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In the

Supreme Court of the United States

JAMES EDWARD BARNES, Petitioner,	)	
v.	)	No. 72-5443
UNITED STATES OF AMERICA, Respondent.	)	

Washington, D. C.
March 20, 1973

Pages 1 thru 30

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES EDWARD BARNES, :
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Petitioner, :
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v. : No. 72-5443
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UNITED STATES OF AMERICA, :
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Respondent. :
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Washington, D. C.
Tuesday, March 20, 1973

The above-entitled matter came on for argument at 1:31 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:

MALCOLM H. MACKEY, Esq., 215 West Fifth Street, Suit 1011, Los Angeles, California 90013; for the Petitioner.

DANIEL M. FRIEDMAN, Esq., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; for the Respondent.

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On behalf of the Petitioner

In Rebuttal 28

Daniel M. Friedman, Esq., 11
On behalf of the Respondent

* * *

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-5443, Barnes against United States.

Mr. Mackey, you may proceed whenever you are ready.

ORAL ARGUMENT OF MALCOLM H. MACKEY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MACKEY: Mr. Chief Justice and other Members of the Court:

I will try to keep my argument relatively brief. Most of my argument, of course, is in the brief submitted. I do wish to point out, though I have not filed a reply brief, I do wish to point out that I did discover a Law Review article, Stanford Law Review article, and I would like to mention it to the Court. Volume 23, pages--it is a rather long article--341 to 355, reviews the--and I just discovered it in preparing for the argument. I do not think it changes--it does have some reflection--but I call it hits it right on the button as to these presumptions, so-called inferences, that we are talking about.

That article--and I bring it up at this point--states that there are three reasons why the rational connection test fails. One, that the right allows the prosecution to get his case to the jury without producing any evidence of a probative effect of a material element

of the crime. Two, that the presumption of the evidence is insufficient evidence to justify a finding of reasonable doubt. And that generally, flatly, this article states that rational connection or not, all these presumptions or inferences are unconstitutional as in giving sort of a directed verdict for the prosecution on the one element of the crime.

I would like to go back to the pure unadulterated Constitution, Fifth Amendment: No person shall be compelled as a witness. And when we look at that little sentence or segment of a sentence, compelled as a witness against himself, we find nothing about a rational connection test naturally. And, going to the Sixth Amendment, which says that no one shall be confronted with witnesses against them-- and in this case I think we are confronted with an inference against them which says, as in the Barnes case, Mr. Barnes should not take the witness stand, and he is confronted with this problem of getting over the hurdle. If he takes the witness stand, of course he puts himself in Pandora's Box, into the fire, and then I do not think he can use the constitutional prohibitions.

Q Are not all the things that you have just said true of a large area of what we vaguely call circumstantial evidence, evidence of circumstances? You do not have confrontation in the sense you are arguing when

you are confronted with a set of circumstances. And is not this very close to a circumstance?

MR. MACKEY: It is close but with distinctions. Naturally, circumstantial evidence--you do not have to see the boy eating the cookie if you see the broken cookie jar. That is the cookie jar analogy. If you see the boy with the cookie jar and cookies on his face, that is circumstantial evidence. But are we not doing something else with the inferences? Are we not saying that this--we are applying knowledge to it. And that is the problem that I see. I think there is a distinction. We have circumstantial evidence certainly in civil law. We have this situation. You can put a person on, and we do not have any constitutional prohibition. You can call a person under 776 of the Evans Code in California and put him on and elicit all the information.

We have res ipsa loquitur where we presume that certain elements in a civil case--I do not think that these elements--we could say a person who is up in Appalachia with one of these Mafia groups, that his presence there is some evidence that he knows the conspiracy that is going on. But I do not think we want to do that. I do not think that we want to limit the Constitution.

Therefore, I feel that we should knock out these inferences or, as in the Rodgers case, no matter how

piously--and the Court said in that case no matter how piously we state to the contrary, these inferences are in the jury's mind, that they--

Q Did the petitioner take the stand?

