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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner,	:	
vs.	:	No. 74-1141
BOBBY GENE GADDIS and BILLY SUNDAY BIRT	:	

Washington, D. C.

Monday, December 15, 1975

The above-entitled matter came on for argument at 10:03 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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:

ANDREW L. FREY, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530
For Petitioner

TOMMY DAY WILCOX, ESQ., P. O. Box 6176, Macon, Georgia 31201
For Respondent
(appointed by this Court) (pro hac vice)

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in United States against Gaddis and Birt.

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

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.

ON BEHALF OF PETITIONER

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

This case is here on the Government's petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit which reversed Respondent's conviction for aggravated bank robbery and possession of the proceeds thereof in violation of various subsections of 18 USC 2113 and remanded the case for a new trial.

The facts may be stated simply.

Respondents, along with codefendant Davis robbed a bank. In the course of doing so, they assaulted several people in the bank and in departing the scene of the robbery, both Respondents shot at and one, at least, hit the police officer who tried to intercept them.

After getting away with their loot, Respondents and Davis split up the money.

For this event Respondents were indicted in an eight-count indictment. Seven of these counts charged robbery and assault and unlawful entry offenses under

subsections (a) and (d) of Section 2113.

The eighth count, thanks to which we are here today, charged Respondents with possession of the proceeds of the robbery in violation of subsection (c).

The case was submitted to the jury under instructions that allowed the jury to convict on all eight counts.

The jury was not told that the possession count was inconsistent with all the others or that it could not return a guilty verdict on that count unless it refused to convict on the robbery and assault counts.

The defense made no objection to the failure to give this -- what I'll call hereafter in the argument -- either/or instruction.

Jury convicted Respondents on all counts.

In imposing sentence, the District Court stated that -- this is set forth at page 6 of our brief -- "The Court realizes that 25 years is the maximum and the cases say that there is a merger of all of these offenses. If there is any question as to the legality of that sentence that is the Court's intention."

And the judgment indicated maximum sentences on each of the counts, all to run concurrent. The maximum sentence for the (c) count would be ten years had the Defendants been convicted only on that count.

However, in effect, they received the 25-year

sentence.

On appeal, the Court of Appeals, relying on this Court's decision in Heflin and Milanovich, reversed. It held that the failure to give the either/or instruction was plain error and that the proper remedy for this error was a remand for new trial.

It explained this as follows: and this is at page 18 of our petition --

"There is no way of knowing what verdict the properly-instructed jury would have returned in this case. And for a reviewing court to speculate on that subject would be to usurp the functions of both the jury and the sentencing judge, citing Milanovich.

"Since the jury's verdict was inherently inconsistent, the proper remedy is to remand for a new trial."

Now, before beginning the argument portion, I'd like to make one correction in our brief. At page 17 --

QUESTION: Which brief?

MR. FREY: The brief for the United States.

QUESTION: On the merits?

MR. FREY: The brief on the merits, yes.

QUESTION: Not your supplemental brief.

MR. FREY: I don't believe we -- we had a supplement to the petition, but we don't have a supplemental brief or a reply brief. We have only one brief on the merits.

MR. FREY: At page 17 in footnote four in the second paragraph there is a citation to a case called Ethridge versus United States.

QUESTION: What page, Mr. Frey?

QUESTION: Seventeen.

MR. FREY: Page 17, footnote four, the second paragraph, See, e.g., --

QUESTION: Thank you. Yes.

MR. FREY: That Ethridge case is miscited. It did not involve equal concurrent sentences and that citation should be deleted and I suppose the e.g. signal should also be deleted because I can't replace it with any other cases. It is not pertinent to the main body of my argument but I would like to --

QUESTION: [Inaudible.]

MR. FREY: I believe it does.

Now, we have presented basically three arguments to the Court in our brief. First, that the Milanovich decision is distinguishable on these facts.

Second, that the either/or instruction and the new trial remedy dictated by Milanovich were incorrect and that the case should be overruled and,

Thirdly, failing those arguments that any retrial that might take place in this case should be limited to a selection by the jury between the possession and the theft

offense and should not entail a retrial of guilt or innocence.

We have not argued, although it was argued in the Court of Appeals and this is a point that may perhaps be kept in mind, the plain error issue. Milanovich did not deal with the question of whether it was plain error because there was an objection in Milanovich.

Here there was no objection and presumably if the either/or instruction was correct, then we hope the Court will hold that no such instruction ought to be given but if it should be given, had defense counsel pointed out to the Court, the error could have been rectified at the time.

QUESTION: Mr. Frey, as I understand it, you do agree, do you not, that a person cannot be convicted of both bank robbery and of receiving or possessing the proceeds of the robbery of the same robbery?

MR. FREY: No, I don't think that's -- I don't think that is correct. What we do agree with, we don't dispute Heflin and what we do agree with is there can be no accumulation or pyramiding of punishments.

We -- when it comes to the question of whether they can be convicted, I think that is not, in a sense an important question, so long as they are not cumulatively punished.

We would have no objection to a rule which required the vacation of a possession conviction.

QUESTION: Would you have had an objection to an instruction in this case that had said, if you find that these people were the robbers, beyond a reasonable doubt, then you should convict them of bank robbery, but if they were the robbers, then they were not guilty of receiving stolen goods.

MR. FREY: I -- on the facts of this particular case we would have had no objection because on the facts of this --

QUESTION: All the evidence was, in this case, that they were the robbers.

MR. FREY: On the facts of this particular case, I think there was simply no independent basis for convicting them of possession and it was completely irrational.

QUESTION: There was none.

MR. FREY: Right.

QUESTION: Well, in the Milanovich case there was a distinction in the facts, wasn't there?

MR. FREY: Yes. We distinguish Milanovich from this case because in Milanovich there was separate evidence of a separate receipt transaction. However --

QUESTION: Seventeen days apart.

MR. FREY: Seventeen days apart.

QUESTION: Evidence of each one of them.

MR. FREY: But the Courts of Appeals, in applying

Milanovich, have rather consistently taken, extracted from Milanovich the principle that the two offenses being inconsistent in law, although of course they are not inconsistent in fact, this either/or instruction must be given to the jury.

Normally I believe it is important to submit both counts to the jury. Now, on the facts of this case where there was absolutely no independent evidence of possession, I think it would have been quite proper for the District Court simply not to instruct the jury on possession.

