

ORIGINAL

**OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE**

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-5119
NELSON BELL, Petitioner
TITLE v.
UNITED STATES
PLACE Washington, D. C.
DATE April 25, 1983
PAGES 1 - 48



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IN THE SUPREME COURT OF THE UNITED STATES

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NELSON BELL, :

Petitioner :

v. : No. 82-5119

UNITED STATES :

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Washington, D.C.

Monday, April 25, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:34 a.m.

APPEARANCES:

ROY W. ALLMAN, ESQ., Fort Lauderdale, Florida; on behalf of the Petitioner (appointed by this Court).

RUDOLPH W. GIULIANI, ESQ., Associate Attorney General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

ROY W. ALLMAN, ESQ.
on behalf of the Petitioner

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RUDLOPH W. GIULIANI, ESQ.
on behalf of the Respondent

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ROY W. ALLMAN, ESQ.
on behalf of the Petitioner -- Rebuttal

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: The next case is Bell
v. United States.

Mr. Allman, you may proceed whenever you're
ready.

ORAL ARGUMENT OF ROY W. ALLMAN, ESQ.,
ON BEHALF OF THE PETITIONER

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

It is my position here in the interpretation
of the federal bank robbery statute, section 2113(b)
does not cover the crime of false pretenses. Here, as
the facts indicated in the brief, a client managed to
take some money from Dade Federal Savings and Loan by
and with their consent with an artificial trick. That
is, he altered a check which was sort of obvious had
they looked at it and took \$10,000 from this account
which he created in his own name. The check was drawn
to him. It was done totally by mistake on behalf of the
bank.

Basically what we have --

QUESTION: Mr. Allman, Daytona wasn't the
drawee of the check either, was it?

MR. ALLMAN: No, Dade Federal Savings and
Loan. It was a check which he somehow came into

1 possession of, altered the deposit number on the back,
2 i.e., put his account number after scratching out
3 somebody else's and put it in an account that he created
4 at Dade Federal Savings and Loan.

5 QUESTION: The check wasn't drawn on Dade
6 Federal Savings and Loan?

7 MR. ALLMAN: No, it was not. It was drawn
8 through somebody else for deposit to some account of the
9 person whose check it was. Basically, he got the bank
10 involved through the bank's mistake.

11 It is my position in reading the statute and
12 it has created an ambiguity. It has got the Courts of
13 Appeal -- I think it is five to four now -- construing
14 this statute both narrowly and broadly. The bank
15 robbery statute which in 1934 was specifically limited
16 to bank robbery amended in 1937 to include the terms
17 "burglary and larceny", and in 1937 interpreted and
18 argued by the government that, in fact, this covered
19 only common law larceny.

20 So the position now -- The former Fifth
21 Circuit now the Eleventh first went along with my
22 arguments in my brief then en banc reversed itself and
23 took the broad position that 2113(b) covered the crime
24 of false pretense. The reason all this has come about
25 is the way this Congress drew the statute.

1 The statute was drawn as follows: It
2 indicated that you take and carry away, steal, or
3 purloin, words that are not necessarily defined
4 specifically at common law but are in fact defined now
5 generically. But in 1934, 1937 were contemplated in the
6 common law sense.

7 What has happened is this. In 1934 a broad
8 bank robbery statute in dual form was submitted to the
9 House Judiciary Committee. The Committee considered
10 this bill and specifically, specifically rejected the
11 aspects of the bill that covered crimes of false
12 pretense, embezzlement and other crimes by trick or
13 consensual takings and restricted it to the forceful
14 robbery concept. Thus, the title of the Act, the text
15 of the bill and the thrust of the situation in 1934 with
16 the gangster-style bank robberies going on.

17 Subsequently, apparently in briefly reading
18 the Act the prosecutors have brought prosecutions of
19 people who take money from banks in various types of
20 ways, false checks, forgeries, false pretenses, trick,
21 deceit, fraud, et cetera. Four districts have gone
22 along with this. Four districts have not.

23 However, the Supreme Court itself in Jerome in
24 1943 took the position and the government took the
25 position that the Bank Robbery Act, 2213(b) was a common

1 law situation defining the crimes it intended to
2 proscribe as robbery, burglary, and larceny even though
3 the Act eventually uses the terms "steal, purloin, take
4 and carry away," which are not specific to those crimes.

5 In Turley, the Supreme Court gave us some
6 indications how we should interpret these nonspecific
7 common law terms. What they have said is this. You
8 look to the legislative history of the Act. In this
9 case specifically in Le Master the Ninth Circuit looked
10 at the legislative history in great detail and quoted
11 directly from it saying they could not do better than
12 the analysis which they put forth of the legislative
13 history which showed specifically the Act was originally
14 intended to be broad. It was tightened and limited to
15 robbery in 1934 and then extended to burglary and common
16 law larceny only in 1937.

17 For this reason the factual situation that Mr.
18 Bell put himself in unwittingly exempted him from
19 prosecution under 2113(b). In the dissent in the
20 Eleventh Circuit the judge said it is not a question
21 that Mr. Bell has committed some kind of a crime.

22 However, the crime he committed is not
23 contemplated in 2113(b) because the legislative history
24 combined with the title to the Act combined with the
25 fact that the Act contemplated a, shall we say, active

1 or violent taking away from, robbery, burglary, some
2 kind of active, moving type of crime as opposed to the
3 act of crime of false pretenses. That is something
4 stealthily done.

5 It is our position if you follow Turley and
6 the appellate courts that look at Turley carefully and
7 analyze the guidelines in Turley and apply them to the
8 act in this case including the context of the Act, that
9 is robbery, violent acts, taking away, carrying away,
10 that type of thing with the fact that they were
11 specifically in the bill in the House investigation of
12 what they should do about the robbery situations
13 occurring in the '30s took and eliminated the crime of
14 false pretenses from the purview of this Act. It is my
15 conclusion and I think the only conclusion that is
16 reasonable if you take the Act and interpret the
17 ambiguities in it in accordance with what has happened,
18 legislative --

19 QUESTION: You agree you must resort to
20 legislative history to win your case?

21 MR. ALLMAN: Yes, I do, Judge, and I think in
22 the Ninth Circuit Le Master analyzed the legislative
23 histories of 2113(b) even though Turley was a --

24 QUESTION: What is the ambiguity in the
25 statute? Do you think it is what meaning you give to

1 steal --

2 MR. ALLMAN: Steal and purloin, yes, sir.

3 QUESTION: Because there was a carrying away
4 of money with some kind of an intent to -- At least the
5 person knew he was not entitled to the money.

