ORIGINAL

In the

Supreme Court of the United States

JULIUS T. CUYLER, SUPERINTENDENT, etc., et al., Petitioners,	:	
v.	:	No. 78-1832
JOHN SULLIVAN, Respondent.	:	

Washington, D. C.
February 20, 1980

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Wednesday, February 20, 1980

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The above-entitled matter came on for oral argument at 2:20 o'clock, p.m.

BEFORE:

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

APPEARANCES:

STEVEN H. GOLDBLATT, ESQ., Deputy District Attorney, City of Philadelphia, 2400 Centre Square West, Philadelphia, Pennsylvania 19102; on behalf of the Petitioner.

MARILYN J. GELB, ESQ., Suite 1500, 1314 Chestnut Street, Philadelphia, PA 19107; on behalf of the respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 1832, Cuyler against Sullivan.

Mr. Goldblatt, we'll just wait until the room clears.

I think you may proceed whenever you're ready, Mr. Goldblatt.

ORAL ARGUMENT OF STEVEN H. GOLDBLATT, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case is here on writ of certiorari from the Third Circuit Court of Appeals, and does involve Federal review of a State conviction pursuant to writ of habeas corpus.

The prosecution is here, and has sought review, of the decision of the Third Circuit, reversing the decisions of the Federal District Court and the Pennsylvania State courts.

The Third Circuit granted the writ of habeas corpus on the basis that the defendant's Sixth and Fourteenth Amendment rights had been violated by virtue of the fact that he'd been denied the right to effective assistance of counsel.

The case--the primary issue in the case involves

the issue of conflict of interest, and whether there was an adequate showing of conflict of interest here to warrant the granting of Sixth and Fourteenth Amendment relief.

QUESTION: When was this case tried?

MR. GOLDBLATT: 1967.

QUESTION: June?

MR. GOLDBLATT: The crime--excuse me--the crime occurred in June of 1966. The crime was tried in June of 1967. So it is almost 13 years old at this time, since the time of trial.

The crime itself was an execution-style killing of two people inside a local Teamsters' union hall in Philadelphia, Pennsylvania in June of 1966. Three defendants were indicted for the crime in, I believe, December of 1966, after a coroner's inquest.

The three defendants privately retained two lawyers to repesent. As these were first degree murder cases, they were tried separately. The Commonwealth moved for trial on respondent's case first.

He was convicted of two counts of first degree murder. The two other defendants were subsequently tried separately and acquitted.

On the first direct appeal to the Pennsylvania--

QUESTION: Each one of them was tried separately?

MR. GOLDBLATT: Tried separately and acquitted, yes.

This was the only defendant who was convicted.

QUESTION: There were two subsequent trials?

MR. GOLDBLATT: Yes, there were.

In any event, there were two lawyers who represented the three defendants. They were privately retained by the three defendants. There is some confusion in the record as to how they were paid, but there is no question but that they were not appointed by the court.

The two lawyers were two of the most prominent lawyers in the City of Philadelphia.

In an event, after the first conviction it went up on appeal. It was affirmed by an evenly divided court. Subsequent thereto, State habeas proceedings were commenced in State court, and there was an extensive hearing.

QUESTION: Where is this gentleman been in the meantime? Is he still incarcerated?

MR. GOLDBLATT: He is not incarcerated at this time. Bail has been set. It was not allowed by the Federal courts, but bail was set by the State courts after the Third Circuit granted relief, habeas relief.

So he is on bail at this time waiting--

QUESTION: So he's been incarcerated some 10 or 11 years?

MR. GOLDBLATT: He was, yes. He was incarcerated I believe at the time he was arrested on this crime up until

the time he was released after Third Circuit relief was granted.

In any event, when it went back to State habeas proceedings, the two lawyers who represented the three defendants testified along with the trial judge, the defendant, one of the codefendants as well.

As the testimony developed, it appeared that each of the defendants selected at his option one of the two lawyers to be lead counsel; the other to be backup counsel.

Sullivan selected one lawyer, Judge DiBona, who unfortunately died about two weeks ago. The other two defendants selected the other attorney as their lead counsel.

Mr. DiBona testified at the post-conviction hearing, which is our State habeas proceeding, that there was, as far as he was concerned, no conflict of interest in the case. All the decisions he made were based on the best interests of his client Sullivan; and that he perceived no problems in any of his representation.

Now, the key to this case, and the key that troubled the Third Circuit was, Mr. Peruto, when he testified, indicated in one small part of his testimony that he had some regrets. He felt that perhaps he may have advised Sullivan to hold back on presenting his defense, because he thought the case was won. He thought Sullivan had the case won, because the Commonwealth did not present sufficient

evidence to convict. And therefore, why put on the defense when you could save it for the other two cases.

Now, as I say Judge DiBona indicated that he had absolutely no basis or motivation for his decision not to put on a defense; it had nothing to do with the decision at all.

In any event, when the case got to the Pennsylvania Supreme Court on the conflict issue, that Court ruled that there was no true dual representation in the true sense, because of the lead counsel situation, and the backup counsel situation; and found under the circumstances that there was no conflict on the record.

The District Court essentially upheld that ruling, finding, in its conclusion--crediting Judge DiBona's testimony as to what motivated him as to why he did what he did.

QUESTION: Well, if they believed Judge DiBona, they didn't have much alternative about the decision, did they?

MR. GOLDBLATT: The Third Circuit, however, the panel, when they got the case, held that the legal conclusion that there was no dual representation was erroneous; that there was a clear indication on the record that there was dual representation. And there were indices that Peruto did participate in the defense of Sullivan. There's no question about that, and we don't dispute that.

He was present; he was at counsel table; and did

aid in the defense of Sullivan.

The key to the case is the standard employed in the Third Circuit for view of conflict problems, and that is, the possibility of conflict, however remote--

QUESTION: Well, Mr. Goldblatt, before you get to that, in your question three, on your petition for certiorari, you raise the--whether the Federal court failed to give proper deference to the Supreme Court of Pennsylvania's determination on a factual issue; that is, whether there was a conflict of interest.

Now, are you arguing now that dual representation is or is not a mixed question of fact or law, a question of law, a question of fact, and whether conflict of interest is a question of fact if not dual representation.

MR. GOLDBLATT: What I am saying--argument three, Mr. Justice Rehnquist, I believe goes to the question, assuming the Third Circuit panel is correct in their conclusion--two conclusions, one that there is evidence of dual representation on the record. And I would concede, that is a legal conclusion from the record. It's not a factual conclusion.

