In the

# Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

UNITED STATES GYPSUM COMPANY, et al.,

Respondents.

No. 76-1560

4

Washington, D.C.
March 1, 1978

Pages 1 thru 67



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| UNITED STATES, Petitioner, | : | |
| v. | : | No. 76-1560 |
| UNITED STATES GYPSUM COMPANY, et al., Respondents. | : | |

Washington, D. C.,

Wednesday, March 1, 1978.

The above-entitled matter came on for argument at 1:12 o'clock, p.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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

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APPEARANCES:

DANIEL M. FRIEDMAN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Petitioner.

W. DONALD McSWEENEY, ESQ., Schiff Hardin & Waite, 7200 Sears Tower, Chicago, Illinois 60606; on behalf of the Respondents.

APPEARANCES [cont'd:]

H. FRANCIS DeLONE, ESQ., Dechert Price & Rhoads, 3400 Centre Square West, Philadelphia, Pennsylvania 19102; on behalf of the Respondents.

FRED H. BARTLIT, JR., ESQ., Kirkland & Ellis, Suite 6000, 200 East Randolph Drive, Chicago, Illinois 60601; on behalf of Respondents.

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C O N T E N T S



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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-1560, United States against United States Gypsum Company.

Mr. Friedman, you may proceed.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE PETITIONER

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

The principal question in this criminal antitrust case, where is here under writ of certiorari to the Court of Appeals for the Third Circuit, is whether sellers who concertedly exchange among themselves information with respect to the current prices at which they are selling and other competitive matters, conduct that would otherwise violate section 1 of the Sherman Act, may justify this conduct on the ground that the information they are seeking from their competitors would be helpful to them in establishing a meeting competition defense under section 2(b) of the Robinson-Patman Act as a defense to a charge that might be brought against them of price discrimination.

QUESTION: When you say the principal question presented, you mean the questions presented by the petition for certiorari?

MR. FRIEDMAN: By our petition, yes. That's the main issue, the main focus in this Court, and the reason for --

QUESTION: You say the main focus in this Court, don't you have a feeling that if this had been a Dyer Act case the Third Circuit would have affirmed on the basis of harmless error with an instruction like this?

MR. FRIEDMAN: I don't know, Mr. Justice.

But let me explain the reason I say it's the principal case. In addition to this issue, a single judge on the Court of Appeals, two of them, each individually found three other grounds for reversing this conviction in the instructions.

One of the judges thought that the instructions were defective in two respects, because they failed to specify what was necessary to be shown in order to establish the participation of particular defendants in the conspiracy, and also that the instructions were deficient on withdrawal from the conspiracy.

Another judge, although not agreeing with those two rules, thought that the jury had coerced a verdict.

So that what you have in this case is the Robinson-Patman Act issue concurred in by two judges of the Court of Appeals, other criminal law rulings concurred in by only

one judge of the Court, but the two single judges together ended up with a majority that would have resulted in reversal apart from the Robinson-Patman Act question.

The indictment in this case, which was returned in December 1937, charged six corporations that manufactured gypsum board and ten of their individual officers with having conspired from before 1960 until the return of the indictment, in violation of section 1 of the Sherman Act, to fix, raise, maintain and stabilize prices of gypsum board, to fix, maintain and stabilize the terms and conditions of sale and to adopt uniform methods of handling and packaging.

Two of the corporations and seven of the individuals pleaded nolo contendere.

After a 19-week trial, the jury convicted the four remaining corporations and the three individual officers of those corporations who are the respondents now before this Court.

I would just like to say a word about the gypsum board industry itself, because the character of the industry is significant with respect to the issues involved in this case.

The gypsum board has largely replaced plaster as the major material used for the interior walls of buildings. The gypsum board, the standard board produced by all manu-

facturers is the same, you can't tell one from the other. And the result of this is that the competition among manufacturers of gypsum board is not to stress quality but rather price, discounts, and service.

The product is a heavy product, which means that shipping costs are expensive, and it's difficult to serve a very large area from a particular plant. The respondents have plants throughout the country. The industry is also highly concentrated.

During the period covered by this indictment, the four corporate respondents had 75 percent of national sales, they being the four largest in the industry. The eight largest in the industry had a total of 94 percent of the industry. The remaining 6 percent of the industry was held by seven firms of the so-called single-plant producers, a firm that had only one plant and, of necessity, would serve a much smaller geographical area than the larger companies could serve.

These companies came into existence in the 1950's and 1960's, and one of the charges in our complaint, which we believe the record supports, is that part of the defendant's conspiracy involved predatory practices directed against the single producers.

The indictment charged that the defendants had utilized a number of different means for effectuating the conspiracy. And the one that was most litigated in this case

was a practice that the defendants referred to as verification.

Under this practice, when an official at the headquarters of one of the companies was informed from the field that a customer had been quoted a lower price by a competitor, he verified with the company that was reported as giving this price. If the other company denied giving the price, then they normally would not need it. If, however, the other company acknowledged giving the price, then the usual but not the invariable practice was for the first company to meet that price.

The product was sold at a list price with a discount. The list prices throughout the period were virtually identical by all the manufacturers and the discussion of verification related primarily to the discounts that were being given off these prices.

QUESTION: If that's all the record showed, what would be your position?

MR. FRIEDMAN: Just if -- if that's all you had, what we would say, that the verification alone, the verification alone in the circumstances of this -- well, if that's all they did, if all they were doing was verifying, that's all that was shown, that would not, in our view, be a violation of section --

QUESTION: How about verifying and then meeting the

price cutter?

MR. FRIEDMAN: And then that would -- meeting the cutter, that would begin to get more.

QUESTION: Begin, but would it be a crime?

MR. FRIEDMAN: I couldn't state without knowing more facts, I think, Mr. Chief Justice. But, and this we think is the critical thing, in this case the charge was, and the jury by its verdict must have found, that verification if done with either the purpose or the effect of fixing prices would be enough to violate the Sherman Act.

That's our -- the case is not limited just to the mere act of the verification, because there's a lot more.

Let me add two things in addition to the verification, it was not only with respect to prices, it was also with respect to various terms and conditions of sale. For example, they would call to ask whether somebody was giving greater credit terms than they were giving. In some instances they called to ask whether firms were trucking the product to the customer, because trucking is more convenient if it's delivered right to your plant than if you have to pick it up at the railsiding.

And there were instances in which the inquiry related not just to what was being done with respect to a specific customer, but more broadly: what were you doing in a particular city? Is it true you were doing certain things

in Texas? And so on.

The primary justification that the respondents offered for this practice was that they say the need to comply with the Robinson-Patman Act. Now, the Robinson-Patman Act, of course, prohibits generally discriminations in price whose effect may be substantially to lessen competition.

It provides a limited exception in 2(b), which says that a person charged with discrimination may justify it by showing that he gave the lower discriminatory price in a good-faith attempt to meet the equally low price of a competitor.

The respondents also contended that they needed to engage in this practice in order to protect themselves against what they call customer fraud. The customer fraud, as they see it, being that a customer misrepresented to them that the customer was getting a lower offer from one of the competitors.

But at the trial there were a number of admissions that at least one purpose of this verification was to minimize price competition. As one officer of United States Gypsum stated, he said, "I was attempting to minimize deviations from list price". That's at page 501 of the record. Described as another method of keeping prices up, at page 519; to keep market stability, to guard against price erosion.

One of these single-plant producers joined in this conspiracy. He did so after he had attended the first meeting of the Gypsum Association, the trade association, at

which Respondent Watt, the executive vice president of U. S. Gypsum Company, said there were certain things that went on in the gypsum industry. Specifically he talked about the exchange of price information and the need to be honest. And this man stated that after he had been told that, the reason he engaged in verification was, and this is at 205 of the record, "the price in our prime market was rapidly deteriorating and my motive was to try to keep it from deteriorating any further."

Now, during the time of this --

QUESTION: Mr. Friedman, what part of the instruction is this part of your argument devoted to?

Because there -- or is it devoted to something other than the instructions?

MR. FRIEDMAN: No, it's devoted to the basic question of whether an agreement, a price exchange agreement, that has the effect of fixing or stabilizing prices may be justified because of a purpose to comply with the Robinson-Patman Act. And our argument on that score primarily is that because of this exchange of prices tends to facilitate price maintenance, price stabilization and price fixing, to permit this would create a serious loophole in the Sherman Act, and this is designed to show that the defendants themselves at least recognized, and to show what one of the purposes was.