Normally -- and I might mention that the Court had before it two petitions which, I guess, it is holding for the time being, in cases that raise related facets of this problem.

One is a case called United States against Sellers out of the Fourth Circuit.

Now, Sellers was halfway between the facts of the present case and the facts of Milanovich in that -- or a little closer to Milanovich, I would say. In Sellers he was found with the loot sometime later so that there was independent evidence of possession.

It would have been logically possible for the jury to convict of possession only and not of robbery. That case might more squarely present the problem about which we are concerned.

There also is a case called Phillips, also out of the Fourth Circuit in which we have petitioned and there three of the judges in the Fourth Circuit held that it was a defense to a possession charge to prove that you were the robber. That also is, to us a wooden and improper application of the principles that underlie Heflin.

Now, I mention those cases just to keep in mind that there is a broad spectrum of factual variance that can arise.

Now, certainly, in this case we have argued that these on the facts where all the evidence points to robbery, where there is no independent evidence of possession, at least in that case there is no basis for ordering a new trial and at most it would simply be logical to vacate the possession conviction and the concurrent sentence on that point.

Now, I will say that Respondents have argued that this case is not distinguishable from Milanovich and their argument is based on the fact that one of the Respondents, the evidence suggested it was Respondent Gaddis, was the driver of the getaway car and not an actual entrant into the bank during the robbery.

The argument then is that he is similarly situated to Mrs. Milanovich because he was not a principal. That is, he did not take the money out of the bank drawers.

That argument would have a little more merit were it not for the fact that he was a principal in one of the assaults involved in this case. That is, it was he who shot Officer Cody, according to the evidence and so that, I think, creates some difficulty in analogizing his situation with that of Mrs. Milanovich.

QUESTION: Well, there was no question in the Milanovich case that had the jury believed that Mrs. Milanovich and her husband had had indeed been the drivers of the getaway car, that they would have been, themselves, guilty of bank robbery. But that was up to the jury and there was wholly different and independent evidence indicating that some 17 days later she had dug up some -- made a hole in the ground and dug up the proceeds of a bank robbery and those were two separate --

MR. FREY: It was a theft, not a robbery. Yes, it --

QUESTION: I'm sorry, theft from a commissary down in Norfolk.

MR. FREY: Yes. Yes. Well, it was -- it's true that the evidence was far more separated than here but logically one could perhaps suggest that after all, the Government's witness was corobber Davis and his testimony was that Gaddis had waited outside in the getaway car and that after they had made their getaway, they had divided the loot.

Logically, I suppose one could argue, although I don't think it is an empirical possibility on this record, that the jury could have disbelieved that Gaddis' portion of his testimony -- the portion that Gaddis was involved in the robbery -- but believe the portion that he divided the proceeds.

You shake your head, Justice Stewart, and I think it is obviously unlikely.

QUESTION: Well, juries have done stranger things than that at times.

MR. FREY: Well, they have done strange things.

I do -- we do submit that the cases are distinguishable but I also submit at the heart of this whole problem is the either/or instruction that this Court indicated in the Milanovich case was required and I believe and it is our submission to the Court that that instruction has been the source of considerable problems in the administration of the Bank Robbery Act and that it is not justified upon close analysis and that this Court ought now to indicate that the either/or instruction is improper and ought not to be given in the future.

Now, the first defect --

QUESTION: Do you mean by that that the problem of double punishment could be taken care of by the sentencing or --

MR. FREY: By the sentencing court.

QUESTION: Or, the judge did, indeed, give cumulative sentences for both offenses. That could be readily corrected on a remand review.

MR. FREY: Or even on subsequent attack later on. That would be an illegal sentence under Heflin, yes. That is exactly our position and, indeed --

QUESTION: But, Mr. Frey, if all the evidence in the case for the prosecution is that the Defendant -- let's simplify this and just say there is one -- entered a bank, armed, held up the teller, left with the money. Is there any ground at all upon which the trial judge should instruct the jury with respect to the offense of possession or receipt of the proceeds of a bank robbery?

MR. FREY: Well, I agree, Justice Stewart that --

QUESTION: No, just answer the question. Given my case, where all the evidence for the prosecution indicates that the Defendant was a bank robber, period.

MR. FREY: I think it would be proper not to submit the possession.

QUESTION: It would be improper to submit it, wouldn't it?

MR. FREY: Well --

QUESTION: Under Heflin?

MR. FREY: I am reluctant to say that because if

you look at the lesser included --

QUESTION: Well, that is what it stands for, isn't it?

MR. FREY: Well, Heflin stands for the proposition that you can't pyramid punishment.

QUESTION: Any more than in a bank robber case it would have been -- it might be error for a trial judge to instruct the jury on a dire act offense. There is just no evidence of it.

MR. FREY: Well, but that requires us to conclude before the jury has decided the case what the evidence shows.

Now, I think it is true that there is no evidence and it ought not to be submitted but there are lesser included offense cases where there is virtually no evidence in courts of appeals that nevertheless --

QUESTION: Well, Heflin said that it was not a lesser included offense, did it not?

MR. FREY: I understand. I cite that by analogy.

QUESTION: But that is not an analogy, given Heflin. This is not a lesser included offense.

MR. FREY: Well, I fail --

QUESTION: Is it?

MR. FREY: -- to see the -- from the standpoint of safety, there is no conceivable prejudice to the defendant from submitting the possession count and it eliminates the

possibility that an appellate court might later determine that perhaps the jury could somehow have convicted of possession and acquitted under the either/or instruction, acquitted of robbery.

I mean, that would be out of a great abundance of caution that one would submit and if I were the district judge in this case I think I would not have submitted it because I think it is clear on this evidence that it would have been unnecessary.

QUESTION: Well, why do you say that there is no evidence of possession?

MR. FREY: Well, there is evidence.

QUESTION: Certainly he had it and he possessed it. But you certainly can argue very sensibly that that wasn't what, Congress didn't intend to make a separate crime out of possessing what you stole.

MR. FREY: Well, that is what Heflin suggests --

QUESTION: Yes.

MR. FREY: -- that Congress [intended] and Milanovich, where the possession is distinct in time and proved by distinct evidence suggests that even there Congress did not intend to make it a separate offense.

Of course, as a matter of fact, the person is guilty of possession and were he indicted only for possession and not for robbery there would be no obstacle to

convicting him of possession.