And if they're also correct that the standard, possibility of conflict, however remote, is an appropriate standard of review, even in that event this case would have to be remanded to the District Court. Because the Third

Circuit, in rejecting the District Court and State court, made its own findings of fact, based on a record that is totally disputed in every way and every step of the way up.

In other words, it's not a situation where they're adopting District Court findings or State court findings; nobody has made relevant findings under their theory of the case. And they proceeded--

QUESTION: When was the issue of dual representation first raised?

MR. GOLDBLATT: The issue of dual representation was first raised, of course, in the State habeas proceedings.

QUESTION: But not at the time of the trial?

MR. GOLDBLATT: No, not at the time of the trial. There was no pretrial request for separate counsel. There was no issue of separate counsel.

QUESTION: How about on appeal?

MR. GOLDBLATT: On first appeal there was no issue, either. It was not until collateral attack.

So what I'm saying, Mr. Justice Rehnquist, we don't reach argument three until we get through argument--the first two. If we win it, and are successful in convincing the Court that there should be an actual conflict standard, argument three won't even be reached. There's not enough evidence on this record to find an actual conflict.

Excuse me.

QUESTION: How long after the original conviction and trial was the collateral proceeding in which this issue was first raised?

MR. GOLDBLATT: I believe the collateral proceeding at which this was first raised would have been in about 1972 or 3, and I'm sure counsel will correct me if I'm wrong.

QUESTION: Some years after?

MR. GOLDBLATT: It was some years after, no question about that. There's no question the first time this issue comes up is well after conviction, well after the first appeal. Of course, the first--

QUESTION: Wasn't a re-appeal granted?

MR. GOLDBLATT: That's correct.

QUESTION: Which coincided with the appeal in the habeas.

MR. GOLDBLATT: That is correct. What happened at the first habeas proceeding in State courts, as a matter of fact, is that the hearing court found ineffective assistance of counsel on the first direct appeal. Ironically, one of the reasons they found ineffective assistance was because the case had not been argued on direct appeal, and because the Court had split 3-3 on the issue of sufficiency of evidence. So a new appeal was granted.

On the new appeal, it was argued and fully briefed by both sides, and the court split 5-2, that there was

sufficient evidence.

In any event, moving back to the focus of the issue, as far as the standard employed by the Third Circuit, we would submit that this is not a standard at all.

QUESTION: Before you leave it, the first action of the Supreme Court of Pennsylvania would vindicate the judgment of the trial counsel that this case--or give some vindication to the notion that it was not necessary to put on any evidence.

MR. GOLDBLATT: There is no question; as a matter of fact, the Third Circuit even noted that had independent counsel made every decision that was made in this case, they would have little trouble finding effective assistance. They found every decision that was made strategically sound, but held simply because of the possibility of conflict, however remote, on the record, the entire proceedings had to be vitiated, and unless the State retried him, the defendant had to be discharged from custody.

Now, this Court of course has dealt most recently in Holloway v. Arkansas with a situation where there is a pretrial request for separate counsel by a lawyer; and the court has held there that absent an inquiry by the court to determine that no conflict existed, that request must be honored. That representation by counsel that there is a potential for conflict.

This presents, however, the issue left unanswered in Holloway, which is, what do you do when the issue is first raised on collateral attack, where there is no objection pretrial?

Here you have the additional factors that you have separate trials for these defendants; this isn't a joint trial. These are separate trials with the same lawyers representing them, which substantially reduces any potential for problems of conflict of interest, or certainly eliminates a myriad of problems that could otherwise occur.

And what we submit is, especially when we're dealing with a State habeas review, a standard of possibility of conflict, however remote, is far too lenient and far too minimal to justify the granting of relief.

QUESTION: Mr. Goldblatt, you said earlier in your argument, the record wasn't clear as to who paid the lawyers. I was under the impression that the defendants who were tried later, rather than the respondent, had paid the lawyers.

Is that not clear?

MR. GOLDBLATT: There's not even a clear indication of that. Because what happens is, there was some testimony--and again--

QUESTION: Isn't that, though, what the Third Circuit and the District judges assumed? Or am I wrong?

MR. GOLDBLATT: The Third Circuit assumed that. And I think it assumes it from the testimony of the defendant Sullivan at the State habeas hearing that he didn't have any money; he didn't pay them; he didn't know how it came about.

QUESTION: Well, if the Third Circuit made that factual assumption for the purposes of its decision, and if you haven't questioned that, shouldn't we assume that to be the fact for our decision?

I don't know if it makes any difference.

MR. GOLDBLATT: No, that's argument three. Argument three in our brief is, assuming all the legal standards, and when you get there, the Third Circuit made any number of factual findings to reach its conclusion that had never been found by the District Court; that had never been found in the State courts.

What the Third Circuit did was, they said, well the State courts didn't reach the issue we wanted. And they didn't make adequate State findings. For that purpose, we don't dispute it.

What we're saying is, at that point they can't make the findings from a cold record. Because the record is disputed.

QUESTION: It seems to me the legal issue might be a little different if you say a man being represented by

counsel for two codefendants who are paying the lawyer, conceivably you'd have a little different standard than one where there isn't that factual situation. I don't know, but I--

MR. GOLDBLATT: You may or you may not. You don't have enough on this record to really determine who was paying. You don't know if the Teamsters were paying. I mean, you can't tell where the source for the money was coming from.

All we know is, Sullivan testifies that he speaks to the two codefendants. They said, "Well, you can use our lawyer too." That was already---

QUESTION: But was it at least clear that Sullivan did not pay for his own lawyer? Is that much clear?

MR. GOLDBLATT: There is that testimony from Sullivan. That is all I can say. There is no credited factual finding that Sullivan's testimony is truthful. Even the Third Circuit--

QUESTION: But there's no contrary testimony, either?

MR. GOLDBLATT: No.

QUESTION: It's unrebutted testimony.

QUESTION: And it's also clear, isn't it, that these lawyers were retained lawyers? They were not court-appointed?

MR. GOLDBLATT: Absolutely clear; there was no court appointment in this case.

QUESTION: So presumably they weren't working for nothing, and if Sullivan didn't pay for them, somebody did.

MR. GOLDBLATT: There was some indication actually in the record that perhaps they were working for nothing.

QUESTION: Certainly the Court didn't have to believe a quote interested statement of Sullivan on the point.

MR. GOLDBLATT: Certainly not. That's our point, though. All this material in the record is just testimony; there are no findings. The various State courts and the District court largely found it ireelevant on the basis of Judge DiBona's testimony, which was credited.

The Third Circuit gets the case, and they say, "We don't really care that much about Judge DiBona's testimony. We find dual representation if Peruto did anything in the case. And we are now going to glean the record, and pick and choose what we think may be possibilities of conflict."

