In the

Supreme Court of the United States

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HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner

v.

HUGH KYLE NAUGHTEN,

Respondent

Criminal Case No.
72-1148

Washington, D. C.

October 16, 1973

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HOYT C. CUPP, Superintendent, Oregon State Penitentiary, Petitioner	
vs.	Criminal Case No. 72-1148
HUGH KYLE NAUGHTEN, Respondent	

Washington, D.C.

Tuesday, October 16, 1973

The above-entitled matter came on for argument at 2:02 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:

JOHN W. OSBURN, Solicitor General of Oregon, State Office Building, Salem, Oregon For the Petitioner

ROSS R. RUNKEL, ESQ., College of Law, Willamette University, Salem, Oregon Appointed by the Court 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. 72-1148, Hoyt C. Cupp, Superintendent, Oregon State Penitentiary versus Hugh Kyle Naughten.

Mr. Osborne, I think you may proceed whenever you are ready, now.

ORAL ARGUMENT OF JOHN W. OSBURN, ESQ.,

ON BEHALF OF THE PETITIONER

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

The sophisticated legal issue which is before the Court in this case involving the presumption of witness truthfulness, is an interesting contrast to the factual situation which gave rise to the case and upon which the state court trial jury was called upon to deliberate.

The Respondent, Naughten, was convicted in state trial court of the crime of armed robbery involving the robbery of a late night drive-in market in Portland, Oregon. Two eyewitnesses and a friend of his who were in the store testified as to the facts of the robbery, that as the proprietor was locking the place up and getting ready to close and just before he locked the place, a man came in, whom the witness later identified as the Respondent, Naughten, and brandished a pistol and informed Mr. Livengood, according to Mr. Livengood's testimony, that this was a stick-up and he

then forced the proprietor and the friend into the cooler and told them to wait there until he was finished and then the two men were sitting in the cooler and the friend said to the proprietor, "Well, I think they are gone now," and so the proprietor went out and the robber had not gone and forced him again back into the cooler.

Then, a short time later, the friend again suggested that the robber was gone by this time and they came out and the proprietor called the police. The police arrived fairly immediately and it turned out that Mr. Naughten's car had been parked across the street in a tavern parking lot.

The police arrived and the proprietor, Mr. Livengood identified the Respondent, Naughten, as being the robber. There was no line-up. There were no Wehde-Gilbert problems, no problems of undue suggestibility. Both the proprietor and the witness had seen Mr. Naughten for approximately a period of 15 minutes, most of which they were in his presence, part of which they were back in the cooler.

There was also testimony by two police officers, one who testified that he came and Mr. Livengood had identified Naughten as the robber and there was also testimony that at the time that Naughten was handcuffed with his hands behind him, that he was attempting to stuff some money into the cracks between the seat of the automobile. This money was later retrieved by the police and this, essentially, was

the testimony that was presented at the trial.

The defendant cross-examination consisted primarily -- the cross-examination consisted primarily of asking the two eye witnesses about whether they talked about the case, asking about why was it that the man who was arrested, who was identified as Naughten, why it was that he didn't have a pistol.

And the defendant didn't present testimony, didn't call any witnesses and the case went to the jury then with the court's instructions.

Now, the trial court instructed the jury that it was the state's burden to prove guilt beyond a reasonable doubt, instructed the jury that the defendant was presumed to be innocent and the jury returned a verdict of guilty.

Q I take it, Mr. Solicitor General, that you viewed these evidentiary matters in detail, perhaps for the purpose of indicating that the guilt was established by overwhelming --

MR. OSBURN: Yes.

Q -- evidence so there is no question?

MR. OSBURN: This is the reason why we try to present it in this fashion because it seems to us that on those facts and given the instructions which the court gave, clearly instructed on burden of proof, clearly instructed on presumption of innocence, that it is just inconceivable to me

that a lay jury could have taken that instruction about witnesses being presumed to speak the truth and could have turned that, on the facts of this case, into an instruction which did just the opposite and placed the burden of proof on the defendant and this is particularly true in this case because of what occurred at the time that the jury had received its instructions and Counsel took his exception to the instructions.

