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OF THE
UNITED STATES

CAPTION: WAYNE T. SCHMUCK, Petitioner V. UNITED STATES

CASE NO: 87-6431

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IN THE SUPREME COURT OF THE UNITED STATES

WAYNE T. SCHMUCK,

Petitioner

v. : No. 87-6431

UNITED STATES

Washington, D.C.

Wednesday, November 30, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

APPEARANCES:

PETER L. STEINBERG, ESQ., Madison, Wisconsin; on behalf of the Petitioner.

BRIAN J. MARTIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 87-6431, Wayne T. Schmuck v. United States.

Mr. -- It's Steinberg?

MR. STEINBERG: Steinberg.

QUESTION: Steinberg. Mr. Steinberg, you may proceed whenever you're ready.

ORAL ARGUMENT OF PETER L. STEINBERG

ON BEHALF OF THE PETITIONER

MR. STEINBERG: Thank you, Mr. Chief Justice, and may it please the Court:

I have about a dozen points to make here. The first is that title registration is required by law just as in the case of Parr, payment of taxes was required by law. And in each case, the use of the mails was convenient but not compulsory. I think that's a significant parallel to the Parr case.

Second, even in the decision of Galloway, the Seventh Circuit case initially establishing that odometer tampering could become mail fraud under these circumstances, the court recognized that it was stretching the limits of the mail fraud statute. Judge Crabb, the trial court in this case as in Galloway, didn't in Galloway accept the proposition. She granted

a directed verdict, and the Seventh Circuit reversed.

Judge Swygert dissented from that in the Galloway case and Judge Cudahy, who concurred in the judgments, said that it was taking the mail fraud statute to its outer limits, but he accepted the extension because of the judicially hypertrophied reach of the statute.

QUESTION: Judge Crabb let the case go to the jury and then granted judgment of acquittal after they returned their verdict.

MR. STEINBERG: Yes, in the Galloway case.

And then in the present case, in the panel decision in which Judge Swygert participated, although he rejected our argument that this wasn't a proper mail fraud case, he did indicate that it was the history of judicial expansion of the statute which he felt controlled the case.

Now, I think in the McNally case, this Court established, according to the general principles of interpretation of criminal statutes, that where you're faced with two possible interpretations, you should choose the less harsh one and also that you shouldn't create constructive crimes -- constructive offenses. And in McNally itself, the trial court had dismissed mail fraud charges based on the mailing of tax returns

which were, once again, compulsory although -- and the ruling in Parr was applied by the trial court in McNally.

The odometer tampering statute, which is on the books, covers my client's conduct precisely. And in the case of Maze where after the offense in Maze, which was credit card fraud, had occurred, Congress subsequently passed a law establishing credit card fraud as a separate offense. In footnote 9, the Court in Maze noted that there may or may not have been some significance in that and didn't actually decide whether the existence of a specific federal statute covering the specific conduct meant that the mail fraud statute should or shouldn't also apply.

QUESTION: How long a period of time did this odometer scheme go on as established in the indictment and as established at trial?

MR. STEINBERG: About two years, Your Honor. My client had been --

QUESTION: Well, isn't the government going to tell us in its part of the argument that the mails were really necessary for the scheme to continue this long?

MR. STEINBERG: Well, it seems to me that if in a single instance the mailing of the title documents doesn't suffice to make it mail fraud, the

multiplication of the instances doesn't change anything. I simply feel that the repetition of odometer tampering doesn't create a mail fraud.

QUESTION: Well, a mail fraud can be a long-term scheme involving multiple acts, can it not?

MR. STEINBERG: Well, Justice Kennedy, the core prohibition of the mail fraud statute, as I think was well-analyzed in McNally, is to prohibit mailings which somehow alter the situation to the benefit of the person committing the fraud. And these odometer -- these title registrations didn't in any way induce reliance or forbearance. They didn't lull anybody. As -- as I indicated in my reply brief --

QUESTION: Why didn't they lull anybody? They -- they lulled the -- the -- the car dealer into -- into believing that the titles your client had provided him were good in the past instances, and therefore he could rely on good title in future instances. Wasn't that a lull?

MR. STEINBERG: Justice Scalia, my client gave good title to those cars. That's correct. It -- the -- the success of the title registration indicated that my client had passed good title. It said nothing at all one way or the other about whether he had rolled back the odometers. And that's been the point I think at

which the government's case breaks down. There's nothing about title registration which reassures you the odometer hasn't been tampered with. It's simply title registration is a method of preserving a record of who owned the car so that in the event there is an investigation, you can track down what happened.

Now, it's true --

QUESTION: Wasn't passing good title to the car an essential part of his scheme? Didn't he have to -- he had to sell a car, and in order to sell the later cars, he had to persuade the car dealer that he had passed good title to the earlier ones. And the mailing was essential to that.

MR. STEINBERG: Well, the reason that there had to be a title registration mailed was because the state has set up a scheme for title registration in order to preserve a record. My client had to pass good title to the cars, but the only reason the title had to be registered was because of a state requirement which was clearly related to assist in the investigation of this kind of conduct when an investigation is appropriate. And I think it's significant --

QUESTION: But -- but if there had been no mailing in any given case in which your client participated, he would have had problems in the future,

wouldn't he?

