OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1640; 84-1700; 84-1704

TITLE UNITED STATES, Petitioner V. MARSHALL MECHANIK, ET AL.; JEROME OTTO LILL, Petitioner V. UNITED STATES; and MARSHALL MECHANIK, aka MICHAEL PATRICK FLANAGAN, Petitioner V. UNITED STATES

PLACE Washington, D. C.

DATE December 2, 1985

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IN THE SUPPEME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 84-1640

MARSHALL MECHANIK, ET AL.; :

- -x

JEROME OTTO LILL, :

Petitioner :

v. : No. 84-1700

UNITED STATES; :

- -x

MARSHALL MECHANIK, aka MICHAEL :

PATRICK FLANAGAN, :

Petitioner :

v. : No. 84-1704

UNITED STATES. :

- -x

Washington, D.C.

Monday, December 2, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 o'clock p.m.

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APPEARANCES:

BRUCE J. ROSEN, ESQ., Madison, Wisc.;
on behalf of Mechanik and Lill.

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

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Rosen, you may proceed whenever you're ready.

ORAL ARGUMENT OF BRUCE J. ROSEN, ESQ.

ON BEHALF OF MECHANIK AND LILL

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

The rule violation of 6(d) that we are presenting to the Court today clearly resulted in no demonstrable prejudice to the Petitioners Mechanik and Lill, but was anything but harmless to the integrity and independence of the grand jury system. It is important to evaluate the violation of 6(d) in this context: one, in terms of its purpose; two, the gravity of the violation and the misrepresentation that occurred in the district court level.

Besides the obvious secrecy motives behind Federal Rule 6, there also is to prevent undue influence, prejudice, the potential to overwhelm grand jurors by sheer numbers or the manner of presentation.

It is important to go back in time and re-evaluate and scrutinize what happened. August 10th, 1979, at the federal grand jury in Charleston, West Virginia. The Government at that time called two witnesses simultaneously to the stand to testify before

the grand jury.

The Government asked each witness to swear, take his oath simultaneously, and they proceeded at that point in time to testify literally in tandem, as opposed to each giving a separate version of the event. During the course of 61 pages of grand jury testimony, these two agents 47 times used "we understood, "we believed," "we investigated this fact."

Also of some importance, at least the district court believed so, one was the supervisor of the other. In addition to the two witnesses testifying simultaneously before the grand jury, there was not one, there was not two, there were three prosecutors present in the room, accounting for a total number of five Government agents.

QUESTION: You emphasize the numbers. How many defense people in there? None.

MR. ROSEN: None.

QUESTION: So how are numbers important?

MR. ROSEN: It wasn't through lack of effort that they weren't in there.

QUESTION: Well, how are numbers important if you don't have any? What are you going to compare the numbers to?

MR. ROSEN: I assume when we compare it to the

normal practice of one witness at a time, one prosecutor, in the event an assistant is necessary two prosecutors. But here we are August 10th, and we must put it into the context. Within an hour of five agents appearing in the grand jury room, this grand jury returned this indictment.

We are now left to analyze whether there's a causal relationship between that violation and the return of the indictment. If there is no relationship, potentially we may not be available for any redress in this Court.

In addition to the two witnesses which at least the district court and the Court of Appeals and the Government and the defendants in this case have been unable to find another case in recorded history, either of civil law, of criminal law, of any other practice -- that ever allowed the procedure of calling two witnesses simultaneously.

The logic we hope would appear obvious, because the logic is also embodied in the concept of why we sequester witnesses at trial, to avoid this, to create at least an accountability of what a person says, that later they are accountable. If somebody testifies we did this or we did that, how later are they accountable? There is no accountability.

But more importantly, in addition to the two witnesses that testified, on numerous occasions the prosecutor, and as evidenced in the joint appendix, provided information to that grand jury that was part of its considerations in an unsworn, non-testimonial fashion.

There are numerous instances where the prosecutor, in this instance Assistant U.S. Attorney Hoffman, provided a number of incidents as to who was in communication with the air traffic controller on duty that night at the Kanawha Airport, the definition of third party billings, how we know that Jim Chadwick got a call at his phone because it was a collect call, and explaining to the grand jury the difference between collect calls and third party billing.

Those facts become important because this new indictment, this indictment that we have labeled superseding indictment, is almost a creature of design. There appears not to be a definition for it. Just 30 days ago or 60 days ago, the case before the Court of Rojas Contreras, Justice O'Connor asked the Government, in speedy trial considerations, what is this? What is the superseding indictment?

To which the Government responded, a superseding indictment is something that replaces the

original. And apparently satisfied with that, no further inquiry took place.

There is no definition. The Federal Rules don't anticipate it, so the procedure is somewhat cumbersome, because it obscures an examination of the prejudice or the potential error or harm as a result of what occurred in this case.

QUESTION: Was there any finding of prejudice in this case?

MR. ROSEN: There was no finding by the district court level of prejudice on any of the three counts before the court.

QUESTION: And certainly no finding by the Court of Appeals of prejudice?

MR. ROSEN: Correct. But I would submit to the Court, it's not the existence of prejudice; it's the inquiry of looking for it that this Court throughout history in this decade has abhorred, a district court going behind a presumptively valid indictment, whether it be for a defendant's benefit, whether it be for the Government's benefit, going behind it to examine or to second guess the --

QUESTION: Do you challenge the fairness of the trial?

MR. ROSEN: In no way.

QUESTION: So your client had a fair trial and was convicted, and there's no showing of prejudice?

MR. ROSEN: Correct.

QUESTION: And he should be turned loose?

MR. ROSEN: No.

QUESTION: What do you want? You want a retrial or a fresh indictment?

QUESTION: Reindictment.

MR. ROSEN: We would like an untainted indictment and a trial on that indictment, yes. Clearly, to the court it appeared -- and again, we're at the point of second guessing. It appeared at the trial the real, almost stubbornness --

QUESTION: Do you argue that a new indictment will not be issued? Do you suggest that the indictment won't issue?

