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SUPREME COURT OF THE UNITED STATES

In the Matter of:) No. 87-4

MARK ERICK WHEAT,

Petitioner,

v.

UNITED STATES

Pages: 1 through 44

Place: Washington, D.C.

Date: March 2, 1988

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARK ERICK WHEAT, :

4 Petitioner, :

5 v. : No. 87-4

6 UNITED STATES :

7 ----------------------------------x

8 Washington, D.C.

9 Wednesday, March 2, 1988

10 The above-entitled matter came on for oral argument

11 before the Supreme Court of the United States.

12 APPEARANCES:

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

14 Petitioner.

15 MICHAEL K. KELLOGG, ESQ., Assistant to the Solicitor General,

16 Department of Justice, Washington, D.C.; on behalf of the

17 Respondent.

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C O N T E N T S

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

2 CHIEF JUSTICE REHNQUIST: Mr. Cleary, you may proceed

3 whenever you're ready.

4 ORAL ARGUMENT OF JOHN J. CLEARY, ESQ.

5 ON BEHALF OF THE PETITIONER

6 MR. CLEARY: Mr. Chief Justice, and may it please the

7 Court:

8 The reason the Petitioner chose Mr. Iredale as his

9 attorney in this case was best stated by the trial judge, who

10 said "were I in his position, I would want Mr. Iredale

11 representing me, too, because he did a fantastic job in the

12 prior trial and I can fully understand why he wanted him as his

13 attorney."

14 This case turns on the question of right to counsel

15 of choice. I would suggest that it's a disqualification issue

16 clear and simple. The issue is presented where all parties

17 waived any potential conflict, and the question decided here

18 was the question as to the timing.

19 The timing in this case was that the attorney

20 following basically the guidelines of Cuyler v. Sullivan

21 entered the case at the time he could, when he disposed of the

22 other two. When the second guilty plea was entered, he

23 indicated I am now going -- I am retained by this defendant who

24 has seen my superior trial skills and wants me. He has his

25 independent attorney, this is not someone else, the attorney

1 knows of the performance and says we want him.

2 The trial judge says, when presented initially with

3 it, if the clients have no problem and the prosecutor has no

4 problem, I see no problem.

5 At this time, the prosecutor said we don't plan to

6 call this person as a witness, but there is a potential, a

7 possibility. No time previously was this individual considered

8 as a witness.

9 The following Monday, a written objection is filed to

10 the appearance of this attorney because (1) he would not be

11 involved, Gomez-Barajas would not be involved, but now there's

12 other person who wasn't going to be a witness will now be a

13 witness. That witness would provide no adverse information

14 against the Petitioner. That witness would provide adverse

15 information and substantiate the Government's principal witness

16 that he was a large-scale dope dealer because, in fact, he did

17 deliver marijuana to this individual's home.

18 The key question was, did that marijuana get to the

19 Petitioner's home. The answer was there was no showing in the

20 record, and the Government just assumed that that connection

21 was sufficient to knock out counsel.

22 I think it's also important to note in this case is

23 the District Court finding, and these things are so critical

24 for, I think, an appellate tribunal. In this case, the Court

25 said based on the representations of the Government, so there

1 was no factual finding. It was assumed that what the
2 Government presented in its written papers were sufficient.
3 Second, I have no choice but to file -- find
4 irreconcilable conflict, not a discretionary, a balancing of
5 the tests. There was no hearing.
6 QUESTION: Excuse me. Were any of the Government's
7 representations contradicted at that time?
8 MR. CLEARY: Yes, Your Honor, they were. Flat out.
9 Throughout the initial hearing.
10 QUESTION: Not conclusions, but representations,
11 specifically what was contradicted. I'm not sure that means
12 that the district judge was not making any evaluation of his
13 own. It would be a natural way to say it based on the
14 Government's representations, there being no contradiction of
15 those. I have no choice.
16 MR. CLEARY: Right.
17 QUESTION: What factual representation was
18 contradicted?
19 MR. CLEARY: The factual representation was
20 contradicted, first, as to Mr. Iredale being -- I mean, Mr.
21 Wheat, the Petitioner, being a possible witness against Mr.
22 Gomez-Barajas, if his deal fell through. The arrangement as to
23 the non-marijuana charges. That is to say, the other charges
24 and the Government's representation was that, gee whiz, if that
25 fell apart, Mr. Wheat might be a possible witness against Mr.

1 Gomez-Barajas, and on that record, we have flatly contradicted
2 by the assertions of Mr. Iredale that there is no way he could
3 be a witness in that transaction.
4 So, we do have a classic confrontation.
5 QUESTION: Were they talking about the prosecution
6 calling him as a witness or the defense?
7 MR. CLEARY: No. In that case, Your Honor, there was
8 an assertion by the prosecutor that he thought there might be a
9 possibility. However, in his written statement of which the
10 judge based the decision on, he stated only as to the deal. I
11 think both sides acknowledged that Gomez-Barajas would not be a
12 witness.
13 QUESTION: Well, is that somewhere in the record? So
14 that we know that the District Court credited that rather than
15 the Government's representation?
16 MR. CLEARY: Well, the Government didn't say he was
17 going to be called as a witness. The Government said that the
18 reason that Gomez-Barajas was going to be involved was if the
19 plea fell apart, then the Petitioner might be a possible
20 government witness against Gomez-Barajas.
21 The Government, in its representation to the Court,
22 did not even suggest that Mr. Gomez-Barajas would be a witness
23 for them or the defense.
24 QUESTION: Perhaps I'm just not getting all of it,
25 but in your answer to Justice Scalia's question, you say the

1 Government. The Government represented that someone might be a
2 witness.
3 MR. CLEARY: That's -- maybe there's -- there's two
4 individuals. Gomez-Barajas and Bravo. Bravo was a witness in
5 the trial. There's no question as to that.
6 QUESTION: But when the Government is speaking before
7 the trial, all they can do is represent as to possibilities.
8 They can't say in fact yes, he will surely be called.
9 MR. CLEARY: Well, I think in the sequence in this
10 case, sticking to the record that we have on the 22nd of
11 August, the statement of the -- at the first time Bravo entered
12 a plea and indicating that now Mr. Iredale is the attorney for
13 the Petitioner, the Government says, at this time, we have no
14 plans to call him. They already made the adjudication. They
15 have the trial the following week. There is the possibility.
16 So, I think at this time, what we have so close to
17 the trial after the plea is entered an indication that he is
18 not a viable true-to-form and anticipated witness.
19 QUESTION: Then, the Government changed its
20 representation shortly after that, didn't they?
21 MR. CLEARY: That's correct.
22 QUESTION: And are you saying that the Government's
23 second representation was contradicted?
24 MR. CLEARY: Yes. No. I think the defense said,
25 yes, he is going to be calling him as a witness. What was the

