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CONVICTIONS OF 4 REVERSED OVER JURY GAFF

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A district judge's "unintentionally misleading description" of his method for jury selection requires the reversal of four men's convictions for a multi-kilogram cocaine conspiracy, a federal appeals court in Chicago ruled Thursday.

The 7th U.S. Circuit Court of Appeals reversed the convictions because defense lawyers did not understand the manner in which the U.S. District Judge James H. Alesia was selecting potential jurors and therefore the lawyers were unable to intelligently exercise peremptory challenges.

"In this case, an unintentionally misleading description of the court's method of jury selection, which the court chose not to remedy after the confusion surfaced, compels us to reverse the convictions of four of the five appellants," Judge Jesse E. Eschbach wrote.

Brothers and former Chicago police officers Clement and Christopher R. "Dick" Messino and Dick's sons, Christopher B. and Paul Messino, were convicted in 1995 for their roles in a Florida-to-Chicago drug distribution conspiracy that spanned 11 years as well as other charges. They received sentences ranging from 19 years to life in prison.

However, a fifth defendant, William Underwood had pleaded guilty, and the 7th Circuit rejected his challenge to his sentence.

"In his prefatory description of the process, the judge told counsel that of the potential jurors who survived for-cause and peremptory challenges, the 'first 12' left would constitute the petit jury and the next six would be the alternates," Eschbach wrote.

"Based on the language used by the judge in his description, and on the visual impact of the selection process itself, defendants thought that the 'first 12' meant the first 12 jurors as they were seated in the jury box," Eschbach wrote.

"In fact, the judge meant the first 12 names as they appeared on a jury list that only he and his clerk possessed, which did not correspond to the order of seating in the jury box," the opinion states.

"At the end of voir dire, prosecution and defense counsel met in the judge's chambers to exercise their peremptory challenges against [some of] the 38 qualified jurors," the opinion states. "After reciting and striking the names of potential jurors challenged by each side, the judge began reading the names of the petit jury members.

"When the court named Pamela Boucher as juror nine, defense counsel erupted with comments indicating their confusion about the judge's method of ordering jurors and alternates," Eschbach wrote.

Defense lawyers thought Boucher was an alternate.

"Because so many potential jurors were excused for cause, there was a large discrepancy between the first 12 names on the judge's list, and the first 12 names defense counsel thought would be on that list," Eschbach wrote.

"Relying on their erroneous belief about the judge's list, defense counsel opted not to challenge two particular potential jurors on the belief that they were too far down the list to make it onto the petit jury and if anything, would be mere alternates," Eschbach wrote. "These two jurors, however, were among the first 12 on the judge's list, and sat as jurors at trial.

"Upon becoming aware of the confusion, the judge would have been wise to exercise an ounce of prevention to avoid what has turned out to be a troubling pound of cure," Eschbach.

The District Court apologized for the confusion but refused to "do it over," the opinion states. The judge could have distributed his list to the defense and prosecution and repeated only the peremptory challenge phase, the 7th Circuit noted.

"[W]e are convinced that the jury selection process here violated the defendants' Fifth Amendment due process rights by impairing the intelligent exercise of the peremptory challenges to which they were entitled under Rule 24" of the Federal Rules of Criminal Procedure, Eschbach wrote.

"Our decision today does not turn on a belief that the judge's method of jury selection was itself improper," Eschbach noted. "In fact, either method -- the one described by the court or the one actually used by the court -- would be a proper method of ordering the jurors, as long as all parties were given objectively adequate notice that this method would be used."

Judge Richard D. Cudahy concurred with Eschbach. But in a separate concurring opinion, Judge Joel M. Flaum said he questioned the majority's decision to use this case to cite [Swain v. Alabama, 380 U.S. 202, 219 \(1965\)](#), for the proposition that 'the denial or impairment of the [peremptory] right is reversible error without a showing of prejudice.'

"I am less than sanguine... about the continued vitality of Swain's most sweeping rhetoric," Flaum wrote. "For this reason, and because these appeals do not require us to decide the issue, I would not employ this case to endorse a broad rule of automatic reversal, applicable whenever a defendant has suffered an infringement of his right to exercise peremptory challenges."

Defense lawyer **Marc W. Martin** represented Dick Messino at trial and before the 7th Circuit.

"It's like every trial lawyer's worst nightmare to be saddled with a jury that we didn't expect or chose," Martin said.

"I think the appellate court very perceptively found that the district court could have prevented this," Martin said.

The government could decide to petition for rehearing, but if it doesn't the four cases go back to the District Court for a new trial, Martin said.

"We're still reviewing the decision, and we'll need to consult with Department [of Justice] lawyers in Washington, who were also involved in the appeal," said Randall Samborn, spokesman for the U.S. attorney's office here. "Certainly, we will be prepared to retry the case if necessary."

The cases are: William Underwood, Paul Messino, Christopher B. Messino, Christopher Richard Messino, and Clement Messino, Nos. 95-2155, 95-2925, 95-2926, 95-3052 and 95-3124.

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