

2009 WL 2108267 (C.A.9) (Oral Argument)

This is an unofficial transcript derived from video/audio recordings.

United States Court of Appeals, Ninth Circuit.

United States of America, Plaintiff and Appellee,

v.

David Struckman, Defendant and Appellant.

No. 08-30312.

July 7, 2009.

Oral Argument

Appearances:

Gregory Davis, United States Department of Justice, Washington, D.C., for appellee.

Robert E. Barnes, The Bernhoft Law Firm SC, Milwaukee, WI, for appellant.

Before:

Diarmuid F. O'Scannlain, Andrew J. Kleinfeld and Marsha S. Berzon, Circuit Judges.

CONTENTS

ORAL ARGUMENT OF ROBERT E. BARNES ON BEHALF OF THE RESPONDENT

ORAL ARGUMENT OF GREGORY DAVIS ON BEHALF OF THE PETITIONER

REBUTTAL ARGUMENT OF ROBERT E. BARNES ON BEHALF OF RESPONDENT

JUDGE: Counsel, for the appellant.

ORAL ARGUMENT OF ROBERT E. BARNES ON BEHALF OF THE RESPONDENT

MR. BARNES: Yes, your Honor. May it please the Court. I am Attorney Robert Barnes.

JUDGE: Barnes.

MR. BARNES: I represent Mr. Struckman in this matter. The sole issue on appeal is whether or not the Court-- the district court below properly interpreted a particular fact.

JUDGE: Coun-- Counsel, on the outrageous government conduct claim, we have another-- we have a Supreme Court decision in another such claim where the way the U.S. Government got its men was by kidnapping him by force, Alvarez Machain. That turned out to be okay because the extradition treaty did not explicitly prohibit kidnapping by force. And then we have another Panama case, it didn't go to the Supreme Court, went to a circuit court where the way we kidnap somebody by force was by sending in an Army and starting a war, Noriega, and that was okay, not outrageous government conduct.

Here, all we've got is maybe a little trickiness, pressure, and deception leading to a legal deportation approved by the Panama Supreme Court. I don't understand how that can be outrageous government conduct when the other two aren't.

MR. BARNES: Two different issues, your Honor. First, is that in this particular case, there were two dissaparate issues regarding government misconduct. Only one of which related to the conduct in Panama, the other relating to what the district court re-- referred to as the House of Cards and the illusion that [inaudible] ...

JUDGE: That was [inaudible] Brady stuff as far as I could tell, [inaudible] ...

MR. BARNES: Yes, your Honor. It involved the Brady and involved limiting Mr. Struckman's cape-- capacity to present certain evidence [inaudible] ...

JUDGE: So he got a, you got a suppression order and he got a continuance to go over the materials when they are finally produced. So I don't see where you-- the category of outrageous government conduct is so small, it's so rare that anything ever falls into it. I don't see how you even get the first base on that one.

MR. BARNES: Well, your Honor, I would go to the United States v. Stevens. This case is not much more distinguishable than what happened in Stevens up in the district court, where the district court issued a dismissal for a Brady violation, clearly the same issues of suppress -

JUDGE BERZON: But that is-- isn't it discretionary?

MR. BARNES: Yes, your Honor. I believe that it is. The ...

JUDGE: Counsel, in that case, the-- you're talking about the Ted Stevens case?

MR. BARNES: Yes, your Honor.

JUDGE: The government move for the dismissal.

MR. BARNES: Ultimately, the government did but it's not ...

JUDGE: Looks that the judge dismissed for outrageous government conduct, he didn't. The government move for dismissal and that the government has the power [inaudible] case with slide if any exceptions and the government granted the ga-- the government's motion was granted.

MR. BARNES: That is correct, your Honor.

JUDGE: It, it has nothing to do with outrageous government conduct it could have if it had gone that far but it didn't.

MR. BARNES: That is correct. But the-- so the issue was whether or not what happened in Stevens is something that would have happened in Stevens otherwise, as what could have happened here. Here, the district court was under the impression that he could not do anything about the government mis-- misconduct in Panama, in particular, and could not resort to dismissal based on his interpretation of a Panama Court's habeas corpus order.