Now, what we're saying is, if there's a credited factual finding after the disputed record is resolved by a fact-finder, then if you find possibility of conflict by an appellate court, fine. But you can't just take a cold

record--

QUESTION: Did not Mr. Peruto, on some of the disputed items, say that he would defer to DiBona's recollection?

MR. GOLDBLATT: He most certainly did.

QUESTION: And that DiBona was the lead counsel, and he made the decisions?

MR. GOLDBLATT: That is correct. There is no question about that. And indeed--and there is some confusion in the Third Circuit opinion about it--Peruto--what we've been arguing all along is that a large part of Peruto's testimony should be believed.

We have never conceded that that portion of Peruto's testimony where he said he felt he was operating under a conflict should be believed. And indeed, we argued through the State courts and the District court that that should be expressly disbelieved.

We have never argued that that should be credited. Now, the Third Circuit said when we got there that we suddenly were arguing that the Court should believe Peruto's testimony. We were simply making the same argument we made all along, that parts of it should be believed, but other parts of it, not.

In any event, just to focus back on the problem, we submit that the standard for State habeas review, on

collateral attack, where there's been no objection pretrial, where there's been no trigger to a constitution requirement that the judge inquire pretrial at all presented by the case, that the defendant should be required to show actual conflict.

Now, the point we've attempted to make here is that Mr. Peruto's testimony that he wanted to hold back the defense witnesses, even if credited, is meaningless unless you show that there are defense witnesses that could be presented.

And Judge DiBona testified that once the decision was made by the defendant to not testify, there were no good witnesses to present.

So what we have is the Third Circuit. Now, in the Third Circuit's response--what we're saying is, please look at the record--there was no showing of any real defense witness to present. The Third Circuit said, "No, that we will not do. What you're asking us to do is to make an actual confli determination. And that we won't do. All we're concerned with is the possibility, however remote."

And what we submit is, the possibility, however remote, is not a standard of reversal; it's a standard of prohibition. And this was noted in the Three Judge opinion, dissenting from the denial of reargument, that the effect of a possibility of conflict, however remote, standard, when applied the way it was in this case, is to literally bar

joint representation within those courts that come into the circuit. Because the risk is so great that you're going to lose on collateral attack, if that's the only thing that the defendant has to show, that there's literally no point in risking joint representation.

Now, with that in mind, we have a second issue which is more or less alternative to the first; it's not--

QUESTION: Can I ask one more question before you go to the other issue?

In the trials of the--Carchidi, was it, the janitor?

MR. GOLDBLATT: Carchidi.

QUESTION: And DiPasquale.

MR. GOLDBLATT: DiPasquale.

QUESTION: Did they take the stand?

MR. GOLDBLATT: Carchidi did testify at his trial.

QUESTION: How about DiPasquale?

MR. GOLDBLATT: DiPasquale, I believe, never got that far. There was a directed verdict--literally, a directed verdict of not guilty. The Commonwealth was forced to trial. They had attempted to nolle prosequi the case because their key witness would not testify. No evidence was presented at all. After no evidence--after the Commonwealth was ordered to proceed; presented no evidence;

the jury returned the verdict.

QUESTION: And what witnesses testified for the defense in Carchidi's trial other than Carchidi? Did the--

MR. GOLDBLATT: Interestingly enough, at page 183 of the Appendix, Judge DiBona testified that only one civilian witness testified at the Carchidi trial.

QUESTION: Is that the other janitor?

MR. GOLDBLATT: That was Michael Hessian, and he was called by the Commonwealth.

QUESTION: And so they did not put any defense in at Carchidi's trial? Other than--

MR. GOLDBLATT: There was a defense. There were various police officers who were put on at Carchidi's trial. But they literally showed no witness having not been presented at Sullivan's trial that was presented at Carchidi's; that was held back from the Sullivan trial because of the conflict.

QUESTION: Well, the thing I don't quite understand, if there were police officers put on the stand by the defense in the Carchidi trial--presumably, they gave helpful testimony, or at least, testimony they thought would be helpful--

MR. GOLDBLATT: They did not know of that testimony at the time of the Sullivan trial.

QUESTION: They didn't know about it?

MR. GOLDBLATT: They didn't know about it

when that was litigated. Neither lawyer. There was no conflict problem with that; they just did not discover the availability of a particular piece of evidence.

QUESTION: You mean, the only tactical decision was whether to put on Sullivan himself?

MR. GOLDBLATT: There was that tactical decision--

QUESTION: That isn't the impression I got from the opinion.

MR. GOLDBLATT: Well, the Third Circuit opinion--again, this is what we argued--there's an argument that there were three witnesses outside the union building. Those weren't put on at Carchidi's trial, according to Judge DiBona's testimony. And the point we're making is, nobody ever showed. Everybody said--Peruto said there were three witnesses outside the union hall who he didn't want to put on at Sullivan's trial, because he was afraid that they might identify one of the other two defendants.

Now, what was never shown was what on earth those witnesses were going to testify to to help Sullivan. Everyone was going to tell--Peruto was willing to say why he didn't want to put them on, but never explained why he would have wanted to put them on. There was no showing how they could have helped Sullivan.

And that's the point we're making. No such witness was presented at the State habeas proceeding to

say, I'm available, I'm a witness, I could have testified to the following.

You run the risk--

QUESTION: It's a puzzling case, because I remember--as I remember, Peruto did testify that one of the facts in their minds was the fact that if they did put on some other witnesses, that might prejudice the trials in the other two cases.

MR. GOLDBLATT: That's correct. But that's the problem: He says that, but when it comes to the next point, okay, who are you talking about?, that's where the record drops out. That's the end of it.

And what we're saying is, under the Third Circuit standard, you run the risk of granting someone a new trial, effectively, so that he can put on a defense that doesn't exist. Because you haven't inquired far enough to find that actual conflict, to make them put that witness up and show who it is.

That's why the record is so confusing.

QUESTION: Did the lead counsel agree with Mr. Peruto?

MR. GOLDBLATT: No, the lead counsel most certainly did not agree with Mr. Peruto. He said: "no conflict, no witnesses."

As a matter of fact, the witness they offered,

they witness they said shouldhave been called, for the defendant, was the codefendant Carchidi.

Now, one thing I think is perfectly clear, that if there had been separate counsel in this case, there is no way counsel for Carchidi, who was awaiting trial on two murder counts with a possible death penalty, was going to allow him to testify at Sullivan's trial.

That is the only tangible witness. And he testifies at the State habeas proceeding after he has been acquitted, and says, "Yes, I would have testified for Sullivan had he called me." That, I would submit, is not an available witness. And again, what he would have done to aid the defense is not even clear from the record.