1 contradiction was as to whether or not that witness would give
2 evidence that would, in effect, be adverse towards the
3 Petitioner.
4 And I think that the concern was that what the
5 witness had to say and in the case we had -- and what's
6 important, I think, is the time sequence on this. The original
7 case, Mr. Iredale represented Gomez-Barajas. In April of 1985,
8 some several months before, appointed counsel represented the
9 witness Bravo. Bravo relieved the appointed counsel and at
10 that time, Mr. Iredale was representing two defendants with the
11 approval of the court and no objection from the Government.
12 And I think then to see the sequence of events where
13 they have no objection to multiple representation as such, to
14 shift after Iredale has successfully engaged them and really
15 done damage to their witnesses, the same witnesses the
16 Petitioner would be facing, changed the ball park.
17 I think, further, that what the Court also said after
18 it found an irrebuttable presumption of conflict, it said no
19 waiver is possible. It didn't say a question about an
20 intelligent knowing and voluntary waiver, which I think is an
21 appropriate inquiry for a court, but said no waiver is
22 possible.
23 QUESTION: Mr. Cleary, did you ask for a hearing?
24 The trial is on Tuesday and these arguments are taking place on
25 Monday. Did you ask for an evidentiary hearing?

1 MR. CLEARY: What happened was, Your Honor, that at
2 first, the previous Thursday is when Bravo, the witness,
3 entered the plea, and the court indicated it had no objection
4 and at that time, the representations were made that all
5 parties involved had consent and the court said, but I will
6 give the Government an opportunity to object if it wishes to
7 object, and what had happened is the Government filed the
8 written paper, the memoranda, on the following Monday.
9 The trial was scheduled for Tuesday, and at that
10 time, on Monday, given the Government's objections, the court
11 never inquired as to a hearing and the offer was made and there
12 was a clear cut offer of proof, that these individuals would
13 testify that they (1) had no conflict and that they were
14 willing to waive any type of conflict, potential or actual.
15 QUESTION: Am I correct that you did not ask for an
16 evidentiary hearing? You just submitted it on offers of proof?
17 MR. CLEARY: I think that they asked for the question
18 of taking a waiver, but I think the judge foreclosed it by
19 saying waivers are not possible. So, the inquiry of what could
20 be said as to the nature of the conflicts or their intelligent
21 waiver was never considered below.
22 I think that in this case, the representation as to
23 conflict are minimal. I think that the concern is we have like
24 a double standard. In Cuyler, this Court found where we had
25 two attorneys representing three defendants, and the first one

1 went first to trial and was convicted of murder. The attorney
2 still representing the other two and found that there was
3 multiple representations.
4 The court held that multiple representation doesn't
5 work to the disadvantage, that the right to counsel of choice
6 is that it's a benefit. You should have the ability to choose
7 who your attorney might be. In that opinion, there was at
8 least some concern given for the deference that was owed to the
9 choice of the client and the attorneys involved.
10 In Cuyler, we had a situation where there was a
11 potential conflict and this Court found an implicit waiver. In
12 this case, we suggest that what we have at most is a
13 speculative or potential conflict and should it not be able to
14 be overcome by an expressed waiver, --
15 QUESTION: Mr. Cleary, you're not suggesting that in
16 a voluntary knowing waiver on the part of a defendant is the
17 final answer to any conflict, are you? That that ought to just
18 guarantee the selection of this particular lawyer?
19 MR. CLEARY: I am suggesting that a knowing
20 intelligent and voluntary waiver, I mean one fully explored by
21 the court, --
22 QUESTION: I think the question asked you can be
23 answered yes or no, and then you can explain your answer.
24 MR. CLEARY: Yes.
25 QUESTION: You say that a voluntary knowing

1 intelligent waiver can concludes the matter?

2 MR. CLEARY: Yes.

3 QUESTION: Even though you could say there would be a

4 conflict?

5 MR. CLEARY: Yes, Your Honor. If I can give an

6 example.

7 QUESTION: Yes.

8 MR. CLEARY: The famous Loeb Leopold case was two

9 University of Chicago law students who murdered a young boy,

10 and they both made accusations, one accusing the other. They

11 picked a single attorney, Clarence Darrow, to represent them,

12 and could the prosecutor come in and move to disqualify like

13 here, on the grounds that there would be a conflict of interest

14 between the two or should not the two be allowed to make the

15 choice that may be notwithstanding the conflict, their best

16 interests might be served by a state escaping the scaffold, and

17 I think that in that context, we could have an actual conflict

18 that can be waived.

19 In the context of this case before the Court now, my

20 suggestion is there's only two potential conflicts.

21 QUESTION: But how about, you know, the ABA standards

22 on conflicts, state bar standards on conflicts? You know, they

23 are not favored, to put it mildly.

24 MR. CLEARY: The standards the Court refers to is

25 that they lean towards, and I would say as a general rule, the

1 preference is to have separate counsel, and to that extent,
2 where I track the other lawyers.
3 However, each one of those professional rules gives
4 way and defers to the right of the defendant to choose, and I
5 think that we have to protect that right.
6 QUESTION: Even in the face of a known conflict?
7 MR. CLEARY: Even in the face of a known conflict.
8 Would I be in a better position to choose my attorney or have
9 the Government choose the attorney for me? And I think given
10 that tension, I would like to think I could choose my own
11 attorney.
12 QUESTION: Yes, but you can carry that to -- you can
13 say, you know, my real favorite is someone who isn't admitted
14 to the bar.
15 MR. CLEARY: Your Honor is correct. I think there's
16 -- the Court, I think, in Chandler v. Fretag referred to it as
17 an unqualified right. However, I think the right to demand
18 counsel and, therefore, would have to be a lawyer. Your Honor
19 is correct.
20 Second, --
21 QUESTION: Why? Why? I mean, on your theory, if I
22 think someone who is not a lawyer is better, the only reason we
23 demand a lawyer is to protect the defendant even when he
24 doesn't want to protect himself. He thinks he knows better,
25 that he'll be better off with his non-lawyer.