6 MR. ALLMAN: There is no question about that,
7 Judge. He committed a crime probably a state crime
8 involving the generic term. He stole. He took somebody
9 else's property.

10 QUESTION: But Jerome at least used words that
11 had some common law meaning like larceny --

12 MR. ALLMAN: Larceny --

13 QUESTION: -- and things like that, but steal
14 or purloin does not have that kind of meaning.

15 MR. ALLMAN: It is a generic term. That is
16 correct, and that creates the ambiguity in this sense.
17 If you look at the history of the law, if they intended
18 to cover that type of crime they would not have
19 eliminated specifically the crime of false pretenses as
20 they did in the legislative debates that created the
21 robbery statute.

22 They wanted to leave the states with that type
23 of crime specifically focusing the federal law on the
24 crime involving robbery, active carrying away, the
25 violent gangster-type crime that initiated this

1 situation. That is my analysis of that ambiguity
2 situation, Judge.

3 In Turley where they were interpreting the
4 direct act of the interstate transportation of stolen
5 motor vehicles that type of thing, stolen was construed
6 consistently with the legislative history to be a broad
7 thing where the federal government had an interest in
8 controlling interstate transportation of stolen
9 vehicles. In this case it is the exact opposite.

10 The Congress specifically eliminated the crime
11 of false pretenses in its debate before creating the
12 statute. That is analyzed very well, I think, in Le
13 Master, the Ninth Circuit decision which is inconsistent
14 with the other four decisions in applying Turley to the
15 word "stolen" in the context of the statute along with
16 the legislative history. The only conclusion I think
17 you can come to reasonably if you look at Le Master and
18 go along with Turley is that 2113(b) was a restrictive
19 statute and the government used to argue in 1937 that in
20 fact it was a restrictive statute.

21 QUESTION: Are there any other statutes that
22 would make it a crime to get money from a bank other
23 than by this violent kind of crime?

24 MR. ALLMAN: Yes, there are, Judge. I think
25 every state in the Union has a generic term which they --

1 QUESTION: I mean any other federal law, any
2 federal law.

3 MR. ALLMAN: Yes, as a matter of fact, a
4 recent case, Williams. The Williams case construing, I
5 think it was 1025, indicates that, and this Court held
6 recently, I think it was 1982 that unless the Congress
7 specifically says in so many words that this is the
8 proscribed act, we will not expand the congressional
9 intent to cover a generic-type situation.

10 In analyzing the legislative history in
11 Williams, this is exactly what they did. The government
12 was seeking to place a broad concept on the word's use
13 in the statute where Congress in its legislative history
14 did not intend to say --

15 QUESTION: I will put it another way. Does
16 this Act go as far as any Act towards covering false
17 pretenses kinds of crime, or are there some other
18 statutes that might reach false pretenses?

19 MR. ALLMAN: There are other statutes both
20 state and federal. I believe --

21 QUESTION: I mean federal.

22 MR. ALLMAN: Okay.

23 QUESTION: Or does this come as close as any?

24 MR. ALLMAN: I believe this comes about as
25 close as any. There are other statutes that cover, for

1 instance, the card sharpening statute which specifically
2 contemplated false pretenses by specific language which
3 I cite in my brief. I can't recall the case name at
4 this time.

5 However, in that case the Congress
6 specifically said card sharpening and false pretenses is a
7 federal crime on the high seas -- It was gambling off
8 the shore of New Jersey or something like that --
9 specifically enumerated by Congress. This is the
10 reverse. In this case Congress specifically
11 contemplated a broad bank robbery statute in the House
12 bill and rejected it.

13 QUESTION: Well, do some of the cases on
14 either side of this issue -- Do some of them relate to
15 say giving a bank false information in an application
16 for a loan and getting money from --

17 MR. ALLMAN: That is Williams. That was
18 decided in 1982. That is the one --

19 QUESTION: Well, couldn't this defendant
20 perhaps have been charged under that section 1014?

21 MR. ALLMAN: I don't believe so, Your Honor.
22 Reading that as a false statement report to get money to
23 lend. I guess that is probably inducing a bank to lend
24 you money by false statement or some other
25 misrepresentation. That is the way I read Section 18

1 U.S.C. 1014.

2 QUESTION: Well, he certainly got money by
3 means of false statements here.

4 MR. ALLMAN: Well, in reality he took
5 advantage of the bank's mistake. He basically forged
6 the check, eliminated the back deposit number, put his
7 number and name on it and deposited it. The bank didn't
8 look at the check and paid him the money. The false
9 statement I guess -- He induced the bank by trick or
10 fraud to give him somebody else's money is what he did.

11 There is no question about it. He committed a
12 crime. The only problem was the crime was not 2113(b).

13 QUESTION: Have the liabilities been settled
14 as between the Dade Federal Savings and whatever bank
15 the check was drawn upon in this case?

16 MR. ALLMAN: I am not certain about that, but
17 I am certain that Dade Federal guaranteed his
18 endorsement and, therefore, they ultimately would have
19 paid for their mistake, I'm sure.

20 It is an interesting footnote that the money
21 this man got by this means was taken from him in a
22 burglary apparently. That is immaterial, I guess.

23 (Laughter)

24 QUESTION: In 1014 Congress has protected the
25 bank against false statements in loan applications?

1 MR. ALLMAN: Yes, sir.

2 QUESTION: So it really has not left to the
3 states in all circumstances the false pretenses crimes,
4 all of them?

5 MR. ALLMAN: I would agree with that 100
6 percent, yes, sir.

7 QUESTION: Well, here is just another arguably
8 did not leave the false pretenses kind of crime involved
9 in this case.

10 MR. ALLMAN: I would have no problem with that
11 in resolving the ambiguity in saying stolen or purloined
12 if the legislative history had not specifically
13 eliminated the crime of false pretenses. In Le Master,
14 in Jerome if you look at the Le Master case, the House
15 Judiciary Committee had a very broad bill. They
16 accepted one provision and eliminated two others.

