OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Petitioner, v.
RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

CASE NO: 87-1190

PLACE: WASHINGTON, D.C.

DATE: October 3, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner, :

v. : No. 87-1190

RAY C. BROCE AND BROCE :

CONSTRUCTION CO., INC.: :

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Washington, D.C.

Tuesday, October 4, 1988

The above-titled matter came on for oral argument before the Supreme Court of the United States at 10:00 o'clock a.m.

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APPEARANCES:

ROY T. ENGLERT, JR., Assistant to the Solicitor General, Department of Justice, Washington, D.C. on behalf of the Petitioner.

GLENN E. CASEBEER, III, Coffeyville, Kansas, on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning on No. 87-1190, United States against Broce.

Mr. Englert, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROY T. ENGLERT, JR.,

ON BEHALF OF THE PETITIONER

MR. ENGLERT: Thank you, Mr. Chief Justice, and may it please the Court, this case presents the question of whether defendants who plead guilty to two facially valid indictments have the right to claim later, for the first time on collateral attack, that they were guilty of only one crime, despite what the indictment said.

The Tenth Circuit held that defendants do have that right. We contend that they do not.

On November 17, 1981, a grand jury in the District of Kansas indicted Ray Broce, Broce Construction Company, and the General Manager of Broce Construction Company on a single charge of Sherman Act conspiracy. The indictment specifically alleged that the conspiracy began in or about April, 1978, and had as its object the rigging of bids on a road construction project in Meade County, Kansas, let on April 25, 1978.

On February 4, 1982, the grand jury returned its second indictment. This indictment also alleged Sherman Act conspiracy, specifically alleged this conspiracy began in July of 1979 and had as its object the rigging of bids on a Barton County construction project that was let on July 17, 1979, also in Kansas.

In late January of 1982, the Government and the defendants were already engaged in plea negotiations, and by the time the second indictment was handed up, the defendants had agreed to plead guilty to the Meade County and Barton County charges.

The Government, for its part, had agreed not to prosecute these defendants any further for bid rigging in either Kansas or Oklahoma, to dismiss one count of mail fraud against the corporation, and to make certain recommendations at sentencing.

The guilty pleas were duly taken on February 8, 1982. In a written statement of facts in support of the pleas, the Government described the two conspiracies. The statement shows that each of the two projects involved in the indictments was the quid pro quo for concessions that Broce made to the co-conspirators.

In the case of the April 25, 1978 bidletting, there was a trade-off of several projects that were let

on that date. In the case of the July, 1979 bidletting, Broce paid $75,000 to a co-conspirator who would otherwise have bid competitively.

Nothing in that written statement of facts suggests any relationship between the April, 1978 conspiracy and the July, 1979 conspiracy. In fact, there was some colloquy at the plea-taking hearing in which Mr. Broce, under oath, mentioned that he would not trade off a Gray County project that was to be let at a subsequent bid letting for the Meade County project, because he intended each letting to stand on its own.

The facts of this case were visited one more time, on March 15, 1982, when the defendants were sentenced. The Government prepared an official version of the offense, which was included in the pre-sentence report of the defendants. Like the statement of facts in support of the pleas, the official version of the offense described the two conspiracies in some detail, again saying what the quid pro quos were. Again, it showed no relationship between the April, 1978 and July, 1979 conspiracies.

Furthermore, the official version of the offense made explicit what had been implicit all along. It said in so many words that there were two separate conspiracies giving rise to the indictment.

The defendants were given an opportunity at sentencing to contest anything contained in the official version of the offense, and they did have some quarrels with it, but no quarrel at all with the proposition there were two separate conspiracies.

In early 1983, a decision was handed down in a separate but related Kansas bid rigging --

QUESTION: Well, what about the -- how, were they sentenced separately for the two conspiracies?

MR. ENGLERT: Yes. Mr. Broce received a $50,000 fine for each of the two Sherman Act conspiracies, as well as a $1,000 fine for mail fraud. He received concurrent two-year sentences.

The corporation received --

QUESTION: Was there some acknowledgement that they might have been sentenced consecutively?

MR. ENGLERT: That was explicit in the plea agreements, yes, your Honor.

QUESTION: Explicit?

MR. ENGLERT: Explicit.

The decision in United States v. Beachner Construction Company came down in early 1983. The District Court held in that case that all the bid rigging on highway construction projects in Kansas, throughout the entire period of the 1960's and 1970's,

was one massive, continuing, ongoing conspiracy.

The Broce defendants sought to take advantage of the Beachner ruling, even though they had already admitted participating in two conspiracies. In a Rule 35 motion, they asked the District Court to hold that because they had been guilty of only one conspiracy, even though they had pleaded to two, their sentences were illegal, and the corporation's $750,000 -- the corporation's fine had to be reduced by $750,000, the individual's fine by $50,000.

QUESTION: Were these two conspiracies included in that overall one?

MR. ENGLERT: Yes, the theory of Beachner, your Honor, is that there was just one conspiracy on every --

QUESTION: Including these two?

MR. ENGLERT: Including these two, every highway construction project in Kansas throughout the 60's and 70's.

The Government strenuously contested the defendants' claim that they had the right to escape from their prior plea bargains on the basis of Beachner, although the Government stipulated that the Court could consider the Beachner record.

The District Court agreed with the Government

that the defendants' guilty pleas foreclosed their belated attempt to contend that they had been guilty of only one conspiracy. In so ruling, the District Court relied upon the First Circuit's ruling in Kerrigan v. United States, which says that if the defendant, once he pleads guilty to multiple conspiracies, cannot contest the theoretical and factual foundations of the indictment or indictments alleging those conspiracies.

The Tenth Circuit, sitting en banc, reversed and remanded. In a ruling that it has since acknowledged was erroneous, the Tenth Circuit first held that the defendants' right not to be sentenced twice for the same offense, when they had only committed one offense, was "absolute" and not subject to forfeiture or waiver in any way, no matter how hard they tried.

