In the

Supreme Court of the United States

UNITED STATES,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 72-1168
	)	
THOMAS E. MAZE,	)	
	)	
Respondent.	)	

Washington, D. C.
November 13, 1973 &
November 14, 1973

Pages 1 thru 46

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner,	:	
v.	:	No. 72-1168
THOMAS E. MAZE, Respondent.	:	

Washington, D. C.
Tuesday, November 13, 1973

The above-entitled matter came on for argument at 2:44 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:

MRS. JEWEL S. LAFONTANT, Office of the Solicitor General, Department of Justice, Washington, D. C.; for the Petitioner.

WILLIAM T. WARNER, 545 Starks Building, Louisville, Kentucky, (appointed by this 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. 72-1168, United States v. Thomas E. Maze.

Mrs. Lafontant, you may proceed.

ORAL ARGUMENT OF JEWEL S. LAFONTANT, ESQ.,

ON BEHALF OF THE PETITIONER

MRS. LAFONTANT: Mr. Chief Justice, and may it please the Court:

Following a jury trial, respondent Maze was convicted of four counts of using the mails to defraud, in violation of 18 U.S.C. 1341, and of one count of knowingly transporting a stolen automobile in interstate commerce, in violation of the Dyer Act. He was sentenced to concurrent terms of five years imprisonment on each count.

The court of appeals for the Sixth Circuit reversed the conviction for mail fraud, but affirmed the Dyer Act conviction, which is not here in issue now.

The United States' petition for a writ of certiorari was granted to review the judgement of the appellate court reversing the conviction of the four counts of mail fraud.

Q They were concurrent sentences, as I remember, were they not?

MRS. LAFONTANT: Yes, Mr. Justice Stewart. Concurrent sentences, five years each, one on the Dyer Act and on the four counts of mail fraud. And the only issue before this Court is

the mail fraud count. The Dyer Act conviction was sustained by Judge McCree, so it's --

Q So, under the old rules -- pre-Benton, I guess --

MRS. LAFONTANT: Yes, sir.

Q -- this case wouldn't even be here, I suppose --

MRS. LAFONTANT: That's true --

Q -- and wouldn't have been decided by the Sixth Circuit court of appeals after it had upheld the validity of the Dyer Act.

MRS. LAFONTANT: That's true. But Benton v. Maryland has changed that.

Q Changed the ground rules a little bit.

MRS. LAFONTANT: Right, your Honor.

Q If we were to reverse the Sixth Circuit, then, nothing more would happen to the respondent than will already happen to him under the judgement of affirmance on the Dyer Act?

MRS. LAFONTANT: Well, Mr. Justice Rehnquist, you are correct -- he will be serving five years imprisonment no matter what this Court does, but it will have an effect on the law of the land, as far as this particular issue is concerned. And also because we have -- I'm sorry, Mr. Justice Marshall.

Q It would also have an effect on his record.

MRS. LAFONTANT: Yes, that's certainly true. And it's important that this case be determined here because we do

have a division in the circuits, although six of our circuits agree with the government's position there is one case in the Tenth Circuit that is opposite, and, of course, the present one is before you today.

The position of the court of appeals is that the government did not show that the mails were used for the purpose of executing the fraudulent scheme. But the respondent's transaction was completed after he received the goods and services from each motel, and that the subsequent billing was merely incidental and collateral to the scheme and not a part of it.

The question here is whether the use of the mails -- it was charged in the indictment and shown by the evidence -- properly may be said to have been for the purpose of executing the fraudulent scheme, in violation of the mail fraud statute. The government says "yes;" the respondent says "no."

For a period of two months, ending in April of 1971, the respondent lived with one Meredith in Louisville, Kentucky, in Meredith's apartment. He stole from Meredith's apartment a BankAmericard, belonging to Meredith, all of his identification, including his wallet, and he also took from him a 1968 Pontiac Tempest automobile and other personal items.

Between April 15 and 19 of that same year, he used this credit card to purchase goods and services from merchants in California, Louisiana and Florida, all the time representing

himself as being Meredith. For example, as charged in the indictment, on April 17, he charged over $88.00 at the Sheraton p 4, Beach Inn in Bennington [sic] Beach, California. And just two gton days thereafter, he charged over $96.00 at the Sheraton Inn in San Diego, California. The following week, he made charges of over $62.00 at the Quality Motor Capri in New Orleans, Louisiana. And, three days thereafter, at the Holiday Inn in Fort Lauderdale, Florida, he ran up a bill of over $54.00.

Subsequent to this, the Citizen's National Bank of Louisville, Kentucky, which was the issuer of the credit card, received by mail copies of the purchase invoices representing these transactions and requesting reimbursement.. Such invoices, according to usual business practice, were customarily mailed to the bank and then mailed monthly to the card holder with the bill for his total purchases.

One hotel owner testified that there are delays of two or three weeks, or even longer, before merchants are advised that a particular credit card is being used fraudulently.

When the respondent left Louisville, Kentucky, in Meredith's Pontiac, he drove to several states. He first went to Indianapolis, Indiana, from there to St. Louis, Missouri, and to Florida. He went to California, to New Orleans, and finally ended up in Knoxville, Tennessee, where the car developed transmission trouble. At that time, he had the car towed in by the Aamco people down there who took the car to their

garage to service it. And while he was there he borrowed from the Aamco people another car, a '64 Chevrolet. He told them that he needed that car to go to a motel to stay for the night, and then he would return the next day to get his car. He never returned. He was found two days later in a semi-conscious condition in Kentucky in a hit-and-run accident, and as a result of that he was charged with drunken driving and leaving the scene of an accident. But it's this Aamco car that is the subject of the Dyer Act conviction.

