ORIGINAL

In the

Supreme Court of the United States

UNITED STATES

PETITIONER

V.

JACK PAYNER

RESPONDENT

No. 78-1729

Washington, D. C.
February 20, 1980

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UNITED STATES,

Petitioner

v. No. 78-1729

JACK PAYNER

Respondent

Washington, D. C.

Wednesday, February 20, 1980

The above-entitled matter came on for oral argument at 1:23 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice
POTTER STEWART, Associate Justice

APPEARANCES:

WADE H. McCREE, JR., ESQ., Solicitor General of the United States, Department of Justice, Washington, D.C.; on behalf of the Petitioner

BENNET KLEINMAN, ESQ., Kahn, Kleinman, Yanovitz & Arnson Co., L.P.A., 1300 Bond Court Building, Cleveland, Ohio 44114; on behalf of the Respondent

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. McCREE: Mr. Chief Justice, and may it please the Court:

This case presents the question whether the District Court possesses and, if so, that it should have exercised supervisory power to suppress relevant evidence allegedly obtained in an illegal search that did not violate Respondent's rights under the Fourth Amendment.

The facts giving rise to this controversy are as follows:

In September 1976, Respondent was indicted in the United States District Court for the Northern District of Ohio of a charge of knowingly and wilfully making a false statement in the matter within the jurisdiction of a Federal agency in violation of 18 United States Code Section 1001. Specifically he was charged with falsely stating in his 1972 Federal income tax return that he did not have a foreign bank account when, in fact, he knew that during 1972 he had such an account in the Castle Bank & Trust Company of Nassau, Bahamas.

The critical piece of evidence in the Government's case was a loan guaranty agreement dated April 28, 1972 in which Respondent pledged the money in his Castle Bank & Trust

Company account to secure a loan of $100,000 extended by the Bahamian bank through an American correspondent the Perrine Bank of Florida to a Michigan land development company in which he was interested. The guaranty agreement was produced by the Bank of Perrine Florida in response to Government subpoenaes issued in April and May 1974 requesting the production of all documents concerning the Bank of Perrine business affairs with Castle Bank & Trust Company. Other evidence also critical to the conviction was furnished by a former president of Castle Bank & Trust Company who testified that he had checked Respondent's bank account with Castle Bank & Trust and that the amount in it at the time of the loan exceeded $100,000.

Before trial Respondent moved to suppress this evidence on the ground that it had been obtained as a result of an illegal search conducted in Miami, Florida of a briefcase belonging to a Herbert Michael Wolstencroft, a Castle Bank & Trust Company officer, indeed a trust officer, who was visiting in the United States in January 1973.

The person primarily responsible for the search of the briefcase was Norman Casper, a private investigator who was used as an informer by the Internal Revenue Service and who was working with the encouragement and assist ance of Special Agent Richard Jaffe of the Internal Revenue Service.

Casper had met Wolstencroft earlier when Casper had

visited Nassau in an effort to obtain information useful to the Internal Revenue Service in the course of a longtime investigation of it called Operation Trade Winds which was an inquiry into the use of offshore tax havens for illegally obtained or employed funds by United States taxpayers and the Internal Revenue Service had learned that a suspected taxpayer in San Francisco had an account in the Castle Bank & Trust Company and that the Bank of Perrine Florida was an American correspondent for the Bahamian bank.

Casper reported this discovery to Jaffe who encouraged him to try to obtain a list of the depositors of the Castle Bank & Trust Company. On two of Wolstencroft's visits to Miami Casper had introduced him to women, one of whom was a Sybil Kennedy, a private investigator who sometimes worked for Casper. When Casper learned that Wolstencroft was coming to Miami in January 1973 he arranged with Sybil Kennedy to help him secure a list of depositors in Castle Bank & Trust. Wolstencroft visited Kennedy at her Miami apartment and after which the two went to a restaurant for dinner. Casper then entered the apartment by means of a key which had been given to him by Kennedy and took Wolstencroft's locked briefcase to a locksmith who, as the Court found, had been recommended by Agent Jaffe. When the locksmith made a key by means of which the briefcase was opened, it was taken to a photographer by IRS Agent Jaffe where the contents were

were photographed. The briefcase was returned to Kennedy's apartment before she and Wolstencroft returned from dinner.

The Internal Revenue Service ratified this by paying Casper $8,000 for his services out of which he paid $1,000 to Kennedy.

Jaffe made inquiries about the persons whose names appeared in the photograph material and learned from the Cleveland office that Respondent Payner's returns for the years 1968 through 1971 were under investigation. The Cleveland special agent was told of the listing of Payner's name but nevertheless the investigation in Cleveland was closed for want of evidence and the returns from '68 to '71 were accepted as filed.

Thereafter the Department of Justice initiated a Grand Jury investigation in Miami into secret bank accounts. The subpoenaes were issued in April and May 1974 and the critical loan agreement was produced. This opened the investigation again in Cleveland which led to Respondent's indictment involving his 1972 return.

Respondent waived a jury trial and moved to suppress the evidence, particularly the loan guaranty in any testimony associated with it.

After some proceedings not relevant here the Court entered a verdict of guilty and then set it aside when it ordered the loan guaranty and the testimony related to it

suppressed.

