

In the

ORIGINAL

Supreme Court of the United States

WILLIAM ARCHIE WILLIAMS

Petitioner

v.

UNITED STATES

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NO. 80-2116

Washington, D. C.

April 20, 1982

Pages 1 thru 49

ALDERSON



REPORTING

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WILLIAM ARCHIE WILLIAMS, :

4 Petitioner :

5 v. : No. 80-2116

6 UNITED STATES :

7 - - - - -x

8 Washington, D. C.

9 Tuesday, April 20, 1982

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 11:10 o'clock a.m.

13 APPEARANCES:

14 NICKOLAS P. CHILIVIS, ESQ., Atlanta, Ga.; on behalf of
15 the Petitioner.

16 RICHARD G. WILKINS, ESQ., Washington, D.C.; on behalf of
17 the United States.

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C O N T E N T S

ORAL ARGUMENT OF

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NICKOLAS P. CHILIVIS, ESQ.,

on behalf of the Petitioner

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RICHARD G. WILKINS, ESQ.,

on behalf of the Respondent

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on behalf of the Petitioner - rebuttal

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Williams against the United States.

4 ORAL ARGUMENT OF NICKOLAS P. CHILIVIS, ESQ.,

5 ON BEHALF OF THE PETITIONER

6 MR. CHILIVIS: Mr. Chief Justice and may it
7 please the Court:

8 This case is here on writ of certiorari to the
9 Fifth Circuit Court of Appeals. The general questions
10 presented are: whether the Congress, in passing Section
11 1014 of Title XVIII of the United States Code intended
12 to proscribe the deposit of a bad check or "check
13 kiting," and whether a non-collected check upon which
14 the bank extends credit and which is an enforceable
15 obligation can be alleged in an indictment as a false
16 statement underpinning the overvaluation of a security
17 under Section 1014.

18 In this case there were three counts of an
19 indictment and Mr. Williams, the Petitioner, was
20 convicted on all three counts. The first count was a
21 misapplication count and really is only indirectly in
22 issue in this case. The other two counts both involved
23 an allegation of the overvaluation of a security, that
24 is a check, in order to influence the action of a
25 federally -- excuse me -- insured bank on an advance or

1 extension of credit.

2 QUESTION: All three counts were under 1014?

3 MR. CHILIVIS: Two counts.

4 QUESTION: Two counts.

5 MR. CHILIVIS: Yes, sir.

6 Now, in this case the Court has limited the
7 consideration on certiorari to two counts, counts two
8 and three. But I think it's significant that we
9 consider what counts two and three were. Count two was
10 the overvaluation of "a security, a check," of \$58,500
11 which was deposited, drawn on the Winn State Bank and
12 deposited in the Pelican State Bank.

13 QUESTION: At a time when there were no funds
14 to support it?

15 MR. CHILIVIS: At a time when there were
16 insufficient funds to support it, yes, sir.

17 And the Government --

18 QUESTION: That would have something to do
19 with its value, wouldn't it?

20 MR. CHILIVIS: Yes, sir. It was a check that
21 did not have funds to support it, yes, sir.

22 Now, that check did clear the bank in the
23 normal course of things. It was not dishonored; it was
24 paid, and it never came back.

25 The other check was a \$60,000 check drawn on

1 the Pelican State Bank, which was deposited in the Winn
2 State Bank, and that covered the first check. That
3 check too was paid by the bank and was not returned for
4 insufficient funds, although at the time it was
5 deposited there were not funds in the bank sufficient to
6 cover it.

7 Now, the Pelican State Bank, which was where
8 it all started, had the choice in that instance of
9 bouncing the check or extending credit on the check,
10 which resulted in an overdraft. It chose to extend
11 credit and have an overdraft.

12 Now, when this transaction started Williams
13 had an overdraft at the Pelican State Bank. Now, we ask
14 the Court to bear in mind that this started off with an
15 overdraft at the Pelican State Bank on May the 9th of
16 something over \$58,000. The whole transaction ended on
17 May the 11th, two days later, with an overdraft at the
18 Pelican State Bank of something less than \$60,000.

19 No check was dishonored. No check was
20 bounced. And it was two separate checks. Now, we
21 mention that because we raised this issue in the Court
22 of Appeals, that is the sufficiency of the indictment
23 under Section 1014. The Court of Appeals summarily
24 dismissed that by saying that the argument was without
25 merit, because the two transactions at the two banks

1 constitute classical check kiting, and under Payne,
2 which was a Fifth Circuit case, this check kiting falls
3 within the scope of Section 1014.

4 Now, that's significant because they used both
5 counts of the indictment to create the concept of check
6 kiting. And as we know and as this Court has held, you
7 cannot do that. Each count must stand on its own and
8 you cannot say that if both counts constitute an offense
9 then one can be used in the other count unless it's
10 incorporated therein by reference. In this case it
11 wasn't done.

12 Now, the argument in this case ought to be
13 simple, then. In its simplest terms, no crime was
14 alleged in the indictment under counts two and three and
15 no crime was proved within Section 1014. However, the
16 case has become complicated. It's become complicated
17 because the Government contends that a check is a
18 security, a security under Section 1014.

19 Now, I remind the Court of the language of
20 Section 1014. It says: "Whoever makes a false
21 statement or report, or whoever overvalues land,
22 property or security for the purpose of influencing a
23 federally insured bank to extend credit or make
24 advances," and so on and so forth. It uses the word
25 "security," not "a security."

1 But in this case the Government claims that a
2 check is a security and therefore this constituted the
3 overvaluation of a security.

4 QUESTION: Counsel, I suppose that a check
5 could be property in any event.

6 MR. CHILIVIS: A check could be property, but
7 not in the sense of this Code section. A check could be
8 property. But this says "land, property or other
9 security."

10 QUESTION: But the point is, I don't think we
11 have to look just at "security" in view of the broader
12 term of "property."

13 MR. CHILIVIS: A check could be property.

14 QUESTION: Yes.

15 MR. CHILIVIS: And the Government makes that
16 argument. But not in the context of that, and I'll get
17 further into that.

18 QUESTION: But it says "other security,"
19 "other security."

20 MR. CHILIVIS: That's correct.

21 QUESTION: So I mean, the only property it's
22 talking about is property that's security.

23 MR. CHILIVIS: That's correct.

24 QUESTION: I don't think it does say "other
25 security," does it?

1 MR. CHILIVIS: It says "land, property or
2 security."

3 QUESTION: "Or security," yes. It doesn't say
4 "other." Stocks would clearly be covered, wouldn't
5 they, stocks or bonds?

