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ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-281

TITLE JOHN WILLIAM RAY, Petitioner V. UNITED STATES

PLACE Washington, D. C.

DATE April 28, 1987

PAGES 1 thru 41

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN WILLIAM RAY, :

Petitioner, :

V. : No. 86-281

UNITED STATES :

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Washington, D.C.

Tuesday, April 28, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:52 o'clock p.m.

APPEARANCES:

JOSEPH A. CONNORS, III, ESQ., McAllen, Texas; on behalf of the petitioner.

WILLIAM C. BRYSON, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C. on behalf of the respondent.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument next in No. 86-281, John William Ray versus the United States.

Mr. Connors, you may proceed whenever you are ready.

ORAL ARGUMENT BY JOSEPH A. CONNORS, III, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CONNORS: Mr. Chief Justice, and may it please the Court, with this Federal criminal case petitioner requests that the Court acknowledge the demise of the concurrent sentencing doctrine that has been utilized by this Court since at least 1891 in the Clawson case.

In our argument we plan to discuss the relevant trial evidence, the sentencing hearing, and the opinion in the Court of Appeals, the question presented, look at the government's special assessment contention, and then look through the arguments we make why the doctrine should be abolished, in particular calling this Court's attention to the Ninth Circuit case of United States versus DeBright where that circuit has abolished it in a well-reasoned opinion.

QUESTION: May I ask before you get too deeply into your argument are you going to discuss the

government's motion that the issue really isn't here because these sentences were not the same?

MR. CONNORS: I was going to try to attempt to answer that while I am working on the special assessment. Yes, sir.

QUESTION: All right. It is rather important to me, because I --

MR. CONNORS: Certainly, Your Honor. First, we need to look at the procedural background. There's -- defendant's indicted on three-count indictment, jury conviction. The first count of the indictment deals with the conspiracy. It says that the conspiracy lasted from May 25, 1985, until June 3 of 1985. The defendant and Pablo Sandoval and others unknown to the grand jury unlawfully possessed with intent to distribute a quantity of cocaine, and it is unspecified how much.

Count 2 charges the substantive offense of possession of one gram on May 29. Count 3, which is in contention here, alleged the second substantive offense of possession with intent to distribute of approximately six ounces of cocaine on the following day, May 30. At the sentencing hearing on May -- excuse me, on October 2, 1985, the District Court committed petitioner to the custody of the attorney general for seven years on Count

1, seven years on Count 2 and 3, and a special parole term of five years on Counts 2 and 3.

Those sentences are to run concurrent. These sentences were pursuant to 18 USC 4205(b)(2), and that provision of our law allows parole at the time the Parole Commission may deem appropriate. Both parties in their briefs have treated this as a 4205(a) sentence, which is a little different. The prisoner has to serve a third of his time before he ever becomes eligible. We don't have this in this case officially from the District Court, but the Parole Board at their option, they have treated this as a sentence requiring the man to at least serve a third.

The actual trial evidence, we don't contest that were was a conspiracy.

QUESTION: May I ask you before you finish the sentencing, have you described completely the sentences that were imposed? I thought there was a $50 --

MR. CONNORS: There as a $50 special assessment, Your Honor, I am sorry, on each of the three counts, for a total of $150, and that is pursuant to what we are going to reach in a minute, 18 USC 3013, the new Special Assessment Act.

We don't contest the evidence on the conspiracy in the sense that the conspiracy existed on

May 29 for sure. The government wanted to get into detail that the conspiracy continued through May 30th and I am -- petitioner is not sure that there is sufficient evidence for that, and that is what Count 3 gets -- it becomes very important about Count 3. Count 3 is the crime of six ounces on May 30th, and I don't think there was enough evidence to convict my client of that crime. I took that issue to the Fifth Circuit. They refused to review that issue, invoking the concurrent sentencing doctrine, and vacated the man's conviction on the third count.

That count has had some collateral consequences at the Parole Commission, and we are going to get to deal into that in just a minute, but back to the evidentiary facts. There is a drug deal. Informer is working with DEA Agent Herber. Mr. Sandoval wants to sell cocaine to somebody. He approaches the informer and says, do you know anybody I can sell cocaine to, and Molina sets him up with Ms. Herber, the agent. He sells her the sample to show that he has got good quality stuff. It tested out to be 92 percent. That involves Count 2. He did that delivery on May 29. My client from the evidence is involved in that. He is the supplier of that gram of cocaine.