The District Court held that the suppressed testimony was tainted by the illegal search of Wolstencroft's briefcase. It held that the Respondent lacked standing under the Fourth Amendment to challenge the legality of the January 1973 search but that since the Government agent's conduct demonstrated "knowing and purposeful bad faith hostility to a person's fundamental constitutional rights," that the due process clause of the Fifteenth Amendment requires suppression of the challenged evidence.

In the alternative and very candidly because it questioned the validity of the Fifth Amendment determination, it held: The Federal Court's supervisory power over Federal prosecution should be invoked to exclude evidence obtained by Government conduct which is either purposely illegal or motivated by an intentional bad faith hostility to a constitutional right.

The Court of Appeals affirmed the District Court conviction in a brief opinion basing its determination solely on the exercise of supervisory powers and expressly not reaching the constitutional question. This Court ran a certiorari on the question of the asserted exercise of supervisory powers to suppress relevant and probative evidence of criminal activity even though Respondent's constitutional rights were not violated by the acquisition of the evidence.

Our argument urges this Court to hold first that Congress has the undoubted power to declare within constitutional limits what practices and procedures will govern trials in Federal courts. And we submit that Rule 402 of the Federal Rules of Evidence prohibits the exercise of any supervisory power the District Court might otherwise have for the purpose of suppressing relevant evidence derived from the search of Wolstencroft's briefcase. The rule of course provides all relevant evidence is admissible except as otherwise provided by the Constitution of the United States by Act of Congress, by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority.

We submit that this evidence that was obtained from Wolstencroft's briefcase was not prohibited by the Constitution of the United States at the urging of Payner, by any Act of Congress, by the Federal Rules of Evidence or by other rules prescribed by the Supreme Court pursuant to statutory authority, which would mean amendments or revisions to the Federal Rules of Evidence.

QUESTION: General McCree, am I right in thinking that Congress made some changes of its own in these Federal Rules of Evidence when they were transmitted by this Court?

MR. McCREE: Indeed, the Congress did and perhaps most relevant to our purposes here it changed the last sentence from "other rules prescribed by the Supreme Court pursuant to

its authority," or words to that effect to "pursuant to statutory authority," which we submit was intended to indicate that the source of the Supreme Court's authority to amend would be the Congress of the United States.

MR. CHIEF JUSTICE BURGER: You say, I take it, Mr. Solicitor General, that this is an expressed declaration by the Congress on the jurisdiction of the Federal Courts under this Court?

MR. McCREE: That is our submission, this is an expressed declaration by the Congress that the Court shall not exercise a supervisory power relative to the exclusion of relevant evidence. Now, we don't say that the courts are bereft of all supervisory power. As a matter of fact our brief suggests that supervisory power is merely part of the general power the courts possess to decide cases and controversies and the Court every day uses supervisory powers when it determines the procedure that will be followed in the Court. But the Congress has the power to say that the Court shall not use supervisory power unless it is subsumed in one of the specified sources of power.

QUESTION: To put it another way, are you saying that up to the time of the adoption of Section 402 the powers of the Court -- the inherent powers of the Court may well have embraced this kind of supervisory authority but the Congress has deliberately withdrawn that jurisdiction from the courts

MR. McCREE: I would agree with that statement precisely. This Court has in the past prior to the adoption of Section 402 purported to act pursuant -- or to recognize the use of supervisory powers. And even in the area of the admission of relevant evidence. And we don't say that the Court doesn't still possess supervisory powers for other purposes. As a matter of fact these rules, the so-called wild card rule on hearsay evidence allows courts to use power which we would analogize to the supervisory power to admit evidence as the authenticity or equivalent to authencity as specified exceptions to the hearsay rule.

QUESTION: Well, the supervisory power is really just another word for the power that any appellant court has to correct nonconstitutional errors, isn't it?

MR. McCREE: I would agree with that except I would include a trial court as well in that. And I think it does have power -- it is the judicial power of the United States to decide cases in controversy.

QUESTION: Right. And not only power but the function of an appellant court to correct prejudicial errors and to reverse judgments if prejudicial errors have occurred. And if there are nonconstitutional errors you can call that supervisory power if it pleases you.

MR. McCREE: Yes. We agree, Mr. Justice Stewart. We would say that the Congress is the power to prescribe rules

of procedure in evidence with the Federal Courts.

QUESTION: Yes.

MR. McCREE: This court Palermo v. United States held specifically that, that the language that was used was the power of this Court to prescribe rules of procedure in evidence with the Federal Courts exists only in the absence of a relevant Act of the Congress. We submit that the Congress can provide the circumstances under which relevant testimony may be excluded from evidence.

Of course it cannot tell this Court that it can't do it in contravention of the Constitution, there isn't any question about that. And that is one of the specified grounds of course on which the Court may exclude.

QUESTION: I take it that you say that the rule and that section in particular tells the courts that unless you find some constitutional ground for exclusion or unless you find some ground for excluding expressed in these rules --

MR. McCREE: Or a statute.

QUESTION: -- or a statute, you may not exclude relevant evidence.

MR. McCREE: That is the way we read Rule 402.

QUESTION: And that prior to the rules -- the rules of evidence were -- you found them in the books, the courts had made them up.

MR. McCREE: But not --

QUESTION: But then it was decided to reduce the rules of evidence to a set of rules and then Congress turn it into a statute.

