

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: GLORIA ZAFIRO, JOSE MARTINEZ, SALVADOR
GARCIA AND ALFONSO SOTO, Petitioners v.
UNITED STATES

CASE NO: 91-6824

PLACE: Washington, D.C.

DATE: November 2, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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GLORIA ZAFIRO, JOSE MARTINEZ, :
SALVADOR GARCIA AND ALFONSO :
SOTO, :
Petitioners :
v. : No. 91-6824
UNITED STATES :
- - - - - X

Washington, D.C.
Monday, November 2, 1992

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:57 p.m.

APPEARANCES:

KENNETH L. CUNNIFF, ESQ., Chicago, Illinois; on behalf of
the Petitioners.

JOHN F. MANNING, ESQ., Assistant to the Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the Respondent.

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

2 (1:57 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 91-6824, Gloria Zafiro v. the United States.

5 Mr. Cunniff. Am I pronouncing your name
6 correctly?

7 MR. CUNNIFF: It's Cunniff.

8 QUESTION: Cunniff. Mr. Cunniff, you may
9 proceed.

10 ORAL ARGUMENT OF KENNETH L. CUNNIFF

11 ON BEHALF OF THE PETITIONERS

12 MR. CUNNIFF: Mr. Chief Justice, and may it
13 please the Court:

14 The question presented is whether criminal
15 defendants are entitled to separate trials when their
16 defenses are mutually antagonistic.

17 This case involved four defendants charged with
18 narcotics violations. Each moved for severance based upon
19 antagonistic defenses that he or she said were going to be
20 presented at trial. The trial judge denied the motion,
21 and the court of appeals affirmed --

22 QUESTION: Did -- there were four defendants,
23 and did each one of them make a motion?

24 MR. CUNNIFF: Yes, Your Honor, each made a
25 motion.

1 QUESTION: And did they want to be separated
2 from all the other three?

3 MR. CUNNIFF: No, Your Honor. It was broken
4 down in two separate pairs.

5 QUESTION: I got it. Thank you.

6 MR. CUNNIFF: In affirming --

7 QUESTION: Did Ms. Zafiro ever ask for
8 severance?

9 MR. CUNNIFF: She did ask for severance at the
10 trial level. She did not raise it in the appellate court,
11 Your Honor.

12 QUESTION: Is she properly before the Court now?

13 MR. CUNNIFF: I would suggest under fundamental
14 fairness she should be because if this Court finds that
15 the antagonistic defenses are still a proper basis for
16 severance, it had been raised previously, and she should
17 still be considered in that position.

18 In this case, it is the Government's -- it the
19 Government that is asking for a radical departure from the
20 accepted rule of severance. Until now, although the
21 circuits used different standards, there was a common
22 element that ran through all of the decisions of each of
23 the courts. If a defendant raised an antagonistic
24 defense, he was entitled to severance.

25 QUESTION: Mr. Cunniff, let me interrupt you for

1 just -- are all four of these people petitioners here,
2 Zafiro, Martinez, Garcia, and Soto?

3 MR. CUNNIFF: Yes, Your Honor.

4 QUESTION: Thank you.

5 MR. CUNNIFF: The opinion of the court of
6 appeals improperly relies upon civil law for its rationale
7 using the analogy of interpleader and using the analogy of
8 joint tort cases. In doing this, it fails to distinguish
9 the fundamental differences between a civil trial and a
10 criminal trial. And as this Court is aware, in a criminal
11 case the defendant by law is presumed to be innocent. The
12 burden never shifts to the defendant, and the burden of
13 proof is beyond a reasonable doubt.

14 In failing to distinguish between the civil case
15 and the criminal case, there is a serious risk that a
16 joint trial would confuse the jury and prevent the jury
17 from making a reliable judgment about the guilt or
18 innocence of one or more of the defendants.

19 When co-defendants attack each other and attack
20 each other's defenses before the jury, they blur together
21 as one, and as a result, both defendants are likely to be
22 convicted because neither defense is believed. In their
23 antagonism, each lawyer becomes the government's champion
24 against the other co-defendants. The resulting struggle
25 makes each of the defendants vulnerable, as courts have

1 held, to the insinuation that it's a conspiracy that would
2 explain the conflict.

3 The --

4 QUESTION: That's one scenario. I suppose
5 another one is that if you try them separately and they
6 are both lying, each one will be acquitted, the other one
7 being absent and declining to testify because he might
8 tend to incriminate himself.

9 MR. CUNNIFF: That's true, Your Honor.

10 QUESTION: It looks like a hard choice.

11 MR. CUNNIFF: But again, in a criminal case it's
12 not up to the defendant to have to prove his innocence,
13 and this court decision actually results in a shifting of
14 the burden of proof from the Government to the defendant
15 because when the defendant gets up, he then not only has
16 the burden of proving that he himself is telling the
17 truth, he also must convince the jury that the co-
18 defendant is lying.

