In the

Supreme Court of the United States

Solomon Fisher Et Al.,

Petitioners

v.

United States Et Al.,

and

United States Et Al.,

Petitioners

v.

C. D. Kasmir And Jerry A. Candy

No. 74-18

No. 74-611

Washington, D. C.
November 3, 1975

Pages 1 thru 43

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

SOLOMON FISHER ET AL., Petitioners	:	
v.	:	No. 74-18
UNITED STATES ET AL.; and UNITED STATES ET AL., Petitioners	:	
v.	:	No. 74-611
C. D. KASMIR AND JERRY A. CANDY	:	

Washington, D. C.

Monday, November 3, 1975

The above-entitled matters were consolidated and came on for argument at 2:11 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530
For the United States et al

continued .....

APPEARANCES: continued

ROBERT E. GOODFRIEND, ESQ., 2800 Republic National Bank Building, Dallas, Texas 75201 For Kasmir et al

RICHARD L. BAZELON, ESQ., 2600 The Fidelity Building, Philadelphia, Pa. 19109 For Fisher et al

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-18, Fisher against United States and No. 74-611, United States against Kasmir and Candy.

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

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.

ON BEHALF OF UNITED STATES ET AL

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

These consolidated cases present a factual variation on this Court's decision three terms ago in Couch against the United States.

Couch involved enforcement of an Internal REvenue summons seeking to secure a taxpayer's records in the possession of her accountant.

Here, by contrast, we are concerned in both cases with the accountant's own records reflecting his work product in preparing tax returns for the taxpayers.

In each of these cases, the records were in the accountant's possession when the Internal Revenue Service special agents first indicated to the taxpayers that they wished to investigate their tax returns.

In each instance, they had been in the accountant's possession for at least several years, in one case dating

back to 1959 and it was in both cases only after the initial investigator contact between the agents and the taxpayers that the taxpayers hired the attorneys who now have possession of the records and the accountants were requested to deliver the records to the taxpayers who then handed them over to their attorneys, in one instance within about five minutes and in the other instance, 12 days.

The Internal REvenue summonses were issued shortly thereafter to the accountants and the attorneys requesting the records and the testimony of the accountants about the records. There are slight differences in the records involved and the summonses in the two cases, but in both instances, they are records from the accountants' files, working for the taxpayer and helping to prepare his income tax returns and compiling other financial information for him.

Upon refusal of the accountants and the attorney to comply with the summons, these enforcement proceedings were brought and in each case, the Fifth Amendment privilege against self-incrimination was asserted on behalf of the tax-payers.

In the Third Circuit case, Fisher, the taxpayers intervened to assert the privilege for themselves. In the Fifth Circuit case, Kasmir, the taxpayers' attorney sought to assert it on their behalf.

Both district courts found that the records were still owned by the accountants and rejected the claim of Fifth Amendment privilege on the merits and ordered enforcement of the summons.

The district court in the Fisher case summarized its findings on page A-7 of the Appendix to the Petition as follows:

"The facts in the instant case as presented before this Court demonstrate that the papers were and are the property of the accountant. They only left his possession after the taxpayer learned of the investigation. The transfer of the papers seems to indicate that this was an attempt to thwart the Government's investigation."

Much the same could be said of the factual situation in Kasmir, where the time span was even shorter between the call of the special agent and the transfer of the papers to the taxpayer and then on to the attorney.

The Court of Appeals for the Third Circuit sitting en banc affirmed the enforcement order with one judge dissenting. A panel of the Court of Appeals for the Fifth Circuit reversed the enforcement order in that case, again with one judge dissenting.

Now, our starting point in analyzing the problem here is that these materials brought in the summonses would not be subject to a claim of privilege against self-

incrimination while in the accountant's possession. This follows a fortiorari from the holding in Couch, which held that even papers belonging to the taxpayer would not be subject to a claim of the privilege while in the non-transitory possession of the accountant and it also follows from this Court's opinion in California Bankers and other cases holding that there is no privilege against self-incrimination with respect to third-party records whose production is sought from third persons.

And so the question becomes whether their transfer to the taxpayer in these circumstances are created right to resist their production on the ground of the privilege against self-incrimination where that right otherwise would not have existed.

And there is a further question which I think is a less substantial one of whether the subsequent transfer to the attorney affected the right in any way.

In the only other post-Couch case dealing with this question, the transfer was handled the other way and that is in the Beatty case which we have reproduced for the convenience of the Court in the Appendix to our reply brief in the Kasmir case.

That is a Second Circuit decision dealing with an almost-identical factual situation except that there they decided to have the records transferred from the accountant

through the attorney to the taxpayer and the taxpayer now has them in his possession rather than the other way around.

But basically, the same issues are involved.

Now, we believe that the Court of Appeals for the Third Circuit and the Court of Appeals for the Second Circuit in Beatty were correct in rejecting the claim of privilege here based on, really, two lines of cases supporting their view.

The first are the cases dealing with what are essentially third-party records in the possession of the claimant of the privilege. Those cases have in the past involved largely organizational records such as corporate records, labor union records, partnership records in the most recent case.