MR. McCREE: Precisely. Before Rule 402 was adopted Federal Rule -- Federal Rule of Criminal Procedure 26 provided in its second sentence:

"The admissibility of evidence and the competency of witnesses shall be governed except when an Act of Congress or these rules otherwise provide by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."

QUESTION: That was that power was eliminated.

MR. McCREE: It was severely circumscribed and 402 specified the bases by which relevant evidence could be excluded thereafter.

MR. CHIEF JUSTICE BURGER: If 402 were not on the books, Mr. Solicitor General, would you be here today?

MR. McCREE: I would be here today. I would be here today to say that even if there is supervisory power in the courts that it was not correctly exercised in this case and that is my next argument.

QUESTION: That it was inconsistent with our standing case.

MR. McCREE: That indeed it is.

MR. CHIEF JUSTICE BURGER: That would be a different

basis entirely.

MR. McCREE: It would be that the power exists but it should not have been exercised in this instance because it amounts to an utter circumvention of all of the standing jurisprudence that this Court has worked out on a case by case basis over the years.

QUESTION: Would it be another way of saying the same thing General McCree, to say that concededly the Courts of Appeals have supervisory power but that this Court has supervisory power to supervise their supervisory power?

MR. McCREE: Well, there seems to be no question of that and this of course is the end of the road.

QUESTION: General McCree, before you get into your second argument, do I correctly understand that your first argument asks us to overrule Miranda? Because the giving of Miranda warning as I understand it is not constitutionally required.

MR. McCREE: Well, the Miranda warnings are under the Fifth Amendment right to be -- not to be required --

QUESTION: They are required by the rule to protect the Fifth Amendment, right. But they are not themselves constitutionally required.

MR. McCREE: Well, the Fifth Amendment specifically provides that no person shall be required to incriminate himself. And I would say that on that basis there is authority

for the Miranda rule if it is to be a precaution against self-incrimination. It is not a general, open-ended chancellor's foot kind of determination.

QUESTION: It is not a rule prescribed by the Supreme Court pursuant to statutory authority and it is not provided by the Constitution of the United States, that the evidence -- a confession given without the appropriate warning shall be inadmissible.

MR. McCREE: It is not expressly provided. But this Court has found it to be required.

QUESTION: Well, doesn't Michigan v. Moseley clarify that and make it rather clear that Miranda is not a constitutionally mandated requirement?

If I am right about that, then your argument I think does ask us to overrule Miranda.

MR. McCREE: Well, I don't think it does. And I want to think just a moment more about my response to it. And I come back to my earlier answer that the Fifth Amendment does specifically protect a person against self-incrimination.

QUESTION: Right. And of course the Fourth Amendment protects these people against having their briefcases searched and --

MR. McCREE: It protects Mr. Wolstencroft.

QUESTION: Right.

MR. McCREE: It doesn't protect Mr. Payner.

QUESTION: Right.

MR. McCREE: Mr. Payner has no more right to invoke the Fourth Amendment here than a perfect stranger to it.

QUESTION: Well, it would be difficult to imagine why this Court reversed the Supreme Court of Arizona in Miranda v. Arizona if the Constitution didn't require Miranda warnings, would it not? I mean our only authority to reverse the Supreme Court of Arizona is a violation of Federal Constitution or Federal statute.

MR. McCREE: That was my response I thought to Mr. Justice Stevens that there is the express --

QUESTION: Companion cases in Miranda, all but one of which were also State cases.

MR. McCREE: And there is an expressed guarantee against self-incrimination and this Court --

QUESTION: Compulsory self-incrimination.

MR. McCREE: -- compulsory self-incrimination. And this Court equated the failure to give these warnings as subjecting a person to that risk.

QUESTION: At least absent those warnings the State is in constitutional trouble but Miranda and some other cases indicated that these particular prophylactic rules might not be the only satisfactory protection that a State could satisfactorily give to the Fifth Amendment right. But absent some other protections and absent these warnings,

a State conviction is vulnerable.

MR. McCREE: Fortunately, we don't have to face that question here, though.

I submit that the literal language of 402 forbade the District Judge here from using an amorphous and undefined supervisory power to exclude this very relevant, very probative evidence.

QUESTION: Should the Court read it as having Congress say to us that from this time on you will not make any rules except within the framework of 402?

MR. McCREE: I think that is exactly --

QUESTION: That would leave Miranda intact.

MR. McCREE: Rules relating to the exclusion of evidence.

QUESTION: Yes.

QUESTION: Mr. Solicitor General, I suppose that -- suppose someone asks us to overrule Alderman or one of the standing cases that says that Mr. A can't object to a Fourth Amendment violation of Mr. B and five Justices think those standing cases are wrong, that those are just prudential rules anyway, so we reverse Alderman and say that A does have standing to object to B.

I take it your argument would say we have no power to do that.

MR. McCREE: I don't say you wouldn't have.

QUESTION: Why not; why not? We would then exclude the evidence; this very evidence that is involved in this case would then be inadmissible.

MR. McCREE: If you felt constrained by the Constitution to do that you wouldn't be wrong.

