ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-912

TITLE EDWARD LUCE, Petitioners v. UNITED STATES

PLACE Washington, D. C.

DATE Wednesday, October 3, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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EDWARD LUCE, :

Petitioner : No. 83-912

v. :

UNITED STATES :

- -x

Washington, D.C.

Wednesday, October 3, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:53 o'clock p.m.

APPEARANCES:

JAMES I. MARCUS, ESQ., Chicago, Illinois; on behalf of Petitioner.

BRUCE M. KUHLIK, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Marcus, you may proceed whenever you are ready.

ORAL AGUMENT OF JAMES I. MARCUS, ESQ.

ON BEHALF OF PETITIONER

MR. MARCUS: Mr. Chief Justice, may it pleas the Court, the issue presented for review this afternoon is, must the defendant give up his right not to testify in order to preserve his right to appeal an erroneous ruling by the trial court admitting a prior conviction under Rule 609A of the Federal Rules of Evidence?

The context in which this case arose is by way of a motion in limine filed in the United States District Court in Memphis. In his motion, the defendant firmly indicated a desire to testify in his defense.

The issue was briefed, and the relevant case law cited to the court. After argument, both the government and defendant moved for a ruling. The trial court definitively held that a defendant may testify on the issue of flight, absent impeachment by way of the prior conviction.

However, if the defendant were to testify on any substantive issues in the case, the evidence of the prior conviction could then be admitted against him.

The rationale behind the court's ruling was

simply that the earlir convictiçn, first, involved a crime of moral turpitude, and secondly, that it was a felony.

QUESTION: Ycu say the trial court definitively held this. Actually, your client didn't attempt to testify, did he?

MR. MARCUS: He did not. That is correct, sir.

QUESTION: Wouldn't it be better to say the trial ccurt said it then, since the trial court wasn't applying its rule to any particular set of facts that was before it?

MR. MARCUS: The ruling, however, was definitive befcre the ccnclusicn of the defense case.

QUESTION: I don't doubt that it was definitive, but I just thinking holding is not -- a holding is -- I think of a legal rule applied tc specific facts. I don't doubt that the trial court had finally made up its mind.

MR. MARCUS: After the defendant was convicted, post-trial motions in this matter once again raised the issue of the earlier conviction being improperly admitted as impeachment.

And again, the trial court ruled, this time in a written opinion, that the previous conviction was a

felony involving moral turpitude, and therefore would be proper impeachment in this case.

On appeal, the Sixth Circuit Court of Appeals affirmed the conviction, stating in part that, since the defendant had failed to testify and suffered the impeachment, he could not now complain of error.

In the case, the defendant should not have been required to waive his constitutional right to remain silent in orde to preserve a ruling which is patently wrong. The right to remain silent or to testify is a fundamental right of all defendants. It is, more importantly, a personal right to each defendant.

It would stretch the doctrine of waiver beyond its limits to suggest that a defendant faced with these facts, that being an erroneous ruling of the trial court, a ruling which certainly will impact on his decision whether or not to take the witness stand to testify, cannot --

QUESTION: What if the trial court had just declined to rule at all on the motion in limine? Would that have affected --

MR. MARCUS: I'm sorry, Justice O'Connor. I didn't hear the first part of your question.

QUESTION: What if the trial judge had just

declined to rule on the defendant's motion in limine, and had just said well, I don't know if I'll consider this or not, and had just let it ride?

I guess that, in turn, would have affected the defendant's decision whether to testify or not, wouldn't it?

MR. MARCUS: Perhaps. I think --

QUESTION: Do you think you could appeal the judge's decision not to rule on the motion in limine?

MR. MARCUS: I think you can. Yes, Your Honor. I think the --

QUESTION: So you think a trial court must then rule, entertain and rule on every motion in limine?

MR. MARCUS: Your Honor, yes. Otherwise, there would be no purpose in the rule if he did not or would not entertain the motion.

As an example, the rule is there for a purpose. Rule 609A, as the Court is familiar with, is there for a purpose and I believe the Court must indeed decide at some point in time certainly, the motion in limine in this context.

QUESTION: I suppose I have been laboring under the impression at least that most trial courts treat it as a discretionary matter with the trial court,

and as merely a tentative ruling, and not one that's definitive in any event.

MR. MARCUS: Well, I believe, as I had indicated earlier, that it should be decided. I think, in looking to the specific facts of this case, which we submit are important here, the court did rule and it was a definite ruling, and it was made before the defendant did testify.

Your suggestion, of course, raises a different -- or perhaps somewhat different issue than we have presented here today.

QUESTION: You think the trial court here could have changed the ruling at the time of trial if confronted with it again?

MR. MARCUS: Changed the ruling at what point in time now? If you are suggesting change the ruling after the defendant had testified, I think --

QUESTION: Or before.