QUESTION: Doesn't the submission of both these questions to the jury invite the bizarre result -- I say "bizarre" it would have been bizarre on this evidence -- to find him not guilty of bank robbery but guilty of possession.

MR. FREY: Well, it would be bizarre and --

QUESTION: But those things have happened, in a compromise verdict.

MR. FREY: Well, it could happen if there were an either/or instruction. Then it would be considerable risk that something like that would happen and I would like to mention a case to show that my concern with the either/or instruction is not a simply wild conjecture.

An individual attempted to buy a car and he used one hundred $5 bills to make his down payment on the car and those bills were checked and they turned out to contain the bait money from a recent bank robbery.

He was arrested and he was indicted for bank robbery.

The prosecution theory being that his possession of these bills, his recent possession of these bills permitted the jury to infer that he was involved in the robbery itself.

The evidence showed that he was not one of the robbers at the bank but it also showed that he had been in

the vicinity of the bank shortly before the robbery.

The jury accepted the prosecution's theory and convicted the defendant of robbery. The case was appealed.

Now, had there been an either/or instruction -- and, fortunately, there was no possession charge in this case, the jury would presumably have had to acquit him of the possession charge of which he was clearly guilty pursuant to the Milanovich either/or instruction.

The case was appealed to the Court of Appeals. I think Justice Blackmun may remember this case because he sat on the panel in the Eighth Circuit at the time and the Court of Appeals said, The evidence is not sufficient to establish robbery.

It merely shows possession. The inference from possession to robbery is not strong enough where there is no evidence besides the guilty possession and therefore, it reversed the conviction for robbery and it ordered the entry of a judgment of acquittal on the robbery charge.

Now, this case is United States against Jones, 418 F Second 818, which is cited in our brief. Had Jones been charged with possession as well as with robbery, had the jury been given the either/or instruction, they very likely would have convicted him of robbery, acquitted him of the possession charge and on appeal the Court of Appeals would have said, well, this doesn't make out robbery and

he would have gone scot free.

Now, that is a serious problem.

QUESTION: Well, that is -- you say undoubtedly and so on. That is a hypothetical case. In the actual Jones case, he could have been indicted for possession and there would have been no double jeopardy question whatsoever because he had not been charged with that the first time around, as you give it to us.

MR. FREY: But this requires a degree of prescience and prediction by the prosecutor in making an indictment, by the judge in submitting the case to the jury and the question is, why ought not the jury be allowed to consider the facts. That is, did these defendants, in fact --

QUESTION: Well, the Jury in the Jones case was not allowed to consider the alternatives. He wasn't charged with possession. You just told us that.

MR. FREY: No, but had he been -- I am merely pointing out that the cases are numerous where the evidence of possession is stronger than the evidence of robbery, yet there is ample evidence of both.

Where the robbery conviction, if one is obtained, may fall for a variety of reasons on appeal --

QUESTION: Mr. Frey, it is not the jury's job to charge people. It is either the grand jury or the prosecutor.

MR. FREY: That is correct.

QUESTION: What would happen in this case if he had been found not guilty of possession? In this very case.

MR. FREY: Nothing. There would have been absolutely no difference had he been found not guilty of possession.

QUESTION: It would have been an awfully silly verdict, wouldn't it?

MR. FREY: Well, it would have been a silly verdict, yes, but the either/or instruction is --

QUESTION: I don't see why we have to make rules to let the prosecutor try any way he wants to try. I think he should follow the rules.

MR. FREY: Well --

QUESTION: If he decides to try a man on possession, he is stuck with it. If he decides to try him on robbery, he is stuck with it.

MR. FREY: Well, Mr. Justice --

QUESTION: He shouldn't have it both ways.

MR. FREY: Well, but that --

QUESTION: Do you agree with that?

MR. FREY: Not really, Mr. Justice Marshall, because even in Milanovich, there was no question that the prosecutor was entitled to indict on both charges and everybody agreed that he was not required to elect between

the charges. The issue was, when the case went to the jury, was the jury to be forced to select between the two charges? And that is what we are saying was the mistaken holding of Milanovich.

QUESTION: But it was all brought about by the prosecution putting all four of these together. When he gets to the jury, doesn't he have a duty of deciding which one should go to the jury?

MR. FREY: I don't believe that is the law, Mr. Justice Marshall. He is not required --

QUESTION: But don't you think he ought to?

MR. FREY: No, I don't --

QUESTION: He ought to be required to.

MR. FREY: No, I don't think he should be required to elect because --

QUESTION: Well, isn't he required to read these two cases?

MR. FREY: Well, certainly he should be required to read associate defense counsel. I mean, that -- nobody -- so should the judge -- but nobody pointed out -- I mean, apparently, there was not an awareness of Milanovich.

QUESTION: Well, there is now. It has been pointed out now by the Court of Appeals.

QUESTION: Well, Milanovich was a totally different case from this on its facts -- isn't it?

MR. FREY: That is our contention.

QUESTION: Well, it is borne out by the opinion. The opinion indicates that one crime was committed and this woman -- a case against her for the bank robbery was dubious at best and probably could not be made out, but the case against her for the possession is perfectly clear, two or three weeks later.

MR. FREY: Well, I think both cases were quite clear in Milanovich and it is true that the cases are distinguishable but honestly, I don't think I can say to you that Milanovich itself depended upon that distinction.

In fact, Justice Frankfurter's dissent was based largely on the proposition in Milanovich that these were two distinct offenses in fact and therefore the Milanovich rule ought not to be held proper. That is, Justice Frankfurter thought that she should be convictable of both offenses because of the degree of separation between the two.

QUESTION: Well, assuming that the prosecutor on your view, should not be required to make an election before he starts -- that is --

MR. FREY: Yes.

QUESTION: -- he is entitled to wait until his evidence is in to see what his case is -- where the strength and weakness of his case is -- doesn't the either/or instruction present a parallel to the idea of dismissing

one charge at that time?

MR. FREY: Well, we would submit that either the dismissal of one charge at that time or the either/or instruction would be erroneous. There is no harm --

QUESTION: You are talking about what he is required to do.

MR. FREY: He is not required to elect -- both counts can go to the jury. That much is clear. That is, it is established that both counts can go to the jury in the normal case.