MR. STEINBERG: But how could the fact that he had tampered with the odometers possibly affect whether the title registered or not. That's the point I'm making. The title was going to be registered. He was giving good title whether or not he rolled back the odometers. There's no way that his rolling back the odometers would have hurt the title registration process. And as I indicated --

QUESTION: Was there any evidence that the sale of the cars was facilitated by the lower mileage?

MR. STEINBERG: The cars were sold for a higher price because of the lower mileage. There was no evidence that the cars would not otherwise have been sold for a lower price.

QUESTION: Well, then isn't that part of the scheme?

MR. STEINBERG: It's part of the scheme to sell the cars for more money, yes. But as I seem to be repeating, there's simply no connection between registering the change in ownership and detecting this odometer tampering.

QUESTION: If -- if your point is that the -- that the fraud, the misstatement of fact, has to be contained in the document that's mailed -- is that the

point because that can't be right?

MR. STEINBERG: No. We really don't take the position that the inclusion or the exclusion of the odometer mileage statements makes any difference.

Our position is that you have to analyze the core prohibition of the statute and the facts of the case to see how the mailing contributed to lulling somebody, to obtaining something that otherwise would not have been obtained if the fraud had not taken place.

QUESTION: Suppose your client had mailed the automobile title to the used car dealer instead of handing it to him. He had given him -- instead of giving him the title documents, he had mailed the title documents. Would that have been enough to -- to bring this scheme within the mail fraud statute?

MR. STEINBERG: I don't think so, Justice Scalia, because I don't think that the provision of good title was at all affected by the fraudulent odometer. The -- the title was good. The odometer tampering scheme depended upon the false odometer slips which my client hand-delivered. If he had mailed those false odometer slips, then I would agree there was a mail fraud case involved. In fact, he used the telephone a couple of times --

QUESTION: But -- but you're now confirming

what you before denied. You said it isn't essential that the actual fraud -- fraudulent element be put in the mail.

MR. STEINBERG: No.

QUESTION: Because I read the statute that way. It's just the mail has to be part -- the use of the mail has to be part of the whole scheme. Now you're telling me that the use of the mail has to contain the -- the essential element of the fraud.

MR. STEINBERG: No, Justice Scalia. The point I'm making, which I think is made in Parr and in Maze and, for that matter, in Sampson, is you have to be able to point out how the mailing contributed to the success of the scheme, how it lulled somebody, how it permitted somebody to make a promise or as in the Carpenter case, how unless -- in the Carpenter case, unless that newspaper column was distributed, there would be no benefit from trading on the inside information. You have to be able to look at the mailing and see that because of that mailing something of assistance to the fraud. And the point is the --

QUESTION: Well, I -- I -- I take it that if the dealer had mailed your client the money in the mail for each car, there would have been a fraud?

MR. STEINBERG: Well --

QUESTION: I mean, we can't get any more --

MR. STEINBERG: -- I think that case --

QUESTION: -- raw than that.

MR. STEINBERG: I think that case --

QUESTION: And if you say that doesn't have anything to do with turning the odometer back, we get back to the same question. Well, of course, the odometer turn-back facilitated the sales.

MR. STEINBERG: Justice Kennedy, I think the example you cite is more akin to Pereira where the $35,000 bank check was mailed from one bank to another for collection before it was paid. I myself feel that the Pereira case is not reconcilable with Kann and Parr and Maze. It has been distinguished in those cases, but I feel that it simply didn't apply the analysis of what the core prohibition of the statute reached.

QUESTION: May I ask you a question, Mr. Steinberg? Supposing that the automobile dealers, instead of mailing the documents to the Secretary of State, had thrown them in the waste basket and no mailings had occurred, would your scheme have been successful?

MR. STEINBERG: My client's would have been successful. It wasn't my scheme.

QUESTION: For how long? For how long?

MR. STEINBERG: Because he got his money before the dealers resold the car.

QUESTION: Once it would have, but for two years could he have kept going if they kept every time --

MR. STEINBERG: If the dealers had been willing to accept the loss of throwing the title out, yes. It could have continued as long as the dealers were that dumb. But the fact is that, as we know --

QUESTION: You don't really think there are any dealers who are that dumb, do you?

(Laughter.)

MR. STEINBERG: No. I -- I think it's obvious that these mailings occurred, and anyone could have seen they would have occurred. What I see a lack of is a lack of connection.

QUESTION: And isn't it equally obvious that the scheme could not have persisted for two years had there been no mailings?

MR. STEINBERG: The sale of cars in general can't persist without mailings of title registrations. The scheme didn't depend upon the registration of title as in any way --

QUESTION: It depended on repeated sales of automobiles.

MR. STEINBERG: It depended upon repeated

tamperings with odometers. If he had -- if he had been selling the cars without tampering with odometers, it wouldn't have been mail fraud even under the government's construction.

QUESTION: Well, because there's no fraud.

MR. STEINBERG: Exactly. And in this case, the only fraud was odometer tampering fraud. And the mailings were pursuant to a state regulation whose whole purpose it is --

QUESTION: But odometer fraud wasn't an end in itself. The odometer fraud was an end -- was a -- was a design by which cars would be sold for a higher price.

MR. STEINBERG: If you --

QUESTION: Certainly transfer of title is incident to the sale of cars.

