In the

Supreme Court of the United States

C. 2

UNITED STATES OF AMERICA,

Petitioner,

vs.

CHARLES PFIZER & CO., INC., AMERICAN CYANAMID COMPANY and BRISTOL-MYERS COMPANY,

Respondents.

No. 70-72

Washington, D. C.
January 12, 1972

Pages 1 thru 41

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

EM

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioner,	:	
v.	:	No. 70-72
CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY and BRISTOL-MYERS COMPANY, Respondents.	:	

Washington, D. C.,

Wednesday, January 12, 1972.

The above-entitled matter came on for argument at 1:16 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DANIEL M. FRIEDMAN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioner.

JOHN E. F. WOOD, ESQ., 140 Broadway, New York, N. Y. 10005, for the Respondents.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 70-72, United States against Charles Pfizer & Company, and others.

Mr. Friedman, you may proceed.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE PETITIONER

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

After a seven-week trial a jury, sitting in the Southern District of New York, convicted the three respondents, Charles Pfizer & Son, the American Cyanamid Company, and the Bristol-Myers Company, under an indictment in three counts, with violating Sections 1 and 2 of the Sherman Act, by fixing prices and excluding competitors in a market known as broad-spectrum antibiotic drugs.

Each of the respondents was fined the maximum of $50,000 on each count; a total of $150,000 fine on each respondent.

Broad-spectrum antibiotic drugs are a group of drugs that are unusual, they came in fairly recently, because they are effective against a wide variety of microbacterial infections.

Each of the three respondents in this case, plus another firm, Parke, Davis, that was not indicted, had a broad-

spectrum antibiotic drug during the period involved in this case. Each of these drugs was patented. Most of them are fairly well known. One that Your Honors are probably familiar with is something called Aueromycin, which is the drug of Cyanamid.

The drug that is principally involved in this case, the focus of this case, however, is the last of these broad-spectrum antibiotics to come on the market, a drug called tetracycline.

And the basic theory of the government's case in this case was that the respondents, together with the Upjohn Company and the Squibb Company, engaged in a conspiracy to limit access to the broad-spectrum antibiotic market and to fix prices on broad-spectrum antibiotics.

A divided Court of Appeals for the Second Circuit reversed this conviction. The court held that certain errors made by the District Court in its instructions to the jury required a new trial.

And the government has brought this case here on certiorari because of its concern over the way the Court of Appeals reviewed and evaluated the instructions in this case. We think, as I shall develop, that the basic error committed by the Court of Appeals in this case was in its failure to view the instructions in their entirety, in the context of the entire case.

Q Mr. Friedman, are you asking this Court to simply substitute its judgment for the Court of Appeals as a reviewing court in the first instance?

MR. FRIEDMAN: No, Mr. Justice, we think what we're suggesting -- we're asking this Court to hold that the Court of Appeals employed the wrong standard in considering the validity of this charge. We are not asking this Court, of course, to substitute its judgment for that of the Court of Appeals.

And the flaw we think that the Court of Appeals committed in this case was that it didn't look at the thing in the context, it found particular phrases which it thought were improper, it said that the judge had not stressed certain factors sufficiently, and had streesed others too much. This is the basic flaw we think that was committed, which I will come to develop.

Now, there's no question in this case, as the Court of Appeals recognized, as to what happened. The problem in this case is as to what inferences should be drawn from the circumstantial evidence.

Q Well, Mr. Friedman, it will help me if you would -- you've touched on it, but perhaps there's more to it -- if you would state what is the standard this Court is to apply when it reviews the action of the Court of Appeals of this kind. You've said that they must look at the instruction as a whole and not by bits and pieces. That isn't, for me at least, really

a standard. How do we --

MR. FRIEDMAN: Well, I think a fair way to put the standard is to see whether, looked at as a whole, the charge properly put to the jury, the job it was to do, explain to it the basis on which it was to decide the case. That is, obviously, in hindsight, various judges, appellate judges may decide that it would have been better to state one thing one way rather than the other way; that if they had been charging the jury they'd have emphasized one thing rather than the other. But I think the basic question, the basic question is looked at as a whole, it has to be looked at also in the light of all the evidence before the jury, because the jury obviously considered the instructions in the light of the evidence that was presented. Looked at as a whole in the entire case, did this charge tell the jury what it was supposed to do, what kinds of decisions it was supposed to make, on what basis was it to make this decision, how was it to consider this voluminous evidence before it?

I think that's the thing, and, if I may just say so, with all due respect to the Court of Appeals, this is a lengthy charge, the charge occupies 65 pages in the printed record, this charge took the District Judge, Judge Frankel, three hours to develop, to deliver.

I think it's an exemplary charge. I really think it's completely fair. I don't think it's a fair criticism of

it that it may sway the jury. The judge tried to do everything he could to be impartial in this charge, he set it out in detail; and, indeed, the Court of Appeals at no point suggested that there was any legal error in the charge, in the sense that the court applied the wrong legal theories, or anything like that. It's just basically -- basically, it seems to us, that what you have here is that the Court of Appeals is here substituting its judgment for that of the trial court as to the emphasis to be given to the particular factors as to the way in which certain things should be set.

