

In the

ORIGINAL

Supreme Court of the United States

CHARLES RONALD MC ELROY,

Petitioner,

v.

UNITED STATES

:
:
:
:
:
:
:

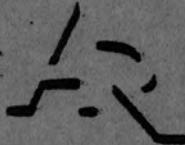
No. 80-6680

Washington, D. C.

January 12, 1982

Pages 1 thru 35

ALDERSON



REPORTING

400 Virginia Avenue, S.W., Washington, D. C. 20024

Telephone: (202) 554-2345

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

-----x

CHARLES RONALD MC ELROY, :
Petitioner, :

v. : No. 80-6680

UNITED STATES :

-----x

Washington, D. C.

Tuesday, January 12, 1982

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 1:56
o'clock p.m.

APPEARANCES:

THOMAS S. WHITE, ESQ., Assistant Federal Public
Defender, Pittsburgh, Pennsylvania; on behalf
of the Petitioner.

CARTER G. PHILLIPS, ESQ., Office of the Solicitor
General, Department of Justice, Washington,
D. C.; on behalf of the Respondent.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	<u>PAGE</u>
<u>ORAL ARGUMENT OF</u>	
THOMAS S. WHITE, ESQ.,	
on behalf of the Petitioner	3
CARTER G. PHILLIPS, ESQ.,	
on behalf of the Respondent	19
THOMAS S. WHITE, ESQ.,	
on behalf of the Petitioner - rebuttal	32

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in McElroy against the United States.

Mr. White, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF THOMAS S. WHITE, ESQ.,
ON BEHALF OF THE PETITIONER

MR. WHITE: Chief Justice Burger, may it please the Court, this case involves the question of statutory construction of the third paragraph of Section 2314. That statute provides in its pertinent part "Whoever with unlawful or fraudulent intent transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeitted securities, knowing the same to have been falsely made, forged, altered, or counterfeitted, shall be fined not more than \$10,000 or imprisoned not more than ten years or both."

It is the petitioner's position here that in order for the United States to sustain a valid conviction under this section of the statute, and under this particular paragraph, it is necessary that they prove beyond a reasonable doubt that the check or checks that were here involved in this case be in a forged or altered condition prior to their interstate transportation.

If I may briefly state the facts, the petitioner

1 here was indicted on a three-count indict, one count
2 charging him with violation of the Dyer Act, the other two
3 counts charging him with violation of this subsection of
4 2314.

5 The facts as developed at the trial were as
6 follows. Early in 1977, a robbery occurred at the union
7 office in Youngstown, Ohio. Some blank checks were taken.
8 The union notified the bank on which the checks were drawn,
9 and the account was closed. Approximately 17 months later,
10 the petitioner visited an automobile agency in Pittsburgh,
11 Don Allen's Chevrolet, and negotiated the price of a used
12 Corvette. After arriving at the price, he told the man, the
13 salesman that he would be back the next day, that he lived
14 in Ohio, that he had to get a check from his credit union.
15 He also told him that he worked in the Pittsburgh area for a
16 railroad.

17 The next day he appeared with one of the checks
18 that had been stolen at the union office in Youngstown, and
19 it was -- when he presented it, it was altered and forged.
20 The dealership took possession of the check, and he took
21 possession of the car. The car was never found again.

22 QUESTION: You say, when he presented it, it was
23 altered and forged. Do you mean by that that the forgery
24 and alteration had taken place prior to the presentation?

25 MR. WHITE: Yes, Your Honor. That occurred, of

1 course, in Pittsburgh. The second --

2 QUESTION: But I gather the alteration or forgery
3 occurred in the state of Pennsylvania, did it?

4 MR. WHITE: Well, that is the question, Your
5 Honor. We believe that there is a presumption that works
6 here, that when a check is presented that is a forgery, that
7 there is a presumption that it was forged where it first
8 appeared.

9 QUESTION: Where do you get that from?

10 MR. WHITE: Your Honor, that is a presumption that
11 goes back to 1822, Justice Storey, and it has been utilized
12 by the lower federal courts. One of the courts that
13 utilized it was one of the courts of which -- which would
14 cause the split here among the circuits, Owens versus the
15 United States. The Fifth Circuit relied on that.

16 QUESTION: Was Justice Storey talking about the
17 criminal law area?

18 MR. WHITE: Yes, Your Honor, he was, and it was
19 used in that case to establish venue.

20 The second incident occurred at Rini Boat Sales in
21 Beaver Falls, Pennsylvania. Again the petitioner appeared,
22 negotiated the price of a boat with a trailer to haul it
23 away, and after having agreed on the price, he told them
24 that he lived in Ohio, and that he had to get a check from
25 his credit union. About a week later he telephoned them,

1 told them that he had the funds, and that he would be there
2 some time during that day, but he had to work overtime.