QUESTION: Mr. Connors, I would think that if

we were to agree with you on your view of the concurrent sentence doctrine, that is, that the Fifth Circuit should have considered your claim on that count here, we would not decide it ourselves, but would probably send it back to the Fifth Circuit. I think it is unlikely that we would get into the merits of whether the evidence supported the verdict on that.

MR. CONNORS: I recognize that, Your Honor, but it becomes important because one of the contentions made by the government is that there was sufficient evidence to find my client guilty of the six-ounce -- or let me word it this way, that the six-ounce delivery is involved in the conspiracy of Count 1. He has been convicted of the Count 1 conspiracy. That has been affirmed. And therefore the Parole Commission can use conspiracy in Count 1 against my client and leave him in this extra time, so the government in reaching the merits of the concurrent sentencing doctrine says Count 3 has no effect on my client. When I get back to the Fifth Circuit I am going to lose on Count -- no, when I get to the Parole Commission I am going to lose on the sufficiency issue because they are going to use it against my client anyway, so that is why, if you follow me, that is why the sufficiency on Count 3 becomes important.

We counter that -- let me follow up on that right now. We counter that with the Parole Commission's own rules that say if a count conviction is -- a man is acquitted on a conviction after trial, then the Parole Commission won't use that under normal circumstances, so if I can get a not guilty on Count 3 down in the Fifth Circuit, the Parole Commission is not supposed to use that, it seems to me.

QUESTION: Weren't you going to deal with this special assessment as to whether --

MR. CONNORS: Let me turn to that right now, Judge. The government in their motion and on the merits brief, they do concede that the Fifth Circuit's judgment should be vacated and the case remanded back to permit that court to -- for me to challenge the unreviewed count down there. They reason that because the legislatures enacted the special assessment law --

QUESTION: Yes.

MR. CONNORS: -- that that law became effective November 12, 1984, so under their theory that would have -- no appellate court should invoke the concurrent sentencing doctrine --

QUESTION: In the Federal system that means the concurrent sentence doctrine is done away with in any case, and I don't -- you really don't care on what

ground you win your case on, do you? If you are representing your client, if you want to get that count, the evidence on that count reviewed, the government's position is that you should have it.

MR. CONNORS: Right, Your Honor, and I agree with you, but I was so scared when --

QUESTION: You don't need to argue on behalf of any other clients.

MR. CONNORS: When they filed their motion, though, I was so scared the Court might give us about a two-sentence motion and nobody in the country would know the concurrent sentencing doctrine is gone, and they would continue using it for some time until you all could actually --

QUESTION: You mean it is gone in the Federal system.

MR. CONNORS: In the Federal system. Yes, sir.

QUESTION: In other words, you don't mind if we grant the government's motion. You just want us to explain why we have granted it. You want a paragraph instead of "The motion is granted."

MR. CONNORS: I guess a two-sentence one.

QUESTION: Is it clear that the $50 applies to each count?

MR. CONNORS: Your Honor, there has been a bunch of debate and at least three appellate decisions so far. Three of them have held that it does apply to each of the three counts. In my case it would total $150. The litigants in those cases were litigating and saying, no, it only applied per defendant per indictment, regardless of how many counts he was convicted on. You can only get a total of $50 per indictment. And three Circuit Courts have said that is wrong so far.

QUESTION: And so does the government.

MR. CONNORS: Yes, sir.

QUESTION: That is their interpretation of it.

QUESTION: And so do you, don't you?

MR. CONNORS: Yes, sir. It seems to be a pretty reasonable -- if you look at -- the best one I saw was the Donaldson case from the Third Circuit.

QUESTION: May I interrupt a minute? Is there anything regarding the disposition of the case with respect to which you disagree with the government? Is there anything we have to decide? Assume we take everything you two agree upon.

MR. CONNORS: I think, Your Honor, we do agree with the government's position, but we would like our knowledge and that of the members of this Court shared

with the appellate judiciary throughout -- the Federal judiciary throughout the country, so it will stop illegally using --

QUESTION: I suppose that is really our responsibility and not yours, though? I suppose that is our job, not yours.

MR. CONNORS: I understand that.

QUESTION: Your job is to get your client the relief you think he is entitled to.

MR. CONNORS: Right, Your Honor, so we can get back to the Fifth Circuit.

QUESTION: Well, I would think the three Courts of Appeals who have construed this Act must know that the concurrent sentence -- that these counts -- that these sentences aren't concurrent. Do you think there is any real problem?

MR. CONNORS: I don't know. It sure missed me in the Fifth Circuit when we were down there arguing in the Fifth Circuit, Your Honor, even though there were special assessments in this case.

QUESTION: I guess the Fifth Circuit missed it, too.