6 MR. CHILIVIS: Stocks or bonds would be
7 covered if they are pledged as security. But they're
8 talking about security in the sense of collateral, and
9 this was not that.

10 QUESTION: You say whatever -- you say that it
11 should be read as meaning "other security."

12 MR. CHILIVIS: Yes, sir. And security in the
13 sense of collateral.

14 QUESTION: Yes.

15 MR. CHILIVIS: Yes, sir.

16 QUESTION: And you think the legislative
17 history helps you on that?

18 MR. CHILIVIS: Oh, yes, sir. Yes, sir.

19 QUESTION: Why do you think it would help you
20 if it read "other security" rather than just
21 "security"?

22 MR. CHILIVIS: Well, I think that it's
23 security in the sense of collateral. I think you may
24 apply the doctrine of *eiusdem generis* and say that it
25 relates back to the type of security that land or

1 property is. But I really say that it talks about
2 security in the sense of collateral, not a security in
3 the sense of a stock or a bond used for something other
4 than collateral.

5 The Government's position is --

6 QUESTION: You mean this wouldn't -- if you
7 were going to a bank for a loan and they made you fill
8 out a loan application and they wanted to know what your
9 assets were, and you fill it out and you overvalued the
10 property that you own by about ten times.

11 MR. CHILIVIS: Yes, sir.

12 QUESTION: And many times banks don't take
13 security on all of your property. They just want to
14 know how much property you got.

15 MR. CHILIVIS: That's correct, sir. That
16 would be a violation.

17 QUESTION: Well, then it doesn't mean
18 collateral.

19 MR. CHILIVIS: No, sir, because there're are
20 two elements of it. One of them says "whoever shall
21 knowingly makes a false report or statement," "a false
22 statement or report."

23 QUESTION: Yes.

24 MR. CHILIVIS: Now, that's what you're talking
25 about.

1 QUESTION: Yes, but it's not just about
2 collateral.

3 MR. CHILIVIS: Well, but it's about if you
4 overvalued security in that sense, that's correct, it's
5 not about collateral.

6 QUESTION: No, so that you wouldn't -- so that
7 section isn't limited to property that's collateral.
8 It's limited -- it just says "property," if overvaluing
9 that property might influence a bank decision.

10 MR. CHILIVIS: Well, that's true. That's
11 true.

12 QUESTION: Well, must not the statute be read
13 by having the word "any" modify all the terms that
14 follow, that is, "any land," "any property," or "any
15 security"?

16 MR. CHILIVIS: I think you could read it that
17 way, sir.

18 QUESTION: Could you read it any other way?

19 MR. CHILIVIS: I don't know whether you could
20 or not. You could read it the way it's written, I
21 guess.

22 QUESTION: Well, is this check "any
23 property"?

24 MR. CHILIVIS: Well, it is property, yes,
25 sir. But it was not used -- it says "for the purpose of

1 extending" -- "of an extension of credit or an advance
2 or a loan." It's talking in terms of commercial and
3 consumer credit. It's not talking about the
4 presentation of a check to a bank for the purpose of
5 having the bank collect it or whatever purpose the bank
6 used it for.

7 QUESTION: What if the bank practice, though,
8 is to immediately credit the account, which was true in
9 this case? If you can immediately draw on that credit
10 and if it turns out that the check isn't collected, the
11 bank can sue you.

12 MR. CHILIVIS: That's correct.

13 QUESTION: Well, you certainly are extending
14 -- you certainly are getting credit from the bank if the
15 bank gives you -- lets you use that money without ever
16 having collected the check.

17 MR. CHILIVIS: But you have two things that
18 occur. One is the crediting your account is not an
19 extension of credit. That's been held by one of the
20 circuits, the Crown case which was recently decided.
21 It's not an extension of credit.

22 But if you say that they draw on that, that
23 that constitutes a commercial loan transaction, then
24 that's one thing. But we submit, Your Honor, that it
25 doesn't, and in order to reach that result in this case

1 it requires such convoluted reasoning that it does not
2 give a person any warning that under this statute they
3 are violating a criminal law.

4 And we say that -- now, we didn't raise the
5 constitutional question of impermissible vagueness, but
6 that's what the principle is about.

7 QUESTION: Well, long before you get to a
8 constitutional principle of impermissible vagueness, you
9 get to some sort of a principle of leniency in statutory
10 construction.

11 MR. CHILIVIS: That's correct, Your Honor.
12 And one of the -- you ask about the legislative
13 history. Let me address that question by stating this.
14 This statute up until 1970 did not include any
15 institution that could accept checks from private
16 customers for deposit. In 1970 the Congress merely
17 passed a law adding certain federally insured banks and
18 federal savings and loan institutions. There was
19 nothing that did anything but that. That's all they
20 did.

21 Now, at the same time this Congress amended a
22 bad check law in the District of Columbia. That bad
23 check law covers the conduct that the Government says
24 ought to be covered here. In that law they use the
25 words "check, draft or other instrument" used at a bank,

1 or that sort of thing. They made it clear what they
2 were talking about.

3 Now, it seems to me that if Congress had
4 intended to include a check or a draft under this
5 statute, all they had to do was what they did when they
6 amended the District of Columbia Act.

7 QUESTION: Well, why do you concede, then,
8 that a check is property --

9 MR. CHILIVIS: Well, a check --

10 QUESTION: -- for purpose of the statute?

11 MR. CHILIVIS: A check is property, but not in
12 the terms of the statute.

13 QUESTION: So you don't concede a check is
14 property?

15 MR. CHILIVIS: Oh, no, sir. I say a check is
16 property. A check can even be security, because if I
17 tender to a bank several checks and say, hold this for a
18 loan, when I get an extension, when I borrow money from
19 the bank, it can be security.

20 But in the terms of this statute and this
21 situation, it is not. And the statute was never
22 intended to include that. If they did, why did they say
23 "land, property or security"? Why didn't they say what
24 they said in the same year, 1970, when they passed the
25 last amendment to this Act, when they added banks and

1 federal savings and Loan institutions? Why didn't they
2 say "check" instead of "land, property or security"?