3 About a few hours later he called and told them he
4 was on the Ohio Turnpike, at a rest stop, and he would be
5 there shortly. Approximately 20 minutes later, an employee
6 of Rini Boat Sales was standing in front of the agency, when
7 he saw the petitioner pull out of a dead end street in a
8 pickup truck. What followed then was just what happened at
9 the Chevrolet agency. The dealer took possession of a check
10 that was in a forged and altered condition. It was one of
11 the checks that had been stolen at the union office in
12 Youngstown 17 months previously. And thereafter, the boat
13 and the trailer were taken by the petitioner. The boat was
14 found about a year later in Pennsylvania.

15 At the conclusion of the evidence, the defendant
16 moved for a judgment of acquittal on the grounds that there
17 was no evidence to support the Dyer Act count because there
18 was no evidence to show that the Corvette had been taken
19 from Pennsylvania to Ohio, and on the check charges, there
20 was insufficient evidence because the government had failed
21 to prove as required by this paragraph of the statute that
22 the checks were in a forged or altered condition prior to
23 their interstate transportation.

24 The judge denied both the motions, and charged the
25 jury in accordance with the points for charge presented by

1 the government that it was not necessary that the checks be
2 in a forged or altered condition so long as they could show
3 or the jury found that the checks were moving in interstate
4 commerce in a forged or altered condition solely in the
5 destination state.

6 Now, the defendant petitioner here was convicted.
7 He received a five-year sentence on the Dyer Act count and
8 seven-year sentences on the check counts, all the sentences
9 to run concurrently.

10 On appeal to the Third Circuit, they said that
11 there was insufficient evidence to convict on the Dyer Act
12 count, because the indictment charged him with taking the
13 automobile from Ohio -- sorry, from Pennsylvania into Ohio,
14 and there was no evidence that the automobile ever went into
15 Ohio. But on the check charges, they said that the judge's
16 charge was correct, and they held that it was not necessary
17 under this statute for the government to prove that the
18 checks were in a forged or altered condition prior to their
19 interstate transportation and prior to crossing state lines.

20 When they so held that, they held directly in
21 conflict with the Tenth, Eighth, and Fifth Circuit Courts of
22 Appeals, which have held with regard to this paragraph of
23 2314 that it is clear and obvious from a reading of this
24 statute, because of the tenses used and so forth, that this
25 statute means that the --

1 QUESTION: It is not the whole statute, it is just
2 two words they rely on, right? "Have been?"

3 MR. WHITE: No, Your Honor, I think it is -- I
4 don't want to say what they had in their mind. They just
5 said a reading is obvious, but I will attempt to --

6 QUESTION: Well, what other words can you get your
7 argument out of?

8 MR. WHITE: "Forged", Your Honor. Past tense. The
9 forged checks prior to the interstate transportation. It is
10 the way the statute --

11 QUESTION: There is nothing that says the check has
12 to be forged before it is transferred.

13 MR. WHITE: No, it doesn't, Your Honor, but the way
14 the tenses are set up in the structure of the section, we
15 believe that it is clear that Congress intended that, and I
16 will demonstrate that, Your Honor, by the Congressional
17 history.

18 QUESTION: Well, if the language of the statute is
19 clear, do we need to go to the legislative history?

20 MR. WHITE: Your Honor, if it is clear, you do not,
21 and our first submission here is that it is not ambiguous,
22 it is clear on its face that what it means is that the
23 checks must be in a forged condition before they enter
24 interstate commerce, but our fallback position, Your Honor,
25 and our second position is, if this wording is ambiguous,

1 then this court should utilize the rule of Lenity.

2 QUESTION: Do you have some cases that say, apply
3 the rule of Lenity in the face of what might be clear
4 legislative history, even though the words are ambiguous?

5 MR. WHITE: Your Honor, you are right. Of course,
6 you would not thwart the will of Congress if you could show
7 clearly by the legislative history what Congress meant.

8 QUESTION: Even though the words themselves might
9 be ambiguous?

10 MR. WHITE: Even though the words might be
11 ambiguous.

12 QUESTION: But your position is that there is no
13 evidence like that in this case?

14 MR. WHITE: As a matter of fact, there is contrary
15 evidence to sustain our position, Your Honor.

16 QUESTION: Do you take the position that if you
17 forge a check or a security, and you get across a state
18 line, you are free?

19 MR. WHITE: No. If you forge a check and cross a
20 state line, you are guilty. If you take a blank check and
21 cross a state line, and then forge it --

22 QUESTION: Then you are free.

23 MR. WHITE: -- you have not violated this section.

24 QUESTION: And you can cross eight other state
25 lines?

1 MR. WHITE: No, Your Honor. Yes, I think I would
2 say that, if it is a continuous movement.

3 QUESTION: And then you realize that it doesn't
4 make sense, don't you?

5 MR. WHITE: Yes, it does, Your Honor.

6 QUESTION: Congress was against transporting forged
7 securities.

8 MR. WHITE: You are right, Your Honor, and they
9 took care of that provision.

10 QUESTION: Well, this was a forged security, wasn't
11 it?

12 MR. WHITE: Yes, Your Honor.

13 QUESTION: When it was presented, it was forged,
14 wasn't it?

15 MR. WHITE: That's right, Your Honor.

16 QUESTION: And it had crossed the state line, right?

17 MR. WHITE: No, not under this section.

18 QUESTION: It had crossed -- the check had crossed
19 the state line.

20 MR. WHITE: A blank check.

21 QUESTION: A check had crossed a state line.

22 MR. WHITE: I agree with you.

23 QUESTION: And when it was presented, it was forged.

24 MR. WHITE: That's right, Your Honor.

25 QUESTION: And that, in any reading of the statute,

1 violates the statute.

