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THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-935

TITLE UNITED STATES, Petitioner v. JOHN CLYDE ABEL

PLACE Washington, D. C.

DATE November 7, 1984

PAGES 1 thru 56



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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner, :

v. : No. 83-935

JOHN CIYDE ABEL :

Petitioners :

- - - - -x

Washington, D.C.

Wednesday, November 7, 1984

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:32 o'clock a.m.

APPEARANCES:

STEPHEN S. TROTT, ESQ., Asst. Atty. General, Criminal
Division, Dept. of Justice, Washington, D.C.; on
behalf of the petitioner.

MS. YOLANDA BARRERA GOMEZ, Senior Dep. Fed. Public
Defender, Los Angeles, Cal. (appointed by this Court);
on behalf of the respondent.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Trott, I think you
3 may proceed whenever you are ready.

4 ORAL ARGUMENT BY STEPHEN S. TROTT

5 ON BEHALF OF PETITIONER

6 MR. TROTT: Mr. Chief Justice, and may it
7 please the Court:

8 This case is here on a writ of certiorari to
9 the United States Court of Appeals for the Ninth
10 Circuit. I will argue that the Ninth Circuit was in
11 error when it reversed Respondent's conviction for bank
12 robbery on the basis of evidence that the Circuit
13 perceived to be improper evidence of impeachment.

14 In arriving at that conclusion, the United
15 States Court of Appeals for the Ninth Circuit announced
16 the rather astounding proposition that it is error to
17 introduce evidence that a person is a member of a group
18 sworn to commit perjury on behalf of another party to
19 the lawsuit.

20 The question presented, in essence, is whether
21 or not it is proper to introduce evidence that a witness
22 and a party to the actions are members of a group which
23 espouses a tenet that members shall lie and commit
24 perjury on each other's behalf if the case arises, if
25 the need be, in order to escape the clutches of the law.

1 The facts as they relate to this particular
2 issue are rather straightforward. In just a few moments
3 I would like to discuss them. Petitioner believes that
4 the facts are very important in this case.

5 Respondent, Mr. Abel, and two confederates
6 committed a bank robbery. They were indicted. Two of
7 the defendants went by way of pleas of guilty. Mr. Abel
8 decided that he would go to trial. The Government
9 called as one of its chief witnesses a Mr. Ehle, who was
10 one of the original co-defendants who had pleaded guilty
11 in order to obtain a deal.

12 Mr. Ehle implicated Respondent in all respects
13 in this robbery. Respondent relied on a defense of
14 alibi, and in order to bolster that alibi Respondent
15 called a witness by the name of Mills. Mills testified
16 that shortly before the trial, he had a conversation
17 with Government witness Ehle wherein Mr. Ehle indicated
18 that it was his intention to falsely implicate
19 Respondent Abel in order to help himself out with
20 respect to the charge that he had to face that was
21 before that court.

22 Mr. Mills testified that when Mr. Ehle told
23 him that he was going to falsely implicate Respondent,
24 he decided that it was necessary to come forward and
25 testify in the interest of justice and truth because he,

1 Mr. Mills, could not bear to see an innocent person go
2 to prison.

3 Confronted with this evidence, the prosecutor
4 announced to the court that he intended to put on
5 evidence for the purpose of impeaching this witness
6 Mills, that in fact Mr. Mills and Respondent Abel
7 belonged to a secret prison organization known as the
8 Aryan Brotherhood, one tenet of which was to lie and
9 commit perjury on behalf of other members if the case
10 arose, another tenet of which was to deny the very
11 existence of that organization for the purpose of
12 enabling it to pursue its perjurious ideas.

13 After a long, complicated, and very
14 professionally held hearing, the judge decided that this
15 was proper evidence of bias; that it ought to be used to
16 impeach witness Mills; the balancing test of Rule 403
17 was applied; the prosecutor was advised in his
18 impeachment not to use the term Aryan Brotherhood
19 because that term itself might somehow prejudice the
20 interests of Respondent; and the cross-examination and
21 the impeachment ensued.

22 Predictably, Mr. Mills denied the very
23 existence of the secret prison organization that he was
24 confronted with, and of course denied that he had any
25 knowledge that members of this organization, which he

1 was alleged to be, had a responsibility to each other to
2 go into court and commit perjury if that were necessary.

3 Faced with these denials, the prosecutor then
4 called Mr. Ehle back to the stand. Mr. Ehle of course
5 first laid a predicate for personal knowledge in this
6 respect, and then proceeded by way of impeachment to
7 establish bias, that on the basis of his first-hand
8 personal knowledge he knew that Mills, Respondent Abel,
9 and even himself were members of this organization and
10 that two of its principal tenets were to lie and commit
11 perjury and to deny the very existence of the
12 organization.

13 The Ninth Circuit approached this from an
14 analytical viewpoint that caused them, as I indicated
15 earlier, to announce that evidence of membership in a
16 group, even a group having these characteristics and
17 attributes, without more was improper evidence of
18 impeachment, did not show bias unless it was also
19 demonstrated that the witness personally in some way had
20 subscribed to these tenets, and in a split vote reversed
21 this conviction.

22 I would argue, first of all, that one of the
23 primary functions of the trier of fact in a case --
24 referring to a jury or a court -- is to determine the
25 credibility of witnesses. It is a time-honored

1 proposition that that is one of the primary functions of
2 the tryer of fact. I would submit that one of the best
3 ways to determine whether or not a witness has
4 credibility is to ask whether that witness is partial or
5 biased either for or against a party to the action.

6 Indeed, this rule is so old that it finds its
7 bases in common law. Bias was one of the six ways under
8 common law that a witness could be impeached. It has
9 survived the centuries because it finds its root in
10 common sense and in the lessons of human experience.

11 It is an unhappy fact of life that, even under
12 oath, certain people who are biased might come in and
13 slant their testimony or, in some cases, even lie on
14 behalf of people towards whom they are biased or with
15 respect to whom they are not impartial.

16 This Court indeed has recognized in *Davis v.*
17 *Alaska* that the bias of a witness is always relevant in
18 reflecting on the credibility of a witness. We all know
19 that the job of a jury is not easy. Jurors are selected
20 on the basis of their lack of knowledge of the
21 individuals involved, their lack of association with any
22 of the witnesses or the parties, and usually the lack of
23 knowledge of the case. They are picked in this respect,
24 placed in a very difficult position, and told: Judge
25 the credibility of a witness.

1 I submit that when we get down to the fine
2 machinery of the truth-finding process, that it is
3 extremely important to give to those jurors the tools
4 that they need to do this job and to assess the
5 credibility of witnesses. To announce, as the Ninth
6 Circuit did, that evidence of bias of this sort should
7 not be used, is to in effect leave the jury in the dark
8 on a very, very critical point at issue in a case.

9 Now bias, however, as this Court knows --

10 QUESTION: Mr. Trott, can I ask you a question
11 here? You emphasize the bias aspects so heavily,
12 supposing that the witness and the defendant were not
13 members of the same organization; that merely the
14 witness was a member of an organization that professed
15 perjury and all the rest of it. Would your argument
16 still apply?

17 MR. TROTT: Yes. I believe that evidence
18 showing that type of bias, that type of attitude toward
19 the court process itself, would be admissible to give a
20 jury a handle on the context of the --

21 QUESTION: By bias, then, you do not
22 necessarily mean bias in favor of the defendant? You
23 just mean bias against the administration of justice?