The line of authority starts with Wilson against the United States and goes through Wheeler, Grant, White and, finally, Bellis, a recent decision of the Court and we have developed those cases in our brief.

In essence, they hold that the privilege against self-incrimination being an intimate and personal right, may be applied only to one's own personal papers.

QUESTION: You are talking now simply about a subpoena to produce them and not testimony in connection with them.

MR. WALLACE: That is correct, and resisting the

subpoena to produce the papers, those cases hold that an individual in custody of the papers can invoke the privilege only with respect to his own personal papers, not with respect to other papers whose "essential character" -- is the expression that has been used in the cases -- is non-personal, even though they are rightfully in his possession and in several of these cases, even though he has a claim of title to them.

In fact, the Grant case involved a claim of exclusive title by the sole shareholder of a dissolved corporation.

The Bellis case also involved a claim of co-ownership of the record.

But because the records were not the personal papers of the individual claimants, it was held that the principle of the Boyd case does not apply.

It seems to us that the result reached by the Third Circuit and Second Circuit here follows a fortiorari from these cases and here there could not even be a claim of ownership asserted. In both instances the District Court found that the papers were still owned by the accountant and the Court of Appeals did not disturb those findings.

There was some evidence to the contrary in one of the cases, but it was properly rejected.

QUESTION: Mr. Wallace, do you think the accountant

would be entitled to a return of those papers if he made a demand for them?

MR. WALLACE: Well, we think that is the law of the states involved, yes, Mr. Justice, that --

QUESTION: Maybe I should ask your opposition that question.

MR. WALLACE: -- the accountant does have a superior proprietary claim if he should choose to assert it, that in the absence of express contracts specifying otherwise, the accountants' records and work papers belong to the accountant rather than to his client.

But we don't think the criterion in these cases really rests on whether the possession is rightful, whether the accountant has acquiesced in the taxpayer's possession of the records or whether he has demanded them back. It seems to us that under the Court's decision, the question is whether these are the personal papers of the individual seeking to resist producing them.

Otherwise, you get into the situation referred to many years ago by Mr. Justice Holmes in the matter of Harris of use of the privilege against self-incrimination as a method of gathering evidence that could then be immunized from legal process.

As he put it in that case, the right not to be a witness against oneself is not a right to appropriate property

that may tell one's story.

While this was said in the context of a question of who has the superior proprietary right as between a bankrupt and the trustee in bankruptcy, as in many of these aphorisms by Mr. Justice Holmes, we think the legal principle cuts much deeper and, indeed, goes to the heart of the distinction under our system between an inquisitorial and an accusatorial system, which is, as the Court has recognized, one of the functions of the privilege against self-incrimination.

One of the purposes, the basic policies of the privilege as recited in Murphy against Waterfront Commission and other cases, is to assure that we will have an accusatorial system of justice in which, instead of extracting incriminating information from the accused's own lips or from the accused himself, evidence will be gathered from other sources.

This line would become, it seems to me, irretrievably blurred if, in anticipation of valid legal process, whether it is an Internal Revenue summons, a Grand Jury subpoena, a trial subpoena, the person under investigation could go out and gather up the evidence that is supposed to be used in place of forcing incriminating statements from his own lips and immunize that evidence by claiming the privilege against self-incrimination, which changes the function.

QUESTION: Does it make any difference if the accountant's work papers were based on the taxpayers' own

personal records?

MR. WALLACE: We don't believe so, your Honor, because this is not a privileged communication between the taxpayer and the accountant, as the Court recognized in Couch. We see very little difference -- I mean, obviously, the accountant's information has to be information that the taxpayer has given him in one way or another, whether it is verbally or in writing, so long as it is a non-privileged disclosure, it seems to me that that information, as requested in the accountant's records, is beyond the reach of the taxpayer's proper scope of his privilege against self-incrimination.

QUESTION: Mr. Wallace, let's assume for the moment that the only records involved were taxpayer's records, for example, his checkbook. Let's assume we were dealing with a checkbook only, the stubs and cancelled checks, and they were turned over to the accountant and they were the subject of the subpoena, they were in the hands of the accountant. What would your position be?

MR. WALLACE: Well, I doubt that we would have a finding in these cases, then, that the record belonged to the accountant.

QUESTION: No, you wouldn't.

MR. WALLACE: And if they were the taxpayer's own papers which the accountant had returned to the

taxpayer, then there would at least be a much more substantial basis for assertion of the claim. Whether there would be some impropriety because of the fact that the investigation was already under way I think could be argued but in the absence of that factor, it seems to me that private papers in the hands of the taxpayer are the kind of thing that the Boyd case is about and --

QUESTION: But if the accountant has done nothing but tabulate statistical data without any analysis so that the accountant's yellow pad notes, for example, are nothing more than an addition, perhaps, of checkstubs, would the mere transposition from the taxpayer's document to the yellow pad of the accountant be controlling, without any analysis or creative work by the accountant?

MR. WALLACE: I would answer that yes, Mr. Justice, just as the accountant could be put on the stand and required to testify from his memory of what figures were disclosed to him.