MR. STEINBERG: Mr. Chief Justice, if you accept that line of analysis, then any person who tampers with an odometer had better be prepared to face mail fraud charges because somebody sooner or later is going to register that car. When you tamper with an odometer --

QUESTION: Only if he sells the car. I mean, I don't think it's a criminal violation to tamper with an odometer if it's in your own car and you never try to sell the car. Right? The offense is selling a car with

-- with an altered odometer. Isn't that -- or am I liable if I just -- you know, I like to play with odometers.

(Laughter.)

QUESTION: Is that a federal offense?

MR. STEINBERG: Well, it says no person shall disconnect, reset or alter the odometer with intent to change the number of miles indicated thereon. But as a practical matter, you don't do it if you're not expecting to sell the car. That's true.

QUESTION: So, you think it would be an offense even if I didn't sell the car.

MR. STEINBERG: I can't conceive of how the case would come to the attention of the U.S. Attorney. So, although it might technically be an offense, I don't think you'd be prosecuted for it. If you disclosed when you're selling the car that you did change the odometer, I don't think that it's an offense.

But the offense that we're talking about is odometer tampering, and the question is is every person who tampers with an odometer going to be guilty of mail fraud when somebody down the line mails in that title. And under this theory --

QUESTION: Well, that really isn't quite the same -- that is not what is alleged in the indictment.

It's not a single odometer tampering followed by a sale. It's a scheme that persisted for several purchases, several resales and so forth. And so, every person who does one doesn't at least fit within this indictment.

MR. STEINBERG: Well, Mr. Maze ran up a bill on several different credit card charges. The defendants in Kann made repeated mailings. If it -- if a single instance isn't within the core prohibition of the statute, the repetition still doesn't bring it within the core prohibition of the statute.

QUESTION: But Maze really just took a winter vacation. I mean, he -- he was gone and defrauded several motel owners. Then he came back home, and that was the end of it.

MR. STEINBERG: I believe, Mr. Chief Justice, it was a summer vacation --

QUESTION: Was it?

(Laughter.)

MR. STEINBERG: -- as you indicated in the opinion that you wrote for the Court.

QUESTION: I don't know why he went south then.

(Laughter.)

MR. STEINBERG: Well, in Maze in the dissent it was described as a $2,000 spree. I don't know how

much profit my client derived from his conduct, but in Kann it was an ongoing scheme. In Parr it was an ongoing scheme. In each case the mailings helped in a practical way because they got the money to the individuals in those cases. But in each case there wasn't anything about the mailings that practically advanced the scheme.

And if you don't look at whether there's a practical assistance to the scheme in terms of helping the fraud, not simply completing the sale or collecting the taxes, you -- you open up a floodgate of prosecution.

QUESTION: I -- I think you're right that -- that the offense here is -- is not odometer tampering. I think if you tamper with an odometer, that's an offense.

The indictment here was for mail fraud. Fraud doesn't have anything to do with odometer tampering. It has to do with selling a car that purports to be one thing and is in fact something else. But an essential part of the fraud is getting money by false pretenses. Here the false pretense was purporting to transfer title of something that was different from what you were actually conveying. Right? And -- and the transfer is part -- is an essential part of that scheme, isn't it?

MR. STEINBERG: Scalia, I disagree. The fraud

here was odometer tampering. We don't usually consider a person who tampers with odometers as not committing some kind of a fraud. As a practical matter, that's the business they're in.

QUESTION: If I never sell the car, that's a fraud? It's odometer tampering. It's certainly not fraud.

MR. STEINBERG: The reason it's prohibited is because that kind of conduct is typically associated with fraud. And in this particular case, the indictment -- there has been some discussion back and forth in the briefs about whether the indictment did or did not charge odometer tampering. I think paragraph 4 makes it clear that my client was charged with having caused to be altered the odometers so that they reflected inaccurate mileage. And I think it's quite clear that the indictment did, in fact, list the elements of odometer tampering.

I'd like to move on to the issue of the lesser included offense instruction. In the cases of Keeble and Beck, the analysis that this Court used focused on the prejudicial effect of the evidence which was received upon the fairness of the jury's verdict. And in the Geiger case, the California case that I cite in my briefs, the ALR note to that case lists a number of

states which use a rule more liberal than the strict elements rule. It seems to be a perfectly good rule.

In the Keeble case itself, the Court noted in footnote 19 the existence of the Whitaker case, the seminal case on the inherent relationship standard. And It noted the abandonment of mutuality and specifically reserved ruling on the propriety of that. So, I don't think that the Keeble case is authority for saying that Whitaker and the abandonment of mutuality are disapproved by this Court.

Now, in this case the jury was out for almost three hours. This is a simple case, and the only thing the jury could have been out considering was is this really mail fraud. Are these mailings really sufficiently closely related to what my client was trying to do to be mail fraud? I think it's clear from that record that a lesser instruction on odometer tampering had at least an arguable chance of success. I think it arguably would have changed the outcome of the case.

And the double jeopardy issue raised by the government I think is a red herring. The Blockburger test for a lesser offense using the elements has been noted by this Court as simply a shorthand method of determining legislative intent. And even if the

Blockburger test says that one offense is an included offense of another, if the legislative intent is to impose double punishment, it's proper. As in the Garrett case, as in a case cited in the supplementary brief in -- before the court of appeals, Missouri versus Hunter, the armed robbery and armed criminal action can be punished as separate offenses.