2 MR. WHITE: No, Your Honor. May I suggest --

3 QUESTION: Well, what else is there in the statute
4 that you have to show?

5 MR. WHITE: Okay. Your Honor, may I suggest that
6 Congress when they passed this Act, the National Stolen
7 Properties Act, took care of the situation that the
8 defendant was here charged with. They took care of it in
9 Section 4, which now became Section 2315, which provides
10 with regard to the same activity, "Whoever receives,
11 conceals, stores, barter, sells, or disposes of any falsely
12 made, forged, altered, or counterfeited securities moving
13 as or which are a part of or which constitute interstate or
14 foreign commerce."

15 We submit, Your Honor, that the whole problem in
16 this case is strictly this, that the government failed to
17 indict him under the right section. Had they charged him
18 under 2315, it would have fit the facts. Having charged him
19 under 2314, they then tried to pull themselves up, and act
20 like Procrustes, and try to stretch the language of 2314 to
21 make it fit a situation which was governed by 2315.

22 QUESTION: You would say, I take it, or would you,
23 if there was a question, would you say that the proof would
24 have been satisfied in this kind of a case if the statute,
25 after the word "transports in interstate or foreign

1 commerce" any "stolen," insert the word "stolen," comma,
2 "falsely made," comma, "forged," comma, "altered?"

3 MR. WHITE: It would have taken care of it, and
4 they did in the first paragraph, Your Honor. You see, in
5 the first paragraph of the statute, it provides against the
6 interstate transportation of stolen merchandise, but
7 Congress has a \$5,000 limit. Now, I don't want to concede
8 that he could have been convicted under that statute, but
9 both of these checks were over \$5,000. I simply find in
10 this case that the government charged him under the wrong
11 statute. The legislative history --

12 QUESTION: Let me ask you, is the section you are
13 relying on the section at the bottom of Page 13 of your
14 brief, the section -- that is the one you are talking about,
15 2314?

16 MR. WHITE: Yes, Your Honor.

17 QUESTION: That doesn't refer to forged securities,
18 though, does it?

19 MR. WHITE: Yes, Your Honor. In the paragraph,
20 second paragraph of 2315, Your Honor, the reading is almost
21 exactly the same. "Whoever receives, conceals, stores,
22 barterers" --

23 QUESTION: Where are you reading? That is what I
24 want to know. What is it you are quoting from?

25 MR. WHITE: I am quoting from --

1 QUESTION: I mean, it is not in the brief. Is that
2 right?

3 MR. WHITE: No, Your Honor.

4 QUESTION: Oh, I am sorry.

5 MR. WHITE: We don't have that whole statute set
6 out, Your Honor, but it is in the second paragraph of 2315.

7 QUESTION: I see.

8 QUESTION: Is it possible to violate two Acts?

9 MR. WHITE: Yes, Your Honor, you could do that.

10 QUESTION: I am just wondering.

11 MR. WHITE: Yes, Your Honor, but they didn't charge
12 him with 2315. That has been the whole point. And as the
13 dissenter pointed out in the court of appeals in the en banc
14 decision, they could have also probably convicted this man
15 under Section -- under the last paragraph of 2314.

16 QUESTION: I'll bet there are a lot of other things
17 he could be convicted of, too.

18 MR. WHITE: That's right, many others.

19 QUESTION: Oh, you agree?

20 MR. WHITE: Yes, Your Honor. But there is no
21 question under this particular section of the statute that
22 he was not validly convicted. When Congress passed the
23 National Stolen Properties Act, they did not rely on the
24 words "interstate commerce" as defined by this Court. The
25 government attempts to show that by going back to the Dyer

1 Act, and it says they can't find anything that would
2 indicate the will of Congress with regard to the National
3 Stolen Properties Act.

4 Your Honor, when the National Stolen Property Act
5 was passed, Congress put their own definition of interstate
6 commerce into the statute, and they didn't give anybody any
7 leeway to interpret it.

8 QUESTION: Mr. White, certainly in the Tobin case
9 and in the Barfield case, the parallel language in the
10 adjacent two statutes has been interpreted exactly as the
11 government is asking that it be interpreted here.