MR. MACKEY: No, he did not.

That is a distinction in counsel's case. They cite--and I want to point--

Q I have opened to page 6 of your brief and I am puzzled. Next to the last paragraph: "Defendant admitted having possession of the checks, but denied that he knew they were stolen and denied the forgery or uttering of these checks." Where was that denial?

MR. MACKEY: Let me state it this way, to clear it up, Justice. Number one, he did not take the stand. They had a--the FBI inspector, the postal inspector took the stand and testified as to the conversation that he had with the defendant. And this is the great distinction that I made; the Tot case--

Q What you are telling me, I gather, Mr. Mackey, is that this paragraph in your brief refers to testimony of the postal inspector?

MR. MACKEY: That is correct. That is correct.

Q On the bottom of page 11 and 12 you say: "His defense is that certain parties gave him these checks as payment for furniture." Would you enlarge on that a little

bit?

MR. MACKEY: Yes, let me enlarge on that, and I think this is important. He had a used furniture store. Naturally he did not take the stand. This information did not come out. He had a used furniture--but it did come out through the postal inspector. He had a furniture store, and he had people he referred to as dudes and chicks going out and selling furniture for him. And they brought in the checks. He opened up a bank account and, just as a businessman would do, just as attorneys do, he stamped as--he endorsed the checks and put it in the account.

This in itself certainly does not create knowledge that he knew. There are other circumstances. In other words, my point is this. The Government does not need this--it is limiting the Constitution, but the Government does not need this instruction.

There is a case referred to in one of the cases this Court decided about throwing a baggie of heroin--I do not know whether it is the Turner or Gainey case, but they throw the--the baggie of heroin goes out. You see this. This is circumstance. When you see that and the heroin drops down from the car, this is a circumstance. This is demonstrable evidence, which is another distinction I would make between the cases.

Certainly, if you have demonstrable evidence, you

would have more of a--

Q Did he put on any evidence at all?

MR. MACKEY: Nothing. Nothing.

Q No witnesses?

MR. MACKEY: Nothing. I happened to be the trial attorney, and I cross-examined, which I naturally had to do, cross-examine the--all we did was cross-examine. And I think that is the valid distinction.

Q You spoke of his putting a stamp on that check and putting it in his bank account. Something else had to happen before that, did it not? There had to be an endorsement--

MR. MACKEY: An endorsement, yes.

Q --by the named payee.

MR. MACKEY: That is correct.

Q And the evidence in the record is that a handwriting expert said he signed it, and was there not an admission through the postal inspector that he said he had signed the payee's name to the check?

MR. MACKEY: I do not believe there was any admission. All he admitted--and we admitted for the purposes of speeding up the trial and certainly the elements--we admitted that he put the checks in the account. There was no getting around it. He put the checks in the account, and but that alone--look at that circumstance. Certainly that

does not create the criminal situation that he knew. If I am at a party, one of these Washington cocktail parties, and I give you some money--and this was the Cameron case--and I say, "Here, here's some money" that happens to be the stolen money of a savings and loan and as Mr. Cameron refused to give back the money to the FBI and consequently had all those problems, you could say--and I refused to take the stand as attorney--say, "No, I am not going to take the stand. I do not have to take the stand. It is our constitutional right." Then I could be subject and very well subject, as I assume this man was a prominent attorney in Texas, to being convicted. And this was set aside by the Fifth Circuit.

Q I still am not sure who signed these checks. Is there any evidence in the record as to who signed them?

MR. MACKEY: The only evidence in the record on the signing of the checks is the evidence of the handwriting analyst. He said that these--this--we are talking on the counts--I am separating counts of forgery and possession. The handwriting expert testified that the signature was forged by Mr. Barnes.

Q And is there anything to the contrary in the record?