QUESTION: The Court of Appeals didn't hold that there

wasn't substantial evidence to support the verdict, did it?

MR. FRIEDMAN: No. No, it's unclear exactly what the Court of Appeals held. The Court of Appeals held that there was evidence to support a finding that this was their purpose, and it's rather cryptic whether it also held that that was the effect. But presumably, since it remanded for a new trial under the different instruction the Court of Appeals thought necessary, that it must have believed that on the proper instruction a finding of effect would be sustainable.

QUESTION: Mr. Friedman, what is the period of the alleged conspiracy?

MR. FRIEDMAN: From the beginning -- prior to 1960 until the return of the indictment in December 1973.

QUESTION: You have a statute of limitations that operates somewhere in there, don't you?

MR. FRIEDMAN: Yes. There's a five-year statute, so the cutoff date is, I think it's December 27th, something like that, --

QUESTION: Of '68?

MR. FRIEDMAN: Of '68.

QUESTION: My impression from your statement of facts, which I think is about 40-odd pages long, is that most ofthe facts you talk about occurred before the period involved in the indictment.

MR. FRIEDMAN: Most of them did, Mr. Justice; but we

have also explained in our brief that there was evidence that the conduct continued into the limitations period. And of course if the conspiracy was underway before the limitations period, as long as acts were done in furtherance of the conspiracy during the limitations period, that is enough to establish a violation.

But there was some continuing activity, some verification, verious other things, some price maintenance during the period of the --

QUESTION: The verification practice after 1968 was at a very substantially lower level, as I gather from --

MR. FRIEDMAN: That is undoubtedly correct.

But I think -- one thing I may just mention in connection with the verification practice that is rather interesting, the major reason that was suggested they needed to engage in verification was so they could protect themselves for a meeting competition defense if they were charged with price discrimination. But they kept no records at all of these communications, they kept no records, indeed there were policies not to keep records. And when one man was asked, "Well, if you needed this in order to protect yourself, to establish a Robinson-Patman meeting competition defense, why didn't you keep any records?" He said, "Well, I can't really answer to that, it just didn't seem necessary."

So I think that again is illustrative of the dangers

in this kind of thing.

Now, during the period in November and December 1965, following the lead of U. S. Gypsum, all of the respondents announced that they were giving up discounting. They were all going to sell at list prices, identical list prices. And for a year and a half to two years this happened. And despite the fact that they were not giving any discounts at this period, they still continued to verify.

And the lack of discounting and the increased prices took place at a time when there was a decrease in demand for the product and over-capacity.

The court gave a lengthy charge to the jury, and explained at length the Robinson-Patman Act and what the meeting competition defense involved. Now, what the court told the jury was that they could convict the defendants if they found either a purpose to fix and stabilize prices or that the effect of what the defendants had done was to fix or stabilize prices, and it said that if the effect of such exchanges was to fix -- raise, fix, maintain or stabilize prices, then an agreement to engage in such an exchange is a violation of the Sherman Act, regardless of the specific purpose that the parties to the agreement had in mind. It was that instruction that the majority of the Court of Appeals held was erroneous.

QUESTION: Was this the same instruction as on page

13a of the Petition? "If you decide that the effect of these exchanges was to raise, fix, maintain, and stabilize the price ..., then you may consider these exchanges as evidence.."

MR. FRIEDMAN: Well, no, it went beyond that. That was the first part of the instruction, Mr. Justice. But over at page 1722 of the record, after they gave that instruction, the court charged: "If the effect of such exchanges" -- and this is about five lines down -- "was to raise, fix, maintain or stabilize prices, then an agreement to engage in such an exchange is a violation of the Sherman Act, regardless of the specific purpose that the parties to the agreement had in their minds."

And then it goes on in the next paragraph: "The effect ..., then the parties ... are presumed, as a matter of law, to have intended that result."

So the court charged the jury that they could convict, if they found that the effects of this -- first, that they had to find if there was an agreement, and if they found there was an agreement, if they found that the effect of this agreement was to raise, maintain or stabilize prices, that was enough to establish a violation of section 1 of the Sherman Act.

QUESTION: So you're picking out a part of the instructions that the Third Circuit didn't really deal with, that's less favorable to the government, and saying -- or the

instruction is more favorable to the government, and arguing that that should be sustained here.

MR. FRIEDMAN: Well, no, I think the Court of Appeals had fairly read it, its opinion said -- it varied in different places, but what it fairly said was that if the sole purpose of this verification was to protect -- concerned their defense under the Robinson-Patman Act, then that would not be a basis for finding a violation of section 1. I think that's what the Court of Appeals held.

And the dissenting opinion by Judge Weis in the Court of Appeals concluded that the instructions properly stated the law.

QUESTION: Of course the trial judge's instructions also said that if the sole purpose was good faith, the compliance with the Robinson-Patman Act is no violation.

MR. FRIEDMAN: No, Mr. Justice, he says if the sole purpose was good-faith compliance, there was no violation unless -- unless it had the effect of fixing, maintaining or stabilizing prices. I believe that's it. The instruction is somewhat cryptic, but I think that when you read it all together you see what he was telling -- if you find they had the purpose of fixing, stabilizing prices, then that's bad. If you find they had no purpose, but no adverse effect, then it would be all right. But if you found that it had an adverse effect without regard to the purpose, that was enough

to --

QUESTION: Well, his first instruction says, "If you decide" -- this is on 1721 -- "that this was merely done in a good faith effort to comply with the Robinson-Patman Act, then you could not consider verification, standing alone, as establishing an agreement to fix, raise, maintain, and stabilize prices as charged."

He says in words, as I read them, that if they found compliance with the Robinson-Patman Act to be the sole motive, there's no -- that's the end of the case.

MR. FRIEDMAN: Well, no, but he said you couldn't consider verification standing alone, --

QUESTION: Right.

MR. FRIEDMAN: -- as establishing an agreement. But we had more than just verification in this case.

But then he went on to say, "if you decide that the effect of these exchanges was" -- in the next sentence -- "to fix, maintain, and stabilize prices, then you may consider these changes as evidence of the mutual agreement or understanding alleged in the indictment to raise, fix, maintain, and stabilize list prices."

I think it's --

QUESTION: So you think that's to be understood as instructing the jury even if the sole purpose of the verification was to establish a defense under Robinson-Patman, if indeed

the effect of it was, then it was a criminal violation?

MR. FRIEDMAN: That's correct. I said that and I think he --

QUESTION: He left that out at the sentence you read before.

QUESTION: He just says it's evidence in that paragraph, he doesn't say it's sufficient evidence.

QUESTION: Right.

MR. FRIEDMAN: No, the jury could infer -- could find a violation if --

QUESTION: Well, it's all right if you want to read it to be more favorable to your opponents than the actual language is.

QUESTION: Yes.

QUESTION: Does it surprise you that the jurors were taking pills after deliberating for four days on this matter?

[Laughter.]

MR. FRIEDMAN: It was -- it does --

QUESTION: Luckily we're only going to be here for an hour.

[Laughter.]

MR. FRIEDMAN: It doesn't surprise me. Mr. Justice, I was ready to take pills when I was plowing through this record. But I didn't have any.

[Laughter.]

QUESTION: It was even more extravagant than that. The foreman of the jury reported to the court here that literally some of the jurors were ready to jump out the window.

MR. FRIEDMAN: Well, I think what --

QUESTION: Do you think that was a little hyperbole?

MR. FRIEDMAN: I think so. What he said was there was one woman who was at the window, and he thought maybe she was going to jump out. But --

[Laughter.]

MR. FRIEDMAN: -- I don't think he said that. And it's clear that some of the --

QUESTION: Maybe she was just climbing the walls.

[Laughter.]

MR. FRIEDMAN: Well, that's not unusual, Mr. Justice, with a long case and a complicated, difficult case --

QUESTION: You don't have to tell me!

MR. FRIEDMAN: -- a lot of facts, there were seven defendants. You have to evaluate the evidence against each of them. It's something to try the tempers of, I think, all people.

Now, let me come to that issue in the case, which is whether you can justify an agreement exchanging prices that would otherwise violate section 1 of the Sherman Act, because you say you need and want this information in order

to establish a meeting competition defense under the Robinson-Patman Act.