12 MR. WHITE: Your Honor, I think --

13 QUESTION: How do you distinguish that?

14 MR. WHITE: Because of the "moving as" language,
15 Your Honor. It is clear that "moving as, constituting a
16 part of interstate commerce" is different than having an act
17 that is committed prior to the transportation in interstate
18 commerce. That is what I think the whole Act was -- these
19 two sections were designed to do, and remember, 2314 and
20 2315 were one section in the National Stolen Properties
21 Act. But this definition that Congress put in provided as
22 follows. "The term interstate or foreign commerce shall
23 mean transportation from one state, territory, or the
24 District of Columbia to another state," et cetera.

25 Now, reading the statute as with that language in

1 it, it would read, "Whoever with unlawful or fraudulent
2 intent transports from one state to another a falsely made,
3 forged, altered, or counterfeitted security," which clearly
4 sets up our position in this case.

5 QUESTION: But that is quite a narrower reading
6 than the actual language of the statute itself.

7 MR. WHITE: Your Honor, yes, but if we are looking
8 to divine the will of Congress at the time the Act was
9 passed, I think you have to look at the definition that they
10 used.

11 QUESTION: Well, why don't we first look to the
12 statute? The language of 2314 itself? Which says, "Whoever
13 with unlawful or fraudulent intent transports in interstate
14 commerce any forged security." I don't think it is
15 unreasonable to say that when they talk about transporting
16 in interstate commerce, they referred to the entire journey,
17 and if the forgery takes place at any time during that
18 journey, the violation is complete.

19 MR. WHITE: Your Honor, if that were the case, then
20 that would swallow up 2315. You would never need 2315.
21 There would be no reason to have 2315. And that is our
22 point. When you read it with "from state to state" it means
23 that the document has to be in a forged condition prior to
24 its transportation.

25 Now, I will admit that the definition that I told

1 you that Congress had implanted into the Act was taken out
2 by the general code revisions in 1949, and was replaced by
3 Section 10, but the drafters of those sections, and when
4 they revised 2314 and 2315, noted that there was no change
5 in substance, there was merely changes in minor phraseology,
6 and therefore that leaves us with the same intent and the
7 same expression of Congress's will.

8 Furthermore, the Act has been amended several times
9 to provide for the same prohibitions with tax stamps and
10 forged countersignatures on traveler's checks, and in
11 several other ways. Nobody has ever bothered to change the
12 definition or make it clearer or anything, and furthermore,
13 when they put in -- when Congress wants to show in 2314 what
14 it is that they want to cover, in the third paragraph it
15 reads -- I am sorry, in the second paragraph, "Whoever
16 having devised or intended to devise any scheme or artifice
17 to defraud or the obtaining money or property by means of
18 false or fraudulent pretenses."

19 They can speak in language of intent now and intent
20 later, not in the third paragraph of this statute. It is to
21 my mind clear and unambiguous, and three circuits have so
22 found, and that basically is our position. We would cite
23 the Court, of course, to your case of United States versus
24 Barrett, where Justice Blackmun said that where Congress has
25 utilized verb tenses and subrogated them throughout the

1 entire Act, and seemed to know what they were doing when
2 they did it, then we will give full weight and be influenced
3 by that to a great degree, and in this case I think that is
4 exactly what we have.

5 If there is an ambiguity, then that should be
6 resolved in favor of the petitioner, because Congress's will
7 has certainly not been unerringly clear in this situation.
8 Otherwise, we wouldn't have these three circuits' courts of
9 appeals, and one was an en banc decision reading this
10 statute so clearly.

11 QUESTION: Would you say that he knew that that
12 check had been stolen when he --

13 MR. WHITE: Your Honor, there is no evidence that
14 the petitioner --

15 QUESTION: There isn't?

16 MR. WHITE: -- engaging in the theft.

17 QUESTION: Well, what about the old inference that
18 can be drawn from possession of recently stolen property?

19 MR. WHITE: Yes, Your Honor, he could do that, but
20 remember, he is not charged with the theft. What we are
21 dealing with here is --

22 QUESTION: No, I am just reading the statute.
23 Whoever transports in interstate commerce, and so forth, any
24 securities, and so forth, knowing the same to have been
25 stolen, converted, or taken by fraud.

1 MR. WHITE: You are talking about the first
2 paragraph, Your Honor?

3 QUESTION: Of 2314.

4 MR. WHITE: Yes, the first paragraph. That has the
5 \$5,000 limit. He couldn't have been charged -- he wasn't
6 charged with that. You see, the government was very
7 specific in this case. At the trial, the government
8 attorney announced to the court clearly what we have here
9 and what I am charging this man with is a violation of the
10 third paragraph of 2314. There was never any question that
11 he was not being charged with anything else -- or that he
12 was being charged with anything else other than that one
13 paragraph.

14 QUESTION: Well, your brief -- I am reading from
15 Page 3, going over to 4, recites that he was charged of
16 doing this in violation of 2314.

17 MR. WHITE: It is a shorthand way of saying it,
18 Your Honor, the paragraph that is involved, because we
19 clearly pointed out the paragraph, Your Honor, and the whole
20 record is replete with the fact that the judge and the U. S.
21 Attorney and the attorney and the defendant all realized
22 exactly what he was being charged with, and that is what
23 went on in the court of appeals also. There is no question
24 about the specificity of the charges in this case.