QUESTION: Did you say transposed?

MR. WALLACE: If you could remember them. If you had an accountant with a photographic memory, he might certainly remember some totals which might --

QUESTION: Well, suppose it were a diary of the taxpayer in which he recorded all his gambling and other illegal transactions and that is what it was from which the

accountant worked on his yellow pad.

MR. WALLACE: Well, any record that the accountant has made, even if it reflects illegal --

QUESTION: No matter how incriminating the taxpayer's own document might be.

MR. WALLACE: If the taxpayer has chosen to disclose this information in a non-privileged communication, I don't see any basis for resisting the testimony of the person to whom it was disclosed in whatever form and that person can call upon his own records --

QUESTION: As if he had written a letter to the accountant.

QUESTION: Or called him on the telephone.

MR. WALLACE: I think all of those cases are the same for purposes of the privilege and the policies underlying the privilege.

QUESTION: And would you regard it as any different because the letter was written to the lawyer or the diary was given to the lawyer?

MR. WALLACE: We would not, your Honor.

And we don't believe that in anticipation of legal process documentary evidence of this sort can be gathered up whether by purchase or by persuasion or any other way and immunized from proper legal process.

Now, the other line of cases that also supports

the holding below of the Third Circuit en banc and the holding of the Second Circuit in Beatty is --

QUESTION: May I just get back to this question a moment? I take it if this communication were addressed directly to the lawyer, not to the accountant and turned over by the accountant to the lawyer, it might have a different case?

MR. WALLACE: There would be a question of attorney-client privilege.

QUESTION: No different, just a lawyer-client difference?

MR. WALLACE: I think so, your Honor, although in the privilege relationship between the taxpayer and the lawyer, there is a basis for saying that the taxpayer retains constructive possession of his papers turned over to the lawyer for purposes of preparing the legal defense.

That is not a non-privileged disclosure.

It seems to us quite a different case.

The other line of authority that supports the Third Circuit's holding here is the Hoth, Schmerber, Warden against Hayden, Wade, Gilbert, Dionisio, Mara line of authority, the leading case in modern times being Schmerber, which limits the privilege to testimonial or communicative compulsion and the Boyd principle is described, then, in Schmerber as being a principle which protects responses

which are themselves communications.

Here the taxpayer can comply with the subpoenas by furnishing the accountant's records without making any incriminating disclosure in doing so. It is up to the accountant to make them meaningful, to authenticate them, to verify their accuracy in some way.

They have no evidentiary significance in the absence of that verification.

Whereas Judge Friendly analyzed this point for the Second Circuit in the Beatty case on page 10A of the Appendix to our reply brief.

However, in order to bring a case of compelled production of papers within the privilege, the process must elicit not simply responses which are also communications, but communicative responses tending to incriminate. It is here that the taxpayers' argument breaks down.

By responding to the summons in this case, the taxpayer would not be admitting the genuineness, correctness, or reliability of the accountant's workpapers. He would be admitting only his present possession of them, a fact of no significance in a criminal trial for filing false returns.

QUESTION: What if the government directs a subpoena to me requiring the production of some counterfeit plates for counterfeiting money that I made? Might that be a different question?

MR. WALLACE: It might, indeed, and I think often whether your response to the subpoena would have evidentiary significance would depend on how the subpoena is drafted.

QUESTION: Or the elements of the crime being investigated, I presume.

MR. WALLACE: Yes. Yes, your Honor. It is certainly two different cases. Whether the results would be different if you were asked for the weapon you used in committing a certain crime on a certain date or you were asked for a revolver with a particular description known to be in your possession for which you have a license, I don't -- we don't need in this case to decide that it is two different results, but it is certainly two different cases with respect to the privilege.

QUESTION: What if the counterfeiter turns the illegal plates over to his lawyer or a murderer turns the murder weapons over to his lawyer? Do you find that answer lurking in anything you have said?

MR. WALLACE: Well, we have taken the position with respect to these documents that turning them over to the lawyer doesn't increase or diminish the ability of the taxpayer to claim the privilege.

QUESTION: Well, there you go back to Boyd, where the language acquitted the English judge and described papers as "man's dearest possession." And you say that would not

necessarily apply to the counterfeit plates?

MR. WALLACE: Not at all. We certainly don't think that turning them over to the lawyer would give a right to resist their production that would not otherwise exist. Otherwise, the lawyer would become a sanctuary for incriminating evidence, a repository for it, a way of taking it out of circulation and making it unavailable to legal process but --

QUESTION: A safety deposit box would be something of a sanctuary too, would it not?

MR. WALLACE: Yes.

QUESTION: Or a safe in the man's own home.

The fact that it is a sanctuary doesn't really --

MR. WALLACE: Well, it would be a sanctuary --

QUESTION: -- mean it is the santuary of a person -- does it not?

MR. WALLACE: If the privilege were extended to immunize it from legal process such as a search warrant or a subpoena merely because it has been given to the lawyer so that it would be unavailable for trial or for a grand jury proceeding or whathaveyou, that seems to us to be an improper extension of the lawyer-client relationship -- at least with respect to documentary evidence, which is all we have addressed here.