Exchanges of price information occupy a peculiar place in the learning of this Court. There have been cases which have upheld them, there have been cases which have turned them down so that the exchange of price information was not permissible.

But I think the one thread that runs through all of these cases and culminates in this Court's decision nine years ago in the Container case was that an exchange of current prices, which is what this was, which they were offering to a particular customer, that an exchange of current prices violates the Sherman Act if either its purpose or its effect was to fix or stabilize or maintain prices.

QUESTION: Do you read Container as being unanimous in that respect?

MR. FRIEDMAN: I do, Mr. Justice, because the dissenting opinion in Container specifically refers two or three times and said they didn't think in that case the government had established either the purpose or the intent to stabilize or fix prices. I think --

QUESTION: Or effect.

MR. FRIEDMAN: Or effect. I'm sorry, either the purpose or effect.

I think the disagreement between the majority and the

minority was over what the government had proved in the case, not over the guiding legal standards.

And I think this principle reflects the economic realities of what happens when you have this kind of an exchange of price information.

There is very little incentive for one firm to cut its prices if it knows that as soon as it does so its opponent, its competitors will know about it, because, as soon as it's reported by a customer that the price has been cut, the salesman, wanting to make the sale, will try to get approval from the home office to make the cut, he will have to say who the competitor was that gave the price. The firm getting this request will get in touch with the other firm to see whether they did it.

Well, this, it seems to me -- and correspondingly, you know that if you are giving them price information, they are giving you price information; it seems to me this removes a great deal of the incentive for engaging in price competition, because price competition is effective -- is effective when what you have is the first price and it's tried to be done secretly. If your costs remain relatively steady, the only reason to cut a price is in the hope of gaining later volume. You make up in your volume what you lose in the individual sale. But if you know that everyone is going to follow suit, it's no great incentive to do this.

And similarly, this kind of verification of prices is a very effective method of policing an agreement to fix prices, because you know that if you deviate from the agreement you will be caught up on it very quickly, and the record shows numerous instances where that kind of thing happened.

Now, the Container case we think is very close to this case. There you had a similar situation that the companies reciprocally exchanged their most recent prices on sales to specific customers. Without even considering the purpose of this arrangement, the court held that this arrangement was illegal price-fixing because it said it stabilized prices, though at a downward level. The inferences are irresistible, that the exchange of price information has had an anti-competitive effect in the industry, chilling the vigor of price competition.

The Court of Appeals decision, and respondents' argument in this case as to why they should have this exception rests on two words, literally two words, in the Container opinion. The opinion in Container began by explaining why this case is unlike any other price decisions we have rendered, and then it distinguished Container from other cases, and it distinguished, among other cases, the Cement Manufacturers case which had upheld an exchange of price information. And it noted that while both cases involved an exchange of prices to specific customers, there was absent the controlling circum-

stances viz., the Cement Manufacturers price exchange were designed to protect against fraud.

And the Court of Appeals and the respondents urged that because this Court, in distinguishing the case, used the words "controlling circumstance", this amounts to a recognition of an exception to the general rule condoning the exchange of price information that has an adverse effect on competition; if there is a controlling circumstance, that will justify an exception. And then they go on and say, and here we have a different, another controlling circumstance, the wish to protect themselves from being charged with price discrimination under the Robinson-Patman Act.

QUESTION: Well, also, wasn't there the same sort of -- the same controlling circumstance as in Cement, i.e., to protect against customer fraud?

MR. FRIEDMAN: Well, that we think is -- it's a different type of customer fraud, Mr. Justice Stewart.

QUESTION: Here the assertion is that it was to protect against being misinformed by a customer that a competitor had given him a lower price.

MR. FRIEDMAN: Yes. Yes.

QUESTION: What was the customer fraud in Cement?

MR. FRIEDMAN: In Cement, the customer fraud was -- they had an arrangement whereby they would permit people to get a product at a lower price during the duration, when they

were going to increase the price --

QUESTION: Oh, during the protection period, yes, and they had over --

MR. FRIEDMAN: Protection period. And the purpose of the exchange in Cement was to enable a firm to be protected against having to ship -- the concern was the shipment. Where here the concern was to find out whether a similar arrangement was being offered by a competitor.

Now, we don't think that that statement in Container can fairly be read as creating this kind of an exception. It was just the words that the Court happened to use. The Court could have equally said, instead of saying that that case -- there was absent, instead of the controlling circumstance, it was absent the fact that. If the Court had said that, which would have been the identical statement, there wouldn't be any basis for this --

QUESTION: Well, they had a fact doctrine, then.

MR. FRIEDMAN: What?

QUESTION: It's not an unusual experience for a man, any member of this Court, to casually use a phrase in an opinion and it comes back a year or two later as a doctrine.

MR. FRIEDMAN: That's right. We don't --

[Laughter.]

QUESTION: Or a test.

QUESTION: Right.

MR. FRIEDMAN: We don't think that that's fairly what's Container said. I think you've got to look and see what Container held.

QUESTION: Yes.

MR. FRIEDMAN: What Container held was that the exchange of price information there, similar to that that you have here, was illegal price tampering or price fixing, price stabilization under the Sherman Act, because of its effect upon prices -- because of its effect on prices.

There's nothing in the Robinson-Patman Act that says that in order to establish your good faith in giving a discriminatory lower price, to show that it was done in good faith to meet the equally low price of a competitor, you've got to check with the competitor to find out how much he is charging.

The Federal Trade Commission does not take that position, there's attached to our petition a letter they sent us advising that, and we know of no court cases that take that position.

The rule that the Court of Appeals -- the principle that the Court of Appeals has announced, and the principles which respondents are arguing here, it seems to us, would cut a very wide gap in the Sherman Act, because it's not difficult for people who want to facilitate the maintenance of prices to say they have to do it in order to protect themselves against

-- protect themselves from a possible charge under the Robinson-Patman Act. Of course, the Robinson-Patman Act -- they talk about meeting the requirements of the, 2(b) of the Robinson-Patman Act. The Robinson-Patman Act, the only requirements of the Robinson-Patman Act are that you can't discriminate in price where it has anti-competitive effects. 2(b) is a limited exception to that defense, it's a defense recognizing a specific situation; but it's never been thought, it seems to me, that in order to take advantage of a defense like that, you can justify something that otherwise would violate another statute.

And that is precisely what happens in this case, because the claim is that even though this thing has the prohibited effect upon competition, even though this exchange had the effect of stabilizing the prices, nevertheless they can justify it because they want this information in order to defend against the possible charge of price discrimination.

Now, the argument has been made here that to subject the respondents to conviction for this conduct amounts to a prohibited retroactive application of a new rule of law, we don't think there's any new rule of law that was applied by the district court in this case. We think, as I've indicated, the principles governing this field are well settled, and all the district court did was to tell the jury to apply these principles to the facts of this case.

So in this aspect of the case we think that --

QUESTION: Mr. Friedman, before you leave this aspect of the case, in Judge Hunter's opinion at pages 28 and 29 of the cert petition, he summarizes what he thinks would be a proper instruction, which was not quite given. Would you say that that instruction, had it been given, would have been wrong?

MR. FRIEDMAN: Yes. We would say that that instruction -- that we're challenging that instruction. That instruction would have been wrong, we think, because we don't think that if they engage in the practice solely to comply with the strictures of the Robinson-Patman Act, even subject to the other qualifications, that that would be a justification.

Our position is that you cannot justify an exchange of price information that has the effect of fixing prices, and because, if you wish, even solely comply with the Robinson-Patman Act. We would not accept that. In fact, that's what the holding, I suppose, of the Court of Appeals is, and that's the holding we're challenging.

That gives a -- that holding is a narrower rule than the respondents urge, but even that rule, in our opinion, is wrong.

QUESTION: Mr. Friedman, before you go on, if there is verification practiced widely, as it was in this case, and it does not result in stabilizing prices, I take it you wouldn't

complain of that?

MR. FRIEDMAN: No, if it -- in other words, if I may rephrase the question, Mr. Justice, if we assume that the exchange of prices did not adversely affect competition, price-to-price level, if there were mere exchange of prices, we would not question that; and indeed this Court in many of its decisions recognized that a mere exchange of prices itself is not illegal, indeed it may be very useful in some situation if it gets --

QUESTION: In an industry like this one where you stated at the outset that price is stabilized because of the nature of the commodity and the nature of the industry, how does this work out in practice? If you're a businessman, what do you do?