The Court also held that the question of one conspiracy versus two required factual proceedings on remand, and the Court therefore sent the case back to the District Court.

On remand, the District Court simply followed Beachner and held that there was one massive conspiracy, and that therefore these two bid riggings were part of that massive conspiracy.

QUESTION: All of these proceedings after the plea agreement and since were under Rule 35?

MR. ENGLERT: They purported to be brought under Rule 35, your Honor. Technically, I don't think that's the correct way to bring allegations like this. I think technically it should be brought in a 2255 proceeding, but that issue was not raised in the lower courts, and it purported all to be under Rule 35.

We appealed --

QUESTION: Do you think that anything that can be brought under Rule 35 can also be brought under Federal habeas?

MR. ENGLERT: No, not necessarily, your Honor.

But as I understand Rule 35, the purpose of Rule 35 is to correct sentences that the legislature did not intend for the crimes for which the defendants had been convicted.

We don't think the procedural posture of this case makes any difference. The basis issue is the Constitutional issue.

We appealed the District Court's ruling vacating the defendants' conviction and sentences for the second conspiracy, but the Tenth Circuit affirmed. The Tenth Circuit now acknowledged its earlier error in saying that the double jeopardy right was absolute, but it said the issue now was whether the guilty pleas themselves "waived the double jeopardy protection" and

it found no such waiver.

We're here today arguing that the Tenth Circuit's decision should be reversed. We think there are two independently sufficient reasons why the results should not be as the Tenth Circuit saw it.

First, the Tenth Circuit completely overlooked the fact that the way to raise and resolve factual disputes is not to plead guilty, but to litigate those disputes after a plea of not guilty. The holding of the Tenth Circuit, that litigation of factual disputes can be postponed until after a guilty plea, is absolutely unprecedented.

Second, the pleas in this case induced the Government to rely on those pleas in dismissing other charges. The Government's detrimental reliance, we think, is also a basis for holding the defendants to their pleas.

We think both of these factors serve to distinguish Menna v. New York and Blackledge v. Perry, the only two cases in which this Court has ever held that a defendant can escape from a guilty plea entered knowingly and voluntarily on advice of competent counsel through proper procedures.

QUESTION: Mr. Englert, can I ask you a question? I know you don't argue this, but is it not

theoretically possible, at least, that the one ongoing, complete conspiracy that went on for many, many years was one crime, and that pursuant to that conspiracy, from time to time, the defendants would enter into separate bid-rigging agreements on particular jobs, which could be both pursuant to the overall conspiracy in one sense, but also separate violations of the law in themselves. So that couldn't you, at least theoretically, say that there were two conspiracies, even though there was one ongoing conspiracy?

MR. ENGLERT: Your Honor, I'd like to be able to say that, but I don't think I can in this case.

First of all, this is an antitrust case.

QUESTION: I understand.

MR. ENGLERT: And so, there is no substantive offense that corresponds to the conspiracy offense, the conspiracy to rig bids.

If this were a drug case, for example, we could --

QUESTION: I understand. But why couldn't you have, say, a written agreement that for the next 15 years, we'll all agree on bids, and then we'll have a paragraph agreement that says that every time a bid comes up, we'll enter into another written agreement fixing the specific prices on this deal? And wouldn't

both of those be separate violations of the antitrust laws?

I know you don't argue it, but I just wondered why.

MR. ENGLERT: Well, your Honor, that's consistent with what the Sixth Circuit said, in a case called In re Grand Jury Proceedings, involving Delard Electric Company and the Sargeant Electric Company, in a conspiracy in Kentucky.

We hesitate to endorse the Sixth Circuit's approach. We have some problem under Braverman with the proposition that there are things that can be prosecuted separately as parent conspiracies.

QUESTION: Braverman, you think, is the obstacle to that?

MR. ENGLERT: That is the obstacle we see. But we certainly would be delighted if this Court so held.

When a defendant is faced with criminal charges, he has essentially two choice. He can put the Government to its proof, or he can plead guilty. The whole point of a guilty plea is to substitute an admission of the Government's allegations for the right to put the Government to its proof and have those allegations adjudicated by the Court and the jury.

The choice between those two options, once made, is not revocable simply because the defendant later thinks better of it. In particular, as a factual matter, the defendant has to put the matter in issue and get it resolved before pleading guilty, or else forget about pursuing the issue.

This is in essence exactly what the First Circuit said in Kerrigan, and we think the Kerrigan approach is exactly the one this Court should adopt.

We think that approach follows pretty readily from Menna itself. There is a long footnote in the Menna opinion which is the subject of most of the interpretation in the lower courts of that case. The Court said in that footnote two things that we think are vitally important.

First of all, it said that a plea of guilty quite validly removes the issue of factual guilt from the case.

Second, the Court expressly limited its holdings to the situation in which the invalidity of the indictment can be "judged on its face." We think the upshot of those two observations together is that when the indictment is valid on its face, and a claim of invalidity depends on factual matters, the plea of guilty quite validly resolves those factual issues.

QUESTION: You don't really get to any double jeopardy claim, because on the facts to which the defendant agreed, there was no dud. There were two separate conspiracies.

MR. ENGLERT: That's precisely right, your Honor. It's just like a defendant who pleads guilty, and then says later, "Well, I was really innocent." On the facts he admitted, he was guilty, whether or not he later claims the facts are otherwise.

It's just the same way when a defendant admits he's guilty of two conspiracies.

QUESTION: Well, isn't there some argument that they didn't agree to those facts at all? Isn't there some argument that he didn't really agree that there were two conspiracies?

MR. ENGLERT: I'm not aware of any such argument, your Honor. There is --

QUESTION: You think the indictment was clear enough to make that clear?

MR. ENGLERT: I think the indictment was clear enough to make that clear.

QUESTION: Isn't there some argument that it wasn't?

MR. ENGLERT: There is some argument that the indictment was vague, but even -- I think that argument

is quite wrong. The indictment said that one conspiracy began in April, 1978 and one began in July, 1979. If those allegations are true, there are two conspiracies.

