ORIGINAL

In the

Supreme Court of the United States

F. W. STANDEFER,

PETITIONER

V.

UNITED STATES,

RESPONDENT

No. 79-383

Washington, D. C.
April 14, 1980

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F. W. STANDEFER,

Petitioner

v. No. 79-383

UNITED STATES,

Respondent

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Monday, April 14, 1980

The above-entitled matter came on for oral argument at 10:59 o'clock a.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:

HAROLD GONDELMAN, ESQ., Gondelman, Baxter, Mansmann & McVerry, 6th Floor, Porter Building, Pittsburgh, Pennsylvania 15219; on behalf of the Petitioner

WILLIAM H. ALSUP, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530

C O N T E N TS

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Standefer against the United States.

Mr. Gondelman, you may proceed whenever you are ready.

ORAL ARGUMENT OF HAROLD GONDELMAN, ESQ.,

ON BEHALF OF THE PETITIONER

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

The opinion in U.S. v. Standefer appealed from is now reported at 610 F.2d 1076. It had not been when we prepared our briefs.

QUESTION: What was the page, 76?

MR. GONDELMAN: 1076. 610 F.2d 1076.

In this case Mr. Standefer was indicted on a 9-count indictment, the odd counts of which charged him with violation of 26 U.S.C. 7214(a)(2), the event counts of which charged 18 U.S.C. 201(f).

Having read the 72-page opinion, majority and minority opinions of the court en banc and the three-judge panel, the Circuit Court withdrew their original opinion when they did order a hearing before the court en banc. But in reviewing that and in reviewing the briefs in this case, it sort of reminds me a little bit of the Alice-in-Wonderland story when Alice says to the big rabbit, "Where do I start?" And the

rabbit said, "You start at the beginning, you proceed to the end and then stop."

Now, in this case as a defense lawyer and trial counsel in the court below, when I received the indictment and the privilege of representing Mr. Standefer I didn't start with the legislative history in 1908,which was five years before the 16th Amendment, which allowed income tax laws to be passed to create a bureaucracy that they now want to apply the legislative history of 1908 to.

QUESTION: Well, Mr. Gondelman, after having read your 113-page brief on petition for writ of certiorari, I notice that nowhere do you cite Dunn v. The United States, which is Justice Holmes' old opinion saying that inconsistent verdicts in juries are perfectly permissible under the Constitution and the Federal law.

Do you think you can win this case without overruling the Dunn case?

MR. GONDELMAN: I think so, Your Honor, and I will address myself directly to that, because in order to start in this case you must start by leading the indictment against Mr. Standefer and, unfortunately, no court has yet got to the indictment that I thought I was trying.

Let me show Your Honor why I think and did not discuss Justice Holmes' case, because it has nothing to do with this case, if I may say so.

The indictment in this case says that Mr. Standefer did on or about -- and I won't go through all the odd counts, but each start with a date -- did aid and abet Cyril J. Niederberger, an officer and employee of the United States, acting in connection with Revenue laws of the United States, namely a supervisory Internal Revenue agent -- skipping dates -- in unlawfully and knowingly receiving a fee, compensation and reward as set forth below which was not prescribed by law for the performance of his duties as an Internal Revenue Service agent.

Now, when I read that indictment I then to make certain that all courts would be able to correlate very clearly what I am talking about, in my motion to dismiss I attached the Count 1 indictment against Standefer with the Count 2 indictment against Niederberger so that we could see exactly what the same party -- that is the United States of America -- under its grand jury charged Mr. Niederberger with as well as Mr. Standefer with.

And at pages 28-A on, you will see that the grand jury indictment against Mr. Niederberger says that from on or about the same dates that Standefer is charged with having given the fee, compensation and reward to an officer employee Niederberger -- and no one else, Niederberger -- that Mr. Niederberger did receive the golf trip in the exact amount on the exact date to the same place at the same time.

QUESTION: Well, what if Mr. Niederberger had dropped dead even before he was indicted; do you think that would preclude indictment and conviction of Standefer?

MR. GONDELMAN: Mr. Chief Justice, we are long past the need to try the principal or convict the principal. But when the Government of the United States chooses to indict the principal, and they are supposed to know the law, and in order to have some kind of semblance of uniformity across this country of ours, because each U.S. Attorney may act differently and does, if Niederberger was not tried there would not be a mutual collateral estoppel, there would not be a finding by a jury that he did not in fact commit the crime, and that is what happened here.

QUESTION: They indicted the principal and tried him and he was innocent.

MR. GONDELMAN: And he was found not guilty on three counts.

QUESTION: Dunn says he can be found not guilty and your client can be found guilty.

MR. GONDELMAN: But, Justice Rehnquist, in every case that is decided and every circuit that is reported, and interestingly enough you ask why I didn't comment on U.S. v. Dunn, why didn't the Government talk about one case cited on page 9 of my brief where if you try the principal and the aider and abettor --

QUESTION: This isn't the Court of Appeals, this is the Supreme Court of the United States.

MR. GONDELMAN: I understand that. In this case, Your Honor, in every case that has been passed upon --

QUESTION: Are these United States Supreme Court cases you are referring to?

MR. GONDELMAN: There are cases in the Supreme Court of the United States where if you try two conspirators and only two conspirators and one is found not guilty, there can be no conspiracy. So you really have to get to the nub of whether or not I can also win this case because I think the charge is incorrect, and that is raised on this appeal, and that the judge below in his charge said you don't have to find an agreement.

Now, that is why I would like to get back to the indictment. What does the indictment say? Standifer cannot be indicted, as we all know, under 7214(a)(2). It only applies to an employee of the Government of the United States. He can only be indicted as an aider and abettor. Now, if we want to look at definitions we have to look at Black's law dictionary which says that aiding and abetting, as cited on page 15 of my brief, implies knowledge. It comprehends all assistance rendered by words, acts and so forth. It is not sufficient that there is a mere negative acquiescence not in any way made known to the principal malefactor.

QUESTION: In the eight years I have been sitting here Black's law dictionary has never been thought of as a substitute for the U.S. Reports.