QUESTION: Well, do you think Alderman is -- after all if a prisoner has a case of controversy with a State and the State is trying to convict him by evidence that was illegally seized and we said, "Well, the evidence, it wasn't seized in violation of your rights and so you can't object to it."

Is that a constitutional --

MR. McCREE: Well, you would order the remedy to a person whose rights -- whose constitutional rights you found to have been violated. I think that is what --

QUESTION: In those cases we have denied, have denied a remedy to --

MR. McCREE: But you have denied it to the person whose rights were not -- whose rights were not --

QUESTION: Well, he was being put in jail by illegally seized evidence.

MR. McCREE: But you have held that A's rights that are protected by the Fourth Amendment were not violated by a search -- by the invasion of a right of privacy of B.

QUESTION: Well, the District Court here held that

they had to create standing in somebody in order to enable them to litigate unconstitutional conduct of the Government even though the particular defendant before them was unable to --

MR. McCREE: Well indeed the District Court here indeed found that Payner's rights had not been violated at all. And so this is -- this is a clear attempt to afford a remedy to exclude relevant probative evidence without showing that the person who claims to be aggrieved had a constitutional right of his infringed.

QUESTION: Or right --

MR. McCREE: Or right created by a statute.

QUESTION: I still think under your first argument that in effect you are saying Congress has now forbidden us to overrule any of our prior evidence cases.

MR. McCREE: Well, I don't make that contention and I don't think we have to decide that here today. I think today you could agree -- well, you could agree with our position here that at the very least Rule 402 forbids the lower court.

QUESTION: Well, what if we decided that you get to a second argument and suppose we are thinking about your second argument that this ruling is inconsistent with Alderman and the other standing cases. And we say, well, it certainly sounds like it is inconsistent and we now think Alderman is

wrong and we would like to reverse it. But then we say, well, the Solicitor General told us, in effect, that we couldn't.

MR. McCREE: Of course if you reverse -- you mean to exclude evidence that you think A is right but at B's insistence.

QUESTION: Exactly.

MR. McCREE: I think you would probably find a constitutional underpinning for it.

QUESTION: If the Court rested it solely on standing, where would we be?

MR. McCREE: Well, it is hard for me to divorce the notion of standing from the notion of a constitutional right having been violated. Someone's constitutional right may be violated. But whether another person can assert it is another matter.

QUESTION: Up to now we have said they couldn't, haven't we.

MR. McCREE: And conceptually it is difficult to separate these. Yes, you have said that up to now.

QUESTION: Well, how can you say the first man's rights were violated. They didn't use it against him, did they?

MR. McCREE: They do not use it against him.

QUESTION: So he wasn't incriminated, was he?

MR. McCREE: As a matter of fact -- that is correct.

As a matter of fact this case really should not be -- would not have been in this Court if the Court of Appeals had looked to see whether this evidence that was critical for the conviction had whatever might have been produced by the search of Wolstencroft's briefcase. As a matter of fact in the Northern District of Illinois in Chicago there is a case called the United States of America v. Baskes that grew out of this same investigation of this Operation Trade Winds. There also the name of Bastis may surface in the photographing of the contents of Wolstencroft's briefcase. But the District Court determined that since they already knew that the Bank of Perrine Florida was a correspondent for the Castle Bank & Trust Company and had the information that led them to subpoena the Castle Bank & Trust Company papers in the Bank of Perrine's possession, that this was an independent source of information and therefore there was no taint connected with going into the briefcase.

And there was another episode too where Casper allegedly took a Roloder -- or I think it was Kennedy took a Rolodex address device which didn't figure into this case. If the Court of Appeals had decided this and addressed the question I think this case might not have been here. I think it would have come out the same way the District Court in Illinois did. And incidentally, that case is pending now in the Seventh Circuit.

It is also instructive, to me anyway, that the District Court in Bastis also found that, and said so expressly, that to allow the use of supervisory powers here would circumvent this Court's Fourth Amendment jurisprudence associated with the concept of standing and that --

QUESTION: General McCree, may I return for a second to my question about Miranda because it does trouble me.

I have been looking at Michigan v. Tucker -- I mis-described the case before -- at 417 U.S. at pages --

Mr. McCREE: That use of the evidence to impeach --

QUESTION: No. This is the violation of Miranda before Miranda was decided, the question of whether it was retroactive, in effect. And at page 444 of the opinion the Court points out that the Court in Miranda had recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead made to insure that the right against self-incrimination was protected. And then later on on page 445, our determination that the interrogation in this case involved no compulsion sufficient to breach the right against compulsory self-incrimination, does not mean that there was not a disregard, albeit an inadvertent disregard of the procedural rules later established in Miranda.

I think it quite clearly draws a distinction between

a constitutional violation and a violation of a procedural rule imposed by this Court. And I think if we accept your theory we would say that Rule 402 has overruled Miranda as so interpreted.

MR. McCREE: Well, on the other hand --

QUESTION: Maybe there was no jurisdiction to decide Miranda but it is on the book.

QUESTION: It does say of course what my Brother Stevens of course says it says but Miranda couldn't -- this Court wouldn't have had power to reverse the judgments of convictions in Miranda had it not been construing the United States Constitution.

MR. McCREE: I have said before that I have a conceptual difference, a difficulty with this problem on habeus, of course a State judgment may be reviewed only for a constitutional violation.

