In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner

v.

RALPH FEOLA,

Respondent.

No. 73-1123

Washington, D. C.
November 19, 1974

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RALPH FEOLA,

Respondent.

No. 73-1123

Washington, D. C.

Tuesday, November 19, 1974

The above-entitled matter came on for argument at 10:11 a.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:

ALLAN A. TUTTLE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, for the Petitioner.

GEORGE J. BELLANTONI, ESQ., 190 East Post Road, White Plains, New York 10601, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument first this morning in No. 73-1123, United States against Feola.

Mr. Tuttle.

ORAL ARGUMENT OF ALLAN A. TUTTLE

ON BEHALF OF THE PETITIONER

MR. TUTTLE: Mr. Chief Justice, and may it please the Court: Some three years ago in United States v. Crimmins, 123 F. 2d 271, judge Learned Hand ruled for the Second Circuit Court of Appeals that in a prosecution for conspiracy to violate Federal law, the Government must prove the defendant's knowledge of the Federal jurisdictional element even when such knowledge need not be shown in a prosecution for the underlying substantive offense.

This case presents this Court's first opportunity to consider this anomaly in the law of conspiracy. The Crimmins rule has been widely criticized and has been rejected in some circuits, but it remains the law in the Second Circuit and was applied by that court in this case to reverse Respondent Feola's conviction for conspiracy to commit an assault upon a Federal officer.

The evidence in the case showed, and the jury found, that Feola and his co-conspirators planned a narcotics rip-off, that is, a scheme to rob or defraud prospective

purchasers of narcotics. Pursuant to this plan co-conspirator Farr met with a prospective purchaser of narcotics and arranged to sell a kilogram of heroin for $30,000. Unfortunately for the plan and for the conspirators, the prospective purchaser was Agent Jeffrey Hall, of the Bureau of Narcotics and Dangerous Drugs, acting in an undercover capacity.

On the day of the proposed sale, Agent Hall, in the company of fellow undercover agent Lightcap and an informant were taken to an apartment on West 68th Street in New York City by co-conspirators Farr and Rosa. They were admitted to the apartment on 68th Street by one Alsondo. Agent Hall was then taken into a back bedroom and then shown an open attache case containing a quantity of a substance which was represented to be heroin but was in fact a form of sugar. As Hall left the bedroom, he observed Alsondo in the process of drawing a gun on his fellow agent Lightcap. Hall shouted out a warning to his fellow agent and also yelled that they were Federal agents.

The two agents then subdued Alsondo. After that agent Lightcap subdued Rosa and the agents arrested the reamining co-conspirators, including Feola, the respondent in this case, who was found hiding in a closet.

The conspirators, Feola and the others, were charged with assault upon a Federal officer in violation of 18 USC Section 111. They were also charged with conspiracy to commit

that assault in violation of 18 USC 371. The trial court in conformance with the settled law on the subject charged the jury that knowledge that the victim of the assault was a Federal officer was not an element of the offense under section 111.

QUESTION: Mr. Tuttle, you say settled law. Has this Court ever so spoken?

MR. TUTTLE: This Court has not so spoken on that particular issue. However, it is the law -- well, there are a number of considerations about that subject matter.

First of all, that question is not the question upon which certiorari was granted in this case. The question on which cert was granted was the question of the application of the Crimmins rule.

Also, I think that in terms of being settled law, we were able to count nine of the circuits all uniformly holding that such knowledge was not required. There are a number of reasons why such knowledge is not required, and if there is any doubt in the mind of any member of the Court, I would take the time to explicate the reasons, but I do suggest that's not the question on which cert was granted.

As I said, the court also charged the jury that the knowledge of the victim's official status was not an element under the conspiracy count either. Under these instructions Feola and his co-conspirators were convicted on both counts

and appealed to the Second Circuit Court of Appeals. The Court of Appeals reversed the conspiracy convictions, holding again in conformance with the settled law, that while such knowledge was not required, knowledge of the victim's official status was not required under section 111, the court did hold that such knowledge was required in a prosecution for a conspiracy to commit that assault.

The court reached this conclusion not by an analysis of section 111, but by an application of the Crimmins rule. And the court followed Crimmins as controlling precedent indicating that it was somewhat reluctant to do so, but in light of the age and the long standing of the case did follow it.