19 QUESTION: Well, he'd have to do that if the co-
20 defendant weren't a co-defendant and chose to testify.
21 Why is that -- you know, you always have to respond to
22 people who are making arguments against you.

23 MR. CUNNIFF: You would, Your Honor. If his co-
24 defendant who has pled guilty or been found guilty who is
25 testifying, in that situation the co-defendant says I'm

1 guilty and my accomplice was the defendant on trial. It's
2 different than in a situation where a defendant is on
3 trial saying I am innocent, but it's the co-defendant who
4 is really guilty, and for my defense to be believed, the
5 co-defendant must be found guilty.

6 QUESTION: Well, when you say shift the burden
7 of proof, you're not talking in any literal sense, are
8 you? The judge still charges the jury that the Government
9 has the burden of proof beyond a reasonable doubt. You're
10 simply talking as a practical matter?

11 MR. CUNNIFF: I'm talking as a practical matter
12 and also focusing in on the specific language of Judge
13 Posner, if I can refer Your Honors to the opinion. The
14 court said if it's, indeed, certain that one and only one
15 of a group of defendants is guilty, the entire group
16 should be tried together since in separate trials all
17 might be acquitted or all convicted. In either case, it's
18 a miscarriage of justice.

19 QUESTION: What's wrong with that statement?

20 MR. CUNNIFF: The problem is that the difficulty
21 is that you have a particular defendant who then's defense
22 is going to become blurred. Let me give you perhaps an
23 example.

24 We have four defendants who are in a jail cell
25 together, and one of the defendants is murdered. And the

1 Government has no other evidence other than the fact one
2 of the defendants in the jail cell is murdered, but there
3 were only three other people there. Under this theory of
4 Judge Posner, if all three were tried together, the jury
5 would then be able to find which of the three -- by the
6 time that each made their presentation, if in fact one was
7 made, the jury would be able to find which of the three
8 committed the murder.

9 QUESTION: Well, what if they all refused to
10 take the stand? The Government would have no proof.

11 MR. CUNNIFF: And in fact, that's the point I
12 would try and make, Your Honor, because the Government
13 would have to prove a particular defendant guilty with
14 specific elements --

15 QUESTION: It still --

16 MR. CUNNIFF: -- proving specific elements.

17 QUESTION: It still does to have its case go to
18 the jury. As I understand the criminal law, the
19 Government has to have evidence that tends to prove each
20 of the elements of the crime against each defendant whose
21 -- against whom the case is sent to the jury. Nothing
22 about the severance rules changes that, does it?

23 MR. CUNNIFF: It doesn't, Your Honor, but what
24 is does do is by not allowing severance, it no longer --
25 by not allowing severance, the difficulty is each

1 defendant is going to be prejudiced, and the jury is going
2 to be unable to focus its attention on the individual
3 defendant to determine whether or not the prosecution has
4 met its burden of proving each and every element beyond a
5 reasonable doubt. That's where the concern comes in.

6 QUESTION: Well, we needn't quibble, but in your
7 hypothetical, I doubt that the Government has sufficient
8 probable cause to enable it to indict all three people in
9 the jail cell.

10 MR. CUNNIFF: And, in fact --

11 QUESTION: That would be questionable enough in
12 a civil suit.

13 MR. CUNNIFF: But again, in Judge Posner's
14 opinion, he talks about specifically the analogy to
15 interpleader and to joint tort cases, and when you're
16 bringing those types of analogy into a criminal case,
17 you're then talking about relative degrees of
18 responsibility or relative degrees of fault which I'd
19 respectfully suggest is inappropriate in a criminal case.

20 QUESTION: But here there was no doubt in the
21 world that this big suitcase of cocaine was brought to the
22 apartment by one of these people.

23 MR. CUNNIFF: That's -- in fact, there's no
24 doubt it was brought by both people.

25 QUESTION: Yes.

1 MR. CUNNIFF: The issue is whether or not which,
2 if either, knew what the contents was of this very large
3 package that was brought up to the apartment.

4 QUESTION: And there would be a certain irony if
5 -- under the facts that we know about this case, if all
6 four of these people were acquitted.

7 MR. CUNNIFF: There would be an irony, Your
8 Honor, but I would suggest to Your Honor that that
9 probably would not occur if, in fact, the Government was
10 able to prove each of the defendants guilty and to show
11 the knowledge which would be inferred by virtue of the
12 fact of the possession without explaining what was
13 contained in the suitcase or the package that was being
14 carried by each individual.

15 QUESTION: Well, I suppose the trial court can
16 give an appropriate instruction regarding the burden of
17 proof on the part of the Government.

18 MR. CUNNIFF: I believe that the --

19 QUESTION: And we normally assume that jurors
20 will follow such instructions. Does that cure the concern
21 that you have, do you think?

22 MR. CUNNIFF: It does not, Your Honor, and it
23 does not because it's the position of the petitioner that,
24 as a result of the antagonistic defense, when each
25 defendant is going against the other defendant rather than

1 the Government going against the defendant, what you have
2 is a blurring and there's confusion. And the concern is
3 there's a substantial likelihood that a conviction is
4 going to result not because of the evidence --

5 QUESTION: Excuse me, but if we assume that a
6 proper instruction is given, why do we have to assume
7 there is confusion? I don't understand.