MR. CONNORS: Yes, that is what I am saying, and I believe they -- if I remember their opinion in this case, they called that $150, they call it a fine in

the actual opinion from the Fifth Circuit. They don't call it a special assessment.

QUESTION: Didn't the United States Attorney miss it also?

MR. CONNORS: He missed it in the original, when I was asking for petition for cert, Your Honor. Yes, he did. But at that time I don't believe he had a copy of the trial court's judgment before him.

QUESTION: Well, the same result would be with a fine, if you imposed a fine on each count.

MR. CONNORS: That is the decision in the Pinkus case. Yes, sir, Your Honor.

QUESTION: Mr. Connors, I hate to be a skunk at a garden party, but you really -- you really haven't been harmed by anything that has to do with this assessment, right? The assessment was set aside by the Court of Appeals, wasn't it?

MR. CONNORS: In the Fifth Circuit. Yes, sir.

QUESTION: Yes, so that is no part of your appeal at all, is it?

MR. CONNORS: No, it is not --

QUESTION: You haven't been harmed by it.

MR. CONNORS: It hasn't been paid and it --

QUESTION: Right, it hasn't been paid or

anything. And the government hasn't cross-petitioned, has it?

MR. CONNORS: No, sir.

QUESTION: So do you want to tell us how that is up before us then?

MR. CONNORS: By their motion to vacate, I got the impression they would like me to get out of here.

QUESTION: They can't move to vacate if they didn't seek an appeal.

MR. CONNORS: They have confessed error --

QUESTION: They can do that, just come up and move to vacate?

MR. CONNORS: They have confessed error in the past, and the last two times this issue was before the Court they confessed error each time and it disappears off the docket.

QUESTION: Confessing -- yes, but they have confessed error on an issue that had been a subject of the appeal.

MR. CONNORS: The concurrent sentencing doctrine, yes, sir, in Rubin and Mariscal, and so the Court --

QUESTION: But this $50 fine is not the subject of an appeal. Your client hasn't been harmed by it.

MR. CONNORS: I never appealed on that, no. I am appealing on the sufficiency issue --

QUESTION: You couldn't appeal on it, because you didn't pay it.

MR. CONNORS: Right.

From our viewpoint, the Solicitor General wanted to narrow this case down to the special assessment law, and we would prefer that we talk about the concurrent sentencing doctrine and that it was unconstitutionally applied to this client. If the Court recalls the opinion by Justice White in Benton versus Maryland, he mentions that there may come a case where a defendant is denied equal protection because most defendants can appeal their cases and see if there is sufficient evidence or whatever, and when an appellate court refuses to address that under the the doctrine, a defendant may be denied equal protection if he is hurt, and our man -- my client is definitely hurt because the Parole Commission is using this against him.

QUESTION: What is irrational about the distinction between concurrent sentences and nonconcurrent sentences, if you are going to talk in constitutional terms?

MR. CONNORS: Ask me that again, Your Honor.

QUESTION: Well, you are saying there is a

violation of equal protection if your client can't appeal and somebody else can appeal and get review. What is irrational about -- for equal protection purposes about distinguishing between concurrent sentences and nonconcurrent sentences so far as deciding which sentences to review?

MR. CONNORS: Let me try to answer it this way. In the sense that our client -- the reason for seeking review is sufficiency of the evidence, that beyond a reasonable doubt he is not guilty of this case, and that seems to go to the heart of our system, and I thought you could get review on that, and if an appellate court finds the man not guilty, Burks versus United States, 1978, talks how he can't be retried.

QUESTION: Well, to make out a violation of the equal protection clause you have to show not just that your client is in a class treated differently from another class but that the distinction between the two is irrational. Now, as I understand the distinction here is the concurrent sentence doctrine says if it doesn't make any difference to the punishment you are going to get an appellate court doesn't have to review a particular count, and that doesn't seem irrational to me. It may be a violation of the statute, and it seems to me you have got a much stronger argument on violation

of the statute than you do on the Constitution.

MR. CONNORS: To address your question, that gets us to the Parole Commission's guidelines of what they have already said they are going to do in this client's case. The guidelines, if Count 3 was struck on a sufficiency ground, petitioner feels that the guidelines would be maximum of 16 months, but instead the Parole Commission has told us it is going to be a maximum of 60 months. That is a whole lot of extra months between there, and it seems to me to be irrational when you are attacking the sufficiency of the evidence. They are using that against us.

QUESTION: (Inaudible) sentence on this count was set aside?

MR. CONNORS: Yes, sir, Your Honor, the Court doesn't note -- have this document before it. I would like to leave a copy with the clerk. But it is the notice --

QUESTION: Does the government have that?