MR. ROSEN: No.

QUESTION: Well then, what's this exercise all about?

MR. ROSEN: What we are attempting to do is to make sure: one, the Government, to create a remedy for a clear violation. We are here merely seeking a remedy. The concept -- we are not seeking to punish the Government.

QUESTION: Well, what will it accomplish

except giving your client another bite at the apple?

MR. ROSEN: It will accomplish allowing convictions to be obtained based on untainted indictments, and I think the Court --

QUESTION: But you concede that a new indictment will issue.

MR. ROSEN: I would have no reason not to believe one would reissue.

QUESTION: Well, is this just an advisory opinion you're asking us for?

MR. ROSEN: No. What I'm suggesting to the Court is the standard, the very standard this violation was judged in, was clearly inappropriate. The defendants, to almost paranoid degrees, pretrial kept attempting to get grand jury material from every ingenious, litigious method available to one with enough resources and enough time to devise.

QUESTION: When was this issue first raised?

MR. ROSEN: The issue -- there was a first indictment that resulted on June 14th.

QUESTION: Yes.

MR. ROSEN: The issue was then raised requesting notice, in essence compliance with 6(d).

QUESTION: When was that raised?

MR. ROSEN: That was raised within 30 days --

in the pretrial motions as they relate to the first indictment. Before the Government could respond as to whether they complied with it or whether even a response was appropriate, a superseding indictment issued on August 10th.

The district court, upon motion of the defendants, then allowed an adoption, so that, as opposed to going through the exercise in futility of redrafting an identical motion, it allowed an adoption of all the pretrial motions as they were filed to the first indictment to apply to the second indictment. In fact, Judge --

QUESTION: Then what happened?

MR. ROSEN: Then in response to that, the Government, because under the rule clearly the defendant was unable to show a basis other than paranoia to believe that a 6(d) violation occurred, to clearly alleviate further inquiries, the Government filed a response.

QUESTION: And said?

MR. ROSEN: No unauthorized people appeared before the grand jury that resulted in this indictment. That response was filed on August 30th of 1979. Based on the response, there clearly was no basis for further inquiry, because the Government in apparent good faith,

at least at the time, was representing there were no violations. Let's continue on with the main event, the trial.

QUESTION: It turns out there was, though. There was a violation.

MR. ROSEN: Correct. There was a temporary argument proposed by the Government, temporarily adopted by the district court and forever abandoned, this concept of a joint witness. And the joint witness they proposed to the first district court -- and there were two district courts. One was ill.

The first district court adopted it, saw nothing inappropriate with the rule to allow witnesses to testify in tandem. Upon renewing the motion, and there was the transfer to the second district judge, Copenhaver, the defendants, upon another decision in the same district for the same type of violation, filed a petition on May 22nd, 1980, with the second trial judge asking him to reconsider in light of this other violation and the fact that it was dismissed pretrial.

In response to that and the efforts of the defendants, the Government argued: How possibly can the defendant be prejudiced by allowing the case to proceed on to trial and allowing at the end of the trial to analyze whether or not a dismissal should have

occurred?

There clearly was prejudice to the defendant by delaying consideration. As the Government argues or proposes in their brief in this case, they are attempting to hold us to a post-conviction harmless error standard, when the defendants raised the issue pretrial and but for the Government's at best misrepresentation and at worst lie, the issue would have been resolved at the pretrial stage.

As the Government even concedes in its petition or brief in support of their petition to the Fourth Circuit, it says that at a pretrial stage really what you're confronted with is "the temporary inconvenience of resubmitting the matter to the grand jury as opposed to potential prejudice."

The stakes of the analysis significantly change at a post-conviction or mid-trial stage. The district court found the multitude of --

QUESTION: Well, would you be satisfied if the new grand jury was allowed and then the grand jury returned the indictment, but you stood on the conviction that's now extant?

MR. ROSEN: I don't know if "satisfied" is the right word; not happy.

QUESTION: Well, you would have accomplished

this prophylactic objective that you referred to.

MR. ROSEN: One, we'd be creating a legal fiction. Clearly, the defendants were tried on this indictment. The prosecution filed notice of intent to proceed on this indictment, not the first. The jury was sworn as to this indictment, and conviction was entered on this indictment.

More importantly, the type of remedy that you propose would have no incentive for compliance. If this Court determines that a strict construction of 6(d) requires minimally one witness at a time in presenting evidence to the grand jury, the question is now how do we encourage compliance?

The Government argues this was a good faith mistake and how can you encourage, as the concept of Leon would seem to indicate, how can you encourage compliance when the mistake, if there was a mistake, was inadvertent?

QUESTION: But is this not somewhat like the harmless error situation that courts are confronted with frequently? Conceiing that an error, even of constitutional proportions, has occurred, we often say it had no impact on the ultimate results and therefore ignore it.

MR. ROSEN: It would appear --

QUESTION: Isn't that essentially what Chapman and California decided many years ago?

MR. ROSEN: Correct. But there are values, whether it be constitutional values or procedural values, as this Court recognized in Rose, where guilt is really of a secondary concern. It is the integrity of the entire system or other possible motives.

Defendants have been propounding, requesting access to the grand jury, the right to present exculpatory evidence, the right not to have illegally obtained evidence presented, the right not to have hearsay presented, the right not to use perjured testimony, the right concerning preindictment delay.

QUESTION: What about the right not to be arrested without probable cause?

MR. ROSEN: All of those. All of those --

QUESTION: I know, but if you arrest a person without probable cause and then you convict him, you don't use any fruits of the arrest, you convict him, and everybody agrees that there's plenty of evidence to convict, it isn't going to do you much good in that situation to say we need a remedy for the arrest without probable cause.

You're certainly not going to set aside the conviction, are you?

MR. ROSEN: No.

QUESTION: And yet there was a constitutional violation.