QUESTION: Of course, Mr. Tuttle, while you are quite correct, that is the question on which certiorari was granted, i.e., the validity of the Crimmins rule, as you answered in response to my brother Blackmun's question, this Court has never settled the law as to the necessity of knowledge of the Federal jurisdictional element in a substantive offense. And if the law were otherwise from what you contend to be settled law, of course, there would be no anomaly at all, would there?

MR. TUTTLE: There would be no anomaly and you would have to affirm the Second Circuit. It would be an alternative ground for the affirmance of the opinion below, because our contention is simply a contention for symmetry in the law.

QUESTION: Symmetry could equally be achieved by saying that the jurisdictional element need be proved both to the substantive events and the conspiracy.

MR. TUTTLE: Absolutely, and because you raise that, Mr. Justice, I think maybe I should speak briefly about that subject.

As I have indicated, the courts of appeal are unanimous in indicating that such knowledge is not required. Indeed, the respondent Feola agrees with this. He indicates in his brief that such knowledge is not required in a substantive offense. Moreover, I think it is quite clear that Congress knows how to draft a statute. And when they wish to require knowledge of an element, they can so state.

I would cite to the Court, for instance, the assault upon a process server statute, section 1501, which provides that whoever assaults, beats, or wounds any officer or other person duly authorized, knowing him to be such officer or other person duly authorized, in the process of serving a writ, he commits a crime against the United States. So in that instance, the Congress has very explicitly required knowledge. Here they clearly have not.

I think that the protection of Federal officers requires the Federal court to assert jurisdiction whenever a Federal officer is involved. Otherwise, it would put the protection of Federal officers in many instances in the hands

of State courts which might not be hospitable to such claims. One can imagine, for instance --

QUESTION: A removal statute would take care of that.

MR. TUTTLE: Well, I don't mean to say that the officer charged with a crime. Of course, removal would take care of that, but if the officer is a victim of a crime, the removal statute --

QUESTION: The removal statute would take care of that, too.

MR. TUTTLE: I am not --

QUESTION: ... removal statutes, or at least were when FBI agents were victims, Federal agents were victims, at least of murder. There was a statute providing removal of the trial to the Federal court of an offense that would otherwise have been in the State court.

MR. TUTTLE: I confess I didn't notice that in looking at the removal statutes.

QUESTION: If removal were generally available, that would tend to solve this problem, wouldn't it?

MR. TUTTLE: Well, it would solve the problem of being remanded to the State courts for protection. It wouldn't solve all of the problems involved in the protection of Federal officers. If knowledge were required, the protection would obviously be of a lesser degree.

I think if you look at analogous statutes, it

becomes clear, at least over the long history of these statutes, that a knowledge of the Federal, or knowledge of the jurisdictional element, or the official status of the individual, has not been required, I noticed in section 112(a) for instance, which deals with assaults upon ambassadors and foreign ministers that you can go back to cases in the 1810's and 1820's dealing with the question of whether knowledge that the man is a foreign ambassador or foreign minister, and those cases hold that such knowledge is not required.

I think an analogous statute would be the theft of Government property statute which has generally been held -- and this is not entirely settled, but it has generally been held that to commit the crime in violation of section 641, the Government has to show that there was a theft, but not necessarily that the defendant knew that the property came from the United States.

And I think that it would be a mistake to have Federal jurisdiction turn on the state of mind of the person committing the assault. It would seem to me to deflect the purposes of the inquiry. You would have a case where the assault was admitted and all the elements of the crime admitted and the fact that the man is a Federal officer admitted, and the litigation turns entirely on the state of mind of the person committing the assault.

I think as a final thought on this matter, that the

notion that knowledge ought to be required comes from viewing section 111 as essentially an obstruction of justice statute, and I think if you look at the words of the statute, it clearly is not that, because it makes it a crime to commit an assault on any individual named in section 1114. And if you look at 1114, that includes a wide variety of officers, such as Agriculture Department officials, and Post Office employees who would not ordinarily be included as officials executing the law, the interference with whom would be an obstruction of justice.

In any event, I do suggest that this is not the question that the Court took, and I would like to return to the Crimmins rule which is the principle before the Court.

The Court of Appeals, as I indicated, did apply the Crimmins rule in this case, and we they are petitioning, seeking to have the Crimmins rule overturned as applied to reverse respondent Feola's conviction for conspiracy.