MR. CONNORS: Yes, and they have noted it in their brief on the merits at Footnote 25. They have used this to explain to you. My client after we -- the vacation in the Fifth Circuit he filed his notice of appeal to the Parole Commission, and he --

QUESTION: By the way, what was vacated by the

Fifth Circuit? The conviction was?

MR. CONNORS: The conviction, but not the jury's verdict.

QUESTION: How do you do that?

MR. CONNORS: By writing an opinion and signing it.

QUESTION: Well, I know that.

MR. CONNORS: I don't understand it.

QUESTION: I know, but it says the conviction is vacated.

MR. CONNORS: And it can be reimposed whenever the government wants, and at that time we can seek review in the future.

QUESTION: Well, what if the Court of Appeals just thought there wasn't enough evidence and they just reversed the conviction? What would that do? It would reverse the conviction.

MR. CONNORS: And order an acquittal on that count.

QUESTION: And what would it do with the jury's verdict?

MR. CONNORS: Obviously it voids --

QUESTION: It just leaves it there. It just leaves it there.

MR. CONNORS: I thought it voided the jury's

verdict.

QUESTION: Well, if you set aside a conviction, you would think you were having something to do with the jury's verdict, wouldn't you?

MR. CONNORS: You would, but this fine distinction that three of the circuits are using that it is okay to vacate convictions but not the jury's verdict --

QUESTION: And the Parole Commission seems to think that. Is that it?

MR. CONNORS: Their guidelines seem to say even if it is vacated they can still use the -- in fact, that is what they say in this case. They can still use the conviction against my client even though it is vacated because --

QUESTION: Because why?

MR. CONNORS: -- there is sufficient evidence to support that conviction anyway, and they get back into sufficiency. Procedurally I think it was June when we received the Fifth Circuit opinion. In August my client filed his -- pro se filed his appeal with the parole folks, and they ruled on it later on. At Page 53 of the merits --

QUESTION: His appeal from where to the parole folks? I mean, he had an application to the Parole

Commission?

MR. CONNORS: Yes, sir. Yes sir, and this is his application that the government speaks of in their Footnote 25 at the end of the merits brief. The actual Parole Commission ruling on that appeal is found in our brief at Page 63, and we show you that they are actually using this vacated conviction against him and therefore that is the collateral consequence that it seems to me the Fifth Circuit missed and at least in the sufficiency area because of the way the Parole Commission uses these things, there should be a rule that says from this Court that under these circumstances the concurrent sentencing doctrine at least is abolished in the --

QUESTION: One way to cure that would be to say that the Court of Appeals has no business vacating a conviction without reviewing the evidence. You either review the evidence or not.

MR. CONNORS: Your Honors, that is exactly what the first opinion in the Ninth Circuit's case of DeBright said. I think it is at 710 Fed 2nd. That was a panel. And we will just vacate it. Then it went en banc and the entire court with no dissents held that that is an improper way to handle these things, the mere vacation, that is an improper way to handle it, and then they proceeded to address, I believe, six or seven

reasons why they needed to abolish the doctrine under their supervisory power because it was just improper to invoke it at all. We have set that out in our brief quite in detail.

(Pause.)

MR. CONNORS: Are there any other questions from the Court? I believe I have covered it.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Connors.

MR. CONNORS: Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: We will hear from you now, Mr. Bryson.

ORAL ARGUMENT BY WILLIAM C. BRYSON, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BRYSON: Mr. Chief Justice, and may it please the Court, our position in this case is that first, the sentences that were imposed were not concurrent, and therefore the question of the validity of the concurrent sentence doctrine is not properly before the Court in this case, but second, if the Court feels that the concurrent sentence doctrine, the validity of the concurrent sentence doctrine should be addressed in this case, we submit that the doctrine should be upheld in its traditional form, which is to say that when concurrent sentences are present, that an

appellate court can in an appropriate case affirm the concurrent sentence count without having to review the merits of that count or any challenge under that count.

Now, with respect --

QUESTION: Don't you have to cross-petition to ask for that relief?

MR. BRYSON: Well, You Honor, we are not asking for any relief, any judgment that is greater than the judgment that the other party is seeking.

QUESTION: But you are saying if we reach the issue we should modify the judgment below.

MR. BRYSON: Well, no, Your Honor, we are not asking that -- in other words, if we had wanted to get the extra $50, let's say, that it appears that one could -- one could argue that the Court of Appeals overlooked the fact that there was $150 as opposed to $50. If we had wanted the extra $100, we presumably would have had to cross-petition, but we think that the Court of Appeals erred in the way that it approached the special assessments, its interpretation of the sentence.