MR. GONDELMAN: Well, it may not. But you see, aiding and abetting I think connotes a certain action on the part of an aider and abettor. You cannot aid d abet nobody, as Judge Aldisert said in his dissent in the Court of Appeals. And when you do have one who is charged that he did aid and abet Niederberger and Niederberger must have received a fee compensation or award by reason of official acts to be performed, performed or to be performed --

QUESTION: Well, it was found in this case that he did.

MR. GONDELMAN: No, sir. In this case it was found that he didn't. It was found that Niederberger did not receive a fee compensation reward in Counts 1, 3 and 5. He was found not guilty.

But even as to the counts in which he was found guilty --

QUESTION: He found that he aided and abetted somebody doing an unlawful act.

MR. GONDELMAN: Now, when the aider and abettor goes to trial, Justice White, I suggest to you that contrary to the judge's charge to the jury in which he said you do not have to find an agreement between Standefer and Niederberger, it

is sufficient if he received as the large case auditor of Gulf Oil --

QUESTION: The jury had to find that the principal committed an illegal act, --

MR. GONDELMAN: And I suggest --

QUESTION: -- didn't it? In this case it had to find that the principal committed an illegal act?

MR. GONDELMAN: Yes, sir.

QUESTION: And it did.

MR. GONDELMAN: It found as to all counts, yes.

QUESTION: It found that he committed an illegal act and that in certain respects your client aided and abetted. And it is true that in another case the principal was found innocent but in this case the principal was found guilty.

MR. GONDELMAN: The principal was found guilty at a retrial by the same Government.

QUESTION: That is correct.

MR. GONDELMAN: But then I get to the next point, Mr. Justice White, and that is that under the instructions this jury was a very intelligent jury. After three hours of deliberation they sent a note to the Court saying is intent important in any of the nine counts of this indictment. I suggested to the Court that the answer to that was a very simple "yes." The Court then called the jury back and not only said "yes" but then proceeded to tell the jury that they

did not have to find an agreement between the principal and the aider and abettor and in fact all they had to do was find that a gratuity was paid for a speedy audit of which there was everything but evidence of that. These cases show that the IRS was auditing 1960 cases in 1971. But he said if you find that it was by reason of a speedy audit or a favorable result, which brings me to the third point of my argument.

If you find that it is a favorable result, and I cited Bollenbach to show that the last ditch instructions of a judge to a jury is the one that carries out a dictum back in about an hour after those instructions, which left them nothing to decide, took complete defense away from the jury, they came back within an hour of a verdict of guilty.

Because I wanted to show and in fact did show that Gulf Oil over the period of these audits have paid $150 million in additional taxes. I showed and could show that in each case what the IRS did here and the Government did here, they did not find a specific act for which these golf trips were taken. They found that an audit had been turned in by the audit team of which Niederberger was a part, then they went back from there to see if they could relate a golf trip to the audit. And if they took place 2 or 3 months after the audit had been filed, the judge then told the jury that this could be fee compensation or reward.

QUESTION: This obviously is a different argument

than whether or not you can convict one as an aider and abettor if the principal has been acquitted.

MR. GONDELMAN: That is right, sir.

QUESTION: How about the -- are you through arguing that?

MR. GONDELMAN: No. I think the fact that a jury has passed upon the innocence of Niederberger precludes when a judge should be able to take judicial knowledge of that into the rules of evidence.

QUESTION: The Government should not have more than one chance to prove the principal guilty if he has been found innocent, that is the end of it?

MR. GONDELMAN: I would hope --

QUESTION: Aider and abettor too?

MR. GONDELMAN: Yes. I am urging this Court to say to the United States of America and its U.S. Attorneys you are no different than any other litigant.

QUESTION: But you don't cite Dunn, which is to the contrary and you don't urge that in your brief?

MR. GONDELMAN: I urge in my brief, Your Honor, that non-mutual collateral estoppel, Ashe v. Swenson, should be applied to this situation where the Government -- and this is where I suggest respectfully to this Court you can say it to the U.S. Attorneys across the land, do not indict a principal and then if he is acquitted come back and unfairly then try on

the same facts. It is a narrow issue in this case. It is not --

QUESTION: Your argument of course would be far broader than aiders and abettors. Suppose the statute said it shall be illegal to give or receive a gratuity for performing a governmental act. And so you indict under that statute a Government servant and he is acquitted. And then you indict the person that was accused of giving him a gratuity and not as an aider and abettor but as a principal. And then you would say that is barred.

MR. GONDELMAN: I would say, sir, that if the identical facts were presented to a jury in this country and a jury has found against the Government of the United States, the Government of the United States is barred just like any other litigant.

QUESTION: Your argument is even weaker than Dunn, it seems to me, because Dunn was the same trial. Here you are talking about two separate trials.

MR. GONDELMAN: But I am also talking, Justice Rehnquist, about a narrow issue that does not -- was not present in Dunn and is not present in all the hypothetical cases that we can conjure up to show why it doesn't apply. For example, if the principal is --

QUESTION: A narrow issue in your case that was not present in Dunn.

MR. GONDELMAN: There can only be one recipient and guilty principal in Standefer, and that is Mr. Niederberger. And it is not a case where you have a suppression of evidence, you don't have entrapment, you don't have a principal who wasn't tried, you don't have all the things that has to be found in order to avoid the fact that in this case the only main principal, the only main principal who could commit the principal offense, was acquitted.

QUESTION: I take it you are just making a statutory construction. You wouldn't say -- would you say that Congress could not under the Constitution expressly provide for convicting the aider and abettor after the principal is acquitted?

MR. GONDELMAN: If Congress ever passes the new penal code, it will have to reach the constitutional argument. But it also --

QUESTION: Well, what is your position? Are you making a statutory construction?

MR. GONDELMAN: Right now I am making a statutory construction argument because the model penal code and the one now pending before Congress would indicate that it its legislative intent when it passed the 1951 and 1909 aiding and abetting statutes was that an acquitted principal would bar the trial of the aider and abettor, because --

QUESTION: These were in effect when your client was tried.