Now, in addition to the Dyer Act charge, the respondent was indicted on four counts of mail fraud. The indictment alleged that he had devised a scheme to defraud the Kentucky bank, to defraud Meredith, the card holder, and merchants, by using the BankAmericard without authorization, and falsely securing credit from persons who had agreements with BankAmericard to furnish goods and services on credit to card holders, and of course on the condition that payment would be made when due. The indictment alleged that the use of the mails was also part of the scheme.

We all realize that in the last decade one of the most significant commercial developments have come about -- has come about. And that is, the emergence of the credit card as a substitute for cash. Inherent in the three-part type of credit card system, we submit, is the use of the mails. The use of the mails is a necessary and essential feature of the

collection and the billing systems, and in the processing of the sales invoices. It is common knowledge, and I believe anyone over 21, like the respondent, who is 31, who tries to collect goods with a credit card knows that, first, the card is a national card; he knows, too, that the invoices must be sent to the card issuing company, and in many instances that's across state lines, for payment and then to the owner.

In Pereira, this Court established a broad test for determining whether a defendant, in setting in motion a chain of events which results in the use of the mails by another, has caused a mailing within the meaning of the mail fraud statute. And the Court held in Pereira, and I quote: "Where one doesn't act/knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he causes the mails to be used."

But the Sixth Circuit already has conceded that the respondent had caused the mailing of the purchase receipts to the Louisville bank from the motels, in the sense that the Court said that he should reasonably have foreseen that this use of the mails would necessarily occur. But it nevertheless held that these mailings were not a significant factor in the success of the scheme.

We respectfully submit that these mailings were an integral part of the respondent's scheme, because with the de-

lay caused by the mails, it enabled him to go on longer with this scheme, and enabled him to avoid detection. At the core of any successful credit card scheme, or any credit card involving more than a single illegal purchase, is the necessary delay in detecting the fraud. The respondent should reasonably have foreseen that the use of the mails would prevent his apprehension from being immediate, anyway. And detection, if ever, would be delayed.

Q Well, as opposed to what? The use of the mails compared to what, Mrs. Lafontant? If a motel owner had done nothing, and not ever even sent the invoice in, I suppose that would have been an even surer way of avoiding detection on his part; and I suppose the option wasn't really there of telephoning or telegraphing the invoice material -- I don't see --

MRS. LAFONTANT: Well, it's -- I would think it would be unreasonable for a merchant no to turn in the -- the invoice; but I would certainly say that if it had not been turned in, then we wouldn't have a mail fraud violation, because you have to have the use of the mails. Now, whether they could have gotten the invoices over there by some other means is really not before us. But I would say if any other means was chosen then there would not be a violation of the mail fraud statute.

Q Well, it seems to me the real explanation for

delay in this case is not use of the mails, but the distance from the point of origin which the respondent conducted his various activities. I -- it's hard for me to follow the government's argument that implicit in the use of the mails was the idea of delaying the discovery, because it seems to me once he was in Fort Lauderdale and the bank was in Louisville, discovery was going to be delayed, absent telephone communication which was just out of cons- -- out of the question.

MRS. LAFONTANT: But wouldn't you agree, though, that by having to use the mails to even notify the Louisville bank, that gave him another day -- by the next day he had gone to another state. So that even if he just had the delay of one day caused by the mails, it would bring it still within the statute.

Q But -- but I don't think the delay was caused by the mails, albeit there is probably a lot of argument contra on that subject. But, if you're in Fort Lauderdale and mail something to Louisville, and send it through the mail, the delay in the people in Louisville finding out what you've sent from Fort Lauderdale isn't necessarily the result of the mail, it's the result of the distance. And you have to have some mean of communication.

MRS. LAFONTANT: Well, in this case, it would be the result of the mails, because the mails were used. Now whether it was mailed within the same state or across state lines or --

isn't really the point in issue, because even if it were mailed within the same state it would take a day, and he would be on his way to the next jurisdiction.

Q Would this statute cover a forged check, which also travels in the mail afterwards?

MRS. LAFONTANT: Well, we have -- we have many cases, your Honor, concerning forged check --

Q Under this statute?

MRS. LAFONTANT: Where forged checks have been found to be -- the mail fraud statute has been violated where forged checks have been sent through the mail, and the mail's been used. If they can show that by the use of the mails was more than incidental -- that it played an integral part in --

Q Well, this is a man waltzing in the bank and puts a forged check in the bank here in Washington. And, of course that bank goes through Federal Reserve to check it, and from Federal Reserve it comes back through the mails. Has he violated this statute?

MRS. LAFONTANT: I would say if he could foresee the use of the mails in this instance he has violated in this case, too.

Q Well, my other point -- and it's getting late -- How did he defraud this man he was living with? He just stole the money.

MRS. LAFONTANT: Yes. The --

Q How do you de- -- charge him with defrauding?

MRS. LAFONTANT: The main person -- main person that was defrauded was the issuer of the card; but, also, the person he stole the card from was defrauded, too, because he had to pay up to $50.00 to BankAmericard for -- well, he would have had to pay it if he hadn't notified them on time. I think in his -- in this case he was not -- he didn't have to pay it.

Q I mean he is guilty of larceny -- he's not guilty of fraud. Maybe I'm old school, I guess that's what it is, but I mean I can't --

MRS. LAFONTANT: You had what?

Q I'm "old school" -- for I can't see defrauding when you steal a man's wallet -- that you've defrauded it --

MRS. LAFONTANT: You wouldn't see it as part of the whole scheme to defraud the card issuer that he had to use Meredith, too. But I think you are right that the crime against Meredith would be larceny, or embezzlement, yes.

The decision in the Parr case, decided upon -- decided by this Court upon which the respondent relies -- that decision did not stand for the proposition that once a defendant has obtained that which he has gotten fraudulently and has set out to obtain -- once that he's gotten that, it doesn't hold that no subsequent mailing could form the basis of a mail fraud prosecution. In the Parr case the essence of the fraud lay in the abuse of the petitioner's position. In that in-

stance, which you may all remember, the petitioner and several other people who were trustees and on the board, and also who had certain jobs with this particular corporation, took from the corporation -- or bought on the corporation's credit -- gasoline with its credit card.