QUESTION: I understand.

MR. BRYSON: And therefore we are not asking for a greater judgment. We are simply saying that we think the Court of Appeals made a mistake.

QUESTION: No, I think you are asking for a greater judgment if you assume that three concurrent sentences are more severe because of their collateral consequences than just two. You are saying the proper and normal disposition by the Court of Appeals would not have been to vacate the sentence on Count 3 but rather to affirm on Count 3.

So if we followed what you say is a correct rule of law, the result will be, we would order the Court of Appeals to enter a different judgment.

MR. BRYSON: Well, except that we may be foreclosed by virtue of our failure to cross-petition --

QUESTION: Right.

MR. BRYSON: -- from asking for the judgment that would be as favorable as we would be entitled to, but nonetheless we agree, which is all that we can do by virtue of not having cross-petitioned, we agree that at least so much of that judgment as would require the Court of Appeals' current disposition to be reversed, we agree that it should be reversed to that extent. In other words, we are not asking for the extra $50. We are simply asking that petitioners' position be upheld, albeit for a different reason.

QUESTION: You are just confessing error.

MR. BRYSON: We are confessing error on the

basis of a sentence that --

QUESTION: Yes. Yes.

MR. BRYSON: -- we think the Court of Appeals misconstrued.

QUESTION: And you made a motion.

MR. BRYSON: And we have made a motion to that effect.

QUESTION: You made a motion earlier --

MR. BRYSON: That's correct.

QUESTION: -- a couple of months ago --

MR. BRYSON: Yes. Yes, Your Honor.

QUESTION: -- asking us to vacate and remand.

MR. BRYSON: That's correct.

QUESTION: Of course, the irony of this case as I see it is that the net result of your joint position may well be that when this -- when there is review on the third count they may find there is sufficient evidence, and --

MR. BRYSON: Well, we are, as a matter of fact, quite confident --

QUESTION: -- you don't complain about that, but --

MR. BRYSON: -- that there is plenty of evidence on that count, but that remains to be seen. One of the ironies again of this case is that it is a

peculiar case for the Court of Appeals to have applied the concurrent sentence doctrine.

QUESTION: In light of the special assessment statute, isn't any argument about the concurrent sentence doctrine sort of moot?

MR. BRYSON: Well, it is largely moot, I think, Your Honor.

QUESTION: Because there never will be a concurrent sentence.

MR. BRYSON: There are only two settings, I think, in which one could arise in the Federal system, assuming that Congress doesn't repeal the statute any time soon. One is if the District Court simply omits to impose the assessment or omits to impose it consecutively. We think it is quite clear that the statute requires that they be consecutive.

QUESTION: Well, that would be an erroneous --

MR. BRYSON: Exactly.

QUESTION: -- an erroneous -- that would be a --

MR. BRYSON: But there may be a few such cases.

QUESTION: Yes.

MR. BRYSON: I would assume as time goes on the courts --

QUESTION: What is the other one?

MR. BRYSON: The other situation would be in an Assimilative Crimes Act case. There is a case out of the Tenth Circuit which we cite in our brief, the Mayberry case, in which the Tenth Circuit held, erroneously, we think, but nonetheless held that the special assessments do not apply to sentences imposed under the Assimilative Crimes Act because the Assimilative Crimes Act, of course, picks up the state sentences. We think that the special assessment was intended to apply to all Federal crimes, including Assimilative Crimes Act --

QUESTION: So if the government's position with respect to the special assessment statute is accepted and it is followed, there never will be another concurrent sentence.

MR. BRYSON: That's correct, until the statute --

QUESTION: In the Federal system.

MR. BRYSON: In the Federal system until and unless the statute is overturned, assuming we are correct both on our challenge to the Assimilative Crimes Act --

QUESTION: Yes.

MR. BRYSON: -- case and also to our contention that the special assessment applies

consecutively.

QUESTION: And so if we accept your confession of error here we are electing not to address the concurrent sentence doctrine.

MR. BRYSON: That's correct.

QUESTION: We are saying this was a case in which there weren't concurrent sentences.

MR. BRYSON: That's correct, Your Honor. That is our first position, that there simply weren't concurrent sentences, and that therefore the question of the validity of the concurrent sentence doctrine is not really presented. However --

QUESTION: Mr. Bryson, can we assume that it is true that these fines are routinely sought? I mean, is there an element of -- supposing the United States Attorneys say, you know, for $50 it is not worth it to have to go up on appeal and sustain all counts.

MR. BRYSON: They are mandatory, Your Honor.