Both our side and the government's side agreed in the supplemental briefs filed with the court of appeals that the double jeopardy analysis shouldn't be used to determine this issue. In the government's supplemental brief at page 10, you'll find that concession.

So, I would submit that in fact the only way to preserve fairness in a situation where there is a potential for juries being influenced by proof of one crime is by looking, in fact, at the evidence in order to determine what instruction is appropriate.

I would like to reserve the balance of my time for rebuttal.

QUESTION: Thank you, Mr. Steinberg.

Mr. Martin, we'll hear now from you.

ORAL ARGUMENT OF BRIAN J. MARTIN

ON BEHALF OF THE RESPONDENT

MR. MARTIN: Thank you, Mr. Chief Justice, and

may it please the Court:

The first issue in this case is whether there was enough evidence for the jury to find that Petitioner Schmuck used the mails to further his scheme to defraud. The indictment alleges and defines that scheme. It states that from on or about July 1, 1979 until on or about July 30, 1980, defendant Wayne T. Schmuck did devise and intend to devise a scheme to defraud persons in the State of Wisconsin who would be and were induced to purchase automobiles from Wisconsin dealers on which Schmuck had caused the odometer mileage to be altered.

The government alleged and proved an ongoing scheme. The victims of that scheme were the retail purchasers. They testified at trial that they relied on the false odometer readings when they made their purchase decisions. And, indeed, Petitioner's counsel at trial conceded to the jury that their testimony showed that his client had devised a scheme to defraud within the meaning of the mail fraud statute.

QUESTION: Mr. Martin, why wasn't it complete when the cars were sold to the dealers?

MR. MARTIN: Because Mr. Schmuck was in -- in the business of -- a continuing business of selling cars to the public through dealers. The evidence shows that

he sold some --

QUESTION: Well, I thought he wanted his money. And why isn't it complete when the dealers bought the car? He wasn't getting the money from the ultimate consumer.

MR. MARTIN: He sold to dealers with the understanding that they would resell. He sold continuously.

QUESTION: Well, all dealers are going to resell.

MR. MARTIN: Absolutely, absolutely.

QUESTION: But I'm not sure that that means that the offense isn't complete when the dealers bought it. What if the cars had been destroyed by a fire or something while in the dealer? Would the government take the position there had been no fraud?

MR. MARTIN: Well, there would -- if -- if there was no resales --

QUESTION: He had sold them to the dealers, gotten his money, and the car is destroyed. No fraud?

MR. MARTIN: Certainly there would be no fraud at the retail level. The dealers would have been defrauded. I don't know if the mails would have been used in -- in furtherance of that fraud.

The evidence showed that he sold some 300 cars

in -- in the two years in question here. He was in -- had a continuing relationship with the dealers. The demand for his cars was created at the retail level. The more the retail level persons would buy from the dealers, the more the dealers would buy from Petitioner.

QUESTION: Did the evidence show that they relied -- that they purchased for him because they'd purchased from him on past occasions?

MR. MARTIN: Yes. Two of the dealers who testified at trial purchased on many occasions, five times for one dealer, five times for another dealer, and that's just of the 12 -- or 12 counts of this case. We don't know how many times in all that they purchased from Mr. Schmuck, but two of the dealers had a relationship of many, many years. And of the four dealers in this case, two of them had five mailings, two other had five mailings, and there was one apiece --

QUESTION: Did they say specifically that they relied upon him because of past transactions, or do we just infer that?

MR. MARTIN: They developed a business relationship with him. It was a good business relationship. It was profitable to them. He would call them up and say I have these cars. They've been reliable in the past. So, the dealers would rely on Mr.

Schmuck in that way.

We have not understood Petitioner's claim to be a challenge to the scope of the indictment or the alleged fraud. Rather he claims that the mails -- mailing of title papers cannot, as a matter of law, be in furtherance of such a fraud.

QUESTION: When you say the scope, he's not challenging the scope, you mean he's not raising the point that Justice O'Connor was raising?

MR. MARTIN: That has not been --

QUESTION: Because I have trouble with that point too. I think it's very difficult --

MR. MARTIN: That has not been our understanding. At trial he -- he did not challenge the factual point that the government was making that it was a continuing business, that it mattered to him that these cars were resold in the way that would matter to General Motors that its dealers sell cars to the public. That's where the demand for his cars was created. That was not challenged by Petitioner at trial, and we have not understood that to be the basis of their challenge in this Court.

QUESTION: Okay, but -- but nonetheless, if -- if that is your theory then, you have to show that the use of the mails was necessary to sell it to the

customers, not to the dealer.

MR. MARTIN: Exactly.

QUESTION: Okay, which is probably easier I guess.

MR. MARTIN: Yes. The mailings in this case were all title applications for the retail purchasers.

QUESTION: And mailed by him.

MR. MARTIN: And mailed by the dealers.

QUESTION: Mailed by the dealers, not Schmuck.

MR. MARTIN: Not by Schmuck, although Schmuck -- the evidence shows that Schmuck knew that the dealers customarily mailed applications.