And of course it was the judge who presided at this case who saw all the evidence, who was really in the best position to know how to frame his charge to the jury.

Now, if I may just briefly indicate what the facts in this case show;

During the period of the indictment -- the indictment period covered from 1953 to the middle of 1961 -- Pfizer, which had the patent on tetracycline, licensed only two other firms to make tetracycline, to manufacture it. That was the respondent Cyanamid and the respondent Bristol.

It also licensed only those two, plus the two alleged co-conspirators -- the two co-conspirators, Squibb and Upjohn, to sell tetracycline. This is all alleged in the indictment.

In addition, there's no dispute that during the entire period of this indictment only one firm, Bristol, sold tetra-

cycline in bulk, that is, not selling it to the drug trade in the normal capsule doses as in other doses, it was selling it in lump product, and that Bristol sold in bulk only to the two co-conspirators, Squibb and Upjohn.

Now, in addition to that, the evidence shows that during the period of this conspiracy, most of this period, from 1953 to 1960, and indeed for the two years before 1953, the prices of all five of the conspirators on all four broad-spectrum antibiotic drugs was substantially unchanged.

That is, the typical example, the most popular dosage form was a bottle containing 100 capsules, and the pricing system they used is they had a price to the customer, to the person who gets the prescription, and then they gave discounts.

Well, throughout this whole period, all of these five companies on all of these four antibiotic drugs charged $30.60 to the druggist for this 100-capsule bottle. And this price remained static for a nine-year period, despite the following facts: that shares of the market shifted, one of them got more, the other one got less.

Despite the fact that, for example, Pfizer, who was a low-cost producer, in the period from 1958 to 1960, saw its share of the market drop from 22 percent to 15 percent, while, at the same time, Upjohn, that was a high-cost producer, increased its share from 15 percent to 22 percent.

In addition to which, the evidence shows that there

were substantial cost variations among the five co-conspirators, and, indeed, the cost of producing these drugs during the period was rapidly and substantially dropping, but, despite this, no variation in the prices.

Now, the government's theory, as I will develop in a minute, is that what you had here was a series of implied agreements, the first of which was reached between Pfizer and Cyanamid, as the result of a settlement of a patent interference proceeding in 1953, and then another series of agreements reached between Pfizer, Bristol, Squibb, and Upjohn in December of 1955 when patent infringement litigation, that Pfizer had brought against the last three of these people, was settled.

As I say, there's no question what happened. And the government's theory of the case is that there were these implied understandings and agreements under which the parties agreed, first, that only the three respondents would be licensed to manufacture tetracycline; secondly, that only those three plus Squibb and Upjohn, would be licensed to sell it; that only Bristol would be authorized -- would be permitted to sell it in bulk, and that Bristol would in turn sell only to Squibb and Upjohn. That's one element.

And, secondly, that during this entire period they agreed to and did maintain identical prices.

Now, the question before the jury -- the question before the jury -- was whether this admittedly identical

conduct in all of these things that happened, whether this was the result of a conspiracy, of an agreement or understanding, or whether it was the result of independent business judgment by each of these individual firms, as they contended.

There was a vast amount of evidence introduced at the trial on this issue. This is one of these typical big cases that we get frequently in the antitrust field. The record that is spread out here on the table before the Court contains 21 volumes of printed testimony; it's more than 12,000 pages. There was detailed and comprehensive evidence put in on virtually every aspect of the case, evidence relating to pricing, in relation to profits, relating to negotiations on the settling of these patent suits, many meetings that the parties had, there is a whole, great deal of testimony relating to the circumstances surrounding the issuance of the patent to Charles Pfizer & Son, in which the government introduced evidence indicating that in connection with obtaining this patent misleading statements had been made to the patent office. And that information material to the patent office's determination had been withheld.

Much of this information, of course, was technical. It was highly scientific. And, as to be expected, the defendants offered detailed explanations as to why they did what they did.

First, their officers denied there had been any

agreements or understandings, and then they gave lengthy explanations to why, as a matter of business judgment, they did what they did.

And the court repeatedly told the jury that it was for them to decide, on the basis of all the evidence, of all of the evidence, whether this was the result of an agreement, of concerted action, or of independent business judgment.

I would just like to read one instance to the Court, one excerpt from the charge at page 4987, which I think is rather typical ofthe way the court put it to the jury. And this related to the discussion of the question of issuing the bulk sales, making bulk sales, and what Judge Frankel charged the jury was:

All relevant evidence and your recollection of it will be part of your consideration as you undertake to consider whether this situation concerning bulk tetracycline reflected only normal and lawful business conduct by the several companies involved or whether it tends to show the presence of the conspirary the government alleges, or whether it shows nothing either way.

And that same theme was reiterated by the judge in his charge at least 15 or 20 times, as he took up each of the 12 means that the government had alleged were the way in which this conspiracy was effectuated, each one, after he explained the theories, explained the arguments, explained the -- commented

briefly on the evidence, he then pointed out that it was in the final analysis for the jury to give whatever weight they thought was appropriate to that evidence.