The Panama Court said that they had no jurisdiction to rule on anything that could have happened because Mr. Struckman was removed from their jurisdiction without their authority or without their consent prior to their ability to rule on the issue because there was no [inaudible] ...

JUDGE BERZON: [inaudible] on the validity of the deportation.

MR. BARNES: They denominated a deportation and there's two different aspects of that, your Honor. First, is here, there are certain procedures to be followed both in Panama and under the national law. None of those procedures were followed. The government deliberately knew about Mr. Struckman having counsel, deliberately interfered with his right to counsel, and prevented him from being able to assert his legal rights into that ...

JUDGE: There's no, there's no protection against right to counsel for extraterritorial activities, is there? In fact, I'm not even sure if there'll be a problem outside the Court, but go ahead.

MR. BARNES: Yes, your Honor. In fact, that's what the Supreme Court ruled in 1957 in *Reed v. Cover*, I believe the citation is [354 U.S. 1](#). The Supreme Court said the bill of rights follows the government authority wherever the government acts, within the territory or outside the territory.

And it consequently Sixth Amendment attached to Mr. Struckman the moment he was indicted, his Fifth Amendment right to due process attached to him throughout the proceeding.

JUDGE BERZON: How did they interfere with this? First of all, there was no criminal proceeding in Panama, right?

MR. BARNES: That is correct.

JUDGE BERZON: Second of all,-- so, so there was no right to counsel for a criminal proceeding in Panama that ...

MR. BARNES: Well, actually there was under the Panama constitution and the testimony -

JUDGE BERZON: Right, but, but that mean-

MR. BARNES: - by the fellow.

JUDGE BERZON: - that's a different question, I mean, that, that's a ...

MR. BARNES: Yes. Yes, your Honor, that's correct.

JUDGE BERZON: And second of all, there was-- how did they interfere with his right to counsel? I mean, there was muttering in the emails but how did they actually interfere with it?

MR. BARNES: They are-- what they, what they actually did was, they asked the Panama security officials to transport into various places knowing his lawyer was trying to tract him down so they kept moving him throughout. And then when they found out about the habeas petition being filed, told them to bring him to the airport, put him on a plane, and got him out of a country before his lawyer could find where he was and without ever notifying his lawyer. And so they withheld information both from Mr. Struckman and from Mr. Struckman's lawyer to preclude the Panama Courts from reviewing the matter.

The reason being is because of their degrees of lies and deception as to the issue of Alvarez Machain. That was the extratitorial-- that was a purely private action. There was no Mexican Government involved.

JUDGE BERZON: [inaudible] later case less saying otherwise. Now, I, I'm really more concerned about what happened here with regard to, my understanding is that in the end, the trial judge found that the agents and to some degree, the prosecutors, and I, I am not clear how much the prosecutors had, had lied and in fact, never came clean.

MR. BARNES: That is correct, your Honor.

JUDGE BERZON: I mean, continue to lie ti-- 'till the end.

MR. BARNES: Absolutely, continued to lie around of the stand. I mean, that Attorney Odulio, who was the prosecutor, involved in this to the Department of Justice. I asked him whether he knew about Mr. Struckman having a lawyer in Panama, he denied it. He said he had no knowledge of it. I produced the facts that was sent to him by the Regional Security Officer for Panama. Why should-- when-- distinctive fact about this is, he's acting as the Court's agent.

The Regional Security Officer is representing himself to the Government of Panama as your agent, not anybody else's agent, but as an agent of the federal courts of the United States. That's whose name, he committed this deception and fraud in. And what happened is, and they lied on the stand. Regional Security Officer O'Brien lied about even knowing Spanish, denied that his-- that he knew what Spanish letters meant, denied that he knew what the word is means in Spanish.

JUDGE BERZON: I, I was actually talking about the issues having to do with the, the -

MR. BARNES: - the ongoing Brady violation ...

JUDGE BERZON: - informant here and the, the fellow who had the au-- the auditing and so on.

MR. BARNES: And the-- absolutely, your Honor. All the agents got up on the stand and, and repeatedly made false statements or misrepresentations. So when they submitted the dec ...