17 Specifically section 2 said it should be a
18 crime for anybody to trick a bank in any way shape or
19 form, false pretenses or whatever and accomplish the
20 taking of money from said bank. This was not enacted in
21 the statute. It was contemplated and eliminated
22 specifically in 2113(b). That is why I think it is
23 different.

24 I think it would be a good result had they
25 left it in, but they did not. That is my problem with

1 2113(b) in this prosecution.

2 QUESTION: What would he have been charged
3 with under state law? Do you suppose forgery?

4 MR. ALLMAN: Larceny. Straight larceny.

5 QUESTION: I know but how about --

6 MR. ALLMAN: Forgery.

7 QUESTION: He forged somebody's name, did he
8 not?

9 MR. ALLMAN: In reality forgery is given very
10 broad definition in Florida. If you do something that
11 alters something to your benefit --

12 QUESTION: Well, he purported to be the payee,
13 did he not?

14 MR. ALLMAN: Yes. He removed for deposit only
15 to some account number. He scratched that out, for
16 deposit only, me, my account number. That is exactly
17 what he did. The bank chose to ignore the fact that he
18 scratched out the prior limited endorsement, and they
19 guaranteed his endorsement. That was the bank's mistake.

20 But that is not a crime under 2113(b) and that
21 is the whole problem here. It should be, but it is
22 not. The Congress chose to eliminate that specifically
23 in the legislative history, and that is the problem.

24 QUESTION: Is there not an aspect of the
25 legislative history that you have not addressed at least

1 yet? In the '34 bill they broke it into two parts,
2 consensual takings and nonconsensual takings and it was
3 with the consent of the bank that the artifice and trick
4 line which appeared. But in the '37 bill there is no
5 division between consensual and nonconsensual from which
6 one might infer, I am not sure this is right, that the
7 statute was intended to cover both categories and once
8 it covers both categories you do not need the artifice
9 language because takes and carries away is enough to
10 take care of it. Anyway, you see what I mean.

11 MR. ALLMAN: You could argue that, Judge, but
12 when Congress has done something specifically and not
13 later taken corrective action as they have done in other
14 cases --

15 QUESTION: They did take out the words
16 "without the consent of the bank," which was also in the
17 '34 bill.

18 MR. ALLMAN: The bill which was not enacted
19 into law --

20 QUESTION: Correct. That bill said without
21 the consent of the bank was one of the two alternatives,
22 but that language is not in the '37 Act.

23 MR. ALLMAN: That is correct. If you look at
24 the '37 Act, the Attorney General said, look, we have
25 got a robbery statute but if there is nobody around and

1 the guy comes in and takes the money off the counter and
2 walks out, we do not have a robbery. We cannot
3 prosecute him under our Bank Robbery Act.

4 Therefore, we should change the Act as
5 follows: make it burglary, you do not have to put
6 anybody into fear to take the money, and larceny, common
7 law larceny. At that time the government argued, yes,
8 the definition is common law larceny --

9 QUESTION: If they wanted just to cover that
10 situation, should they not have said takes and carries
11 away without the consent of the bank because in that
12 situation there would have been no consent --

13 MR. ALLMAN: That is correct.

14 QUESTION: --the one that they are talking
15 about specifically. Somebody came in and found the
16 money on the counter.

17 MR. ALLMAN: Takes and carries away, steals,
18 or purloins. That is an inaccurate common law larceny
19 definition basically. It is a little broader than
20 that. I agree with you.

21 QUESTION: You are suggesting the statute
22 should be read as if it included the words "without the
23 consent of the bank?"

24 MR. ALLMAN: If we are going to separate the
25 part -- False pretenses gets us to the fact that they

1 tricked him. The bank gave consent to take it, yes.

2 With the larceny situation, and I think as the
3 statute reads and as Congress intended it contemplated
4 an active, violent, robbery, burglary concept, coming in
5 and taking something, not coming in talking to the
6 teller, putting a check in, going back, waiting the
7 20-day period and then withdrawing the money at their
8 leisure taking a chance that the bank would not detect
9 this.

10 This is not common law larceny. This is false
11 pretenses. Le Master specifically addressed this issue
12 and said the statute does not cover it.

13 QUESTION: Well, Mr. Allman --

14 MR. ALLMAN: Yes, sir?

15 QUESTION: --wasn't common law an element of I
16 think they call it asportation in larceny. Was that not
17 just taking and carrying away requiring a removal right
18 them so to speak?

19 MR. ALLMAN: This is the way I feel and this
20 is what I think Congress was concerned with. They were
21 concerned with, I think, the violent aspect, taking and
22 carrying away, the robbery concept. This is the Federal
23 Bank Robbery Act. Twenty-one thirteen (b) is, I think,
24 a lessening of the requirement for violence but
25 requiring still the nonconsensual taking away.

1 QUESTION: Certainly it does not have to be
2 robbery. It could be burglary.

3 QUESTION: Burglary or larceny, but the quick,
4 violent active type of crime that Congress was
5 addressing in this matter, if you look at legislative
6 history and if you look at the interpretation in Turley,
7 Turley says how are we going to interpret the words
8 "steal and purloin?" Purloin could mean by stealth, but
9 it is still the same concept. All the tellers go to the
10 coffee machine. He comes in sees the money on the table
11 picks it up and walks out.

12 That is a larceny. Like you say, there is no
13 consent from the bank. In this case the bank helped him
14 commit this crime by a mistake. He tricked the bank as
15 just as though he tricked the people who had the money.
16 That is why Congress in limiting itself to the violent
17 type of crime specifically said, we do not want to cover
18 the crime of false pretenses by eliminating section 2 in
19 the 1934 bill and again in 1937 not specifically
20 enacting it.

21 QUESTION: When you say a violent I take it --

22 MR. ALLMAN: I mean active.

23 QUESTION: --burglary could certainly obtain
24 at 3:00 in the morning and no guards around. There
25 would be no violence but there would be an immediate

1 removal.

2 MR. ALLMAN: Nonconsensual, active taking
3 away, yes, sir. That is my problem with this statute
4 applying to this case.

5 QUESTION: Why is this less a removal than
6 taking it a 3:00 in the morning when they happen to
7 leave the door open?

8 MR. ALLMAN: It is both a removal. There is
9 no question about it. It is a crime. The difference is
10 this --

11 QUESTION: He carries it away in both cases
12 does he not?

13 MR. ALLMAN: I'm sorry?

14 QUESTION: He carries it away in both cases?

15 MR. ALLMAN: Yes. He carries it away. There
16 is no question about it. The difference is in this case
17 Congress considered the option of covering consensual
18 trickery or crimes by the bank coming in and being
19 suckered into a deal. They considered that. They
20 specifically eliminated it in 1934.