At the time that the prepared instructions were given, the court and defense counsel, the prosecutor and the defendant and the court reporter all went into the court's chambers and they then considered whether or not there were exceptions to the instructions and Counsel did take some and one of the instructions which he requested which he had not asked for was an instruction that the jury was not to infer guilt from the fact that the defendant did not take the stand.

This is what this instruction is. Of course, there is considerable disagreement among defense counsel as to whether or not this is a good instruction or not. Some counsel prefer it. Some consider that the instruction is, in the words of the ninth circuit, a "don't put the jelly bean in your nose" instruction because it simply calls attention to something that the jury might otherwise have overlooked.

Q Mr. Solicitor General, despite the overwhelming

evidence, as you say, I gather the court of appeals disagreed with the district court that this was a case in which Harrington's harmless error rules by?

MR. OSBURN: Yes.

Q Well, as it comes to us, at least, that issue of harmless error is not before us, is it?

MR. OSBURN: Well, we think that it comes before the Court in two ways and maybe these are subtle statements of the same principle.

Q Did you argue?

MR. OSBURN: Yes, we raised both of those issues.

The first way of stating it is this: The instruction itself, while it does present a colorable Constitutional issue because it has been discussed in the various circuits in a Constitutional context and the courts have generally not given good marks to this instruction, that our position is, it is just not that bad, that it should result in the reversal in federal habeas corpus of a jury verdict on these facts, that it is just incovceivable that on the facts of the case and, given the clear, precise instructions that the Court gave, that a jury could possibly even have understood what the legal issue is all about.

Q So you suggest that the Ninth Circuit apparentl adopted the view that any Constitutional error was prejudicial per se and that was what obviated the determination?

MR. OSBURN: Yes.

Now, they also found that none of the other instructions which the trial judge had given specifically obviated the problem that is involved in this instruction.

Well, we think that it did because the jury was called back or rather, the court and parties went back into the courtroom after the jury had been sitting there and they were called back into the courtroom and the Court again gives and instruction which says that the burden of proof is on the state, the state must prove its case beyond a reasonable doubt and the defendant is presumed to be innocent.

Now, we certainly recognize that it is fundamental to our law that the guilt of the defendant in a criminal case must be proved beyond a reasonable doubt.

It is not quite so clear that an instruction must be given to a state court trial jury that the defendant is presumed to be innocent. Nevertheless, that is an instruction which is always given under our state law and which was given in this case.

Now, then, the question is, what is there about the presumption instruction that suddenly shifts the burden to the defendant even though the court has said time and again that the defendant had no burden.

Well, the argument goes that where the defendant does not testify and where the defendant does not present any

evidence or call any witnesses, that the instruction really amounts to a presumption that witnesses who were called by the state have told the truth because the instruction is expressed in terms of a rebuttable presumption.

"Every witness is presumed to speak the truth," says the instruction. "This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest or motives, by contradictory evidence or by a presumption."

Now, the instruction said, in its very words that, while the witness is presumed to speak the truth, that the witness himself may overcome that presumption. The presumption may be overcome by the manner in which the witness testifies, by the nature of his testimony. The jusry was again told at a later place in the instructions that "You are not bound to find in conformity with the testimony of the declarations of any number of witnesses which did not produce belief in your minds."

Now, we have tried, as is our lawerly duty to -- in the brief -- to explain why the instruction is given, to explain what it is intended to convey and I think, essentially, it is simply intended to convey the impressions of the jury that the jury is there to hear the testimony. They are there to hear the witnesses and they may begin with a presumption

that a person who is sworn on oath is not going to commit perjury and until there is something that occurs, something about the way the witness testifies, something about the way he looks, or the nature of what he says that convinces a person that he is not telling the truth.

Q This "permissive" is a matter under the Oregon statute, as I understand it.

MR. OSBURN: Yes.

Q In your experience, is it usually given or is it usually not given?

MR. OSBURN: This instruction was given for many years. It has been part of the standard form instructions.

Q The statute goes back to 1862, you tell us?

MR. OSBURN: Yes.