MR. MACKEY: There is nothing to the contrary, no, except cross-examination by myself of the handwriting expert,

and we did not have--at that time we did not have our own handwriting expert. But the possession--I wanted to make the distinction of the two counts of possession of the checks, distinguishing that between that and the forgery, because I think these may be in different categories.

But my point is, looking at the whole picture as a whole, if you gentlemen feel that this diminished, so to speak, the Fifth and Sixth Amendment, therefore, let us give Mr. Barnes a whole new trial on the element, because as you mix sugar and coffee together it is hard to separate, and as you fuse sulfur and iron filings together it is impossible to separate. Therefore, we would ask for a new trial on all the issues and that we do not give--

Q What more can you ask for?

MR. MACKEY: That is right.

Q You are not doing us any favor by saying we can do that.

MR. MACKEY: Right. Well, I realize that.

Q Does your response to Justice Marshall relating to the Clarence Smith check, is that the check concerning the expert testimony of the handwriting expert?

MR. MACKEY: There were two checks. There were two checks. I do not know whether it was the--let us see.

Q Did not the postal inspector testify that Barnes admitted forging, signing the name Clarence Smith to

checks?

MR. MACKEY: Well, yes, if he--

Q That is additional evidence besides the handwriting expert, is it not?

MR. MACKEY: Right. We admit, if he signed--I am looking at this. Clarence Smith was the name and he admitted--right. He admitted signing it to put it in the bank, excuse me. That is correct. He admitted signing it to put this in the bank, which is customary. The banks normally either stamp--I as an attorney have a stamp and I stamp all these items to go into the bank, thereby becoming an endorser of the check, which is standard commercially.

If I could have a few minutes for rebuttal at the end, thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Friedman.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The petitioner in this case was convicted under six counts of an indictment growing out of the theft of two Treasury checks from the mail. He was first convicted in two counts of unlawfully having possession of property stolen from the mail, that is, the two Treasury checks. He

was then convicted of forging the two Treasury checks. And, finally, he was convicted of uttering the two Treasury checks.

As is true in most cases of this type, the evidence was largely circumstantial, and the principal issue in the case is whether the judge correctly instructed the jury that in determining whether petitioner had knowledge that this property was stolen, which is one of the elements of the offense of possessing stolen property, whether the jury properly could infer from the fact of unexplained possession of recently stolen property, together with all the other evidence, that the petitioner knew the property was stolen.

What was the evidence--

Q That is part of it. Then do you not have to go further and say that the inference was he knew it was stolen from the mail, because that was the charge, was it not?

MR. FRIEDMAN: No, Mr. Justice Stewart, that is not the charge. Under the statute, all that is required is that he know it is stolen and that it be stolen from the mail. He did not have to know it was stolen from the mail. All he had to know was that it was stolen, and all that we had to show in addition to that--

Q That in fact it was stolen.

MR. FRIEDMAN: --that in fact it was stolen. We discussed this in our brief and we show that the legislative

history indicates at one time there was a requirement that he know it be stolen from the mails, and Congress deleted a word in the statute to say that the Government did not have that burden of showing that it was stolen from the mails but only that he knew it was stolen. In other words--

Q The Government now has the burden of showing that he knew it was stolen and that it was stolen.

MR. FRIEDMAN: Stolen from the mails; that is correct.

What was the evidence before the jury which led it to convict the petitioner? The starting point of this story is the 2nd of June, 1971, in which the petitioner, whose name is James Edward Barnes, opened a bank account under the name of Clarence Smith. Approximately a month later, on the 1st of July, it was stipulated that the Government mail a Treasury check representing retirement to a lady named Nettie Lewis for $269, and that two days later the Government mailed a similar check for $268 to a lady named Mary Hernandez covering Social Security payments.

Both of these ladies testified they never received those checks.

Five and seven days after these mailings, in a different branch of the bank petitioner deposited these two checks. Each of these checks had on it the endorsement respectively of Nettie Lewis and Mary Hernandez and also the

name Clarence Smith.

