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In the

Supreme Court of the United States

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SUPREME COURT, U. S.

UNITED STATES OF AMERICA,

Petitioner,

vs.

CECIL J. BISHOP,

Respondent.

No. 71-1698

Washington, D. C.
January 16, 1973

Pages 1 thru 42

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioner,	
v.	No. 71-1698
CECIL J. BISHOP, Respondent.	

Washington, D. C.
Tuesday, January 16, 1973

The above-entitled matter came on for argument at 2:00 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
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

RICHARD B. STONE, ESQ., Department of Justice, Washington, D. C. 20530; for the Petitioner

J. RICHARD JOHNSTON, ESQ., 833 United California Bank Building, Oakland, California 94612; for the Respondent

C O N T E N T S

* * *

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-1698, United States v. Bishop.

Mr. Stone.

ORAL ARGUMENT OF RICHARD B. STONE, ESQ.,

ON BEHALF OF THE PETITIONER

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

This is a criminal tax case which comes here on writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

The respondent in this case was indicted in the Eastern District of California on the charge of wilfully filing income tax returns which he did not believe to be true as to every material matter, an offense punishable as a felony under Section 7206(1) of the Internal Revenue Code.

The elements of the offense defined in Section 7206(1) are that the defendant wilfully makes and subscribes a document, that the document be verified under the penalty of perjury, and that the defendant does not believe the document to be true and correct as to every material matter.

The evidence introduced at respondent's trial showed that respondent was a practicing attorney who owned a walnut ranch which was managed by his step-mother. During the three years in issue, 1963 to 1965 inclusive, respondent sent his

step-mother weekly checks which she deposited in a bank account for purposes of covering the operating expenses of respondent's ranch. Though there was evidence of several different types of improper deductions claimed by respondent on his tax return, the crux of the offense charged against respondent was that he took deductions twice for these operating expenses of the ranch.

What he did was, he deducted both the amounts which he sent to his step-mother and in addition the amounts paid by her out of those very same funds to cover the ranch's expenses.

Respondent's defense at trial, and the only matter essentially in dispute in the transcript of his case focused primarily on his claim that he had no knowledge that the deductions were false and consequently that he did not have the requisite intent, whatever that is and we shall discuss that at great length, necessary to support a conviction under 7206(1), which, as I indicated, requires that the defendant commit the prohibited act wilfully.

In addition, however, respondent requested that the jury be instructed that it could find him innocent of the felony set forth in 7206(1) but guilty of what respondent argued was the lesser included offense of delivering to the revenue service a document known to be fraudulent, which is punishable as a misdemeanor under Section 7207 of the Code.

which respondent argued requires a lesser degree of wilfullness than does the felony charge.

The trial judge refused respondent's requested charge to the effect that the jury could find him guilty of the lesser included misdemeanor and respondent was indeed found guilty as charged of the felony.

The Court of Appeals for the Ninth Circuit reversed and held that respondent was entitled to the lesser included offense charge, for which reason it did not reach other issues raised on appeal by respondent, and it is from this determination of the Court of Appeals for the Ninth Circuit, requiring a retrial with a lesser included offense charge that the Government has sought certiorari in this case.

Q Mr. Stone, just as a matter of curiosity, how do you explain the heavier penalty under 72061, the felony charge, for mere absence of belief in the truth as compared with the penalty for actual knowledge of falsity under 7207, a mere misdemeanor?

MR. STONE: I think that is a very important question in this case, Mr. Justice Blackmun, to which I think the answer is quite simple. There certainly is an anomaly at first glance with respect to that. The answer I think is that 7206, the felony, covers only documents which are signed by the taxpayer, by the defendant, under penalty of perjury.

Whereas, the misdemeanor offense refers simply to any document, including, for example, a worksheet handed to a revenue agent in the course of an audit or--

Q Or a state income tax return that he said here it is--

MR. STONE: An income tax return, if properly filed, is signed under penalty of perjury. There is an overlap between the two offenses insofar as the misdemeanor also applies to documents signed under penalty of perjury. But I think it is quite clear that the distinction with respect to severity of penalty is attirubtable to the fact that one section refers exclusively to documents signed under penalty of perjury, and that is a reflection of a historical concept that a document so signed represents a more serious representation and probably in itself a greater consciousness of effect of the filing of the document than does simply hand, for example, a worksheet to a revenue agent.

Q It has been that way a long time.

MR. STONE: Yes.

Q Although I gather the prosecution could be only for a misdemeanor case of a signed document.

MR. STONE: That is right. That is right, it could be. There is an overlapping element which I think we are forced to conclude leaves a certain amount of prosecutorial discretion.

Q Do you have any information about what the practice is?

MR. STONE: Yes, the practice is ordinarily, I am told, with respect to income tax returns to prosecute for the felony. But there is a discretion exercised and what you would expect to be the factors playing into such a discretion are used.

Q Would the discretion be exercised by the individual U. S. attorney?

MR. STONE: By the individual U. S. attorney, presumably in consultation with the fraud section of the Tax Division and the Internal Revenue Service.

