

Supreme Court of the United States

Office Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

In the Matter of:

----- X
PHILIP JEROME STILES,
Petitioner,
v.
UNITED STATES OF AMERICA,
----- X

Docket No. 74

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Place Washington, D. C.

Date November 20, 1968

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Charles J. Rogers, Jr.

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- - -

WIMBERLY
INDICATOR

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 ----- x
 4 Philip Jerome Stiles, :
 5 Petitioner, :
 6 v. : No. 74
 7 United States of America, :
 8 Respondent. :
 9 ----- x

10 Washington, D. C.
 11 Wednesday, November 20, 1968.

12 The above-entitled matter came on for argument at
 13 11 a.m.

14 BEFORE:

- 15 EARL WARREN, Chief Justice
- 16 HUGO L. BLACK, Associate Justice
- 17 WILLIAM O. DOUGLAS, Associate Justice
- 18 JOHN M. HARLAN, Associate Justice
- 19 WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- ABE FORTAS, Associate Justice
- THURGOOD MARSHALL, Associate Justice

20 APPEARANCES:

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 Providence, Rhode Island 02903
 Attorney for Petitioner

23 ERWIN N. GRISWOLD
 24 Solicitor General
 Department of Justice
 25 Washington, D. C.
 Attorney for Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 74, Philip Jerome Stiles, petitioner, versus United States of America.

Mr. Rogers.

ORAL ARGUMENT OF CHARLES J. ROGERS, JR.

ON BEHALF OF PETITIONER

MR. ROGERS: Mr. Chief Justice, distinguished Justices of the Honorable Supreme Court of the United States:

I would like to indicate at the outset for the record that I would like to allocate my time in 20 minutes for argument and reserve ten minutes, if possible, for rebuttal. I would like to also for the record indicate that I was assisted in and truly appreciate the help from the Solicitor, John Knotty, III, of Rhode Island.

The petitioner, if it please the Court, is under sentence at the present time to a term of two years in an institution to be decided by the United States Attorney General. He was charged, tried and convicted, first, in the District of Rhode Island and in the Federal District Court for a wilful failure and a knowing failure to report for induction into the Military Forces of the United States.

The case, I feel, is accurately cited in the brief for petitioner. I submit to the Court that perhaps the issue in this case is whether or not the defendant in that case and the appellant here did, in fact, have notice of the draft notice

1 itself. The record, we feel, is replete and the testimony will
2 fully indicate that the petitioner in this case, Philip Jerome
3 Stiles, did not in fact receive the notice that was sent to him
4 by the draft board in Westerly, Rhode Island. The first contact
5 that the petitioner had with the Selective Service System of
6 the United States occurred on the 18th day of April 1963, where-
7 in he filled out his application pursuant to the regulations.

8 I indicate to the Chief Justice and the Honorable
9 Justices of this Court that his first communications with them
10 subsequent thereto was on 5-17-65, wherein the petitioner in this
11 case advised his local Selective Service draft board that he would,
12 in fact, be in the State of Tennessee and that the transcript
13 will indicate that that was received by the local draft board
14 on the 20th day of May 1963.

15 The matter of notice relative to receipt of the draft
16 notice has, in fact, been discussed in the case of Bartchy v.
17 The United States and I submit that this is a very important
18 case. The case does indicate that the defendant does have a duty
19 to properly advise his draft board of his address, but the case
20 indicates that he is not, in fact, required to remain in one
21 place, even if he is in fact anticipating the arrival of a draft
22 notice.

23 I submit that the petitioner in this case did not, in
24 fact, anticipate a draft notice. I must admit and do admit that
25 the petitioner in this case directed communications to the local

1 draft board that contained language that was less than desirable
2 from the point of view of the recipient. However, the defendant
3 did, in fact, and the appellant in this case did, in fact,
4 notify his draft board that he would in fact not be at the address
5 that was listed on his papers in the custody of the draft board.
6 And subsequent thereto he was sent an induction notice by the
7 draft board.