MR. MARCUS: Or before the defendant had testified? Certainly, any court can reconsider its motion. That's done -- I won't say routinely -- but district judges, as you are familiar with, do from time to time reconsider motions. And certainly a reconsideration is not improper.

QUESTION: Sometimes trial judges say to

counsel I'll not act on that now; renew your motion at the time of trial. That's very common, isn't it?

MR. MARCUS: Absolutely, Your Honor. It's done quite frequently.

QUESTION: So the problem might have all been solved.

MR. MARCUS: Well, in this case, I think the motion itself, in looking to the facts of the case, arose at the last possible moment prior to the defendant's testifying. The motion was filed at trial, and the ruling was just before the defendant was to take the stand during the course of the defense in this case.

So indeed -- again, looking to the facts of this case, the trial court had all the information, we submit, certainly necessary to make the ruling at that point, and indeed it was the last possible moment for him to rule, prior to the defendant testifying, of course,

Indeed, if the defendant were coerced to testify and relinquish his constitutional right to remain silent, we submit this would be fundamentally unfair, based on an erroneous ruling of the trial court.

QUESTION: Well, your client didn't testify, did he?

MR. MARCUS: That is correct, Your Honor. There was no testimony at the time of trial.

QUESTION: And so what's the violation against him?

MR. MARCUS: The violation against him, we submit, is that the ruling was indeed improper. The court did not apply a balancing test, as mandated by the Federal Rule.

QUESTION: And you object to the Court of Appeals not ruling on it?

MR. MARCUS: That is correct.

QUESTION: And what did the trial court do?

MR. MARCUS: The trial court, at the time of the -- the trial court indeed did rule on the motion, and indeed indicated that if the defendant were to testify, the impeachment could be admitted -- that being the impeachment by way of prior conviction.

We submit that there was not even an attempt at balancing under the Rule 609A which is required, and the court ruled patently wrong in its motion, on the motion in limine.

QUESTION: Well, in the next case, I suppose under the Court of Appeals opinion, a trial court will never need to rule on the motion unless he says he's going to testify and gives the substance of his

testimony.

MR. MARCUS: Well, this is the situation that was presented in the United States v. Cook. The court -- I believe in our motion, this is somewhat of a contention. We indicated that the defendant would indeed testify. This is reflected in the motion itself. There was an accompanying memorandum.

QUESTION: The Court of Appeals, I guess, said a trial judge never needs to -- never has to rule or --

MR. MARCUS: Well, I believe at some point in time, clearly, there's a rule that there and a motion, presumably, that's presented, and at some point the court would have to rule; whether it be before the defendant testified or after the defendant testified. At some point in time before that impeachment was admitted, the district court would have to rule.

QUESTION: If the defendant just stays off the stand --

MR. MARCUS: Stays off the stand; that is correct.

QUESTION: There is never going to be a ruling on his motion.

MR. MARCUS: That is correct.

QUESTION: And there need not be under this Court of Appeals judgment.

MR. MARCUS: That is correct.

I might point out, although I will address this a little later in my argument.

QUESTION: Well, what's wrong with that?

MR. MARCUS: Well, we indicate that we feel it is coercive on a defendant not to have that ruling. Certainly, the most significant aspect of a defense, and it's well-recognized by this Court, is the defendant's own testimony.

QUESTION: Well, what's coercive about refusing to rule on a question of admissibility of evidence before the evidence is presented?

MR. MARCUS: Well, I think in this unique set of circumstances --

QUESTION: What's unique about it?

MR. MARCUS: Unique -- the fact is that this is perhaps the most devastating impeachment that can be admitted or elicited from a defendant.

QUESTION: But it happens often, doesn't it? I mean, I thought you meant by unique that your client's case was singular, as opposed to other similar types of impeachment.

MR. MARCUS: I think it's singular in the context in which it arose, too. We did have a ruling here. I think that's different than other cases where

the court defers ruling. We are confronted with a specific ruling here.

We would suggest to the court that certainly the evidence of prior conviction is the singular most devastating --

QUESTION: When you say it's unique, isn't it true that 99-44/100 percent of the defendants that don't take the stand have criminal records?

MR. MARCUS: I would have to disagree with that, Your Honor.

QUESTION: Okay.

MR. MARCUS: At least if I clarify that.

QUESTION: Okay. Make it 90 percent.

MR. MARCUS: Well, I don't think it's that high. And, if I could, Your Honor, I'm speaking simply not at the state level, but merely at the federal level. I think -- it has been my experience that the federal prosecutions often involve a number of white collar criminals who often times don't have prior convictions.

They do arise, from time to time though, in other situations, more violent types of crimes, bank robberies and things like that, where prior convictions are probable.

QUESTION: And they don't take the witness

stand.