QUESTION: And do you know are the -- is there a sample of the title application in the record? Do you know?

MR. MARTIN: It's -- it's not in the appendix, but it is in the record. Exhibits 1 through 12 are the title applications.

QUESTION: Some applications, you know, require you to put the mileage down.

MR. MARTIN: Yes. The reason this scheme would work is that at the time Illinois titling laws did not require mileage. Wisconsin did.

QUESTION: Yes.

MR. MARTIN: But the first mileage in

Wisconsin titling records was the false odometer mileage that Mr. Schmuck recorded when he applied for Wisconsin titles or when the dealer did. So, that's why this scheme worked. If you look at the titling papers, there's no evidence of any fraud because the first odometer reading in the title papers is the false one.

QUESTION: These were cars brought in from another state?

MR. MARTIN: Yes. These were cars that -- Mr. Schmuck is a resident of Illinois. This is where his business ran. And these cars were -- were sold at retail in Wisconsin.

QUESTION: So, it was a -- so, it was a -- was it the accurate or the false odometer reading that was on the title application in Wisconsin?

MR. MARTIN: It was the false -- it was the false odometer reading. But that's the first reading. So, if you compare it to subsequent readings, when the car is resold, there's no evidence of any odometer tampering which is actually one of the benefits of the titling system is that if you look at the papers, you see no evidence of a fraud.

There's a certain lulling effect. Mr. Schmuck has contended all along that it's a matter of law, titling papers are counterproductive, they cannot

benefit a scheme to defraud. Well, in fact, the evidence would support a finding here that the existence of title laws which he could circumvent, figure out a way to get around, actually had a lulling effect. But the --

QUESTION: Well, that would really broaden the mail fraud statute if every document mailed had a lulling effect because it didn't mention the fraud.

MR. MARTIN: Well, I -- I think our point is that an average retail customer understands that titling laws are there for protection of customers, maybe to some extent to protection from odometer tampering. And if the records do not indicate a fraud, there's an additional lulling effect over and above an average mailing.

But the primary benefit in this case was that -- was that the mailings were necessary to effect the transaction. And that's all that the mail fraud statute requires is that the mailing be incident to an essential part of the scheme or step in the plot of the scheme. And the sale could not be made without the title papers being sent to the Department of Transportation. That's clear. You cannot get a license plate. You cannot drive the car in the Wisconsin. The dealers could not have sold the cars. That's the primary benefit --

primary benefit to Petitioner in this case.

In every case where this Court has found that a particular mailing was not in furtherance or in execution of a scheme, the Court has been unable to find any material benefit to the defendant. And that has been true in Maze and in Parr and in Kann. But here the benefits were the sale was completed. The dealers would come back for more cars. And there was the additional lulling effect of making the appearance appear perfectly traditional. No one was the wiser.

We heard this morning that Mr. Schmuck clearly violated the odometer law and he should have been charged with that. But this Court has held in Batchelder that the government may select between two fully applicable statutes. So the question only is whether the evidence supported the verdict of mail fraud in this case.

QUESTION: He was not charged with odometer tampering in the indictment.

MR. MARTIN: He was not charged with odometer tampering in the indictment. As part of the scheme to defraud in which he used the mails, one of the factual allegations in the indictment is that he caused odometers to be turned back. But it does not even state all the elements of the odometer violation because

there's a knowing and willful requirement which is not set forth in the indictment at -- at that stage.

I'll turn now to the next issue which is whether Petitioner was entitled to a lesser included offense instruction on odometer tampering. And this requires the Court to interpret Rule 31(c) of the criminal rules and the language that a jury may return a verdict on any offense necessarily included in the crime charged.

We believe that Rule 31(c) adopts the statutory elements test that a lesser included offense is defined by the elements of -- of the statute. Every violation of the greater offense necessarily includes a violation of the lesser offense. We believe our interpretation is most consistent with the language of 31(c) and the phrase "necessarily included."

QUESTION: Where -- where in your brief is the language of 31(c)?

MR. MARTIN: It's stated in full in Petitioner's brief. In our brief --

QUESTION: Where is it in the Petitioner's brief?

MR. MARTIN: Page 19 has the "necessarily included" language of our brief.

QUESTION: Thank you.

MR. MARTIN: We believe that points to an abstract examination of the statutory elements of two crimes and not to the facts of a particular case. One offense is not necessarily included in another simply because in one case defendant happens to commit both. Rather we think that offenses necessarily included in another --

QUESTION: Which page 19 is -- is the language?

QUESTION: Whose brief?

MR. MARTIN: We cite it on page 19 and quote a phrase.

QUESTION: All you quote is the phrase "necessarily included."

MR. MARTIN: The entire rule -- the entire rule is in Petitioner's brief on page 2 -- on page 2.

QUESTION: You didn't feel it necessary to set it forth in your brief.

MR. MARTIN: We felt it was necessary to set forth the "necessarily included" language. We left out the other six or seven -- six or seven words in 31(c).

Our lead argument in our brief is based on the history of 31(c) and not the language because we -- we think the language is open to dispute, but the history is not. The advisory committee notes state 31(c) was intended to adopt and restate existing law. And we

explain in our brief what the existing law was and that was the statutory elements test.