QUESTION: They are mandatory.

MR. BRYSON: As the statute -- it was devised in order to try to create a fund for witness compensation. It is mandatory on every count. It applies to both felonies and misdemeanors. It is a little hard to believe that $50 a throw could even pay for the clerical expenses that would be involved in

collecting the money, but that is what Congress decided, and they made it mandatory for the purpose of not going into the Treasury of the United States as a fine would, but rather to create a fund for witness protection. Now, in our view that means that it has to be imposed in every case.

The view we would take if the Court determines to reach the question of the concurrent sentence doctrine is that, as I say, the traditional rule should be preserved and that is that if the concurrent count, the sentence on which a concurrent sentence has been imposed, foreseeably will have no significant adverse consequences, then the proper disposition is for the Court, if it believes that the situation is appropriate for the exercise of its discretion to do so, to affirm that count.

There are two other options, one of which, of course, is to, as in the Ninth Circuit, to review every count regardless of the absence of any adverse collateral consequences, and the other is the disposition that was used in this case and that is used in the District of Columbia Circuit, and that is to vacate any count on which a concurrent sentence was imposed.

QUESTION: The latter seems to me the most

extraordinary of all

.

MR. BRYSON: Well, it is extraordinary. It was certainly inventive. It solves -- it isn't as odd, I think, as it may sound at first blush. It would be --

QUESTION: I think it is odd because a court is undertaking to vacate a sentence without any finding that there is anything wrong with it, and not on the request of the government.

MR. BRYSON: That is our principal objection to it, of course, in that courts should be very slow to be vacating presumptively valid convictions on grounds of convenience, but on the other hand what the Court in the Hooper case, which is the D.C. Circuit case that began this -- invented this device really, what the Court said was that this count will essentially be put in the deep freeze, and we will hold onto it, and if it turns out later that the government needs the count for some purpose, then we may go back and review it.

So it isn't as if it is being vacated forever. It is not as if it is being thrown away. It is simply being put in some kind of suspended animation. Now, we think that is a very messy kind of status which has no --

QUESTION: (Inaudible) conviction and still leave something --

MR. BRYSON: Well, I think the way you do it is simply declare that you have done it --

QUESTION: What is in limbo? What is in limbo?

MR. BRYSON: Well, it just depends on what the Court of Appeals calls it. If the D.C. Circuit, for example, says that this conviction is hereby vacated, what it presumably means is that that conviction cannot be used for any purpose until we declare it can, so that they are simply saying the judgment of conviction is vacated and presumably also any collateral consequences that may flow from the fact or the verdict of conviction or the judgment of conviction are simply foreclosed by virtue of our order. It is in effect an injunction, as I understand the Hooper case, against any District Court from ever making use of that conviction until the Court of Appeals says that it may.

QUESTION: They do this presumably pursuant to their supervisory powers over the District Court. Is that it?

MR. BRYSON: I think under 2106 is where the authority came, which is essentially the statutory authority for a Court of Appeals to dispose of the case as it sees appropriate. Now --

QUESTION: Could it be that the court doesn't

know the difference between vacate and suspension?

MR. BRYSON: Well, in the Hooper case they talked in terms of a suspension of the sentence, but I think what they really meant was a little more than just suspension of the sentence, because I don't think, Your Honor, that they meant to leave in effect the verdict of conviction for use as a verdict of conviction --

QUESTION: I think the verdict of conviction is rather important --

MR. BRYSON: It is.

QUESTION: -- for you to know whether it is there or not.

MR. BRYSON: It is, and that is why I think -- that is one of the Achilles heels, I think, that this Hooper process suffers from, is why we don't believe that is the appropriate --

QUESTION: When do we get an opportunity to pass on it? There is no way for us to get to it.

MR. BRYSON: Well, I don't think so, but were the Court to get to it we would say that for precisely the reason you have said, that this verdict of conviction is important and it seems to be lingering there in the air.

QUESTION: It could be for the purpose of keeping us from getting to it.

MR. BRYSON: Well, it certainly has the effect of preventing any further review because the judgment has been vacated. You can't review just the verdict of conviction, but the verdict of conviction, as long as it stands, may have collateral consequences even though those collateral consequences were not intended by the Court of Appeals that went through the Hooper procedure, so it is a messy kind of procedure that creates, I think, more problems than it solves. It is much easier, I think, more straightforward, and more conventional to simply say if there is no reasonable likelihood of any adverse collateral consequences we should simply affirm.

QUESTION: Mr. Bryson, may I ask you another question about this case? This opinion, also that remarkable footnote at the beginning that the local rule provides for nonpublication of certain -- and they didn't publish this one, did they?