Even if the indictment were vague, the Government said in so many words, in the official version of the offense, there were separate conspiracies here. The defendants were given an opportunity, on the record, to say otherwise, and they declined that opportunity.

The record in this case couldn't be clearer that the defendants agreed that there were two separate conspiracies.

Now, the Tenth Circuit's only response to the argument I've just made, based on Menna, was a single sentence saying that the facts admitted in a guilty plea go only to factual innocence or guilt and not to whether there were two conspiracies. The Tenth Circuit followed that sentence with a citation to the Ninth Circuit's decision in Launius v. United States.

The problem with the Tenth Circuit's response is that Launius doesn't support it, no other case supports it, and no logic supports it. There's no reason why a defendant making factual admissions should get to escape from those factual admissions when he's arguing multiplicity, even any more than what he's

saying after the fact, "I pleaded guilty, but what I said wasn't true. I was really innocent."

Now, on this subject, I want to digress for a moment and discuss the Fifth Circuit's decision in United States v. Atkins, which came down after Broce, and is — tends in the same direction as the decision in Broce.

The Fifth Circuit divided all these cases into three categories. The first category is cases like Menna, in which it's clear from the face of the indictment that there are invalid charges. In those cases, of course, at least in the absence of a plea bargain, one grants relief.

The second category is cases in which it's clear from the face of the indictment that there are two separate crimes; and in those cases, the Fifth Circuit said, relief can be denied.

In the vast middle category, in which the indictment neither proves conclusively nor disproves the existence of separate crimes, the Fifth Circuit said the Constitution always commands an evidentiary hearing on these collateral attacks.

We think that Broce falls into the Atkins court second category. In other words, we think the record shows conclusively there were two conspiracies,

and the Tenth Circuit had no business letting the defendants supplement and contradict their prior factual admissions.

But I think it's also important for the Court to understand that we think Atkins is quite wrong in saying that the Constitution requires evidentiary hearings in cases of ambiguity. The correct categorization, in our view, is just two categories: the Menna cases, in which you can tell from the face of the indictment that there is an invalid charge, and all other cases, in which the defendant should not be entitled to relief.

The reason why the defendant should not be entitled to relief is that he has the opportunity, by seeking a bill of particulars, by litigating, to put the Government to its prove in cases of vague indictments, to make the Government supplement the allegations, and to make any counter allegations he wants. There's no reason why he should be allowed to postpone until after his guilty plea litigation over issues he could have resolved before the guilty plea.

QUESTION: Mr. Englert, is it really true that you could say so categorically, in Menna, that there was no factual admission there? Why couldn't you interpret the plea to the second indictment in Menna as admitting

the fact that there was no prior trial and punishment for this same offense, just as here you want to interpret it as admitting that there are two separate conspiracies instead of just one?

MR. ENGLERT: Your Honor, I don't think that would be a factual admission.

QUESTION: Whether or not it there was a prior trial for the same offense? Surely, that's a fact.

MR. ENGLERT: Well, it was undisputed that there was a prior trial for the same offense in that case. Maybe New York could have argued that, but New York certainly didn't try to argue the case on that basis.

QUESTION: Well, you mean it would be -- this case should come out differently if it were undisputed that in fact there was only one conspiracy?

MR. ENGLERT: If it had been undisputed at the time --

QUESTION: No, not at the time. I mean now.

You wouldn't assert that if you now admitted there was just one conspiracy that your case is gone. You would still say, even if there was only one, it's too late to raise that, right?

MR. ENGLERT: That's correct.

QUESTION: I don't see why it's any different

in Menna. Why can't you regard the plea in Menna as being an admission that there was no prior trial for that offense?

It's an admission that's contrary to the fact, to be sure, but it's an admission of fact, isn't it?

MR. ENGLERT: Well, all I can say, your Honor, is the Court certainly didn't look at it that way.

The Court viewed the plea in Menna as not a series of factual admissions but as simply an admission of factual guilt, to be sure, but the validity of the indictment on its face was left open.

There was no doubt at the time of the guilty plea, or at any other time in the Menna, Justice Scalia that there had been a prior trial. And that was not what people were fighting about.

What we were fighting about, potentially fighting about in this case, was what potentially was a bona fide dispute between the Government and the defendants, about whether there was one conspiracy or only two.

QUESTION: Well, but once again, you wouldn't, you wouldn't say -- would you say to make a difference in this case, if there was doubt whether there was one conspiracy or two at the time? You admit there was doubt, right?

MR. ENGLERT: There was no doubt raised by the defendants. There has been doubt injected later on by the ruling in Beachner.

But the litigable -- the point is, there was a litigable issue, and it was the defendants who failed to litigate the issue. In Menna, nobody thought there is a litigable issue over whether there had been a prior trial. But that litigable --

QUESTION: Okay, but that's a different point from which you've been -- from the one that you've been urging on us. It isn't a matter of fact versus no fact. It's a matter of litigable fact, or, you know, plausibly disputed fact, versus not plausibly disputed fact. Is that the line you want us to draw?

MR. ENGLERT: It's not just plausibly disputed. It's that the Government is in fact advancing a position, in this case, the position that there were two conspiracies, as opposed to in Menna, the State was not advancing the proposition at any time that there had been no prior trial. If the State, if the Government, in charging advances a factual proposition in complete bad faith, and the issue is not even litigable, then we might have a difference case.

But what we have here is the defendant said there were two conspiracies. The defendants -- excuse

me, the Government said there were two conspiracies. The defendants didn't say otherwise. At best, the factual dispute developed later on.

What we had in Menna was the State said, you pleaded guilty to a previous offense, but we have as a matter of law a separate defense. There was no question in Menna, in the guilty plea proceedings, of the Government saying one thing and the defendant admitting that.

In other words, there was no fact, no factual allegation that there had not been a prior trial for the defendant to admit. In this case, there was an explicit factual allegation of two conspiracies for the defendant to admit.