The two recipients of the checks who never got them testified they did not know petitioner, they never authorized petitioner to deposit the checks.

A handwriting expert who had taken handwriting exemplars from the petitioner, testified that upon comparing the exemplars with the signatures on the checks, the petitioner was the man who signed all three names, that is, Nattie Lewis, Mary Hernandez, and Clarence Smith.

Petitioner's side of the story was presented through the testimony of the postal inspector and petitioner's counsel told the jury in his closing argument that since the postal inspector had presented petitioner's side of the case, there was no need for him to be called to the stand.

The testimony he gave was that he said he was in the furniture business and that these checks had been presented to him by men and women who are going out selling furniture door to door. He was unable to identify any of the people who allegedly sold the furniture for him.

Moreover, he said he had no records of any of these furniture orders because, he said, these orders are put in on scraps of paper which they did not take. He admitted that he had signed the name Clarence Smith on these two--

Q Paper which they did not--

MR. FRIEDMAN: Which he had no record of. In other words, they just put it down on a little piece of scrap paper and he did not have any record of these furniture sales.

Q Made by his agents?

MR. FRIEDMAN: Made by his agents, yes.

He admitted to the postal inspector that he had signed the name Clarence Smith on the checks but denied that he had signed the names Nettie Lewis and Mary Hernandez.

The court gave the jury a traditional instruction with respect to the inferences that may be drawn from the unexplained possession of recently stolen property. In fact, the instruction is taken from a well known form book called Devitt and Blackmar, Federal Jury Practice and Instructions, which I understand is currently widely used in the federal courts as a basis for jury instructions. And what the court made clear--

Q How long ago was that published?

MR. FRIEDMAN: The second edition of this book was published in 1970.

Q And the first edition?

MR. FRIEDMAN: The first edition I do not know, Mr. Justice.

The instructions made it quite clear to the jury that they ought to consider all the evidence in this case, not just the inference that may be drawn from possession, and that they were to draw no inference from the defendant's failure to take a stand. What the court said--and this is set forth at footnote six at the bottom of page 7 of our brief--is that "Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may"--may--"reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen."

The court then immediately charged the jury: "However, you are never required to make this inference," because he said, "It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury"--not requires--"permits the jury to draw from the possession of recently stolen property."

And then after saying that in considering whether possession of recently stolen property has been satisfactorily explained, the court reminded the jury that the accused need not take the witness stand and testify. And finally he pointed out that possession may be satisfactorily explained through other circumstances,

other evidence independent of any testimony of the accused. And, of course, as the accused's counsel stated to the jury, he had attempted to explain his possession through this rather incredible statement that he made to the postal inspector.

Finally, the judge charged the jury with two or three other things. He told the jury that it was permitted to draw from the facts "which you find have been proved such reasonable inferences that you feel are justified in the light of experience." He gave the traditional instruction that the burden is on the prosecution of proving every essential element of the crime charged, and finally that the jury was not to single out any single instruction as stating the law but was to look to the instructions as a whole.

This inference that a--

Q Did the judge at any point in his instructions deal with this attempted explanation in the form of a--

MR. FRIEDMAN: No, he did not comment on the explanation as such.

Q Did he comment generally on the explanation?

MR. FRIEDMAN: No, he did not generally comment. He just explained the law and stated the elements and told the jury it was up to them to decide the facts.

Q Mr. Friedman, did the petitioner's explanation to the postal inspector include any explanation as to why he used the name Clarence Smith in opening the bank account?

MR. FRIEDMAN: That was not brought out before the jury. But in colloquy he explained that he had been on parole at the time and was concerned that if his true name came out, it might be difficult for him in his business dealings. But that was not brought out before the jury because of the possible prejudice of it being brought out that he was on parole.

Q Are you arguing at all that he is really in no position to attack the instructions since in fact he relies on what the postal inspector testified as was his explanation?