25 QUESTION: Very well.

1 Mr. Phillips?

2 ORAL ARGUMENT OF CARTER G. PHILLIPS, ESQ.,

3 ON BEHALF OF THE RESPONDENT

4 MR. PHILLIPS: Thank you, Mr. Chief Justice, and
5 may it please the Court, this case is here on a writ of
6 certiorari limited to the issue of the proper scope of the
7 interstate commerce requirement in Section 2314 of Title
8 XVIII of the United States Code.

9 Specifically, the issue is whether in a prosecution
10 for transporting a forged security in interstate commerce,
11 the government must prove that the security in question was
12 forged prior to the time the security reached its
13 destination state or whether instead the government need
14 only prove that a security was transported between one or
15 more -- between two or more states, and that prior to the
16 time it reached its ultimate destination, that security was
17 in a forged condition.

18 Petitioner has adequately stated the facts, and I
19 think it is abundantly clear from those facts that what is
20 at issue here is the transportation of a security from Ohio
21 to Pennsylvania, and the only question that is open is when
22 was the forgery, and there is essentially no evidence in the
23 record as to when the actual signature was placed on the
24 specific security.

25 The district court instructed the jury that if you

1 believe that the government has shown that the defendant
2 transported the checks while they were in a forged condition
3 within the state of Pennsylvania, the requirements of the
4 law are satisfied if that transportation was part of
5 interstate commerce. That was the instruction offered by
6 the government, and it was over the objection of the
7 petitioner.

8 The jury convicted on that instruction, and so
9 there is no dispute that what we are talking about here is a
10 conviction on the basis of the third paragraph of Section
11 2314.

12 The Third Circuit affirmed the conviction on
13 Section 2314, and it did so en banc. Nine of the ten judges
14 on the Third Circuit adopted the theory of the government in
15 this case. The concurring opinion by Judge Adams -- or,
16 excuse me, the dissenting and concurring opinion by Judge
17 Adams dissented solely from the reversal of the conviction
18 on the Dyer Act count. Judge Garth in his dissenting
19 opinion agreed with the theory of the government's case but
20 disagreed with the proof showing that the security in
21 question had been transported from Ohio to Pennsylvania.

22 And finally, only Judge Higginbotham dissented
23 basically relying on the decisions of the three other courts
24 of appeals that have held similar to the way that petitioner
25 argues in this case.

1 Frankly, from the government's perspective it is
2 fairly unusual for three courts of appeals to interpret the
3 same provision in a way that we believe is so fundamentally
4 wrong, and so it seems appropriate to begin our analysis by
5 attempting to explain how three courts of appeals have gone
6 off on that ground. Petitioner in his submission has relied
7 heavily on the presence of those decisions.

8 The source of the law in this area begins in 1961
9 in United States versus Castle, a case in which the fortuity
10 of events, which was primarily a confession on the part of a
11 defendant that he had forged documents in Maryland and then
12 transported those securities into Texas, was relied upon by
13 the court quite properly as stating each of the elements of
14 a conviction under Paragraph 3 of Section 2314.

15 That factual oddity was suddenly transformed into
16 an element of the defense indicta, frankly, by the same
17 court of appeals, the Fifth Circuit, in United States versus
18 Owens. In Owens, the evidence simply proved that the
19 defendant had attempted to cash securities that could be
20 linked back eventually to New Jersey, the securities having
21 been cashed in Louisiana.

22 Unfortunately for the government, there was no
23 proof really as to how the securities had reached Louisiana,
24 nor even how the defendant in that case had come by -- had
25 obtained those securities, and therefore there was no real

1 proof of transportation. The court threw out the conviction
2 on the basis that there was inadequate evidence.

3 Unfortunately indeed for the government, in doing so, the
4 court also said that the important element that was missing
5 was the failure to prove the fraud at the time of the
6 interstate passage, moving away from the interstate commerce
7 language, which is the lynchpin of the government's position
8 in this case.

9 That language in the opinion of the Fifth Circuit
10 was used by the Eighth Circuit in a subsequent decision
11 involving a Section 2255 review of a guilty plea under
12 Section 2314 where the defendant in that case had plead to
13 having transported securities from one state to another.
14 The court found that there had been no proof that those
15 checks had been forged in the state of origin and then
16 transported, thereby truly effectuating the final
17 development of the rule that petitioner seeks to have
18 adopted by this court.

19 That decision then was followed in turn by the
20 Tenth Circuit en banc. The decision in Sparrow, I submit,
21 reflects nothing more than the desire of the Tenth Circuit
22 to avoid a conflict among the circuits. It essentially
23 recites the prior decisions in this area and does little
24 more than cite the rule of Lenity as a basis for its
25 ultimate decision.