1 MR. CLEARY: I would have to stick to the terms of
2 the Constitution which said counsel, and I think that the
3 meaning and understanding of counsel at the time it was adopted
4 in 1791 would mean a lawyer, and also at that time would mean
5 also the right to choose a lawyer because this Court really
6 didn't evolve the alternative appointed counsel until Powell v.
7 Alabama.
8 QUESTION: Mr. Cleary, do you think the public has no
9 right to have a trial proceeding that appears in all respects
10 to be fair, including not having an attorney represent two
11 defendants if there is an apparent conflict of interest?
12 MR. CLEARY: I think that the public's interest has
13 to be balanced against those on trial. I think if there was a
14 problem as to, and this gets into the issue of was it an
15 intelligent waiver, a knowing waiver or a voluntary waiver, I
16 think the Court can interject itself, and there are decisions,
17 for example, when the individual might be an attorney that's
18 involved and wants to represent both people.
19 I think there are some questions as to whether or not
20 that would be voluntary by virtue of the relationship. My
21 suggestion is that the public would be more scornful, that if
22 prosecutors could come in and move to disqualify the best
23 qualified defense lawyers and think that the person has to take
24 someone other than the person's choice of counsel, when, in our
25 system, we face in a criminal context the Government.

1 And you have to think that the person who is with you
2 is your advocate, your soldier, your protector.
3 QUESTION: Do you base your alleged right entirely on
4 the Sixth Amendment?
5 MR. CLEARY: Yes, Your Honor. I think that the Sixth
6 Amendment as developed by this Court, and I think it's rather
7 clear cut and I think, if anything, I'm here with the pristine
8 pure right to counsel because I have 1791. When you look at
9 the authorities, what you had was only the right to counsel of
10 choice.
11 In Powell v. Alabama, 1932, this Court held that due
12 process because the Sixth Amendment didn't apply to the states,
13 that there was a right to appointed counsel in a death case,
14 but Alabama already had it, and you evaluated it, and you said
15 that the right to counsel at that time existed only by statute.
16 '42 Betts v. Brady didn't find it, said no, doesn't apply.
17 QUESTION: The Government takes the position that the
18 right to counsel of choice, if it exists at all, is not found
19 in the Sixth Amendment, but in due process.
20 MR. CLEARY: I would suggest that the argument was
21 evolved by this Court in the context of the due process
22 application because the only way it could be extended to the
23 states would be through the Fourteenth Amendment due process
24 clause.
25 So, I would say in embryonic form, that was the only

1 justification. I think since Gideon, it's very clear that the
2 Sixth Amendment inheres in the right to counsel, so that you
3 have it applied to the states.
4 QUESTION: Yes, but the Government says that entitles
5 you to adequate legal representation, but doesn't extend to a
6 choice.
7 MR. CLEARY: I would say that I am not in a position
8 to comment on the due process clause under the Fifth as was
9 applied in the case when I had the Sixth, which, in historic
10 traditional concept, gives the right to counsel of choice.
11 QUESTION: Do you think the Court before -- before
12 the Court grants the request to appoint this counsel, can
13 demand a waiver? It sounds to me like you say counsel of
14 choice goes to the Court, says I want to discharge my counsel
15 and have another.
16 MR. CLEARY: Well, I don't think that it can be
17 asserted in unreasonable fashion. I think it has to be a
18 reasonable opportunity and limits could be placed on it.
19 If it's a dilatory --
20 QUESTION: What kind of limits?
21 MR. CLEARY: Well, I can only use the rule of thumb
22 of reasonable. It should be given a reasonable opportunity to
23 assert it, and if it will not delay the trial. In this
24 particular case, --
25 QUESTION: Well, I know, but can the court insist on

1 a waiver of what appears to be a conflict of interest?

2 MR. CLEARY: If the court makes the inquiry in a

3 federal context under Rule 44(c), the court can ask if there's

4 a waiver. I don't think the court can force a waiver from

5 someone. If it finds there is no waiver, then I think it has to

6 say other counsel are going to be necessary.

7 QUESTION: Well, so, he could -- the court could turn

8 it down, if there's -- if a waiver is declined?

9 MR. CLEARY: If a waiver -- if there is not an

10 intelligent waiver, the court doesn't have to accept it. If

11 there's joint representation, and --

12 QUESTION: I take it then on your position that if

13 one of these persons is convicted and the other is acquitted,

14 the person who is convicted is a fellow who got the waiver,

15 that he is stuck with it, he just can never come back and say,

16 look, that judge shouldn't have allowed this, there was obvious

17 conflict, I was denied due process.

18 MR. CLEARY: That was the situation in Cuyler v.

19 Sullivan, where the one who was convicted and two were

20 acquitted, and the question was this Court, and I think it was

21 over two dissents or at least commentary that there should have

22 been an inquiry by the court.

23 This Court found an implicit waiver, and in this

24 context where we have an expressed waiver by all the parties,

25 and this is not government witnesses, this is not the

1 Government like we have former federal prosecutors, and the
2 question is, yes, I think that the waiver.
3 This Court would have to sit down and do what it's
4 doing now, to go through, to make the test, is it speculative,
5 potential, actual conflict.
6 QUESTION: Well, at least you would certainly have
7 to, in my example, you certainly then have to at least
8 relitigate again voluntariness, whether you were really
9 intelligent and whether you were informed of all the
10 circumstances, and whether you really were aware of the
11 seriousness of the conflict when you went in.
12 MR. CLEARY: I think that there has to be an inquiry,
13 and it wouldn't have to take very long. The question is Rule
14 11 usually takes ten to fifteen minutes as the Court knows.
15 In this type of case, we have a classic example in
16 Krebs, a Sixth Circuit case that I cited, where it was Judge
17 Peck who wrote the opinion and the trial judge was super-
18 sensitive. Do you want other counsel appointed, you have
19 appointed counsel available, and he did it in a matter of
20 minutes and that was the end of it, and in that case, it was an
21 actual conflict because the prosecutor intimated that the
22 attorney representing him may be involved in the criminal
23 misconduct, and I think in that context, from an appellate
24 tribunal, you would want a cleaner sanitized clear cut
25 established waiver rather than the speculation about what

1 constitutes what type of conflict and to disqualify attorneys.