21 If they had intended and if it had been a
22 problem as the burglary and larceny aspects, the
23 original statute was inadequate to cover the immediate
24 taking and nonconsensual carrying away type thing, so in
25 '37 they amended it. They changed it.

1 But they did not go back to section 2 which
2 they eliminated in 1934 and say this shall include
3 either by implication and interpretation the trick,
4 false pretense. False pretense was not larceny ever
5 under definition in common law. False pretense was a
6 separate crime primarily because they got possession and
7 title. The larceny thing they got possession with the
8 consent.

9 In this case the bank intended him to have the
10 money. They thought it was his money. They had made a
11 mistake. He had involved the bank in a crime but not
12 the crime under 2113(b) because there was no
13 nonconsensual taking away. There was a consensual
14 tricking of the bank not covered by this statute. The
15 legislative history is specific on that. They could
16 have put it in. They did not.

17 In Williams this Court absent support in
18 legislative history for the design of a statute to apply
19 to the specific conduct, this Court, the Supreme Court
20 holds it is not proscribed. That is not the conduct
21 approached in this statute. That was the conclusion in
22 Williams in 18 U.S.C. 1014.

23 We have an analogous situation. Just recently
24 the Supreme Court again said consistent with the
25 approach of lenity the construction of a criminal

1 statute shall be specific. They shall not be presumed
2 to take over the state's role in prosecuting crimes.

3 The federal bank robbery statute approaches
4 and addresses itself specifically according to
5 legislative history the nonconsensual, violent or active
6 taking away from a bank not false pretense which was
7 contemplated and rejected. This is my whole problem
8 with 2113(b) in this case.

9 QUESTION: Am I correct that if you win your
10 man goes free and that the statute is wrong in the state
11 case? Am I right?

12 MR. ALLMAN: No, sir. The statute is not
13 wrong in the state case --

14 QUESTION: It has not?

15 MR. ALLMAN: -- and I think ultimately that is
16 what the courts are doing. They are making sure that
17 somebody who does something that is wrong is punished.
18 I think what is happening is they are stretching the
19 statutes to far when the congressional intent was
20 specific not to stretch it to this crime.

21 I think what really happened and basically
22 what we are talking about is the prosecutor charged him
23 with the wrong statute. He could have turned it over
24 the the state. The man would have been punished. He
25 made a mistake.

1 In the dissent they admit he committed a
2 crime. He did something wrong. There is no question
3 about that. The problem is is it going to be punished
4 or are we going to let him go because he was charged
5 with the wrong statute. Unfortunately, under the law a
6 few guilty men must escape so that the law maintains its
7 integrity.

8 I have reserved some time for rebuttal if I
9 might.

10 CHIEF JUSTICE BURGER: We will resume at 1:00.

11 (Whereupon, at 11:57 a.m., the Court recessed,
12 to reconvene at 1:00 p.m. the same day.)

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1 AFTERNOON SESSION

2 (1:00 p.m.)

3 CHIEF JUSTICE BURGER: Mr. Giuliani.

4 ORAL ARGUMENT OF RUDLOPH W. GIULIANI, ESQ.

5 ON BEHALF OF THE RESPONDENT

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

8 The Petitioner in this case obtained
9 possession of a \$10,000 check that did not belong to him
10 to be deposited into a savings account at the Dade
11 County Savings and Loan Association. Petitioner opened
12 an account at the Dade County Bank using a false
13 address, birthdate and social security number.

14 He then deposited the stolen check into this
15 new account at another branch of the Dade Bank using a
16 second false address and having altered the account
17 number on the check to state his own new account
18 number. After a 20-day holding period, Petitioner
19 withdrew \$10,000 plus interest from this account.

20 In plain every day English, Petitioner stole
21 \$10,000 plus interest that at the time belonged to the
22 Dade County Bank, a bank insured by the Federal Deposit
23 Insurance Corporation. The bank theft statute, 18,
24 U.S.C. section 2113(b) prohibits anyone from taking and
25 carrying away with intent to steal or purloin money

1 belonging to a bank insured by the FDIC. In plain --

2 QUESTION: Mr. Giuliani, did he take cash?

3 MR. GIULIANO: Yes, Your Honor, I believe he
4 did.

5 In plain English that is precisely what
6 Petitioner did. He stole \$10,000. In order to avoid
7 the express language of this prohibition, Petitioner
8 urges that the words do not mean what they say but
9 instead should be read to mean that Congress in 1937
10 meant to prohibit solely larceny at common law. That is
11 trespassory taking or taking without consent.

12 QUESTION: Was there any other federal statute
13 which conceivably could have covered his action here?

14 MR. GIULIANO: I do not believe so, Your Honor.

15 QUESTION: Not 1014?

16 MR. GIULIANO: Ten fourteen would not because
17 this would under your own decision in 1014 this would
18 not have amounted to an extension of credit.

19 QUESTION: The Court's decision.

20 MR. GIULIANO: Yes, Your Honor.

21 Crucial to the crime of larceny at common law
22 was a trespass really a physical invasion because
23 primitive criminal law was concerned only with
24 protection against force or violence. A trespass was
25 necessary for any crime to be felonious.

1 As the criminal law developed, however, and
2 expanded to protect other interests including property
3 rather than acknowledging the changing nature of the
4 law, the Courts in England engaged in fiction to avoid
5 the reality of reversing prior precedents. So crimes
6 such as larceny by trick and unilateral mistake developed
7 so that it was larceny to trick someone out of
8 possession of that money, but it would not constitute
9 larceny if the owner of the money had also turned over
10 title.

11 If Petitioner's argument is accepted and these
12 ancient distinctions are revived, it would be a
13 violation of section 2113(b) if a person cashing a check
14 for \$100 mistakenly received \$1,000 from the teller,
15 realized that mistake and decided to keep it and walked
16 out of the bank because that at common law would have
17 amounted to larceny by trick in the sense that according
18 to the fiction only possession had been turned over, not
19 title.