MR. ROSEN: But clearly --

QUESTION: Followed by a perfectly fair trial. You don't set aside the conviction.

MR. ROSEN: Correct.

Even the Government attempts or does in fact concede in their brief that defendant does have a right to be indicted by a grand jury free from intimidation, coercion, or improper procedures employed to gain the indictment.

It appears frustration is obviously growing over defendants' continued litigation over grand jury issues, as opposed to getting on with the main event.

QUESTION: Well, perhaps if we just ruled for the Government in this case that would enable everybody to get on with the main event and left it to the district judge to enforce the provisions of the Federal Rule that you say was violated.

Certainly setting aside convictions isn't the only way to enforce a rule dealing with the proper attendance before a grand jury.

MR. ROSEN: The proposal suggested in terms of, there clearly was a wrong, what that remedy ought to

be -- a number of suggestions have taken place both in the Hastings case and the Government in their brief: contempt proceedings against the prosecutor. Contempt wouldn't apply to a good faith violation. If in fact this was inadvertent, you can't encourage compliance where the violation was unintentional.

We are not seeking to punish the Government. We are seeking to have what I believe is our right.

QUESTION: Well, but how would a reversal enforce the rule if the breach were inadvertent any more than contempt would?

MR. ROSEN: The district court, concerning whether this is that Leon type situation where because of the blunder of the constable the criminal goes free, the district court -- and the Government in its brief takes some liberty with the district court's finding. The district court made a finding of lack of bad faith in the presentation of two witnesses to the grand jury.

There appears in the very well-reasoned opinion --

QUESTION: I would think there would be, some judge or some procedure might unload a little bit on the prosecutor for making that kind of a representation. But I take it that if Judge -- what's his name, Copenhaver -- Judge Copenhaver had been sitting on this

case originally, he wouldn't have any problem. He thought there was a violation, but he just thought the proceedings were too far along.

MR. ROSEN: Correct.

QUESTION: And so there certainly is a pretrial opportunity to have all -- to make sure that the grand jury rules are enforced.

MR. ROSEN: Correct, in order to ensure compliance.

QUESTION: I mean, the reason there probably wasn't in this case is that if the fact is true that there was a gross misrepresentation.

MR. ROSEN: Correct. The encouragement of the reporting requirement. The defendants in our humble opinion clearly asked for in their pretrial motion more than they were entitled to. They wanted to see grand jury minutes, they wanted to see instructions. And as this Court has clearly stated, let's get on with the main event.

The proposal that we're hoping, or the procedure that we are hoping comes out as a result of this case, is no different than a Brady or a Gelbhart situation. A defendant ought to be allowed to just trigger a request: Has the Government followed Rule 6? If the response to that is in the negative, it ends the

inquiry. It's over. Let's move on to the trial.

But if it's in the affirmative, the question then becomes -- and we must look at this in the pretrial stage, because if the indictment is defective it's jurisdictional. Jurisdiction creates the trial. The trial can't create the jurisdiction.

So at that pretrial stage -- and we must go back in time to fairly analyze it and not allow the Government to reap the windfall benefits of its own misrepresentation to the district court in August, is what should that court have done when confronted with a truthful, candid response, there was a 6(d) violation.

If in fact it is this Court's opinion that it is inappropriate to at that point engage in what took the district court three months -- the matter was first submitted to Copenhaver on May 22nd. An opinion, a carefully reasoned opinion, finally was issued and entered into the docket sheet, on August 15th. It took that judge three months to comb the record in a quasi-result-oriented approach to see, other than this potentially diseased --

QUESTION: Do you think he didn't have anything else to do?

MR. ROSEN: Clearly not. He was conducting the trial simultaneously.

QUESTION: How long was the record?

MR. ROSEN: Pardon?

QUESTION: How long was this grand jury record that took three months?

MR. ROSEN: No.

QUESTION: How long was it?

MR. ROSEN: The grand jury testimony was 61 pages.

QUESTION: Huh?

MR. ROSEN: 61 pages.

QUESTION: It takes three months to act on 61 pages?

MR. ROSEN: No. What the district court judge did is presume that this is a tainted portion of the grand jury. He then began to examine other testimony that was coming out contemporaneous, as 3500 disclosures became triggered. And as the Government provided them to the defense, put them in the record, he was then examining, using conduct occurring at the trial simultaneously to evaluate whether this was a harmful, prejudicial or harmless error.

QUESTION: Well, you've suggested, counsel, that the Government might get a windfall as a result of its own mistake. But isn't this a contest of whether you get a windfall, your client gets a windfall, or the

Government gets one?

You have conceded that a new grand jury will issue the same indictment, that nothing is going to change because the trial was perfectly fair. So isn't that what it comes to, a windfall for you or a windfall for the Government?

MR. ROSEN: I'm not sure I would use the phrase that it's a windfall for us in that my client --

QUESTION: Well, you used it. I was taking your language.

MR. ROSEN: To go back through the criminal system and stand trial again, whether that is a benefit obviously depends on one's perspective. And clearly, we would be on much stronger footing if my client's name were Russell Cooke or my client's name were Jim Chadwick. The only testimony that required them to stand trial and eventually resulted in an acquittal -- and that's why those issues became moot -- is that tainted, diseased testimony.

How is the system to prevent exactly what occurred in this case, maybe not to my client in particular, based on the analysis --

QUESTION: But that testimony must have been repeated before the petit jury, wasn't it?

MR. ROSEN: Correct.

QUESTION: And the petit jury had an opportunity to evaluate it, I presume, in finding the defendant guilty or not guilty.

MR. ROSEN: They acquitted. Both of the other defendants in the first indictment -- part of the difference between the first indictment and the second was three defendants were added, one being a fugitive. The two that were added, and the court found or implicitly made a finding, partially as a result of this joint presentation, were Chadwick and Cooke. Both of those cases resulted in acquittals.