8 He notified them by letter on January 17, 1966, and
9 he advised the draft board that he would be away.

10 Q Did he in advising the draft board that he would be
11 away from his residence advise them where he would be?

12 A If it please the Court, he did not. But he did advise
13 them that he would, in fact, furnish addresses.

14 Q Did he do it later?

15 A He did, if it please the Court.

16 The notice was sent on the 17th day of January 1966,
17 and the draft board promptly on January 24, 1966, sent an induc-
18 tion notice to him ordering him to, in fact, report for induc-
19 tion on the 9th day of February 1966. This notice was, in fact,
20 received by a person other than the applicant. It was received
21 by his mother.

22 Additionally, I indicate for the record that it was
23 received at an address other than the address that it was sent
24 to. It was sent to 10 Fortin Road. It was received not by the
25 appellant, but by the mother of the appellant, and further than

1 that, it was received at an address other than the address of
2 the appellant.

3 Q Was it sent to that address wrongly by the Board? Did
4 the Board send it to his correct address?

5 A The Board did, in fact, send it to the correct address,
6 if it please the Court. It was received by another person at a
7 different address, if it please the Coard.

8 Q You mean the Post Office Department wrongly delivered
9 it to another place?

10 A No, sir.

11 Q What are the facts? Just tell us the facts.

12 A The facts, briefly, are that the communication was, in
13 fact, addressed to the appellant at 10 Fortin Road and that the
14 same was, in fact, received by a person other than the appellant
15 and that the return receipt received by the draft board indicated
16 that it was received at a post office box, Post Office Box 10,
17 if it please the Court, a different address.

18 I submit, further, that we are in compliance with the
19 so-called Bartchy Case. This matter, if it please the Court, I
20 feel is of great significance because this particular appellant
21 has, in fact, done everything he could. And I feel that I agree
22 with the case law of this country, that a person has a duty to
23 remain in compliance with the law.

24 And I submit that we did not anticipate any draft
25 notice, that the appellant did, in fact, notify the draft board

1 in advance of his departure.

2 Subsequent thereto, he notified the draft board from
3 Mexico. The transcript will indicate that he was not aware of
4 the issuance or acceptance of the induction notice until he
5 returned to the United States sometime after he was due for
6 induction.

7 Q What was the notification he sent from Mexico? What did
8 he tell them?

9 A He advised them as to an address in Mexico, if it
10 please the Court.

11 Q Where he could be reached?

12 A Yes, if it please the Court.

13 The communication listed his address for the time being
14 as listed as Coreo Veracruz, Mexico. It also contains a request
15 for a new draft card to facilitate his return to the United
16 States.

17 I feel that we have, in fact, in good faith adhered
18 to the regulations. The defendant's actions clearly show an
19 intent to comply and not an intent to fail to comply.

20 The Solicitor General in his brief cites a number of
21 cases with which most of these cases I agree. I submit that none
22 of these cases permit conviction and sentence without definite
23 knowledge. This is not a case where we are attacking classifi-
24 cation. It is one that very simply stated, if it please this
25 Honorable Court, he never received the notice.

1 I submit that all of the appellant's conduct should,
2 in fact, be taken into consideration for determination of whether
3 or not he is, in fact, guilty as charged.

4 Q Am I right in understanding that your defense, your
5 sole defense at the trial, was the defense of insanity?

6 A No, if it please the Court. I filed at the trial a
7 plea of not guilty certainly and I filed a subsequent plea of
8 not guilty by reason of insanity. The record, if it please the
9 Court, I feel is replete with testimony from both sides. I would
10 like to deviate for a moment to explain that, if it please the
11 Court.

12 The record will indicate that this appellant has, in
13 fact, been treated by psychiatrists and psychologists. I have
14 produced qualified psychiatrists in the State of Rhode Island and
15 I moved that the Federal District Judge for the District of
16 Rhode Island permit the defendant, in that case, the appellant
17 here, to in fact be examined.

18 This motion of mine was, in fact, denied by the trial
19 justice. Subsequent thereto, the appellant was, in fact, exam-
20 ined by three psychiatrists, members of the United States Navy,
21 and was found unfit for military service. The report of the
22 attending physicians is contained in the trial transcript and
23 before this case began, if it please the Court, the trial justice
24 knew because he had the report on the record that this young man
25 was, in fact, unfit and had, in fact, been declared unfit by

1 psychiatrists of the United States.