MR. MARCUS: Are you saying with the -- I think the --

QUESTION: I said that 99 percent who don't take the witness stand do not take it for the reason that they've got prior convictions.

MR. MARCUS: I would have to agree with that comment. I think that certainly is a key factor in deciding whether or not a defendant will testify, is whether or not he has a prior conviction.

QUESTION: Would you be making the same argument here if the district court hadn't ruled and said that the impeachment would be admissible?

MR. MARCUS: I'm sorry. He did rule and did say it was admissible.

QUESTION: Yes. But what if he hadn't? What if he had said, sorry, but I'm just not going to rule on your motion. You haven't given me any reason to rule on it. I'm just not going to rule on it now. You'll just have to take your chances on whether you're going to testify or not.

And then your client did not testify, and you go up to the Court of Appeals, and your client is convicted. And then in the Court of Appeals you say, I was kept off the stand because the district refused to

rule, and that left me with the threat of impeachment.

Now, would you be making that argument, or do you think that this is a unique case in the sense that the district court did rule against your?

MR. MARCUS: I think that district courts in virtually every case that I found, and every case certainly that's been reported that I'm aware of, the district court does rule. I think district judges --

QUESTION: I don't think the courts in the Fifth Circuit --

MR. MARCUS: Sixth Circuit.

QUESTION: Yes. Are going to rule so often after this.

MR. MARCUS: After this. His Honor may be correct. But I think in every other circuit in the country, there is a procedure in which review is granted. This circuit in this decision stands alone.

QUESTION: Doesn't -- this circuit leaves it with the discretion of the district judge.

MR. MARCUS: Well, I think this circuit requires at some point in time, if the defendant testifies, the court does --

QUESTION: I know, but if the defendant doesn't testify, he just doesn't go on the stand because he doesn't know if he is impeachment will be offered or

not.

MR. MARCUS: That certainly would leave him hanging by a thread, there is no question. We also suggest, and I think a problem which did confront us in this particular case to a lesser extent, is advice of counsel. What if the lawyer for the defendant tells his client, when he is confronted with the situation, that the judge may or may not allow this impeachment in against you?

QUESTION: What did a lawyer tell his client 25 years ago, you know, 150 years after the adoption of the Constitution, before there were any such things as motions in limine?

MR. MARCUS: I --

QUESTION: That was before your time, I realize.

(Laughter.)

QUESTION: Frankly, you've probably grown up with motions in limine, but the practice got along without them quite well for many, many years without anyone suggesting there was a violation of any constitutional provisions.

MR. MARCUS: I don't doubt that, certainly. My background, it's a little more current than what the Court suggests. And I do feel, though, that the problem

that is confronted by counsel -- and I think it does impact to some extent on the Sixth Amendment right of effective assistance of counsel.

How can a counsel be effective and advise his client what to do if he doesn't know whether or not it's a specific piece of evidence that's going to come in?

QUESTION: Well, under that theory, you could come in at the beginning of a criminal trial. The defendant could move for a series of rulings in limine on each piece of evidence the prosecution was going to tender, each prosecution -- each piece the defense was going to tender, because presumably decision as to admissibility of any one of those pieces of evidence might affect the defendant's trial strategy.

Would you go that far?

MR. MARCUS: No. No.

QUESTION: Where would you draw the line?

MR. MARCUS: Well, certainly, I think in this particular instance, we have a rule, a federal rule of evidence which has to be construed at some point in time. Certainly motions in limine are filed to attack motions to suppress certain other crucial pieces of governmental evidence. It's unknown.

Again, a motion to suppress is not the same as a motion in limine, but something akin to it certainly.

This is not unheard of.

QUESTION: Not having the ruling would just test your skill as a lawyer and your judgment, which is what lawyers always have to exercise. You'll just have to say, well, is this the kind of impeachment that's admissible or not?

Then you know your judge.

MR. MARCUS: Well, that's true. Sometimes you're confronted with a brand new district court judge. This is not the case in this situation.

QUESTION: Didn't this problem arise only after there were some decisions that, under some circumstances, prior convictions should be excluded if they were too remote or irrelevant or what not?

That's what gave rise to this procedure, isn' it?

MR. MARCUS: I believe so, Your Honor.

QUESTION: And then the rule followed.

MR. MARCUS: That is correct.

QUESTION: Now, when you made the motion, did you undertake to present reasons why in this particular case the prior conviction should not be --

MR. MARCUS: Absolutely, judge. Excuse me -- Mr. Chief Justice.

QUESTION: And what was your reason?

MR. MARCUS: My reasonings being -- this Court, I am aware, is the author the Gordon decision which predates, of course, the federal rule. But we specifically found that the earlier conviction was an old one. It was eight years old. The rule provides for ten.

QUESTION: Eight years old?

