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PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MIDLAND ASPHALT CORPORATION and ALBERT C. LITTEER
Petitioners V. UNITED STATES

CASE NO: 87-1905

PLACE: WASHINGTON, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

MIDLAND ASPHALT CORPORATION and :
ALBERT C. LITTEER, :
Petitioners :
v. : No. 87-1905
UNITED STATES :

Washington, D.C.

Tuesday, January 17, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:59 o'clock p.m.

APPEARANCES:

RICHARD JAMES BRAUN, ESQ., Nashville, Tennessee; on behalf of the Petitioners.

LAWRENCE S. ROBBINS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(1:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1905, Midland Asphalt Corporation v. The United States.

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

ORAL ARGUMENT OF RICHARD JAMES BRAUN

ON BEHALF OF THE PETITIONERS

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

This case involves the pretrial appealability of decisions by district courts with respect to indictments in which a 6(e) error is involved.

We agree with the government that this case is governed by an application of Cohen. The government has agreed with us that at least the first of the three Cohen prongs has been satisfied in that the district court decision conclusively determines the question.

The second prong of Cohen -- the government disagrees that that prong is met as to whether or not the case involves an important issue separate from the merits. The government says it does not because a 6(e) violation will, under this Court's decision in Mechanik, be merged into the merits and become harmless. However,

the government's argument assumes that the 6(e) violation did not undermine grand jury independence and therefore affect the grand jury's charging decision so as to deprive a defendant of his requirement of indictment by an independent grand jury.

That right is supported by two of this -- at least two of this Court's previous cases: Stirone, which said that the purpose of the Fifth Amendment requirement of indictment by grand jury is to limit a citizen's jeopardy to offenses charged by fellow citizens acting independently, judge or prosecutor. This case's -- and this Court's subsequent decision in Dionisio that the Fifth Amendment guarantee presupposes an investigative body acting independently of prosecutor and judge and added that the Constitution cannot tolerate the transformation of the grand jury into an instrument of oppression.

That right is further supported by this Court's recent holding in Nova Scotia that if there is grave doubt that the decision to indict was free from the substantial influences of prosecutorial misconduct, the error cannot be deemed harmless and that the inquiry is into the impact of the violation on the grand jury's decision to indict.

The constitutional right to an indictment by

an independent grand jury is also supported by the Second Circuit's 1983 decision in Hogan, the Ninth Circuit's 1983 decision in Sears.

Six(e) violations, unlike many other procedural errors, can impact adversely on a grand jury's independence. This Court has recognized that fact in again at least two of its previous opinions. In the Pittsburg Plate Glass case, this Court says that -- said that without secrecy, the grand jury would not be able to act with the independence required of an inquisitorial and accusatory body. In Douglas Oil, this Court again emphasized that the proper functioning of the grand jury depends on secrecy.

The government attempts to talk about Rule 6(e) and the rule of secrecy being merely a procedural rule. Historically, that rule going back to the Middle Ages and the English institution which our Constitution incorporated demonstrates that the purpose of the incorporation of -- of the requirement that a citizen, person, not be required to stand trial, not be required to be held to answer except upon indictment by a grand jury was to protect persons against abuses of in England the Crown, here the government. That's supported by Edwards, the Grand Jury written in 1906, note 4 at page 27, a Michigan Law Review article by Richard Caukins,

Grand Jury Secrecy, 63 Michigan Law Review 455, 457 (1965).

QUESTION: What sort of abuses, to be more particular, do those authorities suggest it was designed to protect the potential defendant? From bringing him to trial without any probable cause?

MR. BRAUN: Yes. As this Court recognized in Nova Scotia where the violation has an impact on the grand jury's charging decision and therefore by implication and impact on the grand jury's independence, then the government has no right to hail a man into court.

QUESTION: Well, when you -- but you are appealing to these great historical truths about the grand jury in the time of the Stuarts and the Tudors. And there wasn't any Rule 6(e) then. I mean, the general idea of overreaching and so forth suggests a real breach of some sort of very fundamental idea. Rule 6(e) and some of the other rules are very kind of detailed proscriptions as to conduct in the -- in the grand jury room. For instance, to have two witnesses in the room at the same time or to have one witness read and then another witness read without excusing one is scarcely the sort of historical overreaching that you -- that those authorities are talking about, I dare say.

MR. BRAUN: Rule 6(d), the two witness in the grand jury rule -- its purpose was to preserve grand jury secrecy, as Rule 6(e) more directly is.

QUESTION: Well, do you think -- do you think the -- the examples one would call from the times of the Stuarts and the Tudors is that there were two witnesses in the grand jury room at the same time?

MR. BRAUN: No, Your Honor. I think that's a -- a different question altogether, at least in -- in terms of -- of the particular facts Your Honor poses. I think the rule going back to the Tudors, as illustrated by the Earl of Shaftesbury trial and the trial of Stephen College at Oxford which go back to 1681, was to allow the jury secrecy in which to interrogate witnesses so that they would be unaffected by the prosecutor, that is, the Crown.

Rule 6(e) codifies essentially what has been a historic practice of grand jury secrecy on which the grand jury's independence depends. And for that reason, once the grand jury's independence has been eroded by government disclosures of matters occurring before the grand jury, such as names of witnesses, what's occurred in connection with the grand jury investigation, the nature of the investigation, there is the potential for prejudice, the potential that such disclosures could

affect the charging decision and erode the independence of the grand jury.