2 The prosecution in defense of the psychiatrists cer-
3 tainly differed as to the extent of the insanity. However, I
4 submit to this Honorable Court that both sides found that there
5 was, in fact, an emotional disturbance.

6 Q Is that the issue that you were raising, the so-called
7 insanity issue, whether he was emotionally unfit for military
8 service or were you raising a defense in conventional criminal
9 terms, that if you gave him the M'Naughton test or that he was
10 unable to distinguish between right or wrong or unable to control
11 his actions.

12 What sort of insanity defense were you making?

13 A If it please the Court, at the particular time, the
14 jurisdiction in Rhode Island was following the so-called M'Naughton
15 Rule.

16 Q Does the question of whether he was or was not mentally
17 or emotionally suitable for military service have anything to do
18 with the M'Naughton Rule except possibly it involved some of the
19 same criteria, but the standard is quite different, isn't it?

20 A I agree with Your Honor.

21 Q What does fitness or unfitness as an emotional matter
22 for military service have to do with the issues that were before
23 the District Court and are now before us?

24 A If it please the Court, at the trial level, it was a
25 clearly straight criminal defense.

1 Q On the M'Naughton basis?

2 A I filed a defense of not guilty by reason of insanity.

3 Q The M'Naughton test?

4 A The M'Naughton test was, in fact, applicable at that
5 time. I requested the trial justice to give to me the charge
6 of the American Law Institute rule. The charge wasn't given as
7 exactly requested by the American Law Institute rule.

8 My psychiatrist, if it please the Court, found that
9 the applicant in this case and the defendant in that case was,
10 in fact, insane. That was his conclusion.

11 The examining psychiatrist -- and I would like to
12 emphasize ---

13 Q Now you are saying "sane" and in your argument you
14 were saying that he was unfit for military service. What did
15 the psychiatrist testify to? Did he testify in terms of the
16 American Law Institute test or the M'Naughton test or did he
17 testify in terms of the military suitability?

18 A If it please the Court, the transcript will indicate
19 that as far as his military suitability goes, he testified that
20 clearly the defendant, appellant, was not suitable. He also
21 said that in his opinion that the defendant, in that case,
22 appellant in this case, was not competent.

23 If it please the Court, the transcript would, in fact,
24 indicate that they found him unfit for military service from a
25 military point of view and even though they have but one hour to

1 examine this young man, the transcript would indicate that there
2 were many areas that were not, in fact, touched upon. They
3 felt there was in fact an existence of a chronic emotional dis-
4 turbance of long standing, if it please the Court.

5 The trial justice did, in fact, write to me my request
6 for charges under the American Law Institute Rule, thereby makin
7 the ALI Rule the law of that case, while the law of the juris-
8 diction remained ---

9 Q You are here urging that the trial judge committed a
10 reversible error by failing to find that the judgment against
11 the defendant should have been not guilty by reason of insanity?

12 A In effect, yes, Your Honor. I feel that the tran-
13 script would, in fact, and does, in fact, bear out the position,
14 if it please the Court.

15 Q Mr. Rogers, I notice you opened and said you were
16 going to give only 20 minutes. You haven't yet touched on the
17 issue that I must say to you in all candor is the only one that
18 really concerns me in this case, and that is the refusal of the
19 trial judge to postpone the trial.

20 Are you going to get to that?

21 A Yes, Your Honor, I will address myself to that imme-
22 diately.

23 If it please the Court, in the ordinary criminal case,
24 many things happen. The United States Attorney had, in fact,
25 argued against me in my motion to have the then defendant, now

1 appellant, examined as to suitability. Subsequent thereto, he
2 was, in fact, examined at the United States Naval Hospital at New-
3 port and we had between us a report that indicated clearly un-
4 suitability for service.

5 I went on the record, if it please the Court, out of
6 the presence of the jury and so advised the trial justice. The
7 transcript will, in fact, indicate that, and I construe the
8 remarks of the Assistant United States Attorney, as in fact being
9 a motion to either dismiss or a motion to postpone.

10 The trial justice did not, in fact, recognize it as
11 a motion to, in fact, dismiss. I concede and I agree that this
12 is a discretionary matter with the trial justice. However, I
13 submit that it is error for him to fail to recognize it as such
14 a motion.