The charge we think was an exceptional charge, as I have indicated, it was clear, it was fair, it was objective, and explained to the jury on what basis they'll reach their decision.

Now, we have lengthy briefs in this case, in which are discussed at considerable length the various alleged errors in the charge, obviously it's not feasible in the brief compass of oral argument to deal with them in detail; and I will come to two or three of them in a moment that are illustrative; but I'd just like, I think it would be helpful in considering the sufficiency and the adequacy of the charge to put a little of this conspiracy into its proper factual framework.

The first broad-spectrum antibiotic drug came on the market in 1948 and by 1953 there were three broad-spectrum drugs available. Pfizer had one, Cyanamid had one, and Parke, Davis, which the government said was not a conspirator and it recognized that in this case, had the third one.

In 1953 -- and in 1952 the drug that Parke, Davis had had gotten some unfortunate medical reports, as a result of which its sales dropped sharply. In 1953 Pfizer and Cyanamid together had approximately 85 percent of the broad-spectrum antibiotic market. This business was extremely profitable to them,

representing a major if not the major share of their profits and was also a major part of their total sales.

Now, in the summer of 1952 tetracycline was discovered. Word of this got around in the industry and it became quite apparent that this was a great advance in the broad-spectrum antibiotic field, and a drug that was likely to catch on very quickly. And within two years after its introduction, I think it had something like 50 percent of the broad-spectrum antibiotics.

But the existence of tetracycline, of course, threatened the market position that Pfizer and Cyanamid had at that time, because if this were a superior drug and if in fact this drug was not patentable or could not be patented, and this drug came on the market with no patent protection, it was obvious it would be promptly widely sold, and a number of companies would come into it, and what you would have, basically, the record indicates, what you had in the case of penicillin. Penicillin was not a patented drug, penicillin had a lot of sellers, but price went down and down and down, and the result of this is, for example, Bristol, at the time, we say, it joined the conspiracy in 1955, that practically its whole business was penicillin; it was losing a lot of money, it was in desperate straits.

Pfizer, Cyanamid and Bristol, each filed patent applications, on beginning in 1952 and continuing to 1953, and

Pfizer and Cyanamid had reason to believe that an interference was about to be declared at the patent office, that is, the patent office was going to determine which of these had priority of invention.

So they got together and settled the case, and they settled it on the basis that they would exchange proofs of priority, that whichever one turned out to be the winner would get the patent, the winner would license the loser, they would exchange knowhow, and, in addition, at this point Pfizer had no tetracycline, only Cyanamid did, and Cyanamid agreed to sell to Pfizer a very large amount of bulk tetracycline to enable Pfizer to get right on the market, because Pfizer was concerned that if it did not have immediate tetracycline while Cyanamid did, Cyanamid would get what they call leadtime, they'd get their product onto the market, they would get the doctors used to prescribing this and this would result in putting them at a tremendous disadvantage.

They sold them a supply of many months, it came to a total of $3,800,000, and they began shipping this drug even before the interference was declared.

Well, things didn't work out quite as they had thought originally, after Pfizer -- oh, let me go back a bit. They did this, they exchanged proofs and Cyanamid conceded priority to Pfizer; Pfizer claimed the concession. At this point Pfizer an icipated it would be shortly getting

the patent. And it was around this point that the chief executive officer of Pfizer had a meeting in his plant with a group of securities analysts, and after the end of the meeting there were some questions and answers and he was asked if he got the patent, would they license others; and he said,"No, we will not license anyone other than Cyanamid", a report that was widely spread in the drug trade.

Well, things don't always work out as planned, because, despite their best hopes, the patent office had declared it interference, not only with two of these patents but also with Bristol; and then, several months later, the examiner came down with a decision in which he said he was going to dissolve the interference and rule that tetracycline wasn't patentable at all, it was not patentable at all because, he said, he surmised that tetracycline was co-produced with Cyanamid's broad-spectrum antibiotic Aueromycin, and the process by which these companies were manufacturing tetracycline was to subject Aueromycin to some further things and, in effect, extract out of it the tetracycline. They changed it molecular structure.

This of course posed a great threat to both of them, and it was after this thing that Pfizer set out to try to persuade the examiner to change his mind, that he was wrong, that in fact the proof being that tetracycline was not produced together with Aueromycin; and this is where they made the misrepresentations,relied on certain misstatements that

Cyanamid had made.

Now, under the licensing agreement that Pfizer and Cyanamid had in settling the interference, when, as soon as the Pfizer patent was issued, Pfizer was to license Cyanamid and Cyanamid was to pay two and a half percent royalties on all the tetracycline that's sold.

Well, one might wonder why Cyanamid, who would immediately be subject to paying royalties upon the grant of the license to Pfizer, would attempt to help Pfizer and to press for license to Pfizer. And Cyanamid's patent counsel, in his testimony, explained quite candidly why. It's in the passage we've quoted at the top of page 16 of our brief. He said the reason it was important to Cyanamid to see that the patent issued to Pfizer was, he explained, "We wouldn't have people like Bristol in the market for one, we wouldn't have the Italians importing it over here for another, and, of course, anybody -- with no patent on tetracycline, any Tom, Dick and Harry with a little bit of money could get in the business."