JUDGE BERZON: That the agents testified-- do the agents who were involved with [inaudible]? I thought they did not testify.

MR. BARNES: Agent Hardaway and agent Holm, both testified, your Honor.

JUDGE BERZON: Better.

MR. BARNES: And the Court found that their testimony not credible. He ultimately concluded that what they had built was a house of cards, not to maintain ...

JUDGE BERZON: But-- that they had testified in the trial.

MR. BARNES: Oh, no, your Honor. They did not testify at trial. They were just like ...

JUDGE BERZON: All right. So he exclude -- that's what I'm trying to figure out, okay -- he excluded, not only the evidence, but they did not testify.

MR. BARNES: That is correct, your Honor. And the, the issue was what kind of remedy is appropriate when that kind of government misconduct takes place? Is the district court's conclusion suppression would adequately suffice? The problem here as the Court noted that the government misconduct defense as a trial defense was guided by the prosecute, should never turning over the source of the AI-1, the source of this information.

JUDGE: But would have been except that he got the trial continued.

MR. BARNES: The-- we, we-- you know, even with the trial continuance, there was no way to know where that information would have led for government misconduct to be presented at trial because it was never produced. They just refused to produce it all the way through. And so the remedy of suppression doesn't suffice because it's a situation where there's two different aspects of it. Court problem with the remedy of [inaudible] ...

JUDGE: There are two, two things you need in Brady-- you need it to be disclosed and you need it to be disclosed in a sufficiently timely ways so that you can make practical use of it. Eventually, your Brady material was disclosed and because of the continuance, you had enough time to make practical use of it.

MR. BARNES: It's the first, where, I disagree with you, your Honor. What the Court concluded is that they had never given this Brady and that they apparently never intended to, and that that, that was an ongoing Brady violation.

JUDGE BERZON: Right. And his basic finding was that they, they continued to lie, -

MR. BARNES: Exactly, your Honor.

JUDGE BERZON: - [inaudible]. The, the Ted story wasn't true and that-- whatever story-- and, and then they had never come up with another one.

MR. BARNES: That is correct, your Honor. And that's the problem we have. You know, as we were never given, whatever the real source of the information was, they continued to lie throughout so we had no way to utilize the information they never gave us, they never disclosed, they ...

JUDGE BERZON: And to this day, it hasn't been disclosed.

MR. BARNES: That is correct, your Honor, to this very day. And so the question is, what to do with that sort of ongoing Brady violation with the nature of the Brady violation, is that they don't disclose what it is that Brady compelled them to disclose. So in that instance, suppression is not a sufficient remedy.

JUDGE BERZON: Now, with regard Bowden, that was eventually disclosed, everything-- [inaudible] ...

MR. BARNES: Yes, your Honor. Exactly. That portion of the suppression was sufficient as to, to Mr. Bowden, as to Mr. Struckman's indictment, not as to Laura Struckman's indictment. That would be a separate habeas issue at some time.

JUDGE: There are two kinds of Brady material. One kind is the kind that shows that the defendant is innocent, and the other kind is the kind that impeaches government witnesses. I think what you're talking about is never having been fully disclosed its impeaching material.

MR. BARNES: Two different ...

JUDGE: And on that, I don't see why it's not cured by keeping the possibly lying witnesses off the witness stands.

MR. BARNES: There's two different aspects, your Honor. One, is we don't know who the witness was that that information came from, so we don't know which one was lying. We don't know where that information would have been able to that witness would have been able to ...

JUDGE: Is there some witness who testified that you're saying there is undisclosed Brady material that would have impeached him?

MR. BARNES: Your Honor, I believe that that some of these information came from witnesses including Mr. Anderson and Mr. Lamantia, both of who testified and-- or cooperating witnesses for the government. But I was unable to prove so because the government never produced the actual Brady material. The second aspect is the exculpatory defense at trial of government misconduct that the district court recognized as a valid trial defense, and know that we couldn't present that defense without the full source of the Brady information but we were never given the Brady information.

JUDGE: What reason is there to think that there was either exculpatory-- Well, let's start with the exculpatory. What reason is there to think that there is unproduced exculpatory material?