MR. GONDELMAN: Which, sir?

QUESTION: The two that you are referring to, the model penal code and the revised --

MR. GONDELMAN: Congress has not yet passed what it is considering.

But the fact that you now have legislation pending before Congress indicating that they want to pass a law saying that the acquittal of the principal will not bar the trial of the aider and abettor, in my understanding of statutory construction, would indicate that when Mr. Standefer went to trial and until today the acquittal of the principal is in fact a bar because they are changing the law.

QUESTION: Well, they haven't changed the law.

MR. GONDELMAN: Therefore, having indicated they would like to do it, sir, I think it indicates congressional intent was to the contrary in 1951 when they passed the aider and abettor amendment.

QUESTION: Except that there are two different Congresses.

MR. GONDELMAN: Pardon me, sir?

QUESTION: I said that there are two different Congresses.

MR. GONDELMAN: Well, that is the trouble to looking to legislative intent and I think, Your Honor, in U.S. versus --

QUESTION: Well, you can say that the original jury

all it did was acquit the man. It didn't say the crime wasn't committed, did it? Did it say the crime wasn't committed?

MR. GONDELMAN: I think in this country it has to be that, sir. And I --

QUESTION: All it said was acquitted.

MR. GONDELMAN: As I understand --

QUESTION: They didn't say this man is not guilty, they just thought that he wasn't properly identified.

MR. GONDELMAN: And also --

QUESTION: Or he could have been in China when it was committed.

MR. GONDELMAN: Of course then he couldn't have been aided and abetted, you see.

But the fact is that in this case they did find that he was not guilty and I understood that when Mr. Niederberger went to trial --

QUESTION: Under what constitutional rule can you say this young man cannot be tried?

MR. GONDELMAN: Well, the constitutional rule that I would apply is the application of nonmutual collateral estoppel that was discussed in Ashe v. Swenson.

QUESTION: Where is that in the Constitution?

MR. GONDELMAN: Well, I think Justice Stewart went through nonmutual collateral estoppel as a principle established by this Court, applicable to criminal cases as well as civil

cases.

QUESTION: Of course Ashe v. Swenson involved the double jeopardy clause, a guarantee against being twice put in jeopardy. There is no -- you can't -- there is no double jeopardy --

MR. GONDELMAN: There is no double jeopardy in this case. This is why I call it nonmutual collateral estoppel, which is what we are talking about, you see.

QUESTION: Does not your argument mean the inconsistent verdict and the idea of a compromise verdict would be washed out. Isn't it possible that this first jury for Niederberger simply reached a compromise verdict?

MR. GONDELMAN: Well, of course anything is possible, Mr. Chief Justice but I think that --

QUESTION: Isn't that what Justice Holmes had in mind when he wrote in Dunn?

MR. GONDELMAN: In Dunn he said that. But I might also cite Benton v. Maryland to Your Honors in answer to that question, because Your Honor said and Justice Harlan stated the State has no more interest in compelling petitioner to stand trial again, recognizing that is double jeopardy, for larceny of which he had been acquitted than in retrying any other person declared innocent after an error free trial.

Now, I don't know why the ALI and the majority of the Court of Appeals keep saying that because a man is

found not guilty in the American system of justice that it is somehow a miscarriage of justice. The fact is Niederberger had a trial, the conviction was affirmed by the Court of Appeals, he was presumed innocent, he was acquitted of three charges. I thought in America that meant that he is innocent.

QUESTION: He was found guilty of the other charges in the only trial to which he was subjected.

MR. GONDELMAN: That is correct. And on those other trials I then get to the argument when Justice White took me back to the question of the Constitution. And it is a stronger argument, if you will, and that is that if a principal must receive a fee, compensation or reward, there must necessarily be an agreement between the principal and the aider and abettor who is charged as an aider and abettor in giving him a fee, compensation or reward, because if he doesn't give it as a fee, compensation or reward and if it isn't received as fee, compensation or reward, there is no substantive offense committed.

QUESTION: Is it possible that he did receive it?

MR. GONDELMAN: Justice Marshall, what I am talking about now is a factual condition to be presented to a jury.

QUESTION: But wasn't it presented to a jury?

MR. GONDELMAN: No, sir.

QUESTION: It wasn't presented in this case?

MR. GONDELMAN: In this case, absolutely not, because --

QUESTION: It was not?

MR. GONDELMAN: No. The judge specifically said to this jury, sir, that you do not have to find an agreement between Mr. Standefer -- and I have that covered in my brief, I can point it out. But the fact is that at page 87-A of the appendix Judge Knox charged the jury specifically that it is not necessary to find intent. The question of whether or not the tax returns were correct is irrelevant to their consideration.

QUESTION: But your client was charged as a principal, was he not?

MR. GONDELMAN: He is charged as a principal but you still have to have a substantive offense. He can't be charged as a principal without having 7214(a)(2) violated by Niederberger. That is the difference between Dunn and Bryan and the cases which say if you have an innocent dupe, Standefer could not be convicted of aiding and abetting an innocent dupe. And that is the difference between U.S. v. Dunn and any other case that is recorded.

QUESTION: Well, in your jury, the jury concluded all the issues against your client.

MR. GONDELMAN: No, it concluded --

QUESTION: It returned a verdict of guilty again him.

MR. GONDELMAN: But I respectfully suggest to Your

Honor that what I am saying to you is that the jury could only pass upon what a judge charged that they could pass upon. And in this case the judge took away from them two ingredients that are crucial to the defense.

One, there must be an agreement between the principal in this kind of a case who has to receive a fee compensation reward and an aider and abettor who must pay the fee compensation reward. If Niederberger had received it differently or if Standefer took him on golf trips for different reasons even though he received it as a fee compensation reward, the intent after the jury came back and asked about intent the judge said intent is unimportant. If he did it for any one of a number of reasons without specifying any particular act.

So I am challenging and I took exception and you will see I continue to take exception to the charge where Judge Knox said, "You don't need intent." I said, "Well, what is this malum prohibitum nonsense? If you have an IRS agent and you buy him a cup of coffee, you take him to lunch, you take him on a golf trip you are guilty of a crime. You don't need intent."