If that occurs, then the government is not entitled to put a man to trial. And therefore, the government cannot depend on merger for harmless error analysis when it's not even entitled to the subsequent proceeding on which it depends for merger, that is, the criminal trial.

QUESTION: Mr. Braun, have you alleged facts in this case that would even fit within the rule you propose for compromising the independence of the grand jury?

MR. BRAUN: Yes. In Justice O'Connor's concurring opinion in Mechanik, the Court recognized that one of the purposes of grand jury secrecy was to encourage full disclosures by witnesses, participation by grand jurors and that adversely affecting the testimony of an important witness could prejudice the grand jury, undermine its independence, affect the charging decision.

In the case -- in -- in this particular case, after the improper disclosure, an individual named Leroy Krantz entered into a plea agreement with the United States, testified before the grand jury. The grand jury, at least with respect to that transcript which

we've seen, asked no questions and was -- and was never asked a key question in the antitrust case whether or not there were -- he entered into any agreements with the -- with these defendants, who were later indicted -- whether or not he entered into agreements to rig bids or raise prices.

Subsequently last August, we took his video tape deposition at the government's request, and he testified he had no such agreements with these defendants. The grand jury was deprived of that testimony, perhaps in part because of the government's improper 6(e) disclosures.

The district court conducted no in camera review of the grand jury transcripts, gave the defendants no opportunity to show prejudice. It was a pre-Nova Scotia case.

QUESTION: Well, do you think the -- the motion and the argument that you make could be considered post judgment by the Court?

MR. BRAUN: Yes, Your Honor, I do. I believe that under Nova Scotia, the error would not be deemed harmless and could be reviewed post judgment. However, because a grand jury with a lack of independence and where the charging decision is affected, I think the right at issue here is a right not to be held to answer

at all absent a valid indictment by a grand jury that's independent and whose decision has not been compromised by the improper breach of secrecy by the government.

QUESTION: Well, it just seems to me we have a pretty strong policy of not encouraging interlocutory appeals. And if the thing is reviewable at the end, I wonder if the importance of letting things go ahead doesn't outweigh --

MR. BRAUN: I think one has to weigh.

QUESTION: -- interlocutory appeal.

MR. BRAUN: I agree with that analysis, and one has to weigh the value of the right not to be held to answer except in a valid indictment I think is a very, very important right. And I think it's one akin to the previous cases in which this Court has found interlocutory appeal available, that is in Abney, the double jeopardy right. That too could be reviewed after a trial.

Vasquez, the discriminatory selection of grand jurors -- that case involved a post-trial review. But I don't think there's any question that this Court would entertain an interlocutory review of that issue.

The speech and debate clause issue under Helstoski could certainly be reviewed post trial, but the right is considered important enough to grant it

interlocutory review. And I think the Fifth Amendment right to be held to answer only upon the indictment of -- of -- of an independent and uncompromised grand jury is a right equally, if not more, important.

QUESTION: It's only in the speech and debate clause case and the double jeopardy case that we've allowed interlocutory appeal in a criminal case, isn't it?

MR. BRAUN: That -- that is -- that is correct, Justice.

QUESTION: So, you say now we should add to that this right that you say not to be indicted by a grand jury that has violated Rule -- where the government has violated Rule 6(e).

MR. BRAUN: Yes, Justice, because that right to an independent and unbiased grand jury is so important that the value of the right of -- that is, a right not to be tried except upon a valid indictment is too important. That right is denied if -- if it cannot be heard until post-conviction review.

QUESTION: Your claim here, of course, is just the violation of a rule of criminal procedure. It's not a constitutional claim the way Helstoski and the double jeopardy case were.

MR. BRAUN: The procedural rule violation --

that's correct, Your Honor -- creates a constitutional violation.

QUESTION: How does that happen?

MR. BRAUN: Because if -- if the disclosures made by the government in violation of the rule undermine the independence of the grand jury, then you don't have a valid indictment on which the government can require --

QUESTION: What -- what -- what authority from our Court would you cite for that proposition?

MR. BRAUN: Two cases, Dionisio, which states that the --

QUESTION: Well, Dionisio was a holding against the person who had been indicted.

MR. BRAUN: Yes, it is -- it is --

QUESTION: And so, it's not a holding.

MR. BRAUN: -- dicta. It is dicta in that -- and in fact, in both cases, Stirone and Dionisio, it -- it is dicta, not the Court's holding.

There are two courts of appeals decisions, again both dicta and not holding, that I think is implicit in this Court's holding in Nova Scotia that the error -- if the grand jury's charging decision is affected by the government misconduct, be it Rule 6(e) or some other type of misconduct -- if the grand jury's

decision is affected by the misconduct and thus the grand jury's independence has been infringed, the -- that conduct can never been deemed harmless.

QUESTION: Well, whether it may ever be deemed harmless is quite a different question from whether a mere violation of a rule of criminal procedure invariably amounts to a constitutional violation.

MR. BRAUN: I don't think it invariably amounts to a constitutional violation. I think it amounts to a constitutional violation only where the impact of the violation essentially compromises the grand jury's independence. And I would concede that not every independent individual violation does of Rule 6(e), but the cumulative effect of those violations does.