3 We think that's part of the legislative
4 intent. In addition to that, we cite in our brief
5 several situations where we quote from the House Banking
6 and Currency Committee when they say it's intended to
7 cover a borrower. We quote from the Senate Banking and
8 Currency Committee, which talks about the 1970 amendment
9 and says it simply adds institutions that are covered
10 under the Act.

11 QUESTION: But if you go to a bank and present
12 a check drawn on another bank and ask for cash and the
13 bank gives you cash without having collected the check,
14 and you know very well that the check isn't any good, do
15 you think you've got a loan from the bank?

16 MR. CHILIVIS: No, sir.

17 QUESTION: What have you got?

18 MR. CHILIVIS: Well, what I've got is a normal
19 --

20 QUESTION: Do you think you'd end up owing the
21 bank some money?

22 MR. CHILIVIS: Oh, yes, sir. Yes, sir, I
23 would. But that happens --

24 QUESTION: Have you been extended credit?

25 MR. CHILIVIS: Well, not under the terms of

1 this statute. Let me explain it this way, because I
2 don't want to dodge the question. Under Louisiana law,
3 when you present a check to a bank for deposit you
4 engage that you will, upon notice of dishonor, make that
5 check good. That's what you engage.

6 QUESTION: Like if you give me the cash or
7 give me the credit, you can treat this check as a note,
8 and I promise to pay.

9 MR. CHILIVIS: It's in the form of a note,
10 yes, sir. It's in the form of a note. And what you do,
11 you engage that, and that's the only representation you
12 make, unless you orally or in writing make some other
13 representation.

14 QUESTION: I promise to pay for this, pay you
15 back for this extension of money or credit?

16 MR. CHILIVIS: That's right. You are getting
17 it on an uncollected check. You promise to pay only if
18 the check is dishonored and the bank protests and gives
19 you notice of dishonor.

20 QUESTION: Well, is this really any different
21 if you go to the bank and say, please loan me \$500, and
22 they say, fine, sign this check, sign this note, and you
23 sign the note?

24 MR. CHILIVIS: Yes, sir, because in that
25 instance it is a commercial transaction where you are

1 borrowing money. In the other instance you are merely
2 depositing a check and they are giving you immediate
3 credit, which is a unilateral decision on the bank.

4 QUESTION: It should be even worse, because
5 it's interest-free.

6 MR. CHILIVIS: Well, there's no evidence in
7 this case it was interest-free. This was an overdraft.

8 QUESTION: Let me put this hypothetical to
9 you. Suppose a man that has a good standing with a
10 particular bank, good standing in the community, so he's
11 trusted --

12 MR. CHILIVIS: Yes, sir.

13 QUESTION: He goes to the bank and hands them
14 a \$50,000 check on a nonexistent bank, and the signature
15 is forged. Would he have violated this statute?

16 MR. CHILIVIS: If he gives them a check on a
17 nonexistent bank where the signature is --

18 QUESTION: Forged signature, but it's payable
19 to him, and the bank, because it trusts him, simply
20 says, yes, here's your \$50,000. Has he violated this
21 statute?

22 MR. CHILIVIS: No, sir, I don't believe he
23 has.

24 QUESTION: You don't think so?

25 MR. CHILIVIS: Not this statute, no, sir.

1 Whether he has violated all 50 states' bad check laws,
2 which is another thing that's involved in the history
3 and rule of lenity, and that is that all 50 states in
4 1970 had bad check laws that covered that conduct and
5 this has historically and traditionally been the subject
6 of state regulation. And if Congress had intended to
7 make such broad inroads and intrusions into state law,
8 then certainly it should have said something to let
9 people know that that's what it was doing.

10 QUESTION: May I ask you a question. I wonder
11 if the statute requires that credit be extended pursuant
12 to a false application. In other words, supposing you
13 went into a bank and said, I want to open a checking
14 account and I'm going to file an application, and you
15 make a lot of false statements on where your other
16 accounts are.

17 MR. CHILIVIS: No, sir. No, sir, it does not
18 require that.

19 QUESTION: The statutory language is awfully
20 broad.

21 MR. CHILIVIS: It is broad, and it says "to
22 influence the extension of credit or advance" or
23 forbearance and that sort of thing. But it does not
24 have to actually influence as long as it was intended to
25 influence.

1 QUESTION: Well, if such an application were
2 merely intended to influence the bank, A, to open the
3 account, and B, to put you on their list of good
4 customers, so the next time you come in they'll treat
5 you well, wouldn't that violate the statute?

6 MR. CHILIVIS: No, sir, because they're
7 talking about extensions of credit, advances, loans,
8 commitments, that sort of thing.

9 QUESTION: It says it's a false statement and
10 so forth, upon any application, comma, advance, comma,
11 discount, comma, purchase, purchase agreement,
12 repurchase agreement, commitment or loan. Now, they're
13 making a commitment to you that they'll deal with you as
14 a depositor. Or any change or extension or any of the
15 same.

16 It's awfully broad language. But you just
17 think it does require that --

18 MR. CHILIVIS: Your reasoning is good up to
19 the point where the interpretation of the word
20 "commitment" is used to commit to open a bank account.

21 QUESTION: Well, I can understand that's the
22 central thrust of the statute.

23 MR. CHILIVIS: It's an agreement to make a
24 loan or to extend credit in a commercial, consumer type
25 setting.

1 QUESTION: This one-sentence statute, two
2 pages long; it's difficult to parse down.

3 MR. CHILIVIS: I know it is.

4 QUESTION: But in going to that section, that
5 part of it that my Brother Stevens just referred to,
6 what's "deferment of action or otherwise"? That's the
7 broadest possible, isn't it? "Or otherwise"; it seems
8 to embrace almost anything.

9 MR. CHILIVIS: Well, the -- I don't know what
10 "or otherwise" means. The only time it has been
11 interpreted was in the Pinto case, and in that case what
12 they did there -- I believe it was the Pinto case --
13 where the man had gotten an erroneous credit of \$193,000
14 when it was supposed to be \$193. And after it was all
15 found out that he had gotten the erroneous credit, he
16 lied to the bank. He told an intentional falsehood in
17 order to get them to defer action or otherwise.

18 And they used it in the sense of defining
19 deferring action. And I don't know what it means other
20 than that. But it certainly cannot cover a bad check.