QUESTION: Are you saying your client was not properly chargeable as a principal?

MR. GONDELMAN: I am saying that the judge did not --

QUESTION: That could be answeres "yes" or "no."

MR. GONDELMAN: He was not properly charged as a

principal for the three counts of which Niederberger was acquitted. On the others, yes. But in order to have a jury pass upon the facts, the jury must have had an opportunity to recognize that the Bahamas actually point in the post-Watergate syndrome we have in this country, Gulf Oil was supposed to have given political contributions through a corporation called Bahamas X. I still say it is nice to get back to the beginning, it is the indictment.

The indictment in this case, 8 and 9 charges and, again, if we only stick to what I am suppose to be defending which is in the indictment, much of what Your Honors are asking really doesn't have much to do with this indictment.

QUESTION: Except that evidence can come in during the course of a trial and if it is unobjected to the indictment need not be formally amended under the rules.

MR. GONDELMAN: That is correct but you still have to charge a jury properly, I think, so that they might consider. In Bollenbach, you see, after going through all of that this Court said the charge on inference at the last ditch charge of the judge was wrong, so you reversed.

And that is where I am, I am at the point where a judge charged this jury and took my defense away on all counts of the indictment, whether you want us to go to trial on nine counts or six counts. But on every count, I did not have an opportunity and I have covered the legislative intent on 201(f)

where Senator Keating has talked about this is not a malum prohibitum statute, he wanted to make it such and it wasn't passed as such.

But in --

QUESTION: May I ask you one question.

MR. GONDELMAN: Yes, Your Honor.

QUESTION: You are trying to go back to the beginning all the time.

With reference to the Dunn v. United States and inconsistent verdicts and that problem, would your position be the same if the two cases had been tried as one, it had been a joint trial?

MR. GONDELMAN: Yes, Your Honor, and every case --

QUESTION: You don't rely on the fact that there are separate trials?

MR. GONDELMAN: No, sir. In fact I have relied on the fact that in joint trials -- see, what I object to is the Government being able to pick and choose and have a different result. In the joint trial every appellate court that has had it, every circuit court that has had it, have said that you must charge a jury in this kind of a case. If you acquit the principal, you must acquit the aider and abettor. Now, why should you let a U.S. Attorney try the principal and then come back and say now we don't apply that principle of law. That is the law in this country, up at least up to this point.

QUESTION: You say that if we affirm that it necessarily means that a jury could come out with different results in the same trial between the principal and the aider and abettor, they could acquit the principal and convict the aider and abettor?

MR. GONDELMAN: That is correct, sir. And up to this point no court has said that.

But I might also say in connection with the charge --

QUESTION: I am puzzled. Why isn't that perfectly permissible under the Dunn case?

MR. GONDELMAN: In Dunn, as I recall it, and all the cases that I have read in connection with inconsistent verdicts say, well, one jury could -- for example, the conspiracy cases. If you charge only two named conspirators and one is acquitted, every court has said there is no conspiracy.

QUESTION: What is the leading case for that proposition?

MR. GONDELMAN: I have it in my brief and I do have it cited. If I can have a moment, I will catch it for Your Honor.

But the issue -- I have the conspiracy cases cited, I believe, Your Honor, in -- on page 36 of my brief Morrison v. California, which held conspiracy imports a corrupt agreement between not less than two.

Now, in those cases where you have only two named

conspirators or alleged conspirators, one is found not guilty, Morrison says the other has to go free. And there are lots of lower court cases to that effect.

However, if you have the conspiracy between two and other persons know --

QUESTION: Morrison v. California?

MR. GONDELMAN: Pardon me?

QUESTION: Morrison v. California?

MR. GONDELMAN: Morrison v. California, 291 U.S. 82, 92, Your Honor.

QUESTION: You don't list that in your --

MR. GONDELMAN: Yes, I do, at page 56 of my brief, Your Honor, I have it.

QUESTION: But you didn't get it in your table of citations.

MR. GONDELMAN: Yes. 291 U.S. 82 at page 92. Hartzel v. United States, 322 U.S. 680. Bates v. United States, 323 U.S. 15. U.S. v. Fox, 130 F.2d and so forth, and so on. I have a myriad of cases which hold that as the principle and I think you have to say it. To me it is as logical to say two people must conspire to convict two and you can't have one as it is to say that you can't convict an aider and abettor of an innocent principal. And it does not make sense to me that you allow the United States Attorneys to pick and choose the time in which one will come to trial or the other will come to

trial and say in one case after you come the trial together you must charge the jury that if a principal is acquitted, acquit the aider and abettor. But if I happen to choose as U.S. Attorney to try the principal first, and then the aider and abettor, a different result obtains. And it doesn't make sense.

QUESTION: Well, what if you tried the aider and abettor first?

MR. GONDELMAN: There are cases on that too, Your Honor. You will see in lower court cases where the aider and abettor is tried first and the verdict against the principal has been reversed, the Court of Appeals has vacated on its own motion the aider and abettor -- and I have that cited in my brief -- vacated the aider and abettor conviction because they say it is nonsense to allow the principal to go back and be acquitted and the aider and abettor would end up being convicted.

QUESTION: Was Dunn a conspiracy case?

MR. GONDELMAN: I am sorry, Your Honor, I don't recall. I don't believe so.

QUESTION: I don't believe it was.

MR. GONDELMAN: But again, the difference between them is there are cases that can -- there are crimes that can be committed by innocent dupes. In this case you cannot have an innocent dupe principal. He must receive a fee compensation

or reward for his job.