QUESTION: Well then, was none of the tainted testimony directed towards your clients?

MR. ROSEN: The tainted testimony, as is indicated in the exhibit, provided, overt act HH in the conspiracy count provided the probable cause portion of the indictments as they relate to counts two, three, and four.

QUESTION: What do you mean, the probable cause portion of the indictment?

MR. ROSEN: I'm using the words of the Government before the grand jury. The evidence to the grand jury to support counts two, three, and four were presented in tandem.

QUESTION: Well, did the testimony of these

two witnesses whom you say couldn't properly both be before the grand jury, did it implicate -- did their testimony to the petit jury implicate your clients at all?

MR. ROSEN: Sure, yes.

QUESTION: Well, to that extent the petit jury evaluated it and found your clients guilty, I guess.

MR. ROSEN: Correct.

QUESTION: So it wasn't just the grand jury processing that testimony. The petit jury vindicated what the grand jury found.

MR. ROSEN: But again, if we're dealing with jurisdiction, assuming that I'm correct that a defective indictment is jurisdictional -- and Rule 12(b) seems to presume it's probably personal, because it's waivable. So if it's jurisdiction you can't use -- either it exists or it doesn't exist.

QUESTION: Yes, but not every procedural violation of the rules amounts to a deprivation of jurisdiction. We've long passed that day.

MR. ROSEN: I understand there are proponents feeling targets ought to have more rights before a grand jury. Clearly that attitude has been rejected, whether he has a right to testify or a right not to. He has one right, and it doesn't seem terribly, awfully difficult

to comply with, the only right he's got, that is it's secret and one witness at a time.

And we're now taking away that, one of those cornerstones. If we remove it here, not only is the Government allowed to do it, but in order to notify a district court of compliance, there is no penalty for noncompliance.

QUESTION: Well, how long has he had this right of one witness at a time which you say is a cornerstone?

MR. ROSEN: Throughout history.

QUESTION: 6(d) is that old?

MR. ROSEN: Since 1946, it was codified within the Federal Rules of Procedure. But throughout history, as Judge Copenhaver -- there is no reported opinion other than one instance in this district in Winter, which was the basis of the defendant's request that Judge Copenhaver reconsider his opinion.

Other than those two cases they aren't reported, because they don't get reported because, as the Government rightfully states, the more prudent course, "proper and prudent," to use the district court's findings, would be to just dismiss and reindict. Using a Costello approach to the grand jury, it would take an hour.

I submit to the Court --

QUESTION: Well, using a Costello approach to the grand jury would take about two minutes, I would think, because Costello says it just doesn't make any difference what happens, what kind of testimony is presented to the grand jury.

MR. ROSEN: Whether it be hearsay or non-hearsay, correct.

QUESTION: Well, there's language in Costello that goes a good deal further than just hearsay or non-hearsay.

MR. ROSEN: I submit and I hope that Rule 6 will remain intact. It is the only rule protecting potential defendants from improvident Government prosecution. The inconvenience of reindicting and reprosecuting this case is temporary. To allow a conviction to be sustained on the basis of what occurred on this record is perpetual.

Thank you.

CHIEF JUSTICE BURGER: Mr. Levy.

ORAL ARGUMENT OF MARK I. LEVY, ESQ.,

ON BEHALF OF THE UNITED STATES

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

Before I begin the merits of my argument, I'd

like to respond to the accusation that the Government made a misrepresentation or a lie to the district court in this case. There's no basis at all for that allegation.

The Government in the grand jury proceedings understood Rule 6(d) not to be violated because they read the rule to mean where two witnesses could properly testify separately there was no bar on their joint appearance before the grand jury. And it made eminent good sense in this case to do so because each of the agents was in charge of a different facet of the investigation, and so the simultaneous testimony allowed the grand jury to be apprised of the events in a chronological, interrelated way.

The district court specifically found that that joint testimony was not presented in bad faith by the Government. Now, the Government followed the same legal understanding of the rule in its representation to the district court that there was no unauthorized person present.

It simply was not a misrepresentation. It was at best a misunderstanding on the part of the Government of the rule's requirements, a misunderstanding that shouldn't occur again now that the rule has been clarified.

QUESTION: But is it not true that --

MR. LEVY: But beyond that, let me also say that once the fact of the joint testimony became known, Chief Judge Knapp, who was then presiding, rejected the defendants' motion to dismiss on the merits and adopted the Government's reading of the rule. So it certainly was a reasonable interpretation, even if it turned out to be incorrect.

So there's no basis whatever for the allegation that the Government engaged in misrepresentation.

QUESTION: Mr. Levy, is it not true, though, that that colloquy would have induced the defendant not to inquire further on this point?

MR. LEVY: It may well have.

QUESTION: And would it be different if -- supposing what he says is true. Supposing that it was a deliberate misrepresentation, would it make any difference? It would still be totally harmless, wouldn't it?

MR. LEVY: That would be our position, it would still be totally harmless. Now, there could be other remedies directed to the derelictions by the prosecutor that would be appropriate and warranted in such a circumstance. But it would be harmless --

QUESTION: What would the remedy be? Say that eventually the district judge came out as the Court of Appeals did and said he thought this was a violation of the rule.

What should the district judge do?

MR. LEVY: Is this before trial, Justice Stevens, or after the trial?

QUESTION: Well, at each stage. As soon as he finds out, what should he do? Say it's before trial.

MR. LEVY: Well, in our view, as we argue at length in our brief, this kind of a technical defect in a grand jury is not a basis for dismissing an indictment, even before trial. What the district court should do then, either in the middle of the trial or more likely afterward, is deal with the bad faith action of the prosecutor.

QUESTION: Let's say the prosecutor says, oh, I just didn't read the rule, I'm sorry; I'm new and they didn't teach me this in law school, and Rule 6(d) isn't all that clear, although it's been construed a number of times; I goofed.

What does the district judge do?