MR. BARNES: That the government would not go to these lengths to lie and hide the source of information unless there was exculpatory information in there.

JUDGE: There was a finding by the district court that there-- essentially, that there is something you weren't give up but there's no finding about the character of that something.

MR. BARNES: The-- that's correct, your Honor. It's, it's the problem of, when you successfully hide, and they didn't successfully hide in the sense the judge caught them lying and proved they were lying. But what happens is when you don't produce what is hidden, nobody knows what it is, nobody knows how exculpatory it could be, nobody knows what kind of defense it could provide, nobody knows what kind of impeachment material is in there, nobody knows how it could aid you either at trial or at sentencing. There's no way to know.

JUDGE: So you want us just to suppose that there is exculpatory material out there because we know that the government was at, that lying at various points about various things.

MR. BARNES: I believe that's the remedy when the government refuses to ever produce the real source of the information.

JUDGE BERZON: You have asked for any other sanctions like sanctions directly against the agents or the contempt orders, for example, for-- because they didn't come forward with what they were asked to come forward with. They are asked, for example, to, to sign declarations under penalty of perjury and they didn't do it several times. Was there any ever-- did you ever request sanctions? Would there ever sanctions imposed?

MR. BARNES: We inquired into the Department of Justice, their-- whether their internal disciplinary remedies would be invoked. And we were told or led to believe that, that would-- we would know by the time of sentencing whether that had taken place or not, and then we could then resort to maybe a Bowden suit or whatever else down road -

JUDGE BERZON: And -

MR. BARNES: - if it was available. The-- and the representation to the district court at the time of sentencing was that there-- that nothing had happened. There'd been no disciplinary action against anybody in the entire case.

JUDGE: Counsel, you have about two and a half minutes left. You may want to reserve because that -

MR. BARNES: Yes, your Honor.

JUDGE: - you may want to respond to the government.

MR. BARNES: Thank you, Judge.

JUDGE: Thank you. We'll here from the government.

ORAL ARGUMENT OF GREGORY DAVIS ON BEHALF OF THE PETITIONER

MR. DAVIS: May it please the Court. Gregory Davis, for the United States. Addressing first the, the question of whether this was an extradition or deportation, if you read the district court-- the, the Supreme Court's opinion at-- let's see, what pages does the excerpts of record-- supplemental excerpt of record, page 35, in virtue with the, the-- [inaudible] the second from the last full paragraph, starting on, on the third line, because he's outside the jurisdiction due to the fact that he was deported in compliance with resolution 107886 of August 2004, issued by the National Immigration and Naturalization Directorates. That makes it very clear that the Supreme Court of Panama has concluded this was a deportation, not an ec-- not an extradition. Besides which as we pointed out in our brief, there was never a formal request for extradition.

The fact that Agent O'Brien, as facilitated the deportation, does not change the deportation into an extradition. Also, I mean, the actual State doctrine, counsels against this Court, deciding a case where the outcome turns on the legality of an official act of the foreign state conducted in its own territory that's Riggs versus Nash-- Riggs National Court versus Commissioner of the D.C. Circuit. The Supreme Court has-- of, of Panama has made it clear, this is a deportation, not an extradition.

JUDGE: Counsel, you've heard to some rather strong accusations made against the government.

MR. DAVIS: I, I did. And I, I [inaudible] ...

JUDGE: But, but let me ask you about two things. First of all, the right to counsel with respect to activities in Pa-- in Panama, what's the government's response?

MR. DAVIS: The response is, there is no independent right to counsel for extradition proceedings or the deportation-- excuse me, deportation proceedings. It's, it's fairly clear. Certainly, he had a six-- he had a, a right to counsel but the the right to counsel was for the criminal proceedings, not for deportation proceeding. The case, in he-- ew-- he, he relies somewhat on the Dollot case. But Dollot was very different because in Dollot, it's the Tenth Circuit case. The defendant had specifically requested from the district court counsels for-- counsel and a, a payment for an investigator to

look at the criminal investigate-- the-- to look at the criminal investigation against him in the Tenth Circuit. I don't remember which state it was, unfortunately. Of course, here, there's, there's, there's nothing like that here. This is completely different, this was a simple deportation hearing which he had waived because [inaudible] ...