MR. FRIEDMAN: Well, it's stabilized through list prices, but what they're trying to do is prevent and eliminate the discounting. That's the problem, it seems to me.

I think if I'm selling at list price, and a customer comes to me and says a competitor is offering me a lower price, I have to decide whether I want to cut the price on that sale or not. I can't check with my competitors, I can make the best judgment -- the best judgment I can make on the basis of everything I know. For example, is this customer reliable? How reliable is the salesman? Is this the first --

QUESTION: You are now saying you would not check

with the customer, which --

MR. FRIEDMAN: Pardon?

QUESTION: You're now saying you would not check with your --

MR. FRIEDMAN: Competitor.

QUESTION: -- competitor.

MR. FRIEDMAN: No. I think -- I don't think the Sherman Act permits that kind of direct consultation between competitors over the price they're going to charge where it's a widespread practice and where it has the effect that the jury must have found in this case.

QUESTION: What if -- Mr. Friedman, I want to be sure that I understand your answer to my brother Powell's question -- what if the avowed and acknowledge, proven purpose of the exchange of information was to stabilize prices, but that the effort was unsuccessful and the effect was not -- and prices were not stabilized; would that not be a conspiracy and a violation?

MR. FRIEDMAN: That would be a violation if there was an agreement and if the purpose was to stabilize prices.

QUESTION: Even though wholly unsuccessful?

MR. FRIEDMAN: Even though wholly unsuccessful.

QUESTION: It would still be a violation, wouldn't it?

MR. FRIEDMAN: It would still be a violation.

QUESTION: Then I misunderstood your answer to my brother Powell.

MR. FRIEDMAN: I'm sorry.

QUESTION: Well, Mr. Friedman, why shouldn't the significance of the effect on prices be merely evidence of an agreement to affect prices?

MR. FRIEDMAN: Well, it is, it is one element, it is one element.

QUESTION: Well, should the jury -- must not the jury have to conclude that there is a conspiracy or agreement to set prices, or to affect prices?

MR. FRIEDMAN: Oh, yes. Yes.

QUESTION: You agree with that?

MR. FRIEDMAN: Yes.

QUESTION: And that the -- so that the whole function of proving effect would be to lead the jury to conclude that there is a conspiracy to --

MR. FRIEDMAN: Yes. There has to be two things. There has to be the conspiracy, and there also has to be the purpose of the conspiracy. And the purpose of the conspiracy has to be to fix, stabilize and maintain prices. There had to be a conspiracy to fix prices, in other words.

But you can presume from --

QUESTION: Well, just the bare statement of the government's position and even the bare statement that you can

get out of Container, both the majority and the dissent, would indicate that if you just have an agreement to exchange price information and you have the effect of -- and it has an effect on prices, that there's a -- a violation has been proved?

MR. FRIEDMAN: I would think if --

QUESTION: Yes, but you should go through the litany and say, if there's an agreement to exchange price information and then there's an effect on prices, do you say then as a matter of law that it must be concluded that there is an agreement to fix prices?

MR. FRIEDMAN: I would think that is for the jury to decide, but I would think that certainly a --

QUESTION: Well, whichever way you put it, there's more to it than just saying that you have to have an agreement to --

MR. FRIEDMAN: Yes, there's more to it, but the reason I'm putting it in these terms is because of the -- what we think is the error of the Court of Appeals holding, that without regard to the effect on prices or what the agreement was, if the purpose was merely to offer a defense under the Robinson-Patman Act, then that would be sufficient to justify the practice.

I'd like, Mr. Chief Justice, we've dealt with the jury instructions in our brief, I'd like to reserve the balance

of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. McSweeney.

ORAL ARGUMENT OF W. DONALD McSWEENEY, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I am going to deal with the Robinson-Patman verification point, as described by Mr. Friedman, including retroactivity; Mr. DeLone is going to address himself to the other instructions, namely the one which Judge Hunter found a reversible error on scope and purpose, the instruction on scope and purpose, and the abandonment; and he will also deal with the question of the coercion of the jury.

Mr. Bartlit thereafter will address himself to some of the issues affecting the individuals.

I would say at the outset, if I may, to Your Honors that the question here is of course a very important one, and more important than ever in this criminal case, because any rule fashioned by this Court will be applicable now in felony cases, since December 1974, a Sherman Act violation is a felony; and I say that because I want to emphasize, if I may, that it's very important, I think, to retain the law which is that in a price exchange case, even where the price exchange has an effect of stability, the element of purpose in exchanging

prices should not be emasculated, and that's what was done in the --

QUESTION: But I just asked the Solicitor General here if the effect just is the intrument or the vehicle or the evidence of a conspiracy to set prices.

MR. McSWEENEY: Well --

QUESTION: And if it's a conspiracy to set prices, it's purposeful.

MR. McSWEENEY: If there is, Mr. Justice White, a conspiracy, a direct agreement, so to speak, to fix prices, he doesn't need to show the effect; but in this case there was no direct agreemant to fix price, there was only --

QUESTION: Well, would you say it would be -- that a jury verdict -- if a jury is told that you must find a conspiracy to set prices, which means purposeful agreement, if you must find that, that then it's instructed that you may but you need not find it, if you find an agreement to exchange information plus an effect upon prices? Now, was that -- if a jury then finds the defendants guilty, would you say that should be upset?

MR. McSWEENEY: Mr. Justice White, if the jury has the option so that it could have found the defendant guilty on the basis of merely an exchange of prices and price stability, that is error which should be upset; that is what happened here.

The jury -- the government concedes that.

QUESTION: You said they can't even use it as a basis for inference?

MR. McSWEENEY: No, they could use price stability as a basis of an inference, but they must find they could infer a purpose, which is what I think this Court did in the Container case, from price stability and an exchange of pricing information.

QUESTION: So you say those two facts aren't enough to infer, from which a jury could infer a conspiracy to set prices?

MR. McSWEENEY: Mr. Justice White, exactly, and that is the central point of this verification issue.

QUESTION: Right.

MR. McSWEENEY: In this case that's what -- we don't know what the jury found, and the government shouldn't be talking about what it proved, this isn't a sufficiency of the evidence case, it's here on instructions.

QUESTION: Well, you don't think the jury here was instructed to find the defendants guilty if they found an effect on prices, do you?

MR. McSWEENEY: Mr. Justice White, I'm confident that the jury here was absolutely instructed if they found an exchange of price information and price stability, they must find that that would be a violation of the Sherman Act.

QUESTION: "must" or "may"?

MR. McSWEENEY: That they could find that on that basis.

QUESTION: Yes, but that's "may".

MR. McSWEENEY: Yes, that is "may".

QUESTION: Well, were they required to find it or not?

MR. McSWEENEY: They were not required, they were -- but they were not -- they were told to disregard purpose entirely. And if I may quote the instructions, and quoting from page 1722 of the record, which is a little bit in the charge after, I believe, the portion that Mr. Justice Stevens referred to, down to the paragraph which begins on that page, to those critical words, "regardless of the specific purpose", very clearly the trial court said to the jury: "You don't have to be concerned with the purpose of complying with the Robinson-Patman Act if you find an exchange of prices and price stability, then you may find", and that's only -- that is what the case is here on, because, as you know, the government concedes --

QUESTION: There's one thing you omit, though. He did in that paragraph also require that there be an agreement to exchange the information.

MR. McSWEENEY: Right, an agreement to exchange the information, and it seems to me --

QUESTION: Then he says, if there is that plus the

effect, then they can infer purpose.

MR. McSWEENEY: Yes, he instructed -- no, he says, "regardless of the purpose", Your Honor, he doesn't -- Mr. Justice Stevens, he doesn't require them to find purpose. That's the error of that instruction.

QUESTION: Well, let's read the whole paragraph: "You see, a conspiracy to fix prices doesn't have to be successful to be unlawful, if there was such a thing." Namely the conspiracy. "If the effect of such exchanges was to raise, fix, maintain or stabilize prices, then an agreement to engage in such an exchange is a violation of the Sherman Act, regardless of the specific purpose that the parties to the agreement had in their minds." So he's surely talking about agreement.