8 MR. CUNNIFF: The difficulty is the jury focuses
9 in on each of the defendant's defenses, and because each
10 is, in effect, saying the other person did it and I'm
11 innocent, the concern of the other cases in all the other
12 circuits that have considered this question is that the
13 jury will be unable to differentiate between the defendant
14 or the defendants. And that's the reason why up until
15 this opinion, every other circuit recognized that
16 antagonistic defenses should be a grounds for severance.

17 QUESTION: I just don't understand that fully.
18 It seems to me that the probability of a correct result,
19 of a nonerroneous determination, is much higher where all
20 of the witnesses can testify before the same trier of
21 fact. It seems to me a very elemental proposition.

22 MR. CUNNIFF: The difficulty is in a criminal
23 case, the question isn't whether or not a particular act
24 was done. The question, I respectfully suggest, is
25 whether or not the particular defendant has been charged

1 with the particular -- who has been charged with a
2 particular crime is proved guilty of each of those
3 elements of the crime beyond a reasonable doubt, not
4 whether or not the act actually occurred, not whether or
5 not the package was actually carried up by either of the
6 two defendants, but whether or not the Government proved
7 the elements, including knowledge of what was in the
8 container, beyond a reasonable doubt. I would suggest,
9 Your Honor, that would be the distinction.

10 QUESTION: The Government in their brief takes
11 the position that a single jury in a joint trial would
12 have to virtually conclude that some of the petitioners
13 are guilty. The jury's task would be to decide which, if
14 any, of the petitioner's stories seemed plausible and
15 convict those whose did not. That's the standard which
16 the Government referred to in their brief.

17 The difficulty with this standard is that's not
18 the burden of proof. It's not up to a jury to determine
19 which of the stories seem plausible, but it's up to the
20 jury to determine whether or not the Government had met
21 their burden of proof with respect to each element of the
22 crime which he's charged.

23 QUESTION: I suppose if the Government wanted to
24 make sure they had that evidence that you object to from
25 the other defendant, they -- if they severed and they gave

1 him immunity, you're going to have the same testimony
2 against your client.

3 MR. CUNNIFF: That's correct, Your Honor. There
4 would be the same testimony, but that would be coming in
5 an immunized situation as opposed to a co-defendant on
6 trial saying that he himself is innocent.

7 QUESTION: In other words, it would be less
8 plausible is what you're saying.

9 MR. CUNNIFF: That's correct, Your Honor.

10 QUESTION: Yes.

11 QUESTION: You know, in a sense -- I'm just
12 trying to think this thing through. The two pairs -- one
13 testified and the other didn't testify at all, as I
14 remember it. Like Soto testified that Garcia had the --
15 knew the contents of the suitcase, and Garcia did not take
16 the stand.

17 MR. CUNNIFF: That's correct, Your Honor.

18 QUESTION: It would seem to me that in the joint
19 trial one would be more apt to believe Soto simply because
20 of the fact that the other defendant didn't get up on the
21 stand and say anything. The jury might say, well, maybe
22 he's telling the truth because nobody has denied this,
23 whereas if he was there all by himself, he might be less
24 apt to do it. I'm just not quite clear why it's -- there
25 is a greater probability of conviction on these facts than

1 if they had been tried separately.

2 MR. CUNNIFF: Because I think what occurs, Your
3 Honor, is that when Garcia's attorney in closing argument
4 took the contrary position and said really it was Soto who
5 possessed, it was Soto's home, it was Soto's automobile,
6 what in effect occurred was they had two co-defendants, in
7 effect, trying each other and trying to convict each other
8 rather than permitting the Government to convict -- try to
9 convict the defendant as a trial should actually proceed.

10 And what you have here -- and you can even take
11 Your Honor's example further. If Soto testifies and
12 testifies that really it's Garcia who did all of these
13 things, and Garcia does not testify, it's solely Garcia's
14 attorney in his closing argument which -- who says it
15 really was Soto. The courts instruct the jury that
16 closing arguments are merely --

17 QUESTION: Right.

18 MR. CUNNIFF: -- the arguments of counsel and
19 you're supposed to rely --

20 QUESTION: And not evidence, yes.

21 MR. CUNNIFF: -- on evidence. I think it shows
22 that even in that situation, as a situation in this case,
23 when those things will occur, the practical effect is the
24 facts get blurred, and the jury begins to confuse what
25 each of the defenses are and convicted both.