For example, in 1980 the General Accounting Office report of the Comptroller General -- more supervision and guidance needed over the grand jury -- found 492 violations of grand jury secrecy which adversely affected one or more of the purposes of grand jury secrecy. Of those 492, 328 were in the last two-year period of the study, 1978 and 1979. And 85 of those were attributable to the government or the -- or government agents.

So, unlike the setting in Nova Scotia, there is a substantial history here of -- of government

disclosures of -- of 6(e) material. And I think it is becoming a much more serious problem.

The Second Circuit has recognized the growing nature of that problem in a case called U.S. v. Flanagan. A district court within the Second Circuit in -- I believe it's In re Archilada -- yes -- 432 F.Supp. 583 at 599 -- has decried the growing number of breaches of grand jury secrecy by the government and -- and -- and -- and complained in an opinion that all it could do is gnash its judicial teeth.

So, I think there is a growing number of these violations that are becoming a problem, and the cumulative effect of them can certainly do no more than to undermine the independence of -- of the grand jury.

QUESTION: Well, I suppose you could say that about a lot of violations. So long as they don't end up doing any harm, what's the difference? I imagine a lot of district judges may gnash their teeth about prosecution asking leading questions or going beyond the scope of direct on cross or something of that sort which always provokes an objection, or maybe not always, 90 percent of the time, but even when it doesn't, it should. That's all wrong. It all distorts the trial process, and what can the district judge do except gnash his teeth?

You don't have interlocutory appeals in order to stop those things, do you? You wait until the trial is over. If it has affected the outcome of the trial, which it almost never does, you get a reversal. But you don't -- you're not going to get a reversal on something like that 999 million times out of 999 million plus one.

MR. BRAUN: I -- I agree that we're not talking about a tremendously large number of cases, but we're not talking about a relatively large number of cases in the Abney double jeopardy situation, in the Helstoski speech and debate issue. We're talking about a limited number of cases where the right -- that is, the right -- in this case, the right to an independent, unbiased grand jury -- has been compromised certainly by not all of the government's violations of 6(e), but by -- but by a number whose significance certainly matches the significance in Abney and -- and in Helstoski.

And I think for that reason, the importance of the right and the fact that, yeah, we're not opening the flood gates to an interminable number of appeals, that the right at issue -- that is, the right to indictment only on the -- on an independent and unbiased grand jury and the importance of maintaining that institution as a shield between the government and a potential accused -- is important enough to justify interlocutory review.

The particular violation in this case was not as -- as egregious as the violations in a lot of other cases such as Lance in the Fifth Circuit, Eisenberg in the Eleventh Circuit. There's the Helmsley case that's on this Court's docket raising the same issue where I believe the 6(e) violations are far more egregious and are far more likely to affect and impact the grand jury's charging decision than the violation in this case.

Nevertheless, those violations do have the capacity to undermine the independence of the grand jury. And there has to be some opportunity to inquire into that because if the grand jury's decision to indict is undermined and its grand jury -- and its independence is undermined, then the government doesn't have a right to make a person stand trial.

QUESTION: How does public releases about what went on in the grand jury room -- I can see why that would have some effect on the grand jury. Why does it undermine its independence?

MR. BRAUN: For two reasons. One, the grand jurors may be reluctant to ask their own independent questions of witnesses for fear that -- that those portions may become public, and they might be held up to ridicule or -- or some type of public criticism. Secondly, witnesses whose names or testimony are going

to be released improperly by the government may not provide full and untrammeled disclosures before the grand jury.

QUESTION: But neither of those really points to failure of an independent charging decision, do you think?

MR. BRAUN: I believe -- I -- I believe it does. You know, I believe that if you don't have an active, independent, questioning grand jury, then it has got to become more dependent upon the prosecutor, that is, the government. And I think that this Court's previous decisions in -- in cases like Douglas Oil where there have been attempts to get disclosure of grand jury transcripts, this Court has emphasized over and over again the importance of secrecy to the -- to the grand jury's independence, and particularly the Pittsburg Plate Glass case that -- where -- where the Court stated that secrecy was indispensable to the independence of the grand jury.

QUESTION: Do you think you could ever prove that -- that this kind of a violation actually would undermine the independence of the grand jury?

MR. BRAUN: Yes, Justice, I do. I think that there are some cases where the -- where the nature of the violation is -- is serious enough --

QUESTION: Well, why then -- why -- why wouldn't this error be reviewable on appeal after conviction?

MR. BRAUN: No. I -- I believe that the error would be reviewable on appeal after conviction, but then the right --

QUESTION: But you --

MR. BRAUN: -- of which the defendant is deprived, that is, the right not to be held to answer, which is the Fifth Amendment right guaranteed him under the Fifth Amendment --

QUESTION: So, you think it would be --

MR. BRAUN: -- is already gone.

QUESTION: You think it would be harmless?

MR. BRAUN: No, I don't think it would be harmless. Under this Court's opinion in -- in Nova Scotia, the -- the inquiry would -- would be --

QUESTION: Well, do you think -- do you think on appeal after conviction you could have the conviction reversed because of this error?

MR. BRAUN: If one could prove that the grand jury's charging decision was impacted by the violation. I believe that Nova Scotia says that that error could be reviewed post conviction and wouldn't -- could not be deemed harmless.

QUESTION: Well, then why -- why would it ever be appealable before final judgment?