JUDGE BERZON: But he was actually arrested.

MR. DAVIS: I beg your pardon?

JUDGE BERZON: He was arrested in Panama.

MR. DAVIS: Oh, he was not arrested by the United States. He was arrested by-- he was-- well, arrested in compliance with the, the orders of the, the directorate for having-- and if you look ...

JUDGE BERZON: So, so your position is that there is no Amer-- there's no United States right to counsel with regard to a criminal proceeding in other country.

MR. DAVIS: I, I'm not saying that but he was-- this was-- he was arrested for-- to be held in pending deportation.

JUDGE BERZON: Well, he is originally arrested as I understand it because they went into his house because there-- or where he was because there was gunshots coming out, and, and, and also, for having a false passport.

MR. DAVIS: Well, ...

JUDGE BERZON: [inaudible] was originally arrested, apparently quite fortuitously.

MR. DAVIS: Apparently, yeah. I-- as I understand it there were gunshots. The police entered the house where he was located, and then that he discovered that he was carrying a-- that he was a Venezuelan passport at the time.

JUDGE BERZON: So it certainly would have had the right to counsel if this was an American pro-- arrest at that point.

MR. DAVIS: Correct. The, the problem was ...

JUDGE BERZON: So it's your position, that he doesn't because it wasn't an American arrest?

MR. DAVIS: I'm not going to go that far. I'm going to say the, the, the problem is he was, he was arrest-- he was arrested for something else. He had right to counsel for that.

JUDGE BERZON: Right.

MR. DAVIS: But he did not have right to counsel for deportation hearing.

JUDGE BERZON: Okay. But ...

MR. DAVIS: There's no independent right to counsel in deportation hearings. That's fairly clear-- consistent in this-- in the U.S. Court cases.

JUDGE BERZON: So essentially, you're saying that had nothing to do with what-- where he-- why he had ended up in this Court and [inaudible] ...

MR. DAVIS: Correct.

JUDGE BERZON: All right. What about the-- well, I think Judge O'Scannlain had another question actually.

JUDGE: Well, I was just hoping you would respond to somebody assertions made by opposing counsel with respect to government-- the alleged misconduct as it may affect the way in which the trial judge handled the Gelio issue.

MR. DAVIS: Well, re-- of course, it is an abuse of discretion. The, the, the district court has a discre-- has the-- a discretionary-- is in the-- - it's an abuse of discretion standard as the terms of-- in terms of what remedy to apply. The district court considered all of that. I mean, I, I would note that defense counsel didn't order the trial transcript. So we don't know what exactly happened in the trial. We don't have any filings after. Basically, that all of his filings stop with, with this-- with the, the district court's opinion here.

So we don't know what happened. I'm not aware but I haven't read the transcript because no one ordered this. So I don't know what happened to trial. I don't know if anything was, was-- I don't know if any of this-- the kinds of things he said were actually, actually true. I'm not going to dis-- dispute it but it should be his obligation ...

JUDGE: I guess, though I guess either side could have ordered the transcript, correct?

MR. DAVIS: That's-- and that's correct. But-- since we didn't know that this was going to be an issue ...

JUDGE BERZON: [inaudible] is going to be an issue. They-- I mean, the-- they-- it, it is, it is accurate, is it not, that the district judge's finding with regard to the whole Ted issue was that the agents, and to some degree, the prosecutors, or, or at least that the prosecutors weren't preventing them from lying and continuing to lie, that they had never come clean. In other words, his ultimate finding was, what you're saying isn't true and they never said anything else.

MR. DAVIS: Well, he-- yeah. The, the district court judge basically found that Gary Moritz, who-- we never really-- he, he, he suffered of, of massive head trauma. So the, the district court concluded that circumstantially, it was impossible for him to have provided all the information attributed to, to Agent Hardaway, [inaudible] ...