This Court applied it in the 19th century under the then effective statute. The Ninth Circuit applied it two months before 31(c) was adopted, and many state and lower federal courts had applied it in the interim.

And in Petitioner's reply brief, he has not questioned our history, but instead relies on the inherent relationship test which seems to find its origins in the 1971 opinion of the D.C. Circuit in Whitaker.

We also think that the statutory elements test was the implicit understanding of this Court in the Berra decision and in the Sansone decision when it considered whether the failure to pay a tax is a lesser included offense of tax evasion. The Court compared statutory elements and concluded that, yes, it is a lesser included offense. But under the facts of that case, no instruction was required.

So, we basically think that 31(c) adopts the statutory elements test, and that's the end of the matter. The language and the history support that.

QUESTION: May I ask you a question there?

MR. MARTIN: Sure.

QUESTION: The only case I guess we have that deals with this is the Keeble case in which the lesser included offense was one which was not prohibited by federal law. So, how could the statutory elements of the lesser included offense have been part of the greater included offense in that case? You recall the case (inaudible). There was no --

MR. MARTIN: I do recall the case. This Court held under the Major Crimes Act that lesser included offense -- I -- I believe that the Court applied an elements test. And I think they looked to --

QUESTION: But there was no federal definition of the federal crime of simple assault which the lesser included offense, as I remember it.

MR. MARTIN: As I remember, this Court held that the lesser included offense was assimilated necessarily implied in the Major Crimes Act. And that was -- the whole point of the decision was the lesser included offense in -- included implicitly in the Major Crimes Act. And this Court said, yes. Basically it was a matter of statutory construction as we understand the case.

QUESTION: Thank you.

MR. MARTIN: We also think that the elements test is the better rule although the Court need not

address that aspect of it because we think it is a required rule. But we think it's clear and certainly much simpler to apply. Both sides know in advance the possible charges to the instruction, the possible convictions that the jury could return. And --

QUESTION: May I ask one other question?

MR. MARTIN: Certainly.

QUESTION: Would it -- is it any simpler to apply than the -- than just looking at the indictment? In this case I guess the indictment clearly alleged odometer tampering as well as mail fraud. At least as I read it, it seems to allege all the elements of odometer tampering.

MR. MARTIN: It doesn't say knowingly and willfully, but -- so, there could be a challenge if -- if --

QUESTION: But it's certainly clear that it was done --

MR. MARTIN: It's close.

QUESTION: -- intentionally.

MR. MARTIN: Uh-hum, uh-hum, uh-hum.

QUESTION: I'm just wondering because your argument of -- I mean easily applied certainly has some appeal to it. But is it really any easier to apply than -- it would be more difficult here to look at the

evidence. But when you have the indictment that at least arguably spells out all the elements of the lesser offense --

MR. MARTIN: Well --

QUESTION: -- why is that any harder to apply?

MR. MARTIN: I think it's -- the statutory elements test is still easier, and that's apparent from the panel opinion in this case because the alternative is the so-called inherent relationship test. No circuit -- no -- Petitioner does not advocate a lesser included offense instruction whenever the evidence would support such an instruction or support a finding that the defendant committed that crime. They tack on the inherent relationship test to avoid abuse by defendants.

Now, what does it mean to have an inherent relationship? The panel and this Court disagree. We're not sure. And that's where we think that the difficulties in application counsel in favor of the elements test, which this Court applies in double jeopardy contexts (inaudible) and Woodward the Court applied it in determining whether Congress intended dual punishment under two separate statutes.

There can be difficulties in applying the elements test. That's a matter of congressional intent and reading of statutes, and -- but if you find one --

one crime in Title 18, another in Title 27, it may be difficult to determine whether the elements test is satisfied. But we --

QUESTION: Mr. -- Mr. Martin -- your first name Brian.

MR. MARTIN: Right.

QUESTION: If you -- if you adopt a test based on -- on an indictment, I take it you still wouldn't give an instruction unless there were evidence of the lesser included offense, enough evidence to support a verdict to that effect.

MR. MARTIN: Absolutely. There would have to be enough evidence to support a verdict to that effect and an acquittal on the greater offense. If in a typical case the -- the evidence would either support an outright acquittal or a conviction on the greater offense, then the lesser included offense should not be given. There has to support a rational jury finding the defendant innocent on the greater offense. One of the outside elements is hotly contested. Perhaps it's intent, perhaps it's willfulness, whatever it is. In such a case, then a lesser included offense may be required. The Court in Berra actually made that point.

And we think lastly that the elements test respects the role of the government and the grand jury

as the charging instrument in criminal matters.

QUESTION: Excuse me. I just want to be clear on that. Your position is -- is that the defendant is entitled to the lesser included offense instruction if he asks for it in the Berra type of -- in the case that Berra had in mind, that is to say where the lesser offense is necessarily included in the greater.

MR. MARTIN: Where it's necessarily included, and the evidence is hotly contested on the element which makes the greater offense the greater offense so that a rational jury could find the government hasn't proved the greater offense, but has proved the lesser offense. Then the instruction is appropriate --

QUESTION: But if -- if -- if the -- if -- if the evidence is -- is very strong on all of the elements of the greater offense?

MR. MARTIN: Then --

QUESTION: I mean, I thought the evidence was always contested because the government has the burden of proof.