Now the one point I would like to touch on, and that would go to argument two in our brief, which as I asay, is an alternative argument, is, whether or not the defendants have made out the requisite State action. Now, it's clear, coming in via the Fourteenth Amendment, there must be some State action.

And what we would submit is, under the particular facts of this case, given the fact that both lawyers were retained, absent a showing of actual conflict rather than the possibility, however, remote, that there is no State action. There is nothing the court could have done. There's nothing the Court should have been aware of to do. There

is nothing the prosecutor should have done, or should have been aware of.

And we would submit, where retained counsel is in the case, and there is no actual concrete conflict that is shown, there is no state action. And this is fairly consonant with the Fifth Circuit standard on general ineffectiveness claims, and what must be shown, where you have retained--

QUESTION: On that basis, there wouldn't be any State action if some State presented perjured testimony unknowingly.

MR. GOLDBLATT: No, because then I think you would get into a question of the State being the operating force for doing it. In other words, the State is still putting on that testimony.

QUESTION: Well, there's nothing they can do about i

MR. GOLDBLATT: All we're saying here, Mr. Justice White, is that where there's an actual conflict, then the State apparatus is automatically implicated, regardless of whether the Judge knew about it or the prosecutor. But where there is absolute--only a possibility, however remote, there's nothing in the State machinery that's implicated in creating the error.

QUESTION: Well, suppose a lawyer representing a defendant just hires out to somebody else? Suppose he

deliberately makes sure this man gets convicted--he knows o f some evidence that he should have put on, but he's paid not to put it on. The State doesn't know anything about it.

MR. GOLDBLATT: That's actual conflict.

In other words, all I'm saying here--I'm not saying that where you have retained counsel in a situation where you can come into court and prove that an actual conflict took place, that you're not entitled to relief. There I'm saying, yes, you would. Because there you implicate not only the Sixth Amendment; you also implicate--

QUESTION: Well, what's the State action in my example?

MR. GOLDBLATT: In that example where you have actually shown a conflict of interest existed, you have a denial of a fundamentally fair trial, number one.

QUESTION: Yes, but not by the--just by the fact that the State has convicted him?

MR. GOLDBLATT: Just by virtue, the State has convicted him.

QUESTION: The State has convicted him.

MR. GOLDBLATT: And that is the state of--as it is applied in the Fifth Circuit where they say, where there's actual conflict, it's automatically implicated.

QUESTION: Well, and what about a possibility of conflict?

MR. GOLDBLATT: What I'm suggesting is, where you're talking about the possibility of conflict, however remote, that is not enough. That there must be a showing of an actual conflict of interest, not merely a guess; not merely a probability.

There the defendant, in order to show the requisite State action, should at least be required to show that his conviction was tainted by an actual conflict.

QUESTION: Mr. Goldblatt, in both cases the State's action is precisely the same. They try him both times, deprive him of his liberty, and the judge knows nothing about the misconduct of counsel; neither does the prosecutor.

Yet in one case you find State action, in the other you do not.

MR. GOLDBLATT: You will, firstly, of course have the State machinery implicated in every criminal case.

QUESTION: Yes.

MR. GOLDBLATT: It will be there in any case.

QUESTION: But your test of State action turns on the seriousness or the character of the constitutional--or the alleged constitutional violation.

MR. GOLDBLATT: It's not so much the seriousness or the character of it; it's the degree of proof. Where you can in fact show that an actual conflict took place, then the implication of State action will be assumed. But where

you haven't shown it--it's almost a degree of proof.

QUESTION: It was something which took place without the knowledge of any officer of the State, without the knowledge of the prosecutor or the judge, and without any duty to inquire, if I understand your facts.

MR. GOLDBLATT: No, what I'm saying is, if in fact you've shown that it is something that took place--

QUESTION: Well, Mr. Justice White's example, that you assume Mister--one of these two lawyers was paid a large sum of money by the union to railroad the first defendant and get the two--other two off, something like that.

You'd say--why would there be State action there and not in this case? That's what I just don't quite get.

MR. GOLDBLATT: All I'm saying is if--what I'm saying, to analogize to this case, what I'm arguing is, if you come in and you prove that somebody was paid off, there is State action.

If you come in and you prove--

QUESTION: By a private party.

MR. GOLDBLATT: By a private party.

QUESTION: What's the State action?

MR. GOLDBLATT: The State action is the implication of the State machinery in the process. All I'm saying is, in one case you would prove that the State has obtained a

conviction through that payoff, be it advertently or inadvertently. In the other instance, you haven't proved that. All you have proved is a possibility that might have occurred.

QUESTION: Why get into the matter of State action? If you showed those facts, you'd show ineffective assistance of counsel. There would not have been any real representation. So State action becomes irrelevant.

MR. GOLDBLATT: It would become immaterial in that sense.

But all I'm submitting is, it's more a degree of proof problem, rather than, you know, what type of violation occurred.

MR. CHIEF JUSTICE BURGER: Very well.

Ms. Gelb?

ORAL ARGUMENT OF MARILYN J. GELB, ESQ.,

ON BEHALF OF THE RESPONDENT

MS. GELB: Mr. Chief Justice, and may it please the Court:

This case--this is a capital case. These were two murder charges that were levelled against Mr. Sullivan and two codefendants.

The position of the respondent in this case is that there were actual conflicts, and at least one instance of prejudice, and this Court need not reach other issues

raised by Mr. Goldblatt.

QUESTION: Well, that isn't what was decided below.

MS. GELB: The Third Circuit proceeded just to apply its standard--

QUESTION: Well, I know. But we would have to make findings that were not found below to find actual conflict.

MS. GELB: Sir, I would like to take a few moments at this time to review the procedural history. Because I think--

QUESTION: Well, just tell me--just tell me--

MS. GELB: And that's what I think answers the question.

QUESTION: --just tell me what basis did the Third Circuit use to set aside these convictions.

MS. GELB: Yes, sir. The Third Circuit pointed to specific instances.

QUESTION: Did it say, actual conflict, or a possibility of conflict?

MS. GELB: The Third Circuit referred to conflict.

QUESTION: Possibility, however remote.

MS. GELB: That is the standard that the Third Circuit has enunciated in the past, and that it applied to the facts of this case.

QUESTION: Well, then, it did not find--how can you say it found an actual conflict, if that's the standard it applied?

MS. GELB: In several respects. First of all, because the possibility of the conflict in several instances--and I will be glad to refer to the record to show you which those instances are--did in fact become the conflict.