MR. CHIEF JUSTICE BURGER: We will resume here in the morning.

MRS. LAFONTANT: And this --

Thank you.

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner,	:	
v.	:	No. 72-1168
THOMAS E. MAZE, Respondent.	:	

Washington, D. C.
Wednesday, November 14, 1973

The above-entitled matter was resumed at 10:02 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, 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:

MRS. JEWEL S. LAFONTANT, Officeof the Solicitor General, Department of Justice, Washington, D. C.; for the Petitioner.

WILLIAM T. WARNER, 545 Starks Building, Louisville, Kentucky, (appointed by this Court); for the Respondent.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume in the United States v. Maze.

Mrs. Lafontant?

RESUMPTION OF THE ORAL ARGUMENT OF JEWEL S. LAFONTANT, ESQ., ON BEHALF OF THE PETITIONER

MRS. LAFONTANT: Mr. Chief Justice, may it please the Court:

First, I would like to develop a little more the theory expressed yesterday afternoon that this case involves the substantial use of the mails, or the use of the mails is, as stated in Pereira, incident to and essential part of the scheme.

It is significant that the respondent went on a cross-country frolic, representing himself as one Meredith, to obtain goods and services, well knowing that the issuer of the card would not learn of the fraudulent scheme until the purchase invoices, which within the usual business practices, would be mailed from the merchants to the card issuer. And according to the testimony of one hotel owner, there is a delay of two or three weeks, and often longer, before the merchants learn that a particular credit card is being used fraudulently.

There is no doubt, from the record, that this respondent used the mails in that fashion. There is no doubt that, upon the receipt of the invoices through the mails, discovery of respondent's fraud would be uncovered. However, if the card

issuer was present with the merchant when the respondent presented the credit card, he would have been discovered immediately, and apprehended.

Q Hypothetically -- if none of the motels or stores ever sent the vouchers in, the discovery would be indefinitely delayed, would it not?

MRS. LAFONTANT: That's true.

Q Is it your point that, since this is an indispensable -- that is, the use of the mail -- the routine process of bringing this to the notice of the credit company -- is an indispensable, integrated part of the whole thing that --

MRS. LAFONTANT: It's inherent in the credit card system, and without it he would not have been able to perpetrate this kind of fraud.

Q Even though he didn't select the mails as --

MRS. LAFONTANT: That's right --

Q -- part of the process.

MRS. LAFONTANT: The fact that he selected it isn't too important. The fact is that his cause -- his activity created the cause of action which included the use of the mails, which was a pertinent part and essential part in the credit card scheme. And, as you've indicated, Mr. Chief Justice, the fact that the mails were used delayed his detection.

Q Did he testify in this case? I don't recall

from the record. Did he testify?

MRS. LAFONTANT: Yes, he did testify, your Honor, and he admitted the use of the credit card -- he admitted that the BankAmericard belonged to Meredith and that he had taken it, but he said that he had permission to use credit card, as well as permission to use the automobile. But with all of the evidence that was adduced the jury did not believe him, and found otherwise. In fact, Judge McCree of the Sixth Circuit said that evidence was overwhelming -- the evidence that was submitted by the government was overwhelming -- to show that this was a fraud, and that he actually did not have permission to use the credit card.

Now this case --

Q Who, ultimately, was the victim of the fraud? Who was defrauded? I suppose these innkeepers and tradesmen --

MRS. LAFONTANT: The innkeeper --

Q -- were paid, weren't they?

MRS. LAFONTANT: I would assume -- that they were paid.

Q Did they suffer an ultimate loss?

MRS. LAFONTANT: No, I believe the ultimate loss would have been with the Citizens National Bank in Louisville, Kentucky, who issued the card. The merchants, initially, were out of their merchandise, but the BankAmericard has to reimburse them. So the ultimate, true victim would have been the card issuer who does not get paid, because even the card holder is

only obligated up to $50.00, and in some instances not that if he's dutifully notified the card issuer that his card has been stolen. And in this case he did do that.

Q So the loss was suffered by the Louisville bank?

MRS. LAFONTANT: Certainly --

Q Is that right?

MRS. LAFONTANT: Yes, your Honor.

Q Although the victim of the fraud -- victims of the fraud were the four people covered by these four accounts -- innkeepers and others -- who were, through misrepresentation, caused to part with their rooms or their services. Right?

MRS. LAFONTANT: That's correct, Mr. Justice.

Q And there was no -- the fraud was perpetrated, therefore, against the tradesmen and innkeepers, wasn't it?

MRS. LAFONTANT: That's true.

Q And the loss of the Louisville bank was hardly -- the Louisville bank was not defrauded, was it? Because no misrepresentations were made to it --

MRS. LAFONTANT: Well, I interpret this fraudulent scheme as beginning with the idea of perpetrating a fraudulent scheme. And, initially, the innkeepers were defrauded. All the other things were steps in the following that, including the card holder taking misrepr- -- taking --

Q Taking the card in the first place.

MRS. LAFONTANT: -- taking the card from him and mis-

representing him in the first place.

Q In the first place. But the --

MRS. LAFONTANT: The card holder himself was not actually defrauded, but it was all part of one fraudulent scheme, and what actually --

Q The fraud -- the actual misrepresentation -- was made to the innkeepers. And, with respect to the first count, at least, that fraud would have been wholly effective with or without any use of the mails, wouldn't it? Because --

MRS. LAFONTANT: That's true, your Honor.

Q -- as soon as the person walked -- as soon as this man walked out of the motel --

MRS. LAFONTANT: Right. He had defrauded the --

Q -- had he defrauded that innkeeper, and therefore no use of the mails was involved at all, at that point, was there?