MR. BRYSON: That's correct.

QUESTION: Was this the first time they laid down this remarkable doctrine? Is this settled doctrine in the Fifth Circuit?

MR. BRYSON: Oh, it is settled, Your Honor.

QUESTION: They do this all the time. They vacate --

MR. BRYSON: I would say 50 percent of their criminal cases in the Fifth and Eleventh Circuits are disposed of unpublished and --

QUESTION: No, I don't mean the unpublished opinion. I know they do that a lot. But the rule of law regarding the concurrent sentences that when they are the same will vacate one and hold it in suspension.

MR. BRYSON: Oh, I am sorry, no. They have followed that process for the last five or six years I think, maybe four or five years.

QUESTION: They have. I see.

MR. BRYSON: They have done that in a number of cases. They have been somewhat inconsistent. Sometimes they have followed the traditional --

QUESTION: That is a good reason not to publish the opinion, I suppose, if you want to be inconsistent.

MR. BRYSON: Well, they certainly have done this in published opinions. The Cardona case is the leading case.

QUESTION: Have they ever, to your knowledge, actually exercised their power to take a second look where they say we -- you know, the suspended animation business, that the government has ever come back and said, please go ahead and review it?

MR. BRYSON: The only case in which I know that has happened is a case not out of the Fifth or Eleventh Circuits, but out of the D.C. Circuit, a case called Miller, which was decided -- I think it is in 449 F 2nd, in which the government said after the Court of Appeals had applied the Hooper doctrine and vacated this concurrent count had said, wait, this was a separate offense, it was a serious offense, we think the public interest requires that you review this separate offense even though there was a concurrent sentence, and the Court of Appeals acquiesced and did review it and did affirm it.

So that is the only case in which I know that has happened. Typically in these cases, and I think it underscores the fact that in these cases there are very few instances in which there are any collateral consequences --

QUESTION: I suppose -- what do you call your handbook now for U.S. Attorneys?

MR. BRYSON: U.S. Attorneys' Manual?

QUESTION: I suppose there ought to be some -- are you going to amend it to talk about the assessment so that this mistake isn't made again?

MR. BRYSON: Well, I would like to be as optimistic as the question suggests in thinking that an

amendment in the U.S. Attorneys' Manual would immediately alert everyone in the field. I suppose --

QUESTION: Yes, but U.S. Attorneys shouldn't any longer claim that sentences are concurrent in the Federal circuits.

MR. BRYSON: Well, interestingly, the U.S. Attorney in this case --

QUESTION: Didn't.

MR. BRYSON: -- didn't make that argument. This argument was raised by the appellant in his brief by way of anticipating a possible concurrent sentencing argument by either the government or on the part of the Court which wasn't made.

QUESTION: What was the government's answer to that?

MR. BRYSON: It didn't address the question of concurrent sentencing. In fact, the government said without elaboration in the Court of Appeals that there was an assessment, a 3013 assessment on each count, but not pointing out that it was made consecutive, as it was, and the Court of Appeals, because there was no argument, this point was never raised, the Court of Appeals assumed with the appellant that the assessment was actually a fine, assumed it to be a $50 fine and proceeded from there to accept --

QUESTION: Have there been any other instances around the country where a Court of Appeals has recognized that there can be no concurrent sentence?

MR. BRYSON: No. No, this has just, I think, because the statute is fairly new, and because these cases are just getting to the Courts of Appeals, I think this is one of the first times that this point has come up. It obviously was not Congress's intent to toss out the concurrent sentence doctrine with this statute, but it just may have been and in fact we think was.

QUESTION: You speak of concurrent sentences, Mr. Bryson, and anticipating collateral consequences. What about the consequences that Mr. Connors says he must anticipate for his client here, the Parole Commission guidelines? Is that sufficient to avoid the application of the concurrent sentence doctrine?

MR. BRYSON: It would be if he were right in his analysis of his case. Let's suppose that his case involved just two counts, the two substantive counts, and did not involve the conspiracy count. If that were the case, his first count on which his conviction was affirmed involved one gram of cocaine. The second count, which the Court of Appeals vacated, involved the six ounces, the substantive count. That would have made a big difference in his parole disposition and under the

Rubin case and other authorities that would have been enough to require that the Court of Appeals review that second count.

However, in this case the conspiracy count, as the Court of Appeals analyzed it itself, involved precisely the same conduct that was at issue in the substantive counts, and in fact Mr. Ray agreed specifically in an admission that was part of the record to obtain the cocaine that was on order, said that he had three ounces himself and would go find some more.