MR. BRAUN: Because the -- because the -- because the right at issue is -- is a right not to be held to answer, not to have to go through the trial at all, if the indictment is a nullity. In other words, if -- if you have an indictment that's really the indictment of the prosecutor -- take a situation that doesn't involve 6(e), but like Gaither.

QUESTION: Well, isn't it just -- but isn't it kind of speculative to know whether this -- whether this violation really had a -- actually had an effect on the grand jury?

MR. BRAUN: I -- I think that sometimes that's going to be true. I think sometimes it's going to be very, very difficult for the defense to prove that there was a -- that the violation had an impact on the --

QUESTION: Well, you say -- I gather your position is you don't have to prove anything. You just have to prove the violation.

MR. BRAUN: No, I think --

QUESTION: And the show is over.

MR. BRAUN: No. I -- I think there's an obligation to show prejudice and show an impact on the charging decision.

QUESTION: But under -- under our holding in Mechanik, if -- if your claim is simply that -- that the jury indicted without -- when it shouldn't have because there was no probable cause, that's merged into the verdict of the jury to -- to convict. I thought your secrecy claim under Rule 6(e) was perhaps somewhat different than Mechanik because you might show some sort of prejudice to the defendant in standing trial. But you don't rest on that, do you?

MR. BRAUN: No, not on that standing alone. I think that if -- if the violation impacts on the charging decision, that cannot be deemed harmless. I think the defendant is entitled not to be held to answer.

QUESTION: How would you differentiate this case from Mechanik then?

MR. BRAUN: On -- on the basis that this was raised pretrial and Mechanik was not raised until mid-trial.

QUESTION: But in each case the -- the jury did return a verdict of guilty, didn't it? Your case hasn't been tried yet?

MR. BRAUN: That's -- that's correct, Your Honor, so that the right at issue in our case is the right not to have to stand trial at all where Mechanik had already stood trial. And this Court observed in its

opinion that the moving finger read and having read, moves on.

QUESTION: Yes, but you're -- but you're still contending that even if you went to trial and were convicted, you would still be able to get your conviction overturned. So, you are saying that this is somehow a different situation from Mechanik.

MR. BRAUN: Yes. I think this case is governed by Nova Scotia, not Mechanik --

QUESTION: Why -- why is -- why is it that in Mechanik you couldn't get the conviction set aside, but you could get it set aside here? In both cases, there's -- there's a -- an invalid grand jury indictment. Why -- why should it be not set-asideable in Mechanik but set-asideable here -- the conviction?

MR. BRAUN: There's an invalid indictment only if there's prejudice. There was no prejudice in -- the Court found no prejudice in Mechanik.

And if I may reserve --

QUESTION: Well, it wasn't on the facts of the peculiar case in Mechanik, but the idea in Mechanik, as I understood it, was that when a jury convicts, there -- any prejudice from the poorly drawn or bad conclusion about probable cause is merged because the jury has found -- the petit jury has found that you're guilty

beyond a reasonable doubt.

MR. BRAUN: And I think that to the extent that the Nova -- I think Nova Scotia changes that rule.

QUESTION: Well, Nova Scotia certainly didn't say that it changed it.

MR. BRAUN: Yes, it -- it did. In the last paragraph it said that the -- that what had to be reviewed was the impact on the grand jury's charging decision and that it could never be deemed harmless. In Nova Scotia, the Court accepted the court of appeals' findings that there was no prejudice.

And if I may reserve the rest of my time for rebuttal.

QUESTION: Very well, Mr. Braun.

Mr. Robbins, we'll hear now from you.

ORAL ARGUMENT OF LAWRENCE S. ROBBINS

ON BEHALF OF THE RESPONDENT

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

I believe counsel for Petitioners has made the case this afternoon artificially too easy for us because it is perfectly clear from this Court's cases that if, indeed, a Rule 6(e) claim is reviewable post conviction, that is the end of the analysis for purposes of the collateral order doctrine because the third prong of the

collateral order doctrine requires that the error be "effectively unreviewable." If he's right that it's effectively reviewable, then he's wrong that it's subject to the collateral order doctrine.

We'd like to make the case harder for ourselves.

QUESTION: Excuse me. He is -- he hasn't admitted that it's effectively reviewable. He's saying you can review whether it was right or wrong, but it's not effectively reviewable because you can't undo the trial which he -- which he shouldn't have had to go through.

MR. ROBBINS: Well, that is, I take it, because he believes that Rule 6 is -- any violation of Rule 6 is by its nature a violation of the Fifth Amendment which, in turn, gives you a right not to be tried. I think there's no support for that proposition.

We'd like to, however, make the case harder and begin with the premise that Mechanik controls this case and that on conviction, not only would he have suffered through the process of -- of going to trial, but that after tried and after conviction, he would be subject to the harmless error rule of Rule 52(a).

QUESTION: Well, Mr. Robbins, couldn't there be some violations of Rule 6(e) that are so egregious

that they aren't rendered harmless by virtue of the conviction? Isn't that theoretically possible?