I see my time is fast fleeting. I would like to --

MR. CHIEF JUSTICE BURGER: Your time has fled, Mr. Solicitor General.

MR. McCREE: Then I should follow my time. Thank you.

QUESTION: Let me ask you one question and it relates to just the point we have been focusing on.

Assuming that the Court had supervisory power linked to constitutional underpinnings that you suggested

when it adopted Miranda and when it acted in the Tucker case. Is it your position that whatever that authority was Congress has now withdrawn that jurisdiction from this Court under 402?

MR. McCREE: Unless the Court adopts a rule pursuant to statutory authority; yes, Mr. Chief Justice.

QUESTION: We have one case before us and we have had Miranda, Brown v. Mississippi.

QUESTION: And none of those was a supervisory power case, they couldn't have been.

MR. McCREE: Our suggestion is that the Court --

QUESTION: Miranda couldn't have been.

MR. McCREE: -- remand the case and require it to address the questions that it did not address in its very brief opinion and we believe they will find no taint. They will find that the finding is clearly erroneous.

QUESTION: I am not sure I understood one of your recent answers.

Suppose Miranda had not been decided until today. Suppose Miranda was before us today and the question was did we have the power under 402 to do it. I would suppose you would argue that that was constitutionally based and that 402 wouldn't prevent us from doing what the Court did in Miranda.

MR. McCREE: I think I would have to.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Kleinman.

ORAL ARGUMENT OF BENNET KLEINMAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. KLEINMAN: Mr. Chief Justice, and may it please the Court:

I would like first to direct my argument in light of the argument made by the Solicitor General to Rule 402 if I may.

It appears that Rule 402 set forth certain rules regarding the exclusion of evidence. However, what the Solicitor General has not taken into account is that the supervisory power of the Court has historically been exercised to make certain that all of the prosecutorial and all of the procedural steps which evolved in the conviction of a criminal were followed by the Executive and the other branches which were involved in bringing that criminal to justice.

QUESTION: Do you question the authority of the Congress to withdraw specific areas of jurisdiction from the Federal Courts?

MR. KLEINMAN: No, I do not question that authority of the Congress to do that. However, I would suggest that it may very well be, and I am not taking this position here today as strongly as I might, that the supervisory power of the Court to make certain that the constitutional requirements

or at least that due process as the civilized countries of this world do understand due process without the use of torture and without the use of requiring one to testify against himself are within the power of this Court. Otherwise there is no check upon what the Executive can do in order to bring a criminal to justice.

For example, --

QUESTION: Well, before you go too far let me check you on that.

To be compelled to testify against himself, we don't need to get any more authority to deal with that than we have under the Constitution, do we?

MR. KLEINMAN: Well, the question is whether the evidence can be excluded. It is true that the Constitution provides that no person shall be required to be a witness against himself. However, the courts through the supervisory power said, how are we going to enforce this provision. We are going to say that the evidence is not admissible. That is what the Court said in McNabb. An interesting part of the McNabb case was there were three brothers who were brought to the police station and were questioned and the Court held that those confessions were not voluntary because of the time that was spent and the manner in which they were carried out and it did not permit any of those confessions to be used against anyone.

QUESTION: The same was true in Mallory, was it not; in the Mallory case that followed McNabb?

MR. KLEINMAN: Yes.

QUESTION: And Anderson.

MR. KLEINMAN: In Mallory the evidence was admissible against others. However, in McNabb it was not. In the Valencia case which was decided in the Sixth Circuit and for which incidentally then Judge McCree wrote the opinion, the rights of an individual who had hired an attorney were violated by the secretary to that attorney who was a spy -- I shouldn't say a spy -- an informer for the Internal Revenue Service -- or for the Government. And that secretary took material from the attorney's files and gave it to the Government and that material was used to convict three people, only one of whom was the client of that attorney. The other two had no relationship with this attorney at all. Yet Judge McCree in the opinion of the Sixth Circuit Court said that that evidence was tainted and it could not be used against anyone.

I am suggesting, Your Honor, that in this particular case the evidence was tainted. The Government continues to act as if the activity of the Internal Revenue Service in this case was an illegal matter, an illegal search, the constable's blunder if you will. However, --

QUESTION: I didn't think its position would be any different if the Internal Revenue Service broke into the bank.--

MR. KLEINMAN: That is correct.

QUESTION: -- and seized the evidence.

MR. KLEINMAN: There would be no difference, Your Honor --

QUESTION: I mean under their argument.

MR. KLEINMAN: According to their argument if they killed Mr. Wolstencroft. As a matter of fact if the Court will recall the briefs point out --

QUESTION: The Internal Revenue Service agent might be in a great deal of trouble but the question is about the evidence.

MR. KLEINMAN: That is correct. Would the evidence be excluded if that that happened. As a matter of fact in this case the revenue agent in charge Mr. Jaffe was asked: Did you know about how Mr. Casper was going to get this evidence.

He denied knowing it although the Court found that he did know. But he said, "No, I didn't know but I didn't expect that he would commit murder to get it."

Now, if the Government is correct in its position on the Rule 402, if the Government agent Mr. Casper had killed Wolstencroft in order to get that evidence, there was no way -- there would be no way that this Court could exclude that evidence if the Government's position on Rule 402 is correct.