Let me point out that the prosecutorial discretion involved in this overlap of offenses is not quite as great as it seems to be because there is no minimum penalty set forth in the felony provision and there is, of course, a somewhat higher maximum penalty both with respect to imprisonment and to fine. But there is no minimum penalty, so that the sentencing judge really is left with the great bulk of the discretion to determine what punishment to impose. And in this case, for example, at least the prison sentence was well below the maximum for a misdemeanor.

Q I gather there are other consequences--

MR. STONE: There are other consequences.

Q --of felony and misdemeanor besides a prison

sentence.

MR. STONE: Yes, that is right.

To return to the matter of lesser included offense, Rule 31(c) of the Federal Rules of Criminal Procedure provides that the defendant may be found guilty of an offense "necessarily included in the offense charged,"

Either the prosecution or the defendant may request that a charge of lesser included offense be given. The prosecution may want the lesser included offense charge for the rather obvious reason that it may think that the jury could find the evidence insufficient to support the greater offense charged, but sufficient to support a lesser included offense.

The defendant's reasons for wanting the charge are somewhat more subtle and complex, although I think as a practical matter readily apparent. One might think that the defendant would reason that if the jury were to find him innocent of the greatest offense, it would be to his, the defendant's, advantage not to leave the jury with a lesser alternative ground for conviction. But in practice it appears that in many cases defendants feel that it works to their advantage for the Court to give the jury a range of offenses varying in severity, of which the defendant may be convicted. And I suppose, quite frankly, the underlying assumption of that is that the jury may, for reasons not entirely related

to a factual determination that it is supposed to make in the case conclude that it would prefer to see the defendant punished with a lesser offense, which is not really properly within the jury domain.

Let me state at the outset it is not really entirely analytically what the function of the jury is supposed to be to determine--

Q Not analytically, but there has been a good deal of comment over the years that that is precisely the function of a jury, or at least this is a precise aspect of the basic function of a jury.

MR. STONE: There may be opinion to that effect, Mr. Justice Stewart, but I think all the law on lesser included offense and with this I think respondent does not anywhere disagree nor did the court below disagree--the lesser included offense doctrine is very precisely designed to avoid presenting the jury with a situation in which it makes a choice on a non-factual determination.

Let me state at the outset that though it is not entirely clear whether the Government and respondent are in complete agreement as to every aspect of the general contours of the lesser included offense doctrine--and I shall refer to a possible difference of opinion later on--with respect to the key issue which this case presents, I think it is quite fair to say that the Government and respondent are indeed in

agreement as to the general contours of the lesser included offense doctrine and disagree only as to the applicability of that doctrine to the specific felony and misdemeanor offenses set forth in Section 7206 and 7207. Both parties agree that if on the basis of the undisputed facts in this case the jury could not find the defendant guilty of the lesser offense without also finding him guilty of the greater offense. The lesser included offense doctrine is inapplicable.

In other words, the doctrine does not apply for the purpose of giving the jury which in fact finds the defendant guilty of both offenses, discretion to enter a verdict only on the misdemeanor. That is not what the lesser included offense doctrine is about, regardless of what may be argued should be the jury's function in other contexts.

Where the lesser included offense doctrine does apply, however, is where the jury on the basis of the evidence might reasonably find the defendant not guilty of the greater offense but guilty of the lesser offense. Consequently in this case there must be a disputed factual matter which, if resolved by the jury in a certain way, could render the defendant innocent of the Section 7206 felony but guilty of the Section 7207 misdemeanor.

It is undisputed here that the allegedly fraudulent documents were made and subscribed by the defendant under

penalty of perjury. So that that basic distinction in these two statutes is not part of the underlying factual dispute of this case.

What respondent does argue, and this is the key problem in the case, is that Section 7206 uses the word "wilfully" in a sense different from the way that word is used in Section 7207, that the standard of wilfullness necessary to support conviction of a felony is greater than that necessary to support conviction of the misdemeanor and consequently that the jury could reasonably find that the defendant was innocent of the felony but guilty of the misdemeanor on a lower standard of wilfullness. So that his position depends essentially upon reading the word "wilfully" in Section 7206 to imply a higher standard of culpability; if you will, a more evil motive than that same word implies in the next section, 7207.

And in spite of the usual presumption, the same word would not be used differently in two consecutive sections of the Code defining very closely related offenses in a different manner. There is some superficial appeal to this argument, as I stated earlier, for indeed it may appear strange at first glance that these two sections punish closely related offenses in a different manner unless there is a higher degree of culpability in some way necessary to support the more severely punished offense, that is, the felony.

And, as I have said, I think it is perfectly clear that what that distinction is based upon is an historical distinction with some validity, I think, in terms of reality between fraudulent submission of a document signed under penalty of perjury and simply a document which is not signed, which is handed over to an official of the Government in administrative capacity.

Having dealt with the reason why this immediate anomaly is really only superficial, let me turn to what I suggest is really the overwhelming reason and the overwhelming way in which respondent's argument that wilfully in Section 7207 means something less than it does in Section 7206. It is patently contradicted by the language of these two statutory provisions.