MR. MARTIN: Well, sometimes the contest will go equally to both the lesser and greater offense, however. If the defense is I wasn't there, I wasn't -- you've got the wrong person, well then a rational jury would not make a distinction between a lesser and

greater offense.

QUESTION: And you're not entitled to the instruction?

MR. MARTIN: You're not entitled to the instruction.

QUESTION: I'm not sure I understand the logic of that.

MR. MARTIN: It's probably explained more from the history than -- than logic, and I direct the Court to the Stevenson opinion, and Berra and the entire history of lesser included offense instructions.

QUESTION: Mr. Martin, may I ask one other question. If -- if -- what we're concerned with here is when the judge must give the instruction, as I understand it.

MR. MARTIN: Yes.

QUESTION: I take it that if a judge felt that in a case like this -- say, Judge Crabb had thought that, well, maybe I only have to give it when it's with the same statutory elements. It would not have been error for her to have gone ahead and given the instruction at the defendant's request, would it?

MR. MARTIN: I don't know which -- what legal rule would support that. It seems to be at odds with the government and the grand jury's role as the charging

party.

QUESTION: So you think that the -- that she may only give it where -- where she must give it.

MR. MARTIN: Yes, where -- where -- where 31(c) authorizes it and the evidence --

QUESTION: Yes, of course, the evidence has to support it. I agree to that no matter what test she used.

MR. MARTIN: Yes.

QUESTION: Yes.

MR. MARTIN: If there are no further questions, thank you.

QUESTION: Thank you, Mr. Martin.

Mr. Steinberg, you have 10 minutes remaining.

REBUTTAL ARGUMENT OF PETER L. STEINBERG

MR. STEINBERG: Thank you, Mr. Chief Justice. May it please the Court:

I don't think that my client's scheme was successful.

QUESTION: You wouldn't be here if it was.

MR. STEINBERG: Right.

(Laughter.)

MR. STEINBERG: In fact, I think that every time he repeated his offense, it raised the probability that he would ultimately be caught. The large number of

transfers of title, the large number of cars that he sold --

QUESTION: Can't you say that to any criminal activity? The more often you do it, the more chance there is you'll get caught.

MR. STEINBERG: Yes, but he should have been caught, Justice Stevens, for odometer tampering.

And this reminds me -- this case reminds me of a story Abraham Lincoln used to use to illustrate a point. You'll find this in Carl Sandburg's biography. By way of illustration, how many legs will a sheep have if you call his tail a leg? Only four because calling a tail a leg doesn't make it one. I don't think that calling odometer tampering mail fraud makes it mail fraud.

Now, what was in these title registration documents that we think was so bad for the scheme? Well, among other things, the address of the person who had sold the car to my client was in those title documents. So, how did they prove the case? They wrote to those addresses. They said can you give us the odometer statement you really gave Mr. Schmuck, and they got it.

QUESTION: (Inaudible) to his scheme, why would he ever have them mailed?

MR. STEINBERG: Well, he had no control. After he sold --

QUESTION: Well, he had -- they had to be mailed for the purpose of the scheme.

MR. STEINBERG: The -- this brings up my point about the relationship between the requirements that automobile titles be registered and the purpose of that registration. The purpose is precisely to make it tough on people like my client. And I don't think that you can bootstrap by a regulatory measure like this a fraud of odometer tampering into a mail fraud, just as you couldn't bootstrap in McNally mailing your tax returns in into mail fraud.

Knowingly and willfully does simply not distinguish the elements of odometer tampering from mail fraud. In the Joint Appendix on page 72 in the panel decision, foctnote 1, the court dealt quite peremptorily with that arguments. Knowingly and willfully means exactly what it says rather than contains a hidden requirements.

In our reply brief on this point, we cited Justice Learned Hand in American Surety Company versus Sullivan saying the word "willful" means no more than that the person charged with the duty knows what he is doing. So, knowingly and willfully is not an element

that needs to be specifically stated in the indictment. Debit and Blackmur's jury instructions recommend that no -- no explanation of knowingly and willfully be made where it appears in the statute. I don't think that's a valid grounds for saying that the indictment didn't charge odometer tampering.

But more importantly, I think you have to look at the evidence to see if the outcome was unfair. In this particular case there was a cartload of evidence about odometer tampering. We objected to much of it on the grounds that it was going to prejudice the jury. The jury panel on voir dire -- half of them knew all about odometer tampering. Some of them were excused because of it.

QUESTION: But in our system, that's up for -- up to the prosecutor. If -- if he wants to go for a lesser offense, he goes -- he -- he could have charged for that, but he chose not to. And that's the kind of system we have. It's -- it's not up to the -- to the court to decide what -- what the individual will be prosecuted for.

MR. STEINBERG: Well, Justice Scalia, when the court applies the elements test and gives a lesser instruction, they're doing the same thing. They're overriding the prosecutor's prerogative. It doesn't

really matter what the test is.

QUESTION: In a very limited area. Your -- your -- your theory would -- would extend that overruling much more broadly.

MR. STEINBERG: Well, I have more confidence in the federal judiciary. I feel that they're not going to go around undermining strong cases with frivolous instructions.