Q And there was a CAlifornia statute from 1872 until 1965, saying the same thing. But I wonder as a matter of practice, is it usually given in criminal cases in Oregon or usually not given? Or don't you know?

MR. OSBURN: I have had occasion to speak to judicial conferences, of course, and I have discouraged the giving of the instruction.

The Supreme Court of Oregon says it is not error if you give it.

Q Right.

MR. OSBURN: But that doesn't mean that it has to

be given and so we have discouraged its use but it has generally been given.

Q It generally is given, in your experience?

MR. OSBURN: Yes.

Q Even when the defendant does not take the stand, does come on for testimony?

MR. OSBURN: Yes.

Q Nobody ever draws a line, there?

MR. OSBURN: Well, this is an instruction that has been given for about 100 years and it is only in the last two years, in fact, this is the first known case in which anybody has challenged the instruction.

Q Well, do you see a difference in a case where the prosecution puts on eight witnesses and the defendant puts on eight witnesses and a case where the prosecution puts on eight witnesses and the defendant puts on none?

You don't see any difference?

MR. OSBURN: I don't see any difference in this instruction.

Q That is from Government.

MR. OSBURN: I don't see any difference. The manner of evaluating when a person gets on the stand, the manner of how you start out looking at him, whether or not you say to yourself, all right, this is a person who is called

who presumably knows something about the case and presumably is going to tell the truth, that applies across the board to all witnesses.

Now, we do mention in the brief, of course, that the witnesses to a case are chosen not by the parties. These aren't the prosecution's witnesses. These are the people who were there.

Q They are not the prosecution's witnesses?

MR. OSBURN: They are the prosecution's witnesses only in the sense that the prosecution has chosen to call them.

Q And vouches for them.

MR. OSBURN: Well, we have a rule, of course, as a matter of state practice that you can't impeach your own witness by evidence of bad character or something like that.

Q The point is, they were held up. They were not employees of the prosecutor's office. They were victims of the hold-up.

MR. OSBURN: Exactly.

Q And you didn't choose them.

MR. OSBURN: Right.

Q In your brief and in the opposing brief, reference is made to the Mathie's book on jury instructions --

MR. OSBURN: Yes.

Q -- and the '61 edition and also the '65 revision. I see no reference to the 1970 edition in either

brief, where the instruction is omitted.

MR. OSBURN: Yes, I had thought that was referred to in the response of my opponent, but maybe it has not been.

Q But maybe that source of the use among your trial judges is now eliminated.

MR. OSBURN: Well, of course, Mathis' instructions are federal instructions.

Q Yes.

MR. OSBURN: And our state courts, as do most state courts, have their own uniform jury instructions.

Q And yours preceded the mapless form by many, many years.

MR. OSBURN: Yes.

Q But the mapless form was almost universally disfavored, shall I put it, by courts of appeals.

MR. OSBURN: Well, it is unusual in that I think as we indicated Judge Mathis was a California trial judge when and he had the opportunity to prepare uniform jury instructions, he put that in, apparently because of his California background and it immediately met with disfavor by practically every circuit and --

Q Is this the only circuit to say, however, that it has a Constitutional infirmity?

MR. OSBURN: There are cases -- many of the cases which, of course, are federal prosecution, do speak in terms

of Constitutional infirmity. But they are talking in a context in which they don't have to put it on Constitutional grounds because the courts of appeals, of course, are free to suggest that the instruction is a poor one, which it very well may be.

Q Supervisory.

MR. OSBURN: Yes.

Q My question is that at least one circuit reversed on pure supervisory powers.

MR. OSBURN: Yes.

Q I don't know about the others.

MR. OSBURN: And, as we indicate, there is only one case out of the myriad of cases that have disapproved the instruction in which, like this case, that is the only issue that is raised. Normally, there has been some other problem, the problem of failure to give an accomplice instruction or something like this. But our concern here is, and the reason for requesting this Court to review the case is that, of course, there is a Constitutional colorable question presented here. Of course we recognize that. Our concern is, though, that there must be some point at which we say that although a colorable Constitutional issue is presented, that the Constitutional -- the problem is really not one of Constitutional magnitude such as to justify overturning the decision of the jury and requiring the defendant to be tried anew.