Section 7206, the felony statute, requires that the defendant wilfully file a document which "he does not believe to be true and correct as to every material matter."

Section 7207, the misdemeanor statute, requires that the defendant wilfully file a document "known by him to be fraudulent or false as to any material matter."

It is difficult to understand on what basis the court below could have concluded and respondents can argue here in this Court that a statute which hinges liability on a finding merely that the defendant did not believe the documents to be true could imply a greater degree of

wilfulness than does a statute which hinges liability on a finding that the defendant knew in fact that the documents were false and fraudulent. Indeed, if either of these sections implies a higher standard of wilfulness or evil motive, it must be the misdemeanor statute, which requires knowledge that the documents at issue are false.

Respondent argues in his brief, without explaining the basis of this argument, that these two formulations of the defendant's state of mind are basically the same thing, i. e., that not believing the documents to be true and knowing them to be false are really not meant to imply a meaningful distinction. And I think there is a rather significant irony to his arguing this, because he contends on the one hand that two very differently worded phrases implying to the average reader quite a different meaning, and I think meaningful in many criminal statutory contexts that these two very differently worded phrases used in connection with closely related offenses in consecutive statutory sections are intended to mean the same thing; while on the other hand he argues that the word "wilfully" also used in an identical manner, the same word used identically in these two provisions, means something different in each of these two provisions, and I think that that is a rather strange version of statutory interpretation.

Q He has the Court of Appeals going for him.

MR. STONE: He has the Court of Appeals going for him, Mr. Justice Stewart, on what I think is just an inexplicable ground, which is essentially that misdemeanors per se--

Q Wilfully and misdemeanors--

MR. STONE: Wilfully and misdemeanors means something different from wilfully in the context of felonies. And I think that the decisions of this Court make it perfectly clear that the word "wilfully" may mean different things in the contexts of different factual criminal--

Q Misdemeanor or felony.

MR. STONE: That difference is certainly not based on some arbitrary distinction between felonies and misdemeanors. And as I read the opinion of the Ninth Circuit, that is virtually all that it says and quite conclusively in support of its holding.

Furthermore, apart from the fact that if there is any distinction at all between the uses of the word "wilfully" in these two sections, the higher standard is really in the misdemeanor which requires knowledge of falsity; let us look at what respondent says is the substantive meaning of wilfully in the misdemeanor charge. He claims that the standard of wilfulness necessary to support a conviction of the misdemeanor is satisfied by a finding that the defendant acted capriciously or with careless disregard,

and that it is not necessary "that the defendant form the specific evil purpose of misleading the Government." This is the language of his requested charge and language basically adopted by the Court of Appeals.

It is, I suppose, somewhat paradoxical for the Government to be in the position of arguing for a higher standard of culpability than does the defendant, even with respect to a charge that has not been brought against this particular defendant. But frankly we simply cannot square a standard of careless or capricious behavior and a lack of purpose to mislead the Government with the requirement in Section 7207 that the defendant wilfully submit documents which he knows to be false.

Q Mr. Stone, I understand that the respondent contends that another paradox is that the Government on other occasions has urged much the same construction of the misdemeanor statute as the respondent now urges.

MR. STONE: Mr. Justice Rehnquist, it is not clear that the Government has ever urged in any tax misdemeanor statute a standard of mere carelessness or capriciousness, and we deal with that in the reply brief in some detail, in the reply brief to his opposition to our petition. But in any event, the only statute which he even claims that we have ever applied a standard of carelessness or capriciousness to, the only misdemeanor tax statute, is Section 7203 which

deals with wilfull failure to file required documents, and a wilfull omission of a required act may involve a different and lower standard of evil intent or wilfulness than does submission of a known fraudulent document. So that really we are not trying to apply across the board in any context a universal standard of what the word "wilfully" means.

That depends in each instance upon an analysis of the factual background that the statute is directed towards. Indeed, this Court has specifically rejected the argument that the misdemeanor set forth in Section 7207 can be committed merely by carelessness and without conscious knowledge of the wrongfulness of the defendant's act.

In the Sansone case at 380 U.S., the defendant was tried for the felony charge of wilfully attempting to evade taxes, which is defined in Section 7201; and he requested there, as here, a lesser included offense charge to the effect that he could be convicted if it were found that he did not have the requisite intent for the felony of wilfully attempting to evade taxes. He could still--

Q He had to meet with two felony statutes, right?

MR. STONE: One felony and two misdemeanors, I think, Mr. Justice Marshall.

Q But it was two felonies, I know, was it not?

MR. STONE: I think the only felony involved was 7201. There were two misdemeanors. I think 7203, the failure

to file was also involved. But I think what he asked for in Sansone was a charge that instead of the felony, he could be charged with either of the two misdemeanors. But, in any event, I do not think that is important for our purposes here because the key issue in Sansone is that the Court denied him a lesser included offense charge and stated quite specifically that at least with respect to the standard of wilfulness that the standard of wilfulness in both felony 7201 and the very misdemeanor at issue here required some sort of wilfull knowledge and evil intent. And the Court quite specifically rejected there any notion that Section 7207 can be satisfied by a mere showing of careless or capriciousness.