1 QUESTION: Of course, these facts weren't all
2 that complicated really.

3 MR. CUNNIFF: Very simple, Your Honor.

4 QUESTION: No.

5 QUESTION: What do you say when you make your
6 motion for severance?

7 MR. CUNNIFF: That you anticipate that the --
8 during a trial that you are going to have evidence
9 presented against you by a co-defendant which will not
10 only exonerate the co-defendant, but which will force --

11 QUESTION: How do you know that about the co-
12 defendant?

13 MR. CUNNIFF: In this particular case, there had
14 been motions to suppress, and there had been statements
15 made prior to trial. So, there was a pretty good
16 indication that each defense was going to rely on having
17 an antagonistic defense in which there would be an attempt
18 to get one defendant --

19 QUESTION: But in order -- you have to know that
20 the -- you have to know that your co-defendant is going to
21 take the stand, don't you?

22 MR. CUNNIFF: You don't have to know that, Your
23 Honor.

24 QUESTION: You don't?

25 MR. CUNNIFF: I don't -- I'm not sure that you

1 would have to know that.

2 QUESTION: Well, you've been talking about one
3 co-defendant testifying against the other one.

4 MR. CUNNIFF: That's what occurred in this case.

5 QUESTION: Well, I know, but how do you know
6 he's -- when you make your motion that he's going to be
7 testifying?

8 MR. CUNNIFF: You don't know that at the time of
9 making the motion in all probability.

10 QUESTION: You do have to show that the
11 defendant is -- it appears the defendant will be
12 prejudiced. And wherein does the prejudice lie if you
13 don't know that the co-defendant is going to take the
14 stand?

15 MR. CUNNIFF: If you don't know that the co-
16 defendant is going to take the stand, you probably would
17 not know about the prejudice. At the moment he does take
18 the stand, you would obviously know of the prejudice. In
19 this particular case --

20 QUESTION: But you move for a -- you have to
21 move for a severance long before the trial starts. And
22 so, am I to take it that generally at the time you have to
23 move for a severance, you don't know whether the co-
24 defendant is going to take the stand?

25 MR. CUNNIFF: Generally you would not know that.

1 In this particular case, you did know it because of the
2 pretrial proceedings.

3 QUESTION: Well, can you make a motion for
4 severance at the time your co-defendant decides to take
5 the stand? You don't know he's going to take the stand or
6 not, and he decides to take the stand. Can you then make
7 a motion for severance?

8 MR. CUNNIFF: You could then make a motion for
9 severance.

10 QUESTION: And what would -- and so, who --
11 there would have to be two new trials.

12 MR. CUNNIFF: That's correct, Your Honor.

13 QUESTION: And would the trial against the other
14 two of the four stop also?

15 MR. CUNNIFF: It would be within the sound
16 discretion of the trial judge to make the determination
17 whether or not the --

18 QUESTION: And I suppose your motion would waive
19 double jeopardy.

20 MR. CUNNIFF: If you make the motion, I believe,
21 Your Honor, that you are waiving the argument of double
22 jeopardy.

23 QUESTION: How about the other parties who don't
24 join in the motion, but who -- the trial of who -- against
25 whom has to start anew? Wouldn't they have a double

1 jeopardy defense?

2 MR. CUNNIFF: If they didn't move for a mistrial
3 based on what was the prejudicial evidence which had been
4 admitted, I don't believe they'd have a double jeopardy
5 offense -- double jeopardy --

6 QUESTION: And what is prejudicial about having
7 the co-defendant testify against your client? I mean, the
8 co-defendant is testifying under oath. Presumably the
9 trial is a truth-finding process. Why is that prejudice,
10 to get testimony under oath even though it hurts your
11 client?

12 MR. CUNNIFF: It's not just that it hurts the
13 client, but in terms of the defense which is presented for
14 the defendant's testimony to be believed, it requires that
15 the jury convict the co-defendant, which would be --
16 that's the basic argument in terms of what the
17 antagonistic defense is. And it's -- so, when he's --
18 when the co-defendant is arguing that my -- when the co-
19 defendant is arguing that he knew nothing about the
20 possession of the large box which contained the cocaine,
21 but really it was the co-defendants, in that -- at that
22 point, it's shifting the burden. He is shifting the
23 burden of proof to compel the co-defendant to get back up
24 and say, no, it really wasn't mine.

25 QUESTION: He's not shifting the burden of proof

1 in any strict use of those terms. He may give an
2 additional incentive to the defendant to take the stand
3 and deny what the co-defendant said. The burden of proof
4 remains on the Government.

5 MR. CUNNIFF: In effect, what occurs here,
6 though, Justice, is that the defendant is becoming the
7 prosecutor to convict his co-defendant.

8 QUESTION: Well, he isn't until he's -- until
9 the Government withstands a motion to dismiss.

10 MR. CUNNIFF: Correct, Your Honor.

11 QUESTION: I mean, the Government has got to
12 make its case and sustain a motion.

13 MR. CUNNIFF: And at that point, there is a
14 prima facie case, and this only occurs after the motions
15 for directed verdict of acquittal have been denied. But
16 at that point, there would be sufficient evidence to go to
17 a jury in terms of a prima facie case, but perhaps not
18 sufficient to convict using the standard which the
19 Government must use.

20 QUESTION: Well, I guess if the defendants
21 decide to take the stand because they think if they don't,
22 they're going to be cooked because the Government has made
23 a case.

