issue

since Dunn, it has relied on the basic point that inconsistency in the verdicts is not required, and it has never cited or relied on the res judicata discussion.

And I think that is equally true in the lower courts, with the exception of these decisions under 843(b) that have now resurrected the discredit res judicata analysis and used that as a basis for finding an exception to the Dunn rule.

Now, the estoppel exception, in addition to all the other problems, simply cannot be limited to compound and predicate offenses. This theory, if it were accepted by the Court, would extend far beyond the present context and would subject all inconsistent verdicts to the usual rules of preclusion that apply in separate proceedings.

Contrary to the Dunn rule, which results in inconsistent verdicts being upheld, the estoppel theory would mean that inconsistent verdicts would always be revised because, by definition, a verdict that is truly inconsistent cannot meet the usual standards of preclusion.

Indeed, under modern principles of collateral estoppel, as I just discussed with Justice Stevens, the inconsistent verdicts in Dunn themselves would be

impermissible.

So, again, while the estoppel argument, like the insufficency of the evidence argument, is presented as a narrow and unique exception to the Dunn rule, in reality it constitutes a basic rejection of the rule and would mean that Dunn itself was incorrectly decided.

If the Court has no further questions, I shall reserve the remainder of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Cleary.

ORAL ARGUMENT OF JOHN J. CLEARY, ESQ.

ON BEHAIF OF THE RESPONDENT

MR. CLEARY: Mr. Chief Justice, and may it please the Court, human absclutes tend toward arbitrariness. The Government's position, succinctly stated, is Dunn permits no exceptions.

In the example of a person charged with robbery in felony murder for a death resulting from the commission of that robbery, if there was a finding of not guilty on the robbery, the murder conviction could stand.

And the essence, as articulated by the ciruit courts below, was that 843(b) is a very narrow offense which has, as an essential element, the commission of a felony prescribed in Title XXI.

In the Dunn case that the Court had before it

in 1932, there was three discrete misdemeanors: maintaining a nuisance, a building where liquor was kept for sale, the offense of possession, and the offense of sale.

And there was some overlap, admittedly, but we all know that possession for sale is an offense other than simply possession for sale itself, and that some of the language was not necessary in the Government's position, which was even referred to by Justice Holmes, was that you could have the commission of one without the other.

In this particular case, there has to be some balance. Sealfon was the opinion that indicated that there has to be some consideration given to an acquittal. Admittedly, in Sealfon we had a two-count referred, conspiracy and a fraud. The conspiracy went to trial first; an acquittal, and there was res judicata after the second.

QUESTION: Did you argue the case in the Court of Appeals, Mr. Cleary?

MR. CLEARY: No, Your Honor.

QUESTION: You did not?

MR. CLEARY: No, I did not, Your Honor. I was appointed by this Court after counsel had argued in the Court of Appeals.

QUESTION: You would have no way of knowing the rather unusual treatment of the Dunn case in the first opinion of the Court of Appeals.

MR. CLEARY: I think that the court was wrestling with the dual issue, Your Honor. I think, first, the issue was the Hannah doctrine, which was, was the essential element there; and also the peculiar facts of this case which indicate, at most, some type of attenuated suspicion focusing on Betty Lou Powell.

I think that what has to be understood in this particular case is, as all of the circuits have said in this matter, is that this rule applies only where the Government charges a targeted conspiracy or offense; that 843(b) had in this case a specific conspiracy that included as overt acts each of the four telephone counts.

And where it has targeted those offenses, and the jury then decides, the same jury, the same case, in those unique circumstances, that which is the essential element of 843(b), wher it goes down -- whoosh -- so also the telephone count.

Four circuits have ruled on decision. Seventeen circuit judges. Not one dissent. Each and every one of them recognized that this could not be in extremis applied across the board. There are some

limitations.

I think in this case, there also is a duty to respect the action of the jury. And this Court is told that -- I don't think this is a Court that's going to be delving into the facts -- that the jury was wrong. It was lenity that acted here.

I am suggesting that the results reached by the Court of Appeals balances respect for the jury and the court along that particular count --

QUESTION: Was the jury properly instructed, in your mind?

MR. CLEARY: No, it was not, Your Honor. And that aggravated the situation, which indicated, I think, the reason the result in this case.

The circuit judge who wrote this opinion is the most experienced judge of the Ninth Circuit. And in Tobbs v. Florida, this Court laid out what insufficient evidence is, or going against the weight of the evidence. Insufficient evidence is words of art to an experienced appellate jurist.