Furthermore, I think the Sansone opinion, which was really not dealt with by the Ninth Circuit in any meaningful way, precludes the Ninth Circuit across-the-board holding that the standard of wilfulness in tax misdemeanors is necessarily less than it is for tax felony, because Sansone said that the standard of wilfulness with respect to that tax misdemeanor, the one at issue here and the tax felony at issue there, were indeed exactly the same.

Finally, we make an alternative argument that is related in several respects to our contention that the misdemeanor in Section 7207 does not import a lesser degree of wilfulness than does the offense set forth in 7206 but

which focuses on the applicability generally of the lesser included offense doctrine itself. This is a slightly different argument, though based upon many of the same underlying reasons.

At common law, as we point out in our brief, the lesser included offense doctrine was restricted to situations in which the misdemeanor was entirely included in the statute, that is, in which there was no element necessary to sustain a conviction of a lesser offense which was not necessary in addition to sustain conviction of a greater offense. This strict version of the lesser included offense doctrine appears to have been incorporated in the federal rules of criminal procedure, for Rule 31(c) requires that the defendant may be found guilty of an offense necessarily included in the offense charge.

Some jurisdictions have allowed slight deviation from that rule, and respondent implies in his brief that he feels that some of the circuit courts have implied by way of dicta that there may be situations in which the federal courts could allow a lesser included offense charge even though there could conceivably be circumstances in which the defendant could be found guilty of the later offense without being guilty of the lesser offense. And I do not think we have to get into the precise contours of the lesser included offense doctrine.

I think whatever justification there may be for a slightly more liberal application of this doctrine, it should not be applicable here. For even if contrary to our contention the Court were to find that the word "wilfully" in Section 7206 means something more than it does in Section 7207, the misdemeanor under Section 7207 would still not be a lesser included offense within the felony under Section 7206, because knowledge of falsity is a key element of the misdemeanor but is not an element of the felony.

Even if wilfulness has no relationship by some strange quirk to the states of mind that are defined in these very statutes, it cannot be denied on the language of the state that there is an element, a key element, in the misdemeanor, an element which was in actual dispute in this case, since respondent's defense rested almost entirely upon his assertion with respect to his state of mind.

There is a key element of the misdemeanor which is not necessary to support the felony. And, consequently, under even a slightly more liberal reading than is traditional and than is implied by the federal rules of the lesser included offense doctrine, this offense, this misdemeanor, is not a lesser included offense within the broader scope of this felony because there is a key element, to wit, knowledge of falsity that is not necessary to support the felony.

Q Are you going to rely on the Berra case?

MR. STONE: The Berra case.

Q B-e-r-r-a.

MR. STONE: Yes, one second, I have it--

Q In which apparently the same elements were. He could have been charged under the misdemeanor or the felony, but he was charged under the felony and in an opinion by Justice Harlan the court was not required to charge in the lesser offense, even though they apparently covered exactly the same thing.

MR. STONE: Well, Mr. Justice Stewart, that is the point. That is the point here.

There was a rather strong dissenting opinion in that case--

Q Yes, I know, by two justices.

MR.STONE: Justices Black and Douglas, I believe, dissented in that case on the ground that they feel that a statute ought not to be interpreted, if possible, to render the prosecution with any degree of discretion to choose between which offense when the underlying commissions are identical.

Q I suppose boiled down and analyzed this simply upheld prosecutorial discretion, did it not?

MR. STONE: It did.

Q Though it is not put in quite those terms.

MR. STONE: That is right. But that was the ground that the dissent put it on. I do not think that the holding in that case, in the majority opinion, in any way contradicts our--

Q It helps you.

MR. STONE: It helps us, yes. And it certainly does not contradict our assertion that--and really I do not think this is in contention. I do not think respondent bases his argument at all upon a general attack of the lesser included offense doctrine.

If it is obvious that the two offenses have to be identically determined, then it is perfectly clear that the lesser included offense doctrine is not applicable. And what Justices Black and Douglas resented in that case I think in their dissent was that statutes are not to be interpreted to overlap to too great an extent, because it is improper for the prosecutor to have accepted discretion that is ordinarily the domain of the judge.

Q In Sansone did not the opinion of Justice Goldberg indicate that there was an important judicial policy not to give the jury too much choice on the selection of the crime and therefore of the penalty?

MR. STONE: That is right. What the Sansone case specifically said was that the domain of the jury was only to choose between offenses on the basis of determining the

factual background that would support one offense or the other and not to find that the defendant was guilty of both offenses and then to go ahead and choose which one to find him guilty of. That is precisely what Sansone said.

Q That would permit the jury to be picking the sentence.

MR. STONE: That is right. That would permit the jury to invade the domain that everyone agrees is proper for the judge and that in some circumstances is proper within limited bounds for the prosecution.

I would like, Mr. Chief Justice, to reserve the small amount of time I have left for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Johnston.