One of the reasons why --

QUESTION: Just to pursue that -- if in Menna there had been an allegation that there had been prior conduct disposed of by an earlier plea and a further assertion that the earlier plea was for a different transaction, or a different occurrence, then there would have been double jeopardy?

MR. ENGLERT: I think not, if there had been an assertion it was for a different transaction or occurrence.

The only issue in Menna was whether, as a

matter of law, the contempt charge and the failure to appear before the Grand Jury charge were under New York law, the same offense.

QUESTION: But your response to Justice Scalia was that it depends on whether or not it's a dispute matter in taking, in the taking of the plea.

MR. ENGLERT: Yes, and I think if the disputed matter had been whether there were separate occurrences giving rise to the two charges in Menna, that would be a factual dispute between the Government and the defendant, that the defendant would have to put in issue in order to have a right to raise that issue.

QUESTION: And if there had been any factual allegations of the prior conviction in Menna, there would then -- the case would then be like the instant one?

MR. ENGLERT: I'm sorry, I didn't hear you.

QUESTION: The case would be like the instant one, if there had been factual allegations of what occurred in Menna?

MR. ENGLERT: I think so. I think that's the import of the Court's footnote, saying we are only holding that when two indictments, judged on their face, charge the same offense, then the defendant gets to raise his double jeopardy claim later.

QUESTION: Well, except when we talk about "on the face," we talk about the records that we can look to the make the determination. And here, in your case, we can look at the record of the later proceeding and see there's only one conspiracy.

MR. ENGLERT: I think not, your Honor.

I think that later proceedings never -- well, the later proceeding in Beachner should have taken place. The later proceeding in this case never should have taken place.

There is no reason why the defendants had any right at all to raise that issue after their pleas of guilty.

One of the reasons why defendants should not be allowed to postpone the litigation of factual issues until after their pleas of guilty and this is the second reason why we think the Tenth Circuit was wrong is because it gives them an opportunity to sandbag the Government.

They can say, "Okay, let's get some concessions from the Government, and we will plead to certain charges in exchange for those concessions." Then, once the Government has given up its prosecutorial opportunities, and evidence has become stale, the defendants then come in and say, "Now that we've gotten

our part of the bargain, it's time to go back and revisit the admissions made." We don't think that should be allowed.

This Court's decision two terms ago, in Ricketts v. Adamson, supports our position that a defendant who enters into a plea bargain is in a different position than a defendant who simply pleads guilty.

In Menna and Blackledge, as far as the face of the opinions disclose, there was no plea bargain. Even if there was, there was only one charge in each case, so it appears that all the Government could have bargained away was its right to make certain recommendations concerning sentence on the very invalid charges charged in those indictments. So, those bargains would have failed from invalid consideration, even if there had been plea bargains.

This is a different case. The Government could have brought charges in Oklahoma, and there's no doubt that there would have been no double jeopardy objection to bringing charges in Oklahoma, whether or not the Kansas charges were for the same conspiracy.

The Government did not bring those Oklahoma charges specifically because the defendants pleaded guilty to two Kansas charges. It's not hard to imagine

what would have happened if the defendants had raised this issue, this double jeopardy issue that they now raise, in 1982 before pleading guilty.

First of all, we would have litigated the issue.

QUESTION: You don't raise a double jeopardy issue, at least you don't raise one successfully, before you plead guilty, because -- you raise a multiplicity objection.

MR. ENGLERT: Yes.

QUESTION: Jeopardy doesn't attach until either the first witness is sworn or, you know, whatever, on a court trial.

MR. ENGLERT: Of course, your Honor. That's correct.

If they had raised their multiplicity issue in 1982, we would have litigated over the issue. If we had lost, we would have charged them in Oklahoma and gotten more than one conviction, not the single conviction -- or at least tried to get more than one conviction, not the single conviction without our having the opportunity to get any other convictions that the Tenth Circuit has now given them.

I'd like to reserve the remainder of my time for rebuttal.

QUESTION: Very well. Mr. Casebeer, we'll now hear from you.

ORAL ARGUMENT OF GLENN E. CASEBEER, II,

ON BEHALF OF THE RESPONDENT:

MR. CASEBEER: Thank you.

QUESTION: How do you pronounce your client's name?

MR. CASEBEER: Broce.

QUESTION: Broce?

MR. CASEBEER: Mr. Chief Justice, and may it please the Court, Respondent submits in this case that the lower court's decision, the Tenth Circuit's decision, is absolutely compelled by this Court's reasoning and logic in Menna and Blackledge.

I'd first like to deal with the factual issues that counsel for the Government has referred to, because there's substantial variation in our interpretation of the facts and their interpretation of the facts.

There is no question that an original indictment was brought against Broce Construction and Ray Broce, and his chief foreman, for bid-rigging activities in Kansas. And it named a certain project.

We are not here disputing the factual basis for that indictment, or that indeed the defendants were guilty of the crime as alleged.

It was not until January of 1982, after the Government notified Mr. Broce, when he was set to go to trial, that in the event you proceed to trial, we will bring another indictment against Ray Broce, Broce Construction. This was consistent, as we've alleged in our brief, with the Government's position in each case, because every defendant who approached trial was notified that they were going to be indicted again.

Now, when the significance of this comes about when you look at the Government's own statement, when it talks about the Government's theory of the case. They talk about the fact that they felt Ray Broce and they have evidence to believe Ray Broce was involved in at least 26 of these such activities, on various projects.

QUESTION: Mr. Casebeer, sir, when you talk about the Government's own statement, do you mean their statement in this Court, or in the indictment, or in the official statement for sentencing? At what point?

MR. CASEBEER: The official statement.

QUESTION: For sentencing?

MR. CASEBEER: Yes.

The Government's -- what they titled their official version of the offense -- they talk about the fact that there were 26 projects between May of 1977 and July of 1980, eight of which went to Broce, and two of

those, or which are included in the case that's before this Court now.