24 MR. CUNNIFF: In this particular situation, Your
25 Honor, the defendant had, by way of affidavit, said before

1 trial that he did intend to testify, and he did lay out
2 what the testimony -- what he believed his testimony would
3 show. So, the court was aware pretrial on the grounds for
4 the motions for severance. And it's interesting that --

5 QUESTION: They still didn't know whether he was
6 going to take the stand or not, and he still didn't know
7 whether or not the Government could prove their case.

8 MR. CUNNIFF: If in fact, as the other Justices
9 have pointed out, if the man is caught with -- if the man
10 has in his physical possession a package of 50 pounds of
11 cocaine and there's a joint possession of it --

12 QUESTION: Somebody did.

13 MR. CUNNIFF: Somebody did it.

14 What's interesting in this case is both at trial
15 and at the appellate level, the Government took the
16 position that this was mere finger pointing, and now up in
17 this Court, it concedes that it's an antagonistic defense.
18 And what we're asking of this Court is that it find that
19 antagonistic defenses still require severance and the
20 defendants are entitled to a new trial.

21 QUESTION: What's the difference between finger
22 pointing and an antagonistic defense?

23 MR. CUNNIFF: In the finger pointing, I'm simply
24 saying that someone else did a particular act. With the
25 antagonistic defense, I'm saying the examples which the

1 courts give in the DeLuna case is you have an individual
2 whose -- two individuals standing on a street corner, and
3 as one of the individuals sees the police officer come
4 down the street, he hands the narcotics to the other
5 individual. Their defense at trial is the person who is
6 holding the narcotics that was handed to me as the police
7 officer came down the street, and I didn't possess it
8 before trial, and I received it from the other co-
9 defendant while the other co-defendant says simply I never
10 possessed it all, I was merely standing there. Acceptance
11 of one of the defendant's defenses requires the finding of
12 the other defendant guilty.

13 QUESTION: Mr. Cunniff, can I ask you a
14 question? I think at the outset of your argument you said
15 something to the effect the Government is asking for a new
16 -- to change the settled law or something like that.

17 MR. CUNNIFF: Correct, Your Honor.

18 QUESTION: Is there a line of cases that's
19 fairly -- a lot of cases that hold that whenever there are
20 antagonistic defenses, severance is normally granted?

21 MR. CUNNIFF: Yes, there are, Your Honor.

22 QUESTION: Have you cited all those in your
23 brief?

24 MR. CUNNIFF: Yes, I have, Your Honor.
25 Specifically, I have all of them cited in the brief, and

1 the specific circuits are -- the Fourth, the Tenth, and
2 Eleventh, and the D.C. Circuit take the position that
3 severance is required when the co-defendants present
4 irreconcilable or mutually exclusive defenses, and the
5 jury will unjustifiably infer that the conflicting
6 defenses are in and of themselves established that both
7 defendants are guilty.

8 The Second, the Fifth, and the Seventh, up until
9 this case, held that standard that severance is required
10 if the defenses are inconsistent to the degree that
11 accepting one co-defendant's defense would preclude a jury
12 from accepting the other's defense.

13 So, in each case in which this has occurred and
14 which the jury found that there are antagonistic defenses,
15 uniformly all of the courts have required severance.

16 QUESTION: What about the text writers? Have
17 they written on this issue, do you know? Are there any
18 Law Review -- any -- is there any, you know, scholarly
19 writing on this very precise --

20 MR. CUNNIFF: I'm not aware of it because --

21 QUESTION: I'm not -- I --

22 MR. CUNNIFF: There was a clear differentiation
23 between a court finding something was finger pointing as
24 opposed to antagonistic defense, and in every other
25 instance in which there's an antagonistic defense finding,

1 the courts have required that there be a severance.

2 QUESTION: Thank you.

3 MR. CUNNIFF: I'll reserve the remainder of my
4 time.

5 QUESTION: Thank you, Mr. Cunniff.

6 Mr. Manning.

7 ORAL ARGUMENT OF JOHN F. MANNING

8 ON BEHALF OF THE RESPONDENT

9 MR. MANNING: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 We have three points here. First, the motion
12 for severance is typically made at the beginning of trial
13 and then renewed again throughout. That was what occurred
14 in this case, and that is a fairly standard practice.
15 This Court has made clear that the obligation under rule
16 14 to consider the question of severance is a continuing
17 obligation on the trial court throughout trial.

18 The difficulty, however, is that when defendants
19 file a motion for severance at the outset, it is very
20 difficult to tell how the trial is to proceed, and the
21 better practice for the district court is to wait the
22 development of the trial and see if there is, in fact,
23 prejudice from any source before it renders the decision
24 to sever.

25 In this case, for example, on -- in the joint

1 appendix on page 101, for example, the attorney for
2 Salvador Garcia indicated that Mr. Garcia would testify
3 that the box of cocaine was Soto's and not his own. Mr.
4 Garcia did not testify at trial.