QUESTION: We could affirm his conviction for murder, couldn't we?

MR. KLEINMAN: Well, I am not sure of that. I am not sure of that because I do not believe as I read some of the cases that a Federal agent in connection with his duties for the Federal Government may not be subject to criminal prosecution under State law. I don't make that as a --

QUESTION: Well, it wasn't a Federal agent.

MR. KLEINMAN: He was a Federal agent.

QUESTION: He was a hired private investigator, --

MR. KLEINMAN: Yes, but this Court --

QUESTION: -- wasn't he?

MR. KLEINMAN: Yes, he was; but he was an agent for the Government, the court so found. He was an agent of the United States Government.

I would like to --

QUESTION: Mr. Kleinman, before you go on, where is Rule 402 here in the papers that we have?

MR. KLEINMAN: Page 15 of the Respondent's brief.

QUESTION: All right. Thank you. Thank you very much.

MR. KLEINMAN: I must say that the Government has talked about ratifying an Act. In their brief they talk about distasteful practices. The fact of the matter is that the United States Government was a participant, as a matter of fact planned to commit a criminal act in order to get evidence against this defendant. I submit to this Court that the act

of the Government was more heinous than the act allegedly committed by this defendant, by the Respondent here. The fact of an account in a bank in the Bahamas was not an illegal act. They had every right to have such a bank account. The contention was that he lied about it.

QUESTION: That he lied about it.

MR. KLEINMAN: That he said that --

QUESTION: That is not reprehensible, lying?

MR. KLEINMAN: I didn't say it was not reprehensible, Your Honor, but I would suggest that the commission of a felony by stealing this man's property was a more heinous crime than failing to state on a tax return that a man had an account in the Bahamas, because that would not necessarily indicate that any crime was committed by him other than that statement made.

Now, I suggest that in the Jacobs case, the Second Circuit, for example, held that it was their opinion -- the only case that I find that directly confronted Rule 402 problem -- they held that the Congress did not direct its attention to the supervisory power of the Court at all and that therefore if one looks at the legislative history of Rule 402 one will find no reference to such an important matter as the supervisory power of this Court.

QUESTION: Mr. Kleinman, you are talking I take it about the supervisory power of the Federal judiciary as a

whole, not of each Court of Appeals independently.

MR. KLEINMAN: Correct. I am speaking of the right of the Federal judiciary to govern the manner in which a criminal is brought to justice, including its right to supervise the activities of the Executive branch in bringing that criminal to justice.

QUESTION: So if the Seventh Circuit case that General McCree mentioned is affirmed by the Court of Appeals and there is a conflict in the Seventh Circuit and Sixth circuit in your case, that conflict would presumably ultimately have to be resolved by this Court.

MR. KLEINMAN: I believe it would; yes.

QUESTION: So it isn't a question -- as I recall the Jacobs case, it was the policy of U.S. Attorneys in the Second Circuit, something that the Second Circuit didn't purport to say was something that ought to be followed in the Ninth Circuit or the Fifth Circuit or the Fourth Circuit, it was simply more or less an administrative policy.

MR. KLEINMAN: It was an administrative policy of the U.S. Attorney's Office to do certain things. And the Court in Jacobs held that they improperly failed to do it in the case of Jacobs, in that particular situation. But incidentally to its decision it stated that Rule 402 did not deal with the supervisory power of the Court. As I say, the receipt or the acquisition of evidence in the case by a crime as heinous

as the murder of Wolstencroft would not have been excludable if the Government's interpretation of Rule 402 is correct. I submit --

QUESTION: Holding aside from Rule 402, the Government says that evidence would be admissible under our -- under the --

MR. KLEINMAN: That is correct.

QUESTION: -- under the standing cases.

MR. KLEINMAN: Well, the question of the standing cases is another matter, Your Honor.

QUESTION: Well, I know but you certainly have to get by those, too.

MR. KLEINMAN: Yes. That depends on whether we rely on the Fourth Amendment or whether we rely on the Fifth Amendment.

QUESTION: But whatever you rely on you have to get by that point, don't you.

MR. KLEINMAN: The standing point? I don't understand the matter of standing to be involved in the question involving the Fifth Amendment; the due process clause provides thatif there is a taint to evidence it cannot be used. The citizens of this country are entitled to know that the Government, the Executive branch of the Government will deal with its citizens in a manner which comports with modern day civilization.

QUESTION: What was involved in Alderman? What was involved in the Alderman case; that is a standing case isn't it?

MR. KLEINMAN: Yes, that is a standing case. But that had to do with a particular act that was involved. For example, in the search cases, in the illegal search cases we are dealing with an act, with the illegal act of searching, making an improper and an illegal search against an individual. And this Court has held that an individual in order to have standing to complain must be the individual against whom that search was directed.

Now, however, we have argued in our brief that in this particular case the Respondent had the right, the legitimate expectation of privacy in the records that were maintained in the Bahamian bank. So that extent he could be held to have had standing. However, in connection with the Fifth Amendment --

QUESTION: What if we had a treaty that would have allowed us to "extradite those records?"

MR. KLEINMAN: Well, if there were such a treaty, then I would assume he did not have a legitimate expectation of privacy because he would know that this Government recognizes the fact that they could get those records. And that if he knew that,he had no legitimate expectation.