Turning it over to the lawyer should not create any privilege that otherwise did not exist, with respect to

resistance to legal process we are demanding production of the documents.

Any disclosure to the lawyer by the client would be within the attorney-client privilege but we are dealing here with documents that were made prior to the beginning of the attorney-client relationship and they reflect the non-privileged disclosures of the taxpayer to the accountant, not disclosures to the lawyer.

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

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Goodfriend.

ORAL ARGUMENT OF ROBERT E. GOODFRIEND, ESQ.

ON BEHALF OF KASMIR ET AL

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

As we understand the Government's argument in this case, they say that the privilege is unavailable to the taxpayer here basically for four reasons:

One, they say the taxpayer did not own these papers.

Two, he was not the author of them.

Three, he did not maintain them in sufficient secrecy. That argument is not made explicitly but the quotation from the language from Couch about the expectation of privacy is relied on.

And, finally, they rely on this doctrine which is explained more fully by Judge Friendly in the Beatty decision, that there is, in effect, no incriminating act of production here and, therefore, production of the records, they say, will not incriminate the taxpayer.

That premise, as I understand it, that theory is based on the notion that the privilege does not protect the writing itself but rather, the privilege, insofar as it is applied to documentary evidence, is based upon the testimonial act of production.

We take issue, serriatim, with each of these arguments.

First, we say that this Court has held in Couch and in White that ownership -- that to tie the privilege to ownership is a meaningless -- is to draw a meaningless line.

And in the White decision the Court said that the papers and effects which the privilege protects must be the private property of the person claiming the privilege or at least in his possession in a purely personal capacity, certainly admitting the possibility of the application of the privilege to papers that are not owned by a person.

Now, before this argument, my colleague and I investigated something that has not been heretofore investigated at any point in this case, namely, what is the basis in common law for saying that accountants' work papers

are, in fact, the property of the accountant, and I went back and among the very few cases I was able to find was a case, a Massachusetts case of Ipswich Mills versus Dillon, a 19 --

QUESTION: Which case?

MR. GOODFRIEND: It is not in the brief, your Honor. It appears at 53 ALR 792. And in that case --

QUESTION: That is an old-timer, isn't it?

MR. GOODFRIEND: Excuse me?

QUESTION: It's an old-timer, isn't it?

MR. GOODFRIEND: It's an old-timer, your Honor, and I --

QUESTION: Ipswich what?

MR. GOODFRIEND: Ipswich Mills versus William Dillon, one of the few cases I could find directly on the property, the common law property concepts involved in this case and as best as I could tell, accountants work papers are owned by the accountant because the paper upon which his computations are made is owned by the accountant before he applies his functions or applies the functions to them.

As the court there said, the paper on which the computations were made belonged to them -- that is, the accountants. They were not employed to make these sheets. The sheets were merely the means by which for which the defendants were employed might be accomplished.

The title to the work sheets remained in the defendants after the computations were made.

In the absence of an agreement that these sheets were to belong to the plaintiff or were to be held for it, they were owned by the defendants, that is, the accountants.

Now, we submit to this Court that the Court meant what it said in the Couch case when it stated that to tie the privilege to a concept of ownership is to draw a meaningless line and that this fact illustrates it because the concept of ownership, a great Constitutional privilege, should not turn on a question as frivolous as who owned the paper prior to the performance of the accountant's functions, nor, we submit, will anything be accomplished in this Court if that ownership concept is adopted since all that will be required to alter the outcome of any case will be a prior agreement between the client and his accountant that the work papers will be owned by the client when the work is done.

As we understand the common-law concepts of ownership as applicable to this situation.

We also --

QUESTION: Conceivably, some clients might not want that ownership because of the burdens it would carry with it. Is that not so?

MR. GOODFRIEND: Why would there be --

QUESTION: Well --

MR. GOODFRIEND: -- burdens of owning the accountants' workpapers? I don't see it -- see the problem. I mean, you just take them home. If you want them, you put them in a drawer. If you don't, you just --

QUESTION: I was merely suggesting that that might be the attitude of the client, that he doesn't want the responsibility for how the --

MR. GOODFRIEND: -- in that event --

QUESTION: -- accountant arrives at his conclusions because he wants to use as a shield the fact that the accountant has taken the responsibility which, conceivably, in many instances, might shelter him from criminal liability, by reason of the lack of intent.

MR. GOODFRIEND: I see. Yes. Would shifting the ownership, though, of the work papers necessarily change the question of who was liable?

QUESTION: I am just addressing myself to your suggestion that this could be avoided very easily by this contractual arrangement, but it is not quite that simple, perhaps.

MR. GOODFRIEND: I am suggesting that a great constitutional -- that it is, indeed, to draw a meaningless line, as the Court stated in Couch. And the reason I emphasize what the Court has stated is because both Judge Friendly in the Beatty decision and in the Fisher case, the

judges attempt to explain away this Court's language rather than simply argue the Court's language back to the Court, which the Court is in the best position to interpret.