MR. FRIEDMAN: We do not make that argument as such, because he did accept to the instruction. What we say is that his claim that this instruction constituted an impermissible comment on his failure to take the stand, that that claim seems to be belied by the fact that he relied on the postal inspector's testimony--

Q As an explanation?

MR. FRIEDMAN: --as an explanation and stated in fact that there was no need for him to take the stand in these circumstances.

This inference of knowledge from unexplained possession of recently stolen property is one of the oldest known to the law. It goes far back into the history of the common law. This Court and the lower federal courts have consistently approved the instruction. I think the only exception that I know of is the Fifth Circuit case decision in Cameron upon which the petitioner largely relies.

Q You say this Court approved it?

MR. FRIEDMAN: Yes, Mr. Justice, as recently as 1964 in the Rugendorf case which involved the possession of stolen furs.

Q I gather then we should look at this case as though the Government had only put into evidence the fact of possession, plus the fact that the goods were recently stolen and had been stolen from the mails?

MR. FRIEDMAN: Oh, no, Mr. Justice, there is much more than that.

Q I know, but would that not have been enough?

MR. FRIEDMAN: That probably would have been enough, but the Court did not so limit these.

Q I understand that, but are you saying then that the instruction here, even if error, is harmless or something?

MR. FRIEDMAN: Yes, we do make that argument. But our position--

Q Is that your only argument?

MR. FRIEDMAN: No, no, but we think the instruction is proper.

Q Then you would make the same argument if the only evidence there was in the case?

MR. FRIEDMAN: If that was the only evidence in the case. The jury may infer--

Q You would say that the instruction, nevertheless, would be valid--

MR. FRIEDMAN: Would be valid.

Q --and the conviction would be valid if the only evidence was possession, proof of recent theft, and that it was from the mail?

MR. FRIEDMAN: And lack of any explanation.

Q Yes.

MR. FRIEDMAN: Lack of any explanation.

Q That is a rather wise asylum.

MR. FRIEDMAN: That we think would be enough, Mr. Justice. But, as I say, in this case there was a great deal more than that.

Q If there is so much more, should we address ourselves to the question of the inference as such on the hypothetical that Justice White just addressed?

MR. FRIEDMAN: I think only because, Mr. Justice--and I assume the reason the Court took the case--of the

conflicting decision of the Fifth Circuit in the Cameron case where the--

Q A writ for certiorari is pending here in the Cameron case, is it not?

MR. FRIEDMAN: No, Mr. Justice. That particular decision I do not believe is pending, because that case has been reversed and was retried, I understand. There may be a petition pending growing out of his second conviction, but I am not certain of that.

Q But you concede a square conflict between this decision by the court of appeals and the Cameron case.

MR. FRIEDMAN: Oh, yes. The instruction that the court of appeals struck down in the Cameron case is almost a carbon copy--

Q That is what I thought.

MR. FRIEDMAN: --of the instruction which the Ninth Circuit here approved.

Q Tell me, Mr. Friedman, is it possible--I am not familiar with the Cameron case, but I gather it falls under this hypothetical that Mr. Justice White put to you. Is it possible that that case could be affirmed and this one also?

MR. FRIEDMAN: I would not think so as it was decided, Mr. Justice.

Q Did you not draw a distinction--I am asking really--between the fact that the Cameron case involved currency, did it not?

MR. FRIEDMAN: It did. It did.

Q And you think the fact that ordinary negotiable currency creates a different fact situation than one of Government checks?

MR. FRIEDMAN: It might, Mr. Justice, except that the Fifth Circuit in the Cameron decision did not go on that basis. What the Fifth Circuit said in the Cameron case was that the inference cannot be drawn--

Q That is right.

MR. FRIEDMAN: --where the element of knowledge is itself a separate element of the offense. But the Fifth Circuit in Cameron said ordinarily the instruction from unexplained possession is a permissible one. But it said you cannot draw that inference where the fact of knowledge is a separate element of the offense. And it said that since the charge there involved proof both of possession of recently stolen property and knowledge that it was stolen, you could not infer from the fact of possession the fact of knowledge.