MRS. LAFONTANT: Up to that point. That's right.

Q Now, your point is that he perhaps could not have continued to commit the other three offense -- offenses --

MRS. LAFONTANT: Without counting --

Q -- except for the delay occasioned by the delay in the mails. And, incidentally, your argument is not a very good advertisement for the Post Office Department -- since you emphasize --

MRS. LAFONTANT: I think, Mr. Justice Rehnquist, we

agree on that --

Q -- you emphasize the great delay.

MRS. LAFONTANT: Yes.

Q But, as to any one of these counts, the fraud could have been complete without any use of the mail at all. Isn't that right?

MRS. LAFONTANT: That's just because it was --

Q Certainly as to the first count.

MRS. LAFONTANT: Yes.

Q Certainly as to the first count.

MRS. LAFONTANT: Especially as to the first count. If he turned in the card and got the credit --

Q Showed him the card and signed it or whatever you do --

MRS. LAFONTANT: -- and that was the end of it.

Q -- and so the bill was paid.

MRS. LAFONTANT: And there was no use of the mails, it would have ended right there. Yes.

Q Ended right then and there without any use of the mails.

MRS. LAFONTANT: Right. But that is --

Q Now, I would unders- --

MRS. LAFONTANT: -- not our case, in that --

Q Well, your case -- but your ca- -- these are four separate counts. If it had been one count, and you could

have said -- one count covering this long -- this fairly extended frolic, as you call it, through interstate journey -- and you -- in your argument were that he could not have continued his fraudulent -- his -- continued his defrauding of these innkeepers except by the delay occasioned by the mails, it would be one thing, but each one of these is a separate count.

MRS. LAFONTANT: Well, I would be willing to even --

Q And as with respect to any one count was complete, was it not, when the innkeeper extended the credit?

MRS. LAFONTANT: If the use of the mails were not involved, I would agree with that. But if the use of the mails were involved, even with the one transaction, I would go so far as to say that it would be violative of the mail fraud statute. But that's not our case. Our argument here, too, is that although there are four separate counts, we consider this as one unitary scheme, developed from all of the evidence that was here.

Q Well, but you indicted this fellow for four separate defenses.

MRS. LAFONTANT: Yes.

Q Did he get one -- did he get concurrent sentences on this?

MRS. LAFONTANT: Yes.

Q I guess he did.

MRS. LAFONTANT: Yes. Five years each.

Q Now, going back to this hypothetical -- going back to the hypothetical I put to you, if, for one reason or another, the tradesmen had not sent the vouchers into the bank, then the bank could never have been defrauded, could it? Unless they made personal delivery by some other method than the mail.

MRS. LAFONTANT: Hand delivery. I agree with you, your Honor. But if --

Q So if the mail was an indispensible part of the fraud on the Louisville bank -- is your point, is it?

MRS. LAFONTANT: That's correct, your Honor. Very definitely.

Q Mrs. Lafontant?

MRS. LAFONTANT: This -- Yes, Mr. Justice Powell.

Q Do you think the bank, as the ultimate loser here, could have brought a civil action against the party who perpetrated the fraud? The bank was the only party that did lose money in this transaction.

MRS. LAFONTANT: Yes, I would say that he could have brought -- the bank could have brought a civil action against Maze, the respondent here.

Q The bank that pays a forgery -- or the bank which is the victim of a forgery may bring a civil action against the party who commits the forgery --

MRS. LAFONTANT: That's right, and I think that this

an analagous situation. I believe that the bank could have brought a civil action against the respondent.

Q It may have been a futile act, but --

MRS. LAFONTANT: In fact, it may have been -- it would have been a futile effort, I'm afraid, because he -- one reason he was living with Meredith in the first instance was that he had no job, and supposedly was looking for employment.

But the answer to your question is very definitely, the bank could have brought a civil action against him.

This case --

Q I gather, Mrs. Lafontant, that this new '70 legislation and the Truth-in-Lending Act --

MRS. LAFONTANT: Yes.

Q That makes crime of fraudulent use of credit cards, but/applies only where the amount involved is over that $5,000.00?

MRS. LAFONTANT: That's right. In the 1970 amendment the law states that credit cards -- the misuse or unauthorized use of credit cards -- in excess of $5,000.00, is punishable.

Q Well, I notice in your footnote of page 27 of your brief, you suggest that as a matter of policy Justice has been following something like this? That doesn't include the $5,000.00 -- limit, does it?

MRS. LAFONTANT: No, and -- No, it doesn't. It's just that the Department of Jusitce, in many of these cases,

has not prosecuted under the mail fraud statute as such. But even where they do, it has to be one of interstate commerce, as this case is.

Q You say "important credit card frauds." The policy is to prosecute under the mail statute only "important"-- What's "important"?

MRS. LAFONTANT: Well, I don't know the real interpretation of that, but I would interpret "important" as an ongoing scheme, more than one little act of a fellow who might go and forge a --

Q But, in any event, I gather that it's not the policy to rely only on the Truth-in-Lending Act --

MRS. LAFONTANT: No --

Q -- in these cases -- in the future --

MRS. LAFONTANT: No, not at all. And, of course, it's been well settled that one act can violate two statutes. And these statutes are not conflicting in any way. In --

Q What was the necessity for the new statute? If this statute governed -- why did you need some more Federal presence in this --

MRS. LAFONTANT: Well, from reading the CONGRESSIONAL RECORD, Mr. Justice White, I gather that because this credit card business had just mushroomed so quickly, and banks were sending cards out all over the country, even without people requesting them; and that there was to be -- beginning to be

such a problem, that Congress addressed itself to the problem to make sure that anyone who misused a card would be punished. They made it for $5,000.00 in -- I think Senator Proxmire had said that he had talked with the Justice Department and they had suggested using the figure of $5,000.00 because it would be very expensive to oversee all of the credit fau- -- credit card cases under this section.