15 Additionally, in that the plea of not guilty by reason
16 of insanity had, in fact, been put in issue and the fact that the
17 United States Attorney did, in fact, indicate and clearly indi-
18 cated on the record that the appellant, then defendant, was in
19 fact willing to submit for induction at that particular time,
20 and I asked the Court to bear that in mind, that the transcript
21 does, in fact, indicate that from the lips of the United States
22 Attorney came the words "In that he is, in fact, unwilling to
23 report for induction, we feel no further prosecution was in
24 order."

25 Q Is this the situation as you saw it at the time, if

1 the Government were to find on an examination that he was not,
2 in fact, fit for induction, his having said, "I will go through
3 this examination. If they find I am fit for induction, I will
4 be inducted," the Government would have dismissed this prosecution.

5 Is that it, and that you wanted an opportunity to go
6 through this examination and the trial judge refused you the
7 opportunity? Is that what it all comes down to?

8 A No, if it please the Court.

9 Q Let me ask you this: I am looking at this colloquy
10 between the trial judge and Mr. Gearon, who I gather represented
11 the Government.

12 A Yes, Your Honor.

13 Q Mr. Gearon says, "This is the position that if this
14 man submits to induction, in all probability he will not be
15 acceptable anyway. But in view of the fact that he is unwilling
16 to go down to induction, the Government would take the position
17 and the United States Attorney has recommended that there will
18 be no further prosecution because it would really, in effect,
19 if it were a person who could be eligible for the Armed Services,
20 there would be a point in going forward with it. But insofar
21 as this person, while charged with failure to report for induc-
22 tion, which is a serious crime . . ." et cetera, and then the
23 Court says, "Are you ready to go to trial or aren't you?"

24 Then I thought your position was, although the Govern-
25 ment was willing to postpone the trial and not even to go forward

1 with the prosecution if, in fact, it were determined that he
2 was not fit for induction, that the trial judge didn't give the
3 opportunity to have the examination which would determine that
4 fact. Is that right? Is that right or not?

5 A It is not, Your Honor. The examination had already
6 been accomplished at that time and the trial justice well knew
7 of the findings of the three Navy psychiatrists at that time,
8 if it please the Court.

9 This was immediately before trial. We went to trial
10 approximately two minutes later.

11 Q The Court said, "I see no need of it. Let's try this
12 case and get it behind us."

13 A Yes, Your Honor.

14 Q That is what the judge did say?

15 A Yes, Your Honor.

16 MR. CHIEF JUSTICE WARREN: Mr. Solicitor General.

17 ORAL ARGUMENT OF ERWIN N. GRISWOLD

18 ON BEHALF OF RESPONDENT

19 MR. GRISWOLD: May it please the Court:

20 This is a troublesome case. They say that hindsight
21 is always 20/20 and there are at least a half a dozen points
22 where I wish it had been handled differently and might not have
23 come here.

24 However, in reviewing it in our office, although there
25 are a number of critical points, we found none where it seemed

1 to us appropriate for officials in the Executive Branch of the
2 Government to do anything, but to present the case to the Court.

3 There are several critical points. There are some
4 issues which I think are not serious and which I will leave to
5 the brief. It seems to me clear, for example, that the defendant
6 was not "insane" within the legal definition of that term, that
7 there is virtually no evidence that he was insane, and the jury's
8 verdict that he was not insane should not be subject to review.

9 It also seems to me clear that proof that he was
10 "unfit for Military Service" is irrelevant in this particular
11 prosecution. Otherwise, any person who had a health impairment
12 could simple ignore ---

13 Q Apartment, Mr. Solicitor General, from the prosecution
14 as such, I gather that a finding that he was unfit might have a
15 bearing, might it not, on the issue of whether the trial should
16 have been postponed?

17 A The question whether the trial should be postponed is
18 another issue.

19 Q Apartment from the merits of the prosecution itself,
20 the fact that he was not fit for induction may not have been
21 relevant on the issue of guilt or innocence. But it might well
22 be, might it not, relevant on the issue as to who ---

23 A Yes, Mr. Justice, and that is one of the two issues
24 which I am picking out of the group. I am simply trying now to
25 dispose of others. Perhaps I didn't make it clear enough that I

1 thought that that was a different issue than the one as to
2 whether the trial should have been postponed.