24 MR. TROTT: Yes. And that would more
25 properly, I think, be characterized as an attitude

1 toward the proceeding itself and to the administration
2 of justice. I believe under those circumstances the
3 correct approach --

4 QUESTION: Are there any cases that adopt that
5 definition of bias? I always thought bias meant in
6 favor of one party or the other.

7 MR. TROTT: Well, that is why I say I think it
8 would more properly be characterized as an attitude
9 toward the court proceeding. If one would read Devitt
10 and Blackmar, for example, the jury instructions, one
11 would see that a juror is told that an attitude toward
12 the proceeding itself is something that can be taken
13 into account.

14 Analytically, I think one would approach that
15 pursuant to Rule 401, and the question would simply be
16 whether or not this evidence is relevant, whether it has
17 any tendency to make more likely or less likely a fact
18 in contention. And as is pointed out in almost all the
19 cases, the attitude of witnesses is a fact of contention
20 in a case like this.

21 QUESTION: But, counsel, can we not assume
22 that a defendant is opposed to the court? Can we not
23 assume that the defendant will just as leave not have
24 the court around?

25 MR. TROTT: I think that is a fair assumption,

1 yes, sir.

2 QUESTION: Well, I do not understand what your
3 point is here.

4 QUESTION: Your point is directed to the
5 witness, is it not?

6 MR. TROTT: Yes. And I believe that the
7 appropriate test --

8 QUESTION: Well, the witness was a convicted
9 felon, wasn't he?

10 MR. TROTT: Witness Mills, or witness Ehle?

11 QUESTION: One of them was, wasn't he?

12 MR. TROTT: Yes.

13 QUESTION: I mean, he doesn't like courts
14 either.

15 MR. TROTT: This is an array of felons that
16 were involved in this. There's no question about
17 that.

18 QUESTION: And they've been in a lot of
19 courts.

20 MR. TROTT: But I believe that the proper
21 approach, as opposed to the approach, with all due
22 respect, taken by the Ninth Circuit, is to ask whether
23 the group in question has the attributes and the
24 characteristics under the rule of relevancy that would
25 cause a sensible person to draw a conclusion that

1 membership in that group might provide a basis for lack
2 of partiality.

3 As I was indicating, usually this comes in the
4 form of circumstantial evidence. Membership in a group,
5 membership in a family, membership in a business firm,
6 any number of varieties, is usually regarded as a
7 sufficient basis for the inference of lack of
8 partiality.

9 QUESTION: Was the witness who gave this
10 information to the court and the jury then impeached
11 with his criminal record?

12 MR. TROTT: Yes.

13 QUESTION: So the jury had before them the
14 pros and the cons about the credibility of the person
15 who was giving this information?

16 MR. TROTT: Yes. Mr. Mills himself testified
17 that he was in jail at the time he had the relevant
18 conversations with Mr. Ehle. So the context in which he
19 ought to be viewed came out very early on direct
20 examination.

21 Ordinarily evidence like this requires an
22 inference. A member of a group, you draw the inference
23 that the member may be partial toward other members, and
24 therefore the inference that there's possible bias is
25 proper. The interesting aspect of this case is that it

1 is not necessary to draw that inference.

2 It was admitted almost from the beginning in
3 this case that it would be proper to show that the
4 witness and the Respondent were members of the same
5 group. And I suppose that it would therefore be proper
6 to infer that they might be partial towards each other,
7 and therefore bias might exist.

8 The confusing part of this case is that the
9 agreement is that it is all right to speculate on
10 whether or not the bias exists, but somehow it is not
11 all right to be able to prove that by direct evidence
12 that these people have somehow agreed that they will go
13 into court and commit perjury.

14 So the problem with this evidence is, in one
15 strange way of characterizing it, it is too probative.
16 We allow a jury to speculate that members of a law firm
17 might be biased towards each other because of a
18 financial interest in testifying in court. We allow a
19 jury to speculate that members of a family may be biased
20 against each other.

21 But when we come to a group like this, somehow
22 we now find out that not only we would allow that
23 speculation, but we will not allow proof of the fact. I
24 believe --

25 QUESTION: Mr. Trotter, may I ask another

1 question there? Do you think when you're impeaching a
2 witness, you first question and ask him something on
3 cross-examination, if he denies it, then you come back
4 on rebuttal and you offer evidence to show he was lying
5 when he denied it.

6 Do you think that every question that is
7 permissible as cross-examination of the witness itself
8 can also support rebuttal evidence? Or do you think
9 there are some cases in which you must take the answer
10 and live with it?

11 MR. TROTT: There are many cases where one
12 must take the answer. The question is whether or not it
13 is a collateral matter or one of consequence. The rule
14 with respect to bias and credibility is that is always a
15 matter of consequence, and therefore the subject of
16 extrinsic evidence in case the facts are denied by the
17 witness.

18 QUESTION: So that if it weren't this kind of
19 an organization, but membership in some say political
20 group or some literary society or something like that,
21 if the man denied -- whenever he denies that he's also a
22 member of the same organization as the defendant, it is
23 your submission that that can always be rebutted on
24 rebuttal evidence by collateral evidence?

25 MR. TROTT: Yes, Your Honor, if the Court

1 believes, applying the proper test under Rule 401, that
2 the evidence is relevant and does not trespass on the
3 escape valve provided by 403.

4 QUESTION: Well, I am assuming it's always
5 sufficiently relevant to justify the question on
6 cross-examination.

7 MR. TROTT: Yes. It's our position that under
8 those circumstances, the issue of credibility of
9 witnesses being so important in the pursuit of the truth
10 that extrinsic evidence ought to be allowed to rebut the
11 denial of the witness under oath.

12 QUESTION: Well, the Federal Rules of Evidence
13 leave a fair amount of discretion in this area to the
14 district court, don't they?

15 MR. TROTT: Yes, they do, quite a lot of
16 discretion.

17 QUESTION: And the district court allowed this
18 evidence in.

19 MR. TROTT: The district court conducted
20 lengthy hearings in chambers out of the presence of the
21 jury, and in our view properly applied both the test of
22 401 and 403 to the evidence, and cut out, as I indicated
23 before, the characterization of the group as the Aryan
24 Brotherhood in the interest of making sure that that
25 potentially prejudicial name somehow didn't infect the

1 case.

2 QUESTION: Suppose you had a civil case, the
3 redistricting of a state, for example, and a person
4 testifies as an expert to help make the plan, could he
5 be on cross examination asked and required to answer
6 that he had previously been a member of the republican
7 or democratic state central committee and active in the
8 party politics of that party?

9 MR. TROTT: The answer to the question is yes,
10 and I believe so for the following reasons. The test,
11 again, to be applied is whether or not that fact would
12 provide a sufficient predicate for the inference that
13 there may be some sort of partiality for or against the
14 party. And again, the question is admissibility not
15 weight of the evidence, and certainly anybody on the
16 other side would be free to adduce evidence that would
17 indicate the inferences were not fair.

18 But the question is relevance, and I think
19 latitude ought to be given to trial judges who are on
20 the spot who can get a feel for what is going on, for
21 the tenor of the case, and for the jury to make these
22 determinations.

23 If the evidence is relevant -- and I believe
24 evidence of bias is relevant to credibility which is
25 always a fact of consequence -- that ought to be

1 communicated to the jury.