In this case, he said the facts aren't there in the original opinion, the evidence isn't there, and when the Government said we want a second shot on a petition for rehearing, he said, "Let me make this clear for you. You lack sufficient evidence. Insufficient

evidence."

Now, those are not sloppy craftsmanship, an error. And the Government says we have an inconsistency case. A condition precedent to your review for inconsistency is that you must find the evidence sufficient. And if you look at the history of your cases on inconsistent verdicts, starting with Dunn, Dotterweich, Standefer, and Harris v. Riveria, each one of those cases, there was an express finding in the holdings of this Court that the evidence was sufficient.

I find that due deference is owed to the lower court in the evaluation of fact. And, further, the Court of Appeals in the Ninth Circuit went an extra step, giving the Government a little extra. And what they want to give them in the case -- we'll apply the Areas variation.

The Fifth Circuit says if you have a situation where there is evidence outside of the targeted conspiracy, some other conspiracy, no matter how ephemeral it might be, we'll sustain the conviction. They said we're looking under the Areas doctrine; we can't find that evidence.

QUESTION: I don't suppose -- do you think the Government would be here if it was clear that the

finding was that there was not sufficient evidence to convict of anything?

MR. CLEARY: I can't predict what the Government would do, and I would not want to --

QUESTION: Well, that isn't -- I'll put it to you: What if it were clear that that isn't what they held; that they held that just because, because there wasn't a conviction on one count, there was not sufficient evidence for the other?

MR. CLEARY: I would hope that the Government would not come to this Court.

QUESTION: But you aren't complaining about Dunn; is that it?

MR. CLEARY: No, Your Honor. I'm saying that, one, Dunn is inconsistent with the position of the Ninth Circuit, even under the inconsistent doctrine; that 843(b), when it has a charge, specified conspiracy, is an exception to Dunn,

And so to the extent -- I think Dunn is valid law as to what it said, and again the precedent of this Court is rather substantial.

I'm saying that there is a very narrow limited exception as defined by the facts in this case. The Government says no.

QUESTION: And when you say that you could

never convict on the telephone counts if there is an acquittal on the conspiracy count.

MR. CLEARY: On the charged conspiracy; that is correct, Your Honor.

QUESTION: No matter what. Even if you said well, we certainly would have sustained a jury verdict, there's enough evidence to sustain the jury verdict on the telephone counts. You would say that the jury just can't come out inconsistent.

MR. CLEARY: No, juries are inconsistent, this Court well knows. In this case, there was four telephone counts. Found not guilt of one, but guilty of three. If the predicate offense was established by the other evidence, I couldn't say they cut loose on one telephone count; therefore, the other three can't stand. I can't take that position. It's illogical.

So I say inconsistency is there, and I have to respect the authorities of this Court, but I just don't think there's an absolute Dunn requirement that would cut across the board for all cases.

I would like to point out that the jury was not irrational, as Justice Marshall alluded to, and I think that the point here was they followed, like soliders almost, the law of this case. They took the trial judge's instruction. And the judge instructed on

what we consider the fatal variance aspect in this particular case, where the charges were for cocaine.

And the jury came out with its first note and says, now, we don't know if it's cocaine or not, and if we can't find cocaine, do we have to go that way? And the judge instructed, on the two conspiracy counts and on the two substantive counts, if -- for you to find guilty, there must be that specified controlled substance, cocaine or quaaludes.

The came back the second time and said we're having problems. Does this mean -- we're at an impasse. If we have to find it's cocaine, as charged, and we can't, do we have to find not guilty? And the response was the judgment, and the prosecutor realized that the case might be going down and said, well, I'll stick with my stare decisis. I'm stuck with the specific substance as to the conspiracy in the substantive counts, but on the telephone counts, Judge, make it cocaine or quaaludes.

But what did the indict charge in the telephone count? It charged a conspiracy to possess cocaine with intent to distribute, or possession of cocaine with intent to distribute. Cocaine, not quaaludes.

This Court, in Stirone, said you can't get

away with that type of thing. In our system of justice, it's the indictment returned by the Grand Jury, and the respect that that Grand Jury is entitled to must be responded to by the court. You can't do it. And when you massage it around to make it more convenient, it won't fly.

I'm going back to the old 1886 Ex Parte Bain where, in this case, we contend that there was no --

QUESTION: Ex Parte Bain is virtually dead, isn't it?

MR. CLEARY: I wouldn't say so. I think the Court has quoted it up until the last few years. In fact, I think this last term, in 1983, there was some dicussion. I realize Your Honor --

QUESTION: Always to distinguish it; never to follow it.