I tried to understand by going to the basis of these concepts why that was, in fact, the case.

The other reason, very quickly, why we say ownership is not only meaningless and an elevation of form over substance but also we think very dangerous is, we pose to the Court the situation, for example, where, let's say, notes of a psychiatrist or notes of a priest in the Confessional might be involved in a govermental summons case, perhaps having come back into the possession of the parishioner or of the client.

In those situations if ownership dictates the outcome of the privilege, there is no question that under the common law that those papers, as they were originated, were the property of the psychiatrist or of the priest.

Yet we suggest that the statements they contain are essentially a blueprint of a man's mind and that they are as entitled to the privilege as statements the man makes upon the witness stand himself.

We move to the question of authorship.

We do not think that authorship, as this Court has stated flatly in Wilson versus United States, can vary the applicability of the privilege.

QUESTION: I am not sure I followed you. Were you suggesting that the ownership should dominate over everything else?

MR. GOODFRIEND: No, I am saying, if the ownership dominated over everything else, then in the case of the psychiatrist's notes or in notes that a priest might have made about statements he heard in the Confessional, then insofar as the Fifth Amendment is concerned, putting aside other privileges, under the Government's theory in these cases, those papers would be compellable -- would be producable. Because as they originated, they were unquestionably the property of the third party, not the claimants.

QUESTION: So you would put the emphasis on the possession.

MR. GOODFRIEND: I would put the emphasis, one, on the possession and the testimonial compulsion, which is unquestionably being directed to the accused in this case -- the accused and to a person in such an intimate relationship, namely, the attorney, that it is tantamount to being directed to the accused.

QUESTION: What if the papers were stolen from the attorney or by a faithless secretary to the lawyer and given to the Treasury agent?

MR. GOODFRIEND: Well, that -- I think that is the Burdot versus McDowell case, if I am not mistaken, I --

QUESTION: Close to it.

MR. GOODFRIEND: -- think this Court has answered that question.

I would like to address myself, if I may, before going into authorship, since I think that is clear, to Judge Friendly's analysis in the Beatty case, which I find extremely troublesome and which I think will virtually end the -- if adopted -- will end the application of the Fifth Amendment to documents.

As I understand Judge Friendly's theory -- by the way, this theory was no way asserted in the District Court or in the Court of Appeals in United States versus Kasmir.

QUESTION: What would be so bad about doing away with the Fifth Amendment as applied to documents?

MR. GOODFRIEND: Well, I think this case illustrates it. As I -- there are many documents which reflect prior testimonial communications, admissions, confessions of the accused himself. If those documents are back into his possession and judicial process is issued to him, he is essentially republishing, under compulsory process, his own prior statements.

QUESTION: Well, but if he has once let them out they lack, certainly, some of the privacy that some of our cases have had.

MR. GOODFRIEND: My answer to that privacy

rationale, Mr. Justice Rehnquist, is that, suppose I were to admit that I committed a crime to a friend of mine and the Government knew about it. They would be able to put the friend on the stand and have him testify, but because of that fact, they could make me mount the stand and repeat what I had told him previously.

In fact, I suggest to the Court that the expectation of privacy rationale, which the Government relies on here, is totally misapplied in this case. What the Court was talking about in Couch when it was directing its attention to the statement that there was no legitimate expectation of privacy between the accountants and the accused was, to Mrs. Couch's argument that she stood in the shoes of the accountant, therefore directing process to her accountant, was the same as directing process to her -- that is a very different question from what is involved here.

Namely, there is no question that the Government concedes that directing process to one's attorney is tantamount to directing process to the accused.

What they are arguing instead is, if you somehow treated these papers previously in a manner inconsistent with privacy concepts -- namely, you gave them to an accountant for purpose of republication, portions of the information -- then you have forfeited the privilege and we are now authorized to compel you to produce documents in your

actual possession so privacy becomes a rationale for authorizing or justifying testimonial compulsion directly against the accused.

We reject that proposition.

Turning again to Judge Friendly's analysis, which I think is critical, Judge Friendly says, in effect, that the whole application of documents is limited to this act of production and he says in this case that the taxpayer comes forward with the records, that there will be no incriminating act.

We submit that, first of all, under the Curcio rationale, there is a testimonial statement with the productions even in this case, namely, when you come forward you state -- the attorney comes forward and states -- and I think it would be binding on his client -- that these are all the records called for by the summons.

QUESTION: Of course, Curcio was examined at some length as to why he didn't have the records, not why he did.

MR. GOODFRIEND: That's right. But as I understand it, the Court did say, in dicta in that case, that when you come forward, you make a statement.

The holding of the case, that is correct, was whether you could go further and compel him to tell you the whereabouts of records when he had placed them elsewhere.

But what the Court said there was, in that case,

the mere act of production was not incriminating because you will recall, there was a collective entity involved and therefore, with respect to the act of production, there was no incriminating statement because the collective entity in association or partnership had no privilege.

Here, the Government has expressly taken that point out of the case. They say they are not arguing the collective entity exception.