2 QUESTION: I suppose -- would he also waive any claim

3 of ineffectiveness by the counsel's performance during trial?

4 I thought he was going to be good, but it turns out he was

5 wholly ineffective.

6 MR. CLEARY: I think the right to counsel of choice

7 is different than the right to effective assistance of counsel,

8 and I think one is --

9 QUESTION: Well, when trial counsel fails to object

10 to testimony or lets some in because it favors one of his

11 clients but not the other, is that ineffectiveness?

12 MR. CLEARY: I think that the Court, to the extent

13 that it would ask the person, do you want to fly under your own

14 flag, and I think we see judges do this all the time, do you

15 want attorney X representing you, and they say unequivocally

16 yes, then I think we should give the individual that choice,

17 and I think an effective --

18 QUESTION: I don't know how you're going to really

19 protect the court system from two or three more trials about

20 counsel if you permit -- if a judge is just foreclosed from

21 turning down this choice where there are conflicts.

22 MR. CLEARY: I think, Your Honor, that what we're

23 trying to suggest is that in this case, the judge used the atom

24 bomb to disqualification. There were other procedures in this

25 case.

1 For example, Mr. Iredale not to examine that
2 particular witness, and there were also other alternatives.
3 Cures that could be used in this case, other than total
4 disqualification. We didn't have it. And I think that in the
5 context of this case, where we do have something so fundamental
6 as the right to counsel of choice, and we see that and I would
7 say it's analogous to Faretta and it's not to be measured by
8 Cronic or Strickland, which is the lowest minimum level of
9 effective assistance of counsel.
10 QUESTION: Mr. Cleary, in Faretta, we have seen many
11 examples since Faretta of relitigating a question of whether
12 the court was justified in letting them proceed on their own.
13 MR. CLEARY: Your Honor, --
14 QUESTION: The trial court can't win in some of these
15 situations. If he says no, you're not capable of proceeding on
16 your own, it's appealed, I should have been able to represent
17 myself. If he says yes, you are capable of representing
18 yourself as you want to, he later comes in and says if I had
19 any sense, I never would have tried that.
20 MR. CLEARY: I think we all have to assume risks that
21 are made in waivers. The defendants in the police station
22 often waive counsel thinking it's for their mythical benefit,
23 and find out that they have to live with that mistake much
24 later on.
25 QUESTION: If I thought we'd have to live with it, I

1 could easily accept the argument you're making with this, but I
2 cannot imagine that you really think that these people are
3 going to live with the waivers they make.
4 Let's assume the most voluntary informed waiver you
5 can imagine, this counsel is going to represent all three of us
6 and then what happens at trial is that counsel in order to save
7 two of them allows in testimony or, indeed, elicits testimony
8 that absolutely condemns the third. Counsel said, well, I did
9 the best I could, I, after all, was representing all three.
10 You acknowledged that I could represent all three. You waived
11 it.
12 Now, are we really going to allow that to happen?
13 MR. CLEARY: First of all, I think the Court
14 denigrates the role of defense counsel because most of us are
15 not going to put ourselves in that situation, and in Cuyler,
16 there was a representation that certain deferences were going
17 to be.
18 In that situation, no defense counsel would take
19 himself into that position, but there can be cases where --
20 QUESTION: We have no problem if we posit that no
21 defense counsel will ever put himself in a situation of a bad
22 conflict. We don't have to worry about any of this. I mean,
23 that's the problem we're talking about.
24 MR. CLEARY: But I think there has to be some point
25 where the individual -- in the context of this case, we have

1 the Government using it as a tactical advantage to knock out
2 counsel who face the same witnesses, and when you have the
3 reason to want this particular attorney and you see not
4 demanipulative, not be stumbling, not be mistaken guidance but
5 a firm choice, even though it has with it certain risks, and
6 the Court is correct, I think just the same way we have pleas
7 of guilty, can't everybody say that the plea of guilty is wrong
8 and that's why we have a Rule 11 hearing.
9 I think that the time involved in the context of this
10 case, where all three parties waive, it was a speculative
11 conflict that in this particular instance, there should be, I
12 think, the right to go forward with your chosen advocate.
13 I would like to suggest that Faretta, I think, would
14 be the analogous rather than Cronic v. Strickland, for
15 determining it. This Court made reference to that in Cronic as
16 to distinguishment, lining up with Flanagan in every circuit
17 that has treated it when the right has been denied. It is done
18 without a showing of prejudice.
19 I'd like to reserve my remaining time.
20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cleary.
21 We'll hear now from you, Mr. Kellogg.
22 ORAL ARGUMENT OF MICHAEL K. KELLOGG, ESQ.
23 ON BEHALF OF THE RESPONDENT
24 MR. KELLOGG: Thank you, Mr. Chief Justice, and may
25 it please the Court:

1 The absolute position taken by Petitioner is that he
2 has an unqualified right to waive any conflicts of interest
3 arising out of multiple representation stemming from the Sixth
4 Amendment.
5 Now, we acknowledge at the outset that a criminal
6 defendant in most cases has a right to choose any lawyer he
7 wants, but that right does not stem from the Sixth Amendment,
8 and it's an inherently qualified right. It is not like the
9 right to counsel or the right to self-representation which must
10 be enforced directly by the Court in every serious criminal
11 case.
12 Now, the right to choose your counsel is inherently
13 subject to a number of significant qualifications which
14 Petitioner ignores. For example, the lawyer one would choose
15 may be unwilling to represent you or his fees may be too high
16 or he may have other commitments which conflict with the
17 court's schedule and make him unable to appear. He may not be
18 admitted to the bar of the court. He may be a lay man or a
19 disbarred attorney.
20 All these sorts of reasons can limit to some extent
21 the defendant's choice of counsel. It is also limited by the
22 existence of certain serious conflicts of interest. These
23 conflicts can be very many types. For example, the lawyer he
24 wants may be a former prosecutor who, while he was working for
25 the Government, was involved in the same criminal matter or the

1 lawyer may have been retained by third parties with interests
2 adverse to that defendant or he may be a fact witness at the
3 trial or implicated in the same criminal conduct with which the
4 defendant is charged.