20 If, however, that same --

21 QUESTION: Is the same true that that would
22 have been a violation of state law?

23 MR. GIULIANO: Pardon me, Your Honor?

24 QUESTION: That would be a violation of state
25 law, I assume?

1 MR. GIULIANO: I assume it would be.

2 QUESTION: Just in a broader sense, what is
3 the reason why these cases ought to be in the federal
4 court rather than the state court?

5 MR. GIULIANO: Well, Your Honor, the banks --

6 QUESTION: I understand it is a federal
7 insurance at a bank, but nevertheless it is a state
8 crime as well. Just in terms of allocating law
9 enforcement resources, why would this not be a good
10 category to leave to the states?

11 MR. GIULIANO: Well, first of all there is
12 potential federal liability in the sense of all of these
13 banks are insured by the Federal Deposit Insurance
14 Corporation --

15 QUESTION: I understand.

16 MR. GIULIANO: -- and it is our view that this
17 is precisely --

18 QUESTION: I am not too sure that the statute
19 does not limit it to those. It says any bank. The
20 statute says any bank, those insured or not would it not?

21 MR. GIULIANO: No, Your Honor, it would have
22 to be either a--

23 QUESTION: Are all banks insured?

24 MR. GIULIANO: I do not believe all banks are
25 insured, Your Honor, it would have to be --

1 QUESTION: Well, the statute says all banks.
2 Does it not?

3 MR. GIULIANO: Well, it should be --

4 QUESTION: Or any bank, credit union, or any
5 savings and loan association, so it applies to all banks.

6 MR. GIULIANO: Now it does. At the time that
7 this amendment was passed in 1937 it was passed
8 specifically to apply to banks that were insured by the
9 Federal Deposit Insurance Corporation.

10 QUESTION: But the statute we are operating
11 under says all banks.

12 MR. GIULIANO: It has been expanded since
13 then. That is correct, Your Honor.

14 QUESTION: It says all banks. That is the one
15 we are operating under?

16 MR. GIULIANO: That is correct.

17 QUESTION: I join Justice Stevens. I do not
18 see what the federal government's interest is in any
19 bank. An uninsured bank, what interest would the
20 federal government have? In stealing money from an
21 unfederally uninsured bank?

22 MR. GIULIANO: First of all, Your Honor, this
23 particular bank was not an uninsured bank. This bank
24 was insured by the Federal Deposit Insurance
25 Corporation. The statute that we are construing here

1 was passed in order to protect the assets of federally
2 insured banks and that is one of the reasons why we
3 argue for an interpretation that would include all forms
4 of theft.

5 QUESTION: Is it not it was passed in response
6 to a specific problem. John Dillinger and some of his
7 friends were running around the country crossing state
8 lines holding up banks all over the place. Was that not
9 what caused this statute to be enacted?

10 MR. GIULIANO: No, Your Honor, that is what
11 caused the 1934 Act to pass.

12 QUESTION: Right, and then they picked it up
13 to take care of the fellow who walks in and finds the
14 money on the counter.

15 MR. GIULIANO: But I think there is a very big
16 difference between the 1934 Act and the 1937 Act. The
17 1934 Act when it originally was proposed by the Attorney
18 General would have covered all forms of taking. It
19 would have covered robbery, burglary, and larceny both
20 with and without consent.

21 QUESTION: I suppose one explanation on the
22 policy issue is that that is the way Congress decided it
23 should be. Congress enacted the statute.

24 MR. GIULIANO: But, Your Honor, I do not
25 believe that that gives effect to what the 1937 Congress

1 did.

2 QUESTION: No, my point is only with respect
3 to the policy question that was suggested that why does
4 the federal government get into it. The answer is
5 because Congress says.

6 MR. GIULIANO: That is precisely correct.

7 QUESTION: Why didn't you read the statute
8 correctly?

9 QUESTION: If it did not say that you would
10 make precisely the same argument to the contrary.

11 MR. GIULIANO: Well, our argument is simply
12 that the plain language of the statute if you put aside
13 distinctions that are 200 and 300 years old and have
14 been criticized for 200 or 300 years as just introducing
15 technicalities into the law that have no equity. If you
16 read the plain language of the statute it certainly
17 covers the conduct of this Petitioner taking and
18 carrying away \$10,000.

19 Then when you look at the legislative history
20 of the 1937 Act and what Petitioner has done is to
21 confuse the legislative history of the 1934 Act with the
22 legislative history of the 1937 Act. There is no doubt
23 that the 1934 Act was limited to bank robberies. The
24 House so limited it. Their concern was the Bonnie and
25 Clyde gangster bank robbers who moved around state to

1 state.

2 QUESTION: Not just burglaries but robberies.

3 MR. GIULIANO: Only robberies in 1934. In
4 1935, however, a significant fact occurred. Congress
5 expanded the coverage of the bank robbery statute to
6 cover not only federal reserve banks and banks chartered
7 by the federal government, but in 1935 Congress expanded
8 it to cover all banks insured by the Federal Deposit
9 Insurance Corporation, a much larger and greater area
10 now of potential federal liability.

11 So that in 1937 when the Attorney General went
12 back to Congress, he asked the Congress to expand the
13 coverage of the 1934 Act to include burglary and larceny
14 and he used new words to define larceny, not the old
15 words that we used in '34 but new words. The words that
16 he used were "taking and carrying away with intent to
17 steal or purloin" so that the purpose of the '37
18 Congress cannot be the same as the limited purpose of
19 the '34 Congress.

20 The purpose of the '37 Congress goes beyond
21 merely being concerned about taking by force and
22 violence.

23 QUESTION: Mr. Giuliani, what if Mr. Bell
24 instead of being an outsider here had been a teller in
25 the Dade Federal Savings and Loan Association and had

1 simply embezzled \$10,000?

2 MR. GIULIANO: That would be covered by a
3 separate statute that had a federal embezzlement statute
4 that applies to agents and employees of the bank. That,
5 in fact, had already been a violation of federal
6 criminal law, I believe, at the time these statutes were
7 passed.

8 QUESTION: Would you say it was covered also
9 by this statute?

10 MR. GIULIANO: It could be covered by this
11 statute as well.

12 QUESTION: Does that mean you think it might
13 be but you are not sure?

14 MR. GIULIANO: No, I believe that the purpose
15 of the Congress in 1937 was to broadly prohibit theft
16 from a federal bank. That term was defined then as a
17 generic term.