MR. McSWEENEY: He's talking, though, only about an agreement to exchange prices, but not an agreement to fix prices.

QUESTION: Okay. But it's the agreement -- the question, as I understand it, is whether the agreement to exchange prices, which had an adverse effect on the price level, is enough to prove a violation. Isn't that the issue?

MR. McSWEENEY: Mr. Justice Stevens, and which relates back to the exchange of prices, I don't -- it's the exchange of price information which has the stabilizing effect. Whether the exchange is an agreement or not, this is --

QUESTION: Well, this is the paragraph you contend was erroneous, though; this paragraph of the instructions?

MR. McSWEENEY: Yes, that is --

QUESTION: Not the one that Judge Hunter relied on.

QUESTION: Well, if they had left off the last five words, you'd be satisfied with it? Five or six words, about purpose.

MR. McSWEENEY: I'm sorry, I don't understand that.

QUESTION: Well, the last five or six words that Justice Stevens just read to you, in that instruction. About purpose.

MR. McSWEENEY: Oh, the "Act does not require a specific purpose to restrain trade", that's the error. If you left that off, it might have been all right.

QUESTION: Might have been or would have been?

MR. McSWEENEY: If the instruction --

QUESTION: Would you be attacking it if he left --

MR. McSWEENEY: Well, as he said earlier, Mr. Chief Justice, "regardless of the specific purpose", I would still be attacking it because of course I must read the whole thing, because that's what the jury heard, Mr. Chief Justice. And he clearly from this instruction instructed that purpose in a price exchange information case was not an element. And that's error.

The government here concedes, if you'll note at

the government brief, page 72, in footnote 67, it says "the verdict must be treated as if it stood entirely on the jury's conclusion that the information exchange affected prices".

"That the information exchange affected prices."

Now, that's not the way they charged us in the indictment, and that I will come to in my point, that the charge had a variance, the instructions to the jury varied from the charge in the indictment; that's not the way the case was tried below. That's not the way the prosecutor argued it to the jury. He was telling they had to find a purpose, but the court said "You don't have to find a purpose". So the fault, although we don't know from the general verdict what was proved, we must assume that the jury could have convicted us on the basis of an exchange of price information and price stability.

QUESTION: Could you look at the third paragraph of the instruction of the petitioner, on page 13a, which is a part of the Court of Appeals opinion, beginning, "However, if you decide that the effect of the exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these exchanges as evidence of the mutual agreement or understanding alleged in the indictment to raise, fix, maintain and stabilize list prices."

Do you think that's an erroneous statement of the law?

MR. McSWEENEY: I think they may consider. They have to find a purpose.

QUESTION: Well, Judge Hunter said they couldn't He said that was an erroneous statement, didn't he?

MR. McSWEENEY: Well, I think what the Court of Appeals found to be erroneous was the omission from the charge of the necessary element of purpose in the exchange of price information. That's the error here.

QUESTION: Well, the instruction to which my brother Rehnquist has just referred to, told the jury that they could infer purpose from the exchange and from the effect of the exchange, if the effect was to stabilize prices, then they could infer purpose. That's, in short, what this instruction says, isn't it?

MR. McSWEENEY: I think if -- yes, I think it does. I think if they can -- I think that -- I'm not arguing that purpose cannot be inferred from price information exchanges and resulting stability. But they must determine there was purpose.

QUESTION: Yes.

QUESTION: So you wouldn't -- if the jury were properly instructed that they must find a purposeful agreement to set prices, and then said, "but you may, but you needn't, infer such an illegal conspiracy from an agreement to exchange prices plus stability", and the jury came back with a

verdict, and that's all the facts there were, would you think the jury was -- would the verdict stand up? Would there be enough evidence to sustain that verdict?

MR. McSWEENEY: I think the jury should be told you have to find purpose in an exchange of price information in order to -- in a price information exchange --

QUESTION: Well, assume they were told that.

MR. McSWEENEY: I think that I would object to that and find that reversible, and certainly in a criminal case, where purpose is such a vital element, especially if we're going into penalty cases.

QUESTION: Well, are you assuming you're trying it for the government or for the defendant?

MR. McSWEENEY: For the defendant.

QUESTION: But you're saying that a charge where a judge says you may infer, and you're saying the charge should be you must infer.

QUESTION: I didn't understand you to say that, I understood you to say that they must find the purpose.

MR. McSWEENEY: They must find purpose.

QUESTION: Must find purpose, and they may infer it from these circumstances.

MR. McSWEENEY: May infer it from all the circumstances.

QUESTION: But you insist that the jury must be

instructed that they must find a purpose to stabilize prices.

MR. McSWEENEY: That's correct.

QUESTION: And you further insist that there was no such instruction in that case.

MR. McSWEENEY: That's my position, and I say that this has been the law for fifty years, starting with, in 1925, Maple Flooring and Cement Manufacturers, which were both, although civil, purpose cases, and Cement Manufacturers of course also had in it the element of the customer fraud with respect to the job protection plan. And those cases stand for the proposition that you must find in price exchanges -- where we have a circumstantial case on the basis of price exchanges, you must find that the reason for exchanging prices was for the purpose of fixing prices, an anti-competitive purpose.

The government of course relies heavily here on Container, and there the Court, finding no controlling circumstance, analogized the price exchange in those cases to what it had already found -- to the cases, American Linseed Oil and American Column & Lumber Company, which were purpose cases.

I say that the Container case, that the Court had to have been inferrring purpose in that case, although I recognize that the Court did not expressly say that in its opinion. But that is the only way it can be reconciled with the decisions

both before Container and indeed after Container, and after Container I mentioned reconciliation with the C&S Bank case. And indeed the Court itself, in the majority opinion in Container, did reconcile by analogizing to American Linseed Oil and American Column & Lumber, it said: The agreement in the present case, in the Container case, though somewhat casual, is analogous to those in American Column & Lumber and American Linseed Oil.

But the trial court in our case permitted a conviction without the requisite essential element of purpose.

Now, moreover, with respect to Container, even if my reading of Container is not accepted by this Court, they -- my reading is that they had to infer a purpose. But if you read, if this Court should read Container to say all you need is information exchange plus price stability, that still wouldn't govern here, because they do recognize the controlling circumstance, whether it's a doctrine or otherwise, they recognize it and use that word, and they said a controlling circumstance such as was present in Cement would save a price information exchange, even if it had a stabilizing effect.

QUESTION: Now, you've emphasized, very properly, that this is a criminal felony case. Suppose, to take an analogy that may be far-fetched, in a charge for the felony of assault with intent to kill, the jury was instructed -- I'll

try to make it parallel to this instruction -- that if you find that the defendant had a gun in his hand, that he knew it was loaded, that he cocked the gun and pointed it at the victim and pulled the trigger, you may infer an intent to commit the crime charged in the indictment.

Would that be an inappropriate charge?

MR. McSWEENEY: I would think, Mr. Chief Justice, you may infer it from these circumstances, but you must infer it to convict him.

QUESTION: Well, you must find it.

MR. McSWEENEY: You must find it.

QUESTION: You must find it somewhere.

MR. McSWEENEY: Find it, whether you infer it, you may use these circumstances for such an inference, but whatever basis you must find it to convict the man.

QUESTION: Yes. In other words, I'll alter that a little bit to make it strictly parallel. "You may consider these circumstances that I've just described as evidence of an intent to commit the crime charged", and that would be an appropriate instruction?

MR. McSWEENEY: To consider those circumstances, they must find a purpose.

Now, I refer this Court to Citizens & Southern Bank and I say merely there, in Citizens & Southern Bank, that the defendants were trying to avoid violating a State law, the

anti-branch banking law, and like here in this case, we're trying to avoid violating a federal law, the Robinson-Patman Act, and there the Court found that despite an exchange of pricing information and a stabilizing effect, that there was not a violation of the Sherman Act.

I would like to mention briefly that what is a variance from between what we were charged with -- we were charged with a purpose case, and that -- sure, the government in the indictment talked about effects, but in section 5 they said what we were charged with, in section 6 they said what the effects were. But if you go to the bill of particulars, you'll see that we were charged very definitely when it was explained there with a purpose -- and I refer to page 37 of Volume I of the Appendix, the Particulars Re Paragraph 12.