3 Then there was the argument about the authority of
4 the clerk of the Draft Board to issue the notice. I don't think
5 that is an issue. It seems to me that there are two principal
6 places where there are problems. The first arises out of the
7 form of the statute which makes it a crime if a person knowingly
8 fails or neglects to or refuses to perform any duty.

9 And the question of the effect of knowingly, I would
10 point out that the indictment goes even further. The indictment
11 says, "Wilfully and knowingly." The statute only requires know-
12 ingly.

13 I don't know whether there is any difference. I think
14 it is arguable that knowingly in that statute doesn't quite
15 mean perception within the mind, but means that the circumstan-
16 ces were such that he knew he was doing wrong.

17 With respect to that, it is probably clear that he
18 did not in fact himself receive or know about the notice to
19 report for induction. So we do have a case in which the Govern-
20 ment has to maintain that he knowingly failed to report for
21 induction, although he did not have actual knowledge of the
22 notice to report for induction.

23 There is a long history in this case going back to
24 1963 when the defendant filed a printed form in which he filled
25 out his name with the Draft Board, in which he declared his

1 disaffiliation from the draft system. He was, however, at that
2 time a student and the Board continued his 2-S student deferment.

3 In the fall of 1965 he ceased to be a student. The
4 Board sent him on November 29, 1965, an order to report for a
5 physical examination. He ignored that. He did not report.

6 The Board, it seems to me, used a certain amount of
7 calm at that time. On December 21, 1965, they sent him a second
8 order to report for a physical examination on January 6, 1966,
9 and the record is clear that he received both of these notices
10 and that he failed to report on January 6, 1966.

11 On January 11, five days later, he was declared
12 delinquent under the regulations of the Selective Service System.
13 A delinquency notice was sent to him and the record is clear
14 that he received that delinquency notice.

15 The particular notice which was sent to him was a
16 somewhat old form. We have examined it in the record. It advised
17 him that he was subject to criminal penalties. It did not advise
18 him, as the regulations plainly say, that he would be subject to
19 immediate induction ahead of even volunteers.

20 On January 14, he was ordered for a third time to report
21 for a physical examination, this to be on January 20, 1966. It
22 was on January 17 that he sent to the local board the letter
23 which appears on page 48 of the appendix. I think I will read
24 the whole letter. It is somewhat bizarre.

25 "Dear Sirs:

1 "Your threatening letters continually arrive, tell me
2 exactly what to do and informing me of the penalties for not
3 complying with your directives."

4 That shows that he was aware that he was in a somewhat
5 serious situation.

6 "In response I can only repeat my previous assertions
7 that I am unwilling to be part of the organized murder and
8 threat of murder which is the basis of any army."

9 I might point out, however, he has never made a claim
10 of conscientious objection at any time either in the record or in
11 connection with the trial.

12 "There are better forms of communication than imper-
13 sonal printed forms filled with orders and threats. If the man
14 is to function socially as something more than a self-destructive
15 machine, the improvement of communication is of great importance.
16 If you wish to discuss these matters further, perhaps we could
17 arrange a mutually convenient time and place. I hope that you
18 folks rise above crude attempts at manipulation and engage in
19 some constructive interaction.

20 "Love, Bill Stiles."

21 And then a postscript: "I am soon going to take a
22 vacation trip of a month or two. I tell you this because my
23 leaving town with no definitive forwarding address might other-
24 wise seem evasive. Don't worry, I will send you postcards let-
25 ting you know how I am getting along."

1 He then did leave town apparently about January 20.

2 The record contains some evidence that he was very much concerned
3 about the reporting for the physical examination on January 20,
4 that he came pretty close to doing it, but that he finally
5 pulled out.

6 It was on January 24th that the Board sent him the
7 notice to report for induction on February 9th.

8 Mr. Rogers has said something about this being received
9 at a different address to which it was sent. That is true, but
10 I think it is quite immaterial. The place where it was addressed
11 was 10 Fortin Street, Westerly, Rhode Island, and it was received
12 at Post Office Box 10, Westerly, Rhode Island, which is the
13 place where the mail for 10 Fortin Street is delivered, because
14 the people who live there have a post office box. It was received
15 by his mother and signed for by his mother.