5 Courts have universally held that under those
6 circumstances, the conflicts of interest override the
7 defendant's right to choose his counsel and permits
8 disqualification. Now, the most common of these types of
9 conflicts arises in cases where one lawyer represents more than
10 one defendant in a given criminal case, and Rule 44(c) was
11 designed to deal with that situation.

12 States that -- the District Court has to inquire into
13 every instance of multiple representation, and take such
14 actions as may be appropriate unless there's good cause to
15 believe that no conflicts are likely to develop at trial.

16 The Rule 44(c) does not itself state what actions,
17 what measures might be appropriate if conflicts are likely to
18 arise, but the advisory committee note to the rule makes clear
19 that disqualification of counsel is legitimate option. The
20 dangers created by multiple representation that Rule 44(c) is
21 designed to address is primarily centered around the fact as
22 noted during the previous argument that the interest of the two
23 defendants may diverge at trial. Disparity of evidence in one
24 -- between the defendants may require the lawyer to forego
25 presenting a witness or making an argument or taking other

1 action that would help one of his clients at the expense of the
2 other.
3 QUESTION: Mr. Kellogg, let me throw out a question
4 that troubles me about the case to be sure you don't overlook
5 it.
6 You're mainly directing your remarks to the case in
7 which the new counsel would be the sole attorney for the
8 defendant, and I'm particularly concerned in this case about
9 the fact that this lawyer was willing to be additional counsel
10 and he could have kept the same counsel and this man just work
11 along with him.
12 Why wouldn't there be adequate protection against the
13 concerns you address if he let them both sit at counsel table?
14 MR. KELLOGG: Well, first of all, from the record,
15 it's not actually clear whether Iredale was going to represent
16 him by himself or whether he was just --
17 QUESTION: He originally wanted to do it by himself,
18 but it seemed to me that it was rather clear that he was
19 willing to serve as additional counsel and just cross examine
20 these witnesses that seemed so important to him, and I hope you
21 cover that point as fully as you can before you get through
22 because that's what troubles me about this case.
23 MR. KELLOGG: Well, it raises problems because he was
24 representing the other two defendants alone. So, no other
25 counsel would be protecting their interests independently, and

1 with respect to his representation of Wheat, it would have
2 involved one of his clients being a principal -- not a
3 principal witness, but certainly a witness with adverse
4 information to the Petitioner at the trial and it was also
5 particularly troubling about this case is the fact that he was
6 representing defendants at widely disparate levels of what was
7 a fairly large conspiracy. He was representing the lead
8 defendant, who is the ultimate source of the marijuana. He was
9 representing a middle level defendant, Petitioner, who was
10 responsible for brokering large amounts of marijuana, and one
11 of the small fish at the bottom who delivered.
12 QUESTION: But I don't see why the other lawyer
13 wouldn't be perfectly able to look out for all the pitfalls
14 that would concern the Court in that situation. If you assume
15 the other lawyer is completely independent and competent, which
16 I gather he was from the record, he would surely, it would seem
17 to me, understand the potential for conflict and surely there
18 is some potential for conflict here.
19 MR. KELLOGG: Well, Rule 44(c) does say that the
20 primary burden is placed on the lawyer to anticipate conflicts
21 that are likely to develop, but there's a number of reasons why
22 they can't do that, and Rule 44(c) goes on to state that even
23 the defense counsel is not going to be able to anticipate all
24 the sorts of conflicts that might arise at trial because he's
25 not going to know fully what the nature of the Government's

1 case is.

2 Also, there's the problem that in representing more

3 than one defendant, it's difficult to give independent advice

4 to each defendant if the multiple representation favors one at

5 the expense of the other.

6 Now, with Petitioner having a separate counsel to

7 represent him, that concern would be alleviated somewhat, but

8 with the other two defendants not having separate counsel, that

9 concern -- that's a very legitimate concern of the District

10 Court.

11 The fact that the motion to disqualify --

12 QUESTION: Clarify one thing for me. During the

13 trial of this case, the man that wanted to come in, I forget

14 his name now, --

15 MR. KELLOGG: Iredale.

16 QUESTION: Iredale, was not going to represent

17 another defendant during that same trial, was he?

18 MR. KELLOGG: No. It would have been --

19 QUESTION: If the trial had been almost terminated

20 and a plea taken, but during the hearing itself, there wasn't

21 any possibility of conflict of that kind.

22 MR. KELLOGG: Well, he would have been representing a

23 witness against Petitioner.

24 QUESTION: But the witness would have been, in

25 effect, a former client.

1 MR. KELLOGG: Yes.

2 QUESTION: But the other lawyer --

3 MR. KELLOGG: He had not yet been sentenced.

4 QUESTION: And if it looked like it was really -- he
5 was not doing an effective job, why couldn't the court say,
6 well, I think we better have the other lawyer examine this
7 particular witness.

8 MR. KELLOGG: Well, that would have been one option.

9 QUESTION: Why wouldn't that have been an adequate
10 option? Because -- I know you say that there's no absolute
11 right to counsel of your choice, but surely there is some value
12 to letting a defendant have choice if all the other conditions
13 are met, that he's a lawyer and that he's competent and so
14 forth and so on. There is some value the Court should respect,
15 is there not?

16 MR. KELLOGG: There is, but the concerns here are
17 really twofold. First, there's the concern as the Chief
18 Justice and Justice Scalia noted during Petitioner's argument,
19 with the problem of adequate waivers. Each defendant has a
20 right to conflict-free representation, that he can waive only
21 if he understands and appreciates all the dangers involved.