MR. MARCUS: Eight years old. That is correct. The similarity of the conviction was extremely crucial in this case. It was a drug-related crime. And the defendant in this case was on trial, of course, for a cocaine conspiracy.

So the similarity of the conviction was significant. We also found that the defendant had no subsequent criminal history, or I should say no conviction subsequent to that incident, earlier incident. And we feel that the factors and the fact also -- the case was, we submit, weak as to this particular defendant. His testimony was extremely important. The facts in this case were not particularly strong as to the defendant Luce.

We're not contesting, as the solicitor notes in his brief, the sufficiency of the evidence, but certainly his testimony was sufficient or was important in this case and was indeed extremely significant.

The effect of a ruling such as in this case, which was not in any way tentative, again as we indicated, but rather definitive, on a specific motion to limit evidence should not escape review merely because a defendant adjusts his trial strategy to meet the court's ruling.

The defendant took the judge at his word. The court ruled. We accpeted that ruling and took this court at its word. There was not any indication that he would later modify his ruling, but that he needed more information to make his ruling. I think this is an important point.

The court felt it had enough information at that point to make its ruling. And indeed, under the terms of this ruling, which again we submit is somewhat significant, it would not have mattered what the defendant said on direct or cross-examinations.

QUESTION: Doesn't the rule speak in terms of relevancy outweighing prejudice?

MR. MARCUS: Well, I think it speaks of probativeness.

QUESTION: Well, isn't prejudice something that can best be ascertained when the defendant actually takes the stand and testifies?

MR. MARCUS: I don't think, Your Honor, that

this is the type of area that a defendant would have to testify in, in order for a court to make a ruling.

QUESTION: Could the court make a better or sounder ruling as to the prejudice if the defendant had testified? Because the question before the court wasn't -- I mean, presumably, the defendant might have testified for several hours on direct examination, and you would never get to the question of impeachment until you get to cross-examination.

So that the trial court would have the advantage in that case of having heard the defendant's testimony.

MR. MARCUS: Well, again, in this case, the district court did not feel it needed that information. It felt it had sufficient information to make the ruling, absent the defendant's testimony.

I think this would be, again, a rather harsh rule to adopt, for this Court to adopt; to, first, require the defendant, as the Sixth Court of Appeals does, take the the stand and wait for the court's ruling until the cross-examination.

QUESTION: We ordinarily decide abstract questions, and it seems to me until your client takes the stand, this remains an abstract question

MR. MARCUS: Again, in the facts of this case,

it was not an abstract question. The district court did not need more information, did not need additional matters to consider, did not need the defendant's testimony, but felt it had all the information necessary to make the ruling.

We would also suggest that the district courts rule on these motions routinely, and the appellate courts review them routinely. And up until this decision, this had been more or less a routine matter.

QUESTION: So what rule do we use to see whether or not the judge was wrong? Clearly erroneous, or what?

MR. MARCUS: In this particular --

QUESTION: Abuse of discretion, or what?

MR. MARCUS: I believe the Court would have to look to an abusive discretion standard, whether or not the court incorrectly applied the rule.

In this case, I -- in this particular case, I don't think there can be any question. The judge did not attempt to balance in any way, shape, or form the prejudice versus the probativeness in this case.

QUESTION: Is he obliged to?

MR. MARCUS: I believe he is, Your Honor, under the rule.

QUESTION: And is he obliged to give reasons?

MR. MARCUS: The appellate courts that have spoken --

QUESTION: Is he obliged to give them in writing?

MR. MARCUS: He did in this case. I don't believe -- I believe the appellate courts have always encouraged the district judges to give their reasons on the record, and indeed, if necessary, write an opinion.

QUESTION: It seems to me that the trial judge is in a better position than any of us to decide this point.

MR. MARCUS: That is correct. I agree with that proposition. And I agree that the trial judge did decide this point, albeit, we submit, incorrectly. And the Circuit Court of Appeals never saw fit to review that decision.

I don't quarrel with that proposition at all. The trial judge is in the best position.

The single most important evidence to a defense case is the defendant's testimony. Its force and effect on the course of the trial is well-recognized by this Court. Often times, without it, the defense can only argue that the government did not prove its case beyond a reasonable doubt. With it, they are armed with a direct denial of the accuser's accusations.

It is also fair to say that the most significant factor in determining whether a defendant will testify is whether or not this prior conviction is admitted. This, as Justice Marshall has noted, is certainly one of the crucial points in determining whether a defendant will or will not take the stand.

On the one hand, the government does not need this evidence to prove its case. It is merely general impeachment of the defendant. On the other hand, the defendant would be reluctant to testify in the face of this devastating impeachment.

The balancing considerations clearly favor the defendant.