18 QUESTION: So the taking away requirement is
19 really almost done away with because in the facts of
20 this case you have Bell actually taking \$10,000 that did
21 not belong to him, dollar bills, so to speak, or tens or
22 hundreds, but in the embezzlement thing it is just
23 basically a credit or a ledger transaction. You say
24 that is covered, too?

25 MR. GIULIANO: No. It does not have to be

1 covered, Your Honor. You do not have to go that far
2 because at the time that this statute was passed
3 embezzlement was already a crime.

4 QUESTION: But I am not trying to strike a
5 bargain. I am just trying to find out how high you
6 think the statute should be interpreted.

7 MR. GIULIANO: The statute should be
8 interpreted to reach theft offenses, larceny, larceny by
9 trick, and taking by false pretenses.

10 QUESTION: How about embezzlement?

11 MR. GIULIANO: It does not have to be read and
12 should not be read to reach embezzlement. Embezzlement
13 is already covered by another federal statute.

14 QUESTION: Do you think embezzlement is a
15 taking away? At least there is a taking away here, is
16 there not?

17 MR. GIULIANO: Yes, Your Honor, there clearly
18 is.

19 QUESTION: If there was an embezzlement, why
20 would the statute not cover it?

21 MR. GIULIANO: Well --

22 QUESTION: We have other instances where an
23 act we have already recognized it that, I think it is in
24 the bank field, where the same act violates two
25 different criminal statutes.

1 MR. GIULIANO: You could interpret -- The
2 statutes could cover the same ground. There is no doubt
3 about that.

4 QUESTION: What about the false applicaton on
5 a loan application? A false statement on a loan
6 applicaton, that is covered in another section.

7 MR. GIULIANO: That is covered in 1014.

8 QUESTION: Was that on the books in '37?

9 MR. GIULIANO: I do not know if it was or not,
10 if it was on the books in '37 or not, Your Honor. The
11 embezzlement statute was a crime prior to 1934. I do
12 not know about section 1014.

13 To assume that Congress in 1937 had
14 reintroduced these distinctions would mean that it would
15 be a violation of this statute if someone mistakenly
16 received \$1,000 as I said before and decided to keep
17 it. But it would not be a violation of this statute if
18 he stole checks, forged those checks, presented those
19 checks to a bank and over a period of time depleted the
20 bank of unlimited amounts of money because at common law
21 one would constitute larceny by trick because there had
22 only been a cheating of possession and the other would
23 constitute taking by false pretenses.

24 Petitioner and the few Circuits supporing his
25 view in our view confused the purpose of the 1934

1 Congress with the purpose of the 1937 Congress and
2 interpret those purposes as being exactly the same. The
3 1934 bill as presented by the Attorney General and
4 passed by the Senate would originally have prohibited
5 robbery, burglary, and larceny defined actually as both
6 taking by false pretenses and larceny at common law.

7 The House Judiciary Committee struck the
8 burglary and the larceny provision not as Petitioner
9 would have it because of some concern over the reach of
10 common law larceny. There was no discussion of common
11 law. There was no discussion of common law
12 distinctions. The word never even came up in the
13 legislative history.

14 That Congress, the 1934 Congress was concerned
15 with limiting the crime to reach the situation of
16 interstate gangster bank robbers and wanted to limit the
17 crime just to robbery and not to embrace burglary or any
18 form of larceny. The 1937 Congress when it took up this
19 subject again clearly had a different purpose than the
20 1934 Congress.

21 The 1937 bill was intended to broaden coverage
22 beyond robbery, beyond just merely taking by force and
23 violence to cover burglary and larceny. Concededly
24 under everyone's interpretation of this statute, it
25 would cover crimes such as taking money mistakenly given

1 by the bank or larceny by trick, scarcely crimes that
2 are committed by the Bonnie and Clyde interstate bank
3 robbers.

4 Once Congress removed the force and violence
5 limitation and expanded the statute to reach nonviolent
6 theft as well as fraudulent theft, it cannot be logical
7 to ascribe to the 1937 Congress the same intent as the
8 1934 Congress. Rather the more logical and sensible
9 conclusion is that in expanding the statute the intent
10 of the 1937 Congress was to give broad protection to
11 banks whose assets were insured by the Federal Deposit
12 Insurance Corporation.

13 Now the choice of words that Congress used, I
14 believe, is very important. The Petitioner relies very
15 heavily on the fact that Congress selected the words
16 "take and carry away" and the title larceny as if those
17 two formulations are code words for all of the ancient
18 distinctions of common law larceny.

19 By 1937, however, the words "take and carry
20 away" as well as the term "larceny" no longer were
21 limited solely to describing common law larceny. In
22 fact, in the 1934 bill which passed the Senate it used
23 the words "take and carry away" to go on and define
24 takings without consent which would have been common law
25 larceny and then taking and carrying away with consent

1 which at ancient common law would have been a false
2 pretenses.

3 As this Court has noted in the Turley
4 decision, by 1919 the law of many states had developed
5 to include not only common law larceny but larceny by
6 trick and false pretenses in their prohibition of
7 generic larceny and theft offenses. This Court, in
8 fact, in the Jerome case twice used the label larceny
9 for a description of crimes including false pretenses
10 and pointed out that Congress did so in the legislative
11 history to the 1934 Act.

12 Thus, by 1937 to conclude mechanically and
13 dogmatically that larceny means solely common law
14 larceny and that takes and carries away means the same
15 thing that it meant in the 18th century is to ignore the
16 contemporary use of those words both common use and use
17 as words of art.

18 QUESTION: Mr. Giuliani, speaking of the
19 Jerome case, in Jerome the Court held the burglary
20 prohibition of section 2113(a) did not cover this act
21 and the underlying act in Jerome was, I think, uttering
22 a forged check. Under your theory, could the government
23 have brought that action under subsection (b) then?

24 MR. GIULIANO: No, Your Honor, because
25 actually it was an incomplete crime. The crime was

1 never completed in Jerome in the sense of a taking and
2 carrying away.

3 The Jerome case does contain dicta --

4 QUESTION: That is contrary to your position.

5 MR. GIULIANO: That is contrary to the
6 position that the government is now arguing. At the
7 same time the Prince case contains dicta that supports
8 precisely what the government is arguing.

9 The Jerome case really involves in our view a
10 very different issue. It involved a question of whether
11 in determining whether Congress meant to cover in the
12 burglary section a situation where a person enters a
13 bank with intent to commit a felony.