22 QUESTION: Now, that argument would support a rule
23 that will never respect a waiver because it may have litigation
24 about it later. We just won't allow waivers. I mean, you
25 can't push that too far. There's got to be some situations in

1 which a defendant can waive conflicts, and there's always a
2 risk, you're absolutely right, there's always a risk in these
3 situations in post-conviction proceedings they'll say I didn't
4 know what I was doing just as you have in Faretta, but can that
5 be an adequate reason for never accepting a waiver?
6 MR. KELLOGG: I think it could be. Rule 44(c) could
7 be written to forbid all cases of multiple representation. It
8 would serve significant interests of the criminal justice
9 system in the finality of judgments and the independent
10 interest in the fairness and integrity of the proceedings.
11 Now, it's written, it doesn't go that far. It takes
12 a lesser position to the effect that the trial judge must have
13 some discretion to override waivers in certain circumstances.
14 We're not suggesting a standard in which all cases of multiple
15 representation would lead to disqualification, but only when
16 there's a substantial likelihood of a serious conflict.
17 QUESTION: What was that substantial likelihood here?
18 MR. KELLOGG: Substantial likelihood was created by,
19 first, as I mentioned, disparate positions of the defendants in
20 a criminal conspiracy. Gomez-Barajas was the lead defendant.
21 Petitioner was a lesser defendant. Whenever you have a lead
22 defendant and the lesser defendant represented by the same
23 attorney in a criminal proceeding, there's always a danger that
24 the lead defendant will exercise too much influence upon the
25 decisions of the lesser defendant.

1 This particularly is true in narcotics cases --

2 QUESTION: You mean the lawyer representing the

3 lesser defendant?

4 MR. KELLOGG: That's correct. Well, decisions --

5 that's correct. Decisions that the lawyer will take on behalf

6 of that defendant.

7 QUESTION: Well, in almost every criminal trial,

8 there is one dominant and one secondary character, and, so, you

9 would almost say that there is an absolute rule that the judge

10 is never required to accept a waiver when there are two

11 defendants, one of whom is dominant.

12 MR. KELLOGG: If there is reason to think that there

13 is a hierarchial relationship between them, I would say that

14 the potential for conflict is sufficient that the District

15 Court would have discretion under those circumstances to

16 disqualify the joint representation.

17 I'd like to explain to you in a little more detail

18 the nature of the concerns here. Even if the District Court

19 goes to great lengths to get a knowing and intelligent waiver,

20 it is still going to be subject to collateral attack on various

21 grounds. The defendant can easily claim that he did not

22 foresee the actual conflicts that would develop or that he was

23 coerced by his co-defendant or that he was misled by

24 incompetent counsel, and there's a strong interest in the

25 finality of the judgments in preventing such collateral attack

1 and such uncertainty.

2 There is also, as Justice O'Connor pointed out, an

3 independent interest in the fairness and the integrity of the

4 proceedings. Even if the defendant is fully aware of the

5 dangers of multiple representation, he might accept it because

6 at the behest of a more powerful defendant, co-defendant, or in

7 order to help a more culpable friend or family member.

8 Now, the --

9 QUESTION: Well, Mr. Cleary takes the position, the

10 rather clear position that waiver is always permitted, and

11 that, at first blush, sounds like a hard rule. But it seems to

12 me that your position is that the judge can always decline the

13 request for joint counsel.

14 I can't imagine an instance in, say, a narcotic

15 trial, conspiracy, where the waivers would be allowed. So, it

16 seems to me that your position is equally clear and hard-lined

17 on the other side.

18 MR. KELLOGG: I think not. If the evidence in a

19 particular case is roughly equal against two defendants, if

20 there doesn't seem to be any coercive relationship between

21 them, then there would be no reason that the District Court

22 could not allow joint representation in that case, even though

23 it's certainly possible that conflicts would arise.

24 QUESTION: Mr. Kellogg, perhaps I misunderstood your

25 position. I thought it was that the -- where there's a

1 conflict, the District Court would not be reversed for abusing
2 discretion if he said no, but that he in exercise of his
3 discretion could allow it.
4 MR. KELLOGG: He could allow it. He could allow the
5 representation. That's correct. But in the exercise of his
6 discretion, if he does disallow the representation, it can
7 rarely be reversed because there -- the possibility for
8 potentials of conflict are rife in any joint representation.
9 QUESTION: Well, I'm sort of hung up on Justice
10 Stevens' point. If I agree with that, still and all, in this
11 case, there was not even in the particular trial here a request
12 for joint representation alone, but with another attorney.
13 Could you spell out to me what were the conflict
14 problems with the other defendants? How could his
15 representation of the other two alone be prejudiced by his
16 taking on joint representation of Wheat?
17 MR. KELLOGG: Well, first, with respect to Bravo, who
18 is going to be the witness at trial against Wheat, Iredale
19 would have received confidential information in the course of
20 representing Bravo. When Bravo took the witness stand, that
21 confidential information might have been available as a good
22 source of impeachment of Bravo. Helpful to the Petitioner.
23 So, he has a choice. He either helps the Petitioner
24 by burying his former client or actually his current client
25 because the client hasn't been sentenced yet in front of the

1 very judge who's going to sentence him, or else he holds off
2 and doesn't cross examine vigorously and thereby hurts the
3 defendant that he's currently representing.
4 There's also the difficulty --
5 QUESTION: Yes, but before you leave that witness, in
6 fact, they didn't even cross examine him, did they?
7 MR. KELLOGG: No, they did not. In fact, --
8 QUESTION: So, this is totally conjectural.
9 MR. KELLOGG: I don't think it's conjectural because
10 the decision has to be made in advance of trial. It is clear
11 that --
12 QUESTION: But that's my point. If you've got both
13 lawyers there, why couldn't you see what he said? Then, let
14 the judge say, no, no, he's been talking about things that you
15 probably have confidential knowledge of that I don't think you
16 should cross examine as the lawyer. Why couldn't the judge
17 wait until he saw what the witness had to say, and he would
18 have found out there was no reason in the world to deny this
19 man the lawyer he wants?
20 MR. KELLOGG: Well, he --
21 QUESTION: Based on that particular argument.
22 MR. KELLOGG: The judge knew what the witness was
23 going to say because the judge had taken his guilty plea.
24 QUESTION: Then, why not -- then, there was no need
25 for cross -- well, I'm sorry, I shouldn't --