It doesn't rule out the mail fraud section because you could be guilty of the 1970 Amendment Act and also mail fraud, if it exceeded $5,000.00. But the people under $5,000.00, we contend, are still covered by the mail fraud, because even though they passed this new law, there is nothing in conflict -- there was no talk of repealing the earlier law, and I don't think we can repeal the law by inference or implication or what we think went on in the minds of the lawmakers at the time.

Q You could have some coverage under the Truth-in-Lending section where you didn't have it under the mail fraud section, too, couldn't you, because --

MRS. LAFONTANT: Yes.

Q -- all the Truth-in-Lending section requires is affecting interstate commerce.

MRS. LAFONTANT: Yes, that's true. And then just the unauthorized use is sufficient. So it's broader, in a sense, although it's limited because of the $5,000.00 figure.

Q Do you think the new Act was prompted at all by

decisions such as the one here in this case?

MRS. LAFONTANT: No, I don't. All I can say is, there's nothing in the CONGRESSIONAL RECORD to indicate that they knew that there were any cases at all. We've had at least 13 cases involving the mail fraud statute, most of them before 1970. So that they should have been aware of it, but there was no mention of it, and --

Q Were those cases where the mail fraud statute was said to cover the transaction?

MRS. LAFONTANT: Yes. Yes. We have them in six of the jurisdictions: the Second, Third, Fourth, Fifth, Seventh and Ninth all say that the mail fraud scheme embraces the credit card. I mean the mail fraud statute embraces the credit card schemes. The last case was -- just came down October 17 of '73, in Osher in the Second Circuit, which went along with the majority's view.

I see that my time is up.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Warner?

ORAL ARGUMENT OF WILLIAM T. WARNER, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I want to respond directly to several points and

contentions raised by Mrs. Lafontant, but, with the Court's indulgence, I would like to do so within the context of presenting two major considerations which I feel are important and are before the Court this morning in this case.

Now, the first is the, what we consider to be the utter failure of the government's proof upon the issue of knowing use of the mails, including the so-called "delay" issue.

The second point is the reasonableness, propriety and/or the necessity of extending Federal criminal jurisdiction to this case and other cases similar to it.

Now, I think it should be pointed out that --

Q Well, would it not be true, Mr. Warner, that if you left this to local prosecution that there would be prosecutions in four states? Or three states, is it?

MR. WARNER: It's possible. I think in this case --

Q Well, they were assuming that the fact proof is the same as here. There would be potentially one suit with respect to each act of defrauding that is alleged in the indictment. Isn't that correct?

MR. WARNER: In this case, Mr. Chief Justice, I submit that it wouldn't, to the extent that, as Mrs. Lafontant pointed out, the ultimate loser, in terms of who ended up with the paying the bill, in this case, was the Citizens Fidelity Bank in Louisville, Kentucky. They took the responsibility;

they had to pay these invoices. Maze was caught in Kentucky. He was caught 30 miles from Louisville. And presumably, as we cover in our brief, and as is a matter of record, the Kentucky statutes are more than adequate to cover every aspect of this so-called scheme -- from the misappropriation, or theft, of the credit card right on through to the defrauding of the bank.

Now, the Sixth Circuit Court of Appeals opinion in this case, I think, should be pointed out, was not as broadly drawn as the government contends. It was a very carefully drawn opinion. And it said, essentially, that the government did not prove, in this case, by the evidence of record that Maze could have foreseen or knew that the mails would be used, or that the mails were an inescapably direct incident between the defrauding of the innkeepers and the defrauding of the bank.

Now, I think it's significant to --

Q How else, Mr. Warner, would the vouchers reach the bank in Louisville, in the normal course of credit transactions?

MR. WARNER: Well, sir, in this case there were four vendors who testified. Two stated that they customarily used them in the mails -- they dropped them in the mails and they were sent in. One said that -- testified that they went through bank channels -- that was the extent of his testimony. And one vendor, I believe, was indefinite or stated he didn't

know. So the proof is not with the --

Q Would the banks not use the mail, in turn?

MR. WARNER: Well, this is a question in this case, that some of the Circuits have raised, with respect to charging a defendant such as Maze with a detailed knowledge of the very complex and intricate commercial scheme. I assume that the mails were used -- I would. But there may be other ways -- I don't know how the banks transmit matters of this type. It may be like they do checks -- through the mails.

Now, Mr. Chief Justice, in response -- on this proof issue, I think it's significant, and in response, partially, to a question that you addressed to Mrs. Lafontant -- Maze did testify in this case. He not only testified in his own behalf, but he gave a statement to the Postal Inspectors. Now, neither the Postal Inspectors nor the assisting United States Attorney, who tried the case, addressed one single question to Maze on the knowing use of the mails, or did he know, or did he contemplate, or could he have known. Nor did the government introduce any other witness as -- on this issue as to how the mails are a necessary indicent of this type of fraud.

Now, also, I want to point out that, at this point, that the government contends that there are six Circuits which support this per s- -- this so-called per se doctrine that the fraudulent use of a credit card is per se a use of the mails. Now, my reading of the cases does not support this view. There

are at least two Circuits -- the Fifth, certainly, in the Adams case, which is the fundamental case on the per se doctrine, supports this view. The Seventh Circuit does, and perhaps -- I'm sorry, the Second Circuit, in the Kellerman series of cases, and most recently the Third Circuit in the Ciotti case.

Now, the other cases involve varying kinds of fraud, and as the Eighth Circuit Court of Appeals said in the Isaac's case in 1968, that the forms of fraud which are possible under the mail fraud statute are as multifarious as human ingenuity can devise. And I think that this should be kept in mind.