14 Did Congress mean by felony, felony under the
15 laws of all the states in which case what it would have
16 read into the federal statute all the differing
17 interpretations and definitions of felony, high
18 misdemeanors and misdemeanors that vary in the 48 states
19 or not.

20 It came to the conclusion actually which is
21 supportive of our position that you should not read
22 felony to mean what felony meant at common law and that
23 you should give it an interpretation consistent with the
24 purpose of the 1937 amendment which is precisely the --

25 QUESTION: If the act had been completed in

1 the Jerome situation, could the government have
2 prosecuted under subsection (b)?

3 MR. GIULIANO: Yes, I believe so. It would
4 actually be a taking of the money.

5 QUESTION: Could the government in the case
6 that we had last term in Williams have prosecuted for
7 the check kiting scheme under this subsection?

8 MR. GIULIANO: If the scheme had actually been
9 completed in the sense that check kiting you have the
10 ambiguity as to whether or not the person intends to
11 make good on the check in the period of time between the
12 time that they write the check and the time that the
13 check is actually finally negotiated. If, in fact, the
14 person goes through with the check kiting scheme and
15 takes away the money then you really move out of the
16 strict definition of check kiting and you have an actual
17 theft of the money.

18 In looking at the language that was struck by
19 the 1934 Act, the Petitioner ignores several crucial
20 points, and I think makes more of that than the
21 legislative history can sustain. The 1934 Congress as I
22 said before was concerned with a situation of robberies
23 and limited the language to robberies. It was not in
24 any way, didn't evince any concern at all with the
25 coverage of larceny as either being common law larceny

1 or false pretenses so there was not a specific striking
2 of the language because Congress was concerned with any
3 of these distinctions as between common law larceny and
4 false pretenses.

5 In 1937 the new language that was presented
6 was significantly different. It deleted the words "with
7 consent of the bank" which would have covered false
8 pretense, but as Mr. Justice Stevens noted before it
9 also deleted the words "without consent" which would
10 have clearly defined solely common law larceny. So the
11 words that it used "with intent to steal or purloin" in
12 our view created or evinced a concern with a broad
13 interpretation or at least as broad as the matter that
14 they were concerned about, the assets of federally
15 insured banks.

16 QUESTION: Let's get back to the other
17 question that you made. What is there in the
18 legislative history or the rules of the department that
19 delineate a line between state and federal crime on a
20 particular alleged crime?

21 MR. GIULIANO: Well, in this particular case,
22 Your Honor, the line would be with this particular bank
23 a bank whose actual funds were insured by the Federal
24 Deposit Insurance Corporation so that I --

25 QUESTION: You mean the state law would not

1 cover that?

2 MR. GIULIANO: No, state law does cover it.

3 This is one of --

4 QUESTION: Mine is what line says that this is
5 a state crime and this is a federal crime?

6 MR. GIULIANO: In this particular case it
7 would be the federal insurance in federally insured
8 banks, the necessary and proper clause of the
9 constitution.

10 QUESTION: You say it was two crimes. This is
11 two crimes, a federal crime and a state crime.

12 MR. GIULIANO: Yes, Your Honor.

13 QUESTION: Is there any procedure in the
14 Department of Justice that says who should prosecute an
15 instance of double crime when it is a crime against two
16 sovereigns?

17 MR. GIULIANO: There is a formal procedure
18 that exists if a person is prosecuted in one place and
19 then there is the possibility of prosecuting him again
20 because of the possible double jeopardy concerns
21 involved in that. But there is no formal process that
22 takes place in making that decision in advance.

23 Most United States Attorneys have policies
24 that they work out with District Attorneys as to what
25 cases they will take and what cases would be turned over

1 to the Department --

2 QUESTION: There is nothing in the record to
3 show why this was brought in the federal rather than the
4 state court?

5 MR. GIULIANO: In most --

6 QUESTION: No, sir, in this one. There is
7 nothing in this one.

8 MR. GIULIANO: No, Your Honor. In most urban
9 areas the local prosecutor is anxious for the federal
10 government to take as many of these cases as the federal
11 government can take because of the tremendous burden on
12 the administration of justice.

13 QUESTION: And there is no burden on the
14 federal department?

15 MR. GIULIANO: Yes, there is, Your Honor,
16 but --

17 QUESTION: I thought so.

18 MR. GIULIANO: -- there is a sharing. There
19 is a kind of attempt to share the responsibility and to
20 share the burden. This would be one that would easily
21 fall within a matter of federal interest. The amount of
22 money was \$10,000. It was not diminimus.

23 In some of the drug cases there are guidelines
24 that are worked out so that it has to be either a
25 conspiracy case or a case involving a certain amount of

1 drugs for it to involve the federal government and in
2 some of the embezzlement cases U.S. Attorneys have
3 dollar figures that they use to try to delineate the
4 difference between whether the federal government will
5 take the case or the state government. But by any
6 standard that I know of a theft of \$10,000 would
7 certainly be enough for a United States Attorney to
8 prosecute it anywhere.

9 QUESTION: If this savings and loan
10 association had not been federally insured, could there
11 have been a prosecution under this statute?

12 MR. GIULIANO: I do not -- The statute was
13 expanded in 1950, Your Honor, to cover additional
14 institutions, and it is not limited just to institutions
15 insured by the FDIC. There are a certain number of
16 banks that are not covered. I am not exactly certain
17 what the additional criteria would have to be.

18 QUESTION: Not all banks but some savings and
19 loans institutions, I think, are purely state
20 institutions --

21 MR. GIULIANO: That is correct.

22 QUESTION: --without any federal insurance. I
23 just wondered on the face of the statute any bank would
24 seem to mean that you could answer my question yes, but
25 I wondered --

1 MR. GIULIANO: I think that is further
2 defined, Your Honor, to include only banks that are
3 federal reserve banks, federally chartered banks or banks
4 that are insured by the federal government in some way.
5 There are very few banks left that --

6 QUESTION: Any bank in this statute has been
7 so limited?

8 MR. GIULIANO: I think it has been, yes, Your
9 Honor.

10 QUESTION: How has it been limited? It has
11 not been limited by a amendment of the statute, is it?

12 QUESTION: There has been a construction?

13 QUESTION: By a definition somewhere?

14 MR. GIULIANO: Yes, further on in the statute,
15 Your Honor, 2113(f) as used in this section the term
16 bank means any member bank, federal reserve system and
17 any bank, banking association, trust company, savings
18 bank or other banking institution organized or operating
19 under the laws of the United States and any bank the
20 deposits of which are insured by the FDIC. So it would
21 not be -- There are very few banks left in that
22 category.