ORAL ARGUMENT OF J. RICHARD JOHNSTON, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I would like to refer first to the matter of the Berra case which was just mentioned. That case was one which held in fact that Section 3616(a), which is the predecessor section to the misdemeanor section that we are concerned with here, namely 7207, was in fact co-extensive with a felony section.

But in the following year, 1957, this Court decided

the Achilli case in which it then held that 3616(a) was not applicable to income tax returns at all. And it was not until the Code was revised in 1954 and the substance of 3616(a) then came back into the income tax sections in the form of 7207, with which we are concerned today, that that section again became applicable to income tax returns. And part of the holding in the Sansone case is that 7207 does apply to income tax returns.

What I should like to do, with the Court's permission, is to deal first and rather briefly with two of the points that counsel has made and then address myself to what I really consider to be the heart of the problem that is presented here.

Both in the Government's brief and in the argument today the Government has argued that the instructions that we requested and which were not given by the trial court were improper because they stated a standard of wilfulness in connection with 7207, misdemeanor offense, that really amounts to nothing more than negligence.

Our answer to that is really in two parts, I suppose. The first is that I want to make it quite clear that I do not argue to this Court that that is a proper standard of wilfulness under 7207 or under any criminal statute. It is the standard that had been adopted by the Ninth Circuit in which our trial took place. And in framing proposed

instructions for the trial judge my aim necessarily was to propose instructions that would meet the law as it has been held in the Ninth Circuit. And I was successful, at least to that extent.

Our position is, however, that the question that is raised at this stage of the proceeding is not whether the instructions that we requested correctly stated the law but whether the instructions that were actually given by the trial judge correctly stated the law. And we argue in our brief that under the rules and under the decided cases, we are not required to propose instructions to the trial court.

Our position is taken, if we make timely objection to the instructions that are given or to the omission of the instructions that we think should be given, if we fairly and correctly state the grounds for the objection, our success or failure later on should not depend on whether the instructions that we then drafted and proposed to the trial judge meet the test that this Court may finally determine to be correct.

This we think is true under Rule 30 of the Rules of Criminal Procedure. We cited in our brief also the case of United States v. English and an excerpt from Volume 8 of Moore's Federal Practice.

So that my position here today is not that the standard of negligence or something that approaches negligence as it has been formulated and applied in the Ninth

Circuit is necessarily a correct standard of wilfulness under this misdemeanor section or under any misdemeanor section. Our position is simply that the word "wilfully" as used in the two sections with which we are concerned in this case, namely 7206 and 7207, has a different meaning in those two sections. And our argument is that it means something less in 7207, the misdemeanor section, than it means in 7206, the felony section.

In capsule form our argument is that if we are correct in that contention, then we were entitled to the lesser included offense instruction, and it was error on the part of the trial court not to give such an instruction.

Q The argument that the same word might have different meanings has a lot of force in statutes that are either unrelated or separated either in subject matter or by the number of pages and the time of the enactment. But when they are in two successive paragraphs, is that not a little more difficult burden?

MR. JOHNSTON: Perhaps so, Mr. Chief Justice, but this--

Q These are both subjects at the same time, are they not, when the draftsmen are working on it?

MR. JOHNSTON: They are not necessarily thinking, I believe, that the word has identical meaning in the two sections. And I would suggest that this Court in the Spies

case, however it is pronounced, in 1943 spoke at some length referring back to the older case of Murdock in which the Court in its opinion had a long paragraph to the effect that the word "wilfully" is a word of many meanings, and it has listed a variety of meanings that may be given to that word. These are both tax cases. These are both criminal tax prosecutions. And in the Spies case, as a matter of fact, the Court suggested that the word might have different meanings with respect to two portions of the very same section. That section at that time was 145(a) under the 1939 Code. Under the present 1954 Code that becomes 7203. And the Court said it would assume that perhaps the word meant something more when connected with a wilfull failure to pay than when used in connection with only a wilfull failure to file a return.

So that I think in a general sense, at least, there is a good deal of authority in the decisions of this Court for the proposition first that the word "wilfully" does have different meanings, that it does not invariably mean the same thing, and that it may indeed have different meanings when used in different sections relating to criminal tax offenses.

Q What is inconsistent with Congress having said that where you wilfully file a paper which you do not swear to it is a misdemeanor, and when you wilfully file a paper which you swear to, that is a felony?

MR. JOHNSTON: I do not say that is necessarily

inconsistent, Mr. Justice.

Q I did not think so. What do you think "wilfully" means in the misdemeanor statute?

MR. JOHNSTON: My own position--

Q You are not using the negligence now, are you?

MR. JOHNSTON: No. I agree--

Q Once you get rid of negligence, what do you have?

MR. JOHNSTON: I agree with the Government that the word "wilfully" when used in any criminal section should mean at least intentionally and deliberately. This, I think, is a kind of minimum meaning for the word "wilfully."

Let me suggest, which we have said in our brief, that there are three rather commonly or frequently accepted meanings of the word and perhaps four. The lowest level of culpability would be the Ninth Circuit definition of wilfully in misdemeanor cases, the definition that is given in the Ninth Circuit opinion in this case, where they say it may mean no more than without reasonable cause or capriciously or with careless disregard of one's obligations or whether one has the right so to act. That is a very low level of culpability.