Now, the Government -- when you take it from a businessman's point of view, we're now in a position where the Government is alleging that we may have potentially 26 future trials. Now, the heart of this whole case goes to the Government's invasion of the double jeopardy clause, in the position that they were taking, which we say is completely contrary to Braverman. That --

QUESTION: Well, an indictment doesn't raise any double jeopardy problems until double jeopardy doesn't attach until you either -- until you go to trial, or until you're sentenced.

MR. CASEBEER: No, excuse me. I agree with you totally. The double jeopardy did not attach at that point.

The position the defendant was placed in was being told, as a businessman, you may face the expense, the litigation of us splitting these up into 26 separate trials.

Now, this leads a defendant to take certain actions. In this case, the defendant instructed his attorneys that he did not want a trial, and that he wanted to plead guilty. The defendant's attorneys

contacted the Government in January of 1982 and notified them of that position.

Unfortunately, the Government attorneys were already aware that Mr. Broce had so instructed his attorneys. It was at that point that the Government told Mr. Broce's attorneys that the defendants would have to plead guilty to two indictments for conspiracy or face multiple trials.

That is put out in the affidavit of Mr. Crockett, who is the attorney. That affidavit was never refuted by the Government and that was the basis -- and that is the sole basis, of the plea negotiations in this case at this point in time. At this point in time, the defendants agreed to plead guilty to two indictments on different projects, in exchange for the Government not bringing succeeding indictments in Kansas.

There is no mention of Oklahoma at this time. There is in fact no mention of the mail fraud count.

At this point in time, the defendants do enter into court, they do plead guilty. And We have a scenario of events where the indictment is actually handed down a few days before the plea. The indictment is handed to the defense attorneys the morning of the plea. They go in, they plead guilty to two conspiracy charges as alleged by the Government, which in essence

-- the two indictments as factually analyzed, say nothing about the nature of the conspiracy. All they do is identify two different sections of highway in Kansas and two different road projects.

QUESTION: But if you had some difficulty with those indictments, surely the thing to do is not to plead to them, but to contest them.

MR. CASEBEER: The -- that's correct. Obviously that would have been the correct posture for the defense attorneys to take, but they didn't have difficulties at that point in time, because as stated in Mr. Crockett's affidavit, they never considered -- these attorneys never considered -- whether or not pleading to two conspiracies, two different projects involved in the same conspiracy, involved a double jeopardy question.

QUESTION: Well, I guess they just hadn't heard about the Beachner case. The Beachner case was decided later, was that right?

MR. CASEBEER: That's correct.

QUESTION: And at that time, then, the defense counsel thought they ought to take advantage of that and try to get that finding brought forward in this case.

MR. CASEBEER: I think that is in part correct. I would rephrase it differently, in the fact that I believe the Beachner case woke defense counsel up

to the fact that the Government can't proceed as they alleged they could.

QUESTION: Well, it just seems like the defendants in this case freely elected to forego the opportunity to raise that question.

MR. CASEBEER: This Court has said, and why I would disagree with that, this Court has said that the right belongs to the defendant. And if the attorneys never advised the defendant that the Government could not, by the Constitution, proceed and divide up a conspiracy, and take each object of the conspiracy, which is a given highway project, the letting of that highway project, and prosecute that individually -- prosecute each object of the conspiracy in a separate count, therefore putting the defendant in a position of facing multiple trials and multiple expense, or the convenience of a plea agreement.

If the defendse counsel --

QUESTION: Wait. They obviously can't do that. The Government can't do that. But what the Government can do is try to prove that there were 26 separate conspiracies, instead of one. They could have done that, couldn't they?

MR. CASEBEER: I agree with you.

QUESTION: And they gave up their right to do

that. That's something of great value that your client got.

The Government said, "We won't try to prove 26. You plead to two, and that'll be it."

MR. CASEBEER: Fiscally, I would say it's of great value to tell the defendant, obviously we're not going to proceed on 26 counts. I acknowledge that as a value.

QUESTION: But wasn't that the deal?

I can't imagine that counsel did not know that you can't split one conspiracy up into 26 -- that doesn't take a whole lot of imagination. When the Government comes in and says, "We're going to bring 26 separate counts," and your client says, "My goodness, why 26? This is one conspiracy?" It doesn't take a very good lawyer to figure out what's going on.

MR. CASEBEER: Number one, I don't think the defendant would realize the difference of the nature of the conspiracy, whether it's ongoing or --

QUESTION: He had a lawyer, though, didn't he?

MR. CASEBEER: The lawyer states in his affidavit that at no time did they consider it. They never considered the double jeopardy aspects of this case at all.

QUESTION: There's no claim of ineffective

assistance. That wasn't the Tenth Circuit's ruling at all, that there was some sort of ineffective assistance of counsel that would enable him to go back into this thing?

MR. CASEBEER: No. The Tenth Circuit's ruling, as I understand it, is under the terms of Menna and Blackledge. Once we see the defendant has been convicted twice of the same crime, then we get to the second subject of this case, and that is the waiver issue, and did the defendant waive it?

One of the ways -- and the Court has acknowledged waiver of some personal rights -- and one of the ways he can do that is through advice of his counsel. He understands that he has a double jeopardy claim here, and he is willing to forego that.

QUESTION: Well, there are lots of rights that can be waived without that sort of Johnson against Zerbest approach, as witness your Fourth Amendment claim. But here, the Government also contends that the defendant, in the plea agreement, simply agreed factually that there were two different conspiracies. So in that view, you never get to the double jeopardy question, because the defendant is bound by what he pleaded to, for which certainly some of our cases hold.

MR. CASEBEER: Certainly there are cases such

as Ricketts that can hold. You can be contractually obligated to the terms. But here again, we differ with the Government's version of the facts, Mr. Chief Justice.

The plea agreement, as it originally formed, is in Mr. Crockett's affidavit, and that is that they would not continue to seek indictments against him in Kansas, in exchange for a plea to two counts. And the --

QUESTION: The plea agreement, I take it, is what's on record in the District Court, where you have the indictment and the plea?