But I think in this case we were the victim of the jury's hostility to odometer tampering. I mention in my brief the comment that the government's attorney made in his rebuttal argument about how if you do any type of crime, you should pay for it. It was clear invitation to say, well, he's certainly guilty of something, and we can't let him go.

And that's what the court didn't like in Keeble. You're correct, Justice Stevens. In Keeble, the lesser offense was not even in the federal statutes, but they, nevertheless, said to be fair, we have to let the defendant have the benefit of this rule. We don't want to induce an unfair verdict.

QUESTION: Let me ask about --

MR. STEINBERG: It may less --

QUESTION: Let me ask about the instruction you say you are entitled to here. Should Judge Crabb

have said you may convict him of 20 different counts of -- I don't know how many times he did it, but it was a large number, as I understand it.

MR. STEINBERG: They only proved 12, Your Honor.

QUESTION: Would he have been subject to conviction for 12 counts of odometer tampering or just 1 under your view?

MR. STEINBERG: We would have been happy to take 12 counts of odometer tampering.

QUESTION: But is that what she should have instructed?

MR. STEINBERG: Yes. She should have instructed that you may find on each count. If you can't find beyond a reasonable doubt that he's guilty of mail fraud, you may consider whether he's guilty of odometer tampering.

Now, we weren't even permitted -- my erstwhile partner who argued the case to the jury wasn't even permitted to say to the jury, well, this is really not mail fraud. This is really odometer tampering. Don't let the government get away with overcharging. Now, if we're not even allowed to suggest to the jury that it's overcharging and if the government is allowed to make the kind of argument that says he has done something, so

convict him of what we've got him here for, I think we've been the victim of unfair use of the jury's hostility to odometer tampering. Nobody likes odometer tampering. It's not --

QUESTION: Presumably nobody likes mail fraud either.

(Laughter.)

QUESTION: I mean, odometer tampering is a -- is a misdemeanor. Mail fraud is a felony, isn't it?

MR. STEINBERG: In fact, mail fraud is now a felony too although it's only a three-year felony. So, Congress -- excuse me --

QUESTION: What is now a --

MR. STEINBERG: Odometer tampering has been raised to the level of a felony by the Truth in Mileage Act of, I believe, 1986.

QUESTION: Truth in Mileage Act?

QUESTION: But it seems to me for your argument about unfairness to amount to much, you'd have to say that the jury wasn't justified in returning a verdict against your client for mail fraud.

MR. STEINBERG: Well, if as Judge Crabb indicated, the question of whether these mailings were or were not in furtherance of the scheme was a jury question, and she did let it go to the jury, then yes.

It may have been sufficient taking -- assuming that it was sufficient for the jury to find mail fraud, it was also sufficient for the jury to not find mail fraud as the judge instructed it. But by failing to give us the lesser included offense instruction, the jury was given an up or down choice. And if they had been given the third option, I'm confident that that's what they would have done. They were out for three hours in a very simple case.

As to what the -- one other thing the title documents included, they did in 9 out of the 12 cases include an odometer mileage statement. It's now compulsory for every state. They -- as I said, they included the addresses of the prior owners so that it was -- they were a useful tool.

When Congress passed the Truth in Mileage Act, they talked about how useful these records were going to be to catch odometer tamperers. And to me, as I've said before, it seems incongruous to say that a regulatory scheme set up to inhibit, deter and detect this fraud is nevertheless going to raise it to a higher level because it was complied with not by my client, but by the people he -- the victims. The victims of the scheme were both the dealers and the retail purchasers. That's what the indictment said, and --

QUESTION: (Inaudible) --

MR. STEINBERG: Yes?

QUESTION: -- your -- your mailing argument that -- that -- you think it's important that the mailing wouldn't have helped -- wouldn't have helped your client's scheme, that if anything, it would have -- it would have hurt it. That depends on how you read the statute, doesn't it? The statute says for the purpose of executing such scheme knowingly causes to be delivered to be delivered by mail. It depends on what the phrase "for the purpose of executing such scheme" goes to. Does it mean for the purpose of executing such scheme causes or does it mean for the purpose of executing such scheme delivered?

MR. STEINBERG: Well, Justice Scalia --

QUESTION: Is it delivered for the purpose of executing the scheme, or is it is causes for the purpose of executing the scheme? He -- he doubtless caused this to be delivered for the purpose of executing the -- he didn't cause it to be delivered for the purpose of executing the scheme, but --

MR. STEINBERG: Well --

QUESTION: -- for the purpose of executing the scheme, he caused it to be delivered. Isn't that -- isn't that --

MR. STEINBERG: For the purposes of analyzing whether he knew it was going to happen or not under the rule of Pereira, he caused it because he could have foreseen that it happened. But in order to determine what execution of the scheme means, you simply have to look at the statutory history -- the legislative history of the statute which indicated the main thrust of it was to keep people from sending out circulars advertising things that they then didn't deliver, and you have to look at the relevant cases, Kann and Parr and Maze, which I feel state quite clearly it takes more than just a mailing. It takes more than the proof of a fraudulent scheme plus some connected mailing to make a case mail fraud.

(Inaudible) time is up.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Steinberg.

The case is submitted.

(Whereupon, at 1:47 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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NO. 87-6431 - WAYNE T. SCHMUCK, Petitioner V. UNITED STATES

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BY Judy Freilicher

(REPORTER)