The next level up the scale, I should think, would be the level which would include at least intentional and deliberate action. And, as I have pointed out previously, I make no argument for the Ninth Circuit level, but I think that

the word might very well be held to mean intentionally or deliberately under 7207, and then under the felony section, 7206, the Court might hold as many courts have held, many circuit courts, that there is an added requirement in the felony section. Not only must the act be done intentionally and deliberately, but it must be done with a bad purpose or an evil motive, some additional state of mind, some additional intent that is superimposed.

Q Like taking an oath?

MR. JOHNSTON: Well, perhaps, Mr. Justice.

Q Is that not the difference between the two statutes?

MR. JOHNSTON: The fact is that in our factual situation where we are talking about income tax returns and in any case where we are talking about tax returns, the other portions of the law and regulations require that the returns be made under penalty of perjury. The declaration is stated right on the return.

Q But is that not the difference between the two sections?

MR. JOHNSTON: But in the case where we are talking about--

Q Where you wilfully file, is my first question, was the difference between wilfully file a piece of paper that does not purport to be an oath and wilfully filing a

piece of paper which is an oath. Wilfully would mean the same in both statutes and yet Congress could make a distinction between the two.

MR. JOHNSTON: Mr. Justice, I think it could be the same, but my argument to the Court is that it should not be construed by this Court to mean the same.

Q You do not think Congress did make that distinction?

MR. JOHNSTON: I think the Court now has the job of deciding what Congress's intent was. And if I may quote from the Court's statement in the Achilli case, which I think is most appropriate here, this Court said in the Achilli in 1957: "Our duty is to give coherence to what Congress has done within the bounds imposed by a fair reading of legislation."

So, here we have a group of sections that fall in the same portion of the Internal Revenue Code. The sections that we are concerned with today are two of those sections. There are others that precede and follow. My argument to the Court is that in connection with the filing of any kind of a tax return which is required by other provisions of law to be filed are to be made under penalties of perjury so that that distinction does not apply when we are talking about any tax return. It does not make much sense and it does not result in a rational construction and interrelation of these sections

to conclude that we have two sections then which at least with respect to tax returns prohibit precisely the same offense and yet--

Q I understood that the second, the misdemeanor one, was not limited to tax returns; it was any tax information you might give.

MR. JOHNSTON: That is correct. That is correct, Mr. Justice.

Q That does not require an oath.

MR. JOHNSTON: No, sir. But the case that we are concerned with involves tax returns, and tax returns are required to be made under penalty of perjury. And this Court has held that 7207 applies to the filing of income tax returns. So that my argument to the Court is that we do not achieve the kind of coherence that the Court seeks to give to acts of Congress if we arrive at a conclusion that we have two sections which, at least with respect to income tax returns, prohibit precisely the same act and in the one case the act is punishable as a felony by imprisonment for not more than three years and a fine of not more than $5000, and in the other case punishable only as a misdemeanor with a maximum punishment of one year or $1000.

If those two sections are to be given any kind of rational coherence as part of a total system of sanctions, of which this Court has spoken in the past, then it seems to

me it is very reasonable to argue that the difference must be that the requirement of wilfulness in the misdemeanor section is something less than what is required in the felony section. And if this Court arrives at that conclusion, regardless of how the term is to be defined for the two purposes, if it means something less in the misdemeanor section than it means in the felony section, then my argument is that Mr. Bishop was entitled to a jury instruction on the subject of lesser included offense.

Q Mr. Johnston, just as a matter of English usage, I take it "wilfully" is an adverb. What does it modify under your construction of the two statutes other than the verbs "deliver" or "disclose" in 7207 or "make" and "subscribe" in 7206?

MR. JOHNSTON: I think, Mr. Justice, those are the verbs that it modifies or describes. In 7206 it is in terms of any person who wilfully makes and subscribes any return and so forth. Wilfully modifies, I take it, making and subscribing.

Q So, the variations in the definition of wilfully that you adverted to go to the state of mind with which one performs this act?

MR. JOHNSTON: Precisely. I think when we talk about wilfulness, we are talking about only a state of mind. We are talking about intent. We are talking about some degree

of specific intent, as distinguished from lesser kind of intent. And that is the whole question, I think, how this word "wilfully" is to be defined as a desdription of someone's state of mind at the time he performed an act.

Q In the Ninth Circuit's construction, a person who carelessly or inadvertently delivered a return would be guilty, which really does not make much sense at all if he did not actually intend to deliver the thing.

MR. JOHNSTON: I hope I have made it clear I have some difficulty with that position also, Mr. Justice. But I would point out that 7207, the misdemeanor section, by its language applies only to returns, documents, and so on, known by him to be fraudulent or false, so that there is a requirement of knowledge that the document is false, which is part of that section. And the word "wilfully" then, I take it, describes the state of mind or the additional state of mind, perhaps, of the taxpayer when he files his return. The requirement of knowledge is in that section regardless of the meaning of the word "wilfully."