23 QUESTION: Well, if that were not the case,
24 why it would apply to any bank and it would not make any
25 difference how this case came out. Whatever the reach

1 of this statute it would reach any bank.

2 MR. GIULIANO: That is correct.

3 Your Honors, there are four principle reasons
4 why we urge this Court to affirm the decision of the
5 Fifth Circuit. First of all the plain language of this
6 statute clearly reaches this conduct. Any ordinary
7 person reading this statute would assume that this
8 person's misconduct was covered by it, and there is no
9 issue here of fair notice or in some way the
10 Petitioner's being treated unfairly because he might
11 have misunderstood what the statute meant.

12 Secondly, the legislative purpose evinced by
13 the 1937 Congress clearly covers all forms of taking
14 from a federally insured bank. That is exactly what
15 happened here and that interpretation, the government's
16 interpretation is in line with that purpose.

17 Third --

18 QUESTION: May I interrupt right on that
19 point? The footnote your brief quotes, I guess it is a
20 note which I have not read but points out that Chairman
21 Sumners of the House Judiciary Committee in 1934 sought
22 to limit the expansion of federal power just to those
23 situations where there was not really a strong showing
24 of need. I am curious to know and perhaps I should not
25 take your time, but was he still chairman of the

1 committee in 1937?

2 MR. GIULIANO: I believe he was. I will check
3 that but I believe he introduced the '37 legislation as
4 well.

5 QUESTION: That is why it would seem to me --
6 I wonder if he thought it was as expansive as the
7 government's argument would make. Is that consistent
8 with the views he seemed to be espousing in '34? Do you
9 think maybe he changed his mind?

10 MR. GIULIANO: Well, I actually do not think
11 you have to say that in '37 you need an expansive
12 interpretation of the language of either the statute or
13 the legislative history, just a common sense
14 interpretation of it. The plain meaning of the language
15 clearly covers the misconduct and the '37 Congress was
16 clearly intending to protect banks, federally insured
17 banks, broadly against theft. So I don't think --

18 QUESTION: And more broadly than '34?

19 MR. GIULIANO: That is right.

20 QUESTION: The only example that was given,
21 and am I correct, and it is the only example that was
22 given was the larceny example?

23 MR. GIULIANO: It was an example that would
24 have constituted if you use the common law distinctions
25 of common law larceny. However, Your Honor, Chairman

1 Sumners never displayed any interest at all or any
2 concern about whether larceny was defined as common law
3 larceny or taking by false pretenses. He was concerned
4 about in '34 limiting it just to robbery.

5 QUESTION: Right.

6 MR. GIULIANO: But in '34 or '37 there is
7 absolutely no concern at all evidenced as to whether it
8 should be common law larceny or larceny by false
9 pretenses.

10 In summation, the views have now been -- This
11 question has been passed on by just about every
12 Circuit. I believe nine Circuits have either held or
13 expressed their viewpoint on this, and the split for
14 whatever it is worth is six to three for the
15 government's view. But also the most recent decision
16 and I believe the best considered decision is the Hinton
17 case which was decided after our brief in the Second
18 Circuit and the Simmons case lay out the legislative
19 history very clearly.

20 Finally, to reintroduce these distinctions
21 would just create unnecessary, needless distinctions
22 that have no purpose any longer. It would become
23 difficult to charge under this statute in the sense of
24 bringing an indictment. It would be difficult to charge
25 a jury as to the distinction between possession and

1 title. It would also raise unnecessary issues on appeal
2 that have nothing to do with the underlying equities of
3 why theft or why protection of federally insured banks
4 should be a federal crime.

5 For all those reasons and for the others that
6 we mentioned in our brief, we ask this Court to affirm.

7 Thank you very much.

8 CHIEF JUSTICE BURGER: Very well.

9 Do you have anything further counsel?

10 ORAL ARGUMENT OF ROY W. ALLMAN, ESQ.

11 ON BEHALF OF THE PETITIONER -- REBUTTAL

12 MR. ALLMAN: May it please the Court.

13 Everything he said was true. The government
14 is arguing what the statute should say and maybe what
15 the law should be, but I am arguing what the law is and
16 what Congress intended the law to be specifically in the
17 development of this law. This law has been specifically
18 expanded and amended and nowhere in all this time since
19 1934 has Congress taken upon itself to say it covers the
20 crime of false pretenses.

21 It has added larceny and burglary. The
22 government used to argue in Jerome in 1943 it applied to
23 common law larceny specifically. There is no question
24 about that but the definitions are not important.

25 What we have to decide here is the ambiguity

1 of steal and purloin. Is it expansive to the point
2 where it covers crime by false pretenses and the answer
3 is no. Sumner specifically addressed that issue saying
4 he wanted to confine the extension of federal power to
5 those situations where the need to supplement state and
6 local law enforcing agencies had become imperative.

7 It was an emergency-type statute to eliminate
8 bank robberies. It is the bank robbery statute, not the
9 thing that is covered by state law and the statute has
10 not run on a state law in this case with regard to the
11 fact that a man did commit a crime by false pretenses.
12 That is my whole point in this case.

13 Twenty-one thirteen (b) is not an expansive
14 statute. It is a narrowly defined and specifically drawn
15 federal statute that does not approach and control for
16 that crime.

17 Thank you.

18 CHIEF JUSTICE BURGER: Thank you gentlemen.

19 The case is submitted.

20 (Whereupon, at 1:28 p.m., the case in the
21 above-entitled matter was submitted.)

22

23

24

25

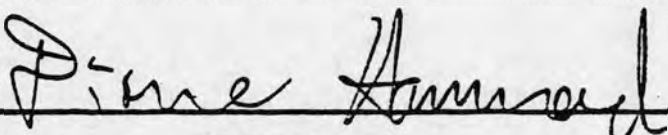
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Nelson Bell, Petitioner v. United States No. 82-5119

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BY

A handwritten signature in cursive script, appearing to read "F. Anne Howard", is written over a horizontal line.

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