21 QUESTION: But when you put a check into a
22 bank, do you not, in the words of the statute, influence
23 the bank to extend you the credit that goes with that?

24 MR. CHILIVIS: No, sir, I don't think so, for
25 two reasons: Number one is, when you put the check in

1 the bank you are not making a statement other than what
2 the law says you're making, and that is that you will
3 pay the check in the event it is dishonored and you have
4 notice of dishonor. All right, that's number one.

5 Number two, it is not security for anything.
6 It is not security for anything. Now, admittedly under
7 Louisiana law they have a lien on an uncollected item
8 until such time as they send it out for purposes other
9 than collection or until such time as it's collected.

10 But again, if you have to take the Uniform
11 Commercial Code or if you have to take the Louisiana
12 Revised Statutes and compare them and then say that
13 because they have a lien at some time for some period on
14 uncollected items, then that fits into security or the
15 influencing of a loan in this case, then that's too
16 convoluted to come under a statute which talks about
17 land, property or security for the extension of credit.
18 And that's one of the points we're making.

19 QUESTION: Let me go back and see if I
20 understand your answer to my question. A man goes to
21 the bank with a \$50,000 check. It's no good. Because
22 of his standing, they either give him cash or let him
23 cash a check on his personal account for anywhere up to
24 that amount.

25 Has not his conduct influenced the bank to do

1 something very important here?

2 MR. CHILIVIS: It's influenced them to issue
3 money on an uncollected item. It has done something.

4 QUESTION: You say that's not a violation of
5 the statute?

6 MR. CHILIVIS: No, sir, it's not a violation.
7 It's a violation of a state statute, and if they can
8 prove intent to defraud it may even come under other
9 statutes. Of course, you'd have to use the wire or the
10 mails to do that.

11 But this statute is sort of a strict liability
12 statute. You don't have to prove that they intended to
13 defraud, and the Government takes the position that the
14 mere giving of a check that at the time it's presented
15 to the bank does not have sufficient funds to cover it
16 if he's given immediate credit on it constitutes a
17 violation.

18 I suggest to Your Honors --

19 QUESTION: And if he knows that it won't be --
20 that's it's an overdraft.

21 MR. CHILIVIS: No, sir. No, sir.

22 QUESTION: Well, surely the "willfully" --

23 MR. CHILIVIS: No, sir. No, sir. He says
24 "knowingly," knowing that at the time it's presented for
25 deposit that there aren't sufficient funds to cover it.

1 Now, that doesn't mean that he doesn't have a reasonable
2 expectation to cover it when it's presented, and I was
3 just about to say that I submit that everybody has done
4 that, deposited a check in the bank and covered it the
5 next day at the receiving bank, the drawee bank.

6 But that's what is contended to be a crime,
7 and you don't even have to prove, under the Government's
8 contention, that there was an intent to defraud, because
9 this statute does not embrace the intent to defraud.

10 Now, the deposit, in response to Mr. Chief
11 Justice's question, if you take that just a little bit
12 further and you make that a certified check that is
13 known to be false, then I think you could have a
14 violation of this statute. Now, the reason for that is
15 this. If I --

16 QUESTION: What's the difference? What's the
17 difference, except the one is more impressive than the
18 other?

19 MR. CHILIVIS: No, sir. The difference is
20 what the legal representation is. As I said before,
21 when you have a check uncertified the legal
22 representation under Louisiana law is that you will
23 honor it on notice of dishonor. Okay.

24 Now, if it's a check drawn on a bank and it's
25 certified, then the representation is that the bank has

1 the funds already on hand to cover that check and that
2 it will be honored. If you --

3 QUESTION: And that the money had been set
4 aside.

5 MR. CHILIVIS: Has been set aside, and that's
6 the representation you make by the mere presentation of
7 the check. And if you know that to be false, then you
8 have made a false representation.

9 QUESTION: Well, you made a false
10 representation -- I realize that a certified check may
11 be different in that respect. But I thought you said
12 that a check was not either land, property or security,
13 and therefore I don't see why that element of the
14 offense would be proved any more by a certified check
15 than by a personal check.

16 MR. CHILIVIS: Well, I don't think it is
17 property, land or security.

18 QUESTION: Well, why do you concede that a
19 certified check might violate the statute?

20 MR. CHILIVIS: Well, it depends. If you got
21 immediate credit, it might violate the other portion of
22 the statute, Your Honors, the false statement for the
23 purpose of influencing the extension of credit.

24 QUESTION: But the false statement has to be
25 with respect to any land, property or security, doesn't

1 it?

2 MR. CHILIVIS: No, sir. No, sir, it does
3 not.

4 QUESTION: Well, you have to willfully
5 overvalue land, property or security.

6 MR. CHILIVIS: No, sir. No, sir. There are
7 two separate elements. A false statement or report has
8 to do with one element to influence. The other is the
9 overvaluation of land, property and security. Now,
10 that's one of the problems here.

11 QUESTION: Oh, I see.

12 MR. CHILIVIS: You see? One of the problems
13 here is they didn't charge this man with the first
14 element, that is making a false statement or report.
15 They charged him with the second element and they tried
16 to fit it in by calling it a security. And that's the
17 point I was trying to make.

18 QUESTION: The second element -- this is in
19 the disjunctive, isn't it? Those are two separate
20 offenses, isn't it?

21 MR. CHILIVIS: Yes, sir. That's two separate
22 offenses.

23 QUESTION: Well, I thought you -- perhaps I
24 misunderstood you. I thought you were saying the
25 offense had to show two elements, a false statement and

1 willful --

2 MR. CHILIVIS: No, sir. I was making the
3 opposite point. The distinguishing factor is that one
4 of them is a false statement, and the security has
5 nothing to do with that. I can make a false statement
6 just by telling you I'm a millionaire.

7 QUESTION: I see your point.

8 MR. CHILIVIS: It would be a false statement.

9 QUESTION: What were you charged, what were
10 you charged -- what was your client charged with? Was
11 he charge under one subsection or under one clause?

12 MR. CHILIVIS: He was charged with overvaluing
13 "a security, that is a check." But they underpin that
14 and try to fit it into the false statement section by
15 saying that's based on the fact that he misrepresented
16 or caused to be misrepresented the value of the check
17 because he -- because he represented it to be in the
18 face amount of the check.

19 QUESTION: Which of course it --

20 MR. CHILIVIS: It was honored. The funds
21 weren't there, but the bank paid it. It didn't come
22 back and it wasn't bounced.