2 QUESTION: May I ask, just to be sure I've
3 gotten your position: Wouldn't it be sufficient for the
4 Government to prevail in this case to say, as Justice
5 Rehnquist suggested, that this is an area within the
6 discretion of the judge, and sometimes he lets extrinsic
7 evidence in and sometimes not. Or are you asking us to
8 say it must always be admitted?

9 MR. TROTT: I believe that Mr. Justice
10 Rehnquist was describing the test that we would like to
11 see. We believe the trial judges ought to be given wide
12 latitude, that the latitude was appropriate in this
13 case, and that viewed from the context of an abuse of
14 discretion, the actions of the judge in this case were
15 not only proper but laudatory in the sense that the
16 judge was extremely concerned about the ability of the
17 jurors to examine this evidence and determine whether or
18 not it was accurate.

19 In a sense, the Ninth Circuit has essentially
20 told the trial judges within the circuit that they must
21 tie their hands and allow a conspiracy to obstruct
22 justice and to commit perjury to happen in front of them
23 and really to do nothing about it until the victim is
24 produced in the sense of a skewed verdict.

25 QUESTION: I suppose the jury was free to

1 disbelieve that evidence, the impeaching evidence, on
2 the ground that the man had a bad criminal record and
3 was not trustworthy.

4 MR. TROTT: Absolutely. The entire array of
5 possibilities was available. The jury again had a sense
6 of the attitude of the witness, the demeanor of the
7 witness on the stand, the manner in which he testified,
8 a better sense of the context, and as they are with all
9 evidence, the jury was free to --

10 QUESTION: Of course we have no way of knowing
11 whether they decided to disbelieve all of them, do we?

12 MR. TROTT: All we know is what the verdict
13 was. And it is conceivable, on the basis of the
14 evidence in this case, that they could have thrown them
15 all out. They could have ignored Mills, they could have
16 ignored Ehle, and gone on the basis of the surveillance
17 photos, the fact that there was money, bait money in
18 Respondent's pockets, Susan B. Anthony dollars in the
19 man's pocket; that he was arrested a short time after
20 the robbery. It is conceivable a jury could have
21 ignored the whole shooting match; that's correct.

22 QUESTION: What if the question that was asked
23 had been answered yes, do you believe to a secret type
24 of prison organization, yes? What would have been the
25 next question?

1 MR. TROTT: And is it not true that two tenets
2 of that organization are, one, that under oath you shall
3 deny the existence of the organization; and two, that
4 one member shall commit perjury on behalf of another if
5 called upon to do so?

6 QUESTION: Well, wouldn't the next one have
7 been: Do you know whether the defendant is also a
8 member?

9 MR. TROTT: Well, that could have been in
10 there.

11 QUESTION: If you're going to talk about bias
12 in favor that he's partisan towards the defendant, that
13 witness is, you should -- I would suppose you would want
14 to say they are both members and, hence, we support each
15 other -- they support each other.

16 MR. TROTT: I would agree.

17 QUESTION: That is the bias part. That's your
18 bias argument. If it's just a credibility thing that
19 one of the tenets of the organization is to lie,
20 wouldn't the court of appeals then have had much more to
21 its opinion than you say it has?

22 MR. TROTT: Well, with all due respect, and
23 not sounding like I'm trying to provide something after
24 the fact, my third question would have been to tie the
25 two together. Because it is true, as I indicated in the

1 questions presented, that there is a link that is
2 involved in the inferences of partiality. Otherwise, it
3 becomes simply a question of credibility.

4 QUESTION: Exactly, and you are making a
5 partiality argument --

6 MR. TROTT: Yes.

7 QUESTION: -- primarily, rather than a
8 credibility argument.

9 MR. TROTT: That's right. That is correct.
10 This is a partiality question.

11 QUESTION: So you would really want to -- And
12 that's why I suppose you asked, when you called -- who
13 did you call back? You called --

14 MR. TROTT: Mr. Ehle, himself, came back.

15 QUESTION: Yes, you called him back and he
16 said that Mills and the defendant were both members.

17 MR. TROTT: That's right. That was the
18 necessary linkage to showing bias. Bias is a two-way
19 proposition. I don't believe you can have bias in a
20 vacuum in the sense that it's understood as a term of
21 law in the Rules of Federal Evidence.

22 But I can conceive of no policy reasons -- and
23 I find it hard to believe that this Court in
24 promulgating the Federal Rules of Evidence, and Congress
25 in working on the rules and making them tools with which

1 judges approach their tasks, could have conceived that
2 this ought to be the result; that somehow the operation
3 of those rules should deprive the jury of this evidence.

4 Now the fear, of course, that was being
5 articulated that is the undercurrent in the Circuit's
6 opinion is that somehow the jurors will attach to that
7 evidence itself, somehow decide these are all bad
8 people, and find a verdict of guilt on the basis of
9 whether or not they are bad people, rather than whether
10 the evidence supports --

11 QUESTION: Mr. Trott, may I follow up on
12 Justice White's question? I was just looking at part of
13 the examination that is quoted in your brief. It may
14 not be the whole thing. But I don't find that you asked
15 if they're both members of the organization. You just
16 asked him about the organization.

17 QUESTION: Well, that's because he denied he
18 was one, he was a member.

19 MR. TROTT: He denied he was a member of the
20 organization.

21 QUESTION: But was he asked whether the
22 defendant was a member of the organization? Or was that
23 merely brought out when you brought in your rebuttal
24 witness?

25 MR. TROTT: I believe it was, Your Honor,

1 but--

2 QUESTION: Not in the part of the brief that
3 the Court of Appeals quoted.

4 MR. TROTT: Mr. Justice White, I ought to have
5 my finger on that particular part of it, but I do know
6 that that was part of the preliminary discussions and
7 the offer of proof. Once the man denied the very
8 existence of the organization, I think it was
9 appropriate to assume that he would then deny -- he
10 denied any knowledge of the organization. But that was
11 a sufficient predicate for then allowing the extrinsic
12 evidence to come in as rebuttal to indicate that, yes,
13 they did belong, and there was such an organization, and
14 these were the tenets.

15 I believe that was sufficient to trigger the
16 admissibility of the extrinsic evidence on this point.

17 As I was saying, the fear is of course that
18 somehow the jury is going to be mislead by all of this
19 evidence, but I would submit that the court in this case
20 appropriately applied 403, applied the balancing test,
21 and came to a determination that the probative value,
22 the importance of this evidence, outweighed its
23 potential prejudicial effect.

24 QUESTION: General Trott, your submission on
25 the bias prong of your argument, I take you would be the

1 same if the two had been members of an Elks Lodge which
2 had no tenets about perjury or anything else?

3 MR. TROTT: Yes, that's correct. The question
4 is whether or not that would be a sufficient predicate
5 from which to infer partiality, and then to take the
6 next step.

7 QUESTION: You would leave it up to the
8 jury.

9 MR. TROTT: The jury then decides what weight
10 or effect the evidence has.

11 QUESTION: And then the summing up, counsel,
12 would probably remind the jury of the fact that, either
13 in the redistricting case or a case like this, in the
14 redistricting case he'd remind the jury that they better
15 look closely at the testimony of the expert witness on
16 redistricting because he had been formerly a member of
17 the governing board of one of political parties.