MR. ROBBINS: Well, off -- offhand it's hard to know exactly, Justice O'Connor, what that would look like. I suppose one possibility is this. If a Rule 6(e) violation, a disclosure of matters occurring before the grand jury, was so pervasive that it became in the nature of pretrial publicity so that a trial court or reviewing court lost confidence in the reliability of the verdict as a barometer of whether or not there was antecedent probable cause, then I suppose it would be the case that Mechanik would not control. But that would be true not by virtue of -- of a Rule 6(e) error as such, but by virtue of its continuing effect on the petit jury, not on the grand jury.

QUESTION: Well, I -- I don't know. I think there could conceivably be 6(e) violations that don't fit in the Mechanik format it seems to me.

MR. ROBBINS: Well --

QUESTION: And -- and 6(e) serves purposes somewhat different than 6(d).

MR. ROBBINS: There's no question of it. It does, indeed, serve purposes apart from what 6(d) serves. On the other hand, it's not at all clear to me that to the extent it serves those other purposes, it

conveys on a defendant the right to challenge his indictment. I take it that the real lesson of Bank of Nova Scotia is not the lesson that my colleague draws, but the lesson, rather, that the defendant's ability, right, to challenge his indictment turns on the prejudice to him.

So, for example, Rule 6(e) unlike Rule 6(d) serves a number of systemic purposes: protecting the secrecy of witnesses, safeguarding the grand jurors' own rights to not have their names in the paper, so on -- to be subject to harassment. But those aren't rights that I take it a defendant would have the right ever, pre or post conviction, to get his indictment dismissed on. The only thing he can claim under Bank of Nova Scotia, as we read it, is that his grand jury presentation has been tainted, that the probable cause determination is unreliable. And that is a claim that washes away, we believe, in Mechanik.

Now, of course, this Court doesn't ultimately have to resolve that question. But on the assumption that it did wash away in Mechanik, become harmless as a matter of law, we believe nevertheless that the collateral order doctrine would not entitle the defendant in this case or any other to -- to interlocutory review.

I think it's very important to take into consideration here what exactly the claim of Rule 6(e) error is in this case. And this returns, Justice O'Connor, to the question that you asked counsel earlier, whether he could say, based on the facts, that in fact there's a compromise of independence.

The answer is there isn't a ghost of a compromise of independence in this case. The case is barely a -- falls under 6(e) at all. What you have here is basically a claim that the government attached a memorandum arising from civil litigation in which it revealed a witness who was going to be called before the grand jury, and revealed as well the nature of the grand jury investigation, all of which, as the district court properly found, had been revealed by Midland Asphalt in their own moving papers in that civil litigation.

The fact that this is on its face essentially a frivolous claim is not the point. The point is that claims like this are always available. Anybody can cook them up. And the F.2d volumes are chock full of motions just like this.

Now, counsel candidly acknowledges that his claim, in fact, is less substantial than many others he could imagine. He also suggests that in the final analysis, most of them will be found not to be very

meritorious, and therefore we don't run the risk of having criminal prosecutions derailed.

But the fact of the matter is that all of these things can be alleged, and allegations are what get you into federal court. Allegations are what get you into the courts of appeals, and allegations are what brought this case to this Court today.

It's -- every grand jury case has not just 6(e) motions available to it, but claims that there's too much hearsay, claims that there's prosecutorial overreaching.

QUESTION: Well, the -- the court -- the -- was it Second Circuit here?

MR. ROBBINS: Yes, Justice O'Connor, it was.

QUESTION: Yes. Held that the claim would be reviewable post judgment. You are not defending that position here.

MR. ROBBINS: No, we're not.

QUESTION: I mean, it would be enough for us to affirm and say no interlocutory review. But you want us to go further and have it both ways.

MR. ROBBINS: Well, not necessarily. Let -- if I can back up a moment, there -- the Second Circuit has sort of flip-flopped on the issue of whether Rule 6 is -- Rule 6(e) claims can be reviewable post

conviction. Following their decision in Midland Asphalt in a case called United States v. Friedman, et al., they held in fact that a Rule 6(e) claim could not be reviewed post conviction in light of Mechanik. So, it's unclear exactly what the state of the law is in the Second Circuit.

We believe that, in fact, for the reasons that the Chief Justice suggested before, that Mechanik would control this case as well. But, Justice O'Connor, this Court doesn't have to resolve that today. Plainly, if Mechanik does not control and a Rule 6(e) claim survives the conviction, then the collateral order issue is -- is quite an easy one, as I suggested at the outset.

We -- we propose to -- to defend the harder position because it's only that one that is plausibly controversial. If it does -- if Mechanik does control and it is subject to the harmless error standard -- and frankly, we believe that the logic of Mechanik does extend to Rule 6(e) claims. If it controls, nevertheless there is not interlocutory review.

The suggestion that has been made by counsel for Petitioners today is that, in fact, it's possible to narrow the class of -- of orders subject to interlocutory review by subjecting it to a -- to the following legal standard: whether the error somehow

compromises the right to an independent grand jury. Apparently, counsel believes that the claim in this case compromises an independent grand jury, and my guess, frankly, is that that kind of contention can be made in almost every case.

There really isn't a limiting principle, and that in the end is the point. Precisely as this Court said in the Cohen case that these decisions have to be made on a practical and not technical basis, we suggest that the practicalities cut against interlocutory review.

Let me say also that the technicalities cut against interlocutory review as well. We believe that, as this Court has articulated the collateral order doctrine, to be collateral in the appropriate sense requires that the error in question neither affect nor be affected by the disposition of the merits. It's hard to imagine a claim that would be more affected by the disposition of a -- of the merits than a claim which, under Mechanik, is rendered harmless by the merits.