We further hold that the conduct of the entire defense case will be altered because of the introduction of the general impeachment, and the defendant must either be coerced to testify to preserve error in the point, or remain mute and waive his right to appeal an erroneous ruling would be intolerable and fundamentally unfair.

To further suggest the defendant's testimony may not be relevant is unrealistic. Anything a defendant says is important to the tryer of fact. In virtually every case, the jury would want to hear from the defendant himself.

The more sensible approach, we submit, is that what a defendant says is relevant and pertinent, especially to his own defense. We also submit that if a motion such as this is made, it is made in good faith. The defendant indeed intends at that point to testify.

If there is reason to question a defendant's willingness to testify or the motives in filing of the motion, the government, of course, may address itself to this issue in response to the motion.

Also, to suggest that trial courts will not be able to rule on these motions is without merit, since they have been ruling on these issues for years, and in virtually every circuit, as we had pointed out earlier, except the Sixth, review is permitted.

I will reserve the remaining time, unless there are more questions, for rebuttal.

CHIEF JUSTICE BURGER: Mr. Kuhlik.

ORAL ARGUMENT OF BRUCE M. KUHLIK, ESQ.

ON BEHALF OF RESPONDENT

MR. KUHLIK: Mr. Chief Justice, and may it please the Court, petitioner seeks review of an advisory evidentiary ruling when the evidence was never actually offered or admitted at trial.

The Court of Appeals in this case determined that in that circumstance, the petitioner had failed to

preserve his claim of error for appeal. And I would like to suggest that the facts of this case show vividly why that rule is an appropriate one in these circumstances.

Petitioner made his motion in limine on the second day of trial, before the government had rested, while the government was still putting on its case. Petitioner stated in the motion that he intends to testify in his own behalf; did not state that he intended to testify only if his motion were granted. He did not lay out any testimony that he wished to give, and has never done so.

The court's ruling on the motion, to the extent that it can be identified, is set forth in the Joint Appendix at pages 21 and 22. And I think it bears close scrutiny.

The court stated that if the petitioner testified concerning his flight to avoid arrest, his flight from the arresting officers, then the court would keep the impeachment evidence out. The court then went on to say if, on the other hand, petitioner testifies about drugs, "I've never had any prior drug involvement," then I'll let the impeachment evidence in.

And I take it, petitioner has no quarrel with either of those rulings. Certainly, petitioner does ot

quarrel with the proposition that the evidence would not come in if he testified concerning the flight. Moreover, in his brief on pages 14 through 15, petitioner states that, if indeed he did testify that he had no prior drug involvement, the impeachment would clearly be proper.

What is it, then, that petitioner seeks to review on appeal? He has never offered any sort of evidence that he wished to present, that he was precluded from presenting by the court's ruling.

Moreover, the very fact that the district court looked to the substance of what petitioner would testify to in determining how it would rule on the motion, demonstrates that the court was, in fact, applying the balancing test that is required under Rule 609, and it demonstrates a more general point under that rule as well; that the court cannot make its final intelligent, informed ruling under Rule 609 until it has in front of it the defendant's actual testimony, until it has seen what the defendant has to say and seen how his demeanor and his credibilty have been demonstrated before the jury.

QUESTION: Well, the Court of Appeals declined to say whether the district court was right or wrong in ruling on his motion.

MR. KUHLIK: That's correct, Your Honor.

QUESTION: And he says the Court of Appeals should have ruled on it. Isn't it implicit in that position that the petitioner is insisting that the district court was wrong in his ruling?

MR. KUHLIK: Well, he's insisting that the court was wrong, but he's never identified what element of the ruling was incorrect.

QUESTION: Well, it would be a little odd to come all the way here and say the Court of Appeals should have ruled, if it didn't think the district court was wrong.

MR. KUHLIK: Well, perhaps it might be more clearly --

QUESTION: He certainly wouldn't have gotten up in the Court of Appeals and said please rule on this motion, even though it was rightly ruled on.

MR. KUHLIK: Certainly, Your Honor. Perhaps I should say the petitioner has not shown any prejudice from the ruling. He's never demonstrated what he would have testified to that he was precluded from testifying to. In fact, he was never precluded --

QUESTION: In the Court of Appeals view, it wouldn't have needed to rule, even if he had said he was going to testify, and even if he had told them what he

was going to testify to.

MR. KUHLIK: That's true, Your Honor.

QUESTION: And disagreed with the Ninth Circuit in that respect.

MR. KUHLIK: That's true. And prior Sixth Circuit precedent clearly suggested that result in the case of United States v. LeBlanc, in which the government on appeal confessed to error on the --

QUESTION: It wouldn't have done him any good to tell them what he was going to testify to.

MR. KUHLIK: Well, I think it would have been helpful, but I don't think it would have been enough, Your Honor. I think that the informed definitive ruling can only be made, can only be intelligently reviewed by a Court of Appeals in terms of looking at the reasonableness of the district court's exercise of discretion, and perhaps most importantly, determining whethe there was any harmless error, whether the error, if any, was prejudicial to the defendant.