1 QUESTION: Mr. Phillips, suppose a check is stolen
2 in Pittsburgh and the check stays in Pennsylvania all the
3 time but it is stolen by somebody from Cleveland, and he
4 leaves the check in Pennsylvania with his colleagues and
5 goes back to Cleveland, and then he goes to -- makes a trip
6 to Pittsburgh, picks up the check, and goes to Philadelphia,
7 forges it in Philadelphia, and does whatever he did with it
8 here.

9 MR. PHILLIPS: Well, it is difficult to know
10 exactly, because the key to this is going to be whether or
11 not --

12 QUESTION: Well, I would think if you mean
13 literally what your submission is, that there is an
14 interstate movement from Cleveland to Philadelphia. It
15 doesn't make any difference whether the check itself crosses
16 a state line or not.

17 MR. PHILLIPS: Well, no, the check itself has to
18 cross the state line as --

19 QUESTION: Why? Why? Why?

20 MR. PHILLIPS: Well, at some point, it would be
21 difficult --

22 QUESTION: There is interstate commerce. There is
23 movement in interstate commerce.

24 MR. PHILLIPS: Of the defendant. We are not
25 submitting that there doesn't have to be some movement of

1 the forged security.

2 QUESTION: Well, I know, but the check is being
3 transported in interstate commerce.

4 MR. PHILLIPS: Well, it may be that it is in
5 interstate commerce. The question -- there would be
6 essentially a question for the jury to decide whether or not
7 it ever became in interstate commerce, and it may well be on
8 the facts --

9 QUESTION: Well, there is no doubt about it, the
10 fellow drives from Cleveland to Pittsburgh, picks up the
11 check, and goes on to Philadelphia, one movement. The check
12 is moving in interstate commerce, just as surely as if the
13 check was moved from Cleveland to Pittsburgh.

14 MR. PHILLIPS: It may be true, and I am not -- if a
15 jury were to convict on that theory, we would be here
16 defending that conviction.

17 QUESTION: The jury -- if the court instructed that
18 you may find that the statute is satisfied if the check just
19 moves from Pittsburgh to Philadelphia, would you object to
20 that or not?

21 MR. PHILLIPS: Well, I can imagine that there -- it
22 would generally not be the case that that would ever have
23 become in interstate commerce, because the check has never
24 begun to move in interstate commerce. The only person who
25 has moved --

1 QUESTION: Well, they begin moving in interstate
2 commerce as soon as they picked it up. It became part of an
3 interstate trip.

4 MR. PHILLIPS: Well, I suppose that you might say
5 that the defendant's movement from Cleveland to Pittsburgh
6 was sufficient to create a movement in interstate commerce.

7 QUESTION: I am sure you would. I am sure you
8 would.

9 QUESTION: If that was part of his plan.

10 MR. PHILLIPS: If that was part of his plan. But
11 we would have to demonstrate that that is all a continuous
12 movement, and certainly if that kind of movement, relying on
13 an individual from Cleveland to take up the check and move
14 it along, is designed in some way along -- to avoid
15 detection, then it even falls clearly within the intentment
16 of what Congress wanted under Section 2314.

17 QUESTION: Is there or is there not a requirement
18 in the statute that the check ever cross a state line?

19 MR. PHILLIPS: Well, certainly we need go no
20 further than that in this case, obviously, because the check
21 did go across the state line. I would think it would be
22 generally difficult to make out a case when the check
23 doesn't move across state lines.

24 QUESTION: Why would there be any difference?
25 Suppose you have the same facts you have here, except as

1 Justice White suggests, the theft was from Pittsburgh, but
2 yet he lived in Ohio, and he called up from the Ohio
3 Turnpike to Beaver Falls and said, I am on my way in, I am
4 going to pick up the check in Pittsburgh and deliver it to
5 you. He did exactly that, but it was a forged check.
6 Wasn't that exactly like this case?

7 QUESTION: Sure.

8 MR. PHILLIPS: Well, and that was the basis, I
9 suppose, for Judge Garth's concurring and dissenting opinion
10 saying the evidence was insufficient because we couldn't
11 prove that he hadn't just picked up the checks from --

12 QUESTION: So under your theory it would be all
13 right.

14 QUESTION: There is just as much basis for
15 requiring the check to cross the line in a forged condition
16 as there is to have the check cross the line at all.

17 MR. PHILLIPS: No, I don't believe that that is so,
18 Your Honor. It seems to me that all the statute says is
19 that you must transport in interstate commerce. It is the
20 check that must be in interstate commerce, not the defendant.

21 QUESTION: Well, the check is, on your theory. You
22 say there is a whole movement.

23 MR. PHILLIPS: Yes, that's right, Your Honor.

24 QUESTION: A whole movement, and if the check is
25 part of it at all, it is moved in interstate commerce. It

1 doesn't have to cross the line.

2 MR. PHILLIPS: It is transported in interstate
3 commerce. But we are not saying, moving as in interstate
4 commerce. We are simply saying transported in interstate
5 commerce.