18 MR. TROTT: May I correct myself on one
19 point? Page 36 of the Joint Appendix sets forth,
20 halfway down the page, the following question by Mr.
21 MacIntyre of Mr. Mills:

22 "Q All right. Do you and John, Mr. Abel,
23 belong to any organization together?

24 "A No, I don't.

25 QUESTION: That's Mills, not Ehle, though.

1 MR. TROTT: Yes.

2 QUESTION: Maybe I've got the witnesses mixed
3 up. Isn't Ehle the one who was the alibi witness, or am
4 I wrong? Have I got them backwards?

5 MR. TROTT: Mills is the one who came in and
6 suggested he was lying to get out of jail, and this is
7 the cross-examination of Mills: Do you belong to any
8 organizations together? And he said, No.

9 QUESTION: Right.

10 MR. TROTT: Then Mr. Abel came in -- rather,
11 Mr. Ehle was called back and said, yes, we all do, but
12 we deny it under oath and we commit perjury for each
13 other. But now since I'm a member of the witness
14 protection program, I've broken ranks and that's why I'm
15 giving you this information.

16 I submit that it's bad policy to leave the
17 jurors in the dark on information like this, and to tell
18 judges that their hands are tied. I suggest that it
19 would be more appropriate to allow judges to apply these
20 rules, to analyze them, and to give the jury as much
21 help as they can.

22 There is a suggestion here that somehow the
23 First Amendment is implicated. Quite frankly, I don't
24 think this case has anything to do with the First
25 Amendment. I don't think it's a chilling effect on

1 association to tell groups that subscribe to commit
2 perjury in court that somehow on cross examination that
3 might come out. I don't believe it's a advocacy
4 problem, it's a membership problem, or anything else.
5 And Brandenburg and Scales, cited liberally throughout
6 these papers, are simply in apposition.

7 If the prison sanction for perjury, if the
8 prison sanction for conspiracy to commit an obstruction
9 of justice, is not sufficient to produce a chilling
10 effect on these types of groups, I doubt very much that
11 being cross examined in court is.

12 Unless there are any other questions, I have
13 nothing further.

14 CHIEF JUSTICE BURGER: Very well.

15 Ms. Gomez

16 ORAL ARGUMENT OF MS. YOLANDA BARRERA GOMEZ

17 ON BEHALF OF RESPONDENT

18 MS. GOMEZ: Mr. Chief Justice, and may it
19 please the Court:

20 Just a few minutes ago you heard Mr. Trott
21 tell you about the facts of this particular case. One
22 of the things that he told you was that the facts in
23 this particular case were very important. As you heard
24 the recitation of the facts, there was no reference
25 about the bank robbery itself. That is one of the

1 things that is very important in this case.

2 What we have to keep remembering is that we
3 are talking of a bank robbery trial that was held in the
4 Ninth Circuit, the Central District of California, and
5 yet when we refer to the facts, we talk simply about the
6 facts that happened at the trial, the testimony of
7 Mills, the testimony of Ehle.

8 It is important to keep in mind what it is
9 that we're talking about. We're talking about the
10 rights of a defendant. We're talking about the rights
11 of John Clyde Abel, who was denied a fair trial.

12 QUESTION: Am I mistaken, that I recall some
13 testimony in this case -- or am I confusing it with
14 another -- that they found him in possession of some of
15 the stolen property?

16 MS. GOMEZ: Mr. Abel was found in possession
17 of, I believe, one bait bill and eight Susan B. Anthony
18 dollars. There was testimony during the trial that
19 Gramard, who was one of the defendants in the case, had
20 owed money to Mr. Abel, and the inference, or at least
21 the argument to the jury was that Mr. Gramard had, after
22 the robbery, had paid the money that he owed to Mr.
23 Abel. That was basically the extent of the evidence
24 against Mr. Abel.

25 Mr. Trott indicated that there was extensive

1 evidence against him in the form of surveillance
2 pictures, identifications, and that just isn't true. As
3 a matter of fact, what happened is that there were some
4 bank tellers that came in, identified Mr. Abel, or had
5 identified Mr. Abel from a photo spread, and it was
6 their testimony that the person that they claimed was
7 Mr. Abel was a person who was standing in the middle of
8 the lobby of the bank, that he was the one that was
9 issuing all of the orders, he was the one that was
10 wearing boots, and that he was the only one of the four
11 robbers wearing boots, he was the one with the cigar in
12 his mouth -- when Ehle, the government witness,
13 testified, Ehle testified that he was the one standing
14 in the center of the lobby, he was the one smoking the
15 cigar, and he was the one wearing the boots and issuing
16 all of the orders.

17 So that the evidence against Mr. Abel was not
18 clear at all. Actually, there was a conflict between
19 what the bank tellers were saying and what the key
20 government witness, Mr. Ehle, was saying.

21 QUESTION: On this impeachment question,
22 instead of having a scenario that's been described in
23 the record, suppose the impeaching witness, when called
24 on the stand, related that he had had a conversation
25 with this man, the defendant, at some time shortly

1 before the trial in which he said he was going to lie
2 and commit perjury on the stand in the hopes that it
3 would get him off. Would that be admissible to impeach
4 him?

5 MS. GOMEZ: No, because the defendant did not
6 testify in the case. Had the defendant testified --

7 QUESTION: No, I am speaking of the witness.

8 MS. GOMEZ: Yes, I believe.

9 QUESTION: Impeaching the witness.

10 MS. GOMEZ: Yes. Assuming -- to make sure I
11 understand the facts correctly -- that the key
12 government witness had in his offer of proof that he had
13 spoken to Mills, the defense witness, before the trial,
14 and Mills had indicated to him that he was going to lie,
15 I do feel that that would have been proper testimony,
16 proper cross-examination and rebuttal evidence.

17 In fact, I think that is the proper way to
18 proceed, and that is exactly the way the defense
19 proceeded in the case. Our information was that the key
20 government witness had indicated prior to trial that he
21 was going to go to the trial and commit perjury; that he
22 was going to lie and incriminate John Abel as one of the
23 robbers so that he, the government witness, would be
24 able to get a deal with the government so he would
25 basically be able to walk out of the courtroom a free

1 man. And that's exactly the type of impeaching evidence
2 that was offered by the defense.

3 I am very glad that you asked that question,
4 because that brings me to the most important point of
5 the Ninth Circuit argument. That is, that if the
6 impeachment is personal -- that is, if the witness
7 himself has indicated that he will lie, or if the
8 witness himself has taken a perjury oath, or if a
9 witness has lied in the past -- all of that is
10 permissible under the Ninth Circuit opinion.

11 QUESTION: But you think the evidence, the
12 testimony that they're both members of a group which is
13 sworn to do that, is different from what we have just
14 been discussing?

15 MS. GOMEZ: That is exactly the objection that
16 we have. That is, that the impeachment of this case
17 went not -- the impeachment of Mills was not because he
18 was a proven liar, not because he had lied, but because
19 he allegedly belonged to an organization; and that that
20 organization required its members to lie.

21 So the impeachment was on the basis --
22 essentially what it came down to was on the basis of
23 associating with bad people. Because Mills was reputed
24 to be friends, be acquaintances, belong to an
25 organization with bad people, he was being impeached.

1 QUESTION: Well, that certainly wasn't the way
2 I understood the district court's ruling. Just looking
3 at it from a perjury point of view rather than a bias
4 point of view, not the idea that these are generally bad
5 people, but that one who belongs to an organization
6 which is committed to perjure -- members committed to
7 perjure themselves can be presumed, for purposes of an
8 evidentiary ruling, to subscribe to the tenet of the
9 organization. Now what is unreasonable about that?