So therefore, here, when you come forward and produce the papers and -- a natural individual -- and he says, these are all the papers called for by the summons, that is, in fact, an identifying act and the mere fact, under Judge Friendly's theory, that you can get the accountant to do that for you is not a reason to make the accused himself do it.

QUESTION: Of course, you are asking a lawyer to do it here. You are not asking the accused to do it.

MR. GOODFRIEND: That is correct. Your Honor, we would take the position on that simply that a lawyer's admissions made in the course of a judicial proceeding, are normally binding upon his client and the same would probably apply here.

QUESTION: How can a lawyer invoke a client's Fifth Amendment privilege if it is a personal privilege which must depend on an assertion that the thing would be incriminating? How can a lawyer know that?

MR. GOODFRIEND: We say this. We say that the policy of allowing the lawyer to invoke the privilege is the same here as it is in the case of the attorney-client privilege where the lawyer not only is allowed to invoke the privilege, but has an affirmative duty to do so and the reason is to promote the policy of free communication between lawyer and client.

QUESTION: Yet, you take a typical trial and if your client is not a defendant, he has to mount the stand and claim the privilege, question by question. Most judges won't hear of his lawyer saying, my client declines to answer that. It is the client that has got to make the assertion.

MR. GOODFRIEND: Your Honor, in this case, of course, we are not dealing, as we were in Hoffman, with oral statements. We are dealing with documents.

QUESTION: No, but why should it be any different with documents?

MR. GOODFRIEND: Well, I think because, first of all, the documents determine the incriminating nature of the material, but more importantly, because the -- if you do not permit the lawyer to assert this on behalf of his client, we submit that it will chill the transfer of documents between the lawyer and his client because the lawyer will always be in fear if he possesses the documents necessary to make an

intelligent decision on a tax-fraud investigation case, he will always be in fear, my God, the client may not be around when the day comes when the Government subpoenas these documents from me. So I am going to make sure that whenever I examine these documents I do it in my client's home or he does it in my office.

Also we say, your Honor, that this is a matter entirely within the Government's own control. Under their own rules stated to this Court in Couch, they usually direct a subpoena to the man who has the right to custody as opposed to the man who has physical custody so the whole standing question has been created by the person to whom the Government chose to direct the summons.

Now, if they directed the summons to the client and said, produce any records that you have or that are in custody of your agents, there would be no standing in the case.

I would like to answer a few questions, Justice.

Mr. Justice Blackmun asked the question of opposing counsel whether or not we thought that the accountant could seek return of the papers from the taxpayer. I would say that that depends on the reason he is seeking return of the papers.

If he is seeking return of the papers for his own property purposes, as in matter of Harris, the trustee in bankruptcy which was invested with title, then I think he

would have a good shot at it in a state court, although even there I think the taxpayer here would have a defense, namely, the papers were turned over expressly stated by the accounting firm, turned over and giving the taxpayer the rightful, indefinite and legitimate possession of such documents.

MR. CHIEF JUSTICE BURGER: Mr. Goodfriend, I think you may be cutting into your colleague's time now.

MR. GOODFRIEND: Okay. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Bazelon.

ORAL ARGUMENT OF RICHARD L. BAZELON, ESQ.

ON BEHALF OF FISHER ET AL

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

The issue in this case, as the Petitioners in 74-18 see it, is whether the taxpayer has a Fifth Amendment right with respect to documents which are properly in his possession in a purely personal capacity, prepared at his personal direction, for his personal use, based entirely on personal records supplied by him.

The record in our case makes very clear what the nature of the documents sought by the Government is.

They are simply summaries of cancelled checks and deposit receipts of the taxpayer. The accountant, in preparing this record, has simply transcribed information from the

cancelled checks and deposit receipts in no different a way than a scrivener would transcribe the information from documents that are given to him.

We submit that when a citizen makes available to a third party personal information and that third party merely transcribes that information and the document containing that transcription is given back to the citizen, that the citizen can assert a Fifth Amendment protection if the production of that document will incriminate him.

We believe that the facts in this case are very compelling and fall squarely within the Fifth Amendment protection.

The Government argues in this case that solely because the taxpayer made a revelation to a third party of highly personal material, that he in some way forfeited his Fifth Amendment protection.

We can see no justification in the Fifth Amendment for such a position. The compelled production by the taxpayer is no less self-incriminating and the information is no less personal, is no less of personal nature because of this disclosure to a third party.

QUESTION: Mr. Bazelon, how personal are cancelled checks, which presumably you have already sent out to a payee, they have been paid through a bank. They certainly aren't like a diary, are they?

MR. BAZELON: Your Honor, they are not like a diary. They are personal in the sense that they reflect the financial transactions and financial business of the citizen involved and this Court has stated in the Bellis case, for example, that the record of a sole proprietor, business record, fall with /in the Fifth Amendment protection.

Certainly, we would say that a fortiorari, the records based on cancelled checks and deposit receipts would also fall within the Fifth Amendment protection.

We would like to speak now to the Court with respect to the revelation of this information to an accountant that we believe it is particularly inappropriate in this situation to hold that this works a fourth picture of the Fifth Amendment protection.