6 QUESTION: Mr. Phillips.

7 MR. PHILLIPS: Yes, Your Honor.

8 QUESTION: Take two cases. One, that this Court
9 says that you have to forge the check before you cross the
10 state line, and you try a man, and he says, I forged it
11 after I crossed the state line. Secondly, this Court says,
12 you only can be guilty if you forge it after you cross the
13 state line, and the man is brought in, and he says, I forged
14 it before I crossed the state line. Wouldn't both of them
15 go free?

16 MR. PHILLIPS: If the rule is as you state it --

17 QUESTION: If the rule is that way.

18 MR. PHILLIPS: Yes, sir. We would have some
19 difficulty. And I suppose that is why we take the position
20 we do here, which is that we simply cannot prove when the
21 defendant forges the check. There are few events that are
22 more secret than the timing of a forgery, and that is why we
23 think that in this situation we have proved out all that is
24 required under the statute.

25 As I suggest, it seems to me that the Fifth,

1 Eighth, and Tenth Circuits, although they have in fact
2 reached results contrary to the ones we assert in this case,
3 supply petitioner with very little assistance in this case,
4 because those decisions are not based on the sort of
5 building blocks of statutory interpretation one would expect
6 to be used, that is, the specific language used in the
7 statute, the legislative history behind the statute, and the
8 relationship of this provision to other comparable
9 provisions in the code.

10 We reject, I think quite easily, the argument of
11 petitioner that there is a clear meaning to this statute
12 that precludes this prosecution. Petitioner's clear meaning
13 from the statute is derived solely from the notion that
14 would only make sense in the context of this statute
15 precluded the transportation across a state line of a
16 security, but that is not what this statute requires.
17 Instead, it forbids transportation in interstate commerce,
18 and the only way to know what transportation in interstate
19 commerce violates the statute can be decided by reference to
20 the legislative intent.

21 We suggest that the statute is at least ambiguous
22 enough to require us to look to what Congress intended. By
23 doing that, it seems to us very clear that the interstate
24 commerce requirement in the statute is designed to be a much
25 broader concept than the idea of crossing a state line.

1 Congress knew in 1919, it knew in 1934, and it knew in 1939
2 how the phrase "interstate commerce" had been interpreted by
3 this Court, and it relied on that broad concept that
4 movement in interstate commerce as a basis and with the
5 desire to stop that kind of movement in interstate commerce.

6 So that the semantic argument, it seems to us, if
7 anything, is quite clear in our favor. Moreover, our
8 semantic argument is buttressed significantly by the policy
9 of this Act, which is to crush frauds committed on
10 interstate commerce by use of the forged securities, and
11 that policy is fully implemented in a case like this where
12 the petitioner has shown himself capable of running back and
13 forth between the states of Ohio and Pennsylvania, making
14 detection of his crime difficult, and making the -- and if
15 there were not a provision like this, making prosecution for
16 his crime quite difficult.

17 It seems to me that the --

18 QUESTION: Mr. Phillips, what do you say about his
19 argument that you just used the wrong statutory provision,
20 that you should have indicted under 2315?

21 MR. PHILLIPS: Well, it may well be that petitioner
22 has violated several statutes, but one that he clearly
23 violated was Section 2314. I don't see any necessary
24 problem. The point is, he carried this security across
25 state lines and held it for a while and used it for various

1 purposes. I have no doubt that we could have prosecuted --

2 QUESTION: But we have just agreed he doesn't
3 really have to carry it across state lines, I thought, in
4 order to come within the statute --

5 MR. PHILLIPS: Well, he doesn't have to, but --

6 QUESTION: -- whereas -- and that is even clearer
7 -- pardon me?

8 MR. PHILLIPS: I am sorry. I didn't mean to
9 interrupt you.

10 QUESTION: Well, I guess we agreed on that. That
11 your position does not require that the security ever cross
12 state lines, it merely requires that it be transported
13 during a part of an interstate journey.

14 MR. PHILLIPS: In part of a -- yes, sir. That's
15 correct.

16 QUESTION: So that you get a commuter, if he picks
17 up the forgery check after he crosses the state line.

18 MR. PHILLIPS: That's correct, as long as it is all
19 part of a single transportation in interstate commerce.

20 QUESTION: But I am just wondering if there is much
21 of a federal interest at stake here if there is another
22 statutory provision that covers this precise --

23 MR. PHILLIPS: Well, I don't think that there is
24 another provision that covers this precise --

25 QUESTION: Situation?

1 MR. PHILLIPS: -- situation. I mean, it seems to
2 me that 2315, which is more concerned with receipt of these
3 kinds of securities, covers a different activity.

4 QUESTION: Well, it is receives, conceals, stores,
5 barter, sells, or disposes of. There is clearly --

6 MR. PHILLIPS: Sure, but those all involve
7 additional activities that are regarded as inimical by
8 Congress, so that it would seem to me the fact that he has
9 done more than one thing certainly is no basis for denying
10 the government the right to prosecute him on this basis.