And the government's theory which was presented to the jury was that this whole thing was part and parcel of an implied understanding between Pfizer and Cyanamid when they settled the interference proceeding, that they would limit licensing to the loser before the patent office, and that they would set non-competitive and fixed prices on the sale of tetracycline.

Thereby in effect preserving the position they have.

Now, these different aspects of the case, of course, were all interrelated. Because the only way that the price structure could be kept up, the only way that prices could be kept high was if you were sure that you didn't have any other people coming into the industry who would cut the prices. And the only way you could be sure that no one else could get into the industry was you could control it with a patent.

Now, this is, under the government's theory, how Pfizer and Cyanamid began the conspiracy. The government -- what happened was Bristol, which at this point had no broad-spectrum antibiotic and was in desperate financial shape, although Pfizer had warned that it would sue anyone for infringement who manufactured the drug, in the summer of 1954 began itself to sell tetracycline under its own brand, and then in September of that year it gave licenses to Squibb and Upjohn, the two co-conspirators -- I'm sorry. It didn't give a license, it sold, it sold this tetracycline that it had in bulk to these two firms.

The day that the Pfizer patent was issued, Pfizer sued Bristol, Squibb, and Upjohn for patent infringement. The three of them filed answers, in which they challenged the validity of the patent, asserting, among other things, that it had been procured by misrepresentation from the patent office; the response of Pfizer to this was to sue the three of them for

tremendous damages. It sought $15 million from Bristol; $30 million from Upjohn; $6 million from Squibb.

At this point the suit was being contested rather vigorously.

Now, later, in 1955, Bristol got word that Upjohn had been talking to Pfizer about possibly settling the patent suit. Upjohn was quite concerned about this $30 million potential liability; and then they had a series of agreements which led to the termination of the Pfizer litigation.

First, there are agreements between Bristol on the one hand, and Squibb and Upjohn on the other, under which Squibb and Upjohn gave Bristol the authority to settle and handle the Pfizer litigation.

Q Mr. Friedman, the Court of Appeals opinion reversing the District Court didn't turn on the insufficiency of the evidence, did it?

MR. FRIEDMAN: No, it did not. Indeed, by implication, the court presumably thought that the evidence was sufficient, because it sent it back for a new trial; and if it had felt that the evidence was insufficient -- but I think that these facts I'm bringing out and meaningful and helpful in terms of some of the objections they raised to the charge.

So -- and in the course of this licensing -- I'm sorry; in the course of this agreement under which Bristol was authorized to handle the Pfizer and Squibb interests in

settling -- negotiating and conducting the litigation against Pfizer, there was a statement in there that any license that Bristol obtained for Squibb and Upjohn during the course of the litigation, during the course of the settlement, might be limited, however, to giving Squibb and Upjohn the right, the right to sell and use but not to manufacture.

So, in addition to which, Squibb and Upjohn were bound, were bound under this agreement, for the duration of the litigation with Pfizer, the patent litigation, and three years thereafter, to purchase all their requirements of tetracycline from Bristol.

So, at this point, Bristol had the thing locked up in the sense that it had control of the litigation, it was protective and Squibb and Upjohn couldn't settle themselves with Pfizer and perhaps purchase in bulk from Pfizer, and therefore losing a customer; and at the same time it had put in there a provision that would protect it from having to give its two major customers, Squibb and Upjohn, the right to manufacture and thus oust this important source of business.

Now, ultimately, the litigation was settled, and was somewhat precipitated by the fact that there was brought out, shortly before the settlement, the fact that a detective, who was paid by the general counsel of Pfizer, had undertaken to tap the telephones of Bristol and Squibb. And when this was brought to the attention of Pfizer, Pfizer immediately said,

"Let's get together and settle it." And they settled it, and they settled it, as I have indicated: a license was given to Squibb and Upjohn to make, use, and sell to the drug trade; and a license was given to Bristol to manufacture, use, and sell.

Now, during the period thereafter, from -- I mean for the whole period to the end of the conspiracy, no one else was licensed other than these five people, no one sold in bulk other than Bristol, and during this same period there were ten requests made for licenses or for bulk sales of tetracycline, and they were rejected.

Now, let me just very briefly refer to one or two of the grounds on which the Court of Appeals said that the charge was insufficient.

Let me take the major argument that the respondents made here.

Parke, Davis was not a conspirator. Parke, Davis, during the period of the conspiracy, did many of the things that the government said were done by the three respondents as part of the conspiracy; they filed the same prices, they did not grant licenses, and so on. And the theory of the respondents in this case, one of their principal defenses, was that Parke, Davis was doing the same thing, admittedly not pursuant to a conspiracy, as the conspirators had done, was strong evidence that in fact that identical conduct was a result of independent

business judgment but not -- and not agreement or concerted action.