Now, the government case on the knowing use of the mails issue, we submit, is built on a series of presuppositions and assumptions. Now, it's long been the rule under our system of jurisprudence that we don't convict people upon presuppositions and assumptions, and that this is where, partially at least, where the government case fails.

Now, as I stated early in response to the Chief Justice's question that the trouble with the per se doctrine -- that is, the doctrine that the fraudulent presentation and/or use of a credit card per se involves the mail is that this imposes on a defendant a detailed knowledge of a very complex commercial mechanism. And again, there is no proof in this record in this case.

Now, the Sixth Circuit in this case stated specifi-

cally that they were not holding that credit card abuse could never constitute mail fraud. They stated in this case -- in this case -- that the government's proof had failed.

Now, with regard to the alleged scheme, I think the facts are significant here. The card was misappropriated, stolen, on April 10, 1971. Now, Maze was arrested and in jail on May 9, 1971. Now, there was no extensive, long-range scheme, such as the one in the Chason case, which is the Second Circuit case involving a man who obtained a credit card, or a series of credit cards, and was engaged in procuring air line tickets; or in the Ciotti case, Kellerman, where you had long-range, extensive schemes where one credit card after another was used.

Now, also, the other cases that have held use of the mails as part -- or as covered under the mail fraud statute -- have involved other types of people -- businessmen, who submitted fraudulent statements for the purpose of getting credit. The Pereira case -- a very sophisticated person who, as the Court knows, defrauded a widow over a long period of time.

Now, it is possible -- and I want to point out to the Court that I'm not saying, or arguing, this morning that Maze didn't know that the mails would be used. The point is that the government didn't prove it. Now, as long as we're dealing, as the government is, in presuppositions and assumptions, I think there are some other assumptions that could just as rea-

sonably be made, that Maze presumably could have counted on.

One, Mr. Justice Rehnquist, I think, alluded to yesterday, and that is the -- Chief Justice -- the fact that the vendors themselves might, for some reason, delay a week or ten days in sending in their invoices. It's possible that Maze could have known and counted on the fact that credit card issuers such as the banks, customarily collect statements over a 30-day period. Now, Maze first went to California -- that invoice was sent in. The bank didn't bill Meredith right away. They waited until the end of the month, collected all his invoices and sent them out.

Another presuppositon which could be indulged in this case is that Maze could have counted on the fact of a possible breakdown in the Citizens Fidelity Bank's lost card, or stolen card, procedure. Obviously, it may take ten days to two weeks for the vendors themselves to be notified, and in this case one vendor did testify that it took three weeks.

Q Your challenge to the government's position is, I take it, that the per se rule approach impinges on the presumptions of innocence by creating a presumption of some kind --

MR. WARNER: Yes, sir, that's part --

Q Well, now, what if the courts took a different tack -- and this is -- I just want to explore it with you --

MR. WARNER: Yes, sir.

Q You're familiar with the rule that possession of

recently stolen property gives rise to an inference which the jury may, if it wishes, draw from the totality of the evidence, that he knew it was stolen. That's a common law type of development --

MR. WARNER: Yes, sir.

Q Would it be unreasonable for the courts, do you think, instead of the per se rule to develop the rule that the possession and use of the stolen credit card creates the basis for an inference of one comparable to that in the recently stolen property's setting?

MR. WARNER: I think it would be, I respectfully submit that it would be unreasonable, Mr. Chief Justice, and I would point, in that regard, dealing with such a presumption through the recent case of Rhuas v. the United States, which was a 1971 case involving the travel act. And there a -- as the Court recalls -- a gambler, or a person running a gambling establishment in Florida just over the Georgia line, was charged with a violation of the travel act, and the basis of that prosecution was that he could reasonably foresee that people would travel interstate from Georgia to patronize his gambling establishment. And the Court struck down that presumption and raised an intesting point that I think may be applicable here.

They stated that this so-called foreseeability doctrine, which is present in the Maze case, is very troublesome when it applies to the acts of others. Now, in the -- with re-

gard to possession of recently stolen property -- there is the man with the property. He's got it in his hands. Now, in the Rhuas case, as the Court said, I think correctly in that case, that the person who was running that establishment had --

Q But the evidence in this case shows possession of a recently stolen credit card, and the evidence also shows fraudulent use of it. You would agree up to that point?

MR. WARNER: Yes, sir.

Q And you say it would be unreasonable for a common law type of rule saying from -- at that point the unexplained -- the unexplained situation would give rise to an inference. I'm not talking about a presumption, now --

MR. WARNER: An inference, yes, sir.

Q Just an inference the jury might draw if it wished.

MR. WARNER: I think, your Honor, on the presentation of some evidence to the jury, or some proof as to how this could happen.

Q With such a rule, then, hypothesizing would not get the government home free by any means. It would mean that there would have to be an instruction along this line.

MR. WARNER: Well, I feel that, personally, and I would submit to the Court, that a holding or a doctrine which went the -- totally the other way from the per se doctrine in credit card cases, I think would be inappropriate. And I think

it's got to be taken on a case by case basis. And what we are, in effect, attacking here today is this per se doctrine.

Now, I had one other point, sir. That is that it may not only be unreasonable but I think in view of existing state statutes and some jurisdictional problems which I want to get to shortly, that it may be unnecessary.

Now, there is another problem, again responding to your question, sir. And I think that there's a flaw in the logic here somewhere. The government says that because the defendant in this case, Maze, intended the fraud that -- which was clearly a criminal act, and the jury so found, and that is not contested -- but because he intended the criminal act, therefore he intended an entirely separate criminal act, which is the use of the mails to the fraud. And, in my view, and I respectfully submit to the Court, the two just don't connect.

Now, the second point that may be, and certainly is, we feel, applicable here, is what we consider to be an unwarranted and unnecessary extension of Federal criminal jurisdiction. Now, it's an elemental principle that Federal criminal jurisdiction can be conferred only by express Congressional grant. Now, the -- this principle does not, and we do not argue here this morning, prevent the courts or the Justice Department in any way from a reasonable construction of a criminal statute. But in this case it's unnecessary, and I'd like to outline why.