I assume that what the court really was saying in that case was that since Congress has specified two elements of the offense, the Government could not prove the two

elements by merely proving the one. I assume this is what the legal rationale is. It is not clear in the opinion. Our answer to that is twofold.

First, we think as a matter of analysis it is unsound because it is not the same offense. It is not the same evidence. Possession is proven merely by showing possession of stolen property. The inference may be drawn only if it is possession of recently stolen property that is not satisfactorily explained.

But, more basic than that, we do not think there is any justification for drawing this distinction. The reason this inference from unexplained possession of recently stolen property has been upheld since time immemorial is because that comports with normal experience. If a person ordinarily has unexplained possession of recently stolen property, it seems that it is just commonsense that the chances are great that he is either the thief or at least knows that he has--

Q What do you think the standard is, Mr. Friedman? Is it no rational connection, the tow type thing, or is it more likely than not?

MR. FRIEDMAN: We think it is the more likely than not standard, and we certainly--

Q That is from Leary?

MR. FRIEDMAN: That is from Leary, I believe.

Q You are willing to accept that standard in judging this?

MR. FRIEDMAN: Yes.

Q More likely than not?

MR. FRIEDMAN: The standard we do not accept, the standard we do not think is a sound standard is the question this Court has left open, that you have to prove beyond a reasonable doubt that the inferred fact flows from the proven fact. We do not think that standard is appropriate.

Q Do you not have to get to my example I gave a while ago simply because the instruction actually was given and the jury would have been permitted to disbelieve all of the other evidence except those basic facts? You just do not know what the jury--the jury might have relied on just those basic facts.

MR. FRIEDMAN: Except, Mr. Justice, for the fact that the instruction was qualified by the words "in the light of the surrounding circumstances shown by the evidence in this case."

Q Then you just say the question just is not really here as to the validity of this inference?

MR. FRIEDMAN: Of the naked inference itself, we do not think it is here.

Q Surely you do not have to defend that on the basis of this instruction?

MR. FRIEDMAN: No, that is correct. And I am perfectly happy to defend that, but it seems to me we do not have to defend it on this instruction. I assume the reason we--

Q Then the question I ask you, Is the issue really here? Why do we have to decide it?

MR. FRIEDMAN: Mr. Justice, we opposed the petition for certiorari in this case--

Q You usually do, do you not?

MR. FRIEDMAN: We usually do, but we suggested in this case--

Q Is this a candidate for dismissal as improvidently granted?

MR. FRIEDMAN: I would think it would be appropriate, Mr. Justice. The thing that bothers us, of course, is the decision of the Fifth Circuit in the Cameron case.

Q I do not know that that is a distinction-- those words in that instruction really say that in the sense that the jury still could have disbelieved everything except the fact of possession.

MR. FRIEDMAN: Yes, the jury could have, Mr. Justice, but the jury was instructed it had to find, prove beyond a reasonable doubt, every element of the offense.

Q Of possession, of the fact it was recently stolen, and the fact that it was recently stolen from the mails. That is all it had to really believe.

MR. FRIEDMAN: That is all it had to believe, but I think we must assume, however, that the jury did follow the court's instruction--that is, look into all the circumstances of the case.

Q I know, but all it really had to do was--it could have disbelieved all the other evidence but still rely on the instruction.

MR. FRIEDMAN: It could have but there is no reason to think, Mr. Justice, that in deciding to draw the inference--and the court stressed that the jury was not required to draw the inference but it was within its discretion. I think in deciding to draw the inference, one must assume that--

Q In this case you would suggest that the prosecutor or the prosecution after this suggest to the judge that he should--the prosecution should not submit an instruction like this?

MR. FRIEDMAN: No, we do not suggest that. We think this is--

Q You mean you would not like to abandon an instruction in fact like this?

MR. FRIEDMAN: No. No.

Q I did not think you would.