10 MS. GOMEZ: I am not sure that I understood
11 the question. I understood the Ninth Circuit opinion to
12 say that if there was sufficient foundation to establish
13 that Mills had in fact lied, or that in some way there
14 was an indication that he subscribed to the beliefs of
15 the organization, then that evidence would have been
16 permissible.

17 QUESTION: But my question is, the Ninth
18 Circuit put a much higher threshold on the thing than
19 the district court. It seemed to me that it was
20 virtually requiring evidence to convict the witness
21 under the Smith Act. And the district court took the
22 position that, from a point of view of an evidentiary
23 ruling where you don't have two weeks to try the witness
24 and you're not trying to try the witness, this sort of
25 affiliation is sufficiently relevant to go to the jury.

1 What's the matter with that?

2 MS. GOMEZ: I believe that that is the
3 government's interpretation of the Ninth Circuit
4 opinion, and I think it is a false reading of the Ninth
5 Circuit opinion. I think the government is reading the
6 opinion much too broadly.

7 There are references in the Ninth Circuit
8 opinion to Scales and Brandenburg, and it is
9 understandable why the government may have misread the
10 Ninth Circuit opinion. However, a very close reading of
11 the opinion, I think, establishes that the reason that
12 the Ninth Circuit made reference to these First
13 Amendment cases was not to say that before a witness can
14 be impeached, that impeachment must rise to the level of
15 a conviction.

16 Rather, what they were saying was, first they
17 reached their decision -- and that is, that credibility
18 is personal, and that a person cannot be impeached
19 except if there is proper foundation to establish that
20 his own personal credibility is being attacked.

21 QUESTION: Let me ask you this. What is wrong
22 with the view, as I understood the district court to
23 express it, that a person belonging to an organization
24 which has committed its members, and one of the tenets
25 of membership is to perjure itself, what is wrong with

1 the district court allowing that evidence to go before
2 the jury when the witness testified? The Ninth Circuit
3 said it couldn't. You say the Ninth Circuit is right.
4 Why is the Ninth Circuit right?

5 MS. GOMEZ: They are right because, as I
6 stated earlier, the impeachment is because of his
7 associations, and not because the individual has ever
8 expressed any willingness to lie.

9 QUESTION: Well, why isn't it a fair inference
10 for a person who belongs to an organization that one of
11 the membership tenets is that we perjure ourselves, that
12 that person is willing to perjure themselves?

13 MS. GOMEZ: Well, that is what the Ninth
14 Circuit basically analogized to Scales and Brandenburg,
15 and it says like for example in Scales, there is much
16 talk of the Fifth Amendment due process and the fact
17 that the Smith Act basically offended the rights of the
18 person not to be convicted unless -- just because of
19 sympathy because of association.

20 The person had to be more directly involved.
21 There is the same situation here. We are talking of a
22 person who may have joined --

23 QUESTION: Even though we are just talking
24 about whether a piece of evidence can go up to the jury,
25 rather than whether the witness should go to jail?

1 MS. GOMEZ: Certainly, because we are talking
2 of the great prejudice to the defendant in this case.
3 We have a critical defense witness who is being
4 impeached not because he is a liar, not because he has
5 indicated he will lie, but because it is reputed that he
6 is a member of an organization that requires his members
7 to lie. No indication he has accepted the tenets. No
8 indication that he follows the creed. And yet he is
9 being impeached. He is being portrayed as a liar, as a
10 cheater, as a thief, as a killer, because that was the
11 rebuttal testimony.

12 QUESTION: Ms. Gomez, you probably heard my
13 question to General Trotter about the civil case. Let's
14 take it out of the criminal. A redistricting case and
15 the expert witness testifying about what the districts
16 ought to be, do you think he could not be cross-examined
17 to ask wasn't he formerly a member of the Republican
18 National Committee, or the Republican State Central
19 Committee, or whatever?

20 MS. GOMEZ: I think that he can be asked that,
21 assuming --

22 QUESTION: Well, that's association. Some
23 people might think that was a bad association, and some
24 might not think it.

25 (Laughter.)

1 But the jury is left to decide whether that
2 affects his truth telling.

3 MS. GOMEZ: I think there are several points
4 that I would like to make in connection with that. One
5 is, assuming proper foundation he can be asked that. We
6 could have a situation, for example, of someone who
7 initially joined one party, very quickly did not agree
8 with the, for lack of a better term, the tenets or the
9 beliefs of the Republican Party, switched over to the
10 Democratic Party. So I think first of all we need the
11 foundation that he, when he was a republican, did follow
12 the beliefs of the Republican Party. Assuming that we
13 have that, then, yes, the person can cross-examine
14 regarding that.

15 Then we get to the secondary question. Now
16 let's assume the person denies that. Then, can the
17 examiner come back and present rebuttal testimony? At
18 that point we get basically to Justice Stevens' question
19 that was asked earlier of Mr. Trott. The question is:
20 Are we talking of credibility? Are we talking about
21 bias?

22 Mr. Trott said we're talking of --

23 QUESTION: But they are very closely related,
24 are they not?

25 MS. GOMEZ: They are very closely related.

1 QUESTION: The bias comes from, possibly, the
2 value of the testimony, the credibility.

3 MS. GOMEZ: That is certainly true, and I
4 would agree with Justice Stevens that one of the ways to
5 make the distinction, when we're talking of credibility,
6 we're talking of the individual. The individual lying,
7 or the individual testifying, his demeanor and so on.
8 Bias is basically the relationship between that
9 individual and someone else.

10 So that if the question is: Do you belong to
11 an organization, alone, do you belong to an organization
12 that requires you to lie? We're not talking of bias.
13 We're talking of credibility. We're talking about
14 whether that person is lying on the stand. Bias would
15 have to be the relationship between that individual and
16 someone else.

17 Now Mr. Trott said, when we're talking of bias
18 or credibility, you can bring in rebuttal evidence.
19 That is totally contra to the Federal Rules. It is
20 contra to all cases that I am aware of in that area.
21 Specifically --

22 QUESTION: But counsel, in this case didn't
23 the witness say, I did not belong to that
24 organization?

25 MS. GOMEZ: Yes, he did.

1 QUESTION: And don't you have a right to test
2 the truth of that statement?

3 MS. GOMEZ: I do not believe so. In this
4 case--

5 QUESTION: Why not?

6 MS. GOMEZ: In this case --

7 QUESTION: Why not?

8 MS. GOMEZ: Two reasons. One is, in this
9 particular case the person I believe -- excuse me.
10 There could have been impeachment that he did belong to
11 an organization along with the defendant. Okay. I
12 don't believe that --

13 QUESTION: My point is --

14 MS. GOMEZ: -- the government was in error.

15 QUESTION: -- can't you test out testimony to
16 find out whether it is a lie or not, without anything
17 more?

18 MS. GOMEZ: I have no objection to the
19 question that was asked --

20 QUESTION: There is no right to lie.

21 MS. GOMEZ: Yes, Your Honor. I have no
22 objection to the initial question that was asked by the
23 government before the sidebar conference. That was the
24 question of, isn't it true that you belong to the same
25 organization as the defendant.

1 I think that was a proper question, and once
2 he denied it I think it was proper for the government to
3 bring in rebuttal evidence that they were both members.
4 And the reason that I think that is proper is because
5 that goes to bias.