Crimmins itself involved a conspiracy to transport stolen securities in interstate commerce. Crimmins was a lawyer in Syracuse and received the stolen securities from a confederate in New York City. The evidence did show that the bonds had in fact traveled in interstate commerce and it showed that Crimmins agreed to receive them, knowing them to have been stolen. However, the evidence did not show that Crimmins knew of the bonds' interstate movement.

While Judge Hand assumed that the evidence was sufficient to support a conviction for the underlying substantive offense, the transportation of stolen securities in interstate commerce, he held that the evidence would not sustain a conviction for conspiracy to commit that offense because the evidence didn't show that Crimmins had knowledge of the bonds' interstate movement.

Judge Hand supported this conclusion principally by reference to an analogy, an analogy which we treat in our brief, which we think is both seductive and wrong. He says, "While one may be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiracy to run past such a light for one cannot agree to run past the light unless one supposes there is a light to run past."

And we think this analogy fails to demonstrate the conclusion that it is used for in a number of ways. To us it indicates the true but trivial proposition that there can't be a conspiracy without an object, which is to say men can't agree when they have no subject matter to agree about. But that tautology does not say men can't conspire when they do have a definite criminal objective in mind but are simply unaware of a fact which is necessary to establish the jurisdiction of a particular court.

Here the conspirators definitely did have a criminal

objective in mind. They could and did agree to assault the Federal agents. That is to say, they agreed to assault Hall and Lightcap. And they knew that the conduct they were proposing to undertake was criminal conduct. The only thing they didn't know was that Hall and Lightcap were Federal officers so that the crime they were committing was a Federal crime rather than a State crime.

We have suggested the inapplicability of this analogy, the traffic light analogy, can be shown if you substitute ignorance of the jurisdictional element which is all that we have in this case, for ignorance of the object of the conspiracy. And such an analogy might be one may be guilty of running past a traffic light on an Indian reservation in ignorance of the fact that it lies on an Indian reservation. But the analogy would continue, one cannot conspire to run past such a light because one cannot agree to run past a light unless he knows that it lies on an Indian reservation. Framed this way, we think the analogy is senseless, even on its own terms.

When a conspiracy does have a definite criminal objective, it's our suggestion that ignorance of which law would apply is no more relevant to the conspiracy than it is to the underlying substantive offense. This is the view of the American Law Institute in their draft model penal code in their section on conspiracy, which is section 503. They

treat the Crimmins rule problem and have this to say: "Although a conspiratory agreement must be made with the purpose of promoting or facilitating the commission of a crime, we think it strongly arguable that such a purpose may be proved even though the actor did not know the existence of circumstances which do in fact exist when knowledge of such circumstances are not required for the underlying substantive offense."

As we see the issue in this case, it's whether men can conspire to commit a Federal crime in ignorance of facts necessary to constitute Federal jurisdiction, and we submit that this Court has already answered this question and answered it in the affirmative in United States v. Freed, 401 U.S. In Freed the defendant was charged with possession and conspiracy to possess hand grenades, which had not been registered in the National Firearms Register and transfer record.

The district court dismissed the indictment for failure to allege that the defendant knew that the guns or the hand grenades were unregistered. And this Court reversed the district court, holding that knowledge of the fact that the hand grenades were unregistered, as distinct from proof that they were in fact unregistered, was not an element of either the substantive offense or the conspiracy to commit it.

This Court -- it was significant to this Court that the possession of hand grenades was not viewed as an act innocent in itself. Thus, the Court didn't answer the question of

whether men could conspire to commit an act innocent in itself in ignorance of the prohibition. They felt that it was perfectly clear that the possession of hand grenades was not an act innocent in itself, and in these circumstances the Court concluded that the knowledge required for the substantive offense would satisfy the requirement of the conspiracy.

We think the same reasoning applies to this case, that the agreement to assault or the assault is not an act innocent in itself, so that, as in Freed, the elements of the substantive offense should satisfy the elements of the conspiracy.

The Crimmins rule appears to proceed from the notion that to exclude the jurisdictional element from the requirement of knowledge would somehow result in an expansion of the scope of the conspiracy beyond what was agreed to by the conspirators. But if it is recognized that the jurisdictional fact is logically no part of the crime itself, then it follows that ignorance of that fact does not result in an expansion of the scope of the conspiracy.