1 MR. KELLOGG: Bravo did provide evidence adverse to
2 Petitioner. He testified to two overt acts in the indictment
3 and he corroborated the testimony of the main witness against
4 Petitioner.
5 QUESTION: And the Petitioner didn't dispute those
6 two overt acts? Those are the deliveries to the intermediary,
7 were they not?
8 MR. KELLOGG: That's correct.
9 Now, I was going to say there's also the problem of
10 the appearance of impropriety in representing both the witness
11 and the defendant in the sense that the testimony of one can be
12 curtailed to benefit the other in exchange for the cross
13 examination being curtailed to represent the witness.
14 Now, for example, Bravo pleaded guilty to criminal
15 conspiracy and acknowledged that he had participated in one
16 single overt act, one delivery of marijuana. He said that was
17 the extent of my involvement.
18 Now, if his involvement is, in fact, greater than
19 that, he's involved in more than one delivery and perhaps a
20 delivery with Petitioner, then what could be more convenient
21 than having the same counsel representing both, not cross
22 examining Bravo about other acts, and thereby not bringing out
23 any connection with the Petitioner.
24 Now, I recognize that there's not --
25 QUESTION: And who would that hurt except the

1 Government?

2 MR. KELLOGG: Pardon?

3 QUESTION: That would hurt the Government, not

4 bringing that out, but how would that hurt either of the

5 defendants?

6 MR. KELLOGG: Well, I think there's an independent

7 interest here in the fairness and integrity of the criminal

8 justice system which would not be served by allowing such an

9 appearance of impropriety. There's really two separate

10 interests here. The interest in the finality of judgments and

11 the interests in the fairness and integrity of the particular

12 proceedings.

13 Now, Petitioner --

14 QUESTION: What about the other witness? What about

15 the other one that he was representing?

16 MR. KELLOGG: Well, Gomez-Barajas, as I noted, was

17 the lead defendant in the case. He has an interest certainly

18 in not being called as a witness against Petitioner or

19 otherwise being embarrassed by Petitioner's defense, which

20 could be served by having his attorney representing Petitioner.

21 QUESTION: What is the status of his case at this

22 point?

23 MR. KELLOGG: He had been acquitted on the main

24 marijuana conspiracy and several substantive counts. He still

25 had other narcotics counts and tax charges to which he had

1 entered a guilty plea, and he was awaiting sentence.

2 There had been a negotiated plea agreement and the

3 District Court had indicated that he would be able to withdraw

4 his plea if the judge did not accept the sentencing

5 recommendation that had been made, but there had been a

6 sentencing recommendation made in his case.

7 QUESTION: I think your substantial likelihood test

8 might be satisfied in the case in the sense that there would be

9 a substantial likelihood of the conflict, but the trial judge

10 could, nevertheless, take the waiver.

11 MR. KELLOGG: Well, certainly if the court --

12 QUESTION: I know you submit the trial judge would

13 have discretion not to take the waiver in that circumstance.

14 May he take the waiver?

15 MR. KELLOGG: If there is a substantial likelihood of

16 a serious conflict of interest, the trial judge still has a

17 possibility of being able to cure that short of a waiver. For

18 example, through a severance or some other action.

19 QUESTION: Well, there wasn't going to be any

20 question of a severance in this case?

21 MR. KELLOGG: No.

22 QUESTION: These were going to be trials on end, I

23 guess, end to end. The possibility that he could take the

24 waiver.

25 MR. KELLOGG: Yes.

1 QUESTION: And --

2 MR. KELLOGG: Assuming he can do something to protect

3 against conflict.

4 QUESTION: And is it also your position that where

5 there are joint trials, two people at the same trial or two

6 people who have been charged in the same charge but going to be

7 tried one after another, are you saying that there are

8 circumstances involving those facts that would not present a

9 substantial likelihood of conflict?

10 MR. KELLOGG: Yes. There could be circumstances in

11 which a substantial likelihood of a conflict was not presented.

12 That's correct.

13 QUESTION: This is not it.

14 MR. KELLOGG: But this is not it. However, I would

15 stress that our principal interest in the standard fashion by

16 the court in this case, rather than the particular facts of

17 this case, the facts could be strong. But the important point

18 that we want to stress is that the two positions adopted by

19 Petitioner in his brief, the absolute position that waiver

20 cures everything, is unacceptable and contrary to the views of

21 the established disciplinary standards in every Court of

22 Appeals.

23 The other standard that Petitioner puts forward in

24 his brief is to try to say that only when there is an actual

25 conflict of interest can disqualification be permitted, and we

1 would submit that that standard makes no sense in this context
2 because the decision has to be made prior to trial.
3 As the advisory committee notes, you can't anticipate
4 all the problems that are likely to develop in the course of a
5 trial, and if you wait for them to develop, then it's too late.
6 You have invited a mistrial in the case.
7 The important standard that we would suggest is that
8 the judge, trial judge finds a substantial likelihood of a
9 serious conflict of interest and he does have discretion to
10 disqualify counsel.
11 The final point that I would like to make is that
12 even if Petitioner could somehow show that the District Court
13 abused its discretion in this case because there wasn't a
14 serious likelihood of conflict of interest, he still has failed
15 to show any way in which he has been prejudiced by that
16 decision.
17 There's been no challenge here to the sufficiency of
18 the evidence or the fairness of the trial that he actually
19 received or the competence of his counsel. Now, the right to
20 the assistance of counsel, this Court has repeatedly stressed,
21 is recognized not for its own sake, but for the ability of the
22 accused to get a fair trial.
23 QUESTION: And tell me again why must prejudice be
24 shown.
25 MR. KELLOGG: Pardon?