MR. CASEBEER: Okay, sequentially, the indictment and the factual statement, the factual statement apparently was -- appeared in court the day of the plea. The plea agreement -- the day of the plea they had apparently not finalized the plea agreement. The plea agreement was alluded to as being there, but changes had been made in it.

Now, I don't know what, obviously, that means, the day he's pleading, that they're telling the District Court judge that "we have made some changes in the plea agreement."

My understanding of the factual situation is that the Government wanted Mr. Broce's assistance in Oklahoma on various projects that they were

investigating in Oklahoma. At no time was a Kansas contractor, who was indicted in Kansas, ever indicted in Oklahoma.

Mr. Broce agreed to give them that assistance in Oklahoma, and it's later determined that the plea -- he apparently gave them information they didn't have -- or at least his lawyer alleged that.

But at that time, it is clear from the plea hearing that number one, the defense counsel was not aware, even, that there was going to be a mail fraud count dismissed. He even confuses at some point the plea agreement, as he understands it at the plea hearing, to give his client, Mr. Broce and Broce Construction, so they would not prosecute him in Nebraska.

It is clear that at some point in time, after the defendants initially said, rather than go to trial and face multiple indictments, we agree to plead guilty. Now we don't dispute, under the holding of this case of the Brady triology, the Tollett case -- obviously if we were saying that there was some coercion by the Government, of threatening to violate his Constitutional rights of double jeopardy by bringing him multiple indictments, and we were moving to dismiss the first count, and saying that was in violation of his

Constitutional rights -- then those cases would apply, because the issue of his factual guilt had already been resolved.

Our position on the second count is not the issue of his factual guilt, because the defendant doesn't repudiate the indictment, he doesn't repudiate the Government's statement of facts. What he does say is that at this point in time, the Government had no legal right to haul him into court on the same charge they brought in the first place.

QUESTION: Well, suppose, Counsel, suppose you hadn't pled guilty. Your client hadn't pled guilty and had gone to trial and your claim was there was only one conspiracy; you can't convict us of two conspiracies. And the trial court says, well, I guess I'll have to decide that issue, and the court decides there were two conspiracies.

Is that a factual determination?

MR. CASEBEER: That's a factual determination.

QUESTION: And suppose the trial court decides that, and you're sentenced for two conspiracies, just like you were here, and then later some other court says there's only one. And then you come back on Federal habeas, or some -- ask for relief.

Would you be in the same position where you

are now?

MR. CASEBEER: No, I con't think you'd be in the same position.

QUESTION: Why not? Why not?

MR. CASEBEER: Because first of all, you have an appeal right that you could have taken from the judge's ruling, and you may have foreclosed your position by not taking that appeal. When the Govern -- when the judge made a determination that you had a --

QUESTION: So you would be bound with the -- you would be bound by the judge's factual finding?

MR. CASEBEER: If you waived your appeal.

QUESTION: All right, if you waived your appeal. Well, you certainly did more than that in your plea agreement. You waived a trial as well as an appeal.

MR. CASEBEER: There's no question about waiving all those corstitutional rights.

QUESTION: And I thought that we had said that the plea agreements at least establish factual guilt. Valid -- it's a valid determination of factual guilt.

MR. CASEBEER: We have no problem with the factual guilt.

QUESTION: Well, one of the facts which you just conceded is whether or not there are two conspiracies.

MR. CASEBEER: No, I disagree.

I don't believe we've conceded there were two conspiracies.

QUESTION: Well, I know, but if the trial court had determined there were two conspiracies, you could not have collaterally attacked that later.

MR. CASEBEER: In the issue as to whether it can be collaterally attacked, if there was double jeopardy in the case where the trial court found two conspiracies, and you had a recourse of appeal, then --

QUESTION: And you waived your appeal.

MR. CASEBEER: And you waived your appeal, then I think you're faced with a different problem from a defendant who does not have knowledge. In other -- a waiver of an appeal --

QUESTION: Knowledge of what?

MR. CASEBEER: A knowledge of the double jeopardy rights that he has.

By this, what I'm addressing is this fact of your right to appeal. A defendant may not waive his right to appeal. There may be circumstances where lack of knowledge of the appeal, the Court may not find a waiver.

My issue, which I present before this Court today, is that this is a defendant without the knowledge

and ability to waive. And it may turn out the same way, although very unlikely, that in a case where a defendant is unaware of his right of appeal, that he may not have waived it.

Going to the issue of the effect of the plea of guilty, the defendant admitted the factual basis of the two indictments, and the defendant, as I said, does not repudiate those today. There is no question he was involved as the Government describes this, as a conspiracy in excess of 25 years, that made bidrigging a way of life in the State of Kansas.

But the Government also makes those allegations in its official version of the events, even though it seeks contrary to Braverman to split up that conspiracy. The Government makes a point that in 1973, the nature of the conspiracy changed, and that is factually accurate.

Prior to 1973, the State of Kansas would announce in advance its projects that it was going to let for the future year. After 1973, it stopped that practice and announced them as they came about during the year. The Government felt that was sufficient to establish that a conspiracy to rig highway projects no longer existed, only a conspiracy to rig individual projects.

QUESTION: May I ask you, on that point, supposing they had entered into a written agreement that said in essence, for the next 10 years, we will meet whenever a new highway project is announced, and we will agree on the prices for it, and we'll follow certain rules when we do it. And the Government alleges that agreement in Count One of an indictment.

Then, pursuant to that agreement, three years later, they do meet on an Oklahoma City project. It's clearly pursuant to the original, but they have to meet separately and they have to figure specific prices. They're indicted on that. Then they do it again in Kansas City, pursuant to the basic agreement.

They file three counts: one, the long-term agreement; secondly, the Kansas City project; and thirdly, the Oklahoma City project -- three counts.

Would you say that indictment is duplicitous, that you have to give the right to strike two counts of that indictment?