5 There's a great incentive in filing a pretrial
6 motion for severance to indicate that there are matters
7 that will result in prejudice to the defendants even if
8 those don't eventuate at trial. So, any broad rule under
9 rule 14 -- broad application of rule 14 will likely result
10 in the reversal of trials at the conclusion of trial.

11 But more --

12 QUESTION: Didn't Soto also say he would
13 testify?

14 MR. MANNING: His motion on page 81 of the --

15 QUESTION: Page 90 or so.

16 MR. MANNING: I believe it's on page 81, Your
17 Honor. He does also say that he will testify, but he did
18 in fact testify at trial.

19 More fundamentally than the practical point,
20 however, we have a basic difference with the petitioners
21 on what it means to be tried in a case with a defendant
22 presenting an inconsistent defense. Our view is not that
23 presentation of inconsistent defenses will blur the case.
24 Rather, it is our view that, consistent with the premises
25 of our system of justice, the truth is more likely to be

1 learned when there are powerful statements on both sides
2 of a difference of opinion about factual disputes.

3 Soto and Garcia, as you know, were both carrying
4 55 pounds of cocaine up a stairwell when they were caught
5 by police. Each of them naturally claimed at trial that
6 the box of cocaine belonged to the other and that he
7 didn't know what was inside of it. If each of them had a
8 different account of events with which both were familiar,
9 then the jury's understanding was inevitably sharpened and
10 not dulled as each tried to show through evidence, cross-
11 examination, and closing argument that his story was true,
12 and his co-defendant's --

13 QUESTION: Are there any court of appeals,
14 besides the Seventh, taken a -- taken your view?

15 MR. MANNING: Your Honor, there are not. The -

16 - QUESTION: But how could all these other courts
17 have been so far off base?

18 MR. MANNING: Well, Your Honor, as our --

19 QUESTION: Which I think you'll say they were.

20 MR. MANNING: We do believe that they are.

21 And I would want to point out one thing, that
22 this is the interpretation of a rule and the fact that 11
23 out of 12 circuits have viewed it a certain way does not
24 mean that the interpretation is correct, particularly when
25 you consider the fact that most of the circuits have

1 articulated standards which varied from one another
2 somewhat. There -- a representative sample is cited in
3 our brief at footnote 5.

4 But typically the way that this issue arises in
5 a court of appeals case is that the court of appeals will
6 articulate one or the other of the varying standards as
7 boiler plate en route to holding that the district court
8 did not abuse its broad discretion in determining not to
9 sever a trial for antagonistic defenses. The court will
10 typically find that there's some reason that the defense
11 is not antagonistic, for example, a defense --

12 QUESTION: Well, are most of the cases against
13 you where they say severance wasn't required?

14 MR. MANNING: That's exactly correct, Your
15 Honor. I believe there's --

16 QUESTION: Are there some that say severance
17 should be required?

18 MR. MANNING: There are, Your Honor.

19 QUESTION: And were they -- was that order put
20 in before trial or during trial?

21 MR. MANNING: Typically I believe that the order
22 for severance was denied before trial. I'm not sure in
23 some -- whether in some cases it was renewed throughout
24 trial, but typically the kind of case in which severance
25 is granted is in our view precisely the kind of case in

1 which severance should not be granted when a joint trial
2 is most helpful to the finder of fact. Typically the case
3 is like this one where it is perfectly plain that at least
4 one of the two defendants -- or two or more defendants has
5 some guilt for the crime.

6 QUESTION: There couldn't be a plainer case of
7 antagonistic defenses. Is that what you're saying?

8 MR. MANNING: They couldn't. I mean, typically
9 there are cases where you have an uncle and his nephew
10 sitting on the front seat of a car with a shotgun, and the
11 police come and they find the shotgun. And the nephew and
12 the uncle say, look, it's -- these are antagonistic
13 defenses. We'll be prejudiced if we are tried together.
14 And in fact, they will be disadvantaged by being tried
15 together because the jury will get a full picture of the
16 case, and if they've tried to shift blame onto each other,
17 the two defendants, then --

18 QUESTION: Well but, Mr. Manning, I'm not sure
19 that's always going to be true. Take your uncle and
20 nephew case or even take in this case Mr. Garcia's
21 position. He, in effect, said if I am tried separately, I
22 will get on the stand and say Soto knew all about it and I
23 knew nothing. But they're tried together and he
24 apparently elected not to point the finger at his co-
25 defendant.

1 Now, there could be cases -- I don't know if
2 there are or not -- in which there is, in fact, an
3 innocent person out with his uncle or something like that
4 who, if tried separately, would tell the whole truth and
5 nothing but the truth, but would be unwilling to get on
6 the stand in a courtroom with his accomplice and accuse
7 somebody who's a member of his family or somebody he's
8 very close to. So, it's conceivable that the antagonistic
9 defense would actually prevent somebody from testifying
10 who would otherwise testify.