MR. CLEARY: Well, the reason was in that case, there was a very narrow striking from the indictment: "and the Comptroller General of the United States." Those words, that striking, was enough to reverse it.

And I would say in haec verba, if it resolved those particular facts, Your Honor is correct and I think Your Honor's position was that, in the case you cited, that it's limited to those facts. And I agree.

But I'm saying that taking Stirone, where we had the changing of the allegations, and then we turn it around and we see in this particular case, Ex Parte Bain, where it says it's a jurisdictional error.

Our position is there was no weight. From the outset he said, I want the specific substance on the telephone count. And the judge says, "You got any quarrel with that?" Who quarrels with the judge?

And then after it was all over, you take a look at -- I think it's Joint Appendix, page 26 -- the last line; he said, "Do you have any quarrel with the instructions?" "None, other than I've already stated."

So I think that that issue was presumed --

QUESTION: Counsel, if the jury, after listening to the judge's instruction, is of the opinion that these are two different crimes, one involving cocaine, and one cocaine and quaaludes, they are different crimes. And we can find guilty of one and not guilty of the other.

What is wrong with that?

MR. CLEARY: I believe there was a case where there's two options, where the jury could one way on two options, and where they could find guilty on one and not on the other. I think it was Yates, if I'm not mistaken, and I think this Court held that you can't

make that option.

If the Court is referring to the fact that both are Schedule 2 substances, which they are, I would point out just --

QUESTION: Mine is -- I asked you if, under the judge's instruction, the jury was of the opinion that these were two separate crimes, wouldn't it be all right?

MR. CLEARY: I don't think in terms of the charge here, because the charge was cocaine, Your Honor, and I don't think that they can substitute quaaludes for cocaine.

QUESTION: You just said so; that the judge -- that was the judge's instruction.

MR. CLEARY: No. That is what the judge's instruction was. An objection was made at trial, and we're contending in this Court that that was improper.

And, further, in dealing with Schedule 2 of Title XXI, Section 812, there is some almost 25 substances listed: the opium, cocaine, 21 enumerated, and then anything containing methamphetamine. But under Section 811 of Title XXI, the Attorney General can add to this list.

So we're dealing with a unique case where there's tremendous flexiblity, and I think even the

fundamental principle of notice, an issue raised in the brief, that there has to be some designation. And when at the jury's impasse, and there's a charge of cocaine, and now we want to switch it to quaaludes, I think it's unfair.

What this Court has before it is an unseemly case, with an unreliable record. Trial defense counsel in this case, subsequent to the hearing by the Court of Appeals -- the charges were filed after this case was taken under submission -- was convicted of accessory after the fact for being in a conspiracy with the fugitive husband of the Respondent and, as a result, received four years and, during that proceeding, was also convicted for false statements made in response to bond containing this particular case. A reference was made as to where $200,000 was.

That disloyalty must be noted by this Court. It's not a matter for 2255 relief because --

QUESTION: But how does that affect the Dunn issue? It doesn't, I take it.

MR. CLEARY: Well, I think it affects the posture of this case before the Court.

QUESTION: But how does it affect the Dunn issue?

MR. CLEARY: The Dunn issue, Your Honor? I

think, again, it's just Wood v. Georgia, where this Court, when it dealt with probation revocation where there's a possibility of conflict, thought it best to remand the case.

And I think that, given the fact that you want a viable case or controversy, it would seem to me that if you found it infected by unreliable counsel, it would be inappropriate.

And I think the role of counsel in this case leaves much to be questioned. Specifically, on the Dunn issue, there was some question as to what was the evidence stated, and I alluded to in the briefs, to reference where counsel almost conceded the existence of some --

QUESTION: But, counsel, the same -- did the same counsel argue on appeal as tried the case?

MR. CLEARY: No, Your Honor. And that -- it was different counsel. And in this particular case, we feel that the prejudice almost permeates the record. In this case at the outset, and I believe counsel for the Government submitted a supplemental transcript, 19 May 1982, page 6. There's a reference to prosecutor, prior to the start of trail, aware of the fact that the Respondent's counsel, defense counsel below, was in communication with the fugitive husband.

At the time of sentencing, there was a reference brought out that this lawyer was carrying letters between the fugitive husband, one of the Defendants in the named conspiracy in the case, to the Respondent at jail.

And, third, there was a reference that this particular lawyer, at sentencing, somewhat agitated about the anticipated sentence, said: "Well, what do you want? Now you're saying is what can you give me," the prosecutor, alluding -- "what can you give me? I'll cut you loose," indicating --

QUESTION: The Court of Appeals ruled against you on this point, didn't they?