23 But the lower court put the two counts
24 together and said, this is check kiting and since Payne
25 holds that check kiting comes under 1014 then that's

1 what we've got here. And that's a jurisdictional
2 question.

3 QUESTION: Your point -- can I just follow
4 up? Your point is that if their theory is right any
5 time you deposit a check drawn on an account that
6 doesn't have enough funds in it that you have then
7 violated the statute, because you've then overvalued a
8 security --

9 MR. CHILIVIS: That's correct.

10 QUESTION: -- under their view?

11 MR. CHILIVIS: That's what this charged.
12 That's all it charged. You've got to combine the counts
13 to make it charge anything else. And I say it's a very
14 dangerous precedent. People do that every day.

15 Now, the state check laws cover that if it is
16 an intent to defraud, and that's a horse of a different
17 color.

18 I'm saving some time for rebuttal, may it
19 please the Court.

20 CHIEF JUSTICE BURGER: Mr. Wilkins.

21 ORAL ARGUMENT OF RICHARD G. WILKINS, ESQ.

22 ON BEHALF OF THE UNITED STATES

23 MR. WILKINS: Mr. Chief Justice and may it
24 please the Court:

25 This case presents a straightforward question

1 of statutory construction. That question is whether
2 Petitioner's deceptive check-writing conduct falls
3 within the reach of the federal statute that
4 specifically proscribes the making of intentional
5 misrepresentations for the purpose of influencing the
6 credit decisions of a federally insured bank.

7 QUESTION: Mr. Wilkins, before you get into
8 that, is he not correct that the indictment is confined
9 to the willfully overvaluing portion of the alternatives
10 --

11 MR. WILKINS: No, Your Honor.

12 QUESTION: -- so that the intentional false
13 statement is not quoted in the indictment?

14 MR. WILKINS: Counts two and three of the
15 indictment charge Petitioner with knowingly and
16 willfully overvaluing a security.

17 QUESTION: Correct.

18 MR. WILKINS: It also contains a
19 representation that he presented the checks and caused
20 to be represented to said bank that said check was of a
21 value equal to the face amount of the check, when in
22 truth and fact this Defendant then well know that there
23 were no sufficient funds.

24 QUESTION: What are you reading from?

25 MR. WILKINS: That's from page 3 of the Joint

1 Appendix.

2 So the indictment clearly contains factual
3 statements underlying an allegation of false statement.
4 Furthermore, Petitioner's contention at this state of
5 the litigation that the indictment does not charge him
6 with a false statement was not raised either before the
7 trial court or the Fifth Circuit. It is here being
8 raised for the first time with this Court and is
9 reviewable only under the plain error doctrine.

10 We -- the Government contends that viewing the
11 statute or reading the indictment, the clear language of
12 the indictment meets the sufficiency requirement set
13 forth by this Court.

14 QUESTION: What if as a matter of a law a
15 check were not security within the meaning of this
16 statute? It may have been property, but you didn't say
17 overvaluing property. You said a security. Suppose as
18 a matter of law a check was not a security. And suppose
19 count two was the only count in the indictment.

20 MR. WILKINS: Exactly.

21 QUESTION: Even if you prove he made a false
22 statement, could you convict him under count two?

23 MR. WILKINS: Exactly. The jury in this case,
24 Your Honor, was instructed that a check is a security
25 within the meaning of Section 1014 as a matter of law.

1 The only question put to the jury under the instructions
2 of the trial court was whether or not that check or that
3 security was overvalued. And as even Petitioner
4 concedes in his reply brief, the question of
5 overvaluation and false statement in the context of this
6 case are the same. The check is --

7 QUESTION: But if the check were not a
8 security within the meaning of the statute you would
9 have to reverse, is that it?

10 MR. WILKINS: No.

11 QUESTION: Because the jury -- because the
12 trial court misunderstood what a security was.

13 MR. WILKINS: No. If -- if a check is not a
14 security --

15 QUESTION: It's just property, rather than a
16 security.

17 MR. WILKINS: If it's just property, for
18 example; the only question that was put to the jury was,
19 is this a false statement, is it an overvaluation. The
20 jury concluded that the check was a false statement,
21 which is a sufficient ground for conviction under the
22 statute. So if this Court disagrees as a matter of law
23 that a check is not a security --

24 QUESTION: But you charged that it was a
25 security and that it was overvalued.

1 MR. WILKINS: Exactly. But even assuming that
2 as a matter of law, as a legal theory, it's not a
3 security, the only factual conclusion reached at the
4 trial below was that it was overvalued.

5 QUESTION: That's because the judge took away
6 from the jury the question of whether it was a security
7 or not, by charging them, under Justice White's
8 hypothesis erroneously, that the check was a security.

9 MR. WILKINS: But even if that is erroneous,
10 the fact still remains that Petitioner was properly
11 convicted --

12 QUESTION: Of what?

13 MR. WILKINS: -- under the theory that it is a
14 false statement.

15 QUESTION: Of what?

16 MR. WILKINS: Of making a false statement.

17 QUESTION: About what?

18 MR. WILKINS: The false statement is that he
19 would have had money, that the checks were represented
20 by funds and would have been paid in the normal course
21 of collection, when in fact such was not the case.

22 QUESTION: That's not what the indictment
23 alleged the falsity of. The falsity is that, "when in
24 truth in fact, as the Defendant well know, there were no
25 sufficient funds in the other bank."

1 MR. WILKINS: Exactly.

2 QUESTION: That's all that's required.

3 MR. WILKINS: Exactly.

4 QUESTION: So that all that -- in order to
5 make out the offense under your theory, as I understand
6 it, is you make a deposit with a check that you know
7 does not have enough funds in the drawee bank at the
8 time of the deposit.

9 MR. WILKINS: For the purpose of influencing a
10 bank upon a loan, advance or commitment, exactly.

11 QUESTION: Well, for the purpose of getting a
12 better bank account that you can draw against. That's
13 all you allege here. In count two all you really do is
14 allege that the balance in the account was therefore
15 debited, I guess it would be, and they could therefore
16 draw more. You don't allege an actual drawing against
17 that in count two. You can't rely on count three.