And when we get to the charge in this case I wanted to show you that under Count 8 of the indictment we are charged with giving Cyril Niederberger a trip. The audit of the '69 and '70 tax returns and an investigation conducted of Gulf Oil Corporation's political contributions and a submission of an investigative memorandum of March 28, 1974. That has been called the Bahamas X report throughout the proceedings. I wanted to show that the Senate of the United States had a special post-Watergate investigative body with a special prosecutor. I wanted to show that the intelligence branch of the Internal Revenue Service investigated that report. I offered, and the offer is in my brief, and cited to show those, to show that the Niederberger report as submitted March 28, 1978 was an accurate report. The IRS declined criminal prosecution of Gulf Oil. I wanted and did show that Gulf Oil had paid over $150 million in additional taxes for the audits of which Niederberger was the large case manager. Every trip of which the golf trip was taken after the Government said the report was filed.

So under these facts you have to go to the fact that the Government is trying to prove a reward. Now, if they are trying to prove a reward, why would or at least can't a jury and shouldn't a jury have the chance to decide if the reports were proper, if Gulf paid $150 million in taxes, couldn't a jury

take as a fact that in the consideration in deciding the factual issue of whether it is a fee compensation or reward or under 201(f) it is for or on behalf of any duty performed.

QUESTION: What difference does it make, Mr. Gondelman, whether you paid in advance, cash on delivery, or 30 or 60 days later, which is the way doctors and lawyers send their bills?

MR. GONDELMAN: Because in this case, Mr. Chief Justice, the judge said, "Oh, you mean because the bribe didn't take." All through this trial I wasn't trying a bribe case, you understand, because then it would have been admissible. But his remark to me was, "Well, if the bribe didn't take you mean the man isn't guilty." The fact is in this case the jury could consider since the golf trips took place after the report was filed, months after, would an intelligent person offer a fee compensation or reward when his company is getting socked with $150 million worth of taxes,or at least isn't it a jury question? That is the issue.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Alsup.

ORAL ARGUMENT OF WILLIAM H. ALSUP,

ON BEHALF OF RESPONDENT

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

The basic issue in this case is whether one who aids,

abets, counsels, induces, commands or procures an offense against the United States may be convicted for doing so after the actual perpretator of the offense is acquitted in a prior suit.

In the present case the evidence clearly showed and the jury found that petitioner as head of Gulf Oil Corporation's tax division and acting on Gulf's behalf gave five, authorized five all-expense-paid vacations to the Internal Revenue Service official in charge of the ongoing audits of Gulf's income tax liability. Although petitioner claimed at trial that these gifts were made out of friendwhip and for social reasons, the jury found to the contrary, that they had been made and received as fees, compensations and rewards for the performance of the IRS official's duty and that, accordingly, the official violated 26 U.S.C. 7214 in accepting them. In turn, the jury convicted petitioner of the five counts of aiding and abetting the IRS official and the unlawful receipt of those five vacations. There was one count for each vacation.

Petitioner challenges three of those counts. Petitioner does not deny the sufficiency of the evidence against him or assert any constitutional affirmity in his convictions. Rather, his basic claim in this case rests entirely on the fact that in a prior trial the IRS official was acquitted of the charges that he violated Section 7214 in accepting those

three vacations. Although I might add that on two of those three vacations he was convicted of violating 18 U.S.C. 201(g), part of the gratuities statute.

In turn, petitioner contends that those acquittals on the 7214 counts absolves him of any having aided and abetted the unlawful acceptance of those three vacations.

In support of this position we construe petitioner to advance two basic arguments:

One, 18 U.S.C. does not authorize the prosecution of the aider and abetter after the actual perpetrator has been acquitted.

And, two, even if 18 U.S.C. 2 -- that is the general aiding and abetting statute -- does authorize such prosecution, then under the doctrine of nonmutual collateral estoppel the prior acquittal of Niederberger, the IRS agent, bars petitioner's conviction.

QUESTION: Mr. Alsup, just as a matter of curiosity, is that term "nonmutual collateral estoppel" used once in the other brief, the opposing brief?

MR. ALSUP: I think it actually is. I believe the substance of the argument is made in the briefs. I am not sure that that term is used.

QUESTION: That the collateral estoppel argument is fairly embraced by the questions presented in the petition for certiorari?

MR. ALSUP: Looking strictly at the questions presented in the petition itself, there is some doubt as to whether or not the collateral estoppel issue itself was raised. However, the -- that doctrine,in fairness to the petitioner I would say that doctrine is somewhat related to the arguments that were made in the Court of Appeals, and which the Court of Appeals did adress.

QUESTION: I take it you are willing to assume it is here, anyway.

MR. ALSUP: We are willing to assume that is here and we have briefed it on the assumption that this Court would consider deciding it.

In our view both of the arguments, the statutory argument and the argument based on nonmutual collateral estoppel, are unpersuasive.

Petitioner's first argument based on the meaning of 18 U.S.C. 2 is that when Congress enacted the statute in 1909, Congress intended to carry forward an aspect of the common law under which the prior acquittal of the common law principle precluded conviction of the common law accessory before the fact.

QUESTION: Can I interrupt to clarify one thing that I am not sure about.

What is the Government's position as to what would be the proper disposition if the two cases had been tried together?

MR. ALSUP: If the two cases had been tried together, it would have been absolutely permissible for the jury to reach inconsistent --

QUESTION: You would rely on Dunn in that situation?

MR. ALSUP: That is correct.

QUESTION: Yes.

QUESTION: Didn't Dunn just involve one person?

MR. ALSUP: That is correct.

QUESTION: And it was just a question of inconsistent verdicts between two counts?

MR. ALSUP: That is correct.

QUESTION: It didn't involve two people.

MR. ALSUP: But the principle that was announced --

QUESTION: Have you got any cases in this Court that says that sustains an inconsistent verdict?

MR. ALSUP: Well, let me respond to that point.

QUESTION: Where there is mor- than one defendant involved?

MR. ALSUP: Yes, the Dotterweich case did involve two different defendants. One was a corporation and one was the officer of the corporation. And the jury did not convict the corporation, they were hung with respect to the corporation. But they did convict the officer. And the claim that was made was that it was inconsistent to convict only the officer and not the corporation, because obviously the officer was simply

acting on behalf of the corporation and this Court, citing Dunn, rejected that proposition.