Now, I agree with Justice Stewart that in this case, there was really no occasion to submit the possession count because of the nature of the evidence and therefore harmless error, however, in having done so -- certainly no basis for awarding a new trial.

QUESTION: How do you know what the jury convicted him of?

MR. FREY: We know that the jury found -- the jury finds facts. That's --

QUESTION: They just said "guilty," didn't they?

MR. FREY: They said "Guilty on each count." Eight counts, guilty as to count one, guilty as to count two, guilty as to count three and so on. That is the form of the verdict and it is in the appendix.

They didn't just say "guilty." In other words,

they convicted him separately.

QUESTION: Did they in Milanovich?

MR. FREY: Nobody said anything about Milanovich. Nobody said to him --

QUESTION: I know, but did they in Milanovich? Was there just a general verdict on --

MR. FREY: I am not sure that I recall. The case was treated -- there were two separate counts. I assume they were convicted on -- Mrs. Milanovich was convicted on each count. On Mr. Milanovich, the larceny count, the possession count, rather, I think he received a directed verdict from the trial court.

QUESTION: Why would the Government object to saying that the instruction was improper and that at least -- and that the conviction for possession should be set aside as well as the sentence? But no new trial is necessary?

MR. FREY: I don't object to the second part. I object to the first part. I think the instruction was proper.

QUESTION: Well, you wouldn't object afterwards for saying, you cannot be convicted for both. Therefore we'll set aside one count or the other.

MR. FREY: I do not object so long as that count is subject to revival in the event something happens to the other count. Yes, we have no --

QUESTION: On appeal. On appeal, if the Court of

Appeals says it should not have been convicted of both counts, we set aside the conviction on possession count and the sentence.

MR. FREY: We don't object to that.

In fact, we believe that uniformity --

QUESTION: Because conviction on both counts is improper.

MR. FREY: Because punishment on both counts is improper. Conviction -- it's a little bit like the concurrent sentence --

QUESTION: I know, but you wouldn't object to setting aside the conviction.

MR. FREY: That's right. We don't.

QUESTION: But what if under 2255 then, they later come and attack the main sentence?

MR. FREY: Then our view is that the conviction would be revivable at that point. But we want a jury verdict of guilty in order to avoid that possibility.

QUESTION: Well, I had thought that you could submit inconsistent verdicts to the jury for the last 200 years, that notions to the contrary went out with Blackstone.

MR. FREY: That is true. That is verdicts that are inconsistent in fact. But what we are dealing with in Milanovich is not inconsistent verdicts. The verdicts are completely consistent in this situation. We are dealing

with verdicts that are inconsistent in law. What the either/or instruction --

QUESTION: But they are inconsistent here in fact.

MR. FREY: No, in fact they possessed --

QUESTION: They are perfectly consistent here.

MR. FREY: Consistent, yes.

QUESTION: They did rob the bank. They did possess the money.

MR. FREY: Yes, right.

QUESTION: It is just a question of whether the rule of law is that that is, in effect, double punishment.

MR. FREY: Well, this is a very technical area. What the Court of Appeals held is, well, they may have robbed the bank and they may have possessed the proceeds but they couldn't be convicted of both and therefore, although nobody doubts that they robbed the bank and possessed the proceeds, we are going to give them a new trial and the reason we are going to give them a new trial is because the judge didn't give an either/or instruction which, if I may give an analogy, it is a little bit like saying to the jury, "You are asked to find on count one whether one foot equals 12 inches and on count two, whether three feet equals a yard, but you may not find both."

QUESTION: Now, in Milanovich, as you have pointed out, Justice Frankfurter dissented and in his dissent, he

said this. "It is Hornbook law that a thief cannot be charged with commiting two offenses, that is, stealing and receiving the goods he has stolen."

This is not a matter of inconsistency, of the general rule of inconsistent offenses. This is a specific rule as to robbery and receiving stolen property.

MR. FREY: Well, I don't --

QUESTION: This is the dissenting opinion I am reading.

MR. FREY: Yes, I don't agree with that portion of the opinion because we don't know until the jury has returned its verdict, Mr. Justice Stewart, what has been done. We don't know whether the person is a thief. We have evidence suggesting that he is a thief. We have stronger evidence indicating possession.

QUESTION: Not in this case you don't. You have nothing but evidence that he is a robber, a bank robber; not a thief, a robber.

MR. FREY: It is true that this case falls within a subclass of the cases in which we have had these issues arise where I agree, it would have been better to indict these people in one count under (d) for aggravated bank robbery and treat the (a) and (b) as lesser offenses.

But it is clearly harmless error in the

circumstances. It hardly warrants a new trial, even if you were to hold the prosecutor was in error in framing his indictment in that fashion and that the court was in error in submitting it to the jury.

The problem will -- that holding, I think, would be correct. The problem, I assume, would be back before this Court shortly because I do submit, with all respect, for the reasons I have indicated, that it is a continuing problem in the administration of the federal theft statutes.

QUESTION: Do you think that failure to object is to the instruction /open to the Government to argue in this Court?

MR. FREY: I don't see why not. It is within the question presented. It was argued to the Court of Appeals. We have -- we have mentioned it in our brief but we have not argued it in our brief.

I mention it here at oral argument. I think it would be open for this Court to decide it on that basis.

I'll reserve the balance of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Wilcox. Sometime in the course of your discussion, will you suggest why this problem can't be remedied, if that is the case, by remanding for reexamination of the sentence to see that double punishment is not imposed for both possession and bank robbery?

MR. WILCOX: I will address myself to that question, your Honor.

MR. CHIEF JUSTICE BURGER: Do it in your own time.

ORAL ARGUMENT OF TOMMY DAY WILCOX, ESQ.

ON BEHALF OF RESPONDENTS

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

Before I begin, I would also like to make a notation and correction, if you will, in the Respondents' brief on the merits.

It is on page 9 and it comes from a quote by Judge Duniway in the Ninth Circuit in the case of United States v. Tyler; about one-third way down the page the quote begins and it begins by leaving off the word "A". It is a typographical error, I assume. But that particular quote should read, "A case does not decide only the exact factual question that it presents --" and then it continues on as it is there.

QUESTION: "A case."

MR. WILCOX: "A case."

QUESTION: Where is that?

MR. WILCOX: Page 9 on the merits.