It is, in fact, the conflict in the lawyer's perception of what he has to do for a client which clouded his judgment; and that is the conflict. It's not necessarily a conflict that's borne out of inconsistent defenses, although that, too, isa conflict.

QUESTION: Well, would you say that we are entitled, here, to judge the case on--by the standard of actual conflict? Is that the standard we should use?

MS. GELB: I would say that that is what the Third Circuit did in this case.

QUESTION: Well, so we should--

MS. GELB: And the Third Circuit did it--

QUESTION: --we should judge this case by that standard?

MS. GELB: No, sir, because I think that the Third Circuit's enunciated standard is a good standard. I would say that this Court need not decide whether there was a speculative conflict, or whether there was a potential

for a conflict, whether there was anything vague about what the Third Circuit did. Because the factual underpinnings of this case, which the Third Circuit noted in its opinion, would support a conclusion of an actual conflict.

QUESTION: What do you have to say about DiBona's testimony?

MS. GELB: I'd like to say, sir, of DiBona's testimony that he testified that he and Peruto were co-counsel in this case. The fiction somehow that there was a lead counsel and a backup counsel did not spring from any testimony in the record. Quite to the contrary, both attorneys viewed themselves as having the same responsibilities.

It may be that one--that during certain periods of the trial, that Mr. Peruto was not examining witnesses whereas Mr. DiBona was; but there were also periods of time when Mr. Peruto was doing the death penalty speech to the jury; when Mr. Peruto in fact rested the case for the defendant, Sullivan, without putting on any evidence, and said, "My client trusts the case to me, and I rest the case."

Peruto, in fact, voir dired the jury; this was a death penalty voir dire, and Peruto conducted that voir dire. The Third Circuit found, as a matter of fact, that there were so many indicia of actual representation by Peruto that in fact it supported the conclusion that was reached by DiBona in his testimony that the two were in fact

co-counsel in this case.

QUESTION: If one was to believe--

MS. GELB: Could I--

QUESTION: If one was to believe Judge DiBona's testimony--Mr. DiBona at that time--

MS. GELB: Yes, sir.

QUESTION: --what's the basis for the Third Circuit's conclusions?

MS. GELB: The basis is that Mr. Peruto, who also represented Mr. Sullivan, was co-counsel with Mr. DiBona; that the two of them had ongoing responsibilities to the other two.

QUESTION: Mr. Peruto testified that wherever his testimony was different from that of DiBona, he would defer to Mr. DiBona because he was lead counsel.

MS. GELB: Well, sir, Mr. Peruto was being deferential to Mr. DiBona because Mr. DiBona was at that time, the time of post-conviction proceedings, Judge DiBona, and Mr. Peruto had to appear before him many times.

However, that is not all that Mr. Peruto said in this record. If I may quote the other instances, I can--

QUESTION: Judge DiBona's testimony was that he urged Sullivan to take the stand.

MS. GELB: Yes, sir, that was his testimony.

QUESTION: Well, Ms. Gelb, we do have a cold

record here, as the Third Circuit also did. And if you'll look at 9B of the Appendix to the petition for a writ of certiorari, which has a portion of the Third Circuit's opinion, they refer the Supreme Court of Pennsylvania's findings--it's the blue--they refer to the Supreme Court of Pennsylvania's language,"we therefore hold that there is absolutely no evidence that a conflict existed." That's the Supreme Court of Pennsylvania.

Then the Third Circuit goes on to say, "Respondents urge that this conclusion is a finding of fact by a State after a full hearing which is entitled to a presumption of correctness and should be accepted by this court. Petitioner argues that we should reject it... The magistrate accepted petitioner's position, while the district judge accepted respondents'. We believe both were mistaken in their approach to this problem."

Now, what do you take the Third Circuit to mean by saying that?

MS. GELB: I take the Third Circuit to have examined the precise procedural history of this case, and to have concluded that the factual underpinnings supported this conclusion of law that there was, number one, dual representation, and number two, a conflict of interest, or at least a possibility for a conflict of interest.

And if I might take a moment at this time, sir,

to discuss the procedural history, because I fear that there be some cloud on that history, as it was rather tortuous when it proceeded through the courts.

It appeared that after Sullivan was convicted, an appeal--well, post-verdict motions were filed by both attorneys. Thereafter the case rather sat for almost a year, during which time--six months after the conviction of Sullivan--Carchidi was tried and was acquitted, and DiPasquale was tried and was acquitted.

Thereafter, post-verdict motions were argued for Sullivan by both counsel, and were denied 2-1--there was a court involving three judges--2-1, there was a denial.

Then, Mr. DiBona and Mr. Peruto appealed to the Supreme Court of Pennsylvania. And that's where the case sat for some--well over three years. Because the appeals were filed, if my recollection serves me correctly, in August of 1968. And the Supreme Court of Pennsylvania never decided this case until December 29th of 1971.

It is entirely possible, and likely, I say, from the factual context, that the Supreme Court of Pennsylvania did not decide the case for that very lengthy period of time because there was no argument by either counsel, Mr. DiBona having become a judge at this time. Mr. Peruto did not argue these capital cases before the Supreme Court of Pennsylvania. Continuances, numerous ones, were requested

during this lengthy period of time. And, as a matter of fact, there was a very strong controversy as to whether any brief was ever filed on behalf of Sullivan.

The duties and obligations which were owed to Sullivan were simply dropped. They were simply abandoned. And he was abandoned in the Supreme Court of Pennsylvania, as he was to later argue, on post-conviction proceedings.

Now, that is the reason post-conviction proceedings were initiated some years later. It was not because he sat on any rights he thought he had. And it was not because he wanted merely to express some sort of lament later on that he wasn't acquitted, as were the two codefendants.

It was because that was filed most timely, the post-conviction proceedings followed by a short period of time the decision of the Supreme Court of Pennsylvania, and petition for reargument that was filed in the Supreme Court following the decision of the Supreme Court.

QUESTION: The conviction was affirmed by the Supreme Court of Pennsylvania on December 29, 1971.

MS. GELB: 1971, sir, that's right.

QUESTION: And that appeal was never argued; is that correct?

MS. GELB: That's correct, sir.

QUESTION: And there's some question about whether or not a brief was ever filed?

MS. GELB: There is a very strong question. And that was one of the issues raised in post-conviction proceedings.

QUESTION: There's no issue here, I know.

MS. GELB: That's right; it is not.

QUESTION: But in any event, that appeal was never argued. And the affirmance was by an equally divided court, was it?

MS. GELB: That's correct, sir, 3-3, the Supreme Court of Pennsylvania, on December 29, 1971.

QUESTION: Does that mean there was no opinion?