Now, the language in Dunn itself is actually much broader than what could be termed the narrow holding of the case. But Justice Holmes did say that there is no need to have consistency in jury verdicts, that that is part and parcel of the jury system in this country is that juries may exercise compassion, they may compromise.

QUESTION: Well, you are just talking about one jury there, and we are talking about two different juries here.

MR. ALSUP: But this Court extended that reasoning in --

QUESTION: In Dotterweich.

MR. ALSUP: -- in Dotterweich.

QUESTION: But the Court has never extended the reasoning of Dunn to successive trials, to two different juries.

MR. ALSUP: Well, that is because there never was any thought up until possibly the time of Blonder-Tongue and Parklane that the idea of nonmutual collateral estoppel was just unheard of at the time Dotterweich and Dunn were decided.

QUESTION: That is right. So that the nonmutual collateral estoppel issue is a brand new question this Court has never really addressed in the criminal context?

MR. ALSUP: Right.

QUESTION: And one of the questions we have to decide is whether the reasoning that applies in the civil context, and I assume you agree that there would be a nonmutual collateral estoppel here if it were a civil case, does that reasoning apply to a criminal case?

MR. ALSUP: Well, we are not -- I agree with your general statement of the issue and I am not quite sure we would agree with an aspect of that that had these been civil cases we would necessarily agree that the Government would be collaterally stopped.

QUESTION: What possible argument do you have against that?

MR. ALSUP: Well, it would depend. You know, in the Parkelane case and in Blonder-Tongue they were specialized --

QUESTION: Their opportunity to litigate, the same issues and --

MR. ALSUP: Well, more than that. In Blonder-Tongue the Court said this is a patent case or special considerations here, there was no law enforcement aspect of the case. Now, if we had a civil case brought by the Government where there were some law enforcement aspects of the case, that might inject -- that would inject a new consideration into the calculus that wasn't present in either Parklane or Blonder-Tongue.

QUESTION: Conspiracy cases, where you indict Mr. A

for conspiring with Mr. B and he is acquitted. And how about then trying Mr. B for conspiracy?

MR. GONDELMAN: Well, our position there, once again, and we think this is sustained by the cases in the Court, is that there can be inconsistency there, too. The --

QUESTION: What if you tried them both in one trial?

MR. GONDELMAN: Absolutely the same result there. You could convict Conspirator A and acquit Conspirator B. There is no need to have consistent verdicts in such a trial. And that is even true in the case where there are only two named conspirators.

QUESTION: The cases that your colleague relies on, Morrison v. California, you don't put much into that?

MR. GONDELMAN: Well, we distinguish all those in our brief but let me take -- I can give you one example. Morrison is perhaps a good example of the infirmity in that reasoning with respect to each of those cases. In the Morrison case there were two people who allegedly conspired and the Court held that evidence with respect to one of them was based upon an unconstitutional presumption. And then the Court looked at the rest of the evidence and said, But there is absolutely nothing else in this record that would support a finding that Conspirator No. 1 had entered into any agreement. Therefore, because there was an absolute failure of any proof with respect to the agreement element, the conviction was invalid with respect

to both. That case does not hold that where there is sufficient evidence with respect to each element of the conspiracy that the jury couldn't return inconsistent verdicts.

And I think you could go down each of those cases that the petitioner has cited on that point and everyone of them can be reconciled with our point of view.

Turning back to the questjion of statutory intent with respect to 18 U.S.C. 2, perhaps I should briefly say that the reason that this statute was enacted in the first place involves a perverse rule under the common law that originally came into the common law at a time that the death penalty was a common penalty for felonies and it was felt there was some procedural protection that was needed to protect against the imposition of the death penalty. The rule worked only with respect to a term known only to the common law and that was accessories before the fact.

Just to contrast it, the rule even at common law with respect to misdemeanors was that everyone who was in any way directly or indirectly responsible for a crime was a principal. There was no such thing as an accessory before the fact for misdemeanors. Moreover, a person who aided and abetted and was present at a crime, that is a felony at common law, also could be charged and convicted irrespective of whether or not any other person was convicted of a crime and that person was regarded as a principal.

Now, the special rule that applies with respect to accessories before fact was this. An accessory before the fact was someone who was not present at the scene of a crime but who aided or somehow counseled and assisted in the commission of the offense. That person could not be even prosecuted until the principal was convicted or unless they were charged in the same joint trial. And that was part of this procedural safeguard against the imposition of the death penalty.

This had some unfortunate results. For example, if a principal just couldn't be found, then the accessory before the fact even if they were in custody could not be brought to justice. Similarly, if the principal were to die, then the principal could never be convicted and therefore they couldn't be accessory before the fact, could not be brought to justice. And, more to the point of this case, if the principal were tried and acquitted, that acquittal would forever thereafter bar the conviction of the principal. And therefore the procedural bar rule couldn't be satisfied and the accessory before the fact thereafter could not be tried.

Now, with the waning of the death penalty, most of the States eventually abolished that distinction altogether. And Congress in 1909 did exactly that in 18 U.S.C. 2 which provided that anyone who aided, abetted, counseled, commanded, induced or procured an offense against the United States is a

principal.

Now, by defining principal to include all aiders and abetters, etc., the statute just simply abolished the category of accessories before the fact. And since this category is the very predicate of the petitioner's argument, the 1909 Act also abolished the predicate for the petitioner's argument. Under the Act petitioner is not an accessory before the fact and is not entitled to any special pleading rules but is punishable to the same extent as the principal.

Turning to the second of the petitioner's arguments, this is an independent argument and as Justice White has pointed out, it is much broader than the statutory argument based on 18 U.S.C. 2. Petitioner as did Judge Gibbons below, argues that the conviction of petitioner with respect to the aiding and abetting counts, as to those three counts, is barred by the doctrine of nonmutual collateral estoppel.

QUESTION: Mr. Alsup, before you get into this argument, I just want to raise on question.

In our earlier argument we talked about this is a brand new concept with Blonder-Tongue and the like. Isn't it correct that the concept of offensive nonmutual collateral estoppel is rather new, as those cases. But the concept of defensive nonmutual collateral estoppel is something that has been around quite a while?