I think it is significant that the Second Circuit which created the Crimmins rule and applied it in this case has recently begun to back away from a consistent application of the Crimmins rule. Only last July in United States v. Morrow, 501 F. 2d 45, the Second Circuit sustained a conviction for conspiracy to receive property which had been stolen from a

federally insured bank. While the court found as a fact that the defendant was probably on notice of the fact that the bonds came from a national bank, the court went on to express its strong doubt that such knowledge would even be required to sustain a conspiracy conviction. In Morrow the Court of Appeals for the Second Circuit declined to follow through on this reasoning because it recognized that Feola, this case, was pending in this Court and that this Court would have an opportunity to consider and possibly to resolve the Crimmins anomaly in this case. That's what we urge this Court to do today.

I would like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Tuttle.

Mr. Bellantoni.

ORAL ARGUMENT OF GEORGE J. BELLANTONI

ON BEHALF OF THE RESPONDENT

MR. BELLANTONI: Mr. Chief Justice, and may it please the Court: I represent the respondent Feola and I represented him in that trial in the Second Circuit Court of Appeals.

Mr. Feola and his co-defendants were indicted under two counts: Conspiracy to violate section 111 and a violation of section 111 of the U.S. Code.

Now, the first count of the indictment used the

language that they conspired to impede, assault, interfere with Federal officers. And the second count read that they did impede, assault Federal officers.

Now, what does this conspiracy consist of? Is it as broad a conspiracy as the Crimmins conspiracy? Is it as broad as Freed? It is as narrow as Crimmins. The assault took place in a short period of time that was of short duration and the assault would not have taken place had the defendants knowledge of the identity of the victims of the assault.

QUESTION: Where do you find that conclusion supported?

MR. BELLANTONI: Well, Judge, logic supports that conclusion. I don't think that people would intentionally, in a case like this, intend to rip off two narcotics agents knowing that they are narcotics agents. I think that the intent here was the --

QUESTION: You mean you are limiting that -- they wouldn't have lured them up to the room.

MR. BELLANTONI: Exactly.

QUESTION: But after they got them there, are you suggesting that they wouldn't, to use your terms, rip them off in order to make their escape?

MR. BELLANTONI: I am suggesting, your Honor, that the plan would never have taken place had any of the defendants had knowledge of the identity of the two men, Lightcap and Hall.

QUESTION: In your view, when do they have to discover the identity of the officers in order to bring it within the conspiracy, the reach of the conspiracy statute?

MR. BELLANTONI: I would say at any time they were identified or with the requisite knowledge that sometime before the assault took place that they had knowledge of the identity of the two men.

QUESTION: One of the undercover agents had dropped his I.D. card or badge, or whatever he had, just as they were at the threshold of this episode, that would be soon enough, would it?

MR. BELLANTONI: I wouldn't think so, your Honor. I would think --

QUESTION: You would not think so?

MR. BELLANTONI: I wouldn't think so because I think an assault is something that takes place spontaneously.

QUESTION: How long does -- does conspiracy take some particular span of time to be formulated?

MR. BELLANTONI: That's the question here. This is a conspiracy to assault and not to transport interstate stolen bonds. Mr. Crimmins sat in Syracuse.

QUESTION: Well, couldn't you formulate a conspiracy in 60 seconds as well as 60 hours?

MR. BELLANTONI: Yes, your Honor, you could.

QUESTION: Assuming that that's an issue in the case.

MR. BELLANTONI: If you formulate a conspiracy in 60 seconds, there would be less flesh to that conspiracy where knowledge could not be inferred.

Now, the Freed case, this Court in the concurring opinion stated that the possession of hand grenades, a person has to have knowledge that there are Government regulations here. Mr. Crimmins sat in Syracuse and received bonds. Now, the duration of that conspiracy was for such a long period of time, and Mr. Crimmins was an attorney, and I would think that the Court could infer that he had knowledge of the possible interstate transportation of those bonds.

But in the opinion in the Second Circuit, Mr. Justice Feinberg stated that people just don't go around conspiring to assault Federal narcotics agents. It's possible, but in this case, given the facts of the case, given the facts that the defendants were in an apartment house with five or six bags of sugar which was probably worth more than Heroin today, five or six bags of sugar, and given the fact that their intent was not to sell this heroin, the intent was to take money from some people, now, you just don't put five or six bags of sugar in front of a Federal narcotics agent and represent to him that this is only half a kilo. What they'd do was put about 10 kilos of heroin out there. They had absolutely no knowledge of his identity.

I think the important thing here in this case is

analogous with Crimmins. The Crimmins analogy. One must have knowledge of the red light before one must go through it, or try to go through it.