MS. GELB: There was an opinion, but the opinion had nothing whatever to do with conflict of interest. It had nothing whatever to do with dual representation, because those issues were never raised.

QUESTION: They were--

MS. GELB: They were--the--

QUESTION: We don't know if there was a brief. But in any event, if there was a brief, they were never raised.

MS. GELB: That's correct.

QUESTION: And if there was no brief, they certainly were never raised.

MS. GELB: The same counsel filed the appeal, you see. And so--

QUESTION: And when did the case get back to that court, then?

MS. GELB: The case got back to that Court, interestingly enough, Mr. Chief Justice, following post-conviction proceedings, where we argued in those proceedings the denial of a right to appeal. And so the lower court
589 the Court of Common Pleas in Philadelphia, held as a matter of fact there was in effective assistance of counsel in the appellate process--

QUESTION: On appeal.

MS. GELB: The appellate rights, that's right. And ordered a direct appeal, once again.

QUESTION: Did they raise the conflicts, then?

MS. GELB: At that time, yes, I did raise the conflict question.

QUESTION: In the this post-conviction, the one you're just talking about.

MS. GELB: Yes, sir. There--the issue of conflict was then raised for the first time.

QUESTION: Is that the first time the State of Pennsylvania was made aware of this problem?

MS. GELB: The problem of conflict?

QUESTION: Yes, sir.

MS. GELB: Our position is that it is not the first time. Because our position is that there is some

evidence on the record of the trial that should have alerted the trial judge to a conflict of interest.

QUESTION: Well, when was it asserted?

MS. GELB: However, it was actually asserted by counsel--by counsel other than DiBona and Peruto--in post-conviction proceedings. And that was the first time that the time was opportune to make that assertion, because, on appeal, whatever that first appeal was or wasn't, same counsel allegedly represented Mr. Sullivan.

QUESTION: But am I not correct that the second time before the Court was also a direct appeal by leave of court, as well as on habeas?

MS. GELB: The second time, sir--yes, Your Honor. The second time there was an appeal pursuant to the order of the post-conviction court to take a direct appeal.

QUESTION: Yes, so that--

MS. GELB: And at that time, under Pennsylvania law, the other issues then were undecided.

QUESTION: So that at least this question was raised on direct appeal on the merits.

MS. GELB: The question of a conflict was raised before the Supreme Court of Pennsylvania on direct appeal on the merits; it was, sir.

QUESTION: What year was that, '72, by the time it got back there the second time? Or '73?

MS. GELB: '75, sir.

QUESTION: '75?

MS. GELB: That's right. It took--

QUESTION: The first time the State of Pennsylvania knew about the conflict claim, it was in 1975, eight years after the conviction.

MS. GELB: That was the first time the Supreme Court of Pennsylvania knew about it, yes. The post-conviction court knew about it in 1973 when the petition was filed, and amended petitions were filed.

QUESTION: And then what happened--

MS. GELB: And that was the first time the issue was raised.

QUESTION: When it was back on the second direct appeal, what was the result?

MS. GELB: The result there was a 5-2 decision, first of all the Supreme Court of Pennsylvania held that it was proper to proceed in this matter, and that the lower court was correct in permitting an appeal to be taken on the ineffective assistance in the appellate process issue; and then proceeded to decide adversely to Sullivan on the merits of the case. Adversely as to the conflict issue as well, except that there is in my opinion quite a decision to be made here, because the Supreme Court of Pennsylvania then decided, "We will not really reach the conflicts issue,

because we're going to decide"--excuse me--"that there was no dual representation."

And the ground for the decision that the Supreme Court asserted for not finding dual representation was then, for the first time, this what I consider to be a fiction, that there was primary and secondary counsel.

There really is no such status in the Commonwealth of Pennsylvania.

QUESTION: Well, didn't Mr. Peruto say that himself?

MS. GELB: He did not say that himself.

QUESTION: Because he had deferred to Mr. DiBona.

MS. GELB: Yes, he was deferring to Judge DiBona's recollection, because DiBona--Judge DiBona had testified earlier in the post-conviction proceedings.

QUESTION: And he said he deferred because DiBona was lead counsel, did he not?

MS. GELB: Yes, sir; he did say that. That's correct.

QUESTION: So that as between the two counsel, they thought that there was a lead counsel and a co-counsel.

MS. GELB: Interestingly enough, in the perception of counsel, Judge DiBona also said that he was lead counsel in the Carchidi case at that time. So that I think there really are problems, factually, and I'm--

QUESTION: Mr. Peruto thought he was lead counsel in that case, didn't he?

MS. GELB: He was lead counsel in that case, sir, as he tried the case. But at the time of the Sullivan case, there is some evidence that Mr. DiBona referred to himself as counsel for my other client, Carchidi, and considered himself lead counsel for Carchidi.

Now, they may have changed back and forth; I don't really know, the record is not clear on that.

On the issue, incidentally, of the Carchidi trial, I would most certainly take issue with Mr. Goldblatt, because I--although it is true that the post-conviction judge in the court of common pleas agreed to incorporate the Carchidi record in the Sullivan record, I don't know whether that was actually done. Because I do not have that record. And I have been told by the District Attorney's office, that the District Attorney's office does not have it. The original record is certainly not in the original court file in Philadelphia.

And so I would make the assumption, therefore, that it is not before this Court. And I do not, therefore, know in fact what happened in the Carchidi trial. But I--

QUESTION: Ms. Gelb, let me ask you a question about your kind of ultimate theory here.

MS. GELB: Yes, sir.

QUESTION: The possibility of a conflict.

You say there was an actual conflict, I'm sure.

MS. GELB: Yes, sir.

QUESTION: Secondarily, you argue, the possibility of a conflict is enough, don't you?

MS. GELB: Yes, sir.

QUESTION: As the Third Circuit holds.

If you take that position, is it your view that if the trial judge was on notice of the fact that Peruto and DiBona had these other clients with other trials pending, that it was his duty just to say to them--call the--what was he supposed to do, call the defendant up and say, you have a right to have a separate lawyer? And then I assume if the defendant said, well, I'm satisfied with these two lawyers, would that have been the end of the matter?

MS. GELB: I don't think it would have been the end of the matter, where you'd have an actual conflict, no, sir.

Because the same attorney--

QUESTION: But you'd then have to prove actual conflict if he did that.

MS. GELB: That's right. And I would suggest to this Court that the trial judge knew that there was, at the very least, a possibility of a conflict. The trial judge first of all was assigned all three cases. And

therefore became aware of the fact--

QUESTION: What is your view of the conflict? The conflict is that there are some witnesses he might have put on if--you disagree with your opponent--

MS. GELB: I do.