MR. LEVY: Well, it may be that there's nothing that the district court could do in that circumstance or, depending on the particulars, there may

be a variety of prospective remedies, such as the certification requirement that the district court devised in this case, that would help to ensure prospective compliance with the rule in the future.

Perhaps just bringing this to the attention of the U.S. Attorneys --

QUESTION: The certification requirement wouldn't have helped here because the prosecutor thought he was doing the proper thing.

MR. LEVY: That's probably correct, although it's possible that that would have made him more sensitive to the nature of the rule than he was in this case.

But I don't think it's necessary that there be a remedy for every good faith violation. The question is whether the system --

QUESTION: Well, I suppose we don't need the rule, either. We don't have to have this rule.

MR. LEVY: Well, you don't have to have it, and we think it is quite a technical rule in the end. But the rule is designed to ensure that the system works in a particular way. The drafters of the rule thought it was better only to have one witness in the grand jury at a time, and presumably prosecutors in almost every case, in virtually every case, will comply with that and

the system will work as the drafters intended.

QUESTION: But if you prevail in the case -- and I understand your position. If you prevail in the case, will the rule be followed in the future? Why would a prosecutor have any motive to follow the rule in the future? Why wouldn't he say, I think I can get my case in a lot faster by getting all four witnesses in at once.

MR. LEVY: I don't think there's any reason to assume, even apart from coercive remedy, that prosecutors will routinely violate or ignore the requirements of the rule.

QUESTION: But why not? What would deter them?

MR. LEVY: Well, my point is that you don't need anything to deter them. The prosecutors certainly generally act in good faith. There is no reason to assume that prosecutors go around deliberately violating the rule.

But there are remedies, even if some coercive remedies are thought to be necessary, that will ensure compliance, that will deter or prevent violations from occurring, such things as contempt for willful violations of the rule, disciplinary sanctions, public censure.

QUESTION: Well, if the defendant finds it out he can move to dismiss the indictment, can't he?

MR. LEVY: Well, we take the position that even before trial the defendant can't move to dismiss the indictment.

QUESTION: Well, I know you take the position, but he can move.

MR. LEVY: He can move, that's correct.

QUESTION: He did in this case, didn't he?

MR. LEVY: He did in this case.

QUESTION: And the judge ruled on it.

MR. LEVY: And the judge ruled on it, twice.

QUESTION: Would that denial of the motion to dismiss the indictment be appealable?

MR. LEVY: No, it would not.

QUESTION: How could a defendant find out before trial whether there had been a violation or not, do you think?

MR. LEVY: There are a number of ways, apart from defense motions to dismiss, in which a defendant can find out. And this case well illustrates the point. The Rule 6(d) violation here was uncovered not through the defendant's boilerplate motion to dismiss, but rather through the prosecutor's disclosure of grand jury materials under the Jencks Act.

So that the motion to dismiss here was really beside the point. The defendant was simply a free rider and is now seeking to get the benefits of a violation that was detected through independent means.

QUESTION: I take it your argument would be the same if there were an inexperienced prosecutor who somehow hadn't bothered to read Rule 6(d) and remained in the grand jury room during their deliberations?

MR. LEVY: I think our position would probably be the same, and in that circumstance it may be enough for the error to be brought to the attention of the United States Attorney, so that through an educational program or otherwise the error wouldn't recur in the future. There's no basis --

QUESTION: Is there any violation of Rule 6(d) that in your view would be grounds for setting aside a conviction?

MR. LEVY: Well, there may be some situations that are so extreme, that also happen to violate Rule 6(d), that it is conceivable that the Court might find them sufficient notwithstanding the petit jury's conviction. We would think there would be a strong argument that there aren't any such violations. But as Rose against Mitchell makes clear --

QUESTION: For instance, if all the witnesses

for a particular offense were brought in at the same time and were present throughout all the testimony?

MR. LEVY: If all that that did was violate Rule 6(d), we don't think that would be enough. Now, if it turned the grand jury into a mob scene rather than a judicial proceeding, that might be a different question, although even there we would submit that there would be no basis for reversing an otherwise untainted petit jury conviction.

Now, all of these issues which we've touched on briefly can be traced back to this Court's decision essentially in Costello versus United States. In Costello this Court held that an indictment is valid and it is enough to call for the trial of the accused on the charges if the indictment is facially sufficient and returned by a legally constituted and unbiased grand jury.

There is no question in this case that the Rule 6(d) violation did not impair either the authority or the impartiality of the grand jury, nor do the defendants contest the sufficiency of the indictment on its face. Accordingly, we submit that Costello controls here and requires that the defendants' convictions be affirmed.

The Costello rule reflects the limited role

played by the grand jury in the federal criminal justice system and the substantial systemic costs that would be imposed for little, if any, benefit if the grand jury's charging process could be challenged by defendants. The grand jury is only a preliminary step in the criminal process. At issue before the grand jury is not the question of guilt or innocence, but only the question whether there is a sufficient basis to go forward for trial.

The grand jury is designed to be a relatively informal and unstructured screen for weeding out insubstantial cases, and it does not incorporate the rigorous procedures applicable at a criminal trial. For example, the grand jury process is ex parte and non-adversarial. Hearsay evidence as well as illegally obtained evidence can be used.

The standard for an indictment is probable cause, not proof beyond a reasonable doubt. Unlike the requirement of unanimity for the petit jury, an jurisdiction can be based on a vote of as few as 12 out of 23 grand jurors.

And if the first grand jury does not return an indictment, the case can be represented to a subsequent grand jury and an indictment obtained. The grand jury thus provides a rough justice screen to give some

assurance that there is a basis for the charges brought against the defendant.

The grand jury process necessarily recognizes, however, that mistakes will be made and errors will occur in the screening mechanism, and that some innocent defendants will be put to trial. The entire grand jury system rests on the premise that it is the trial and not the grand jury itself that affords the essential safeguards for the innocent.