18 QUESTION: Or you don't even say it was for
19 the purpose of anything.

20 QUESTION: No, just that was the illegal
21 purpose, that you knew the other bank was short of the
22 funds.

23 MR. WILKINS: Count two of the indictment
24 clearly states that it was for the purpose of obtaining
25 an advance of money. The facts of this case demonstrate

1 that each check was presented for the bank to obtain
2 that advance, and Petitioner did use them to obtain
3 that.

4 QUESTION: But the purpose of obtaining the
5 advance would have been achieved whether he ever in fact
6 drew against the account, wouldn't it? He's in a
7 position where the balance has gone up, and therefore
8 there are funds he can draw against. Isn't that all you
9 have to prove?

10 Do you think you had to prove that there was a
11 drawing, a withdrawal, following the deposit?

12 MR. WILKINS: No. All we have to prove is
13 that the check was deposited for the purpose of
14 influencing the bank upon --

15 QUESTION: It's future course of conduct.

16 MR. WILKINS: Exactly.

17 QUESTION: Yes, but the falsity was what, an
18 implied representation that there were funds to cover it
19 --

20 MR. WILKINS: Yes.

21 QUESTION: -- when in fact he knew that there
22 were not?

23 MR. WILKINS: Exactly. Petitioner contends
24 that a check can't be a false --

25 QUESTION: That then would be, I gather, a

1 conviction resting only on "whoever knowingly makes any
2 false statement or report."

3 MR. WILKINS: Exactly.

4 QUESTION: And you never get to overvaluing.

5 MR. WILKINS: Right. It is unnecessary to get
6 to the overvaluation of security to sustain Petitioner's
7 conviction.

8 Petitioner contends that a check cannot be a
9 false statement because it is simply a promise to pay a
10 sum certain upon presentment and notice of dishonor.

11 QUESTION: Well, but if your theory is right,
12 why isn't any deposit of an insufficient funds check
13 within the statute?

14 MR. WILKINS: Because, Your Honor, this
15 statute only reaches the deposit or making of knowingly
16 false statements for the purpose of influencing a bank
17 upon a loan, advance or commitment. This construing
18 Section 1014 to reach this conduct does not sweep all
19 bad check prosecutions throughout the United States.
20 Bad check -- state bad check laws will continue to apply
21 to bad checks that are given to the neighborhood
22 grocer.

23 QUESTION: But as I listened to your exchange
24 with Justice Stevens, it sounded like that was exactly
25 what you were saying, and that any time somebody

1 deposits a check knowing that there are insufficient
2 funds to cover it this section has been violated.

3 MR. WILKINS: If that check is deposited for
4 the purpose of obtaining --

5 QUESTION: Well, if it's deposited in a
6 federally insured bank.

7 MR. WILKINS: Exactly.

8 QUESTION: In a federally insured bank.

9 QUESTION: That's -- knowing that there aren't
10 funds to cover it.

11 MR. WILKINS: Exactly.

12 QUESTION: But it has to be a deposit -- do we
13 have many no-federally insured banks any more?

14 MR. WILKINS: I am not aware. I know that
15 there are many state --

16 QUESTION: This was an addition to the
17 statute, wasn't it?

18 MR. WILKINS: Excuse me?

19 QUESTION: Wasn't this an addition to the
20 statute, the federally insured bank provision?

21 MR. WILKINS: Yes. The federally insured
22 banks were added to the statute in 1970.

23 QUESTION: Doesn't it take in almost all of
24 the banks in the United States?

25 MR. WILKINS: No, there are numerous

1 state-chartered institutions that are not --

2 QUESTION: Well, lots of state-chartered
3 institutions are federally insured.

4 MR. WILKINS: Exactly. Many of them are.

5 Petitioner contends that a check --

6 QUESTION: Well, at least, if I may get
7 through Justice O'Connor's question, this surely means
8 that all you have to do is deposit a check in a
9 federally insured bank knowing that there are
10 insufficient funds to cover it and you've violated this
11 statute.

12 MR. WILKINS: Knowing that there are
13 insufficient funds to pay the check in the course of
14 collection, if you intend to influence that bank to
15 extend you credit. Now, for example, in the
16 circumstances of the Crown case --

17 QUESTION: I deposit it and they credit it to
18 my account, or I cash it. In either instance, the
19 requirement for the purpose of extending credit is
20 satisfied, isn't it?

21 MR. WILKINS: No. Take the example of the
22 Crown case the Petitioner brought -- mentioned this
23 morning. In that case the defendants presented checks
24 to a bank that were drawn on a fictitious bank. They
25 were merely deposited in someone's account, there was a

1 credit entry.

2 No one was allowed to withdraw any funds
3 against that check. There was no advance of credit.
4 And the court said there's no violation of 1014 here
5 because, although there's a false statement, there was
6 no advance of credit. All there was was a bookkeeping
7 entry.

8 QUESTION: Well, some banks have that as a
9 practice. They don't -- this check that you've
10 deposited is just not subject to being drawn on until we
11 collect it.

12 MR. WILKINS: Exactly. But in the facts of
13 this case Petitioner deposited a check on May 9th, it
14 was immediately credited to his account and used to wipe
15 out approximately \$58,000 in overcharges.

16 QUESTION: Did he know when he deposited it
17 that he would have immediate credit?

18 MR. WILKINS: The jury found on the facts of
19 this case -- the jury was instructed the Petitioner
20 could not be convicted unless Defendant intended to
21 write checks which he could not reasonably expect to
22 cover and therefore defraud the bank. And on the
23 evidence presented or the evidence before the jury in
24 this case demonstrated that Petitioner certainly was
25 aware that the bank --

1 QUESTION: At least you would say, then, that
2 any time that somebody knows it's the custom of the bank
3 to give you immediate credit and you deposit a check
4 that you know has insufficient funds behind it, but that
5 you know you'll get immediate credit that's useable,
6 that then this statute is violated?

7 MR. WILKINS: Yes.

8 QUESTION: I'm not sure I understand. Does it
9 depend on what the Defendant intends or does it depend
10 upon what the bank does in its accounting practices, or
11 both?

12 MR. WILKINS: It depends -- Your Honor, it
13 would be a factual question. It depends on what the
14 Defendant intends. Of course, the Defendant's knowledge
15 of a bank's accounting practices would certainly be
16 material in determining whether --

17 QUESTION: Well, doesn't every defendant who
18 deposits an insufficient funds check intend that he
19 receive credit for it?