JUDGE BERZON: So therefore, what you're saying-- what the-- he was told-- what the agents had-- and the government had come forward with wasn't so. It was not -

MR. DAVIS: That's right -

JUDGE BERZON: - true -

MR. DAVIS: - because that's we, we ...

JUDGE BERZON: - that's what he said, right?

MR. DAVIS: That's what the district court said. Now, we don't necessarily agree with district court but we did not -

JUDGE BERZON: I understand that. That was the finding. [inaudible] ...

MR. DAVIS: - challenge district court's factual findings.

JUDGE BERZON: And that, and that-- so therefore, the whole story never came out.

MR. DAVIS: And ...

JUDGE BERZON: What was true never came out.

MR. DAVIS: Well, I mean, the district court then barred Agent Hardaway from testifying. The district would also provi-- pro-- precluded Agent Bowden from try-- testifying as far as I understand.

JUDGE BERZON: Uh-hmm.

MR. DAVIS: The district court was able to, to, to balance the-- to, to balance the considerations.

JUDGE BERZON: But I, I'm-- I guess I'm concerned frankly as officer of the Court about the fact that-- and I don't know, quite aside from whether the issue-- the case should have been dismissed, whether there had to be some sanctions or investigation or some long term deterrence to this kind of behavior.

MR. DAVIS: Well, I, I certainly can't speak for Department of Treasury. The agents were-- are agents with the Department of Treasury. The Department of Justice-- the-- internally, we wouldn't investigate them. Some-- DOT would investiga-- treasury would investigate them. I have no idea whether or not they would. Again, this is not something that was directly raised in terms of whether or not there should have been sanctions. This is not something that's -

JUDGE BERZON: Well, but, but [inaudible], for example, Bowden said that he told the prosecutors and I don't know whether it was you or somebody else that about the audit and, and they never told the Court. They continued to say that would-- didn't happen.

MR. DAVIS: If I remember correctly from the record, Bowden said he may have told one of the prosecutors.

JUDGE BERZON: Yes, he may, [inaudible] did. And then the prosecutor said, "I didn't remember."

MR. DAVIS: It's entirely possible to forget things, your Honor.

JUDGE BERZON: Possible to forget things, if you don't have ethical authenticals of but if somebody is, is, is-- but-- the whole issue was whether or not he's, he's had some interest in saying what he's saying and whether he got-- a, a word for it and he tells you he did and then you forget?

MR. DAVIS: We don't have a time frame, we don't know when he said to-- when he, when he claims you have told the, the, the trial prosecutors. There's nothing in the record that I'm aware of that tells when these, these things happened. If I remember reading the record correctly, when-- I think it was Agent Wasalik-- Attorney Wasalik, when he was told that, that the, that the IRS, I think it was Hardaway had contacted the, the similar auditor, he was not happy. And I think it was shortly after that, that that was disclosed to, to defendant. I, I don't remember the exact time line.

JUDGE BERZON: [inaudible] several-- and at least twice, the district judge told the prosecutor just to come in with declarations under penalty of perjury from the agents as to who the informant

was, and they didn't do it. They came in with declarations which were not under penalty of perjury. Now, the-- doesn't that suggests they knew there was some problem here?

MR. DAVIS: It may be carelessness. I don't, I don't think you can attribute that.

JUDGE BERZON: [inaudible] that order. There was an-- and, and after, they didn't come in the -

MR. DAVIS: But I think there's no -

JUDGE BERZON: - first time. It said, "Okay. Come back [inaudible] the second time," and they didn't do it.

MR. DAVIS: Well, it doesn't-- I mean, I, I don't remember reading the order but doesn't it say declaration? And I, I suppose it was the carelessness. I don't -

JUDGE BERZON: The second time, he said, "Under pe-- I want a declaration under penalty of perjury," and he didn't do it.

MR. DAVIS: I believe one was eventually filed under penalties of perjury. I've ...

JUDGE BERZON: Well, eventually what happened with ...

JUDGE: Well, now let, let's hypothesize that the agents committed perjury and that the prosecutors committed misconduct. I'm not saying that so. I'm saying, let's hypothesize it. And ...

MR. DAVIS: In the hearing, that the, the agency didn't testify at trials, would be only [inaudible] ...