I think, basically, that states our position.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Runkel.

ORAL ARGUMENT OF ROSS R. RUNKEL, ESQ.

ON BEHALF OF THE RESPONDENT

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

I'd just like to quote a couple of more lines from the instructions to begin with. The Appendix, page 15, the judge instructs the jury on what a presumption means.

"A presumption is a deduction which the law expressly directs to be made from particular facts," and so on. And then proceeds to discuss the various presumptions involved of which there are really only two, this truthfulness presumption and the so-called presumption of innocence.

Now, it is our position that the truthfulness presumption is in direct contradiction in terms, in theory and in effect to the Constitutional burden of proof.

The burden of proof --

Q Where do you find the burden of proof standard in the Constitution?

MR. RUNKEL: It is in the due process clause, your HOnor, by decision of this Court and several others.

Q It is rooted, we now say, in the due process

clause, but it is not explicit anywhere in the Constitution.

MR. RUNKEL: No, it is not expressed.

The burden of proof means a number of things. It can mean the burden of pleading, the burden of proceeding with the evidence, the burden of persuasion. And the only meaning it can really have that has any effect is the burden of persuading the jury of the truth of the allegations and so by saying that you are to presume that whatever these witnesses say is true, it seems to me that that is in direct contradiction to the concept of the burden of proof being on the state.

Q Suppose, Counsel, that this instruction had been given before any evidence went in, as some trial judges in some courts do give some general instructions so the jurors, particulary jurors at the outset of their service, will grasp the burden of proof concept before they hear the evidence.

Suppose these instructions had been given in advance? Would you think that would lighten the problem any?

MR. RUNKEL: I think it makes a big difference and I think the position of the state seems to be that maybe the instruction was given at the beginning because, perhaps when the witness first gets on the stand, you might accord him a certain deference that he will not either lie or make innocent errors. But now we are dealing with a situation where the

witness has already testified and now you are telling the jury that they must presume that these witnesses have, in fact, testified truthfully and I'd like to contrast that with another point in time where we talk about the truthfulness of witnesses and that is on appeal.

I have cited innumerable cases where the comment is made that witnesses should be presumed to have told the truth and here we are doing a completely different thing. Now we are looking back on the case and saying, was there sufficient evidence to go to the jury and, in testing the sufficiency of evidence, of course, we take the case in the light most favorable to the state and by doing that we presume that the witnesses did tell the truth but that only gets us past the question of whether the case should go to the jury and now what we are doing in this case is, the state is saying that -- the judge is saying, this evidence is sufficient. Therefore, it goes to the jury.

And, secondly, you must presume that this sufficient evidence is, in fact, true. And it seems to me then that there is really no difference at all between the sufficiency of evidence rule, which may simply mean that there is some evidence, and the rule that the burden of persuasion lies with the state. It seems to me they are hopelessly confused by this construction. But I would say that if the instruction were given at the outset that it

certainly would make more sense.

Now, it is inescapable that we have to talk about presumption and inference cases here. I have taken the position, of course, that this is really not a true presumption at all because a presumption is a situation where you have a fact proved and the jury is told that from that they should deduce a second fact.

In this case, it seems to me that there is no proved fact. But I think it is important to distinguish the line of cases in this Court, the most recent one being Barnes, from the spring, working all the way back through Gainey, Romano, Tot, Ball and Back and so on, virtually all of which, it seems to me, involve inferences.

In other words, the jury is told, you may if you wish, link these two facts together in your minds.

In this case, the jury is told, you are expressly directed to link these two facts together in your minds.

Now, the reformulation of the inference rule in Barnes seems to be that the judge may instruct on an inference if a rational juror -- excuse me, this is not in my brief because I think that was decided about the time I was in the printer's office -- a rational juror -- if a rational juror would be able to link the two facts and find the presumed fact beyond a reasonable doubt.

But that is in a mere inference. Here, we are

telling the jury that you must find. In that case, it seems to me, the judge can give the instruction only if a judge, himself, would find that the facts are linked beyond a reasonable doubt. Because the jury has no option at all. They must find this fact to be true.