11 MR. MANNING: No, Your Honor.

12 QUESTION: You don't think that's possible.

13 MR. MANNING: We think -- it's certainly
14 possible, but we think it highly unlikely. I mean, in the
15 run of the mill case, what you're dealing with is two
16 people who are closely connected with criminal wrongdoing
17 and who -- one of whom is likely guilty.

18 In the case that you posited, in any case, the
19 decision of the nephew not to take the stand because he's
20 going -- he might inculcate his uncle is a decision that
21 he's making. It's a litigation strategy --

22 QUESTION: He might fear retaliation, for
23 example, that he might not receive if he testified in a
24 separate trial.

25 MR. MANNING: I'm sorry?

1 QUESTION: He might be afraid of retaliation.
2 Sometimes witnesses are afraid to get on the stand in
3 certain situations.

4 MR. MANNING: Yes, but that -- I think that's
5 the concern that exists whether or not you're tried
6 together or in a separate trial. I mean, you may not want
7 to testify against your uncle in a single trial. You may
8 not want to in a joint trial.

9 QUESTION: But if you have a separate trial, it
10 wouldn't hurt the uncle any.

11 MR. MANNING: It would hurt the uncle if the
12 Government gave the nephew immunity and called him to
13 testify. In that case --

14 QUESTION: Oh, yes.

15 MR. MANNING: -- there would be no choice but -

16 - QUESTION: Sure, if you get immunity.

17 MR. MANNING: I'm sorry?

18 QUESTION: We're assuming no immunity here.
19 That's an entirely different problem.

20 MR. MANNING: But it's a somewhat -- I think
21 that it's not a natural reading of rule 14 to read it as a
22 mechanism for requiring the Government to give immunity to
23 a reluctant witness in the case in question --

24 QUESTION: I'm not talking about immunity.
25 Immunity has nothing to do with it. I'm just talking

1 about the Government doesn't know which of the two did it,
2 but in fact -- and it's possible -- one of them is, in
3 fact, innocent but would be unwilling to get on the
4 witness stand in a joint trial, but would be willing to do
5 so in a separate trial.

6 MR. MANNING: But, Your Honor --

7 QUESTION: That's at least a hypothetical
8 possibility.

9 MR. MANNING: Certainly, and the premise of our
10 adversary system is that when you bring all the facts
11 before a jury, whether or not the person got on a witness
12 stand or not, that the jury would make the accurate --

13 QUESTION: In my hypothesis, all the facts
14 didn't come before the jury because the innocent defendant
15 was unwilling to testify with the other antagonistic
16 defendant in the courtroom. In other words, that's what
17 might have been true of Mr. Garcia --

18 MR. MANNING: I understand that.

19 Perhaps it would help if I clarified what our
20 position is. Our position is not that the question of
21 antagonistic defenses would never be relevant to the
22 determination whether to sever a trial. Under rule 14,
23 the language of the rule provides that if a defendant is
24 prejudiced by joinder, a district court may grant
25 severance or provide whatever other relief justice

1 requires. Now, by its terms, that language gives the
2 district court broad discretion to consider prejudicial
3 joinder.

4 Now, we perfectly -- we acknowledge that
5 antagonistic defenses may be one of many factors --

6 QUESTION: I didn't understand you really to
7 acknowledge that. As I understand, the logic of your
8 position is you should always reject a motion for
9 severance when the only ground for it is antagonistic
10 defenses.

11 MR. MANNING: Well, when the -- the only --

12 QUESTION: Or is that not right?

13 MR. MANNING: When the grounds -- the only
14 ground is the antagonism of the defense.

15 QUESTION: That's right.

16 MR. MANNING: I mean, if there's something in
17 addition to that, for example --

18 QUESTION: No. That's all.

19 MR. MANNING: Let's take a case of a conspiracy
20 where --

21 QUESTION: Let me just ask. Let me -- I think
22 I've got the -- is it the Government's position that if
23 the only ground for severance is antagonism of the two
24 defenses, the judge should always deny the motion?

25 MR. MANNING: That's right. We're saying that

1 it is per se not prejudice, that it is not prejudice per
2 se to have inconsistent or antagonistic defenses, but that
3 it might be, in combination with other factors, a factor
4 to consider in deciding whether to grant severance. For
5 example, if you had a trial and there were 40 defendants
6 and it was a very large, complicated conspiracy case, and
7 everybody said, I'm sorry, we're just an importing
8 company, we don't know how this box of cocaine got into
9 our warehouse, it certainly would be possible for the jury
10 to consider a trial that large given the simplicity of the
11 defense. However, if you had 40 defendants and they were
12 pointing to one another and had very complicated and
13 antagonistic defenses, it might be a fact -- the
14 antagonism might be a factor for the district court to
15 consider in determining whether the jury was able to keep
16 the case straight.

17 QUESTION: But in the hypothetical with the
18 uncle and the nephew with the shotgun, you would say it
19 was an abuse of discretion to sever even if the nephew was
20 reluctant to testify.