It does not denigrate the screening function of the grand jury to conclude, as the Court understood in Costello, that the grand jury was simply intended to establish a reasonable means for initiating a prosecution, thereby setting in train the rest of the criminal process, in which substantial protections would be provided the accused.

Now, in light of the nature and role of the grand jury, it would impose significant and unjustified costs on the criminal justice system to allow indictments to be challenged and dismissed for a procedural irregularity in a grand jury. It would put undue emphasis on the initial charging process and be a misallocation of finite resources for the system to scrutinize the workings of the grand jury and permit the operation of that body to be tried before the

defendant's guilt or innocence can be determined.

This we take to be the central meaning of Costello. It is all too easy for a defendant to allege, as the defendants did in this case, that it is possible that some sort of an error might have occurred before the grand jury. Just as there is no perfect trial, there is no perfect grand jury proceeding either.

Procedural challenges to grand juries are routinely raised in virtually every contested federal criminal case, and especially those cases in which the grand jury investigation was at all lengthy or complex. Now, although experience indicates that very few of these procedural challenges to the grand jury are meritorious, litigation over them takes substantial judicial and prosecutorial resources, resources that could be better utilized in other parts of the criminal process.

Litigating these challenges can also substantially delay the trial of the case on the merits, where the central issue of the defendant's guilt or innocence will be resolved. In raising these challenges, we give defendants various collateral benefits to which they are not otherwise entitled, including discovery of secret grand jury materials, an additional bargaining chip in plea negotiation, and a

delay in the ultimate day of reckoning at trial. In fact, as discussed in defense trial practice manuals, challenges to the grand jury procedure are often filed precisely in order to obtain these kinds of unjustified advantages.

And even if a challenge to a grand jury procedure is successful, the overwhelmingly likely consequence, as the defendants here concede, is that the case will be represented to a grand jury and a procedurally regular indictment returned. Such a duplicative process further taxes prosecutors, witnesses, and grand jurors, and in fact can be quite burdensome, especially in cases involving lengthy investigations.

And even in simpler cases, quite a burden can be imposed on the system, as this case illustrates. In this case, there were some 30 witnesses before the initial grand jury and an additional ten new witnesses before the superseding grand jury as well as the recall of some of the witnesses who testified the first time.

QUESTION: Mr. Levy, could I just ask you a question as a point of information. I know we've had litigation involving whether there's racial discrimination in the composition of the grand jury or the form and that sort of thing. But are there a large

number of these issues litigated other than this 6(d)? I'm not aware of it.

MR. LEVY: In this Court or in the lower courts?

QUESTION: Well, in the lower courts, yes, as challenges to indictments based on irregularities in the grand jury. What are the particular issues you get?

MR. LEVY: It is an everyday occurrence in the lower courts that defendants raise these issues as a way of --

QUESTION: Well, give me an example of a couple of issues.

MR. LEVY: There are all kinds of issues. One that is commonly in vogue among the defense bar is, where Government investigators are sworn as the agent of the grand jury in order to obtain documents or take custody of documents subpoenaed in a grand jury, defendants seek to dismiss the indictment even after conviction on the ground that there's no authority for designating a Government official as the agent of the grand jury.

Challenges are raised to some --

QUESTION: They're not successful, I take it, very often?

MR. LEVY: Well, we have two cases in the

Tenth Circuit now. In the Kilpatrick case which is cited in our brief, where there was a grand jury investigation somewhere on the order of 20 months, it was thrown out before trial on several grounds, principally on the ground of this agency issue.

It is not often that these are successful. They sometimes -- although even there they do not frequently prevail in the district court, they very seldom prevail in the Court of Appeals. That's why we find ourselves in this Court so infrequently on this issue.

But that's exactly the point. There is very little, if any, merit to the vast majority of these challenges, and yet they come up in virtually every federal criminal case and take a great deal of time and resources.

QUESTION: Basically, you're asking us for a holding that no matter what happens before a grand jury, don't dismiss the indictment. That's what you're asking?

MR. LEVY: In essence that's correct. Now, we have put to one side the question of constitutional defects in the grand jury because this case doesn't present any such issues. Certainly where you're dealing with the kinds of procedural irregularities that this

case typifies, we think there's no basis whatever and very substantial grounds for precluding, dismissal of the indictment either before trial or after trial.

QUESTION: Well, Mr. Levy, what if there is a reasonable probability that but for the error the charging decision might have been different?

MR. LEVY: I'm not sure I understand the question.

QUESTION: Well, suppose it can be established that the violation was such that the district court judge is persuaded that but for this error the grand jury might not have issued the indictment against the defendant.

MR. LEVY: Well, once the petit jury has convicted at trial and found the defendant guilty beyond a reasonable doubt, I don't think there's any basis for assuming that the grand jury would not have indicted him.

QUESTION: Well, because the evidence submitted at trial may have been different or more substantial than at the grand jury level.

MR. LEVY: But once we have the fact of the conviction, we know that there is probable cause and that the charges against the defendant are not unfounded, which are the purposes of the screening

function of the grand jury, there's no point. It would be quite pointless to go back at that stage and revisit the grand jury and speculate about the effect that a procedural irregularity might have had on the charging decision.

In effect, those kinds of questions about the institution of the charges merge into the conviction.

QUESTION: That's not a reason -- that's not a reason to disallow challenges pretrial, just because you can say, well, we're going to convict him anyway.

MR. LEVY: No, that would not be a reason. I thought Justice O'Connor was asking a different question.

QUESTION: Well, I know what her question was. But you're making the -- your argument is much broader than that. You say there shouldn't be any challenge allowed at all --

MR. LEVY: That's correct.

QUESTION: -- pretrial.

MR. LEVY: That's correct.

QUESTION: No matter what he alleges.

MR. LEVY: That's correct.

QUESTION: No matter if he says, look, I never would have been indicted if this irregularity wouldn't have happened. And judge, it is pretrial. Let's make

them get a new indictment. What's wrong with that?