And if I can make a comment about Blandis against Klein, which is a whole other situation from the spring, involving an irrebuttable presumption in a civil case, I take it that the rebuttal presumption in this case is one notch lower than Blandis against Klein. What you will notice in Blandis, the Court holds that that kind of an irrebuttable presumption can be used only when the fact would follow necessarily and uniformly and, certainly, we are not asking for that much. We are only asking that a judge be able to find beyond a reasonable doubt, not uniformly and exclusively.

Now, the opinions from the other courts, both within the last ten years and over a hundred-year span, indicate, first, that the presumption of truthfulness is not a standard exception to the reasonable doubt standard. It has never been simply included as a part of the package.

Secondly, every time the presumption of truthfulness seems to raise its head, particularly in the last ten years, it becomes crushed.

Now, in the circuit courts --

Q Excuse me, I didn't hear what you said.

MR. RUNKEL: Every time the presumption of truthfulness raises its head, the court seemed to crush it, in one fashion or another. Pardon?

Q On Constitutional grounds? Not always.

MR. RUNKEL: I think it is very difficult to read both state cases and circuit cases from the standpoint of whether they are federal Constitutional grounds or supervisory or, in the state cases, where they are state Constitutional grounds.

Q Or simply error.

MR. RUNKEL: Or simply error on federal Constitutional grounds.

Q Error of a non-Constitutional magnitude.

MR. RUNKEL: In a state case you have three choices, I guess. But, in reading the language, certainly, of the opinions, they usually talk in terms of presumption of innocence which I think is precisely the same thing as the burden of proof being on the Government and the interference with the prerogatives of the jury and I should say that it seems to me that in three of the circuit cases, the one we are arguing today, in addition, Johnson from the Third Circuit and Birmingham from the Tenth Circuit, there really were no other substantial issues involved. Obviously, all of the rest of the cases, as all cases do, involved a number of issues and you can't get a pure case every time.

Q Would this problem arise in a case where the defendant put on witnesses?

MR. RUNKEL: Well, I think the problem is still there. It is obviously much more irrational to presume -- not irrational, unfair and unbalanced to presume that only the state's witnesses are telling the truth. I think it is just as irrational to presume that the defendant's witnesses are telling the truth.

Q Well, but the instruction is that the presumption is that all witnesses are telling the truth and that if the prosecution's witnesses say, "He's the man," and the defense witness says,"He is not the man," then the problem disappears.

MR. RUNKEL: Then it is less burdensome for the defendant but more irrational because the witnesses obviously are contradictory and how can you have a presumption that they are both telling the truth?

Q Well, but the instruction itself says there are many ways in which presumption can be overcome, does it not?

MR. RUNKEL: Yes, can be overcome.

Q In general, it is sort of a general instruction about the credibility of witnesses and how the jury is to approach whether to believe a witness or not and you say that the instructions must leave the jury completely

at large on that question.

MR. RUNKEL: No, not completely at large at all. There are many cases in which --

Q Well, you wouldn't insist that they say that the state's witnesses be assumed not to tell the truth. You wouldn't insist on that?

MR. RUNKEL: Well, I couldn't object to it.

Q No, but you wouldn't insist on that.

MR. RUNKEL: I wouldn't ask for it at all.

Q Then they are supposed to be left completely in neutral?

MR. RUNKEL: No, no, I know of no case that holds that a jury has to be turned loose at large and there are many cases in which it is perfectly permissable even for the judge to make the comment that in his mind the proof has been made beyond a reasonable doubt. But in every case like that I have seen, the judge goes ahead and then says, "But now, you don't have to take my word for it."

In this case, though, the jury is told that you must find.

Q It says presumed.

MR. RUNKEL: It says, "The Court directs you to find."

Q It says presumed, yes.

MR. RUNKEL: Well, that is the way I read -- that

is why I reread the instruction where the jury is told what a presumption is. A presumption is a deduction which the law directs expressly to be made. In other words, that is not a comment on the evidence.

Q But it is a comment on whether the jury is to believe a witness or not.

MR. RUNKEL: Well, I think it is not a comment in the sense of this is my opinion, take it or leave it or like an inference instruction is. This is telling the jury that they must find, unless it is rebutted.