Now, in the -- in two recent cases, one I've already mentioned -- the Rhuas case, and also in the case of the United States v. Bass, which was also a 1971 case, the Court enunciated certain policies. Now, I don't submit that these cases are analogous to the Maze case, because both of those cases involved a single statute. Here, as Mr. Justice Brennan has pointed out, there are in effect two statutes that we're dealing with.

But the Court there, in those cases, stated that Federal jurisdiction should notbe unnecessarily injected into area which would affect this sensitive state-federal balance. Now, the policy, apparently from the teaching in those cases, is that without a clear statement from the Congress that no such expansion will be permitted or sanctioned. Now, we submit in this case -- in the Maze case -- that there has been such a clear statement by Congress, and that is in the form of Title 15, Section 1644. And I want to call the Court's attention to the legislative history of this particular statute, which is set forth in full at page 17 of our brief. But I think it's clear, from that legislative history, as recited in the CONGRESSIONAL RECORD, from statements and remarks made by -- particularly by Senator Long on the floor of the Senate-- that the Court -- oh, I'm sorry, the Congress felt that there was no adequate protection for credit card fraud.

Now, there's one other significant point with re-

gard to the enactment of this legislation. The original Senate bill, as it was passed, was Section 134 of Title 5, I believe, of the Truth-in-Lending Act -- the original Senate bill had no jurisdictional limitation, other than the interstate commerce requirement. The Justice Department came in and said, "We want a $5,000.00 jurisdictional limitation in this, because of the administrative problems that we anticipate encountering in administering such a broadly drawn statute. And the statute was subsequently enacted with the $5,000.00 requirement.

Now, I think it's clear, again from statement or policy that can be gleaned from a recent case in this Court -- the Erlenbaugh decision which was decided a little less than a year ago -- Erlenbaugh v. The United States -- that a later Act -- in this case, 15 U.S.C. 1644 -- can, to a great extent, be regarded as a legislative interpretation of an earlier Act. And certainly it's, I think, a well settled principle of statutory construction that whenever Congress passes a new statute it acts aware of all previous statutes in the same general area.

Now, the Rhuas case also states -- expresses this Court's concern with the over-extension of limited Federal police resources. And I think it's ironic, in this case, to a great extent, that the Justice Department, in 1970, in urging a jurisdictional limitation upon the Congress, expressed almost the same concern.

Now, as we point out in our brief on the necessity issue, each of the four states involved has a specific statute dealing with credit card fraud. The state of Kentucky, where the Citizens Fidelity Bank is located, which was the bank that ended up with the payment in this case -- Kentucky has probably one of the most detailed, tough credit card statutes in the country, and it provides both misdemeanor and felony penalties. In this case, Maze would have been subjected to very heavy felony penalties. So it's not a question, I submit, of either the Federal government entering the field or having a felon escape punishment. This is not the case.

Now, there has been no showing by the government in this case that the Kentucky officials -- the Louisville police, the state of Kentucky -- are either unwilling -- or were either unwilling or unable to prosecute Maze for this offense.

Q Would Kentucky have had any difficulty in getting evidence from all across the country?

MR. WARNER: Well, sir, the Postal Inspectors acquired the evidence in this case from the Citizens Fidelity Bank, and I can only assume that the Citizens Bank would have responded to a request from the Kentucky police. That's where the evidence ended up. That's where the invoices were, and that's where all the evidence was. So I can only assume that there would have been no more difficulty for Kentucky police than for --

Q You're saying the Federal investigative facilities would have been available to the state.

MR. WARNER: Well, sir, I'm sure they would have been, but I think that even absent that consideration that the state investigative facilities could have gone to the bank and said, "We want to see the same records." The records were all there, right in Louisville.

Q Were any of the merchants who received these invoices or the credit card used as witnesses?

MR. WARNER: I'm sorry, sir, I didn't understand your question.

Q Some of the merchants who --

MR. WARNER: Oh, yes, sir --

Q -- extended credit on the basis of the credit card testified, didn't they?

MR. WARNER: Yes, sir.

Q And they were from other states --

MR. WARNER: Yes, sir. They were from other states. That's right.

This is done not infrequently, in my experience in Kentucky courts, that out of state witnesses are brought in.

Q There is a certain facility that the Federal government has in handling something like that. If you're talking about a motel proprietor in Fort Lauderdale, if you're talking about a Federal prosecution, the F.B.I. agent in Miami

can go out and talk to him, and if you're talking about a state prosecution in Kentucky, somebody from the local county attorney's office has got to fly down to Fort Lauderdale and talk to him, or else you never see the guy before you put him on the stand.

MR. WARNER: Well, this, Mr. Justice Rehnquist, was a point that was raised by the Second Circuit in the Chason case, where they said that obviously the interstate character -- And I think that is a valid consideration. But I would respectfully submit that that alone is not enough to warrant Federal intrusion into this kind of a case.

Now, the problem is, and I think was raised yesterday by Mr. Justice Marshall, is, and I would submit for the Court's consideration, that where does it stop? Now, I raised the point in my brief that if the government's position is sustained, and the per se rule is approved, or expressed as policy, that every type of commercial fraud would be covered. Now, I -- to -- I have since learned that that's a mistake. I want to bring to the Court's attention an indictment returned recently in the United States --

Q Excuse me, Mr. Warner --

MR. WARNER: Yes, sir.

Q -- for interrupting. You mentioned Erlenbaugh. That's the one of the racing sheet across --

MR. WARNER: Yes, sir.

Q -- the bridge, isn't it?

MR. WARNER: Yes, sir.

Q Do you have a citation? I notice you don't have it cited in your brief.