MR. ALSUP: Well, since 1948, I believe it was the

Bernhard v. Bank of America case in the California Supreme Court, not a Federal case at all, was the first time that a major court in this country adopted it. I would say 1948 still qualifies as --

QUESTION: As defensive collateral estoppel?

MR. ALSUP: I believe that was defensive in that case.

QUESTION: And that is the first case it applied that to?

MR. ALSUP: Well, it was the first major case, it is the leading case. There may have been lower court cases before that, I am not aware of them.

QUESTION: That was what, 1948?

MR. ALSUP: 1948.

Now, we contend that nonmutual collateral estoppel is unavailable in the circumstances of this case. Traditionally collateral estoppel is available only if there is mutuality in the application of the doctrine. That occurs where both parties in the present case were parties to the prior case, or at least weren't privity with someone who was a party to the prior case. In the present case the petitioner was not a party to the case in which Mr. Niederberger was acquitted. Therefore, he is not entitled under the mutuality requirement to invoke the benefit.

QUESTION: Was the same evidence used in both?

MR. ALSUP: Actually there was overlapping evidence. Actually there was new evidence. This is not a case where it is identical evidence. Now, there was quite a number of different battle lines formed in the second case because new evidence came to light in the interval. So it cannot be said that this was a case which the jury in Niederberger's case and in Standefer's case had identical evidence before them.

QUESTION: Was there anything show in the way of a pattern of conduct in terms of Standefer's case?

MR. ALSUP: Well, one of the theories that went to the jury in this case was that each of these five vacations, these were not just vacations to the local golfing club but these involved Pebble Beach, Los Vegas, Miami, Absecon, New Jersey and Pompano Beach, Florida, all at the expense of Gulf Oil Company and lasting on the average of four days apiece. Each of these seemed to occur within one or two months of important events in the ongoing audits of Gulf Oil Corporation's taxes and Mr. Niederberger was in the position to make all the critical decisions with respect to those audits at that time.

QUESTION: Could there have been an indictment for conspiring to violate the statute between these two men?

MR. ALSUP: That is a question that no one has raised so far and I -- off the top of my head I would say "yes," but I am not -- there might be problems with that rule -- I believe

it is called Wharton's rule. I am just not quite sure whether there could be a conspiracy indictment in this case.

QUESTION: But if there could, you would take the position that one conspirator can be acquitted and the other one convicted?

MR. ALSUP: That is correct.

QUESTION: At separate trials?

MR. ALSUP: That is correct.

QUESTION: Or even at the same trial?

MR. ALSUP: That is correct.

The reasons that we think that nonmutual collateral estoppel ought not to be applied to criminal cases are as follows:

First of all, unlike the civil case, extension of nonmutual collateral estoppel to criminal cases would frustrate the important overriding interest in prompt and complete enforcement of Federal criminal statutes. It would do this in at least two ways. One of the premises of our penal system is that each person who commits a crime will be held individually accountable for the commission of that crime. In a sense, that was the whole point of 18 U.S.C. 2,which was to do away with these procedural bars and to allow each person to be charged as principal. If nonmutual collateral estoppel were introduced into the criminal courts, then when a jury made an erroneous decision exercising compassion or compromise or whatever, the

effect of that erroneous acquittal against the weight of the evidence would be spread to all of the participants charged with a common fact in that crime. And that would --

QUESTION: That is an interesting question, whether to a try a defendant separately.

MR. ALSUP: I am not quite sure I follow you.

QUESTION: Well, the net result of this is that the only time the Government could ever convict A, they would have to convict them all at once or not at all.

MR. ALSUP: Well, unless --

QUESTION: Say they indicted ten people at the same time and they all moved for separate trials.

MR. ALSUP: Well, that is right, there could be some horrendous results if No. A -- if No. 1 defendant was acquitted --

QUESTION: Was acquitted, yes.

MR. ALSUP: -- then the rest of them -- at least if there were a common factual issue --

QUESTION: What if they were all charged with exactly the same crime?

MR. ALSUP: Well, that is correct. Then there might not even be identical inquiry on whether or not there was a common factual issue.

An example along those lines that might occur would be something like this. Let us say that the Government charged

a so-called underling with conspiracy and the substantive offense. And the conspiracy alleged that the underling had conspired with say someone say named Mr. Big, one of the higher-up's in an operation. And the jury exercised compassion against the overwhelming weight of the evidence, the jury decided to compromise; convict on the substantive offense, acquit on the conspiracy. Now, under the petitioner's theory the Government would be forever barred from going after the higher-up, because --

QUESTION: For conspiracy.

MR. ALSUP: For conspiracy.

QUESTION: But that is a pretty well settled rule in the Federal courts, isn't it?

MR. ALSUP: Not in this Court.

QUESTION: In the Federal courts?

MR. ALSUP: I don't believe that actually even -- there are courts I will say, there are courts of appeals who have held exactly that. But you could not regard --

QUESTION: The Court of Appeals for the Sixth Circuit did so when I was a member of it.

MR. ALSUP: That is correct. I won't dispute that. But I wouldn't go so far as to say that that is a settled rule in the Courts of Appeals. There are Courts of Appeals who have held that but this Court has certainly never held that.

QUESTION: What worries me is that you are asking us to take into our consideration the possibility that a jury might

"exercise compassion" and turn a man loose. You don't really want us to think that, do you?

MR. ALSUP: Well, Mr. Justice --

QUESTION: Don't we take a jury verdict as it is?

MR. ALSUP: No, we don't. Actually, this Court has not handled the problem that way. In Dotterweich and the Dunn case this very Court said and recognized that juries often exercise compassion or compromise or inconsistency and the Court --

QUESTION: And that we should do something about it.

MR. ALSUP: No.

QUESTION: That is what you were saying just a minute ago.

MR. ALSUP: No, what I was saying --

QUESTION: You were saying that because of that we should allow you to take two bites of the cherry.

MR. ALSUP: No, I am saying because the Court has recognized that kind of compromise --

QUESTION: What about double jeopardy?