MR. CASEBEER: I would say in response to that and I would say that I cannot answer that question.

I would think that it would come under the Wilshire, the common objective. What was the common objective?

QUESTION: Well, they're trying to make as

much money out of highway projects as they can.

MR. CASEBEER: Then I'd say it was multiplicitous, duplicitous and it violates the double jeopardy clause.

QUESTION: And for that proposition you rely on Braverman?

MR. CASEBEER: That's exactly right.

QUESTION: Which holds that if you have one continuous conspiracy, you can't split it, but you could be indicted for separate objects if the separate objects are themselves criminal offenses.

MR. CASEBEER: You could be indicted for the separate objects if they do give rise to separate criminal offenses, where the common objective of those parties is to do something other than the conspiracy that is raised in Count One or Count Two, and obviously we contend that is not the facts in this case. But I would take that position.

QUESTION: Thank you.

MR. CASEBEER: Regarding the indictments that were handed down, in -- of essence in this case is the indictments, because that is the basis on which the defendant is brought into court, that is the basis upon which the defendant is advised by counsel, and which the court proceeds.

The purpose of the indictment, obviously, we feel, is to inform the defendant of the nature of the crime that he is being charged with. We do allege these indictments are vague, and an analysis has been made by both Judge Bohanon and the Tenth Circuit judges of the indictment, and they're virtually identical. The only thing they do is take a different section of the Kansas highway projects.

The official version, although it does mention two conspiracies, it also acknowledges that there was one overall conspiracy, referring to a way of life, and multiple projects, as I've stated before, within a short period of time, which Ray Broce, that they felt he was involved in a conspiracy on these projects.

It defies common sense and logic to say that there was only one conspiracy on a single project, and the common objective of all those bidders on that project was to let Broce Construction have that project.

QUESTION: You know, how much relitigation of the factual basis for this case is permitted on Federal habeas? These are things you're supposed to thrash out either in a trial or by a plea agreement.

MR. CASEBEER: The object of what your question is, as I understand it, is can it be waived at some point in time.

QUESTION: It's not can it be waived. It's a question -- if you've got problems with the indictment, if it seems vague to you, if you think no, there's really only one conspiracy, not so many separate ones -- do you fight that at the time that you're pleading to the indictment, or do you go ahead and plead guilty and then try to raise it years later?

MR. CASEBEER: Obviously you prefer to fight it at the time of the indictment. That's the appropriate time to do it.

This is a case where the indictment was handed to the attorneys the day they went into plead.

QUESTION: They didn't have to plead if they were confused by the indictment.

MR. CASEBEER: I agree. I can't explain why they took the actions they did, other than they felt for some reason because of lack of knowledge of the double jeopardy aspects that the Government had a right to do what the Government claimed it had a right to do, and that was to divide the projects up.

QUESTION: What about they felt that maybe the Government could prove 26, if they set their mind to it? Isn't that the much more plausible explanation? I'd rather be found guilty of two than of 26, and that was the deal.

MR. CASEBEER: I would agree that it's very likely that they felt that their client was guilty of being involved in the setting up, or attempting to set up, 26 projects. I do not think it's plausible, based upon their affidavits, that they never considered these aspects, that the attorneys considered the nature of what the Government was doing and the rights under the double jeopardy clause.

I do not believe that's plausible. That's just -- they just never considered it, and I've interviewed them, and it just never occurred to them.

QUESTION: Well, if you win, their lack of discernment has served their client quite well.

MR. CASEBEER: Yes, in certain degrees the Government does pay some price for this.

But, and again, it was the Government -- the Government was obviously aware of Braverman before they brought these indictments. This was a case where the Government was aware that the defense counsels were coming in to plead guilty, and they decided to seek two indictments.

This is the only Kansas contractor that they took that approach with, and they have to also bear some responsibility for knowledge that the maximum penalty, whether you agree with it or not, by statute is $1

million. In this case, they sought to double the penalty of $750,000 and exceed the maximum penalty permitted by statute. They also took their gambles by doing so, in the fact that if the actions they took were improper according to the Constitution, that they had no right to take their action, then they gambled to get an extra $500,000.

Now, in this case, as far as the Oklahoma projects, in the remaining time I'd like to direct my attention to that.

There's some indication that there -- obviously, there's some agreement in the plea agreement, there were some changes made in the plea agreement to require Mr. Broce's cooperation in Oklahoma. In Oklahoma he was given, on certain projects, immunity to testify.

And in this case, what the Tenth Circuit simply said was that the Government having once taken their position in order to try to manipulate this situation, for lack of a better term, cannot complain now that they've lost some type of prosecutor advantage, because of the actions that they took which were invalid according to Constitutional standards to begin with.

QUESTION: What in particular did the Government do to mislead?

MR. CASEBEER: The Government, in particular to mislead, as far as we are concerned, took the position that they were going to prosecute one person right after -- you know, one time right after another. We are going to haul you into court time and time again if you do not plead.

Now, that in itself is within probably a prosecutor's discretion of taking a tough line position. But it was clear from the evidence -- we have not mentioned here the fact that the facts show that the Government had only one conspiracy to deal with, and the facts were the same to the Government as they were to the courts and the defense counsel.

And by taking the position that they would ignore the fact that the statute only allowed one prosecution and one penalty for this crime, but in essence you may not pay that penalty -- you may be found not guilty, but we will penalize you more by bringing you back to court time and time again.

QUESTION: And that is misleading? That is misleading?

MR. CASEBEER: To a degree it is. I share your concern -- I understand it's not come out directly.

QUESTION: You have here a case where a sizable corporation with paid counsel makes a decision,

and you say that they were ill-advised?

MR. CASEBEER: I think that's the correct term, ill-advised.

QUESTION: Counsel, you say the statute only allows for one prosecution. Suppose all the facts the Government knew, there was a bid in Oklahoma City, and another one in Kansas City, each of which was rigged. They didn't know there was any connection, other then similar parties, and the defendants knew this was part of a long-range plan. They'd been doing it for years and years, every time they had a chance but the Government only knows about two of them.