Q Then does not "wilfully" almost boil down to whether or not the act of delivery is required to be intentional or not?

MR. JOHNSTON: Well, I think that is the question. And my suggestion is that perhaps a definition in terms of intentional action is a proper definition of the term in this

misdemeanor section.

There is another word which might be suggested which I think the courts have not used particularly. One might define the term somehow in terms of recklessness, recklessly doing something.

Q Reckless means not actually intending but grossly heedless of the consequences or something like that, does it not?

MR. JOHNSTON: Perhaps it is only a kind of gross negligence. We get degrees of meaning.

Q I can see how you can describe someone driving recklessly. But I have great difficulty in seeing how you can describe somebody as recklessly delivering or disclosing something to the secretary, knowing it to be false.

MR. JOHNSTON: Let me suggest a possible factual situation which might indeed have been the situation here. A person prepares a tax return using in part information that someone else has worked up. That was the situation here. Mr. Bishop used lists of itemized expenditures, and then the total of that list was put into the return as a deduction for farm expense.

Conceptually his state of mind may have been that although he did not check through the list--and he testified that he did not and he did not go through and identify each

item that was in the list--he might well have had some reason to suspect that there were items in that list that were not properly deductible. And yet without checking it out, without determining whether the list contained only deductible items, he nevertheless put the total amount into the return and took the deduction.

Q But that would go to his knowledge of falsity, not to the intentional character of his actual filing of the document, would it not?

MR. JOHNSTON: Mr. Justice, when I use the term "recklessly," I mean perhaps he proceeded without taking some further steps to satisfy himself of the accuracy or inaccuracy of the return, which perhaps he should have taken. To me that is a kind of recklessness. Maybe it is not a very good word. But I suggest it as a possible one, at least.

Reference has been made to the Sansone case. I have difficulty with some of these cases: I am never quite sure how these gentlemen pronounce their own names. The Sansone case is one which of course the Court must consider. And obviously it poses some problems for us.

Sansone was a case where in the first place the taxpayer was charged under 7201, which is a felony section, the section that used to be used mostly, I think, for attempted evasion, a wilfull attempt to evade or defeat tax or the payment thereof. That is not the section that we are

concerned with here, so that there is at least that basis of distinction. The felony section that we are dealing with is 7206.

In that case, the taxpayer requested instructions to the jury that they might find him guilty of a lesser included offense under either 7203, on the basis of a failure to file, a wilfull failure to file, which is a misdemeanor, or 7207, which is the misdemeanor section that we are concerned with here, namely, filing a false return.

Let me state another fact. Prior to the trial apparently, when the taxpayer was being examined by the agents, he had explained that he had capital gain on some sales of land, that he knew he had to gain and that he deliberately did not include the gain in his returns because--I am going to start again.

At the trial--this was his explanation--that he had the gain, that he deliberately omitted it from the return because he thought that he did not have the money to pay the tax, and he intended at a later date to report the gain and pay the tax. That was one explanation.

Another explanation he had made was that he anticipated some expenses in connection with a creek that abutted the property he had sold, and it was his thought that those expenses might very well offset the gain on the sale, so that he would wind up without any gain.

And the precise holding of the Sansone case, as I understand it, is simply that the explanation that he intended to report the gain and pay the tax at a future date would not vitiate wilfulness, and this is the Court's term, under any of the three sections. The Court said that is not a defense, that does not negative wilfulness under any of the three, 7201, 7203, or 7207.

The Court in an opinion written by Mr. Justice Goldberg, went on to make a statement which I think is strictly dictum but which quite frankly gives us some difficulty, in which Mr. Goldberg apparently assumed that the meaning of wilfulness was the same in each of these three sections, and also that the meaning of wilfulness was to be equated simply with knowledge. This is done without any discussion of the argument, the kind of argument, or the issue that we raise in this case. There is nothing in the opinion to suggest that this issue that we now raise was ever briefed or fully considered by the Court in the Sansone case. And beyond what is in the opinion, I do not know for a fact what happened.

But that language is troublesome and I think at least the apparent assumption that the word "wilfully" meant simply knowledge is contrary to a great deal of other law in this area where the word "wilfully," at least in the felony sections, has been held to involve not only knowledge or

deliberate action, intentional action, but also this additional state of mind which involves a bad purpose or an evil motive.

I think that it is quite apparent that the law on this point badly needs to be clarified.

Q Do you think it can be clarified much beyond what was said in that case several years ago, Spies? Like you, I do not know how these people pronounce their own names.

MR. JOHNSTON: I think it badly needs to be clarified, Mr. Justice.

Q The point is wilfulness may mean a variety of different things, depending on its context, and that is about all you can say, is it not?

MR. JOHNSTON: Here, Mr. Justice, we have the precise question as to what it means in these two particular sections, and I think at least it has to be clarified to that extent.