MR. FRIEDMAN: We think this is a very strong case on the facts. I do not think there is any question of that and we think that this instruction here leaves it to the jury fully to consider all the facts in the case, to draw whatever inferences are appropriate to be drawn from the facts, and to determine on all the facts, on the circumstantial evidence, as a jury ordinarily does in deciding questions of circumstantial evidence whether the Government had proved beyond a reasonable doubt that the petitioner had knowledge the checks were stolen. And we submit that on this record the jury was fully justified in drawing that inference.

Q But we well recall that you did, as Mr. Justice White said, as usual oppose the grant of the petition. But now that it is here, in light of the Fifth Circuit, is this in your view something that ought to be clarified for the benefit of the Fifth Circuit if no one else?

MR. FRIEDMAN: I would think so, Mr. Justice. It is most unfortunate, but there seem to be an enormous number of prosecutions involving possession of stolen property. Theft from the mails is constantly a serious problem. This decision of the Fifth Circuit is causing problems. Conceivably another circuit might follow it. I assume at least within the Fifth Circuit it will be very difficult--

Q Then you say that this case we have before

us really is not unique, that there really is a conflict with the Fifth Circuit?

MR. FRIEDMAN: I thought I had made that clear, Mr. Justice. There is a conflict in that the Fifth Circuit found inadequate and improper virtually the identical instruction to that which the judge gave in this case and which the Ninth Circuit approved.

Q Approximately one-third of all the federal district judges in the country are bound by the Fifth Circuit holding, are they not?

MR. FRIEDMAN: I do not know the exact number--

Q Approximately one-third.

MR. FRIEDMAN: --but I would not be at all surprised, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Mackey, do you have anything further?

REBUTTAL ARGUMENT OF MALCOLM B. MACKEY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MACKEY: Yes, let me just make a few comments.

Q By the way, your citation to the Stanford Law Review is not accurate.

MR. MACKEY: I have the book from the library here, Your Honor. Excuse me. I am looking at Volume 22, page three--it starts at page 341 and goes to 355. I checked it out of your library.

Q You said 23.

MR. MACKEY: Excuse me. Excuse me. I was in error. Twenty-two.

Q Is it 22?

MR. MACKEY: Twenty-two, yes.

And it is a very comprehensive treatise of the whole thing, going into rational connection test and the whole ball of wax.

I might say one distinction. The Rugendorf case which counsel cites, the defendant did take the stand, and that is a distinction I make. The Leary case changed it. It was from Leary that the changes started coming in this. And McDevitt has not been changed. They are following the same instruction without modifications to the Leary case.

Q The Leary case held on a presumption, not an inference, did it not?

MR. MACKEY: It did, but as the Rodgers case again said, not matter what we call it, it still creates a hardship. It still in the jury's mind gives one element of the crime.

Incidentally, there was another jury instruction which I think has a bearing, because it is getting to what the justices brought out. That instruction is--and it is a standard one--that from all the instructions inferences are deductions which have been established by the evidence; which means if there is just an inference and no testimony,

the defendant in this case would lose. In a civil case, this would happen. In a fire case where we throw in res ipsa this would happen. And I do not think that we have that-- fortunately we have the Constitution which is a prohibition against these types of inferences, because I can envision many other types of inferences that the Government would like to use and this would stop it.

Incidentally, in that Law Review article, the case of standing at a still, which was one of the cases--

Q Gainey.

MR. MACKEY: Gainey case. And that was highly criticized in the article. But we can make a distinction. Here is an illegal--if you want a distinction, you have it, gentlemen. Here is an illegal operation, a still somewhere in the mountains, I assume, and here is a question of endorsing checks, putting in a bank account of Mr. Cameron money that someone pays him to represent someone in a criminal case. The Cameron case, as we discussed, was reversed and the attorney got off the hook in that case. What has happened to it I do not really know, but it may never come up again.

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

[Whereupon, at 2:09 o'clock p.m. the case was submitted.]