21 MR. MANNING: Even if the nephew was reluctant
22 to testify. Well, there are a number of things that go
23 into the decision to testify, and there are a number of
24 factors that --

25 QUESTION: Well, as the hypothetical has been

1 discussed here, you'd say it was an abuse of discretion to
2 grant, would you not?

3 MR. MANNING: We would.

4 QUESTION: Well, at some point you have to say
5 that a defendant who decides not to testify because he
6 doesn't want to hurt an uncle's feelings, that's his
7 problem, not the Government's problem.

8 MR. MANNING: Well, that's exactly right, Chief
9 Justice Rehnquist.

10 QUESTION: And if the definition of an
11 antagonistic defense is that if you believe one of them,
12 you necessarily convict the other or you disbelieve him,
13 here everybody was convicted.

14 MR. MANNING: Well, that's correct, and that --

15

16 QUESTION: And they didn't believe -- they
17 believed both of them.

18 MR. MANNING: Not only that --

19 (Laughter.)

20 MR. MANNING: Not only that, Your Honor, but
21 everybody -- it is more accurate to say that everybody was
22 convicted of conspiracy, but in fact, Gloria Zafiro was
23 acquitted on the three substantive counts of possession,
24 which indicates that the jury was perfectly capable of
25 sorting through the evidence and applying it separately to

1 each.

2 QUESTION: But the people who -- all of the
3 people who moved for severance were convicted.

4 MR. MANNING: All of them were convicted of at
5 least one offense, but that -- they were all convicted of
6 conspiracy. Gloria Zafiro moved for severance later in
7 the trial after the presentation of the evidence. She
8 didn't move at the outset. She moved later. And she was
9 convicted of conspiracy, but she was acquitted of the
10 substantive defenses.

11 QUESTION: But the other four.

12 MR. MANNING: The other three were convicted of
13 everything. That's correct.

14 QUESTION: And you take the position that had
15 the trial judge here granted a severance, it would have
16 been an abuse of discretion?

17 MR. MANNING: That's right, Justice O'Connor.
18 We think that it would have been an abuse of discretion,
19 but as a practical matter, we would point out that since
20 we don't have a right to appeal that point under 18 U.S.C.
21 3731, then the practical import of saying that it's an
22 abuse of discretion is somewhat limited although that is a
23 reason I would point out for the Court, if it rules in our
24 favor, to be very clear in stating that antagonism alone
25 is not prejudice within the meaning of the rules so that

1 the district courts have clear guidance in knowing when
2 they can sever on the basis of antagonistic defenses.

3 If there are no further questions.

4 MR. MANNING: Thank you, Mr. Manning.

5 Mr. Cunniff, you have 6 minutes remaining.

6 REBUTTAL ARGUMENT OF KENNETH L. CUNNIFF

7 ON BEHALF OF THE PETITIONERS

8 MR. CUNNIFF: As counsel for the Government just
9 told you, the 11 of the 12 circuits that have considered
10 this question have all agreed that if an antagonistic
11 defense is presented, there should be grounds for
12 severance.

13 QUESTION: How -- which was the first decision
14 in this line?

15 MR. CUNNIFF: I don't recall --

16 QUESTION: Who started this snowball?

17 MR. CUNNIFF: It started back in the '30's, Your
18 Honor, I believe.

19 QUESTION: Back in the '30's?

20 MR. CUNNIFF: Yes, Your Honor. I don't have the
21 specific cases in front of me.

22 QUESTION: That's all right. Thank you.

23 MR. CUNNIFF: But in each of the cases -- and
24 Mr. Justice Stevens, I suggest the reason there probably
25 is no scholarly work in this area is because the reason is

1 because up until this particular case, there was no need
2 for it. It was uniformly accepted that the prejudice is
3 so inherent, if you have an antagonistic defense presented
4 by a co-defendant, that the defendant cannot receive a
5 fair trial. And I would suggest respectfully that's the
6 reason that each of the circuits that considered this
7 question said that a co-defendant is entitled to a
8 severance if an antagonistic defense is presented by a co-
9 defendant.

10 Counsel for the Government said that the fact
11 that Zafiro was acquitted of the substantive count of
12 possession with intent to distribute shows that the jury
13 followed the instructions, and I would suggest
14 respectfully a review of the record shows that if she's
15 found guilty of conspiracy of possession with intent to
16 distribute, the facts in the case showed she also should
17 have been convicted of possession with intent to
18 distribute. And I would suggest that the reason for the
19 distinction is the jury was confused.

20 And the difficulty is that the two defenses were
21 always blurred together. And when the defendants become
22 each other's prosecutor, the jury is likely to be
23 confused, and the result is there's going to be a
24 substantial likelihood that both will be convicted. And I
25 would suggest that's the reason why each circuit that

1 considered this question came up with a uniform rule of
2 law.

3 Thank you, Your Honors.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
5 Cunniff.

6 The case is submitted.

7 (Whereupon, at 2:37 p.m., the case in the above-
8 entitled matter was submitted.)

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CERTIFICATION

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ZAFIRO v US

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

BY Leon M. May

(REPORTER)