MR. CLEARY: No, they didn't, Your Honor. What they ruled against was on the ineffective assistance of counsel. This issue was never addressed in the Court of Appeals.

QUESTION: Well, then why are you addressing it here?

MR. CLEARY: Because I'm citing Wood v. Georgia, where the Court had a similar situation, where it was a matter not noticed until it hit this Court, where the imperfection of counsel, the potential for conflict, in this case we feel an adjudication of conflict has been made, and therefore it's somewhat

questionable why this Court is here.

I have also moved that this case be dismissed as improvidently granted.

QUESTION: So you're just kind of running through a whole string of things.

MR. CLEARY: I cannot -- I cannot accept the Court's characterization. I feel that each of these issues are well met, and I think that, as the Court said, I believe it was you, Justice Rehnquist, in your dissent in Yermian, where any issue raised or not raised below may be submitted to this Court in support of the lower court's determination.

QUESTION: Yes, but I think what you're submitting now wouldn't support the Ninth Circuit's judgment. The Ninth Circuit affirmed several counts and reversed several.

And what you're saying is the whole thing should be washed out.

MR. CLEARY: Your Honor, I'm saying -- and that's a -- I have petitioned for cert in this case, and the Court denied cert on the petition, her petition. So you get selective review to the Government. You took only that portion of the conviction that the Government sought to have reviewed.

And I'm saying, in the context of that portion

which is reversal, that the suggestion in this case of remand for further inquiry is certainly within the parameters of that which Court granted reviewing.

I would think that under the circumstances of this case, it's not the type of case that the Court would want to issue out or promulgate, use one -- I'm somewhat embarrassed to present this posture of it, but I feel that much like in Wood v. Georgia, the Court must address that issue.

Thank you very much.

CHIEF JUSTICE BURGER: Very well, Mr. Cleary.

Do you have anything further, Mr. Levy?

ORAL ARGUMENT OF MARK I. LEVY, ESQ.

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. LEVY: Just a couple of points, Mr. Chief Justice.

Respondent's argument is most notable for its avoidance of the issue presented in this case on the inconsistent verdict issue. It raises a number of questions -- variance notice, conflict of counsel -- and we agree with Justice Rehnquist's characterization that these simply are not appropriately considered here.

They were not preserved below. They are not alternative grounds for affirming the decision, the judgment of the Court of Appeals, and they have nothing

to do with the issue that we presented in our petition.

Now, Respondent argued at some length the sufficiency of the evidence. We think that this case is not a sufficiency of the evidence case, and that that simply confuses the issue. The Respondent did not raise a sufficiency of the evidence objection in the Court of Appeals, and the Court of Appeals did not make a traditional review of the evidentiary record to determine whether the proof was adequate to support the conviction. That simply is not an issue that was ever raised in the Court of Appeals and it was not presented here.

But, beyond that, we don't see how there could be any real doubt about the sufficiency of the evidence on this record. We summarized it in our brief so that the Court would understand the case and see that there was no problem with the sufficiency of the evidence. The Respondent engaged in several telephone calls. She knew who the thin man was. She knew his telephone number. She knew what was meant by the coded reference to "coupons" as money.

Reading the transcripts of the wire tap records, we don't think there can be any serious question about the sufficiency of the evidence. And the District Court, at the sentencing proceeding, after

sitting through the entirety of this trial, made it clear that he thought the evidence was ample and that the jury correctly resolved the telephone counts against the Respondent.

The sufficiency of the evidence issue that Respondent seeks to present would be no different if the conspiracy charge had never been brought; if this were only a three count indictment on the telephone offenses, alleging, but not separately charging, that a conspiracy was facilitated by the use of the telephone.

On that record, if the jury convicted on all three telephone counts, there would be no inconsistency in the verdict, and the record would be just as it is here. And in that circumstance, we don't think there could be any realistic question about the sufficiency of the record to support the convictions.

The issue in this case, which Respondent has refused to recognize, is whether the Dunn rule, as applied and reaffirmed consistently by this Court over a half century in cases like Dotterweich and Hamling and Standefer, and as recently as a few years ago, in Harris v. Rivera, whether the inconsistent verdict rule is applicable here, as we contend, or whether there is some exeption for the offense of telephone facilitation under Section 843(b).

For the reasons stated today and in our briefs, we submit that there is no such exception; that is case is controlled by the Dunn rule; and that the judgment of the Court of Appeals should be reversed.

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

We'll hear arguments next in United States v. Hensley.

(Whereupon, at 10:30 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

#83-1307 - UNITED STATES, Petitioner v. BETTY LOU POWELL

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)