That can only take place in the context of a defendant's actual testimony at trial. That's the only time when the district court can say in light of -- the district court may find that the defendant's testimony was so irrelevant or his demeanor so inherently incredible that impeachment would not be justified.

QUESTION: Well, do you think it would be error for the -- was it error for the district court, or unwise for the district court to rule on this motion at all?

MR. KUHLIK: No. I believe that it's perfectly proper for the court to make --

QUESTION: But how can it make a sensible ruling until he goes on the stand and then the impeachment is offered?

MR. KUHLIK: I believe the circumstances, Your Honor, are that the court makes a preliminary ruling that says, based on what I know now, here's what I think I will rule.

QUESTION: Well, isn't one method that's used for the defense counsel to proffer the testimony, outline what the testimony will be, if he's allowed to take the stand without impeachment, and then if he goes beyond that in any significant way, the judge would be free to alter his ruling

MR. KUHLIK: Of course, Your Honor, I think that a proffer --

QUESTION: If the trial judge -- if it's sensible for the trial judge to rule when the defendant makes that kind of a showing, why isn't it sensible for the Court of Appeals to rule on whether the district

court was correct?

MR. KUHLIK: Because what it is sensible for the district court to do is to make a preliminary ruling and say, based on what I know now, this is how I think I will rule. It's always subject to change.

If the district court here had said here's how I think I will rule, but I want to think about it some more, we wouldn't be right now. It clearly would be so tentative --

QUESTION: What if the district court listens and then says, I'll tell you, young man, that impeachment evidence is admissible -- and then he stays off the stand. Now, is that ever reviewed?

MR. KUHLIK: If he stays off the stand? Your Honor --

QUESTION: That's this case, so you must saay it's never reviewable.

MR. KUHLIK: The broad rule stating that evidentiary claims are only preserved when the evidence is actually admitted is the preferable one. I would suggest that --

QUESTION: So your answer is that it's not reviewable if he stays off the stand.

MR. KUHLIK: That's correct, unless, Your Honor, I suppose there may be an exception in the case

of plain error. If there were some error that were truly egregious and, for example, a matter of law that was reviewable --

QUESTION: How would the reviewing court ever get at it, unless there had been, as I just suggested a few minutes ago, a proffer by the defense as to what he would testifyy to if he was permitted to testify free from impeachment? Otherwise, no court could review it.

MR. KUHLIK: That's true. I don't see how a Court of Appeals can make either an intelligent ruling on the merits or a determination of whether any error was harmless or not.

QUESTION: Well, Mr. Kuhlik, what if, as sometimes actually happens, during the motion in limine, defense counsel actually puts the defendant on the stand, out of the presence of the jury for the benefit of the judge, and puts the testimony on the stand and says now, give me your ruling on the motion in limine. We've got a record. Is that appealable?

MR. KUHLIK: Your Honor, I think that that situation makes reviewability an easier task, more appropriate, but we don't believe it goes far enough.

QUESTION: Well, is it -- that's not far enough even?

MR. KUHLIK: Let me tell you why.

QUESTION: Because that happens sometimes in trial courts.

MR. KUHLIK: It does, Your Honor, but it creates a host of procedural problems of its own. You're talking about stopping the trial, conducting an extensive voir dire --

QUESTION: Sure. But suppose it happens? The trial judge decides to let that happen. Then is it appealable? What more would be gained by forcing the same testimony to take place in front of the jury?

MR. KUHLIK: First, Your Honor, I would suggest that the voir dire would also have to include cross-examination by the government.

QUESTION: Yes.

MR. KUHLIK: And to suggest that what is gained is you still -- even with the defendant stating that he will take the stand, you still have no guarantee that he would do so; you still have no guarantee that the government, in the event, would decide to introduce the evidence.

QUESTION: Well, you would certainly have a factual record.

MR. KUHLIK: You would have a better record, Your Honor, but I think that that approach is simply more trouble than it's worth, in a way, that it's --

you're talking about taking a lot of time out of a trial.

QUESTION: But what if the issue weren't impeachment by a prior conviction, but whether the defendant's testimony would be immunized in some way?

MR. KUHLIK: Whether --

QUESTION: Or, of course, a confession issue.

MR. KUHLIK: Your Honor, where you're talking about rulings of law that don't depend on an exercise of discretion by the trial court, I think you've got a more appropriate case for review.

We would still say, though, that the better rule would be the broader one that the claim is preserved only when the evidence is actually admitted. The only --

QUESTION: If you're correct, Mr. Kuhlik, the government should cross-examine on this dry run. Then the government is being forced to expose its hand in cross-examination before the witness ever takes the stand.