Before beginning my argument, let me say that my name is Tommy Day Wilcox and I am counsel for the Respondents Gaddis and Birt. In the tir

In the trial of this particular case I was trial counsel for Billy Sunday Birt. Mr. Tommy Mann of Macon, Georgia, was the attorney for Mr. Bobby Gene Gaddis.

After conviction, Mr. Mann and I, as cocounsel, represented these two Respondents on appeal. I now represent the two of them together, of course.

QUESTION: Why didn't you object to the failure to give the instruction that you now say should have been given?

MR. WILCOX: The -- there are two responses to that question. Certainly I accept responsibility for these Respondents for not requesting that charge. Our theory of that particular case, of course, after interviewing these two defendants, was one, that they were not involved at all, either as possessing or robbery so from that standpoint, that was one reason we did not request it.

Quite frankly, your Honor, I was not aware of this line of cases and therefore, I did not request this particular instruction.

QUESTION: Isn't that the whole point of objections in the trial court, is so that a district judge who may be on the point of erring can have his attention called and if you fail to object, you are presumably barred from raising that point.

MR. WILCOX: You are, your Honor, unless it is

plain error.

QUESTION: And why was this plain error?

MR. WILCOX: The reason this was plain error is that for one thing, whether or not an objection is made, as plain error or not, more times than not, goes to the facts in the case so the courts that have considered that have said that, anyway, whether or not the evidence was overwhelming or not but to this particular point I would cite the Court's attention to at least three appellate courts that have -- were presented with this particular question and decided that it was plain error in the case not to give the particular instruction that should have been requested.

QUESTION: Well, why did they decide it was plain error?

MR. WILCOX: The cases are United States v. Roach and O'Neal versus the United States and those cases went off on the fact that -- and also, in Baker versus the United States, almost the same thought that I am giving here, your Honor, one, the evidence was not overwhelming in those particular cases and the court concluded that it was plain error and it went to, certainly, the merits of the Defendants' claim.

QUESTION: Well, that is true of almost any jury exception, it seems to me. If you say this is plain error

you are going to end up saying that counsel never has to object because you can always call it plain error. The district judge could have shaped his instructions to conform to your objection had you called his attention to the Milanovich case, I would think.

MR. WILCOX: You --

QUESTION: You say frankly that you didn't know of it and he didn't know of it but I would think it is counsel's job to call his attention to that.

MR. WILCOX: Certainly we bear some of the responsibility but in this particular case and in this particular situation the question here is, how to avoid, I think, your Honor, the error that was committed by the lower court.

First of all, the prosecution has all of the facts of the case. They certainly did in this case in that Mr. Davis was arrested and after getting his statement this particular indictment ensued.

The prosecution then, as Mr. Justice -- there is a dissenting opinion, Mr. Justice Clarke, in the Milanovich decision, said it would better be to have the prosecution elect whether or not, at the onset, they were going to indict for possession and for robbery and second, of course, the prosecution could have dismissed this particular charge before it went to the jury and the judge, of course, has

some duty to properly instruct the jury but no, your Honor, I again would say that certainly it was my responsibility and I did not request that particular charge in this case.

QUESTION: Well, if, in evaluating a plain error claim, is it of some consequence that if the error wasn't so plain that the counsel in the case didn't see it?

MR. WILCOX: That is correct, your Honor and as I say, in this particular situation, I can only speak from my experience in this particular case. This was the very first case I participated in as trial attorney, as this is the first case I have participated in here. No excuse, of course. But our defense was one that we did not participate either as the robber or as the possessor.

Perhaps we still should have had the duty to request this particular charge.

QUESTION: Well, then, do you think in those circumstances the prosecutor should be required to elect before the case is tried which count he is going to stand on?

MR. WILCOX: Either before the case is tried or before the case is submitted to the jury, yes, your Honor.

QUESTION: Did you move for a dismissal of all charges at the close of the evidence?

MR. WILCOX: Yes, we did. We made a motion for a judgment of acquittal at the conclusion of the prosecutions case and also at the conclusion of the case as a whole.

If I might comment on the facts in this case -- one brief comment before beginning my argument -- that is, the facts as stated by Counsel Frey certainly were clear and accurate in this case. But at the actual trial of this case, the only evidence that connected either Gaddis or Birk with the robbery of this bank in Loganville, Georgia, was the testimony this codefendant gave.

In other words, there was no independent evidence to otherwise connect them with the robbery of the bank.

QUESTION: Where was the money found?

MR. WILCOX: The -- interestingly enough, the money was found in the possession of the wife of Mr. Davis, the codefendant. She had took some of the marked money to a bank. The FBI discovered it there. Went to her house and the remainder of the money, or a portion of the money was found in her deep freeze, if the Court will. But none of the money, neither masks, guns, nor any independent identification was ever as to Gaddis and Birk at the trial of this particular case.

With the Court's permission I will present two arguments in support of Respondents' position before this case.

First, this Court's decision in Milanovich v. United States, which is applicable to the case at bar in our view, is an appropriate statement of the law where a

defendant is charged and convicted both of taking and receiving the same property.

Second, any suggestion that an appellate court remedy the error that was committed in the trial court by ordering the trial court to either dismiss the taking conviction or the possession conviction is improper in our view, whether under the guise of some rule of priority or what has become known as the concurrent sentence doctrine.

The Petitioner has properly stated the rule enunciated by this Court in Milanovich and, again, that rule simply says that where the Government chooses to indict both for robbery and for possession, then it is the duty or it is incumbent upon the trial judge to give an either/or instruction.

Further, given Heflin v. United States, the rationale of this Milanovich decision is appropriate to this case wherein these particular defendants were charged and convicted under the federal bank robbery statute.

However, in his argument here today, the Petitioner attempts to distinguish the case at bar on the facts and thereby take it out from under the purview of Milanovich.

In our view, the factual pattern in these two cases is much the same, especially when viewed with a look toward the activities of the driver of the getaway car.

To point up what happens in a case and in our

opinion why the Government would choose to indict both for robbery and for possession, I cite this Court's attention to a recent Eighth Circuit case, Dixon versus United States, 507 Federal Second 683.

In that case there were three robbers. One drove the getaway car. He was indicted and that was Dixon. A mistrial was declared as to the robbery but he was found guilty as to the possession.

That particular panel concluded that the no-charge was given but it was harmless error given the verdict and the comment was that the driver of the getaway car acted only as an aider and abettor to the robber and therefore, it can be conceptualized as a separate offense.