JUDGE: Various times throughout the entire proceedings in the case. Let's hypothesize that. And if you hypothesize that, and you hypothesized that they should have been referred to the United States attorney for prosecution in their respected bar associations for disbarment through other bar discipline. If you hypothesize all that, how does that bear on the outrageous government conduct claim? Are there cases where there's been analogous conduct and there's been an appellate adjudication of whether the defendant, although guilty according to the evidence asserted jury verdict or the plea or whatever. Nevertheless, should-- who was entitled to a dismissal for outrageous government conduct?

MR. DAVIS: I'm not familiar with any cases on either side of that question. It's not a question I've-- I researched. I think due some supplemental research and the supplem-- and provide the Court to [inaudible] opposing counsel ...

JUDGE: [inaudible] a focus here, right? I don't understand that I would have thought that the gist of your case would be to try to keep Struckman locked up rather than to try to protect all the government agents.

MR. DAVIS: Well, no, our case is to [inaudible]-- as to-- as United States, our cause is to, is to serve justice whether that means keeping Struckman locked up or not having Struckman locked up ...

JUDGE: Oh, but if you, if you thought that serving justice meant letting him out, then you would come in here and [inaudible] like the government in the Ted Stevens case, wouldn't it?

MR. DAVIS: If you-- if the solicitor general approved of, of that, yes, definitely.

JUDGE: But that's not what's been done of ...

MR. DAVIS: It's not been done. I mean, for variety of reasons ...

JUDGE: Trying to uphold the conviction and the sentence, right?

MR. DAVIS: Well, we're trying to-- we believe the justice will be served by upholding the conviction and the sentence.

JUDGE: Are you trying to or not? Do you want us to affirm or do you want us to reverse?

MR. DAVIS: I certainly want the Court to affirm because the defendant is guilty. And ...

JUDGE: Look, I don't care because quite yeah.

MR. DAVIS: [inaudible].

MR. DAVIS: [inaudible].

JUDGE: I want to know which result you want. You keep going on about [inaudible] ...

MR. DAVIS: We prefer affirmance.

JUDGE: And I want to know which you think justice is ...

MR. DAVIS: We'd like, we'd like the Court to affirm.

JUDGE: Okay.

MR. DAVIS: We think that would served justice.

JUDGE: Now, the claim is that there is outrageous government conduct. We don't have a transcript so that we could see all the details. And if we assume that the government did all the bad things that defense counsel urges, is it outrageous government conduct entitling the defendant to reversal?

MR. DAVIS: No. And before we even get to that, it's his burden to establish that all of these things happened. All of his statements are fine and-- are well and good.

JUDGE BERZON: Well, [inaudible] ...

MR. DAVIS: But he has to establish them in the record.

JUDGE BERZON: This is my question, but he has established because the district court found that the agents were not telling the truth and that they never told the truth. They never came forward with the actual truth. And that-- and that's the part that bothers me. It's not so much that they, at one point, weren't telling the truth, but the ultimate finding is they never told the truth.

MR. DAVIS: As to, as to A1, as to Ted.

JUDGE BERZON: As to Ted, as to A1. And-- you know, and, and then there are these issues about the prosecutors. Let's stay away from that for a minute. The question is, is there any case law that says-- that, that upholds a non-dismissal in a circumstance-- or that's a suppression is sufficient. When this truth never came out, when there was a finding that they were continuing to lie, that is what's bothering me.

MR. DAVIS: I don't know. It's not a question I looked at. And I didn't look at it for a variety of reasons. I mean, one, it's an abuse of discretion standard for the district court. Did the district court abuse its discretion in finding that this-- that suppressing the, the, the testimony was the sufficient sanction?

JUDGE BERZON: But obviously, it wasn't because nobody has ever told the truth.

MR. DAVIS: Well, ...

JUDGE BERZON: And according to the district judge, as I-- as far as I can tell.

MR. DAVIS: The problem we-- I mean, as I said we don't agree with the district court's factual findings. We didn't challenge them on appeal ...

JUDGE BERZON: Well, you didn't. That's right.

MR. DAVIS: We did not.