MR. LEVY: Well, there are several things wrong with it. First, the chances in fact that any of these kinds of procedural irregularities would undermine the existence of probable cause is exceedingly remote.

QUESTION: And we just take your word for that?

MR. LEVY: No, I think the Court can look at the kinds of errors that have been litigated in Court of Appeals and the results of those cases and come to that assessment.

QUESTION: Has any movement been made to get Rule 6 off the books?

MR. LEVY: I'm not aware of any, and this case does not involve the substance --

QUESTION: I thought you said a minute ago it was something horrible.

MR. LEVY: No. And in most cases --

QUESTION: Because you had how many cases you said you had in the courts?

MR. LEVY: Justice Stevens was asking about the whole range of cases involving alleged irregularities.

QUESTION: And you said you had a whole range of them.

MR. LEVY: Defendants frequently --

QUESTION: Well, has any effort been made to get rid of that by changing the rule?

MR. LEVY: No, I don't believe any effort has been made. But the problem here is not the substance of the rule. In most cases prosecutors will comply with the requirements of Rule 6. The issue here is the remedy for those rare cases in which there is a violation.

Now, just because defendants allege it and litigate it routinely doesn't mean that there's any merit, there's any substance to the allegation. Quite the contrary, the reported decisions indicate that very few challenges are meritorious, and yet the system has to litigate each one of these challenges, to the great disadvantage of the sound and efficient operation of the process.

QUESTION: Mr. Levy, do you have any comments about the race cases, Rose against Mitchell and the like?

MR. LEVY: I have no comments about them specifically.

QUESTION: How do you distinguish them?

MR. LEVY: Well, the Court in Rose against Mitchell did not find that the racial discrimination

there had resulted in any injury to the defendant's personal rights that warranted reversal of the conviction. Rather, Rose rested on the proposition that such discrimination violated fundamental societal values of equality and implicated the integrity of the judicial process itself.

The Court also noted that racial discrimination was the core concern of the Fourteenth Amendment, and when practiced in the selection of grand jurors infringed the rights of third parties, those citizens who were wrongly excluded from participating in the criminal justice process.

And finally, the Court gave great weight to the fact that its own precedents had for more than a century recognized the availability of post-trial relief for racial discrimination. None of those things --

QUESTION: It certainly is an exception to your argument today.

MR. LEVY: It is an exception to our argument. We have doubts about whether it is a correct exception, as we indicated in a footnote to our brief here. But even if the Court in Vasquez against Hillery adheres to the Rose decision, that would not control this case, because none of the special factors unique to the racial discrimination context that the Court relied

on in Rose are present here.

There are no fundamental constitutional values at stake, no rights of third parties are jeopardized, no question of judicial integrity is presented, and no issue comes up whether the Court should adhere to its own prior precedents.

QUESTION: Excuse me for interrupting you, but the question put to you by my brother Justice Blackmun and you response have nothing whatever to do with this case, do they?

MR. LEVY: Well, if the Court were to --

QUESTION: This is not a constitutional question, is it?

MR. LEVY: That's exactly right, Justice Powell.

QUESTION: Well, I just want to make that clear on the record. That issue hasn't been argued to us today.

MR. LEVY: No, it hasn't, and I'm sorry if my answer was confusing.

QUESTION: Right. Well, I would now like to come back to this case --

MR. LEVY: My point only though was, Justice Powell, that if the Court overturns the rule of Rose against Mitchell in Vasquez against Hillery, then our

case is considerably easier. On the other hand, even if the Court adheres to Rose, our case is much different and is not controlled by the decision there.

QUESTION: Mr. Levy, the first question in your petition for certiorari concerns a pretrial action on an indictment that is alleged to be improper. Do we have to decide that question? The second question concerns whether or not, after there has been a valid trial, an irregularity in the indictment under Rule 6(d) requires the setting aside of that trial.

What I'm asking is whether only the second question is here or whether we must decide both your first question and your second question.

MR. LEVY: I don't think the Court has to decide the first question. I think the second question presented is a sufficient ground for resolving this case, although the first question likewise is sufficient by itself.

QUESTION: It could be decided, arguably. I suppose that would be a much broader decision than the second question.

QUESTION: Of course, it's rather difficult to say to the defendants in this case, although you made your motion before trial, the fact that it wasn't passed upon until after trial, wasn't finally decided by the

district court until after trial, means that you're in the same boat as someone who first made the motion after trial.

MR. LEVY: That's correct, and that would be the reason why the Court might decide to resolve the first question presented in this case in light of the arguments that the defendant has made. But the Court should also be aware, as the substance of our arguments indicates, that this is quite a serious problem for the administration of criminal justice in the federal courts, and we think that it is an issue that is properly presented in this case in our first question presented.

QUESTION: Isn't it correct, Mr. Levy, that typically the issue we have in this case would arise during the trial, rather than before or after, because normally the defendant won't get to see the grand jury minutes until you make your Jencks Act disclosure, and that's going to be in the middle of the trial, isn't it?

So isn't it typically an issue that would arise during a trial?

MR. LEVY: This issue does frequently arise in the middle of trials, not invariably. Sometimes it comes up before trials, for example if the Government

makes an early Jencks Act disclosure, and sometimes in fact it doesn't come up until after trial. But here and not infrequently, it does come up in the middle of trial.

But the point really is not the time at which it is raised. The consideration is the time at which it is resolved. Once the petit jury has returned a unanimous verdict of guilty beyond a reasonable doubt --

QUESTION: Well, would it be a proper disposition for the trial judge, if it comes up in the middle of the trial, to say, well, let me wait and see if he gets convicted, and if he gets convicted then he'd say, well, obviously there was probable cause, so I'll deny the motion. If he gets acquitted, he'd say, well, I don't have to pass on the motion; okay, that's the end of it.

Would that be correct judicial behavior, do you think, for the district judge when it arises in the middle of the trial to say, I'll defer a ruling until the end of the trial?