QUESTION: --that we don't know who those witnesses are or anything like that?

MS. GELB: I do disagree, and I will make an effort to go into the factual background, because I do think it's important in this case.

You see, DiBona, who tried this case to the jury, opened to the jury, and told the jury that there were very important witnesses, three of whom were outside the window of the building where these crimes were committed, and if in fact the crimes were committee at the time that the Commonwealth was arguing they were committed, then these three witnesses who were waiting for--to come into the union hall for a meeting would most certainly have heard the shots ring out as well, and they would be very important to show that the crime actually was committed at the time that the Commonwealth wanted the court to believe that it was committed.

Now, there's no question that the crimes were committed. There's no question about the heinous character of the crimes. As a matter of fact, that kind of factual

background has been used by the Commonwealth of Pennsylvania over and over again.

The importance, however, is as to what evidence there was which implicated Sullivan in the commission of these crimes. And that was the issue that split the Supreme Court of Pennsylvania 3-3 the first time on the sufficiency that before that split the lower court involved, 2-1.

The issue of Mr. Sullivan's complicity, if at all, was a very, very important issue. And in light of the fact that this was a capital case, it would seem to me that counsel, whose loyalties were not divided, would have done everything that he or she could have done to bring about a proper verdict.

Now, that would have included using independent judgment as to whether to call to testify three witnesses outside the window at the time the crimes were committed.

Now, there was independent--

QUESTION: Weren't some of the three witnesses called by the prosecution?

MS. GELB: What is it?

QUESTION: Weren't some of those three witnesses you're referring to called by the prosecution?

MS. GELB: No, sir. That's exactly the point. They were under subpoena to the prosecution, and they were

ready and available to testify. In fact, another witness not in that same category, outside the window, was also under subpoena to the prosecution. Those four witnesses were outside the courtroom under Commonwealth subpoena, ready to be called.

As a matter of fact, DiBona said that in his opening argument; he said that in a side bar conference with the Judge; he said that in his closing argument. He argued--after he put on no testimony at all--he argued in closing, I don't know the Commonwealth didn't call these witnesses who were outside the window at the time that these crimes were committed. And in so doing, he really invited the prosecutor to comment on the fact that the defense hadn't called those very witnesses.

Judge DiBona said those witnesses were vital at that time. Yet he didn't call them. And that is the same Judge--

QUESTION: Well, there's an explanation for that. The last thing I suppose this Court should do would be to get into all these details. But there was an explanation, and that is, they fear that one or more of those witnesses would say that he saw one or more of those people running out of the room, running out of the building.

MS. GELB: But it's not true. That's what Mr. Peruto said years later. He was then asked at

post-conviction hearing--

QUESTION: Well, then, all of this took place years later.

MS. GELB: Well, not the part about the witnesses outside the window at trial. That took place at trial, sir.

QUESTION: But the explanation took place years later, and so did all this business about the conflict took place years later, too.

MS. GELB: That's right. Because that was the first time--

QUESTION: Right; exactly.

MS. GELB: --this respondent could raise it. And when he did--

QUESTION: My brother Stevens point about--I guess you'd call it the state action point, or whatever it is?

MS. GELB: Yes, sir.

QUESTION: How does the state get in this? Make you take a lawyer? Pick a lawyer for you, and force the lawyer upon you?

MS. GELB: Well, if what you're saying, sir, is that you don't see the difference between retained or appointed counsel, I would agree that there should be no distinctions made between retained and appointment counsel. And I think--

QUESTION: My question is: Where do you get the

right for the State to be required to give you separate lawyers when there is a conflict of interest?

MS. GELB: Because I think that's a necessary corollary of Sixth Amendment effectiveness.

QUESTION: Well, what about the right to pick your own lawyer? Don't you have a right to pick your own lawyer, if he's a jackass?

MS. GELB: Yes, sir, you do have a right to pick your own lawyer, even if he is a jackass. I think that's right.

QUESTION: Aren't you saying that you don't have that right?

MS. GELB: No, sir.

QUESTION: That the state must come in and give you another lawyer?

MS. GELB: No, sir, I'm not saying--

QUESTION: Well, what are you--that's what I'm trying to get at: What are you saying?

MS. GELB: Yes.

I'm saying that in a case where there's a conflict, the harm can be so egregious, because conflict infects the whole trial, because conflict will upset fair trial or will upset fact-finding; because that's such an egregious wrong to the defendant and to the whole system--

QUESTION: How do you know that where you got one

man on trial?

MS. GELB: Because, in this case, this respondent wanted to take the witness stand, wanted witnesses called for him--

QUESTION: Well, when do you say the state should have moved in and appointed counsel for him?

MS. GELB: This respondent didn't know that it was disadvantaged. So I can't--

QUESTION: Well, how did the court know?

MS. GELB: Because--

QUESTION: If nobody--well, who did know?

MS. GELB: Because the trial judge in this case--

QUESTION: Yes.

MS. GELB: --at least at one juncture in this case said to the lawyers that he was tired of trying to get discovery for the other clients. He became aware of the fact that the lawyers were making efforts to get discovery for the other clients, Carchidi and DiPasquale, and that's in the record.

QUESTION: What should the judge have done at that stage?

MS. GELB: What is it?

QUESTION: What should the trial judge have done?

MS. GELB: At least inquire of the defendant whether he understood that he had a right to conflict-free

counsel, where initially, there were three defendants--

QUESTION: Appointed by the court?

MS. GELB: Not necessarily appointed by the court. The inquiry should be directed to whether he knew and understood that he had a right to be represented by an attorney with undivided loyalty.

QUESTION: Well, what about the attorney-client privilege?

MS. GELB: Sir, I think that the extent of the inquiry that could be conducted between a judge and a defendant before him is, in fact, limited by attorney-client privilege. There was never any effort, however, to find out anything about this defendant's understanding of his right to separate counsel. Never any effort whatever.

I agree, if Your Honor is suggesting that in fact the trial judge could not have inquired, "Mr. Sullivan, exactly what are your defenses? Would you please tell me what they are so I can decide whether your lawyers are incompetent."

I think that those limits--

QUESTION: I think that Mr. Sullivan would say, "Judge, I don't have to answer that question, because it's none of your business."

MS. GELB: I think you're right, sir. I agree with you.

QUESTION: "I have a point--I have hired a counsel. I have paid him with my eye teeth." And that's it.

MS. GELB: Yes, sir.

QUESTION: Isn't that our American system?

MS. GELB: Well, yes, sir, I think it is our American system. But it's also our American system--

QUESTION: Well, what is the system--what is the system where you can't have your own lawyer?