The government of course pointed to the fact that Parke, Davis in many respects has not done the same thing. Parke, Davis, for one thing, was not in tetracycline; secondly, Parke, Davis gave no licenses; Parke, Davis was not involved in any of the patent litigations and the various negotiations.

The District Court charged the jury at length about this issue. It pointed out that they had heard a lot of evidence with respect to Parke, Davis; that Parke, Davis in some respects was similar, that in other respects it was dissimilar; it pointed out that Parke, Davis was not indicted, and it urged the jury, told the jury this was one of the factors they could take into consideration.

The judge refused an instruction which the respondents tendered, in which the respondents wanted him to line up the dissimilarities -- I'm sorry; the similarities between Parke, Davis' conduct and that of the respondents. The judge refused to do that. He said that would be, quite correctly we think, that that would be an unfair charge; it would be a loaded charge. Because if you have to charge on the similarities, I should also charge on the dissimilarities.

They also objected because they, and the Court of Appeals criticized the District Court for not permitting an instruction on the presumption of innocence. They wanted the

judge to instruct on a presumption of innocence, that Parke, Davis, not a defendant, was presumed innocent.

The judge said that the presumption of innocence relates to the defendants, and there was no occasion to instruct on the presumption of other persons, that Parke, Davis was not indicted; and that there was no need for the jury to speculate on why they hadn't been indicted.

And had the judge given the instruction that the respondents submitted, this could have engendered a further problem of confusion because the jury might then, despite other instructions, have drawn some inference -- drawn some inference -- that the fact that the respondents were indicted was itself of some significance.

I'd like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friedman.

Mr. Wood.

ORAL ARGUMENT OF JOHN E. F. WOOD, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I represent Charles Pfizer & Company, one of the three respondents in this case. As to some matters in the case, the factual situations of the respondents differ from one another. And my aim will be to present matters that are common to the respondents, and at least are not inconsistent

with the views of any of the respondents.

At the outset I should like to refer to the point with which Mr. Friedman started, and that was the approach of the Court of Appeals to this case, the nature of its review, and the nature of the review that, as I see it, is being sought in this Court.

The argument has been made in the government's brief that in this case, in effect, the Court of Appeals review was over-meticulous, that it found slight errors on the basis of considering particular language in isolation, and that this was done without reference to the charge as a whole.

But, with respect, I urge that that is a wholly erroneous evaluation of what the Court of Appeals did. The Court of Appeals tells us that their procedure was to review the charge as a whole, and that they reviewed the entire record, the whole of it. They considered the different kinds and subjects of evidence in relation to each other, and they considered the court's treatment of these different kinds and subjects of evidence, in comparison with each other.

And the Court was concerned that whereas the instruction, when it discussed evidence -- and I'm not now referring to the general parts of the charge where the basic principles are applicable, but the parts in which evidence was discussed. When the Court was discussing the parts of the evidence upon which the defendants principally relied, it did

not give the jury much room to give weight to that evidence.

On the other hand, by, in effect, neutralizing the evidence upon which the defendants were principally relying, the field was left for the inflammatory materials concerning which much evidence had been put in, which, as the Court of Appeals noted, really had the effect of converting this, in the minds of a lay jury, to a trial for profiteering and patent fraud.

The importance of the charge in this case was fundamental, as the Court of Appeals expressly noted. And of course in reviewing the charge the Court of Appeals had to look at the language of it, and, in commenting on the charge, it had to comment on some of the language; but that is a far cry from taking words in isolation. And I submit that the Court will find that there was comprehensive review. And the conclusion to which the Court came was that because of errors which it found, taken as a whole, not picked up one at a time and laid aside, but taken as a whole, these errors were sufficient to deprive the defendants of a fair trial.

Now, that was, in the main, I submit, a factual exercise and a factual decision. The Court of Appeals did not cite a single case, as I remember it, in its opinion.

The question the Court of Appeals was addressing itself to was having in mind the complexities of this case, the different kinds of evidence that were involved, the

significance, in some instances very limited significance, of some of the evidence that was most heavily emphasized by the government; has this trial been conducted in such a way as to have accorded to these defendants a fair trial? And the Court felt itself forced to the conclusion that the answer to that was no.

Mr. Friedman was asked what sort of review was expected in this Court, I would respectfully submit to the Court that the only review that could be done would be to go through the same process that the Court of Appeals went through.

Now, a word, if the Court please, about the basic issue and the basic problem that the jury had to deal with here. It's been clear throughout the case, and conceded by government counsel and stated by the court, that the government's sole reliance here, in its attempt to prove an implied conspiracy, was on circumstantial evidence. There were agreements among the parties, written agreements; first negotiated between Pfizer and Cyanamid in November 1953, a later group negotiated between Pfizer on the one hand and Bristol, Squibb, and Upjohn on the other, in December of '55.

Those agreements regulated the rights and obligations of the parties with respect to some of the subject matter of this case.

There is no contention that any of those agreements was in itself unlawful. It is conceded that the terms under

which these parties settled their affairs were lawful. The contention is, rather, that there were implied understandings in addition to what was put into these agreements, and that the implied understanding was to be found on the basis of the conduct of the parties after their settlements, and the logical proposition asserted was that companies acting independently and without conspiracy would not, in fact, have acted the way these companies did.