16 The record is quite clear that the mother didn't open
17 it and that the contents were not communicated to her son. I
18 may say, too, that this was his last known address and the
19 record includes the regulation of the Selective Service System
20 that the mailing of any order, notice or blank form by the local
21 board to a registrant at the address last reported by him to the
22 local board shall constitute notice to him of the contents of
23 the communication, whether he actually receives it or not.

24 He on February 11th sent a postcard to the draft board
25 from Knoxville, Tennessee, in which he said he was still thinking

1 of them. Then on February 10th he mailed a postcard from Vera-
2 cruz, Mexico, which is on page 51-52 of the record. I would
3 simply point out that the address he gave there in Spanish is
4 simply General Delivery Veracruz, Mexico, which is not a very
5 permanent address.

6 He returned to Rhode Island about the middle of March.

7 I find it difficult to say that the record contains any
8 evidence so that the jury could have found that he actually knew
9 of the notice to report for induction. It does seem to me that
10 it contains adequate evidence to support a determination by the
11 jury that he was well aware that such a notice was very likely
12 to come and that he took steps to obstruct the communication of
13 the knowledge to him.

14 In the Bartchy Case to which Mr. Rogers has referred in
15 319 U.S. involving a seaman who did take steps to see that the
16 draft notice came to him, he gave the Houston address of his
17 union. He informed the union that he could be in New York and told
18 them to send it to the union office in New York. The Houston
19 office did send it to the New York office. The New York office
20 made a mistake and instead of delivering it to him, sent it back
21 to Houston.

22 When he called for mail in New York, they said there
23 was none. In that case, the Trial Court acquitted him of failure
24 to report for induction, but convicted him of failure to keep the
25 board informed as to his address. This Court reversed the

1 conviction on the latter point, concluding that he had taken
2 appropriate steps and that it was not his fault that it had not
3 gotten to him.

4 In the course of the opinion, however, the Court said,
5 speaking through Mr. Justice Reid on page 489, "Regulation, it
6 seems to us, is satisfied when the registrant in good faith pro-
7 vides a change of forwarding addresses by which mail sent to
8 the address which is furnished to the Board may be by the regis-
9 trant reasonably expected to come into his hands in time for com-
10 pliance."

11 It is quite clear here that he did not do that. The
12 District Court charged the jury that they had to find that he
13 knowingly and willfully failed to report for induction and the
14 jury found him guilty. On the whole, it seems to me that there
15 is evidence to support that verdict. I think I am concerned
16 about the consequence of a decision to the contrary, because I
17 can see the article in the Selective Service Law Reporter which
18 will advise people that when you know that the draft notice is
19 about to come, write your Board that you are about to take a
20 vacation and you will let them know and be sure that you see to
21 it that whoever is at home to receive the mail doesn't open it
22 and doesn't let you know anything about it.

23 If that is a way to avoid the obligation to report for
24 induction, it could be a fairly serious matter.

25 Let me turn now to the other aspect of the case which

1 I think was the part that first gave me concern when I knew about
2 the case. Anyone who has been an educational administrator for
3 a good part of his life has had contact with situations like this.
4 It is very hard to know just where to draw lines here.

5 It was obvious this young man needed help and certainly
6 Mr. Rogers has devoted a great deal of his time and energy and
7 skill in providing that help. I am rather thinking of help at
8 an earlier stage.

9 Q Do the records show wherein this petitioner was a
10 student?

11 A Yes, the record shows that he was classified 2-S.

12 Q He was a student. But does it show where he was a
13 student?

14 Q It appears as Columbia University.

15 A It says Columbia University at the time of trial.

16 In the record at page 73, the FBI agent testified that
17 he in fact registered at the University of Rhode Island and has
18 failed to attend classes and then as a result failed the course,
19 and whether he intended to be a student at the University of
20 Rhode Island, I don't know.

21 At the time of trial he was a student at Columbia
22 University. Whether he was successfully pursuing that, of course,
23 again I don't know.

24 The colloquy I obviously am not going to take time to
25 read it all. It is in the record at pages 20 to 23. It is set

1 out in full in our brief at pages 16 to 18. As an officer in
2 the Executive Branch of the Government, I could not bring myself
3 to the conclusion that that was a motion for a continuance. Even
4 if it were a motion for a continuance, the question of its grant-
5 ing by many decisions and by proper judicial administration is a
6 matter for the discretion of the trial judge.