This is a claim in a sense, because it's part of the grand jury's charging decision and its finding about probable cause, that is so bound up in the merits, so inextricably linked to the merits that once the merits are decided by the petit jury, the underlying probable cause determination, if tainted in some way, is

nevertheless harmless. That we believe cannot satisfy, as a result, the second prong of the Cohen test.

We also believe, however, that these claims fail the third prong as well. They fail because these claims do not entail the right not to be tried. Now, I understand from counsel's argument his view that -- that in fact this does involve the right not to be tried by virtue of the Fifth Amendment because the Fifth Amendment provides that you shall not be -- individuals shall not be called upon to answer to a felony charge except --

QUESTION: But this wasn't -- this wasn't the basis for the court of appeals opinion either.

MR. ROBBINS: No, no. The court of appeals in this case suggested that in fact Rule 6(e) claims were not governed by Mechanik and --

QUESTION: That's right.

MR. ROBBINS: -- and therefore would be effectively reviewable on appeal. They did not go off on the Fifth Amendment analysis.

QUESTION: That's right.

MR. ROBBINS: We believe in that respect, the Second Circuit was wrong, but we also believe that in this respect, this reliance on the Fifth Amendment grand jury's clause, the Petitioners are wrong. It is not the

case that even were this allegation tantamount to the claim that he has been denied an indictment by a grand jury -- even if these kinds of allegations amounted to that -- and they don't -- nevertheless you would not have a right not to be tried.

That is not what the Fifth Amendment means. If it did, it would be hard to see how the Court in Abney could have held, as it did, that an insufficient indictment is nevertheless not subject to interlocutory review. Surely a claim that an indictment is legally insufficient is by far a more dramatic case of the violation of the grand jury clause than the claim that there has been some matters occurring before the grand jury that have been unfortunately leaked.

So, I think it's impossible to locate in Rule 6 or in the Fifth Amendment grand jury clause a right not to be tried. And as we read this Court's criminal cases involving the collateral order doctrine, if you cannot satisfy the right-not-to-be-tried standard, if the substance of the right, as this Court articulated in the MacDonald case -- if the substance of the right does not give rise to a right not to be tried, it follows then that it is not "effectively unreviewable" within the meaning of Cohen's third prong.

In short, even viewed technically as opposed

to practically, this claim cannot succeed. And we believe, in fact, that it is a good thing that this claim cannot succeed as a technical legal matter because even if the Cohen criteria did not otherwise preclude immediate review, the prospect of delay and appellate gridlock would be reasons enough to reject Petitioners' contentions.

Delay, of course is --

QUESTION: Does your -- does your argument essentially rest on the proposition that the grand juries can be adequately supervised by district judges?

MR. ROBBINS: We believe that is -- that is surely the case. It doesn't -- our argument doesn't rest alone in that, Justice Kennedy, but it does rest in part on that. We believe that when you look at the competing costs of creating a new category of interlocutorially appealable orders in criminal cases, in the final analysis, it is much better to entrust these decisions to district judges and that it's unlikely, we think, that it will entail any considerable costs. At least it will not entail any net costs to the system.

We've suggested in the brief, Justice Kennedy, why we believe it's -- it is sufficient to entrust these decisions to district judges. First and foremost, we

think there's very little reason to believe that district judges get these decisions wrong very often. After all, in order to -- to win on a Rule 6(e) claim, what you have to show is that there was a 6(e) violation, and then you have to show that there was prejudice, prejudice in the Bank of Nova Scotia sense, prejudice, that is, in the sense that had this error not occurred, the grand jury would not have reached the decision that it reached.

Now, given that it's only a probable cause standard that the grand jury is charged with making a determination under, it follows we think that only truly egregious 6(e) violations are likely to allow a defendant to succeed. And we think that those kinds of errors are ones that district judges are not likely to overlook.

But apart from that, even that small class of erroneously denied 6(e) errors are unlikely in the experience of the courts of appeals to be subject to reversal. In fact, our research discloses no examples, before or after Mechanik, in which a court of appeals, reversing a district court, ordered an indictment to be dismissed under Rule 6(e).

QUESTION: Well, but are there cases before Mechanik that -- where the courts of appeals did review

after a conviction one of these claims of 6(e) error?

MR. ROBBINS: Oh, sure.

QUESTION: And -- and so, they assumed that it was reviewable on appeal.

MR. ROBBINS: Well, that's right. Until -- until --

QUESTION: And you say that's wrong now anyway.

MR. ROBBINS: Well, we -- we say that as we read Mechanik --

QUESTION: Yes.

MR. ROBBINS: -- the rationale of that decision would control 6(e) as well as 6(d) to the extent that the claim is that the 6(e) error taints the reliability of the grand jury determination.

QUESTION: Of course, you can win without our agreeing with you on that.

MR. ROBBINS: I agree. We are arguing only on the more difficult premise for us but which, as it happens, we believe is the correct premise, that Mechanik does control this class of errors.

QUESTION: So, in -- where there's a -- you say it's not reviewable on appeal under Mechanik and so that, in effect, there's really no -- no remedy for even an egregious 6(e) violation that takes place and the district judge has gotten it wrong.