6 QUESTION: Isn't that what happened here?

7 MS. GOMEZ: No, Your Honor. They went
8 further.

9 QUESTION: Well, now, tell me the
10 difference.

11 MS. GOMEZ: What they did -- that was
12 permissible. Now following that, what they did is they
13 asked questions such as, not only is it true that you
14 belong to the same organization, but they added
15 adjectives. Isn't it true that you belong to a secret
16 prison organization? Conoting nefarious, illegal,
17 odicus, whatever.

18 Then they asked, isn't it true that this
19 organization requires that you deny its existence?
20 Isn't it true that this organization has restrictive
21 membership? Isn't it true that as a member of this
22 organization, you are required to lie?

23 The rebuttal testimony went even further than
24 that. Not only did it prove all of the things I have
25 just mentioned, but they added that the members were

1 required to cheat, that the members were required to
2 steal, that the members were required to kill for each
3 other. All of those questions weren't even asked on the
4 cross-examination originally, but they were proven on
5 rebuttal.

6 That is the difference. If what they wanted
7 to do was establish bias, the first question that they
8 asked: Isn't it true that you belong to the same
9 organization as Mr. Abel? Was enough to show bias, and
10 they could have proven that on rebuttal.

11 QUESTION: And they couldn't have done
12 anything more?

13 MS. GOMEZ: No. In this particular case --I
14 can envision in some other case that happening, not in
15 this case.

16 QUESTION: But in this case, he couldn't have
17 asked any more questions?

18 MS. GOMEZ: They could have asked other
19 questions such as their friendship, their having served
20 time together, socializing, having their wives know each
21 other, certain questions like that could have been
22 asked. Regarding the organization, no additional
23 questions should have been asked.

24 QUESTION: Well, on cross-examination the
25 question was: Do you belong to any organizations? And

1 the answer is: No. You don't suggest that if they
2 wanted to ask some impeachment witness some other
3 questions beyond that, there would have had to have been
4 a foundation laid on cross-examination running through
5 what kind of an organization is it? Well, he says, I
6 don't belong to any organization.

7 MS. GOMEZ: Fight. Now what I'm talking
8 of --

9 QUESTION: Now you concede that you could ask
10 the question on cross: Did you and the defendant belong
11 to the same organization?

12 MS. GOMEZ: Yes, I do.

13 QUESTION: And if the answer is no, you can
14 call an impeaching witness?

15 MS. GOMEZ: That is correct.

16 QUESTION: Who would say, yes, they did belong
17 to an organization. Can you then ask the -- you say you
18 cannot then ask the impeaching witness what kind of an
19 organization is it?

20 MS. GOMEZ: That's correct.

21 QUESTION: Well, I would think it would be
22 very relevant to find out what kind of an organization
23 it is to test out the extent of the bias.

24 MS. GOMEZ: Maybe I'm misunderstanding the
25 question. I think it would have been permissible to

1 ask, for example, is it a prison organization? Or is it
2 like an Elks Club?

3 QUESTION: Well, tell me what kind of an
4 organization is it?

5 MS. GOMEZ: Right.

6 QUESTION: And then he answers the question.
7 He says, well, it's a secret organization where the
8 members agree to lie for one another.

9 MS. GOMEZ: Now we're getting past --

10 QUESTION: That's a description of the -- and
11 that seems to me a very, very, very relevant question to
12 the bias issue. They not only belong to an
13 organization, but the organization, one of the tenets of
14 the organization is you lie for each other. Isn't that
15 even a -- if you concede that you can call the
16 impeachment witness at all, I would think he could be
17 able to testify to that.

18 MS. GOMEZ: We're talking basically at two
19 levels. One is whether the person can ask about what
20 type of organization it is. Is it an Elks Club? Is it
21 a Boy's Scout Club?

22 QUESTION: You just ask the question. You
23 just ask the witness the question, and he answers the
24 question. You would want the answer stricken?

25 MS. GOMEZ: I am saying it should not get into

1 what are the tenets of the organization. I think that's
2 the distinction. What type of organization? It's a
3 prison organization. What are the tenets? Now we're
4 getting into this is what the members are supposed to
5 do.

6 QUESTION: Is it a secret organization? Could
7 you ask that?

8 MS. GOMEZ: I have problems with that in terms
9 of the prejudice, because "secret" of course connotes
10 that it's illegal, certainly, that they must be doing
11 something wrong.

12 QUESTION: Not all secret organizations are
13 illegal.

14 MS. GOMEZ: It connotes that. It is possible
15 that that is not true, but I think it connotes that.

16 QUESTION: There are a lot of fraternities
17 that would resent the idea that they may be illegal.
18 They are secret.

19 MS. GOMEZ: And I think the --

20 QUESTION: So couldn't you, if you asked the
21 witness were you and the defendant a member of Skull &
22 Bones at Yale, no, well you call in people. Were they
23 members of Skull & Bones? Yes. Tell me about Skull &
24 Bones. You were in it, weren't you? Yes. Now can you
25 describe Skull & Bones and say it's a secret

1 organization? We never tell anybody anything about
2 it?

3 MS. GOMEZ: I'm afraid I'm not familiar with
4 Skull & Bones.

5 QUESTION: Let's take the Ku Klux Klan,
6 then.

7 MS. GOMEZ: Very well.

8 QUESTION: That may vary from one place to
9 another, but could a person be asked are you a member of
10 the Ku Klux Klan?

11 MS. GOMEZ: I think that when we're talking of
12 the KKK, now, we're talking of great prejudice in terms
13 of the name that is being used. I think that there
14 would be problems in terms that there would have to be a
15 weighing procedure in terms of --

16 QUESTION: Do you mean there's any question,
17 any doubt that he could be required to answer if that's
18 being offered for purposes of impeachment?

19 MS. GOMEZ: Well, I think it depends on what
20 the exact facts are. If we're talking of --

21 QUESTION: Well, then, could he be asked, are
22 the tenets of the Ku Klux Klan antisemitic and
23 anti-Negro and anti-a lot of other things?

24 MS. GOMEZ: I believe that all of those
25 questions can be asked if there is sufficient foundation

1 for them. Just like in this case, had there been some
2 evidence that Mr. Mills had accepted the tenets, had
3 taken an oath, those questions of the Aryan Brotherhood
4 of the secret prison organization could have been asked
5 of him.

6 QUESTION: Well, Ms. Gomez, it does seem that
7 the court below and your argument today is treating the
8 questions of a witness going to bias or partiality
9 almost like a trial on a substantive offense, that you
10 have to prove beyond a reasonable doubt that the witness
11 holds certain beliefs before the jury is allowed to
12 weigh that fact into its credibility determination. And
13 yet, doesn't our jury system contemplate that jurors can
14 consider a whole range of factors in deciding whether to
15 believe a particular witness, whether they have a shifty
16 look in their eyes, their manner of speech, anything,
17 including a membership in an organization which is
18 shared by the defendant in question?

19 I think that I am concerned about the
20 strictness of your view of factors that go to
21 credibility, basically.

22 MS. GOMEZ: I think what it really boils down
23 to is that the Ninth Circuit believes, and we certainly
24 would agree with that position, that before a witness
25 can be impeached on the basis of his credibility, that

1 there must be a foundation to show that he is the one
2 that holds these beliefs, not that he is associated with
3 someone that has those beliefs.