In Pennsylvania, for example, there is a state statute, 63 Pennsylvania Statutes Annotated, Section 9.11a, which creates an attorney-client privilege.

The record of our case makes clear that these documents, the analysis of receipts and disbursements, were held by the accountant only for a limited time in any event and after a period of several years, they were regularly returned to the taxpayer.

This was the 25-year history of the accountant-taxpayer relationship. The accountant further made clear and testified that he was holding these papers for a

temporary period solely as a matter of convenience and was holding them at the request of the taxpayer if the taxpayer wanted them.

We also believe that the reason for the taxpayer going to the accountant argues strongly against working a forfeiture of the taxpayer's Fifth Amendment rights.

It is precisely because the tax laws in this country make it mandatory and necessary for many taxpayers to seek third-party assistance that the taxpayer goes to the third party. It is in the taxpayer's interest and, we submit, it is in the Government's interest, that the taxpayers avail themselves of assistance of qualified third parties, as the taxpayers did in these cases, going to certified public accountants and to hold the taxpayers who do seek this assistance, which is important to them and to the Government, thereby forfeit a Fifth Amendment right, we believe is very inappropriate to the policies of the Fifth Amendment.

QUESTION: Mr. Bazelon, would your case be any stronger if the taxpayer had gone to a lawyer and these were the work papers of the lawyer?

MR. BAZELON: If the lawyer was serving, Mr. Justice Blackmun, the same function that the accountant was serving in this case, then I don't see why the case should be any stronger if the lawyer performs that work.

QUESTION: Except that a lawyer practices law and

an accountant sometimes practices law, maybe.

[Laughter.]

MR. BAZELON: A comparison to the Boyd case further substantiates our position. The document which the claimant in Boyd was protected against producing was an invoice given to him by a third party. Certainly that invoice did not concern the personal affair of the claimant to anywhere near the same extent as the record in this case concerns the personal affairs of the taxpayer and those records were not nearly as personal in terms of their history as the records in these cases.

The Government, we believe, in their brief and in their argument to this Court in the Couch case, has conceded that if this accountant had been an employee of the taxpayer or if -- even if he were serving as an independent contractor but did his work at the offices of the taxpayer and left his records at the offices of the taxpayer, that the taxpayer could claim a Fifth Amendment protection with respect to these records.

We cannot perceive any policy of the Fifth Amendment which is advanced by making the status and the work conditions of the accountants determinative of the applicability of the Fifth Amendment privilege.

There is no question that the -- under the opinions of this Court the act of producing a document which

entails in it a representation that the documents produced are those documents described in the summons, is a testimonial act. We submit that the act of production of a testimonial force is testimonial in an additional sense as well in that it constitutes a publication of the information which is contained in the documents.

The Government says that unless the particular communication --

QUESTION: Then you would say a search warrant would be equally suspect.

MR. BAZELON: Well, your Honor, a search warrant does not require any compulsion on the person of the --

QUESTION: No, but it is a publication of some testimonial materials.

MR. BAZELON: Yes, it is, Mr. Justice White, but not by the person who is claiming the protection with respect --

QUESTION: Well, so, are you suggesting a search warrant could be validly used to secure these papers from the accountant?

MR. BAZELON: I am suggesting that whether --

QUESTION: Or from the lawyer?

MR. BAZELON: -- whether he could or not would not justify the Government in obtaining these documents in a way that places the taxpayer in a position where he has to incriminate himself.

QUESTION: By the act of producing it.

MR. BAZELON: That's right.

The Government has argued that unless the actual testimonial content of the act of production is incriminatory in and of itself, there can be no satisfying of the criteria of a testimonial act and we submit this is just not what the law has been. This Court has, as recently as in the case of Maness versus Meyers, has held that where there is a compelled testimonial response which is part of the link of the evidence against the accused, that the accused is entitled to claim the Fifth Amendment protection.

The actual response of the taxpayer need not be the kind of incriminatory evidence that would be admissible at the trial if it is part of the link in the chain of evidence against him and, clearly in this case, the taxpayer, in producing the documents, is saying, these are the analyses of receipts and disbursements and we would even go further and say that the taxpayer's implied testimony in doing that amounts to an authentication because the history in this case is that the taxpayer had regularly received these documents over a 25-year period from the accountant, that is, these analyses -- the analysis of receipts and disbursements.

He was familiar, therefore, with the accountant's work product and under the law of evidence in terms of witnesses who can testify to authentication, he was in a

position to authenticate those documents.

He was familiar with the accountant's work product. He had seen it in circumstances which would indicate the genuineness of the past documents. He could be a witness to authenticate those documents.

QUESTION: What is the incriminatory link in just the production along the lines that you are just talking about?

MR. BAZELON: The incriminatory link is that the taxpayer is providing the Government with the information that the papers produced by the taxpayer are, indeed, the records transcribed from his own records by the accountant.

QUESTION: But now, apart from the content of those records, how does that assertion -- if it be an assertion -- tend to incriminate him at all?