7 Almost never, I suppose, is a denial of a continuance
8 regarded as error. I suppose you can amend that and say for
9 the sound discretion of a trial judge. Whether it was sound here
10 or not, I don't know.

11 As I have indicated, it is easy to second guess. My
12 own wish is that the Judge had said, "Well, let's let this go over
13 a couple of days and see what happens."

14 He didn't do that. I find it difficult to see how an
15 officer of the Department of Justice can say that the Judge did
16 not act in a properly judicial manner in making that determina-
17 tion. That passage is very appealing. It was very appealing to
18 me, as I looked into it and examined it, I did think it appropriate
19 to bring it specifically to the Court's attention in the brief
20 in opposition which we filed here. But I could not bring myself
21 to the conclusion that there was either a motion for a continuance
22 or an abuse of discretion in denying it if it was treated.

23 Q Mr. Solicitor General, on page 19, Mr. Gearon says, "We
24 would continue it." He used the word "continue."

25 A Yes. He says, "We would continue." Whether that is a

1 motion for a continuance, I don't know. I don't greatly care
2 because even if it is, I think the judge had discretion to deny
3 it.

4 Q But I am also worried that the judge's language is sort
5 of "gung-ho" language.

6 A Either he is guilty or he isn't.

7 Q "Let's get it behind us." Let's try this case. Let's
8 get it behind us.

9 A I agree, Mr. Justice. I wish it had't been handled the
10 way it was. But I accept in terms of what is sometimes referred
11 to in the books as this Court's supervisory power over the admin-
12 istration of criminal justice.

13 Q Mr. Solicitor General, does this accurately state your
14 position? That the best you can make out of this colloquy is
15 that the Government representative would not have objected to a
16 continuance if the judge found that? On the facts as he and Mr.
17 Rogers laid them out for the judge, it was justified.

18 A I think that is exactly what I get out of it.

19 Q That is the most you can get out of it?

20 A I think that is the most I can get out of it. I think
21 I can properly say I have no objection if anybody else can get
22 more out of it. But that is the most that I could get out of
23 it.

24 MR. CHIEF JUSTICE WARREN: Mr. Rogers.

25

1 REBUTTAL ARGUMENT OF CHARLES J. ROGERS, JR.

2 ON BEHALF OF PETITIONER

3 MR. ROGERS: If it please the Court:

4 With reference to this motion to continue, I wish to
5 make it crystal clear to this Court that there was absolutely no
6 doubt in my mind that I was going to trial immediately. I would
7 like the Court to notice that I was ready enough to have this
8 Court on the record.

9 If it please the Court, I am certain that, all being
10 practitioners, we have been before a Court and it doesn't take
11 too much powers of observation to know when you are going to
12 trial and when you are not going to go to trial. I would indicate
13 also for the record that the Solicitor General has, in fact, read
14 these communications that I brought to the attention of the
15 Court.

16 I indicate to the Court that now clearly there is no
17 doubt in my mind that the additional plea of not guilty by
18 reason of insanity was clearly necessary under those circumstances.
19 I think that the record will indicate the accuracy of it. I know
20 that a defense of insanity was applicable here.

21 The Solicitor General does, in fact, concede it would
22 appear to me that the young man had no notice. He indicates that
23 this young man failed to show up for physical examination. I
24 submit to the Court that he wasn't on trial for failing to report
25 for physical examinations. I concede that.

1 He was charged with not reporting for induction. Addi-
2 tionally, the Solicitor General concedes that the notice that the
3 then defendant, now appellant, received was not one that con-
4 tained notice of immediate induction into the Armed Forces.

5 I submit that it is very important to realize that all
6 of this voice conduct should, in fact, be taken into consideration
7 Did he or did he not comply with the requirements as laid out in
8 the Bartchy Case? To the best of my humble knowledge, there is
9 no statute and there is no case in existence in this country
10 that will find someone guilty and sentence him -- and this young
11 boy is under sentence for two years in a Federal prison -- and
12 I submit that there is no statute or no case in existence in the
13 United States that will charge, try and convict somebody and
14 sentence them for an offense committed that they didn't know
15 about.