MS. GELB: Well, this isn't a question of whether Sullivan could or couldn't have his own lawyer. This is a question of what happens where he agrees to allow the codefendants lawyers to represent him.

QUESTION: They didn't threaten him?

MS. GELB: No; he agreed. I said that.

QUESTION: He agreed.

MS. GELB: It was voluntary. I'm not suggesting it wasn't.

QUESTION: It could be that you don't look a gift horse in the mouth?

MS. GELB: It could be, yes. It could also be that--

QUESTION: But the judge didn't know that, did he?

MS. GELB: Didn't know that--

QUESTION: The judge assumed that that was retained counsel?

MS. GELB: I think that's correct, sir; I don't know from the record, but I think that's correct.

At any event the--the trial that resulted from what we consider to be conflict resulted because of the fact that Mr. Peruto guarded evidence, held it close to the vest, did not disclose it in the trial of Sullivan, and he did so out of fear that in so guarding, he may be tipping his hand in the case of the two codefendants who were not yet tried.

And I think that that creates a situation more egregious, more difficult to handle, than a situation where all three were tried at one and the same time.

QUESTION: When did Mr. Peruto first tell about those things?

MS. GELB: When he was subpoenaed to testify in post-conviction proceedings. He there testified under oath, sir--

QUESTION: How many years after the trial? Number of years.

MS. GELB: Seven years.

QUESTION: Seven years.

MS. GELB: That's right. And he testified under oath, and the Circuit--the Third Circuit ruled that there

was no reason to disbelieve Mr. Peruto's admission of professional impropriety; that that was a very difficult thing that he did at that time; and he did so testify.

QUESTION: Did the Third Circuit do anything about it?

MS. GELB: No, sir. Nor as a matter of fact has the bar done anything about it. But I think that's one of the problems that the courts should be sensitive to, and that is, the possibility that conflict may occur, which are hidden, and which do not surface until years later.

I think there's a likelihood that that will happen where in fact you have a separate trial of a defendant who is represented by a lawyer, who has yet two other clients yet to try, and as to whom he guards and holds back evidence.

If there are no further questions, thank you, sir.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Goldblatt?

MR. GOLDBLATT: Yes, sir

REBUTTAL ARGUMENT OF STEVEN H. GOLDBLATT, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. GOLDBLATT: One, I would point out that the reference to who was presented as witnesses at the Carchidi trial was not taken from the Carchidi record, which is not before the court. It was taken from the record that is before the Court at pages 183 to 184A of the Appendix. That's

Judge DiBona's testimony, who was present at both trials.

Secondly, I would like to touch on two things: One, the inquiry requirement. I would point out that for purposes of the Federal rules, that Rule 44(c), which will set up a Federal inquiry requirement, is now pending with Congress, having been promulgated in 1979 as a matter of supervisory power.

And I would submit to the Court that there is no basis for concluding in 1967, where there is nothing on the record to indicate that the judge should have sensed the conflict problem, especially given separate trials, that there is nothing to find in the constitution to require that the judge should have done it then, or even now.

We have as an addendum to our brief listed the various Circuits and their approaches to this problem, and we would suggest that there is no constitutional predicate at this time for the inquiry.

I would also like to stress that three members of this Court--

QUESTION: But do you think the Third Circuit thought it was propounding a constitutional standard? It did, didn't it?

MR. GOLDBLATT: For evaluating the conflict question.

QUESTION: Mere possibility.

MR. GOLDBLATT: A possibility of conflict, however remote, is their--

QUESTION: When did it first adopt that rule?

MR. GOLDBLATT: Nineteen--Hart v. Davenport, was the first case, and I believe it was 1972. And they subsequently held that they didn't need an inquiry--they weren't going to--they didn't need an inquiry requirement after that ruling. They were right. The inquiry is almost irrelevant except to set up a waiver in the Third Circuit under that standard.

QUESTION: Well, when was the second appeal in the Pennsylvania court?

MR. GOLDBLATT: 1977 it was decided.

QUESTION: The Hart case involved--at least according to Judge Garth as I understood his dissenting opinion--the Hart case involved joint representation.

MR. GOLDBLATT: Joint representation. And one of the things Judge Garth said was, there is no reason to apply that standard willingly in separate trial cases.

QUESTION: Right.

QUESTION: Well, was he--

QUESTION: He was in dissent.

QUESTION: He was in dissent. But in any event, I take it then that the standard the Pennsylvania Supreme Court used in the second appeal was different than was

currently being applied by the Third Circuit?

MR. GOLDBLATT: That is correct. The Pennsylvania Supreme Court has never adopted the standard--

QUESTION: And was that--and about the same Federal constitutional issue. So there was a conflict between the two.

MR. GOLDBLATT: That's right.

QUESTION: And was the Third Circuit standard urged upon the Pennsylvania Supreme Court?

MR. GOLDBLATT: No, it was not. By the defense, no it was not. There was no suggestion of the Third Circuit standard at that time, to the best of my knowledge.

QUESTION: So they used the actual conflict standard?

MR. GOLDBLATT: What they did was--it's very tricky language--I'm not--

QUESTION: But they did decide there was no conflict?

MR. GOLDBLATT: Yes, that is correct. What they said was, there was no dual representation in the true sense of the term, is their exact language; and that under those circumstances, they found that no conflict existed on the record before them.

Those are, almost verbatim, their words. And I don't want to, you know, paraphrase them, because it's

very critical.

The Third Circuit found that there was dual representation, and went from there applying their own standards.

But I think you can argue from the Pennsylvania Supreme Court's decision that they looked at the record based on Judge DiBona's testimony: no actual conflict. And that's the standard they implied.

QUESTION: Well, they might have found something else; but they certainly found that.

MR. GOLDBLATT: That is correct.

The one final thing I'd like to mention, three members of this Court in Holloway, in an opinion written by Mr. Justice Powell, suggested that in a case where there is a request for separate counsel that is denied by the court without inquiry, then in that circumstance, it should not be as the majority of course found fatal to the case, but they should be--the prosecution should be allowed tohave a hearing, at which the ultimate issue would still be whether or not the conflict prevented the defendant from presenting some potentially successful defense.

QUESTION: Well, in Holloway, the defense counsel protested to the court.

MR. GOLDBLATT: That's what I'm saying. Here, where there is no protest, under the standard suggested

by the dissent, we still win.

We're asking for no more than that. We're asking for nothing more than they come into court and prove that they were harmed by something. They have not done it, and we would respectfully request that they not be entitled to relief.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, counsel.

The Case is submitted.

(Whereupon, at 3:15 o'clock, p.m., the case in the above-entitled matter was submitted.)