1 QUESTION: Tell me again why must prejudice be shown.
2 MR. KELLOGG: It must be shown because of this
3 Court's statements in Strickland and Cronic as -- that the
4 purpose of the Sixth Amendment is served as long as Petitioner
5 received a fair trial at which he received the assistance of
6 competent counsel so as not to cast any doubt on the
7 reliability of the verdict.
8 If Petitioner is completely denied counsel, then the
9 Court has held that the rule of automatic reversal is
10 appropriate, but in a case where Petitioner receives the
11 assistance of counsel and there's no question that there's a
12 reliability of verdict, there's no reason to set that verdict
13 aside.
14 QUESTION: How would one ever prove prejudice,
15 really?
16 MR. KELLOGG: One would prove it by showing that the
17 trial one actually had was unfair within the meaning of
18 Strickland because the performance of one's counsel fell
19 measurably below the standards of the profession and undermines
20 the reliability of the verdict.
21 QUESTION: Well, then, you get a new trial anyway.
22 MR. KELLOGG: That's correct.
23 QUESTION: That really means there's no remedy
24 whatsoever for violating the right that's asserted here, if
25 there is such a right, because if you require that standard,

1 you -- the judge -- what the trial judge should always do is
2 disqualify counsel, and he -- as long as he's got somebody out
3 there who crosses the threshold of minimum effectiveness, he
4 cannot commit reversible error.
5 MR. KELLOGG: That's true, but there's no reason to
6 think that the trial judge would not conscientiously --
7 QUESTION: There's a lot of trial judges I know who
8 don't like to be reversed.
9 MR. KELLOGG: But in this respect, the right to
10 counsel of choice would not be really any different from, for
11 example, a District Court's decision on the severance motion or
12 a discovery motion, which is reviewable only in the context of
13 general review of a fair trial.
14 Unless the Court has any further questions.
15 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kellogg.
16 Mr. Cleary, you have seven minutes remaining.
17 ORAL ARGUMENT OF JOHN C. CLEARY, ESQ.
18 ON BEHALF OF THE PETITIONER - REBUTTAL
19 MR. CLEARY: Thank you, Your Honor.
20 First, I would start off with in Bravo's case, the
21 attorney or substitute attorney agreed not to impeach Mr. Bravo
22 and to indicate the, I think, lucidity and accuracy of the
23 testimony of that witness on behalf of the Government. He got
24 the benefit of the bargain. He was promised an FYCA probation,
25 thirty days halfway house. He testified, all right, the

1 Government would recommend thirty days, go away, the Government
2 so recommended. So, we have Government satisfaction with his
3 testimony.
4 As to Gomez-Barajas being the source, that is wrong.
5 The facts of this case indicate there were several enumerated
6 sources of marijuana, not Gomez-Barajas, and the reason he
7 wasn't was there was a prior acquittal and Vidal was still
8 shaking in his boots about the examination that he might have.
9 The question that Justice Stevens raised is
10 absolutely true, that there was almost on the knees begging
11 that this super-star defense lawyer be joined to the defense
12 team. Please, let me have Mr. Iredale. Let us add him to the
13 trial team. That's 1 RT 53-154.
14 However, also, there was two points for two of the
15 witnesses, Vidal and one of the other witnesses, and the
16 defense lawyer again says, please, please, let me have Mr.
17 Iredale cross examine these witnesses. That was denied. That
18 was not available.
19 QUESTION: I don't see what his agreement not to --
20 he promises that he won't cross examine which one was it?
21 MR. CLEARY: Bravo, Your Honor.
22 QUESTION: Bravo. That doesn't prove anything except
23 that perhaps he was being induced by one of his conflicts not
24 to do something that maybe he should have done.
25 MR. CLEARY: Well, I think --

1 QUESTION: I mean, --

2 MR. CLEARY: -- I understand the Court's position and

3 that we're getting into certain imponderables, except that in

4 this case, he had the advantage of two separate defense

5 counsels. Not only for Mr. Wheat but also the co-defendant and

6 neither one examined Bravo.

7 QUESTION: Another thing. When he said, could I be

8 added to the defense team, what does that mean? Was it clear

9 that he would be in a subordinate position to someone else who

10 would make the final call? If he was on the defense team and

11 still had the decisions on those matters that were matters

12 raising his conflict, it wouldn't do anything of any assistance

13 to simply put him in with somebody else.

14 MR. CLEARY: I think the only one would be as to

15 Bravo, and I think it could be easily sanitized as an

16 alternative other than total disqualification to say that he

17 cannot examine Bravo, and in the context of this case, I think

18 that would have been reasonable.

19 The two other issues that I find every interesting is

20 the Washington case, the former federal prosecutor, came out of

21 the Ninth Circuit, and in that case, the trial judge did almost

22 like here. This man is a former prosecutor. He may have had

23 confidential information. Appearance of evil, whap, he's off

24 the case.

25 The Ninth Circuit reversed, remanded, and in that

1 case, the former federal prosecutor, we had different clients.
2 The client, the former client is objecting, and the court held
3 in that case, this appearance alone won't cut it because you
4 have to honor the right to choice, and remanded it to determine
5 if there was confidential information.
6 The same procedure that could have been done here.
7 Diozzi is, I think, a very close case, where the Government has
8 negotiated with two tax lawyers. They were willing to
9 stipulate and at the time of trial, the Government says we're
10 going to call the two tax lawyers as witnesses. So, they knock
11 them off of the case, and they offered a stipulation as to what
12 they would be, witnesses in the case. They could not question
13 the witness, but be an actual witness.
14 And the First Circuit reversed because of the
15 tactical manipulation involved, and I think that there has to
16 be some credence given to the right to choice.
17 The last thing I would say is that we have in our
18 society at least the concept of an ordered liberty, a
19 fundamental right of choice, the right to go with the one you
20 want. That kind of oozed out of Faretta and I think that rises
21 up in this particular case.
22 But what's very, very important is the fact that we
23 can't review the imponderables. What would Iredale have done
24 in negotiations? They were close negotiations in this case.
25 Could he have finalized that? What would Iredale have done on

1 Vidal? How can I prove those things? It's impossible for me
2 and should I suffer the detriment? I think that this case is
3 analogous to Faretta, and I think that it has to be a showing
4 that this Court will enforce in a limited context, in the
5 context of these facts, which is a potential speculative
6 conflict where all parties waived, that there must be a Sixth
7 Amendment right to counsel of choice.
8 Thank you.
9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cleary.
10 The case is submitted.
11 (Whereupon, the case in the above-entitled matter was
12 submitted.)
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1 REPORTERS' CERTIFICATE

2

3 DOCKET NUMBER: 87-4

4 CASE TITLE: MARK ERICK WHEAT v. UNITED STATES

5 HEARING DATE: March 2, 1988

6 LOCATION: Washington, D.C.

7

8 I hereby certify that the proceedings and evidence

9 are contained fully and accurately on the tapes and notes

10 reported by me at the hearing in the above case before the

11 Supreme Court of the United States.

12

13

14 Date: March 2, 1988

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