MR. BAZELON: It becomes part of the link in the chain of evidence against the taxpayer.

QUESTION: Well, how?

MR. BAZELON: Because it allows -- it is a statement that these are the documents that permit the Government -- that is, it is incriminatory because it gets the Government to the next stage in the procession of evidence against the accused, namely, to go to the accountant and have the accountant come in and testify.

Now, the fact that the accountant may be able to give much the same testimony in terms of identifying these

documents doesn't make the taxpayer's own admission any less incriminatory as to him.

QUESTION: But if the subpoena simply describes a piece of paper with a certain title on it -- says produce a paper with a certain title on it and dated a certain date, not saying who it belonged to or anything else, would you make the same argument?

MR. BAZELON: You would have a different case, no question about it, Mr. Justice White. I think it would have raised the separate question of whether or not part of the testimonial act is producing a testimonial --

QUESTION: Whether having possession of it would be a relevant piece of evidence. That would be --

MR. BAZELON: Well, that is always a --

QUESTION: Not always. I wouldn't say --

MR. BAZELON: Well, if that element is involved, that is a separate item of testimony and on that score, I would like to mention briefly part of the Second Circuit's opinion in the Beatty case.

We believe that the Boyd case fully supports the position we are taking with respect to the act of production being a testimonial response by the taxpayer.

After all, those were third-party documents and the taxpayer, by producing them, was saying that this is the invoice and the Government wanted that invoice to establish

how much glass there was in the 28 or whatever number of cartons had been imported. They wanted the invoice for the truth of the averment in the invoice.

The Second Circuit said with respect to the Boyd case that the invoice had significance in establishing that the claimant had received the invoice but there is nothing in this Court's opinion in the Boyd case that indicates that there was any relevance whatsoever to the fact that the claimant had received the invoice and, in fact, the Court's opinion is quite to the contrary.

The Court said, on the trial of the cause it became important to show the quantity and value of the glass contained in the 29 cases previously imported.

The only significance of that invoice was for the truth of the statement contained therein. Therefore, the production of the invoice in Boyd was testimonial in exactly the same way that production of the documents in this case would be testimonial.

QUESTION: What if they subpoenaed the original records from the English importer, as Judge Friendly suggested? They could do that, couldn't they?

MR. BAZELON: They certainly could. And there would be no act of compulsion on the claimant in that case.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Wallace, you have four minutes left. Do you have anything further?

REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.

MR. WALLACE: Very briefly, your Honor.

The act of production here is no more incriminating than was the act of production in Bellis or in White or Wilson or that whole line of cases. It is precisely the same act of production with respect to its communicative nature. It says, this is the file of the accountant's papers that he placed in my custody. Just as in Bellis, these are the partnership records that are placed in my custody, is the implicit communication.

It seems to me that that line of cases establishes that production of a third person's records, that are not one's own personal papers, can be required of the custodian.

The fact that those records contained information about the taxpayer's personal financial affairs is not controlling because as I said in starting my analysis for my argument, the records could have been required to be produced by the accountant while they were in the accountant's possession, even though they had this information in them.

QUESTION: Well, that is -- that just is peculiar, then, to the facts of this case.

Would you say that you could subpoena the records from the taxpayer?

MR. WALLACE: Not his own personal records. That is the distinction, the operative one under the cases, wh ether the records are his own personal records or whether he is holding in his custody someone else's records.

QUESTION: So you are suggesting you could not subpoena them, even though the act of production might not be incriminating at all.

MR. WALLACE: Well, that would raise a more difficult issue under Boyd, which needn't be decided here and I may not foresee all the possible ramifications there.

QUESTION: Well, insofar as thesewere check stubs or whatever else we were told they were, if they had been in the possession of the taxpayer you wouldn't suggest that they could be subpoenaed, would you?

MR. WALLACE: No, we don't try to subpoena such records against a claim of privilege. We might subpoena them.

QUESTION: You are getting the transcripts of the evidence on the yellow sheet of paper that the accountant made --

MR. WALLACE: That is correct.

QUESTION: -- using the the original checks and checkbooks to do that.

MR. WALLACE: I do want to suggest --

QUESTION: I mean, that is the distinction you are drawing.

MR. WALLACE: It is a distinction. This is the disclosure to the accountant and these are his papers and they are his papers not merely because of ancient doctrines about ownership of the piece of paper because as the Court recognized in Couch, the accountant has responsibilities under the Internal Revenue laws to be able to substantiate that he filed accurate tax returns and that he is conducting his business in accordance with law.

But we do agree that ownership is not in itself the governing criterion. We think if the taxpayer had acquired title whether by purchase or by some other method, the result would not change because these would still not be his personal papers. Their essential character, just as in Grant, would remain third-person records, even though --

QUESTION: In other words, had he given the yellow pad to the accountant, "I bought this yellow pad in Woolworth's. You use this. Make your records on this. It belongs to me. It is my pad," that makes no difference?

MR. WALLACE: It would make no difference, your Honor. Thank you.

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

[Whereupon, at 3:10 o'clock p.m, the case was submitted.]