Now, as I've said, the Court found that some of the evidence most heavily relied upon was,by the defendants, was not given correct treatment in the charge. Consider, for example, the trial court's treatment of the evidence as to Parke, Davis & Company,/which Mr. Friedman has made some reference.

Bear in mind, if the Court please, that the proposition being put to the jury here was that a company acting independently and without conspiracy would not have done the things that these defendants did, with respect to the pricing of their products, with respect to sales in bulk, with respect to the granting of patent licenses.

That meant, of course, that the jurors had to ask themselves: Well, what would an independent company not in conspiracy have done? And it happened that we had in this case an independent, non-conspiratorial model, the second largest company in the industry, one of the most successful

companies in the industry, which was assertedly not a conspirator.

And the evidence showed, without any question, that as to pricing that company, Parke, Davis & Company, from the beginning of its participation in this industry right down to 1960, acted exactly the same way these defendants did, with respect to the levels of prices and all the other aspects of pricing.

So far as bulk sales and patent licensing were concerned, the evidence showed that Parke, Davis' behavior was, if anything, even more niggardly than that of the defendants. It granted no licenses to anybody. It sold no bulk to anybody. And the court and jury did not have to speculate as to why this was so, the president of Parke, Davis was called by the government and he testified about these policies of his company and stated the reasons for them. So it was all laid out.

Q Were the counsel inhibited in any way from arguing that evidence to the jury?

MR. WOOD: Yes, Your Honor. I'm going to come to that, Mr. Chief Justice. But the key point is that an important fact about the evidence was not put to the jury, and I'm coming to that right now.

The key significance was that in this case government counsel affirmatively asserted that Parke, Davis absolutely was not a conspirator. It was not merely said that, oh, Parke,

Davis was not indicted or has not been charged as a co-conspirator; government counsel said, and the trial court noted in the colloquy which is quoted in our brief, that Parke, Davis absolutely was not a conspirator. "And I state that on the record," said government counsel.

Well, that meant that this company, the parallel action of this company was the action of a company assertedly not a member of any conspiracy. We sought to have that fact brought to the attention of the jury. We asked the court, in its charge to the jury, to inform them of the fact that Parke, Davis was asserted not to be a conspirator. The court declined to do that.

We then tried some other way. We said: "Well, may we argue, then, from a presumption of innocence?" And the court said: "No, you may not. I'll stop you if you try that."

"Well, may we argue about the presumption of regularity of business conduct?" "No. I'll stop you if you try that."

And the most that the court would do in informing the jury about this was to say that Parke, Davis had not been indicted and was not charged as a co-conspirator.

And the charge went further and made greater difficulty for us because, after having limited the information to the jury to just the technical fact that there was no indictment against Parke, Davis and no charge of being a co-

conspirator, the judge went further and told the jurors, in emphatic terms, that the fact that Parke, Davis was not indicted -- and these are quoted from the charge -- has no relevance whatsoever in any direction as a fact in itself.

Now, what could the jury make of that? "All we know about Parke, Davis is that it's not indicted. And the judge tells us that the fact that it's not indicted has no significance in any direction. How can we weigh this evidence?"

And then the court took one final step -- well, before I -- may I just refer to a passage, at page 70 of the brief of the government in this case, the main brief, it is said there, inadvertently, that there were constant reminders that Parke, Davis was not considered a conspirator. That, the Court will find, is not what the record shows.

What we were trying to do was to get the court to inform the jury that Parke, Davis was not a conspirator and that we did not succeed in.

Well, the final words of the judge, about this Parke, Davis testimony, said that, since Parke, Davis is not on trial here and since the defendants are on trial, your verdict, I quote, "must be based in the end on the law and the evidence relating to them", to the defendants. That left the jury very little room to give weight to the action of Parke, Davis. They were told that what they must look at is not Parke, Davis' actions but the defendants.

Q Now, my question to you earlier, Mr. Wood, was this: Was counsel for Pfizer inhibited in arguing to the jury any of the evidence, the testimony that came from the Parke, Davis vice president?

MR. WOOD: Well, not -- no, sir. No, Mr. Chief Justice. The limitations -- well, I've referred to the fact that the -- we were told that we could not make certain arguments. We were told by the court also that we could risk argument if we wished, but we were given the definite impression that the court was going to be very strict in limiting us. And we simply did not know what to do. We did try to argue it to a limited extent, but since the key fact had not been put to the jury, and we were not free to put it to the jury, our argument was necessarily much less effective than it could have been.

Q May I ask, Mr. Wood, are the arguments to the jury reproduced in the record?

MR. WOOD: Yes, Mr. Justice, they are.

Q I don't see any page citations to them. It's a rather long record.

MR. WOOD: We could supply those.

Q Thank you.

MR. WOOD: Well, I have really, just as briefly as I can adequately, on the Parke, Davis aspect.

I should like to turn to another part of the charge,

as to which the Court of Appeals concluded that evidence favorable to the defense was seriously undermined by the charge. And that had to do with testimony by the principal officers of the defendants.