Q Did he tell the jury that they were the sole judges of the facts, the usual --

MR. RUNKEL: Yes, right at the outset of the instruction.

Q Do you think that tends somewhat to neutralize the --

MR. RUNKEL: You would think so at first if you only read the -- this is a problem, I think, that was brought up in the Cool case from last year, is, how do you read your instructions? Do you parcel them out or do you read them all together? Do you see what I mean? We have to read them together and if I can read, on page 12 of the Appendix, it says, "The jury is the sole and exclusive judges of the facts and reliability." It is followed, however, by a sentence which says, that"The jury's power is not arbitrary

and if the Court instructs you as to the law in a particular subject, or how to judge the evidence, you must follow the instructions." And so they are saying, you are the exclusive judges, so long as you follow the judge's instructions, and the instructions are, that you must find them to be truthful.

Q So it is unconstitutional of you to instruct the jury that they must believe a witness unless he is contradicted? Or, uncontradicted evidence must be believed by the jury.

MR. RUNKEL: Well, I think if that is unconstitutional, it is probably unconstitutional under the jury clause, as to any witness. In this case, of course, we are dealing with witnesses who, in fact testified on behalf of the state so that places the burden of persuasion -- well, there is no burden of persuasion then.

Q Well, the judge, in effect, told the jury, "The witnesses you have heard, you should believe."

MR. RUNKEL: You must believe.

Q No, he said "should."

Q He did qualify it by saying that if a manner of testifying might be taken into consideration or that contradiction --

MR. RUNKEL: Yes.

Q He did the usual kind of qualifications you would expect.

MR. RUNKEL: I think not, your HOnor. They are not the usual ones. There is nothing here about things on the nature of bias or motivation that they can take into account. Absent evidence --

Q Le t me ask you this, Mr. Runkel, where you said, "Every witness is presumed to speak the truth," on page 16 of the Appendix. Then he says, "This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest or motive."

MR. RUNKEL: Yes.

Q Now, wouldn't that include bias?

MR. RUNKEL: Yes, as a matter of evidence. But you see, that shifts the burden to the defendant to put on evidence and in the criminal case, the defendant has no obligation to either put on evidence as it relates to the affirmative case.

Q No, but certainly you can show a prosecution witness' bias by cross-examination, without bringing any witnesses of your own in.

MR. RUNKEL: That is true. That is true. It can be done by cross-examination, and there was a certain amount here. But there is also the burden of persuasion and you may be able to get the evidence on by the state's own witnesses, in other words, that simply means you don't have to go out

and drum up witnesses, but the state still has the burden of persuasion if the facts were true.

Q You mean, all this did was to disentitle the jury to disbelieve evidence that is not contradictive?

MR. RUNKEL: Yes.

Q That is, sometimes juries are free to disbelieve the only witness in the case.

MR. RUNKEL: I think they always are.

Q Well, they aren't here.

MR. RUNKEL: Yes, they are.

Q You say they are here.

MR. RUNKEL: NO, they are entitled, in this case, to disbelieve these witnesses and all of them if the defendant persuades --

Q No, no, in this case, where there weren't any other witnesses on the defendant's side.

In this case, you say the jury wasn't free to disbelieve the government's witnesses.

MR. RUNKEL: I think that is a slight overstatement of my argument.

Q Because they were told they could disbelieve it by the very manner in which the witness testified.

MR. RUNKEL: Well, then, they are permitted to disbelieve him.

Q Well, then, what is wrong with it, if they

are free to disbelieve it?

MR. RUNKEL: The problem is that the burden of persuasion has to be on the Government. Now, the only time the burden can shift to the defendant is after the Government has carried the burden on the onus of the crime. We can put the burden on the defendant to prove insanity, excuse, justification and various defenses.

Q Well, why does the defendant have the right of cross-examination? If what you say is true?

MR. RUNKEL: That is a separate clause of the Constitution, your HOnor.

Q It is there.

MR. RUNKEL: Yes.

Q Well, suppose there was an instruction, the court said, you noticed all the witnesses took an oath. I want to tell you what that means. It means that if he lies, he goes to jail.