11 It seems to me ultimately that the only basis that
12 -- the only argument petitioner really has in this case is
13 the rule of Lenity, and as I think is fairly clear, the rule
14 of Lenity is only a matter of statutory construction. It is
15 really a rule in many ways designed simply for separation of
16 powers -- interests. That is that we want to make sure that
17 Congress declares what crimes exist and how they ought to be
18 punished, and as I hope I have suggested already, Congress
19 has spoken very broadly in this statute, and clearly to
20 include this conduct as within the prohibition of the
21 statute.

22 If there are no further questions, Your Honors, I
23 would ask you to affirm the judgment of the Third Circuit in
24 this case.

25 CHIEF JUSTICE BURGER: Mr. White, do you have

1 anything further?

2 ORAL ARGUMENT OF THOMAS S. WHITE, ESQ.,
3 ON BEHALF OF THE PETITIONER - REBUTTAL

4 MR. WHITE: Yes, Your Honor.

5 Again, the government has not paid any attention to
6 the fact that when this Act was passed, Congress put a
7 definition into it, and did not rely on the broad
8 interpretation of interstate commerce that he would suggest
9 upon which they relied.

10 Furthermore, it isn't just the rule of Lenity that
11 is involved, but a public policy that Justice Marshal spoke
12 of in United States versus Bass. It is so that this Court
13 and any court can know exactly what it is that the man is
14 being tried on, and that people know what they are being
15 tried on. When this statute says, and uses the language
16 here, "whoever transports a forged document in interstate
17 commerce," and then Congress defines the words "interstate
18 commerce" as meaning from state to state, it is clear what
19 he looks at. The difference --

20 QUESTION: Well, as has been suggested by some
21 questions, must you show crossing a state line in interstate
22 commerce?

23 MR. WHITE: Yes, Your Honor, for this. You do,
24 because, Your Honor, you see, in 2315 Congress met that
25 eventuality. The situation posed by Justice White is

1 clearly covered by 2315. Again, I say that all the
2 government failed to do in this case is charge under the
3 right statute and the right section.

4 QUESTION: Well, but that argument -- but 2314 and
5 2315 aren't mutually exclusive in their coverage, and there
6 really is no reason to think that every statute Congress
7 passes is mutually exclusive from another one.

8 MR. WHITE: But it is in the same statute, Justice.

9 QUESTION: Well, but conceivably they could have
10 been aiming at two slightly different things but there would
11 have been some overlap.

12 MR. WHITE: But when they want to do that, Your
13 Honor, I would suggest that they know how to do it. They
14 did it in the second paragraph of 2314. "Whoever devises or
15 plans to devise a scheme," and so forth. And they have
16 never amended that, and three circuits have read it that it
17 is plain and clear that what it means is that under this
18 particular paragraph, not even the whole section, just this
19 same paragraph, it means what it says. The check has to be
20 forged before its interstate transportation.

21 If the government wants to charge somebody under
22 both sections, there is no prohibition against that. They
23 could have charged him with four or five sections, and
24 perhaps sustained a valid conviction. They didn't do it in
25 this case, and now the man stands convicted of the third

1 paragraph of 2314, and what the government is attempting to
2 do, as I say, is stretch that language all out of proportion
3 to what it was intended to cover because Congress already
4 covered that in the Section 2315 --

5 QUESTION: Mr. White?

6 MR. WHITE: -- and that is why the courts draw that
7 distinction.

8 QUESTION: Now, in Section 2312, which I tried to
9 ask you about before, which deals with transporting in
10 interstate commerce a motor vehicle or aircraft knowing it
11 to have been stolen, in the Barfield case, the court placed
12 the exact interpretation on that language which is parallel
13 to that that we have here.

14 MR. WHITE: Yes. You will notice that the Barfield
15 case was decided by the Fifth Circuit Court of Appeals, the
16 same court that decided Owens under 2314. The reason is
17 that it was easily sustainable in Barfield as a continuation
18 because the man was riding in the car, he was clearly
19 chargeable under Section 2 as a principal, a fact that you
20 don't have in this case. They didn't need any broad
21 interpretation of 2312, because you have Section 2.

22 If I drive a car halfway across the state, and you
23 and I are planning to drive a stolen car from Pittsburgh to
24 Cleveland, and I do part of the driving and you do part of
25 the driving to move it along, there is no question I am an

1 aider and abetter and a principal under Section 2. That
2 clearly distinguishes Barfield from the case that we have
3 here, and explains why the Fifth Circuit is the same court
4 that drew this distinction.

5 They would have held, under 2314, that it is
6 necessary that it be a stolen -- a stolen car, which it was
7 in Barfield, that crossed the state line. Here, the
8 question is, was it just a check or was it a forged check
9 that crossed the state line, and that is the distinguishing
10 factor in that case.

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

13 (Whereupon, at 2:39 o'clock p.m., the case in the
14 above-entitled matter was submitted.)

15

16

17

18

19

20

21

22

23

24

25

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:

Charles Ronald McElroy, Petitioner, V. United States No. 80-6680

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Suzanne Young

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

1982 JAN 19 AM 11 05