These men were called by the government as the persons who made the decisions that were alleged to be conspiratory. And they were examined at length by government counsel. And they were cross-examined. They gave detailed factual accounts of the actions, their actions in determining policies of their respective companies as to all of the matters involved in the case.

They described the business and economic considerations, many of them quite peculiar to the prescription drug business, and many of them of special application to this segment of that business that included these new wonderfully popular wonder drugs. And they showed how those economic and business factors really governed their decisions and would have not indicated that other decisions could have been made without loss of profitability.

In the course of this testimony, they told in detail about the meetings at which conspiracy was alleged to have had its inception. The meetings in November of '53 between Pfizer and Cyanamid, and the meetings in December of '55 at which Bristol, Squibb, and Upjohn were claimed to have adhered to the conspiracy.

They described what these meetings were about, how they came to be held, what problems they discussed, the objectives of each party, what was said and what was done by the participants, very full, detailed, factual accounts of what transpired.

Now, in the course of this, they made certain denials, asserting that the agreements alleged to have arisen by implication were not formed and that the parties remained free, as to all these matters.

Now, this testimony was completely inconsistent with any implied conspiracy. And taken as a whole the testimony was a cornerstone of the defense case. But although the court, in the charge to the jury, began by saying that the jury should give full consideration to this, the rest of the discussion of this evidence -- again I'm not talking about the general parts of the charge but the parts where the court was specifically addressing itself to this evidence; really consisting, as the Court will see, of a series of reasons why the jury should give that evidence little if any weight.

Now, time doesn't permit me to touch on --

Q Mr. Wood, isn't it the general rule in federal courts that a federal judge can comment on the evidence?

MR. WOOD: Oh, yes. Yes. But our contention, and the decision of the Court of Appeals, was that the court here commented erroneously.

Q At the close of the instructions, Mr. Wood, were any requests made to the judge, the trial judge, to correct or supplement his instructions?

MR. WOOD: Yes, Mr. Chief Justice, we spent several hours with the judge, making exceptions, making additional requests, urging the judge to correct some of the serious errors that we felt were involved, and the judge did not change one word of the charge.

Q Now, again, is that colloquy with the judge recorded in the record?

MR. WOOD: I believe it is, Mr. Justice. The -- is this the colloquy?

5007.

Q Thank you.

MR. WOOD: I should note there that we had a stipulation that all requests charged, and all exceptions, and so on, made by any one defendant would inure to the benefit of all. So the fact that one lawyer is speaking here and another lawyer there has no particular significance.

Q Now, I gather that during the deliberations, the jury on occasion, maybe more than one, asked that parts of the record be read to them?

MR. WOOD: Yes, Mr. Justice. They asked for the Parke, Davis matter.

It's an interesting point there, which has some

significance as to the effect of the charge and the importance of looking at words.

The jury did not have to rely upon an impressionistic recollection of something they had heard hours before. We followed here the unusual course that the court provided to each juror a full copy of the charge, to take into the jury room with him. So they could take it up line by line, and that they did so is indicated by the fact that when they asked for evidence to be given to them they asked for it by reference to a specific passage.

Q Was that by stipulation of the parties or at least by consent?

MR. WOOD: Yes, Mr. Justice.

Q You did not object to that maneuver?

MR. WOOD: That is correct.

Q In addition to the Parke, Davis matter, what else did the jury ask?

MR. WOOD: I believe that's all.

Q That's all.

MR. WOOD: Well, may I just mention a couple of points about the difficulties with the charge, as to the testimony of the officers. I'll really limit it to one, in view of the shortness of time.

After having suggested several reasons why the testimony should be given perhaps limited weight or need not

be given much weight, I believe that's a fair characterization of the effect of the charge, the court concluded on this subject by saying that these assertions of innocence by the officers may have included contentions of law; and of course he had made it clear to the jury that they were to take their law from the judge and not from any other source.

Nothing was said as to what part of this was contentions of law. It was simply said: In considering this, you must bear in mind that this may include contentions of law.

Well now, this testimony was intensely factual, and even in the denials it was factual. The question here was whether implied understandings had been reached by these men. There was no question of law as to what you can do under a patent or what you can do in certain circumstances; everybody knew that if thss business was conducted independently, what the parties did was lawful; if it was conducted under some implied understanding, it was not lawful. So the facts of understandings was the essential issue in the case.

And the factual nature of such testimony was established by this Court in the Interstate Circuit case. There the Court held, in a Sherman Act case, that inferences adverse to the defendant could be drawn from the fact -- drawn as to whether there had been an agreement for concerted action, because the defendants did not produce witnesses under

their control who were in a position to testify as to whether there had been agreements for concerted action.

Now, the necessary and explicit premise of that decision was that this would be factual testimony, and it would be anomalous, I submit, to hold, in the face of that decision, that if such witnesses are called and do testify, the jury may be allowed to brush their testimony aside on the ground that some undisclosed part of it is regarded as making factual contention -- I mean legal contentions.

May I take just a few minutes on the subject of costs, profits, unreasonable profits, unreasonable prices.