MR. ROBBINS: Well, I'm not --

QUESTION: I mean, you say, well, they can go after the attorney and say you shouldn't be doing these things.

MR. ROBBINS: I think I'm -- I'm saying something a degree or two shy of that.

QUESTION: Well --

MR. ROBBINS: And let me -- let me suggest how. If a district judge simply gets it wrong --

QUESTION: Well, it was claimed in -- it's claimed in this case that it was wrong.

MR. ROBBINS: Well, I think it's hard to imagine that --

QUESTION: All right, go ahead. Go ahead.

MR. ROBBINS: -- the judge got this one wrong.

QUESTION: Go ahead.

MR. ROBBINS: But truly egregious violations, violations in which the district judge has simply failed to exercise his discretion at all, I suppose could be reviewable under a writ of mandamus provided that the very strict criteria set out in Will against United States were met. But failing that, we believe that in fact it would be -- we acknowledge it would be unremediable after a conviction and unreviewable prior to trial. And that means, as we acknowledge in the

brief, that there is a class of errors as to which the district judge will have effectively the last word.

QUESTION: And until Mechanik, the courts of appeals were -- were reviewing them.

MR. ROBBINS: Well, they were reviewing that although --

QUESTION: And I --

MR. ROBBINS: -- although I should say, Justice White, not unmindful of the fact that there had been an intervening conviction that makes a difference.

But let me say that -- that this class of decisions that district judges make is not in our view meaningfully distinguishable from a wide range of class of decisions that are equally subject to the harmless error standard post conviction. That is equally true about routine discovery orders, evidentiary decisions entered mid-trial. All of those decisions are subject to, first of all, an abuse of discretion standard as to whether it's an error at all and, second of all, to Rule 52(a) on appeal.

Now, if the mere fact that it's extremely unlikely that you can win because of the harmless error standard is enough to get you into the court of appeals, it's hard to see where the line ought to be drawn.

QUESTION: Are there actions in the court of

appeals where a writ of mandate is sought in it for grand jury errors?

MR. ROBBINS: I can't -- I can't cite a particular case although I have to believe that cases come up on mandamus fairly often particularly since the appellate remedy is -- is thought not to be available. But I -- I would not wish to be understood as saying that we -- we think that even a mandamus claim is likely to succeed because it has a particularly strict standard.

It seems to me that the fact that ultimately this is subject to harmless error, as I say, does not set this apart from a great many other errors, and in the -- by far the vast majority of them, a defendant is not going to succeed as a result.

QUESTION: You're saying here that he can't succeed, I think. You're saying here he can't succeed. Because of Mechanik, you're saying so long as he's convicted, there is no use. But in these other instances, evidentiary error, for example -- the judge lets in something that he shouldn't have -- I agree with you that the chances are slim you would get a conviction reversed, but it's conceivable. It happens now and then.

MR. ROBBINS: That's right.

QUESTION: It's theoretically possible.

MR. ROBBINS: It is theoretically possible.

QUESTION: In your case it's not even theoretically possible.

MR. ROBBINS: Correct.

QUESTION: Well, that's a difference.

MR. ROBBINS: It is a difference, however, that we -- we think ought not to make the difference between interlocutory review or not interlocutory review because the lines that would have to be drawn would -- would entail in our -- in our view, essentially a deluge of cases, just like this one, that will be in the courts of appeals.

QUESTION: You could have a 6(e) violation I suppose that might have amounted to some sort of pretrial publicity which would not come under the Mechanik head, don't you think?

MR. ROBBINS: Yes. I -- I think, as I was saying before, if the 6(e) violation was so pervasive that it -- it -- it undermines a reviewing court's confidence not in the reliability of what the grand jury did, but in the reliability of what the petit jury did, then I think it follows that the conviction is no longer a reliable barometer of whether there was probable cause in the first instance.

QUESTION: It also follows you wouldn't need Rule 6(e). You wouldn't need the Rule 6(e) violation.

I assume in that case you could simply get it reversed on the basis that the -- the jury verdict is not reliable because of adverse publicity or whatever.

MR. ROBBINS: That's correct.

QUESTION: It's hard to conceive of a case where the only basis for your -- for upsetting the conviction would be Rule 6(e).

MR. ROBBINS: That is correct. I think it is -- it is the fact that if Mechanik controls, as we believe it does, it will mean that in the normal course of things, a defendant will not be able to persuade a court of appeals to overturn his conviction. But I think that simply by virtue of that fact, which we acknowledge freely, these claims do not become collateral to the merits. They do not entail the right not to be tried, and there's no getting away from the fact that if the rule is -- is otherwise, the courts of appeals are going to see lots and lots and lots of these cases because anyone can claim --

QUESTION: We certainly don't need to adopt your view of Mechanik to cut off collateral review or interlocutory review.

MR. ROBBINS: That's correct.

QUESTION: We certainly don't need to adopt that extreme position.

MR. ROBBINS: That's correct. It is -- it is -- it is possible to take a different view of the reach of Mechanik and come out -- come out our way in this case.

QUESTION: We -- we would have to take the extreme view of Mechanik unless we were to want to decide the Mechanik issue in this case without the necessity of reaching it. In other words, if we're not going to decide the Mechanik issue in this case, we -- we would have to say, assuming the worst --

MR. ROBBINS: That's right.