20 MR. WILKINS: No, Your Honor. If there are
21 facts showing that he intended to receive credit. In
22 this case, on May 8th federal and state bank examiners
23 arrived to commence an audit. There was a \$58,000
24 overcharge in his account. Mr. Williams, the
25 Petitioner, was certainly and justifiably concerned to

1 eradicate this overdraft status, and he deposited the
2 check to, and he did in fact achieve --

3 QUESTION: Can't the trier of fact reasonably
4 infer from any deposit slip that the depositor intends
5 to get credit?

6 MR. WILKINS: No, Your Honor, I think that it
7 would -- that the intention to influence a bank on an
8 extension of credit would have to be a determination
9 that would be made in light of all of the facts and
10 evidence that was presented in an individual case.

11 QUESTION: But can you conceive of anyone in
12 their right mind giving a bank a check that's not
13 sufficient funds to cover it and simply planning to wait
14 and let the check go through the clearinghouse and be
15 returned NSF?

16 MR. WILKINS: No.

17 QUESTION: That certainly isn't the intent of
18 any rational person.

19 MR. WILKINS: No.

20 QUESTION: So isn't Justice O'Connor right
21 when she says that anyone who presents an NSF check must
22 be planning to get credit on it?

23 MR. WILKINS: In some circumstances I can see
24 that that would be the case.

25 QUESTION: Well, what if a bank has a practice

1 of not permitting withdrawals until the check has been
2 collected. Even though this was not known to the
3 depositor and the depositor deposited it knowing that
4 there were insufficient funds at the time, would he be
5 guilty in that context?

6 MR. WILKINS: No -- he deposited the check
7 intending to obtain an extension --

8 QUESTION: He did, but unknown to him at the
9 time the bank's practice was it would not permit any
10 withdrawals against the check until it had been
11 collected.

12 MR. WILKINS: That defendant I presume would
13 have violated the statute because he would have
14 presented a false statement with the intent to influence
15 a bank upon an --

16 QUESTION: Even though it was impossible that
17 he --

18 MR. WILKINS: Even though it was impossible.
19 The statute is geared to protect federally insured banks
20 against false statements that are designed to influence
21 them. Whether or not they're actually influenced is
22 irrelevant.

23 QUESTION: Then it seems to me, as my
24 colleagues down here have said, that this covers every
25 bad check case.

1 MR. WILKINS: No, Your Honor, it doesn't.

2 QUESTION: As long as you know that you
3 haven't got insufficient -- that you do not have
4 sufficient funds.

5 MR. WILKINS: No, because it only --

6 QUESTION: Well, the guy's a fool otherwise.
7 He must be. He knows that the check is no good and he
8 goes to the bank and presents it. Why is he presenting
9 it if he knows he's not going to get the money until the
10 bank finds out that there's no money?

11 MR. WILKINS: This only extends to false
12 statements that are made to federally insured banks for
13 this purpose. The vast majority of insufficient funds
14 checks cases do not involve statements that are made to
15 federally insured banks. They involve statements that
16 are made to grocers or --

17 QUESTION: All right, all right. But then you
18 say it would cover all cases presented to a federally
19 --

20 MR. WILKINS: To a federally insured bank,
21 yes, Your Honor.

22 A check -- the alternative ground for
23 liability under Section 1014, as we have mentioned, is
24 that a check constitutes overvalued land, property or
25 security. A check clearly qualifies as overvalued

1 security within the meaning of Section 1014, because the
2 term "security" as it has been generally defined
3 throughout Title 18 of the United States Code includes
4 any item that stands for some other thing of value.

5 QUESTION: Okay. Now, you say that it's been
6 generally defined that way throughout the United States
7 -- Title 18 of the United States Code. Do you mean that
8 definition covers the word "security" in Section 1014?

9 MR. WILKINS: It is generally applicable, or
10 that definition may be used to ascertain Congress'
11 probable intent in using the word "security" in this
12 statute.

13 QUESTION: What section do you rely on?

14 MR. WILKINS: For example, 8 U.S.C. 2311, the
15 National Stolen Property Act, and the general --

16 QUESTION: Well, that just defines it for
17 purposes of that Act, doesn't it?

18 MR. WILKINS: Exactly. It's for purposes of
19 that Act.

20 QUESTION: Well then why do you say it's
21 applicable to this Act?

22 MR. WILKINS: It's not directly applicable,
23 Your Honor. It's only applicable to show that as the
24 term has been defined in other contexts, general
25 criminal law contexts, it has been defined to include

1 any item that stands for --

2 QUESTION: Well, I would think the inference
3 is quite the contrary, that if Congress has taken
4 occasion to define it broadly and said for purposes of
5 some other Act, the fact that it has not taken occasion
6 to define it broadly here may cut against you.

7 MR. WILKINS: The broad term of the statute
8 nevertheless, we contend, should be used consistently as
9 the term "security" has been used consistently
10 throughout Title 18 of the United States Code.

11 QUESTION: Of course, this is just an
12 alternative argument.

13 MR. WILKINS: Exactly. It's just an
14 alternative argument and this Court need not agree that
15 a check is a security to affirm Petitioner's
16 conviction.

17 Petitioner spends considerable effort
18 detailing in his brief the legislative history of
19 Section 1014, but he has been unable to demonstrate a
20 clearly expressed legislative intent to exclude his
21 conduct from the reach of the statute. Petitioner
22 argues from sparse legislative history --

23 QUESTION: Well, do you feel it's the burden
24 on a criminal defendant to show that he's not covered by
25 the statute, or that it's the burden of the Government

1 to show that he is covered by it?

2 MR. WILKINS: It is the burden of the
3 Government, of course, Your Honor, to show that he is
4 covered. But there would be a presumption, I assume,
5 the burden -- in the face of clear statutory language --
6 this Court has often stated that where you have clear
7 language, in the absence of a clearly expressed
8 legislative intent to the contrary, the statute will be
9 given its clear plain meaning.

10 The fact that there is no express mention of
11 Petitioner's conduct in the legislative debates of
12 Section 1014 is of course irrelevant. As this Court
13 stated in Barr v. United States, "If Congress has made a
14 choice of language that fairly brings a given situation
15 within a statute, it is unimportant that a particular
16 application might not have been contemplated by the
17 legislators."