Now, going through a red light consists of an act of very short duration. You conspire to go through this red light. It doesn't happen -- you just don't go back and forth through the red light. You don't assault Federal narcotis agents over a long period of time. It's a short spontaneous act. The Government has jurisdiction under the second count, section 111. No intent is required. The problem here is that Mr. Feola received a suspended sentence on the conspiracy count, and this is covered in the Government's brief.

QUESTION: I take it you concede that no intent is required under 111?

MR. BELLANTONI: I would say that the cases in all the circuits concede that no intent is required.

QUESTION: You concede it.

MR. BELLANTONI: I would concede that point, yes. I would say that's the rule of law in the country.

The Federal Government has jurisdiction of the second count of the indictment. Mr. Feola when he was sentenced, the district judge said, "Mr. Feola, I am sentencing you four years on the conspiracy count, because I think your liability in this case came through the conspiracy, not the assault. You had nothing to do with the actual assault. I fine you $3,000

on the second count and suspend sentence." That's why the Government is here, your Honor, because Mr. Feola did not receive a jail sentence. They concede that in their brief, they concede that they did not seek certiorari in the other three cases because concurrent sentences were given to the three co-conspirators.

Now, it seems to me that in a conspiracy to assault, the minimum requirement would be to assault a Federal narcotics agent. That's the minimum requirement. In dealing with interstate transportation of stolen bonds, you are talking about conspiracy that takes place as full-blown. Knowledge can be inferred. But I think that the defendant should be afforded one thing in this case. If he conspired to assault someone, he must have knowledge that he was a Federal narcotics agent. I think it's a very simple issue in this Court.

QUESTION: You don't agree, then, with Mr. Tuttle that this is merely a jurisdictional element?

MR. BELLANTONI: I don't think it's a jurisdictional element at this point, no. I think the Government has jurisdiction through the second count. The Government wants jurisdiction on the first count and the second count. I think to conspire is to knowingly do something, to perform an act.

QUESTION: What do you think of the Solicitor General's refinement of the Learned Hand analogy?

MR. BELLANTONI: Your Honor, I didn't understand it.

I read it over and over and I didn't understand it.

QUESTION: That may be partly because the original aphorism is somewhat difficult to understand.

MR. BELLANTONI: Judge, I think it's very simple. I think that here we have an assault case, not a conspiracy to perform acts which take place over a long period of time. I think in an assault case, especially, there has to be knowledge, especially in an assault case. In Crimmins I could see where the Court would say knowledge is inferred, and all of these decisions, including Roselli, which the Government states in his brief, all set forth the fact that the conspiracy was of such great duration that knowledge could be inferred. And as I say, in the concurring opinion in the Freed case, the knowledge of the possession was discussed.

QUESTION: Suppose that this man, Feola and the other three, conspired together on the following conspiracy: "If anybody gets in our way, he's going to get hurt." And the one who gets in his way happened to be a Federal officer.

MR. BELLANTONI: I would say they would have to have knowledge of the identity of that person.

QUESTION: Why? They said anybody that gets in our way is going to get hurt. They phrase it "bleed a little bit."

MR. BELLANTONI: If they sit around a table and agree to that. I understand the question, your Honor. I would still have to say that the requirement of knowledge

is necessary in view of the fact that given the facts of this case, and given that statement, there was certainly no knowledge on the part of any of the defendants that these were Federal narcotics officers, and I sure --

QUESTION: All they knew was they were in their way. And we are going to hurt anybody who gets in our way.

MR. BELLANTONI: That would be closer, I would think. I would think that perhaps in that instance, knowledge can be inferred from the very statement and the agreement between them.

QUESTION: The only way they could be guilty was just before they worked him over, he would have to pull out his badge and show it to them.

MR. BELLANTONI: I would say not even in that instance, your Honor.

QUESTION: That wouldn't --

MR. BELLANTONI: Not even in that instance. No. Not even in that instance, because the assault took place in such a short period of time that I don't think -- well, if we assume that he did identify himself and it registered with the defendants, I would say correct, they would be guilty of that conspiracy. But I am saying that if just before the assault took place he pulled out a badge, I'm sure that the defendants at that point would not even have knowledge. I would say they would have to have knowledge in an assault case. I'm not talking about conspiracy to defraud, or transport interstate

securities or anything like that. I am talking about an assault case, simple short-duration acts. I think the defendant should be afforded one thing, knowledge that he was a Federal narcotics agent, that's all.