It sayd, "This mutually agreed upon illegal course of conduct of exchanging ... was for the purpose of raising and fixing prices."

Finally, and in conclusion, may I say that in the event the Court should not accept my reading of Container, and apply Container as the government reads it, that should be applied only retroactively, and it also should -- we should at least get the benefit, in a retrial, of the instructions saying -- applying Container only to the conduct of the parties prior to the decision in Container.

Thank you.

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

Mr. DeLone.

MR. DeLONE: I'm sure that Mr. McSweeney meant Container could only be applied prospectively; it would offend the principale against retroactivity.

MR. CHIEF JUSTICE BURGER: I took it he meant it should not be applied to retroactively.

MR. DeLONE: And I assume the Court understood that.

ORAL ARGUMENT OF H. FRANCIS DeLONE, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. DeLONE: If the Court please:

I want to try to deal with the three additional reasons which led Justices Hunter and Adams to believe that this case should be sent back for a new trial.

Two of those deal with the charges of the Court with reference to conspiracy, the third deals with the subject of the hung jury or jury coercion.

To deal with the instructions, it is important to recall, as Justice Powell pointed out earlier, the government here charged a 13-year nationwide conspiracy involving, all told, some 12 defendants and some 160 co-conspirators. And this fits with the current proclivity, if we might call it that, of the Antitrust Division in any of the nationwide price-fixing cases that are brought. If you look at the cases

brought within the last ten years, you'll see the average duration of the alleged conspiracy is approximately ten years, five more than the statute of limitations.

The government's brief, as you will have seen, contains what is really, in their factual statement, a hodgepodge of separate episodes which they refer to as subsidiary agreements, subsidiary to some over-all price fixing agreement; and these, with the exception of a couple of pages out of the 44, are all agreements which were alleged to have occurred back prior to the beginning of the statutory period, prior to December 27, 1948, which is five -- I'm sorry, 1968, which is five years prior to the indictment.

To illustrate, included in their hodgepodge are a -- are the transaction concerning applicator discounts in Oregon and Washington in 1965.

Another "subsidiary agreement" is a transaction concerning the withdrawal of wooden pallets in Michigan in 1971; and a third concerns alleged predatory pricing back in 1962, in Texas.

You have to realize there is such a hodgepodge in order to understand the need for the instruction which we sought and did not get in this case from the trial court. And that was an instruction not just, as he did charge, that the jury would have to determine first whether there was an over-all conspiracy, and second, whether each individual

joined that conspiracy.

Though the Second Circuit recognized in the Borelli case, from which we modeled our requested instruction, it was necessary with all these separate and distinct episodes that were placed before the jury over this 13-year period, it was necessary for something more to be said so that the jury could not draw from the facts that an individual participated, for instance, in something to do with applicator discounts in 1965 in Washington. They could not draw from that alone the fact that that individual joined some vast over-all conspiracy, but, rather, they would be required to look at the situation of that individual and what his understanding was of what he was doing and what he was joining.

We did not get such an instruction, as was requested. And the prosecution dismisses this as a semantical nicety -- that's the language which they picked up from Judge Weis's dissent.

But is it really, if you're going to convict individuals in a case such as this, a semantical nicety to require that they really know and understand, what is this conspiracy that I'm charged with, before they can be convicted of it. Because that is really what we are dealing with.

I submit the prosecution's claim of semantical nicety is really a cynical disregard of the whole jury system as we know it.

And then the prosecution, in order to get rid of the Borelli case, says: there was either one over-all agreement or none. And the subsidiary episodes were simply manifestations of the conspiracy in action. They could not have taken place without an umbrella agreement or understanding. Yet they never explained, nor was it ever argued, why there had to be some single over-all umbrella understanding in order for two or three individuals to do something about applicator discounts on the West Coast, or about pallets in Detroit.

Or, to bring it down more specifically, to the case of the defendant Colin Brown. There was only evidence, as Judge Hunter points out in his opinion, of his involvement in some transactions about price and credit in 1965 and 1966. And Judge Hunter -- I say comments, that's really all the evidence was. What is there to suggest that Colin Brown, an individual defendant here, knew from whatever the jury may have deduced he did back in '65 and '66, that he was joining some price-fixing or price verification conspiracy that continued on up into '68, '69, '70 and '71?

Indeed, Judge Zirpoli, in the companion civil case, held that whatever conspiracy may have existed in '65 and '66, it was fully terminated and abandoned by 19- -- by January 1, 1968, long before the statute here.

Likewise, as to the defendant Nicely. The evidence as to him concerned almost entirely one sales call in Texas

in 1962. But the jury was never told that. Did Mr. Nicely join this over-all conspiracy, the one with which we were charged? Never told to focus on what Mr. Nicely's understanding was when he made that phone call, and we contend that we were entitled clearly to such an instruction on the scope and purpose and the knowledge of the individual who allegedly joined the conspiracy.

The other aspect of the instructions concerns withdrawal, and on that the charge is so brief that it's easiest understood, I believe, if I read it. The court said simply: "In order to find that a defendant abandoned or withdrew from a conspiracy prior to December 27, 1968, you must find from the evidence that he or it took some affirmative action to disavow or defeat its purpose. Mere inaction would not be enough to demonstrate abandonment." And so far we have no quarrel with that charge; we agree with it.

The court went on: "To withdraw, a defendant either must have affirmatively notified each member of the conspiracy he will no longer participate in the undertaking, so they understand they can no longer expect his participation or acquiescence, or he must make disclosures of the illegal scheme to law enforcement officials."

Now, the government apparently recognizes that isn't the law, that isn't the law as it's been declared by this Court. A defendant is not a member, an alleged member of a

conspiracy is not limited to just two ways: notify all the other members here, some 160; or go to the cops, if I can use that expression.

Not at all. You can disavow participation in a conspiracy by conduct.

But the court ruled that out.

QUESTION: Are you suggesting that at that stage it might be something like a class action, a problem of identifying who was a member of the class of the conspiracy?

MR. DeLONE: [Laughter] On the bill of particulars here I think we did have problems of identifying who were the members, but, in any event, sir, I think that it's perfectly clear from the decided cases of this Court and the lower courts that just as you can infer participation in a conspiracy, you can infer withdrawal, so long as the conduct which indicates withdrawal is known to the others allegedly involved in the conspiracy.

That's what we had here, because we had evidence of vigorous competition among these companies prior to the beginning of the statutory period, we had evidence that the defendant Andrew Watt instructed U.S.G. not to verify at all, again prior to the beginning of this statutory period, as part of this competitive scheme.

QUESTION: Of course, the bill of particulars, identifying all these people, wasn't available back in '65, '6,

'7 and '8, was it?

MR. DeLONE: It was not, sir. [Laughter.] We did not have the bill of particulars.

But basically, to limit the method of withdrawal to two things: one, notify fellow conspirators, whoever they may be; or notify the law enforcement authorities is, I think the government concedes, too narrow a method for abandonment or withdrawal. And there was evidence here which should have been submitted to the jury under a proper charge that we were entitled to -- so that we could have been held, the jury found that we had withdrawn some of the defendants --

QUESTION: Mr. DeLone --

MR. DeLONE: -- had withdrawn from the conspiracy.

QUESTION: -- may I ask, to inquire about the procedure in the trial court?

MR. DeLONE: Yes.

QUESTION: As I get it from the briefs, the trial judge spoke more or less extemporaneously, without a written set of instructions.

MR. DeLONE: He had some notes, sir, but he was unable to repeat his charge when several times asked by the jury to do so, so that he clearly didn't have a full script.

QUESTION: And it went on apparently for several hours, as well as I can tell.

MR. DeLONE: Yes. It was a lengthy charge.

QUESTION: And at the end of the period he asked for objections to what you had all heard?

MR. DeLONE: Yes, he did.

QUESTION: In that period did you call his attention to the error in the abandonment instruction?

MR. DeLONE: Well, I didn't personally, but Mr. Keck, who represents U.S.G., did, and we had a ground rule in the case that an objection made by one would --

QUESTION: Right, would take care of everyone.

MR. DeLONE: That objection appears at page 1757 of the transcript, Your Honor.

QUESTION: Thank you.