16 I submit that factually the Solicitor General is incor-
17 rect when he says all you have to do to avoid the draft is to
18 send some ridiculous letter and I say ridiculous letter such as
19 my client sent and leave town. This is not true. It is neces-
20 sary, clearly, to adhere to the requirements of the so-called
21 Bartchy Case.

22 This country will not permit one to avoid military
23 service in this manner. It is necessary, I feel, that when a man
24 does not, in fact, comply with the requirement of the Bartchy Case
25 to put him in a jail. But when he does comply with the

1 requirement of the Bartchy Case, I feel clearly, Your Honor, that
2 the conviction should, in fact, be reversed and the young man
3 should be set free.

4 I trust that I have shown that he did, in fact, comply.

5 Q You are not really suggesting that petitioner in good
6 faith left a series of forwarding addresses?

7 A I do, Mr. Justice Fortas. I truly do. I feel and I am
8 well aware, if it please the Court, that you personally have tried
9 many cases. I know that.

10 Q That wasn't my question. My question was whether it
11 is your contention, based on this record, that the judge should
12 have instructed the jury to bring in a verdict of not guilty
13 because your client in good faith left a series of forwarding
14 addresses at which he might have received the notice, had the
15 Board been diligent in giving him notice.

16 A Yes, I am, if it please the Court. There are other
17 cases in this area that the Government cited, *Graves v. The United*
18 *States* at 252 Fed. (2d) 878. In that case somebody was off
19 tending bees, if it please the Court. He requested a 60-day
20 delay and left.

21 He was living in his automobile or what-not. He was
22 off tending his bees. His mother also received that draft notice.
23 I submit that this young boy did not have any knowledge, any
24 prior knowledge, that any communication was, in fact, coming to
25 him.

1 The Solicitor General indicates that his last communi-
2 cation did not indicate immediate contact from the Draft Board.
3 In the Bartchy Case, if it please the Court, it indicates clearly
4 that you must be expecting this. This young man had no idea that
5 the United States Army wanted him.

6 Additionally, he did in fact send them notice such as
7 it was. He sent them notice on prior occasions and, on subse-
8 quent occasions, also.

9 If it please the Court, as I indicated for the record
10 when I began my argument, the first thing this young man did after
11 registering for the draft was to advise him way back in 1953, if
12 it please the Court, that he was leaving to go to Tennessee.
13 I feel his actions must be considered as a whole.

14 I submit that his actions, although he may not have sent
15 them an address -- at WXYZ Street, Apartment 4, et cetera -- he
16 did, in fact, provide them the best possible information he could
17 in fact provide.

18 Q How do you explain the two instances where he declined
19 to appear for the physical examination?

20 A I have nothing factual, if it please the Court, to
21 back up what I say. I submit that he very probably should have
22 been charged by the United States Attorney for a violation of
23 that section of the Selective Service law and the only thing I
24 can do, if it please the Court, is to indicate that my personal
25 explanation of why he didn't show up, I submit he was sick.

1 That is why I filed the defense of not guilty by reason
2 of insanity, if it please the Court.

3 Q Leaving the insanity aside for the moment, the origi-
4 nal letter that he wrote to the Board saying he didn't want to be
5 associated with murderers and so forth, and his refusal on two
6 occasions at least to appear for physical examinations, shouldn't
7 those be taken into consideration in determining whether these
8 postcards and letters that he got from Tennessee with no address
9 and the general delivery address at Veracruz, shouldn't those
10 things be taken into consideration in determining whether he was
11 actually trying to comply with the regulations?

12 A Yes, Your Honor. All of his conduct should be taken
13 into consideration. But I submit that no emphasis should be
14 placed on the bad, the ridiculous, the foolish than his other
15 attempts, if it please the Court, and his other activities.

16 I want to thank this Court for allowing me to have the
17 time.

18 MR. CHIEF JUSTICE WARREN: Mr. Rogers, the Court wants
19 to thank you also for accepting the representation of this indi-
20 gent defendant. We consider that public service.

21 We thank you, too, Mr. Solicitor General, for your
22 very fair representation of the Government in this matter.

23 (Whereupon, the above-entitled oral argument was con-
24 cluded at 11:55 a.m.)