4 I don't think that is the same standard as is
5 used in a trial for purposes of conviction. Because
6 we're not talking of proof beyond a reasonable doubt
7 that he has those beliefs. I think any type of proof
8 that he holds those beliefs. If Ehle, for example, had
9 said we're members. I was there when he took an oath.
10 Or I was there when he said he is a good member and he
11 is going to follow the beliefs of the secret prison
12 organization. I don't think that would necessarily be
13 proof beyond a reasonable doubt, but I think that would
14 be sufficient for the Ninth Circuit to believe Mills
15 could be impeached on the basis of that evidence.

16 QUESTION: Ms. Gomez, suppose in this
17 particular case the question was: Were you and this man
18 members of Bank Robbers Anonymous?

19 (Laughter.)

20 Could they have proceeded?

21 MS. GOMEZ: And we are assuming there is
22 proper foundation for that? Is that correct?

23 QUESTION: Yes. To ask the question.

24 MS. GOMEZ: Well, Bank Robbers Anonymous --

25 QUESTION: I don't know what foundation you

1 have to ask on cross-examination for what organizations
2 you belong to.

3 MS. GOMEZ: I think that there is a great
4 prejudice in asking that. To begin with, we're talking
5 of someone who is a recovering bank robber.

6 QUESTION: Well, I would assume that most
7 questions asked by a prosecutor are damaging to the
8 defendant.

9 MS. GOMEZ: I think we can assume that what
10 I'm talking about is undue prejudice versus the
11 probative value.

12 QUESTION: Well, the question is: Are you a
13 member of the organization known as Bank Robbers
14 Anonymous?

15 MS. GOMEZ: I think that we would have
16 problems with that question under Rule 404. The reason
17 for that is because it appears that the purpose of that
18 question is to show that because he has robbed banks
19 before, that he is likely to have robbed this particular
20 bank.

21 QUESTION: I don't see anything that said he
22 had robbed a bank before.

23 MS. GOMEZ: The fact that he --

24 QUESTION: It was an organization known as
25 Bank Robbers Anonymous.

1 MS. GOMEZ: Right. And that term connotes
2 that he is a recovering bank robber, which means that he
3 would have robbed banks in the past.

4 QUESTION: All he would have to do is say no.

5 (Laughter.)

6 MS. GOMEZ: I understood the question to be,
7 what if he says no, can you prove that?

8 QUESTION: Yes.

9 MS. GOMEZ: And I think that is where my
10 answer relates to that, that I think there is a problem
11 to begin with in asking the question, and secondly in
12 proving it.

13 QUESTION: Well, one thing I agree with, it
14 would hurt your defendant. That I agree with.

15 MS. GOMEZ: Well, it is more than just hurting
16 the defendant. We are talking of the prejudice, the
17 type of atmosphere that is created especially in a case
18 where the defendant does not testify, which is what
19 happened here, because Mr. Abel did not put his
20 credibility at issue.

21 He sat through the whole trial silently at
22 counsel table while he heard references to the fact that
23 he was not credible, to the fact that he was a liar,
24 that he was a thief, that he was a killer, all of these
25 references were being implied when he did not even put

1 his credibility in issue. That is what the real issue
2 in this case is. It is not just prejudice, but undue
3 prejudice to the defendant when he didn't even
4 testify.

5 QUESTION: May I ask you --

6 QUESTION: Would it have been different if he
7 had testified?

8 MS. GOMEZ: I think in terms of the
9 admissibility of certain questions with regards to him,
10 yes, it would have been different; had he put his
11 credibility in issue, because --

12 QUESTION: Did they ever ask him that
13 question?

14 MS. GOMEZ: They could have asked him whether
15 or not --

16 QUESTION: Are you a member of that --

17 MS. GOMEZ: -- whether or not he was a member
18 of the organization? Yes.

19 QUESTION: They could have asked him that.
20 They couldn't ask the question that?

21 MS. GOMEZ: They could ask the witness, and
22 they did ask the witness that, and I have no objections
23 to them asking whether or not they belonged to the same
24 organization.

25 QUESTION: Be careful now. I'm talking about

1 a hypothetical.

2 MS. GOMEZ: I'm sorry. The Bank Robbers
3 Anonymous hypothetical?

4 QUESTION: Yes.

5 MS. GOMEZ: Again, I think it's the same
6 situation with the witness and the defendant in terms of
7 the prejudicial value. Again we're talking of 404, the
8 fact that if he robbed a bank before and that is the
9 bank robbery charge now, that he is more likely to have
10 committed the bank robbery that is at issue.

11 QUESTION: Ms. Gomez, may I ask this broader
12 question? Do you view the decision of the Ninth Circuit
13 Court of Appeals as being a constitutional one?

14 MS. GOMEZ: I do not see it as being a
15 constitutional opinion with regards to the First
16 Amendment. Certainly if we're talking of a fair trial,
17 in that sense it is constitutional.

18 QUESTION: But how would you characterize the
19 rule, the constitutional rule?

20 MS. GOMEZ: If we're talking a
21 constitutional --

22 QUESTION: Just saying there was no fair trial
23 is not quite enough, is it?

24 MS. GOMEZ: No. I think it is a due process,
25 defendant's due process right to a fair trial. I do not

1 see this as a First Amendment case.

2 QUESTION: I understand that, although there
3 are two First Amendment decisions cited in the opinion.
4 But the Ninth Circuit did hold, as I understood it, and
5 I think you've agreed, that there can be no impeachment
6 by association with a group.

7 MS. GOMEZ: Correct.

8 QUESTION: So is that a constitutional
9 ruling?

10 MS. GOMEZ: I do not see that as
11 constitutional. When they are talking of association, I
12 do not understand that to be the First Amendment right
13 to association. I see that as a term of art, basically,
14 association meaning like guilt by association,
15 "association" meaning being with other individuals.

16 I see their opinion as analogous to a
17 situation where a person is cross-examined regarding
18 his, for example, having a brother who has lied before,
19 having family members who have lied. It's the same
20 situation. The witness is being asked: Isn't it true
21 that you belong to an organization of a bunch of liars?
22 That's the question that was essentially being asked of
23 him.

24 It's the same thing as asking: Isn't it true
25 that your family are a bunch of liars? Or, isn't it

1 true that your family are a bunch of criminals?
2 Certainly I don't think there's any quarrel that a
3 witness cannot be impeached in that manner, that he
4 cannot be asked: Isn't it true that your family are a
5 bunch of liars?

6 Because -- and the reason he can't be is
7 because there has to be evidence that he, himself, is
8 the same way. He, himself.

9 QUESTION: Is this because the answer would
10 have no probative value?

11 MS. GOMEZ: It is because -- yes, because the
12 answer -- well, there is no foundation to ask the
13 question, to begin with. There is no reasonable
14 belief.

15 QUESTION: So does it get down to whether the
16 lawyer asked the right question first?

17 MS. GOMEZ: I'm sorry?

18 QUESTION: You spoke of foundation.

19 MS. GOMEZ: Yes.

20 QUESTION: My inquiry was whether this case
21 gets down finally to whether or not the prosecutor asked
22 the correct question first.