MR. DeLONE: And we had requested an instruction along these lines also, which appears at 1856, I mean one which did not limit us to these two methods of withdrawal, but one which recognized that competitive behavior, of which others were aware, would itself be a basis for a finding of abandonment or withdrawl. That request appears at 1856. And I did except to the refusal to give that for all of the points that he refused. And he said, "Fine, you don't need to say any more; you have an exception to any of the points which you asked us to give and which I didn't."

So we really covered it both ways.

And I might say the suggestion which the government, the only way they seem to -- they just say it's hardly likely

that the jury paid any attention to the third sentence, in view of the generality of the first and second.

QUESTION: And then they make the point that the counsel were allowed to argue this to the jury.

MR. DeLONE: Well, as a matter of fact, if you'd look at it, counsel never argued it. We wouldn't have been that foolish. We know the judge is not going to charge it, we're not going to argue it, because that's the best way to have the jury feel the rug has been pulled out from under counsel.

That's why, under Federal Rules of Civil Procedure 30, you find out first what's the judge going to rule, so you know how to argue the case. And we were told he wouldn't get to that point, so we couldn't argue withdrawal and abandonment to the jury. And you can search the speeches and there is no argument, because -- so that that's a hollow privilege, I might say, if there could be one.

I'd like to turn finally to the question of a coerced verdict.

This has to be viewed not the way the government would have Your Honors view it, simply taking one sentence in an exchange between the foreman and the trial judge at the end of their meeting, but it has to be viewed in the context, what was the total setting of these jury deliberations.

And, if I may, I want to take you through that as

quickly as I can, but so you may understand the flavor of it.

The jury started its deliberations on Tuesday, July 8th at about five o'clock in the afternoon, and it deliberated from nine in the morning until ten at night daily, Tuesday, the balance of Tuesday, Wednesday, Thursday, Friday. They asked the judge some questions, they asked about exhibits, requests for further instructions. It was a very active, lively jury.

And that went on till Friday when we got word that there was something about the juror's health that was -- the judge called us into a meeting, we meet with the foreman of the jury. At that time counsel and the foreman were all present. And the judge interrogated the foreman, and we learned that jurors were fatigued, that the ladies were crying, that there were health problems. Not an awful lot more than that, but sufficient so the jury begged that they work shorter hours, and the judge said they'd have some breaks, shorter time over the weekend, and we would work -- they would only deliberate from nine until six. Actually, they usually started a little early than nine, but that was the official starting time, right straight along.

And -- sorry, I see that my time is up, and I will have to avert to the brief, because I have to leave Mr. Bartlit five minutes of time, as I undertook to do. It is in the brief, the jury coercion subject is fully dealt with there,

and I would urge Your Honors, because it is a very critical point to us, I would urge Your Honors to look at the transcript with care, it starts at page 1837. Even that portion where the judge interrogates the jury foreman, in the final session, after he's been told by notes from the jury that they could only decide on the basis of compassion for fellow jurors, after he's been told no testimony, no document would change their views, they were hopelessly deadlocked; and at that time the judge tried to see if excusing one juror would help, because he agreed to take the verdict of eleven.

But he finds that it won't help, so both of them abandon that effort. The judge did, as we contend in our brief, coerce the verdict.

MR. CHIEF JUSTICE BURGER: Mr. Bartlit.

ORAL ARGUMENT OF FRED H. BARTLIT, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS

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

For an hour we've heard very distinguished antitrust counsel debate serious complex issues of antitrust policy and economic policy. I think it would be helpful to bring these down to the brass tacks of the individuals in this case.

A man like Andrew Watt, an executive of this company, could, under the instructions given by the trial judge,

be convicted of a crime where his sole purpose was to comply with the law, and where it was reasonable for him to believe that.

Now, Mr. Watt went with U.S.G. in the early 1960's. The company was the subject of many Robinson-Patman suits. He was instructed by the lawyers hired by his employer that if he didn't comply with the Robinson-Patman Act he could lose his job. He was told that price verification was for the purpose of complying with the Act. He was told that it was lawful.

He complied with that advice. Container came down in early 1969. Within a month from the time Container came down, Mr. Watt talked to his lawyers again and sent a letter to everybody in U. S. Gypsum and said, "Don't verify any more on any product." He, himself, had stopped on gypsum some months earlier.

His conduct in verifying was upheld by a federal district judge after a full trial in 1971. Since that time, three Courts of Appeals, the Ninth Circuit including Judge Lombard sitting from the Second Circuit, the Third Circuit, and the Tenth Circuit have all, in one way or another, approved the concept of complying with the Robinson-Patman Act as an exception, whatever you want to call it, as not a violation of the Sherman Act.

Mr. Watt was indicted and convicted for conduct that

eight appellate judges thought was lawful.

Mr. Watt, I represented him at trial, tendered the only instruction at that time that had ever been approved by any reviewing court. We had no choice, that was the only law we had. The Ninth Circuit said, in the Gray case, that it was plausible under existing law for an individual to believe that verification was required to conform with Robinson-Patman obligations. It was a fact issue for the jury.

Now, if the Ninth Circuit thought that it was plausible in 1972 to believe that you were complying with the Robinson-Patman law in verifying, how could Mr. Watt or his lawyers believe to the contrary?

The trial court said that it would give the substance of that instruction, but it did not.

Marks vs. United States, decision of this Court, says, that persons have the right to fair warning that their conduct -- fair warning of the kind of conduct that gives rise to criminal penalty. Individual have that right. And this Court said it's a fundamental constitutional right.

If all of those appellate court judges couldn't perceive that Robinson-Patman verification was unlawful, how could Andrew Watt have fair warning?

With regard to the other issues, it seems to me that the government has made quite a concession in its reply brief. In the reply brief, the government states that the -- at page

15, that the judge told the foreman that he preferred a verdict to a hung jury.

Now, I don't think -- I think that the facts are much stronger than that concession, because I think you can look at what the foreman said and what the jury was saying, and it's easy to conclude that the jury was convinced that a deadlock was not acceptable. But the government concedes that the trial judge told the foreman that he preferred a verdict to a hung jury.

QUESTION: Well, there's nothing -- can't a trial judge instruct the whole jury that not only he but the law prefers a verdict to a hung jury? That's right, isn't it?

MR. BARTLIT: Yes, sir, he can.

QUESTION: This is considerably less than the Allen charge, isn't it?

MR. BARTLIT: Yes, sir. I think you have to consider this against the background of what had gone before. And if we had known, for example, that the trial judge was going to tell the foreman that he preferred a hung jury, then we would have been entitled to an instruction which informed the jury that the jury also has a right to deadlock if those are their honest beliefs.

Mr. Watt, Colon Brown, J. Nicely, the individual defendants in this case, if the Court please, were entitled to have the jurors cling to their honestly held beliefs, if they

were of those beliefs, and when the judge indicated his desire, his preference that the jury not deadlock, we were entitled to an instruction that the jury was entitled to hold those beliefs and that a deadlock was constitutionally acceptable.

QUESTION: You think there is a problem of a judge telling that to one member of the jury, that is the foreman, with his special status of authority, and depending upon that to virtually carry the message back accurately and faithfully to the other eleven?

MR. BARTLIT: I think there's a problem, Your Honor, whenever there's a private meeting between the judge and one member of the jury. We consented to that meeting, because we felt we had no choice. I think that there's a reason why there's a rule against hearsay, I think the reason is that second-hand statements generally don't come out the way they were intended, and I think it's clear here the chances of the foreman re-emphasizing the judge's statement and the judge's belief that a deadlock was unacceptable are great.

QUESTION: Mr. Bartlit, before you sit down, you consented to the private meeting, did you consent to the fact that there would be a transcript of that and that you would not have access to the transcript?

MR. BARTLIT: No, sir. We asked for the transcript immediately, and as the -- excuse me.

QUESTION: Did you know in advance there would be a transcript?

MR. BARTLIT: Yes, sir.

QUESTION: You did. I see.

MR. BARTLIT: We feel that the vice of the meeting was not that it was private, because I consented to that.

QUESTION: Right.

MR. BARTLIT: And I'd consent to it again. The vice of the meeting was what the judge said about the meeting, and, in all candor, his description of the meeting to us, which was found by the Court of Appeals not to be accurate, and prevented us then from asking for the kind of instruction to which we were entitled.

That was the vice of the meeting.

QUESTION: Am I correct? You got access to that transcript only by requesting it from the Court of Appeals after you filed your notice of appeal, is that right?