MR. RUNKEL: I don't think this is a case of perjury, your Honor. Perjury was mentioned by the Solicitor.

Q What is the difference between that and saying he is presumed to tell the truth?

MR. RUNKEL: Truth means what the judge has said it means, which is that that is what the jury is there to find out, is the truth, and truth means objective truth, not perjury or lying versus not lying.

Q Well, would you testify to the construction that Justice Marshall just proposed? Would you think that was unconstitutional if the judge reminded them that the witnesses had taken an oath and/if that they had not told the truth, they would be subject to prosecution for perjury?

MR. RUNKEL: I think that was -- I wouldn't object to it except that it is not an accurate statement of the law because not telling the truth is not perjury. Perjury is a deliberate and intentional lying on a material fact.

Q I was taking a short-cut. Read that into the instructions.

MR. RUNKEL: Okay, read that in, that's fine. But, you see, that is not what they're being told. They are being told that the witness --

Q To you think that is less objectionable, has less impact upon the defendant, than what was said here?

MR. RUNKEL: Yes.

Q Oh, well --

MR. RUNKEL: It is certainly more rational. If the person takes an oath, he knows that he must conform his conduct to the perjury statutes. But there is nothing about taking an oath that improves his perception or his memory or his articulation and that is what we are dealing with when we are talking about telling the truth.

Q Well, Mr. Runkel, I gather that 16, after

discussing presumption, in effect, the Court instructed resumptions are to be accepted by you as true unless outweighed or equalled and then, in the second succeeding paragraph, doesn't the court instruct them how they may be outweighed or equalled, namely "Overcome by the manner in which the witness testifies, or the nature of his or her testimony"?

MR. RUNKEL: Yes, but that simply makes it a rebuttable presumption instead of an irrebuttable presumption instead of an irrebuttable presumption and of course, an irrebuttable presumption would be worse.

But the problem is that "overcome" means -- or equal -- means that now the defendant must carry at least a preponderance burden.

Q No, but the jury -- under that language, the jury on its own motion and its own mind to say, "This fellow testified in such a manner that we don't believe him," without the defendant having to do a thing.

MR. RUNKEL: Not do a thing in terms of put on evidence.

Q No, even argue.

MR. RUNKEL: But he must persuade them that the jury should --

Q No, he doesn't. The jury has already made up its mind, see? If the jury may decide it doesn't believe him because of the manner in testifying.

MR. RUNKEL: Perhaps that is theoretically true, but I think we have to operate under the rule of the game that the jury will comply with the instructions of the court and will not make decisions based on things off the record.

Q I don't suppose it would make any difference, but let me ask you, Mr. Runkel: Suppose, in speaking of overcoming the presumption, this being a case where there was no evidence other than the state's witnesses, had the court left out,"by evidence affecting his or her character," because there was none, "by contradictory evidence," because there was none, and this had just been left with, "overcome by the manner in which the witness testifies, by the nature of his or her testimony," would you be making the same argument?

MR. RUNKEL: Yes, simply because the burden is on the Government to persuade the jury that the facts are true.

Q Yes, but even though this tells the jury that, in effect, if you just don't believe him, if you think the witness is lying, then that is the end of the presumption. Isn't that, in effect, what this court instruction means?

MR. RUNKEL: If the defendant can persuade them by a preponderance that the witness is not telling the truth, then the witness can be disregarded.

Q But may I ask you, since I have interrupted you, in your own experience, I gather this [illegible] in

discretionary, isn't it, with the trial judge?

MR. RUNKEL: Yes, and I'd like to distinguish that from -- I think it was --

Q Well, may I ask you a question?

MR. RUNKEL: Yes.

Q In your own experience, does it make a difference with the trial judge whether the defense has put on a case?

MR. RUNKEL: I don't think I can answer that from my own experience, your Honor.

But I would like to distinguish that from the concept of a permissive situation, permissive only in the sense that the judge is not statutorily commanded to give the instruction. But it is not permissive in the sense of an inference as opposed to a presumption.

Now, I would like to make a couple of other comments. One is that, for the life of me, I cannot understand what interest the State of Oregon has in giving this instruction. It seems to me they don't need it. It's something that --

Q I think there is general agreement on that in the profession, isn't there?