The defendants think, well, we really better not tell them about the long-run thing, because it might be not in our best interest. Could they prosecute the two of them then?

MR. CASEBEER: The defendants are indeed in a disadvantaged position, because obviously they cannot go to Kansas and say, "We are in a long-term conspiracy," or --

QUESTION: But under the facts I give you, could they be subjected to two prosecutions?

MR. CASEBEER: They could be subjected to two prosecutions if -- and this goes back to the --

QUESTION: Each of which would prove all the

elements, an agreement to fix prices in a particular market, one, Oklahoma City, and another in Kansas City.

And just -- they don't happen to know about this long-range backdrop. They could go to jail twice, couldn't they?

MR. CASEBEER: That's correct, and the fundamental --

QUESTION: Well, then why can't they go to jail twice if they go ahead and tell them the rest of the facts?

MR. CASEBEER: The fundamental difference that I see with the scenario you put forth is you said the defendants were aware. And if the defendants were aware of it, and they were aware that the Government could be limited to one conspiracy charge --

QUESTION: Well, I'm suggesting maybe they couldn't be.

MR. CASEBEER: You mean that if they weren't --

QUESTION: Because if each of the crimes is an object of a long-run conspiracy, you can't split that long-run conspiracy into different crimes. But each of the objects, each of the objects that is itself unlawful can be prosecuted separately. That's what Braverman holds.

MR. CASEBEER: The object itself can be

prosecuted separately. I agree.

QUESTION: Right.

MR. CASEBEER: If the Government had chosen to proceed that way. And in none of these cases --

QUESTION: And here, the problem is that you got involved in too many bids. That's why you're subject to prosecution so many times.

MR. CASEBEER: That is correct to some degree. But the Government never proceeded that way. All their procedures were under the conspiracy, and the only thing I can argue is the charges they brought, which were conspiracy.

If there was a conspiracy charge and an object charge, you don't have a double jeopardy problem and we're --

QUESTION: I'm not sure that the two of you mean the same thing by in an object charge. I think Justice Stevens means you can prosecute a separate, individual conspiracy. You don't -- that's not what you mean by an object. You mean if the object of the later conspiracy is to murder somebody, you can prosecute the murder, not the conspiracy to murder.

MR. CASEBEER: You're -- that's the way I was referring to it.

QUESTION: Yes, but I'm suggesting the object

of a long-run conspiracy can be a particular bid-rigging job, which also has the name conspiracy. But there's no reason why you can't have a long-range agreement, and then pursuant to that agreement enter into separate agreements from time to time as objects of the long-run.

MR. CASEBEER: I would answer the same way I answered before. If they have the common objective, I still think the double jeopardy holds.

QUESTION: Well, I understand, but Braverman doesn't say that.

MR. CASEBEER: In this situation, the defendant raised his challenge in the District Court, which is affirmed in the Tenth Circuit, and all of those Tenth Circuit opinions give a very detailed analysis of the various cases and the actual facts.

There was a factual record stipulated to by the parties, and that was the Beachner record. That record conclusively showed only one conspiracy. That issue was taken to the Tenth Circuit and affirmed there. No cert was requested by this Court. The Government was in a position where they knew that the defendant had, in essence, been subject to a prosecution twice for the same crime. That is the only essence of what we're bringing before this Court now, was not whether he was guilty or innocent, but whether they had

the legal right to bring the charge in the second place.

The difference we would see in Ricketts and where we recognize that the Court to some degree has held that a person can contract away their double jeopardy rights by their agreement as number one, we hold that no contractor in Kansas was prosecuted in Oklahoma. Secondly, there was no indictment against Broce in Oklahoma, no indictment indicated against Broce in Oklahoma. The plea agreement to require Broce's cooperation in Oklahoma was to -- the immunity in Oklahoma was to obtain his cooperation.

Thank you, gentlemen, ladies.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Casebeer.

Mr. Englert, you have four minutes remaining.

REBUTTAL ARGUMENT BY ROY T. ENGLERT

ON BEHALF OF THE PETITIONER

MR. ENGLERT: Thank you, your Honor.

A few brief points: the plea taking hearing is reprinted in its entirety on pages 29 to 49 of the joint appendix, and my reading of that hearing is rather different from Mr. Casebeer's. I just leave that for the Court to look at, if it believes there is anything important in those facts.

Mr. Casebeer says there should be a Johnson v.

Zerbest waiver required in this case. Criminal defendants lose rights all the time, without being aware of them, because their lawyers fail to object to trial or fail to do other things. The question that raises is ineffective assistance of counsel. This is not an ineffective assistance of counsel case.

I don't think -- it has not been contended, and I don't think it could be seriously contended that it was outside the range of professional competence not to raise this issue before entering into this very advantageous plea agreement for these defendants.

Finally, I'd like to say a word about the underlying facts of Beachner and of this case.

Before 1973, every Kansas highway construction job was rigged virtually every job. In 1973, a company called Sanori Construction Company went out of business. Following that, our antitrust division did an analysis and saw that only about 10 percent of the jobs were rigged. The rest were bid competitively.

That was why we thought then and we still think today, that there were separate conspiracies in this case. We did litigate that issue and lose in Beachner. We have not asked this Court to review it, but we certainly were proceeding in good faith in trying to prosecute these conspiracies separately for that

reason.

Again, we're not contesting Beachner, but I can't resist adding, we think that's a ridiculous decision. The Court said that there's a common objective to fix prices and therefore raise profits. Therefore, without more, there is one conspiracy. That is not --

QUESTION: Mor, frequently people feel that way when they lose.

MR. ENGLERT: Yes, your Honor.

[Laughter]

MR. ENGLERT: Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Englert.

The case is submitted.

(Whereupon, at 10:56 o'clock a.m., the case in the above-titled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#87-1190 - UNITED STATES, Petitioner, V. RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

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

BY Judy Freilicher

(REPORTER)