QUESTION: -- assuming that Mechanik does apply.

MR. ROBBINS: Well, I -- I think --

QUESTION: Otherwise, we'd have to decide Mechanik.

MR. ROBBINS: That's right. I -- I think the Court has before it the option that it took in a different context in Flanagan, where the Court said we don't need to decide whether prejudice is required to resolve a disqualification motion on the assumption that it is required. There's no interlocutory review on the assumption that it's not required. There's no interlocutory review.

I think it is black-letter law that if

Mechanik doesn't control, it's therefore reviewable post conviction, and that's the end of the analysis. And I've -- I've tried to defend the other horn of that dilemma, which I think the rationale of Mechanik --

QUESTION: Of course, if -- if Mechanik applies, is it so much a question that it isn't reviewable or that you're just not going to be -- have any success at all on your appeal?

MR. ROBBINS: That -- that is precisely our view, that it is -- it's not that it's unreviewable; it's that it's unremediable. Now, that sounds like a distinction without a difference, but we insist that it's a distinction with a legal significance at least in this Court's criminal cases, because as we read the criminal cases involving the interlocutory -- the collateral order doctrine, for -- in order for something to satisfy the third prong, to be effectively unreviewable, you have to be able to identify a substantive right at stake that entails a right not to be tried. And it has never been held, as far as I know, in this Court's cases that the fact that you cannot win your -- in getting -- when you get review, the fact that you can't win is not the barometer, is not the standard.

That, after all, is the argument that the

petitioners made in Stringfellow from two terms ago. There an intervenor sought to enter an environmental lawsuit and was denied intervention of right. He was granted only permissive intervention. And he said, well, I ought to be able to take that to the court of appeals because after this lawsuit is over, no court of appeals is ever going to reverse this -- this judgment just because I couldn't participate as freely as I would have liked.

And -- and I think the way he put it in argument before the Court was that his right to appeal was "academic" at best. Now, he was probably right. Probably at the end of that lawsuit, a reviewing court, perhaps not his reviewing court, but most reviewing courts, would be reluctant to overturn a judgment simply because that litigant could not participate as much as he wanted to.

But the fact is that this Court rejected that argument, rejected a similar argument in Richardson-Merrell, because the prospect of success is not the standard for deciding whether something is effectively unreviewable or not. If it were, we believe that a great many other errors which are essentially as unlikely to succeed, if not quite as unlikely to succeed, would fall within the same umbrella.

There is, we think, in the final analysis this central irony about Petitioners' position. They contend that because a class of grand jury errors may one day turn out to be harmless, those errors must therefore be appealable at once. That is, we submit, exactly the wrong inference to draw. An error is called harmless because it has no impact on the decision of guilt or innocence. And an error that has no bearing on guilt or innocence is a very poor candidate to add to that small class of cases -- small class of decisions that, as Cohen put it, are too important to be denied review at once.

For those reasons, we submit that the judgment of the court of appeals dismissing Petitioners' appeal for want of jurisdiction should be affirmed.

If there are no further questions.

QUESTION: Thank you, Mr. Robbins.

Mr. Braun, you have three minutes remaining.

REBUTTAL ARGUMENT OF RICHARD JAMES BRAUN

MR. BRAUN: The government has indicated that it had some question about whether or not there was a 6(e) violation in the first place. Let me address that issue.

Prior to the time of indictment, Midland and Litteer filed some grand jury motions. There's an

affidavit in the file that shows that we were personally assured by the clerk that those motions would be filed under 6(e). Rule 6(e)(6) required them to be kept under 6(e). The government responded to those motions, and they're all marked In re Antitrust Grand Jury. And that was filed with the clerk.

The clerk gave it a civil number. Some clerks around the country give them civil numbers, other give them miscellaneous numbers for matters related to the grand jury.

Then the grand jury returned an indictment against another person. In responding to a motion in that criminal case, the government attached to that publicly filed motion in a criminal case its response to our grand jury motions pre-indictment. Six months later the same grand jury indicted the -- the Petitioners in this case.

What the government had filed in response to our grand jury motions in the publicly filed criminal case revealed the nature and extent of the grand jury investigation, the names of witnesses, and so forth. I don't think there can be any serious question that that violated 6(e).

Item number two, the government assumes that, for example, the purposes of 6(e), free and untrammeled

disclosures by witnesses, is all in favor of the government, that it cannot favor the defense, that it can't favor a target. A target, a subject of the grand jury, has just as great an interest in free and untrammeled disclosures, which are protected by 6(e), as the government does because sometimes those free and untrammeled disclosures, as in the Earl of Shaftesbury case, as in the trial of Stephen College at Oxford going back to 1681, exonerated a potential accused or -- or target. And -- and so, a person under investigation by the grand jury has that same interest and can be just as prejudiced by persons because of grand jury leaks by the government are discouraged from making full and complete disclosures.

Thirdly, if the grand jury is to be effective in its constitutional right as a shield --

CHIEF JUSTICE REHNQUIST: Mr. Braun, your time has expired. Thank you.

The case is submitted.

(Whereupon, at 2:55 o'clock p.m., the case in the above-entitled 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:

NO. 87-1905 - MIDLAND ASPHALT CORPORATION and ALBERT C. LITTEER, Petitioners

V. UNITED STATES

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

BY Judy Freilicher

(REPORTER)