That is plenty of evidence to support the conspiracy count, conspiracy to possess with intent to distribute ten ounces of cocaine or at least six ounces of cocaine, and under the parole guidelines a conspiracy is rated the same as the substantive offense even if there is an acquittal on the substantive offense, so that he is in the same boat if he is convicted on the conspiracy as if he is convicted on the substantive offense. He is -- if it weren't for the conspiracy count he would be in a different position. But our position is that he is stuck on that.

The one which point he made in his argument which is correct is that the Parole Board did not acknowledge that the Court of Appeals had thrown out, vacated, or whatever it had done, the one count, the

Count 3, and the Parole Board went ahead and reviewed this case as if there had been a sustained conviction on the third count. Now that, I think, was a mistake, but our position is, he would be in exactly the same position by virtue of the conspiracy count, so that mistake is immaterial to his position, and of course in any event our position is that they are not concurrent sentences in this case and therefore all of that becomes immaterial.

If there are no further questions, I have nothing to add. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bryson.

Mr. Connors, you have eleven minutes remaining.

ORAL ARGUMENT BY JOSEPH A. CONNORS, III, INC.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. CONNORS: Thank you, Your Honor. I just want to address two things.

Justice Stevens, you asked about other cases in the Fifth Circuit. I have got a couple of them on my brief on Page 89 and 90. Montemayor was a big drug case. I think the man got about 50 years. And Cardona was the first time the Fifth Circuit used the vacation of convictions. In the Fifth Circuit's own opinion they

cite another one or two cases. ABI is the name of one defendant, but they have been doing it since at least 1981, and now the Eleventh Circuit has picked it up from its sister circuit.

The other thing I would like to address is the last point that counsel was making. At the Parole Commission Mr. Ray will be responsible for the six-ounce delivery because that is part of the conspiracy, and therefore when it is all over the Parole Commission has done the right thing. That is the contention of the government.

I think that is wrong, and let me call the Court's attention to -- one CFR we didn't bring to you, but it is 28 CFR 2.20, which is the normal one on parole, and then under Chapter 13 there is one called Number 4, and it talks about the vicarious liability. And it reminds one of the Pinkerton case that this Court decided in 1946 about vicarious liability, and I will get to that in a second. But that particular CFR reads, "The prisoner is held accountable for his own actions and actions done in concert with others. However, the prisoner is not to be held accountable for activities committed by associates over which the prisoner has no control and could not have been reasonably expected to foresee."

So the only evidence in the record that Mr. Ray is responsible -- from which that inference or speculation could be drawn is set out on my brief at Page 20, and may I read that to you, because I don't think it is enough to get there even at the Parole Commission, and so Mr. Ray -- that is where we differ with the government. Mr. Ray will not be held accountable because he could not reasonably expect to foresee that Sandoval would find six ounces and make the delivery the following day, it being our contention Ray is not the supplier of those six ounces.

The quote from the record, and this is Mr. Molina talking -- he is the informer. He is on the stand, and he's telling the jury the following. Sandoval advised Ray about this person that was willing to buy ten ounces of cocaine, and then quote, "and that this person was requesting ten ounces, and they weren't sure if they could come up with the ten ounces but they had three ounces is what I heard John say," my client, "and that they would have to go back and see if they could get the rest." And that is the extent of Mr. Ray's involvement. I got three ounces, I'll see if I can get any more.

Now, we don't know whether we got any more. We don't know if Sandoval got the rest -- got all six

ounces from a third supplier or he got half from Mr. Ray, half from somebody else, and yet the government -- that little statement there is enough for the government to say my client is involved in a six-ounce conspiracy when the actual conspiracy pled in this case is -- it doesn't say how many ounces. It just says a quantity of cocaine. And so they want that to cover both Counts 1 and 2.

QUESTION: But it was cocaine?

MR. CONNORS: Pardon me?

QUESTION: But it was cocaine?

MR. CONNORS: Yes, sir, six ounces were delivered, and based on the snitch's overheard conversation, petitioner said that he had three and that they would have to go back and see if they could get the rest. So we feel once the Parole Commission has this before it at least it is a good issue of which side of us, the government or Mr. Ray, will be responsible for Sandoval's act of delivering it the following day, since there is no evidence that Ray actually handed over the six ounces. So I would ask you to reach the doctrine that we brought to you.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Connors. The case is submitted.

(Whereupon, at 2:34 o'clock p.m., the case in the above-entitled matter was submitted.)

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-281 - JOHN WILLIM RAY, Petitioner V. UNITED STATES

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BY Paul A. Richardson

(REPORTER)