QUESTION: Your submission that he really had stand-

ing because he had an expectation of privacy, that has either not been presented below or was rejected by the courts below.

MR. KLEINMAN: Yes, it was rejected by the District Court. It was not treated by the Circuit Court of Appeals. It was rejected by the District Court who held we did not have --

QUESTION: Because I think that if you are right about that, the 402 argument is beside the point and so are the standing cases.

MR. KLEINMAN: However, the District Court did hold that the activities of the Government in this particular case, the planning and direction of the larceny, if you will, was such as not to comport with the manner in which due process is carried on in this country. It so shocked the conscience of the court. This was not a mere act of an illegal act of making a search where an officer of the Government thought he had the right to do so, this was a devious plan to acquire evidence by means of a larceny. Mr. Jaffe when he spoke with Mr. Casper said, "I have to talk to my supervisor. I have to talk to Troy Register who is the head of the Intelligence Section. He planned it."

If the exclusionary rule can ever be applied, and I know the courts have struggled with this problem as to whether the exclusionary rule really deters illegal conduct and the criminal conduct on the part of the Government as in

this case, this case ought to prove that the exclusionary rule works. If Jaffe when he talked to Mr. Register in Washington had come to the conclusion, both he and Mr. Register, that this evidence would not be admitted in court if they did what they did, they would not have performed that act. There was no question that when they were told to go ahead and do it because the court has said that this man Payner -- they didn't know about Payner -- but anyone whose name was there or evidence against whom they might acquire had no standing to complain, they went ahead and did it. As a matter of fact the court's decision in this Payner case impelled the Internal Revenue Service to adopt the rule with regard to the manner in which evidence is acquired so it wouldn't happen again. Furthermore, as I understand it, the Government has dropped all prosecution against others in this type of action except perhaps two or three although there were some 400 people involved -- as the evidence showed, there were some 400 names in that briefcase -- the Government after the matter had been determined and had been heard by the House of Representatives decided that they would not proceed against any of the other persons who were named in there because of the taint upon the evidence.

QUESTION: Where do we find that out?

MR. KLEINMAN: The hearings before the House of Representatives.

QUESTION: You are suggesting we judicially notice that.

MR. KLEINMAN: I think you can notice that; yes, sir. There were hearings before the House of Representatives in which the Commissioner of Internal Revenue was involved and he called off as a matter of fact the Trade Winds operation and was subjected to some criticism by some people for having done it. But he called off the investigation of Trade Winds because of the manner in which these things have been accomplished.

I might suggest to the Court --

QUESTION: The Solicitor General has told us that there is a pending prosecution arising out of the same --

MR. KLEINMAN: I said there were two or three. I think --

QUESTION: But they are still persisting with the Baskus case.

MR. KLEINMAN: Baskes is another, because apparently that had gone far enough at that time that they didn't withdraw it. At least that is the evidence we have from minutes of the Intelligence Section, but they have withdrawn any activity in connection with any other of these.

QUESTION: Of course if that is true, when we don't really need any deterrent, do we?

MR. KLEINMAN: Well, except that you cannot say that

in this particular case if it is held that that evidence is admissible the Government can very well say, "O.K., now we are going ahead with it." This Court must hold that this evidence is excludable. Otherwise the Government will proceed, it will not be deterred from using evidence illegally obtained.

QUESTION: Just Stevens has just pointed out that the Executive branch responded to congressional hearings without any statement from this Court at all.

MR. KLEINMAN: No; not true. They responded to the Act, to the judgment rendered in this case. The Internal Revenue Service did not adopt its rule until after Judge Manos in the District Court ruled that the evidence was not admissible.

QUESTION: I thought you said that all these prosecutions were dropped after they were criticized in the Congressional hearings.

MR. KLEINMAN: No, this case itself, Your Honor, was carried on after the hearings in the Congress. It was only after this case was decided that the others were dropped.

QUESTION: So the hearings in Congress really didn't amount to all that much?

MR. KLEINMAN: Well, the hearings -- the Commissioner of Internal Revenue stopped not any further proceedings but further activity of agents in acquiring evidence under the tax haven --

QUESTION: To refer to the tax provision.

MR. KLEINMAN: That is right. But that did not stop the prosecutions at that time. Those prosecutions were continued until this Court ruled that the evidence was tainted, that the agent of the United States had violated the laws of the State of Florida by means of a larceny which they had committed. The Court also cast some doubt as to whether there wasn't something involved with this woman Sybil Kennedy which could have had other implications. The Government did not bring Sybil Kennedy to court, we couldn't find Sybil Kennedy, we didn't know who she was. I don't believe --

QUESTION: And if this Court reverses the Sixth Circuit presumably the prosecutions will continue?

MR. KLEINMAN: I have no knowledge of what they will do if this Court does that. However, I feel that if this Court does not affirm the Sixth Circuit, certainly the Government will then feel that it can proceed to do whatever it feels like in this case because the evidence could not be excluded under any circumstances.

QUESTION: Mr. Kleinman, isn't -- excuse me.

QUESTION: At least for me you covered the standing point so swiftly that I think I missed it. Now, Mr. Justice Stevens has a question but I would like to have you reach that standing question.