MR. LEVY: Well, if the Rule 6(d) violation would be a ground for dismissal prior to trial, but not after a conviction, I think the district court might have some obligation to take a look at the issue before

the jury returned.

But our position, our submission here, is that it is not an adequate ground either before trial or after trial, and that whatever the reason that the district court does not pass on the issue before trial, even if it would be sufficient at that time, the fact of the petit jury's unanimous verdict of guilty beyond a reasonable doubt necessarily establishes the existence of probable cause and demonstrates that the charges were not unfounded. And at that point --

QUESTION: May I ask just one last question. I'm sorry. Does the record tell us whether the indictment went to the jury in this case?

MR. LEVY: I believe that it did. There was a redacted indictment that was drafted at the close of the Government's case. Then at the close of all the evidence, further parts of the indictment, and specifically the telephone counts and overt acts, were stricken from the indictment. Those telephone counts had been the basis of Agent Rinehart's testimony before the grand jury.

Those were stricken before the case even went to a jury, and I think from those trial rulings I infer that the indictment went to the jury, but I am not absolutely certain of that.

Now let me turn specifically to the policies of Rule 6(d) and show that they do not call for any different analysis than the Costello rule provides for. Rule 6(d) does not expressly provide the remedy of dismissal for a breach of the rule. So the question of formulating a judicially created remedy should be governed by the analytical principles generally applicable in the grand jury area.

Under those principles, as I discussed with Justice Stevens a moment ago, the Courts of Appeals have generally held that an indictment is not to be dismissed, even before trial, or a conviction reversed because of a procedural irregularities in the grand jury.

And in fact, some of the kinds of defects that the courts have found insufficient to warrant relief had a greater potential for affecting the grand jury process than the Rule 6(d) violation here. It would be highly incongruous to carve out a special and more stringent remedy for violations of Rule 6(d), which in actuality are quite unlikely to affect the grand jury in its determination of probable cause.

Now, although the rule and its advisory committee notes are silent on the purposes of Rule 6(d), three possible purposes have been suggested. First, the

rule helps to preserve grand jury secrecy, since a joint witness or other unauthorized person is not normally under an obligation to maintain the secrecy of testimony given while he is in the grand jury room.

In our view, this is the most sensible explanation for the rule itself. However, grand jury secrecy serves two important interests. It promotes the societal interest in effective grand jury investigations, and it safeguards the anonymity of those people who are investigated but not charged by the grand jury.

An indicted defendant has no stake or no standing to assert either of these interests, and they provide no basis for affording relief to him if the rule is violated. In addition, because the two DEA agents in this case had access to all the grand jury materials and were under a secrecy restriction, there was, as the district court found, no realistic threat to the secrecy of the grand jury here.

Now, the second possible purpose for the one-witness rule is to help to prevent a witness' testimony from being influenced by his knowledge of the testimony of other witnesses or by the presence of other witnesses in the grand jury room. In other words, it is a witness sequestration rule.

But any such concern about the trustworthiness of the witness' testimony goes to the quality of the evidence before the grand jury, which under Costello the defendant cannot be heard to contest. The same point also answers the concern expressed by the district court that the grand jury might be hampered in assessing the personal knowledge or credibility of jointly testifying witnesses.

Indeed, since the Government can use hearsay evidence, which precludes any assessment of the knowledge or credibility of the absence declarant, it is impossible to see how the joint appearance of two witnesses can impair the grand jury process or justify dismissal.

And in this case, furthermore, the two agents in charge of the entire DEA investigation had access to the grand jury materials, including the testimony of each other, and therefore it is inconceivable that their joint appearance could have affected their testimony to the grand jury.

Thirdly, the one witness rule may be a prophylactic measure to ensure that the grand jurors are not intimidated by the presence of a large number of prosecution witnesses in the grand jury room. But certainly not every violation of the rule threatens this

underlying policy or justifies the kind of relief that might be appropriate if the policy were in fact infringed.

Because the risk of essentially mob rule is far removed from any violation that can realistically be imagined, a one-witness error is not, at least in the absence of substantial aggravating factors, a basis for dismissing the indictment. Moreover, in this case, where both witnesses were already known to the grand jury and in fact could properly have testified separately, the presence of the one extra witness by virtue of the joint appearance could not possibly have intimidated the grand jurors.

If the Court has no further questions, we ask that the judgment of the Court of Appeals be affirmed insofar as it affirmed the defendants' convictions and reversed insofar as it reversed their convictions.

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

REBUTTAL ARGUMENT OF BRUCE J. ROSEN, ESQ.

ON BEHALF OF MECHANIK AND LILL

MR. ROSEN: Very briefly, Your Honor. Thank you.

Concerning the good faith representation, conspicuously absent from the record is any

determination by either the district court or the appellate court as to whether the representation made by the Government on August 30th, 1979, was good faith or bad faith. In fact, the Government concedes that they had denied any irregularity in its oral argument to the Fourth Circuit.

More importantly, the rule itself, contrary to the Government's position, contemplates exactly this remedy and contemplates that defendants in this position have standing to raise this as a remedy. I refer the Court to Federal Rule of Procedure 6(e)(3)(C)(ii), which states under the disclosure section:

"When permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring befcre the grand jury."

It contemplates two things. A defendant who has been indicted may have standing to challenge that occurrence. Second, it contemplates exactly the remedy we are asking for.

The question before the Court: Is this the situation that that remedy contemplates?

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:57 p.m., oral argument in the above-entitled case 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:

#84-1640-UNITED STATES, Petitioner V. MARSHALL MECHANIK, ET AL.; #84-1700-JEROME OTTO LILL, Petitioner V. UNITED STATES; and

#84-1704 - MARSHALL MECHANIK, aka MICHAEL PATRICK FLANAGAN, Petitioner V. UNITED STATES

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

BY Paul A. Richardson

(REPORTER)