This discussion of the distinction between the two engenders, we think, a consideration of whether or not this was a single transaction or two separate transactions.

QUESTION: Did the driver of this car take a shot at the policeman?

MR. WILCOX: The evidence educed at the trial, given Davis' testimony, was that, as I recall, the driver of the getaway car did fire at the policeman when he arrived at the scene.

QUESTION: Do you think that makes any difference as to whether he was a participant in the robbery?

MR. WILCOX: I do not, your Honor, certainly the

separate charge of assault as to the driver of the getaway charge [car] would have been proper.

QUESTION: The man who guides the robbers inside the bank is not a party to the robbery?

MR. WILCOX: Under an aiding and abetting charge, which they had, certainly a jury could return that type of verdict. I have no quarrel with that. But juries do return verdicts saying that drivers of getaway cars -- as evidenced by the Dixon case -- are --

QUESTION: But that is a lesser included offense verdict, isn't it?

MR. WILCOX: Not really, your Honor. Certainly, given the legislative history of 2113(c) the possession is only -- is a separate offense and contemplates separate people.

QUESTION: Oh, no, I am talking about the driver of the car.

MR. WILCOX: That is correct.

QUESTION: You mean, the only people guilty of the robbery are those inside the bank?

MR. WILCOX: No, your Honor.

QUESTION: Well, what are you saying?

MR. WILCOX: I am not taking that position. I am saying that under the facts in this case when looking at the driver of the getaway car, there really is no

distinction between this particular case and the case of the Milanovich situation where the lady there drove the getaway car to the scene.

QUESTION: Well, she didn't shoot anybody.

MR. WILCOX: She did not shoot anybody, that is true and if, in fact, we consider that an assault charge then it would be proper that it is a separate count.

QUESTION: Well, weren't these men in this case charged with assault?

MR. WILCOX: They were.

QUESTION: Well, he was guilty of that then, wasn't he?

MR. WILCOX: That is correct, given the facts.

QUESTION: Well, I have lost your point.

MR. WILCOX: Well, the point is simply this, that in our position whether or not it is a single transaction or two transactions is of no import and that the Milanovich situation and the rule of law there was a rule or a rationale that is applicable to these types of cases whether or not it is a single transaction or two transactions.

I mentioned the Dixon case only to show the Court, if I might, that the reason for the possession count oftentimes is, in fact, juries do return verdicts wherein a person is found guilty of possession and not robbery even

though he drove the getaway car and waited for the robbers to return. A similar case is a Fifth Circuit case, Baker v. United States, with the very same facts. The man drives the car. He waits for the robbers to go in. He identifies a car in the parking lot, steals it and drives the robbers away.

There, that particular case, no either/or instruction was given and the case was remanded for a new trial.

QUESTION: Is this an argument that under the statute it is simply not possible to break this into the separate offenses of this kind, it is one offense and therefore you can't indict on separate counts, one for the robbery and one for the possession?

MR. WILCOX: Yes, your Honor, you can indict but the point is, of course, that the jury should be instructed before they retire that given the history of this particular statute under which these men were charged, that they have the choice to first of all determine whether or not these folks are robbers and if they are, fine, they cannot also be convicted of possession because that is a separate person.

QUESTION: No matter what may be the length of time between the date of the robbery and the incident which led to the possession charge?

MR. WILCOX: That is correct, your Honor. That would be my --

QUESTION: You are talking about the same person, though, aren't you?

MR. WILCOX: In this particular --

QUESTION: I mean, the robber can't be convicted of possession.

QUESTION: Right.

QUESTION: Somebody else can be convicted of possession.

MR. WILCOX: That is correct and of course, under that particular fact or situation, then, the jury could return a verdict against --

QUESTION: But this is a situation where Gaddis was convicted of the robbery.

MR. WILCOX: That is correct, your Honor.

QUESTION: That being so, no matter what the interval may have been, on the possession count, you cannot be convicted.

MR. WILCOX: That is correct.

QUESTION: As a matter of law.

MR. WILCOX: As a matter of law.

QUESTION: Under this statute.

MR. WILCOX: Under this statute.

QUESTION: And that is what Heflin said. Heflin said that the possession count was directed toward a wholly different kind of defendant, a person who was not the

robber. Isn't that what Heflin said?

MR. WILCOX: That is correct, your Honor, and certainly they were -- this Court relied on the legislative history of that statute when they rendered that opinion. And I might add, as far as the facts are concerned in this case on that particular point, while Mr. Davis chose to identify Mr. Gaddis as the driver of a car, the evidence at the trial of the case was that Billy Sunday Bird had a very serious speech impediment and had had, through the testimony of numerous -- several people throughout his life and it is possible that that particular jury decided that yes, these two men were involved but may have decided that Bird was, in fact, driving the car. This is only a conjecture on my part but is the real reason that we are here today, is whether or not we want to look behind what the jury decided.

These facts presented to this Court in the coolness of this hour appears to be just open and closed. This particular jury was out for six and one-half hours.

This appears to be a clear case but certainly in the state court for the State of Georgia, where a man cannot be convicted on the uncollaborated testimony of a codefendant, this case may not have even gotten to the jury.

QUESTION: Well, there is no question what the jury decided with respect to the individual counts, is there?

MR. WILCOX: That is correct, your Honor. My only point was that there is --

QUESTION: Well, they made separate -- returned separate verdicts on the different counts, each count.

MR. WILCOX: They did. There is some concern in my mind whether or not the jury decided it was Birt or Gaddis driving the car. That was my point, your Honor.

QUESTION: Well, your point is, in any event, the jury, under this statute, could have convicted on these facts of robbery or nothing.

MR. WILCOX: That is correct, your Honor.

The question is, what remedy to be applied in this case, given the error permitted.

We concede that the lower courts during this interval between 1961 and today's date have attempted various methods to avoid the new trial mandate of Milanovich.

It is interesting to note the case pointed out by Mr. Frey that Mr. Justice Clarke sat on in the Fourth Circuit, there, Sellers, the defendant, four counts of robbery and possession and he was convicted and when the instruction was not given, and the appellate court there decided that the remedy should be that the case would go back to the trial court and there the prosecution could elect whether or not they would let the possession or lesser sentence stand or whether or not they would seek to have a

new trial.