23 MS. GOMEZ: Well, when I'm talking of
24 foundation, I'm talking about is there a good-faith
25 belief for the prosecutor asking that question to begin

1 with? Do they have some information that this person
2 lied? And in this particular case, the Abel case, there
3 was no foundation. There was no evidence that the
4 government had. There was no reason for them to believe
5 that Mills had ever lied, expressed a willingness to
6 lie, had taken an oath, anything relating to lying
7 other --

8 QUESTION: How can you say that? Ehle
9 testified to that.

10 MS. GOMEZ: Ehle testified --

11 QUESTION: And that was brought out in the
12 offer of proof before all this happened.

13 MS. GOMEZ: Ehle did not testify, and there
14 was nothing in the offer of proof, about Mills having
15 lied. The offer of proof in Ehle's testimony were that
16 Mills was a member of the organization, and that the
17 organization required its members to lie. There was no
18 evidence that Mills had ever indicated he would follow
19 the tenets, that he believed in the tenets --

20 QUESTION: Well, but, it seems to me you've
21 got to break it up into two parts. First was the
22 question on cross-examination permissible?

23 As I understand your argument, you really are
24 not objecting to the questions on cross-examination.
25 Rather, you're objecting to the extrinsic evidence, as I

1 understand you.

2 MS. GOMEZ: No, I am objecting to both.
3 Initially, I see nothing wrong with --

4 QUESTION: Well, the court of appeals didn't
5 buy your argument on cross-examination, as I read the
6 opinion.

7 MS. GOMEZ: I believe that they did. I
8 believe that they basically addressed themselves to no
9 impeachment by association. That is the focus of their
10 argument.

11 QUESTION: I see.

12 MS. GOMEZ: But the way I see this case is,
13 first of all, there was nothing wrong with the first
14 question. That is, isn't it true you are a member of
15 the same association as the defendant? I have no
16 quarrel with that. That is a proper question to
17 demonstrate bias.

18 The questioning should have ended there.
19 Instead, the questioning was about the restricted
20 membership, about the oath, the tenets. Those were
21 improper because there was no reason to believe that
22 Mills had accepted the tenets. Assuming now he's a
23 member, there is no reason to believe --

24 QUESTION: Even if the prosecutor had
25 undisputed evidence that he really did belong to the

1 organization but he didn't have it in writing that he
2 had subscribed to the tenets other than by joining it,
3 you would still say the question was improper?

4 MS. GOMEZ: If all they have is that he is a
5 member of the organization, that is not enough under the
6 Ninth Circuit holding for --

7 QUESTION: Oh, I understand the Ninth
8 Circuit. But that would, in your view, not even be
9 enough to ask the question on cross-examination?

10 MS. GOMEZ: That is correct. That would not
11 be enough, unless there was evidence that the witness
12 subscribed to the tenets that he believed in the
13 organization, and certainly it was not enough for
14 rebuttal testimony.

15 QUESTION: Well, when you call your impeaching
16 witness, though, what you're really saying is that he
17 just lied on the stand.

18 MS. GOMEZ: Exactly.

19 QUESTION: He just lied on the stand. I asked
20 him the question, does he belong to an organization, and
21 he said no. Do you belong to an organization with the
22 defendant? No. Call an impeaching witness, he says
23 they do. So what it is is an assertion that he does
24 lie, and he just did.

25 MS. GOMEZ: Exactly, but now we have a

1 situation of basically two people who have lied. Ehle
2 testified --

3 QUESTION: So the jury has to decide which one
4 of them is telling the truth. That is what the jury is
5 for, isn't it?

6 MS. GOMEZ: And that is the function of the
7 jury. But in this case, it was more than that. It was
8 not just showing that someone had lied. It was a matter
9 of showing that all of these individuals for the
10 defense, including the defendant, were liars and
11 cheaters.

12 QUESTION: You have told us that before, and
13 your time is up.

14 QUESTION: I wonder if you might answer, I
15 would think your response to Justice White's question
16 would be that you can't impeach on a collateral
17 matter.

18 MS. GOMEZ: That is correct. That first of
19 all I have problems with the lack of foundation.
20 Assuming a proper foundation, assuming that the
21 government had information from Ehle that he had seen
22 Mills take the oath. Let's assume those facts for a
23 minute. Then I think the government can cross-examine
24 Mills about the oath, but they cannot come back and
25 prove it, and they cannot come back and prove it because

1 of Rule 608(b), which says you cannot prove a collateral
2 matter.

3 CHIEF JUSTICE BURGER: That completes your
4 answer.

5 Do you have anything further, General Trott?

6 ORAL ARGUMENT BY STEPHEN S. TROTT -- REBUTTAL

7 ON BEHALF OF PETITIONER

8 MR. TROTT: Briefly, Mr. Chief Justice.

9 May it please the Court: Essentially we have
10 probably the most decent and fair criminal justice
11 system in the world. It goes way out of its way to
12 protect the rights of everybody, including defendants.
13 I would suggest that the rule established by the Ninth
14 Circuit, if adopted by this Court, injects an element of
15 vulnerability and naivete into the truth-finding process
16 that is absolutely unnecessary, and simply renders our
17 criminal justice system a potential victim of the
18 abhorrent beliefs of groups like the mafia, and the
19 Aryan Brotherhood, and all the rest.

20 I would suggest, also, that unlike some cases,
21 the opinion that you write, the opinion that has already
22 been written by the Ninth Circuit, will be read by the
23 Aryan Brotherhood and similar groups whose main goal in
24 life is to commit crimes and get away with it, not as an
25 interesting essay on the Federal Rules of Evidence or

1 constitutional law, but functionally as a blueprint to
2 get away with what their schemes are all about.

3 QUESTION: Mr. Trott, what is your position on
4 the applicability of Rule 608(b) to this situation?

5 MR. TROTT: It is our position that Rule 608
6 simply is not applicable. It is the proverbial square
7 hole into which this evidence as a round peg is
8 attempting to be put. It is clear that evidence that
9 was 608 evidence would not be attackable with extrinsic
10 evidence if it were denied.

11 However, evidence, as this Court well knows,
12 may be inadmissible for one purpose, and it is
13 inadmissible in that purpose, is admissible for another,
14 and this is simply a question of bias. We don't think
15 608 is controlling.

16 So I would finally simply end by indicating
17 that it is the Government's position that it would be a
18 travesty to require the victims and the witnesses to
19 this bank robbery to have to go back for another trial
20 simply on the basis that the tenets of the -- the
21 perjurious tenets of the Aryan Brotherhood were brought
22 out for the consideration of this jury.

23 I think I might close simply by reiterating
24 that the purposes of the Federal Rules of Evidence as
25 expressed in Rule 102 are to make sure that trials are

1 conducted with fairness to the end that truth and the
2 proper determination of a cause is determined. I
3 believe if the Rules are applied in that way, that this
4 Court will agree that the Ninth Circuit's rule announced
5 in this case was far too sweeping. Unfortunately, if
6 the case is decided in accord with the request of the
7 Petitioner, it must return to the Ninth Circuit for
8 determination with respect to other viable appellate
9 issues which have not been brought to the attention of
10 this Court.

11 Thank you.

12 CHIEF JUSTICE BURGER: Thank you, counsel.
13 The case is submitted. We will hear arguments next in
14 Ake against Oklahoma.

15 (Whereupon, at 11:31 a.m., the case in the
16 above-entitled matter was submitted.)

17 * * *

CERTIFICATION

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#83-935 - UNITED STATES, Petitioner v. JOHN CLYDE ABEL

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BY

Paul A. Richardson

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