A I think so, but it seems to me that when we are dealing with the concept of due process and the burden of proof that the state's need, or previous cases argued today,

talking about compelling state interest, the state has virtually no interest at all in having this instruction.

And, in the due process area, I think that the state's need is a relevant criterion.

Now, as far as the harmless error doctrine goes --

Q How do you read what the Ninth Circuit has said about harmless error? Is Constitutional error automatically, it is prejudicial?

MR. RUNKEL: It has never been the rule in the Ninth Circuit and --

Q Well, what does this language mean, in the opinion?

"The appellee also contends that the instruction --" I am looking at page 21 of the --

MR. RUNKEL: I have it.

Q "-- even if fatally defective under the Federal Constitution, was, in the circumstances, harmless beyond all reasonable doubt, we reject this argument also. Once Norton established the infringement of a Constitutionally-protected right, the burden shifted to the Appellee to establish that the error was harmless."

MR. RUNKEL: Well, I think perhaps the law under Chapman and Harrington, and the court, the Ninth Circuit is simply saying that the state has not carried its burden of showing that the error was harmless beyond a reasonable

doubt, which is a -- I think an impossible thing to do in any event. We are saying that -- if we apply the harmless error rule, and I am taking the position, of course, that the harmless error rule cannot apply here, you are saying that an appellate court can determine, beyond a reasonable doubt, that if the jury had been given proper reasonable doubt standards, they would have convicted anyway and it is quite impossible to engraph these other harmless error cases into this one because harmless error cases ordinarily involve maybe a little comment that the defendant didn't take the stand, or maybe a little extra illegal heroin introduced into a drug case.

Q Well, your argument does rest upon our acceptance of your proposition that this was a Constitutional error, the instruction was Constitutional error.

MR. RUNKEL: Absolutely.

And the fact that the evidence was sufficient does not mean that the error was harmless because you can stack up 15 or 20 witnesses and if you presume that they have all told the truth, then you would never have a burden on the state and any case would be harmless.

Q Well, this evidence would be a little bit more than sufficient, wouldn't you say? You are not suggesting that it was just enough to get to a jury?

MR. RUNKEL: No, I don't think there is any

distinction to be made between just enough to get to a jury --

Q Well, that is a different point, but your position, then, would be that it doesn't make any difference, the weight of the evidence is irrelevant on this point?

MR. RUNKEL: No, I think the only relevant point is what -- if a juror complied with the instructions, what logical steps would he take in reaching his verdict? Apart from the quantity or the quality of the evidence. Although I would point out that as far as accepting the state's argument on harmless error, that it could be harmless, where was the gun ten minutes after the robbery? Where was the so-called raincoat that the robber wore? Why was he driving a car and there were two other people in the car? Why did the police arrest three defendants in the car and only charge one with the crime? It seems to me there is some doubt here about guilt and innocence which the jury might have considered, if they were not required to believe the state's witnesses.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: You are welcome.

Do you have anything further, Mr. Solicitor General?

REBUTTAL ARGUMENT OF JOHN W. OSBURN, ESQ.

ON BEHALF OF THE PETITIONER

MR. OSBURN: Just briefly, your Honor. We assume, I think, as lawyers, that the words that we say in a courtroom

are hung on by the jury and that they attach great significance to them and we've talked now, both in the briefs and in oral argument about this instruction. Remember, this is an instruction that went to the jury in about fifteen seconds and they heard that in the middle of all kinds of other instructions about other things.

We ask a great deal of jurors. We bring people in who are cabdrivers and housewives. We sit them down in a courtoom and we parade witnesses in front of them and then ask people to make a decision.

We think the fact-finding system here was fair, that adequate evidence was presented and that there is nothing essentially wrong with the standard which was employed by the court, that the instruction is not a model, but it is just not that bad.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Runkel, you came here at the request of the Court and by appointment and on behalf of the courtroom, I want to thank you for your assistance to the man you are representing and your assistance to the Court in presenting the case.

MR. RUNKEL: Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 2:47 o'clock, the case was submitted.]