JUDGE BERZON: That's what we've got. We've got a finding -

MR. DAVIS: [inaudible] with the record as it is.

JUDGE BERZON: - that they weren't telling the truth and they never told the truth.

MR. DAVIS: But the-- I mean, the Court then prevented them from testifying. If the Court said, "Agent Hardaway, you can't testify."

JUDGE BERZON: [inaudible]-- now, that's what's unusual about this case, right? And usually, what you have is the truth comes out and then you say, "All right. You can't testify." But here, we have the truth never came out.

MR. DAVIS: We don't know whether or not it did because there's nothing after this hearing. I mean, there's, there's nothing that he is prevented-- he's presented to the Court as to what happened at trial or after trial. He just stopped and now, he's claiming, he, he's taking this much farther than he did in his brief.

JUDGE: Anything further, Counsel?

MR. DAVIS: No.

JUDGE: Thank you.

MR. DAVIS: Thank you.

JUDGE: Mr. Barnes, you have some reserved time.

REBUTTAL ARGUMENT OF ROBERT E. BARNES ON BEHALF OF RESPONDENT

MR. BARNES: Thank you, your Honor. The issue as to what would the trial transcript could have shown, is that nothing changed. We never have got the truth. The truth never came out at, at all ever. So because of that, we have no idea what the truth is. We don't know which witness is to impeach.

We don't know which witness is to call. We don't know which government misconduct case at trial to present because we were never afforded that opportunity. This case is, as the government suggested, novel. It's the first time where the nature of the Brady violation, is that they never disclosed what the, the Brady information was.

If this is affirmed, it will send a frightening precedent to draw all of law enforcement throughout the country, that the goal is just lie and hide, lie and hide. And even if he did caught lying and hiding, there'll be no remedy because you never have to disclose and the remedy ...

JUDGE: [inaudible] no remedy. The remedy could be Struckman stays in jail, and they go to jail.

MR. BARNES: That could be a remedy. And realistically, they have ...

JUDGE: [inaudible] is a really good remedy if you got a guilty defendant and, and perjure-- and perjuring government witnesses.

MR. BARNES: And if we could trust the government to bring such prosecutions, I would agree with you.

JUDGE: They commit them all in jail.

MR. BARNES: Absolutely. Unfortunately, the government has not done so here, and has not done so in the other case that I know of. Under these circumstances ...

JUDGE: If [inaudible] with the contempt proceeding, if he didn't think that U.S. attorney would do his duty.

MR. BARNES: Absolutely. But I believe, still, the strongest remedy would be if law enforcement knows that they get caught, they don't get what their aim is. Their aim is to put Mr. Struckman in prison. If the script of that writer are, are methodology, that's the remedy they all get because that's their goal and their objective. They know that the chance of them being prosecuted [inaudible]. They know that no matter happens. On the other hand, ...

JUDGE: [inaudible] independent judiciary [inaudible] ...

MR. BARNES: An independent judiciary could do so. Unfortunately, there's not a track record of that doing so. The-- and this is a unique novel case. Included the Court could remand for certain kinds of proceedings. But one of those can be for-- to look at whatever remedies available including contempt sanctions or the Court recommending that [inaudible]-- a special prosecutor be appointed to investigate.

JUDGE: I would think here be quite a deterrent -

MR. BARNES: I think that could be.

JUDGE: - to [inaudible] agents if it had to be worth going to jail.

MR. BARNES: I think that absolutely, could be a deterrent. But a known deterrent that is were throughout our criminal jurisprudence, has been letting depriving them of the fruits of their illegality, which here, their goal was to put Mr. Struckman in prison. The, the remedy for Mr. Struckman only be a year out. I mean, I'll served five-year by the time this gets resolves. It's not like he's taking a walk. [inaudible] that [inaudible] taking the walk are the law enforcement agents in this case, and they don't deserve that in order that the Courts should, they affirm so.

JUDGE: Thank you, Counsel. Your time has expired. The case just argued will be submitted for decision. And we will hear argument, next in Crane versus the US Nuclear Regulatory Commission.

End of Document

© 2023 Thomson Reuters. No claim to original U.S.
Government Works.