MR. KLEINMAN: My understanding of the question of

standing is that the person who objects to the introduction of evidence obtained in an illegal search must have standing to object to that. And it has been held that the person who can so complain is one whose legitimate expectation of privacy has been violated. I believe Mr. Justice Rehnquist wrote the opinion in the Baskes case in which it was sol held that a person must have a legitimate expectation of privacy. And that legitimate expectation of privacy doesn't necessarily involve a property right. He must not necessarily own the property; it must not be his property necessarily that was searched. The question is whether he had the legitimate expectation of privacy.

I suggest here, and that is the reason why I suggested perhaps even the standing requirement has been met is that Mr. Payner had the right to believe that the confidentiality of his records would be observed and he had a legitimate expectation of privacy as to those records.

QUESTION: But the District Court rejected that.

MR. KLEINMAN: Yes, it did.

QUESTION: And it excluded the evidence on another basis.

MR. KLEINMAN: That is right. It excluded the evidence on the basis that the Government had violated the due process right.

QUESTION: Yes, I understand that.

MR. KLEINMAN: That is right, hostility to an individual's constitutional --

QUESTION: Suppose we agree with the District Court; what is your answer to the standing cases if we happen to disagree with you and agree with the District Court that there was no reasonable expectation of privacy in these records?

MR. KLEINMAN: I assume that this Court would then have to hold that my client did not have -- or the Respondent did not have standing to object to the search on that basis.

QUESTION: All right. Then what will you do?

MR. KLEINMAN: Then we would proceed to the next basis upon which the Court ruled --

QUESTION: Due process.

QUESTION: -- and that is that under the due process clause there was a violation of bad faith, hostility violation insofar as an individual's constitutional rights are concerned. And that so tainted the evidence that it is not admissible in a court of law. It does not comport with the American sense of due process and justice.

And, as I said, there were cases that so held. I believe that the Valencia case is a matter in that line. The violation of the constitutional rights in Valencia were against one individual. However, the Court said that this so tainted the evidence, it was so abhorrent to them, shocked their conscience, that that evidence couldn't be used even

against the other two who had no connection with this attorney at all. It seems to me --

QUESTION: Mr. Kleinman, you don't get into Oliver v. California back in 347 one way or the other. You don't cite it and neither does the Solicitor General.

MR. KLEINMAN: No.

QUESTION: From your arguments even if the exclusionary rule were modified as has been advocated from time to time to say that it should not apply to the cases where the constable blundered but only to cases of agregious calculated intentional violations, that this would fall under the latter category?

MR. KLEINMAN: Yes. This is what I am suggesting and this is what the District Court held, the activities of the Government here were so egregious as to call for the exclusion of the evidence.

I might point out that in the Court of Appeals Judge Damon Keith was prompted to comment during the time of the argument after having read the briefs, he said that this reminded him of nothing more than Anatole Scharansky and the KGB in Russia. This is the kind of an impression he got when he read the briefs in this case. This is how egregious he felt the conduct of the Government was. They planned this action. The Government --

QUESTION: There is one difference and that is that

-- I don't know what happened to Mr. Wolstencroft but I presume he has a pretty clear remedy against the agents for damages, doesn't he? The victim of the illegal search.

MR. KLEINMAN: I suggest that that is possible except however that he is under indictment for some of his own activities. He lives in the Bahamas and he is not as far as I know extraditable to the United States. And therefore he will not appear.

One of the things that bothered Judge Manos was --

QUESTION: But in a normal case of a bank representative who was victimized by this kind of procedure and all the facts came out, he would have a pretty good lawsuit, I would think.

MR. KLEINMAN: I believe that is true.

QUESTION: It is not a constable blunder-type situation.

MR. KLEINMAN: I believe that is true. However, I would suggest --

QUESTION: It is a deterrent, at least in our legal system, that is not present in the Russian legal system, so far as I know about it anyway.

MR. KLEINMAN: With all respect, Your Honor, there is such a provision; however, in all my years of practice I have never heard of anyone whose rights were violated by a search of having recovered from anyone who was guilty of having

recovered from anyone who was guilty of having performed that search in any substantial amount for violation of his civil rights. I don't believe it is a deterrent. I can't imagine the jury awarding him anything. Once the Government found evidence which might implicate him in the crime, I can't find --

QUESTION: In a normal case the third party is not implicated in the crime. See, this third party as I understood it wasn't particularly implicated in any wrongdoing insofar as --

MR. KLEINMAN: No.

QUESTION: Now, maybe he did something else that we don't know about.

MR. KLEINMAN: That is true. However, the Sixth Circuit also in the Archer case said that it was unthinkable that evidence could be admitted when the Government instigated robberies and beatings of one individual or a group of individuals to get evidence against other individuals. And that is what happened here, they committed a crime, they violated the rights of Mr. Wolstencroft. And under those circumstances the evidence is so tainted it is not a mere error of judgment of an official of the Government. It is a deliberate devious plan to steal something from someone else. And that makes the difference between a due process violation and one involving the particular standing of this individual.

I believe my time is up.

MR. CHIEF JUSTICE BURGER: Well, it is not but we will be glad to have you terminate if you want to.

I think your time was consumed, Mr. Solicitor General.

Thank you, gentlemen, the case is submitted.

(Whereupon, at 2:19 p.m., the case was submitted.)

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