QUESTION: Why do you think -- or do you think that is not a proper solution?

MR. WILCOX: It is not, your Honor, because I have the fear that what has been done there is that an appellate court there has looked at the facts. They are really -- I am almost arguing for fairness on behalf of the Government and that the appellate court has decided that this man was guilty of possession but was not guilty of robbery and my fear is, of course, on balance, that if it sent back and said, "Drop the possession. They are guilty of robbery," there again, we have in some way usurped the authority of the jury which is what this case is all about, in my opinion.

But the Sellers case also concerns me but is one way appellate courts have looked at this problem and certainly the Tyler case in the Ninth Circuit -- there, the appellate court said, well, we have a sentence here of six years for possession and six years for robbery. So under the concurrent sentence doctrine we will not even look at this particular case.

QUESTION: And why do you say the concurrent sentence doctrine is not applicable here?

MR. WILCOX: For a number of reasons. I have a real question and only this Court can know, after the Benton

case -- Benton v. Maryland -- the real thrust of the concurrent sentence approach at this point but I think certainly here there was a general sentence. Concurrent sentence cases have not gone to where there is a general sentence.

Second of all, as in the recent case --

QUESTION: Well, isn't that a correctable item on a remand, though?

MR. WILCOX: Yes, it is, your Honor. We could go back and have the trial judge break down the particular years on each statute. That would be simple enough and would correct that objection.

QUESTION: Do you think that would be an appropriate solution?

MR. WILCOX: Not to bring it under concurrent sentence doctrine, your Honor, because in this particular case, as in United States v. Belt, a very recent case in the Eighth Circuit, 516 Federal Second, page 73, the court there concluded that the concurrent sentence doctrine lacks propriety where the crimes charged are various and are serious and differing in substance and the possibility of collateral effects is what that particular court went to and certainly, the concurrent sentence doctrine concludes that there is one valid account and, of course, the area here, we say, goes to both counts.

QUESTION: Well, what if it goes back and the -- with instructions that the court acquit on the possession charge, period?

MR. WILCOX: The objection would be, Mr. Justice, that the same fear that this Court had in Milanovich would be, of course, evidenced, and that is, that an appellate court had decided which offense these particular men were guilty of.

And we still have the question of whether or not a correctly-instructed jury would have returned a verdict of possession.

QUESTION: What more do you want than that?

MR. WILCOX: We want a new trial.

In this particular case?

QUESTION: Yes.

MR. WILCOX: That is correct, your Honor.

QUESTION: You want a new trial. You were satisfied with the trial at the time of the verdict, weren't you? You accepted the verdict.

MR. WILCOX: Well, certainly, we made a motion for a judgment of acquittal after the evidence was educed at trial and then again --

QUESTION: Did you cite the failure to give the either/or instruction in that?

MR. WILCOX: No, we did not, your Honor.

QUESTION: So as far as that was concerned, you were satisfied.

MR. WILCOX: That is correct. At the time.

Our main fear is, of course, as I have already pointed out, that given the decision in Milanovich, and given the decision in Heflin, we find nothing to take this case out from under the purview of those two decisions and by the same token, the majority of appellate courts in the interim years have given this same set of facts, remanded the case for a new trial, and the Fifth Circuit alone, there have been four or five cases in particular on the same facts that have been remanded for a new trial.

And, certainly, the proposition that the Government offers, that in some way this case should be sent back to a jury and the jury be instructed that these two particular defendants are guilty of something, either possession or robbery, and it is your duty to find either/or, I find no precedent for that.

QUESTION: Well, one can reject that, I take it, without necessarily feeling that the thing ought to be sent back for a new trial at all.

Do you think it makes much sense in the administration of justice when a jury has found these clients of yours guilty on the two separate counts, to simply say they are entitled to a new trial on both counts?

MR. WILCOX: Yes, I do, your Honor, simply from the standpoing of a rule of law because if, in fact, we decide or a court decides that there was a distinction to be made here, robbery authorization -- and we will make that now, given this record, that this is a beginning of a usurption of the jury's function, which was fact finding.

QUESTION: Well, but all the jury did was found facts and it seems to me that Heflin and Milanovich don't say anything more than as a matter of law, not as a matter of fact, these two offenses can't subsist side by side and so your client is getting a good deal if he is let off the hook on either one of them, is what it boils down to.

MR. WILCOX: Certainly, that is a hard proposition to argue with if, in fact, as in the Sellers case, the case is returned as the Government argued before the U.S. Court of Appeals for the Fifth Circuit.

Their contention there was, drop the robbery count and resentence these two particular defendants on the possession count.

I would not concede that point but --

QUESTION: You'd rather have that than vice-versa.

MR. WILCOX: That is correct, your Honor. Certainly we had rather have a return of the case and upholding the possession as opposed to dismissing the possession, as the Government now suggests would be proper,

and leaving intact the robbery conviction.

QUESTION: Is there some suggestion that Davis now refuses to testify at any new trial?

MR. WILCOX: Your Honor, let me respond to that question in this way. Certainly, to give the Court a little edification about these particular parties as it is germane to our discussion here today, there is not much question that Mr. Davis will testify against Mr. Birk and Mr. Gaddis in our opinion and that since the trial of this case as to these two particular defendants -- and certainly, I am here to discuss a rule of law -- Mr. Davis has testified in a trial, a murder trial, charging both Gaddis and Birk with a double murder. They were convicted in that trial and now have been given a death sentence, two death sentences in the State of Georgia and of course, that case is on mandatory appeal in the state court.

QUESTION: Was that a crime committed before this one?

MR. WILCOX: Yes, it was, your Honor, and of course, Mr. Davis participated in that particular trial.

I know your Honor is concerned with the footnotes that the Government has put in several briefs before this Court. Mr. Davis now has said that he would not testify. But I can only give you my opinion on this, that he had no reluctance to testify in the state court.

As a matter of fact, I am informed at this point now that the Government seeks help from Gaddis to implicate Davis in some crimes in that general area and this all goes to really, of course, who Mr. Davis really is.

QUESTION: It sounds like a good part of Georgia to stay away from.

MR. WILCOX: Well, your Honor began the discussion with a question of my not objecting or asking for the either/or instruction. I might add in that vein, Mr. Davis' attorney at this particular trial was also indicted for murder with Birt and Gaddis and since, in substance to that, the district attorney, I understand, has certainly decided not to prosecute in that there is nothing to connect the attorney but Mr. Davis was dissatisfied with his representation so -- yes, your Honor, I have reason to question Mr. Davis.