QUESTION: Suppose, to take your hypothesis, that at some point the men being in different rooms, one of these defendants called out, "Joe, these are Federals, let's get out of here," and they pulled their guns and shot their way out, all of them. There is no conspiracy there?

MR. BELLANTONI: Yes. No question.

QUESTION: That only took 30 seconds for me to say that.

MR. BELLANTONI: Yes, but what happened at that point, someone recognized and relayed the information to the co-conspirators, to the other defendants.

QUESTION: Would the Government have to show that the prisoners believed the announcement?

MR. BELLANTONI: No, I wouldn't say that, sir. They wouldn't have to believe him, but at least it was a conscious statement -- a statement was made by one defendant to another, "These are Federal officers, let's get out of here," and if they walked out at that point and pulled their guns out and assaulted these agents, I would say there is no question at this point they had knowledge of the identity of the victims of the assault.

I think that had Mr. Feola been given a jail sentence on the conspiracy -- or rather on the substantive count, I wouldn't even be here. And I think this is the gist of the Government's argument. Mr. Feola has to go to jail as far as they are concerned. And I think the judge in the Second Circuit recognized, and I think that the Crimmins rationale is good law, and it's very simple, very simple. And the red light doctrine and the Feola case go hand in hand because it was a very short act of very short duration.

QUESTION: Was the evidence that Feola was found in the closet, that they didn't even know of his presence until they found him in the closet after the assault had been --

MR. BELLANTONI: He was found in the closet approximately 10 minutes after the apartment was secured by Federal agents.

QUESTION: So this is long after the incident involving the assault?

MR. BELLANTONI: About 20 or 25 minutes after the assault took place, yes, he was found by agents.

By the way, Mr. Feola is serving a sentence at the present time on an unrelated conviction.

QUESTION: Now or --

MR. BELLANTONI: At the present time.

QUESTION: He wasn't a fugitive at that time.

MR. BELLANTONI: No, he was not. It's unrelated.

So I would urge this Court to affirm the Crimmins rationale, especially in the case dealing with an assault on a Federal narcotics agent. I think that the Court should examine this case as an assault case and not as a general conspiracy involving acts and of such a duration where knowledge can be inferred.

QUESTION: I gather there is no contention below that he could not have been a conspirator from the fact of being in the closet at the time?

MR. BELLANTONI: That was contended in both the district court and the Circuit Court of Appeals, and on the facts they found that he was a co-conspirator.

QUESTION: They found no merit in that.

MR. BELLANTONI: Based on certain hearsay by co-defendants prior to and his presence on the premises at the time of the assault.

Incidentally, the assault --

QUESTION: In any event, you don't make that argument here, do you?

MR. BELLANTONI: No, I don't make that argument here.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you,

Mr. Tuttle, do you have anything further?

REBUTTAL ORAL ARGUMENT OF ALLAN A. TUTTLE

ON BEHALF OF THE PETITIONER

MR. TUTTLE: Just a few words, Mr. Chief Justice.

I would like to emphasize the point that Mr. Bellantoni conceded that the substantive offense, it is not a contention in this court the substantive offense required knowledge of the victim's official status. And the burden of Mr. Bellantoni's argument seems to be really to point almost to a sufficiency of the evidence claim. And I would point out that there was no cross petition in this case either challenging the substantive conviction or raising any other issues with respect to the conspiracy. And I would point out just one or two items of evidence that the --

QUESTION: Mr. Tuttle, could he raise that question in defense of the reversal on the conspiracy count without cross petition?

MR. TUTTLE: He could raise any ground, alternative ground for the affirmance of the judgment below. That would only go to the conspiracy count, not to the substantive conviction.

QUESTION: I suggest to the conspiracy count only.

MR. TUTTLE: Yes. Although I understand that there is no specific argument as to the sufficiency of the evidence, I would point out that there was a good deal more evidence than simply his being present there. The agent was initially told that Feola was the source and there were various conversations indicating that he would be there, would be the

source. After he was arrested, he lied about knowing his co-conspirators, and that was proven by extrinsic evidence, a book found in his possession. He told the Assistant U.S. Attorney on arraignment that he hadn't done anything because he said the stuff you seized was sugar. He was obviously cognizant of the contents of the attache case, and he could have only known that before he was seized. So I think there was ample evidence to sustain his conviction, and I just want to underscore that single point.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:46 a.m., the argument in the above-entitled matter was concluded.)