We feel that the Spies case helps us because in Spies the Court held that it would not reasonably conclude that the commission of a misdemeanor of failure to file, plus the misdemeanor of failure to pay, together without anything more, constituted a felony of wilfull attempt to evade or defeat. And the Court went on then to speak not in terms of the meaning of wilfull but in terms of the meaning of

a wilfull attempt, and I emphasize the word "attempt," because the real holding of the Spies case is that in addition to a wilfull failure to file and a wilfull failure to pay, both of which are misdemeanors, there must be some further act, some affirmative act, which meets the Court's definition of a wilfull attempt.

In most of the cases that we have, that wilfull attempt consists in filing a false tax return. That is the act.

Q Sometimes wilfull can just mean purposeful or not accidental, and other times it imports mens rea. It always depends on the context, does it not?

MR. JOHNSTON: I think that is correct, Mr. Justice. And, of course, our argument to the Court is that it means different things in the misdemeanor from what it means in the felony section, and that only by giving it a different meaning can the Court really rationalize these sections.

Q How about Berra? There was a misdemeanor statute and a felony statute that everybody seemed to agree covered exactly the same thing.

MR. JOHNSTON: That was the Court's holding.

Q That is right.

MR. JOHNSTON: For that reason the Court said in that case the taxpayer was not entitled to a lesser included offense instruction. But then the next year in Achilli,

this Court held that the misdemeanor section that was involved there, 3616(a) under the 1939 Code, actually did not apply to income tax violations, and that holding was explained in Sansone on the ground in part that this Court would not presume that Congress would enact two sections covering the same area, one of which is a felony and one of which is a misdemeanor.

And it was subsequent to Achilli, then, that that section was re-enacted as 7207 in the 1954 Code. And, although one might have suspected at that point that it was a sort of forgotten section, that somehow Congress was not really focusing on it, it is important to know, I think, that the section was subsequently amended by Congress in 1963. 7207 was amended by adding the entire second half of what now appears in that section. It was subsequently amended still further by a further amendment to that portion of the section.

So, it is definitely there. It is definitely part of some kind of a total system of sanctions--

Q That was the section involved in Achilli?

MR. JOHNSTON: It is the successor to the section involved in Achilli. It was changed by removing the language about attempts to evade or defeat, which had originally appeared in 3616(a). So, that was taken out and then the section was moved into the income tax sections where it now

is in the Code. And in Sansone this Court held that it applied to income tax cases. So, there is no question about its applicability. And the only question then is if both of these sections prohibit the filing of false returns and make criminal offenses of the filing of false returns, does the word "wilfully" have an identical meaning in both sections? And if it does not, if it means something less in the misdemeanor than it does in the felony, then we say we were entitled to have the instruction and the Ninth Circuit should be affirmed regardless of whether this Court agrees with the particular definition that the Ninth Circuit has given to the word generally in tax misdemeanor sections.

MR. CHIEF JUSTICE BURGER: I assume you have a few minutes left, Mr. Stone?

REBUTTAL ARGUMENT OF RICHARD B. STONE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. STONE: Thank you, Mr. Chief Justice. I have nothing especially new to say except that to sum up it seems to me if there is, if I have perceived in the course of respondent's counsel's argument an underlying dissatisfaction with the material involved in this case, is that which I anticipated, and it centers on the rather unsatisfactory and illusory meaning of the word "wilfull" in the context of all of these criminal tax statutes.

And it becomes especially difficult to pinpoint

precisely what Congress meant by the word "wilfull" when we deal like we do here with two statutory provisions that define the basic state of mind required to commit the offense entirely apart from the use of the word "wilfully."

One of these statutes defines the basic state of mind involved in the commission of the offense in terms of lack of belief that the knowledge contained in the document is true. The other defines that state of mind in terms of a knowledge of falsity of the underlying information.

I think that the likelihood is that the word "wilfully" is probably close to superfluous in both of these statutes since the underlying state of mind is defined. But the Court need not reach the metaphysical possibilities of what wilfully can mean precisely in each of these contexts. It is sufficient for purposes of this argument to observe that the basic state of mind necessary to support the misdemeanor is a more serious culpable standard, knowledge of falsity, than is the state of mind necessary to support the felony. And I have yet to perceive either from respondent's presentation or from the Court of Appeals any possible way of holding that lack of belief can be a greater culpable standard in itself and imply a greater degree of wilfulness than can knowledge of falsity.

I perceive in Mr. Justice Rehnquist's questions, if I am not mistaken, some possible attempt to focus the word

"wilfully" not on that state of mind as described in the statute but on the very act of delivery or act of making and subscribing itself, and I cannot understand what might be involved in a distinction of that nature. I suppose it is perfectly clear, with or without the word "wilfully," that these statutes do not apply unless the defendant signed the document consciously, voluntarily, and without coercion, or that he submitted and filed the documents with a similar voluntary state; but I would submit the basic state of mind and intent reflected in these statutes is in the lack of belief of truth required by the felony offense and the knowledge of falsity required by the misdemeanor offense, and that it cannot be said that the felony in that case requires a greater degree of wilfulness than the misdemeanor. Thank you.

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

[Whereupon, at 2:59 o'clock p.m. the case was submitted.]

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