One of the most amazing aspects of this case was the extent to which the prosecution was based on the constant hammering at the proposition that these companies made too much money, and that that necessarily meant that their prices were too high.

Whatever reasons were advanced for the admissibility of the evidence about the costs and profits, those reasons were not what was put to the jury by government counsel, the hammering away, simply at the fact in itself, that these profits were enormous and, as asserted by government counsel, were unreasonably high.

Now, the technique chosen for showing that these profits were so high was to take the fair manufacturing cost and compare that with selling price and say that the difference

is profit. The manufacturing cost included nothing for research, or warehousing and distribution, for selling and promotions, for administrative overhead, taxes; so everybody knew that this comparison did not involve a comparison which could show true profit.

The government had available, had in its possession, accounting studies which were designed to show total cost, and true profit. It declined to use these studies, but hammered away at this production cost, selling price comparison; and in the opening to the jury, in the summation, with placards, with magnified tables and charts, that was the subject that was dinned into the jury, both into their eyes and into their ears.

We tried as best we could to steer the trial away from the question of the fairness of profits, because that question has no bearing in this case.

Q Well, did you put in opposing testimony as to research, administrative, et cetera, costs?

MR. WOOD: No, Mr. Justice, we did not. Our plan, as government counsel has indicated in its brief, since the bulk of the testimony upon which the defendants were going to rely was being put in, had been put in by the government, we wished to put in our whole case, while, as part of the government's case, so that we would not, in the eyes of the jury, be protracting the trial with unnecessary carrying-on of what had

been deducted.

We did, in the course of cross-examination, seek to have received these accounting studies. They were rejected, not finally but at that time. The one offered by Pfizer, for example, was rejected on the ground that the government needed more time to study it. The government had had it for over seven years. And the argument that it should not be received at that stage of the trial, because the government needed more time to study it, frankly did not make any sense.

Q Did you reoffer it later?

MR. WOOD: No, Mr. Justice, we did not.

We did not put in a case except to call one -- one witness to put in one exhibit.

Well, the --

Q How much time was devoted to putting in your case, Mr. Wood? After the government rested.

MR. WOOD: Oh, half an hour.

Q Mr. Wood, incidentally, how long was the jury out?

MR. WOOD: It was out -- hunh? -- 14 hours. A good deal of which was at night.

Q That is continuously, without a recess?

MR. WOOD: Yes, sir.

Q I gather, Mr. Wood, clearly what you say the Court of Appeals held and properly held was that the things

you've been talking about, biased the jury in favor of the finding of agreement, --

MR. WOOD: Yes, Mr. Justice.

Q -- as to matters which, done independently, would not have been illegal?

MR. WOOD: Yes, sir.

And that these errors not taken separately, as government counsel asserts, but looking at the conduct of the trial as a whole, the charge as a whole, that the effect of it was to produce an imbalance. When the evidence favorable to the defendants was downgraded and undercut, when this inflammatory evidence, principally relied on by the government, was given much freer scope, the effect was an imbalance which, in the judgment of the Court of Appeals, resulted in the denial of a fair trial.

Q Do you have any comment about Judge Hays' dissenting opinion?

MR. WOOD: Well, only this, Mr. Justice Blackmun: --

Q That you don't agree with it?

MR. WOOD: -- he conceded at the outset that the government's evidence was not particularly strong, at least not overwhelming, is the way he characterized it. As to some of the errors, I submit, he did not disagree that they were errors. As to Parke, Davis, for example. But he said that it appeared to him that it wasn't necessary to reverse on the

ground of these errors.

But I submit that the errors were fundamental and that taken together they did result in imbalance, which was quite hurtful to the defense.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wood.

Mr. Friedman, your time was entirely consumed, but if you have anything of great urgency, we'll give you one minute.

REBUTTAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FRIEDMAN: One minute? Well, I'll try to be very rapid.

First, Mr. Justice Brennan, the arguments to the jury are set forth at length at page 4719 to 4913.

Q Excuse me, 47 --?

MR. FRIEDMAN: 4719 to 4913.

Secondly, I'd like to refer the Court to pages 60 to 65 of our brief, in which we argue that Parke, Davis and the other defendants were not inhibited from making to the jury the arguments on Parke, Davis; that we argue this was basically a judgment, a strategy judgment made by themselves.

And, finally, I'd just like to say that we disagree, we disagree, with Mr. Wood's argument that somehow this charge denigrated the evidence that was favorable to the defendants

and stressed the inflammatory and prejudicial thing. We think this was a fair charge.

And all I can urge upon the Court is that when it reads the charge, when it reads the charge, it seems to me it's completely objective, it discussed all of this evidence, it recognized the problems on the costs, to which Mr. Wood has referred the Court specifically; pointed out to the jury that the cost figures were different between factory cost and selling price; did not take account of many other items of cost, and that was extensively brought out in the examination of the witness. And the court charged the jury that those were factors to be taken into account.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friedman.

Thank you, Mr. Wood.

The case is submitted.

[Whereupon, at 2:18 o'clock, p.m., the case was submitted.]

- - -