It seems to me that suggests that this whole proceeding, a little show inside the show, is not terribly desirable.

MR. KUHLIK: I think that's perfectly right, Your Honor. Not only would the government be forced to

show its hand, but the defendant would be forced to show his as well.

The Ninth Circuit, in Cook, suggested that these sorts of rulings could be done before trial even began, and that would, to some extent, satisfy the problem of not interrupting trial.

QUESTION: Well, you couldn't interrupt a trial like this. What would you do with the jury for a year or two while you're going up to the Court of Appeals?

MR. KUHLIK: Well, quite obviously, there's no right of the defendant to an interlocutory appeal at this point. I would suggest that the rulings --

QUESTION: Mr. Kuhlik, these are normally done before trial. That's the real world. People come in long before trial, they want to plan their trial strategy, and they come in ahead of time and ask the judge to set a hearing on their motions in limine. And that's how it happens.

MR. KUHLIK: Your Honor, and in that circumstance, the showing of prejudice is particularly difficult for the defendant to make. You're talking about relying on a representation that the defendant intends to testify.

As this Court has recognized in Brooks v.

Tennessee, the actual conduct of the trial with the defendant's own witnesses is an important determination in whether or not the defendant will decide to testify. That's why the court said, in Brooks, that it was unconstitutional for a state to require a defendant to be his own first witness.

So, without in any way doubting a defendant's good faith, counsel's good faith, I would wonder about the advisability of relying on a representation made weeks before trial, simply that the defendant intends to testify.

QUESTION: In this case, counsel, do we have to decide, is the question presented, what would be done if a motion is made before trial?

MR. KUHLIK: No, Your Honor. This motion was made after trial.

QUESTION: During trial.

MR. KUHLIK: During trial, although I don't believe the result should be --

QUESTION: Perhaps not, but we're confronted only with the narrow question here.

MR. KUHLIK: Your Honor, I would submit that under any approach that the court would choose to adopt, this conviction should be affirmed. The defendant has simply made no -- petitioner has made no showing of

prejudice at all.

QUESTION: So we don't need to decide whether the Court of Appeals was correct in ruling as it did, and saying that it wouldn't make any difference if he had made the showing. Here, he didn't make any showing at all.

So is that all we need to decide, or do we need to buy the Court of Appeals opinion to decide the case?

MR. KUHLIK: That is the narrowest ground on which you could decide the case. I would suggest that the Court of Appeal rule is the best one and should be adopted by the Court, but the Court certainly need not go that far to uphold the judgment in this case.

I would like to stress a few points in response to petitioner's points. The first is that, there is clearly no right under the Constitution or under the rules to an advanced ruling of this sort. Courts are well within their discretion to refuse to rule on them, and they do it quite often.

And it differs significantly from motions to suppress, for example, for several reasons. Perhaps the most important is that a motion to suppress can be decided without trial of the general case. You're talking about a motion to suppress a ruling of law which

can be clearly decided before trial.

Here, on the other hand, you're talking about a district court's exercise of discretion under the rules, balance and probative value, prejudicial effect. These things are quintessentially things that the court can only finally determine at trial and, for that reason, there is clearly no right to an advanced ruling.

I would also emphasize that Rule 609 itself is not of constitutional magnitude. Even where there is error, it's not -- it does not rise to the level of due process, simply because a conviction is admitted into evidence in violation of the rule. And I would remind the Court as well that limiting instructions are available on the proper use of this impeachment evidence.

The rule adopted by the court below, requiring that evidentiary claims be preserved only where the evidence is actually offered at a trial, has several benefits. I've touched on some of those already.

One of the most important is that it makes for a clear showing of actual prejudice to the defendant. Where the evidence is actually admitted, you have the defendant taking the stand, you can see the relevance of his testimony, you give the government a chance to decide in light of the defendant's testimony, and not

merely in light of his pretrial proffer, either through counsel or through voir dire, to decide whether to offer the evidence or, in the middle of trial, to decide perhaps that the defendant's testimony is so weak and the government's tastes so strong, that it need not risk a reversal because it is far more likely to convict, even without the conviction.

You give the district court one last chance to decide the motion finally, when the evidence is offered at the right time. This allows the court the opportunity, the appeals court, to clearly identify the ruling that it's reviewing.

I have suggested here that the district court's ruling was simply a denial or a grant of the motion. In fact, it was rather complicated. The court attempted to step into the vacuum created by petitioner's failure to proffer any evidence, and suggest if you testify this way, I'll rule this way; if you testify that way, I'll rule another way.

Petitioner may suggest a broader reading of the district court's ruling here, but when you are reviewing the ruling admitting the evidence at trial, its far simpler. The Court of Appeals need not guess. It's got the ruling right there, it knows what it is reviewing.