MR. BARTLIT: Yes, sir, that's right.

QUESTION: Mr. Bartlit, you mentioned right at the close of your remarks the names of Mr. Colon Brown and Mr. J.P. Nicely, on whose behalf a separate brief has been filed here, and who make quite a separate kind of an argument, including, among other things, the double jeopardy clause. Their claim basically is, as I understand it, that there simply was insufficient evidence to sustain a verdict of guilty as against

them, and that they are constitutionally entitled, if they're correct, not to be tried again, among other things.

MR. BARTLIT: Yes, sir.

QUESTION: Nobody has orally represented them here?

MR. BARTLIT: No, sir. That issue is not before this Court, as I understand it, and we are addressing only the issues, -- the sufficiency issue is not before this Court, as I understand it.

QUESTION: Do you represent Mr. Brown and Mr. Nicely?

MR. BARTLIT: I represent only Andrew Watt, Your Honor.

QUESTION: That was my impression.

MR. BARTLIT: I undertook, to the extent that the instructional errors and the jury coercion bore on the rights of those two individuals, on this appeal I undertook to --

QUESTION: You have a community of interest?

MR. BARTLIT: That's right.

QUESTION: But they also seem to be making a separate argument. But your understanding is that's not within the grant of certiorari.

MR. BARTLIT: That's my understanding.

The petition is still pending, their petition for separate appeal on the sufficiency point is still pending, and has not been acted on by this Court.

QUESTION: Right. All right.

MR. BARTLIT: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Friedman.

REBUTTAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FRIEDMAN: Mr. Chief Justice, the final words that the judge gave to the juror at this meeting he had with him, at page 1840, is: "You tell them to keep deliberating and see if they can come to a verdict." That's the last thing he told him.

QUESTION: Well now, I put to you the question I put to your friend: How do we know that that very sensitive aspect of the case was communicated to the other eleven jurors in the same way the judge communicated it, on the record, to the foreman?

MR. FRIEDMAN: Well, we don't know specifically, of course, what the judge --

QUESTION: We can assume -- I would assume he did his best, but he's not a lawyer trained in the nuances.

MR. FRIEDMAN: I think there are two things about this. First, three times before this meeting with the foreman, the court specifically instructed the jury that while he'd like them to come to a verdict, and they should re-examine their beliefs, that they should not give up a belief consciously held, either because the views of other jurors or because of their wish to reach a verdict. This, in effect,

is a modification of the Allen charge that the Third Circuit has developed.

So the jury was told repeatedly that they were not to surrender their independent judgment.

Secondly, after the foreman returned to the jury, as far as we can tell, the jury deliberated for about eight hours longer before coming to a verdict.

The jury returned to its deliberations at 12:04, we assume they deliberated that day until six or six-thirty. They generally began at eight in the morning. They brought in the verdict at 10:45 the next day. So we had a substantial period of further deliberations.

QUESTION: Well, Mr. Friedman, none of us in this room know what he told the jury.

MR. FRIEDMAN: That is correct.

QUESTION: Well, isn't that a problem?

MR. FRIEDMAN: I don't think so, I don't think so, Mr. Justice, because before -- before it should be held that a jury has been coerced, it seems to me we need something more than this dialogue where the foreman had again requested the judge, saying that the jury is a hung jury, and we'd like -- we think we've had enough of this. And the judge said, "I want you to go back" -- he said it at 1839 -- "I want you to go back and deliberate again."

QUESTION: In any event, while his practices may be

very dubious and fraught with all sorts of risk, in any event it was agreed to by counsel for the defense.

MR. FRIEDMAN: Oh, yes, Mr. -- it was specifically agreed to, and the judge told counsel not only that he planned to do this, but that he would not make the transcript available, and he told counsel, "If any of you have any objection to this, I will tell the foreman no, I will not meet with him."

He then, in turn, called the jury in and wanted to be sure that it was the request of the whole jury, not just that of one.

QUESTION: Why didn't he call the whole jury in and tell them this last statement?

MR. FRIEDMAN: Well, because -- there were two reasons, Mr. Justice. First of all, nobody knows what the foreman is going to say, and it was a request from the jury that he meet with the foreman. That was the first thing.

The second thing about this whole procedure is that if the judge starts telling the jury, starts instructing the jury that they have a right not to return a verdict, that, it seems to me, is not the way it's done, because that encourages the jury in a hard case to say, well, we --

QUESTION: But it's all right if he tells the foreman to tell them?

MR. FRIEDMAN: No. No. All he told the foreman was --

QUESTION: Well, that's what I'm saying, that he could then have called the jury in and said, "The foreman has told you this, and I want to tell you this is what I have to say."

MR. FRIEDMAN: Well, he could have --

QUESTION: Then we at least would have known that the jury got the correct information.

MR. FRIEDMAN: He could have done that, but I don't think it was necessary, Mr. Justice, in light of the previous charges, in the light of what was said to him by the foreman. The purpose of the discussion, as he indicated, that the foreman was trying to convince the court that the jury was hopelessly deadlocked and that the jury should be discharged.

And he said, "No, I want you to go back and deliberate some more." He didn't tell them they had to reach a verdict.

QUESTION: Well, Mr. Friedman, when the lawyers agreed that he could recieve the foreman of the jury, isn't it reasonable that they should think that he was merely going to listen and not give any additional instructions?

That's No. 1. And you can address both at once. And then, No. 2, suppose hypothetically the foreman, in the exhausted state he described himself and that of the jury, went back into the jury and instead of relaying it as it was told him by the judge, went in and said "The judge says we've got to get a verdict." What if he said that?

MR. FRIEDMAN: Well, this --

QUESTION: Do you think that would -- and if we knew that, wouldn't you think that would taint this verdict?

MR. FRIEDMAN: That might -- well, it would be a problem, Mr. Chief Justice. But -- but I respond to that, that there is a strong policy against looking behind the jury and see what influenced their verdict. Now --

QUESTION: No, but there ought also to be a strong policy against, I should think, in 40-some years I've never heard of a judge visiting with one member of a jury for anything except communication of a message by the jury to the judge.

QUESTION: Yes.

MR. FRIEDMAN: Well, the only thing --

QUESTION: And that's a very hard policy.

MR. FRIEDMAN: That is quite true, Mr. Chief Justice, but this was consented to not only by the four counsel for the corporation, but each individual defendant was specifically asked if he consented, and they said yes.

The court in this colloquy did not instruct the jury, other than to tell the jury to go back and deliberate some more. And that seems to me to be a fairly reasonable response when the jury said -- the foreman said, "I think the jury is hopelessly deadlocked, we'd like to be discharged", and the court said, "Go back, deliberate some more and see if

you can come to a verdict." And they deliberated some more, they deliberated for eight hours.

QUESTION: Mr. Friedman, when they consented, what options did the judge give them? What were the options open to them?

MR. FRIEDMAN: The option was that either they would consent or he would tell the foreman, "No, I will not meet with you." That was what he said. He said, "This is the way I think it should be done. I don't want this transcript made public, because something may be said that would be inappropriate, and either, if you don't consent, I'm not going to do this unless everyone consents; and if you don't consent, I will say no to the jury", and then I suppose they would go on in their deliberations and maybe they would send another note.

That's the way I -- they say they were coerced, but it seems to me it was a free acknowledgement. Indeed, one of the counsel, Mr. Keck, not only consented but urged the judge to meet with the foreman,--

QUESTION: Rather than not talking to him at all?

MR. FRIEDMAN: Yes.

QUESTION: Mr. Friedman, I notice the government doesn't urge what I had thought it usual to urge in criminal case, that the instructions should be considered as a whole and no one singled out. Does that mean that you want to win

only by an essay on antitrust laws to this Court?

MR. FRIEDMAN: Now, we did -- I believe we did indicate in our brief, Mr. Justice, that of course the instructions have to be viewed as a whole, of course they have to be viewed as a whole, in the light of this lengthy trial, and the lengthy instructions.

And let me just add, if I may, with respect to one other point, which was whether the instructions were adequate to show participation in the conspiracy. The judge repeatedly -- repeatedly charged the jury that in order to convict they had to determine that each defendant individually knowingly joined in the conspiracy charged in the indictment.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:41 o'clock, p.m., the case in the above-entitled matter was submitted.]

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