QUESTION: Suppose the Court does not agree with you that a new trial is required but that the defendant may be sentenced for only one of the crimes. Do you make a separate point that there must be resentencing here or just cancellation of the one sentence?

MR. WILCOX: The proper method, your Honor, in my opinion, if the Court concluded that that would be proper, would be to remand this case to the --

QUESTION: Well, why, the sentences were separate

on each count?

MR. WILCOX: In the end, the court concluded that this was a general sentence of 25 years and that all of these counts merged and of course, subsection --

QUESTION: Yes, but he did sentence separately on those.

MR. WILCOX: He did sentence separately ten years for the possession and then had them merged. I certainly can find no objection but --

QUESTION: What is a "merged?" Is there a legal basis for that or is that just the way they discuss sentences in that part?

MR. WILCOX: The courts have considered -- of course, the legislative history of the statute says that they cannot run consecutive so several courts concluded after the passage of this statute that subsections (a), (b) and (d), for purposes of sentencing, were all merged into the sentence, the most severe sentence, 25 years was proper.

That is the terminology but of course, the same courts have said that subsection (c), the possession count, will not merge.

And, of course, to completely answer the Justice's question about retrial, as to these two particular defendants, there is some doubt if, in fact, this Court concluded that a new trial was warranted, given the two trials that I have

just alluded to, whether or not these two particular defendants would be given a new trial.

My point here today is that we have an issue of law and I am here to discuss only that and I want to make that clear, if I might.

In concluding, Milanovich v. United States is a sound decision and is appropriate, in my opinion, for consideration here.

We respectfully submit that this Court, one, should not overrule that decision and second of all, should not in some way formulate a procedural cure for the error that was committed at the trial court and that, rather, this case should be remanded for a new trial under the purview of Milanovich and Heflin.

Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you.

Do you have anything further, Mr. Frey?

MR. FREY: Just one or two points.

REBUTTAL ARGUMENT OF ANDREW L. FREY, ESQ.

MR. FREY: With respect to Justice Brennan's question about whether the statute didn't indicate that there should be, rather than this equal either/or instruction, perhaps a priority instruction that asks the jury first to consider robbery --

QUESTION: Well, I had that in mind, Mr. Frey,

because of what was said in Heflin.

MR. FREY: Right. Well, Heflin --

QUESTION: Helfin, really, was a construction of the applicable statute, wasn't it?

MR. FREY: Yes. It certainly was a statutory construction. What is not clear is whether the thrust of Heflin was to the pyramid of punishment that existed in Heflin or whether it was to the entry of dual conviction.

QUESTION: Well, I was thinking of the next-to-the last page and the top of the last page in which Mr. Justice Douglas --

MR. FREY: Yes, he has made both points --

QUESTION: Yes.

MR. FREY: -- that it was a separate class of offenders. My point is that, in effect, counsel concedes away his case here, to agree with your suggestion, because if it is true that the jury will look first to consider robbery and if it finds the defendant guilty of robbery, then prater mit it's consideration of the possession or receipt offense, then the remedy surely is simply to vacate the possession conviction but not, certainly, to grant a new trial.

QUESTION: Well, would the Government interest be adequately protected if the jury was instructed to return a verdict on only one of these counts --

MR. FREY: I --

QUESTION: Now, wait a minute. Suppose it was instructed that if you find these people guilty of robbery, bank robbery, return no verdict on the possession count.

MR. FREY: Well, that would certainly be better than returning an acquittal on the possession count. That would at least theoretically leave the possession count open but the question is, why, as a matter of sound judicial administration, should the jury be told that? Why should --

QUESTION: And then, if you had both counts in the indictment, you would just tell the jury that you don't -- that if you find, unless you find the person guilty of robbery, you may convict him of possession, if the evidence warrants it.

MR. FREY: But the robbery conviction may be ultimately overturned for reasons that would not infect a possession conviction and it seems to me as a matter of sound administration of justice you allow the jury to return verdicts on both and then it is the judge who enters no judgment of conviction on the possession count but only on the robbery count.

QUESTION: Well, it seems to me, then, you are disagreeing with the construction of the statute that the court has adopted in Milanovich, namely, that there isn't any crime of possession on the part of one who robs.

MR. FREY: No, no. All that I am saying is that, that at law there is no crime of possession for one who robs, but --

QUESTION: That is what I am talking about, the law, and that is what instructions do, is state the law.

MR. FREY: No, I don't think that is correct in this case because whether or not somebody is one who robs is only determined at the conclusion of the litigation and possibly even amenable to collateral attack at that point.

QUESTION: Tell me, Mr. Frey, who should be held guilty -- let's suppose you had an indictment that had separate robbery and possession counts in it.

MR. FREY: Yes.

QUESTION: And you instructed the jury that if you find the person guilty of robbery, do not find him guilty of possession. But you may find him guilty of possession if you don't find him guilty of robbery.

Now, you tell me what people you think the Government ought to be able to hold guilty of possession who wouldn't be covered by the second count on possession.

MR. FREY: I am not sure that I understand the question. I -- I --

QUESTION: Well, you are saying that there are three crimes involved now in the statute, one is a class of persons who have just received. But then there are two

crimes that may be committed by another group of people, either they possess or they rob.

MR. FREY: No, I don't -- we don't challenge the ultimate conclusion that ultimately one who is convicted of robbery ought not to have a conviction on his record for possession but we are saying that as a matter of the administration of justice, you ought to let the jury find the facts. In most cases you will have quite separate evidence of possession independent of the evidence of robbery and if you don't have the jury return the verdict with respect to that, you run the risk of having to have a later trial or having double jeopardy objections if there is something wrong with the robbery conviction that wouldn't taint the possession conviction.

It is only one who is convicted of robbery who is immune from possession. It is not one who is a robber. It is only one who is convicted of robbery who is immune from the possession conviction.

That is, we strenuously disagree and we have a petition pending before the Court in the Phillips case that you cannot set up as a defense to a possession charge that you are a robber. It is only after conviction that the preclusion of the possession charge comes into play in our view.

Thank you.

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

[Whereupon, at 11:05 o'clock a.m., the case was submitted.]