Finally, note that reviewing the rulings only when the evidence is actually offered at trial makes the job of the Court of Appeals in determining whether any error is harmless, far simpler.

QUESTION: I would think the government, then, would urge, under the Sixth Circuit ruling, would certainly urge district courts not to rule on in limine motions at all; that you just wait till he -- let him decide whether he's going to take the stand or not, and then rule on the evidence.

MR. KUHLIK: Your Honor, I think the rulings serve a useful purpose, whether or not they themselves are reviewable, because we're talking about a discretionary rule to begin with. The rule doesn't compel the district court to admit or exclude the evidence.

QUESTION: Well, how are you going to -- how are you going to react to motions in limine? Are you going to tell the judge it's discretionary, but we urge you to use your discretion not even to rule?

MR. KUHLIK: Your Honor, I would suggest that that is far more likely to happen if this Court were to hold that the in limine rulings are reviewable, because that's the circumstance where reversible error is being created without a real showing of prejudice.

When the rulings aren't reviewable, both parties benefit from an advance notice of how the district court is feeling about it, how it intends to exercise its discretion, and both sides better plan their case.

QUESTION: If the defense does not proffer or tender what evidence a defendant will give, if he's allowed to testify free of impeachment, how could any court ever review it?

MR. KUHLIK: They can't, Your Honor. I would suggest that the Fearwell case, which is cited by the court below, and is a case from the D.C. Circuit, was one where the defendant had not made any proffer, and the Court of Appeals, without discussing the reviewability question, reviewed the ruling, determined it was error, said but we can't determine whether it's harmless, remanded to the district court to hold a hearing and for the defendant to introduce what he would have testified to.

Now, that sort of --

QUESTION: Did the court order him to be under oath in that hearing?

MR. KUHLIK: I don't recall, Your Honor, but I would suggest that he would be. But --

QUESTION: Is that a recent case?

MR. KUHLIK: No, Your Honor.

QUESTION: Let's hope not.

MR. KUHLIK: That's the kind of difficulties that you get into when you review these sorts of rulings outside of the actual testimony. That type of result makes no sense from any sort of viewpoint. And we suggest it's wrong.

Finally, I would turn to the fair and consistent treatment of defendants. Petititoner has suggested that it is urfair to him to require him to testify, but this is really the sort of decision that defendants and their counsel are confronted with all through every trial.

The only risk, the only real risk at the present, I would suggest, is that defense counsel might inaccurately predict how the Court of Appeals would come out. If defense counsel believes that a ruling admitting the evidence would be upheld on appeal, then the path is clear; the defendant does not take the stand.

Similarly, if defense counsel believes it's erroneous, the path is similarly clear. Defendant takes the stand. Perhaps the evidence is offered. Perhaps the district court does admit it. Then defendant has his point for appeal.

QUESTION: But, of course, the defendant also wants a not guilty verdict.

MR. KUHLIK: Of course, he does, Your Honor, but there are --

QUESTION: Which isn't subject to appeal.

MR. KUHLIK: There are many circumstances where a defendant's desire to obtain an acquittal in front of his first jury conflicts to some extent with his need to preserve points for appeal.

I would point to only one, which is the motion to acquittal contest, where a defendant's motion to acquit is denied at the close of the government's case and the defendant then chooses to put on evidence of his own.

He will have waived on appeal his claim that the denial of the motion to acquit was there.

QUESTION: Is that settled law?

MR. KUHLIK: Your Honor, there are some circuits, I believe, that have gone the other way. This Court, in the Calderon case, stated that that is the correct statement of the law.

And that's a circumstance where defendant is put to what we concede to be a difficult choice: Do I do my best to be acquitted here by putting on evidence, or do I stake my chances right on my motion to acquit,

which I believe was a good one?

Very similar to the circumstances here. And I would suggest the same result should apply.

If there are no further questions --

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

ORAL ARGUMENT OF JAMES I. MARCUS, ESQ.

ON BEHALF OF PETITIONER - REBUTTAL

MR. MARCUS: Just briefly, in response to the Chief Justice's question, how can a district court ever review a motion in limine such as the one in this particular case, we submit the factors are present to balance prior to the testimony of the defendant, the age of the earlier conviction, the nature of the earlier conviction, the district court has the charge before it that the defendant's standing trial on.

There are enough factors present in the record that the Court can indeed make a decision.

We would also point out, as I just briefly mentioned earlier, district courts have consistently ruled on these types of motions for years. Appellate courts have reviewed these rulings for years, whether or not the defendant does indeed testify. The cases are well set out in both the solicitor's and petitioner's brief.

If there are no further questions --

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

(Whereupon, at 2:40 o'clock p.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:

#83-912 - EDWARD LUCE, Petitioners v. UNITED STATES

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BY Paul A. Richardson

(REPORTER)