MR. ALSUP: Well --

QUESTION: If we find that a jury had compassion, then we give you another trial.

MR. ALSUP: In the case of --

QUESTION: You don't need that argument and why don't --

MR. ALSUP: Well, we feel some obligation to make all

the arguments we feel have merit. It is true we don't need that particular argument to win this case. But, you know, the double jeopardy argument is really --

QUESTION: That jury could have turned that first man loose because they thought it was in China. That is not compassion.

MR. ALSUP: Well --

QUESTION: They could have turned that jury loose because the Government didn't prove its case. They could have turned him loose for 50 different reasons without it being "compassion."

MR. ALSUP: Mr. Justice, would you feel the same way if there was overwhelming proof of guilt in that case?

QUESTION: I am not here to answer your questions.

MR. ALSUP: Our point is that we don't feel that way when there is overwhelming proof of guilt. To us the logical inference, as this Court has recognized from time to time, is that juries do exercise compassion.

Now, you are right, in the Ashe case the Court said we are not going to concern ourselves with the fact that there might be compassion, in that passage where the Court talks about we will assume the rational verdict. But that is because the Court was dealing with double jeopardy and in order to safeguard the constitutional right against excessive prosecutions the Court rightly decided we will not indulge or recognize the

fact that juries indulge in compassion. We are not dealing with double jeopardy here. This is solely a judge-made rule of prudential considerations as to whether or not nonmutual collateral estoppel ought to be applied to criminal cases. And just as the judge made rule concerning inconsistent verdicts, takes that factor into account, the compassion factor, so it should be taken into account here.

Another reason why civil cases are different is because in criminal cases the United States does not have the same full and fair opportunity for factual determinations that are available in civil cases. The rule of this problem is the so-called jury nullification which, again, the Court has recognized that that goes on in the jury room. But it begins even before that point. There is no discovery in criminal cases. There are privileges that prohibit the Government from taking the depositions of the principals to the primary transactions at issue in a trial. There is no directed verdict that the Government can ask for when the weight of the evidence is overwhelming. There is no summary judgment motion. And when the jury does exercise compassion, we can't go and ask for a judgment NOV and say set aside that jury verdit or ask for a new trial because the verdict is against the weight of the evidence. Nor can we even appeal the jury's factual determinations. And the Sanabria case, in fact this Court said "No matter how agregious the error may be the Government

just has no recourse against that."

Now, that is a big difference between the criminal case and the civil case. And in the criminal case the Government typically does not have the same full and fair opportunity that is available in civil cases.

QUESTION: I don't think you argue -- maybe I missed it in your brief -- that there might well be situations in which there would be evidence seized in violation of the Fourth Amendment rights of the first defendant,would not be admissible against him. But it could nevertheless prove guilt of the second defendant, which makes the two cases quite different in a criminal count.

Do you argue that?

MR. ALSUP: Well, we did. We intended to argue it and I think we had a long footnote in which we refer to Fourth Amendment problem that you just mentioned. And that would mean that, for example, in case No. 1 certain evidence that is crucial might be excluded but it would be available to be used in case No. 2. And that once again is part of the problem that the Government faces in having the same full and fair opportunity to litigate an issue that is available in civil cases, because in civil cases these exclusionary rules just aren't problems. But they are big problems in criminal trials.

Now, it is Footnote 29, Mr. Justice Stevens, in our brief is where we refer to that problem.

I see my time is running out. I would just say briefly that there are other reasons why nonmutual collateral estoppel ought not to be applied in criminal cases.

Briefly, one is that the inquiry into determining whether or not the Government had had a full and fair opportunity and exactly what issue was previously decided might be an exhaustive inquiry in cases and given the fact that it is the United States -- this is really the only one who has an interest here -- the United States often takes into account the outcomes of prior trials and is not like an ordinary civil litigant and may not repeat litigation except where in the interest of justice we think it is necessary.

QUESTION: Going back to the example -- the type of examples in your Footnote 29, why isn't that problem adequately handled by in the second trial the Government simply advising the trial court that there were these valid objections to its case and therefore the rule shouldn't apply in this particular case. Why is that a reason for not applying the rule?

MR. ALSUP: Well, theoretically you could make an inquiry into exactly what evidence was excluded at the first trial, what evidence wasn't even offered because they knew it would be subject to constitutional problems. For example, in this case, in the Niederberger case we couldn't even call Standefer as a witness in the first case and we didn't even try because we knew he would invoke his -- so there wasn't

any exclusion per se but it was just not done because of --

But you are right. Those factors could all be listed, the judge at the second trial could try to take all those into account and then the judge could turn to the issue of what was actually decided by the first jury.

Our point is that that would be a very exhausive inquiry in each case and most of the time the judge is going to find there wasn't a full and fair opportunity and it is just not worth the candle to make that inquiry in so many cases where it would undoubtedly be raised repeatedly, simply in the very small number of cases to be able to invoke the doctrine of nonmutual collateral estoppel.

If the whole point, or if one of the major points is to save time of the courts, we think this would waste time of the courts, not actually save it.

QUESTION: If you rely on the inability to call Standefer, that would be a circumstance always present, wouldn't it? You would never be able to call the second defendant as a potential witness in a joint transaction. He would assert his privilege.

MR. ALSUP: That is correct and that might be a reason why in most cases the judges in the second case would rule in favor of the Government.

QUESTION: Well, you would be able to call on him. If he were not a defendant there is a high likelihood he would

assert a privilege but you would not be prohibited from calling him to the stand.

MR. ALSUP: That is right. We could call him to the stand and although it might be an abuse of prosecutorial discretion to call someone knowing they are going to invoke the privilege.

QUESTION: What case holds that?

MR. ALSUP: I think that is just in trial courts commonly understood.

QUESTION: Has it ever been held here?

MR. ALSUP: I don't think so.

QUESTION: But in some State Supreme Courts it has been held?

MR. ALSUP: Well, our argument doesn't depend on whether it would or would not be. In many cases even if the potential defendant would simply invoke the privilege and no evidence would come in at the first trial.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

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