18 The federalism concerns noted by Petitioner in
19 his brief and in argument do not loom large in this
20 case. The Federal Government has a paramount and indeed
21 a very important, a very strong interest in maintaining
22 the viability and the assets of federally insured
23 institutions.

24 The conclusion that Section 1014 extends to
25 the presentation of all knowingly worthless checks that

1 are presented for the purpose of influencing a credit
2 decision of a federally insured bank --

3 QUESTION: Not knowingly worthless, knowingly
4 overvalued.

5 MR. WILKINS: Knowingly overvalued.

6 QUESTION: It could be ten cents over, I
7 suppose, and still -- I mean, if the amount in the other
8 account is only a couple of dollars below the amount of
9 the check, you'd still have a violation.

10 MR. WILKINS: If it is --

11 QUESTION: It doesn't have to be worthless.

12 MR. WILKINS: Well, if it is done knowingly.

13 QUESTION: Right. You have to know what your
14 balance is.

15 MR. WILKINS: Exactly. You have to know, Your
16 Honor, that the check will not be paid in the due course
17 of collection. Plus in the instructions in this case,
18 the court specifically instructed the jury here that
19 petitioner had to be engaged in conduct where he well
20 knew that the checks would never be paid and he engaged
21 in this solely for the purpose of obtaining time and
22 credit.

23 The rule of lenity so often invoked by
24 Petitioner applies only where there is a grievous
25 ambiguity in the language or structure of the Act, that

1 is entirely lacking on the facts of this case. And the
2 numerous hyper-technical objections to his indictment
3 and the instructions of the trial court, as I've already
4 mentioned, were raised for the first time before this
5 Court and do not rise to the level of plain error
6 requiring reversal of his conviction.

7 Petitioner's final argument is that his
8 conviction must be reversed because a check kiting
9 conviction requires the prosecution to prove an intent
10 to defraud. The short answer to this contention is that
11 the Petitioner was not indicted for check kiting. He
12 was indicted for making an intentional false statement
13 or willfully overvaluing a security for the purpose of
14 influencing a federally insured bank upon a loan,
15 advance or commitment.

16 Each count of his indictment clearly sets
17 forth those facts, clearly sets forth those allegations,
18 and is sufficient to sustain a statutory violation. The
19 term "check kiting" as used throughout this -- the
20 Government's brief and by Petitioner is simply
21 descriptive of Petitioner's conduct. The question here
22 is not whether this conduct requires some specific
23 intent to defraud in order to be culpable, but rather
24 whether Petitioner's conduct that can be described as
25 check kiting falls within the reach of a federal statute

1 that prohibits intentional misrepresentations for the
2 purpose of influencing the credit decisions of a
3 federally insured bank.

4 As stated in Petition's reply brief, the
5 overall question is whether the allegations of counts
6 two and three are subject to prosecution under Section
7 1014, regardless of how they are labeled. No matter how
8 one labels the conduct of Petitioner, it clearly comes
9 within the reach of Section 1014 and states a violation
10 of that statute.

11 Petitioner's conviction should be affirmed.

12 MR. CHIEF JUSTICE BURGER: Do you have
13 anything further?

14 REBUTTAL ARGUMENT OF NICKOLAS P. CHILIVIS, ESQ.

15 ON BEHALF OF PETITIONER

16 MR. CHILIVIS: Yes, sir. Mr. Chief Justice
17 and may it please the Court:

18 If I can make just two quick points. One of
19 them has to do with what this indictment is all about.
20 They say we didn't raise the issue of false statement
21 until we got up here. The statute is couched in the
22 alternative. It says either a false statement or
23 overvaluing security.

24 Now, they didn't -- if you look at the
25 indictment, it says that he overvalued security in that

1 he presented the check and represented it was of a value
2 in its face amount. They did not make a specific charge
3 of making a false statement. They used that to underpin
4 the charge of overvaluing a security.

5 QUESTION: You're saying you didn't know you
6 were facing a charge of a false statement?

7 MR. CHILIVIS: No, sir, this is the first time
8 we realized this, when we got cert. to this Court. We
9 used it as an argument because it underpins the
10 overvaluing of a security.

11 And let me mention one other thing. This case
12 was tried on check kiting. That's the unfortunate thing
13 about this case and that's why if this Court determines
14 that in this case the court was in error and it should
15 be reversed, it should reverse count one, too. The
16 judge charged the jury that the Defendant was being
17 charged with check kiting.

18 The two witnesses -- the FBI agent testified
19 it was check kiting, and a back examiner testified it
20 was check kiting.

21 QUESTION: Well, there is no statute anywhere,
22 is there, that describes it in terms of check kiting?

23 MR. CHILIVIS: That's correct.

24 QUESTION: We don't have statutes drafted that
25 way.

1 MR. CHILIVIS: That's correct. And I really
2 don't know what check kiting is. Black's gives three
3 definitions and Words and Phrases gives two other that
4 are broader.

5 And let me tell you just one other minute
6 about it. Opposing counsel has stated that this wasn't
7 check kiting. In the Joint Appendix, we show the
8 Government charges that Mr. Williams was involved in
9 check kiting, and that's a direct quote.

10 Let me give one other example about what
11 Justice O'Connor mentioned. Let's assume that a person
12 has two banks that they operate out of, that on the way
13 to bank A to deposit a check they stop at bank B and
14 deposit a check on bank A. They have the check in their
15 pocket to deposit in bank A. They then go to bank A and
16 deposit that check, but until they deposited that bank A
17 did not have sufficient funds to cover the check at bank
18 B.

19 That is a violation under this indictment as
20 charged in this case of the law, and that's all it takes
21 -- no intent to defraud, as long as that bank credits
22 their account with that check instead of waiting for
23 collection.

24 QUESTION: Or even if they don't.

25 MR. CHILIVIS: Even if they don't do it.

1 That's a -- now, opposing counsel said it was a bank's
2 decision to use overdrafts to wipe out that, and that's
3 true, it was the bank's decision.

4 My time's up. I wanted to make one other
5 point.

6 MR. CHIEF JUSTICE BURGER: Thank you,
7 gentlemen.

8 MR. CHILIVIS: Thank you, Your Honors.

9 MR. CHIEF JUSTICE BURGER: This case is
10 submitted.

11 (Whereupon, at 12:01 p.m., the above-entitled
12 case was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

WILLIAM ARCHIE WILLIAMS vs. UNITED STATES # 80-2116

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BY Reene Lannon

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