MR. WARNER: No, sir, I'm sorry. I have a --

Q It's all right. We can get --

MR. WARNER: I can -- that -- it was decided December 12, 1972. I don't have the U.S. citation, I have the large edition -- second --

But as an example of the kinds of cases that the Courts will face, and this Court will face, I want to bring to your attention the case of the United States v. Jasper J. Mirabile, under an indictment brought in the United States District Court for the Western District of Missouri in the Western Division. It's number 73 C.R. 210 60-4, charging a violation of 18 U.S.C. 1341, and the conduct that Mr. Mirabile is charged with is as follows: that he falsified a state gross receipts tax return and mailed it into the state treasurer of the state of Missouri. And the defrauded party in the indictment is the state of Missouri -- stated in the indictment as the state of Missouri.

Now, I respectfully submit to the Court that that constitutes the grossest kind of overreaching and, undoubtedly, may or may not be dismissed, but I cite it as an example of the kinds of things that could be, or may be, possible if this per

se doctrine is not struck down.

Now, --

Q Of course, some of these arguments that you are making are valid arguments to be addressed to Congress for not trying to give too much of a Federal reach --

MR. WARNER: Yes, sir.

Q -- for courts to consider -- and I suppose that's why you are urging them on us. That it's sort of an extension approach, isn't it?

MR. WARNER: Yes, sir, and I want to again point out that I'm not urging on the Court the view that the use of the credit card can never constitute mail fraud. And again, I would --

Q Nor are you suggesting, I gather --

MR. WARNER: No, sir.

Q -- that Congress couldn't enact constitutionally a statute which reached this very transaction. Or are you suggesting that?

MR. WARNER: I have some doubts about that, from my reading of the Bass case. Now, I just don't know. I'm not prepared to respond to that --

Q Yes.

Q Well, what about -- what if they'd enacted 15 U.S.C. 1644 without the money limitation -- the $5,000 in it?

MR. WARNER: I think, now, you're assuming that the interstate commerce requirement would still be there?

Q In haec verba except for the $5,000 limitations.

MR. WARNER: I think there's no question --

Q No question of Congress' power -- constitutional power --

MR. WARNER: I'm sure there is not, and I point to that to reinforce my argument that -- that this is what Congress did intend, and this is what the Justice Department asked for -- was jurisdiction only in cases over $5,000.

Q But, there all you'd have is that "affecting interstate commerce" requirement. The use of the mails could be very tangential under the $5,000 statute, and still --

MR. WARNER: Oh --

Q -- state an offense or --

MR. WARNER: Oh, no, sir, no question about that.

Q You wouldn't have to have any use of the mails at all, under 1644 --

MR. WARNER: No, they could be carried across the state line by bicycle, or transmitted --

Q Or send it by United Parcel Service, which is what lots of people do now that the mails are so slow --

MR. WARNER: That's right --

Q Or Western Union, or --

MR. WARNER: That's right, and in fact, some of the

transactions --

Q Railway Express, or whatever.

MR. WARNER: -- is coming very much --

Q Or if the people that honored these credit cards had failed to send it in the mails wouldn't have been used at all.

MR. WARNER: That's a very valid point, Mr. Justice Marshall.

Q And there's nothing in this record that Maze used the mails at all.

MR. WARNER: No, sir. Nor was he asked any questions as to whether he had used the mails or knew that the mails would be used.

Q Well, I gather that's difficult -- that the elements satisfied on proof that he caused, or had reason to think that, the defrauded people would use the mails.

MR. WARNER: I'm sorry. Are you asking me if -- ?

Q Isn't that -- isn't that all that's required?

MR. WARNER: That he caused the mails to be used. If he doesn't deposit the letter himself, the statute requires that he cause the mails to be used in some way. And, of course, in the Kenofskey case, for instance, where a life insurance agent went to his boss and filled out a fraudulent death claim. He was in the business. He knew that his boss was going to mail that application to the home office, because he'd mailed

them himself. Now, this is where we think the Maze case breaks down.

Q You said earlier you knew, personally, that the mail had to be used --

MR. WARNER: I said I thought so, sir.

Q Were you suggesting then that some people might be held under this statute and others might not?

MR. WARNER: I think --

Q Depending on their sophistication about business matters?

MR. WARNER: I think that's a matter of proof, Mr. Chief Justice, and --

Q I take it all of the points you're making in this direction go to a failure of proof in this particular case.

MR. WARNER: Yes, sir. And, perhaps, cases like it. Now, if Maze, as an example, had been asked directly the question on cross examination: "Now, you knew that that vendor would mail that invoice back to the bank." If he had said, "Yes," I doubt that we would be here this morning.

One other, final, point with regard to the point or question that was raised yesterday to Mrs. Lafontant about this business of concurrent sentences -- as I point in a footnote in our brief, I don't think there's any question that the five year sentence, at least under the Dyer Act conviction, was enhanced by the four convictions under the mail fraud statute,

if this conviction -- or if the Sixth Circuit decision stands, we would anticipate a motion under Rule 35 to the District Court for reduction of sentence. A five-year sentence in the District Court in the Western District on a Dyer Act conviction is rather unprecedented.

Now, again, the government, I think, to a great extent, in this case, has lit off kind of a smoky bonfire on this issue of unless the Court overturns the Sixth Circuit decision that the entire credit card system is going to break down. I don't think that's true. I think there are adequate state laws, and I think that the existing Federal statutes would prevent that.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Warner. Thank you, Mrs. Lafontant.

Mr. Warner, you accepted our appointment, and came here at our request to argue this case.

MR. WARNER: Yes, sir.

MR. CHIEF JUSTICE BURGER: On behalf of the Court, I want to thank you for your assistance, not only to your client, but to the Court.

MR. WARNER: Well, I'd like to state that it's been a real pleasure and a fine opportunity. Thank you, sir.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 10:47 o'clock a.m., the case was submitted.]

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