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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

ORIGINAL

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: EUGENE JOHN CARELLA, Appellant V. CALIFORNIA

CASE NO: 87-6997

PLACE: WASHINGTON, D.C.

DATE: April 26, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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EUGENE JOHN CARELLA, :
Appellant :
v. : No. 87-6997
CALIFORNIA :

----- x
Washington, D.C.
Wednesday, April 26, 1989

The above entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:03 o'clock a.m.

APPEARANCES:

CHRISTOPHER D. CERF, ESQ.; Washington, D.C.; on behalf
of the Appellant

ARNOLD T. GUMINSKI, Deputy District Attorney of County
of Los Angeles, Los Angeles, California; on behalf
of the Appellee

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next on in 87-6997, Eugene John Carella v. California.

ORAL ARGUMENT OF CHRISTOPHER D. CERF

ON BEHALF OF THE APPELLANT

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

Appellant was convicted of grand theft after failing to return a rental car by the date set out in the rental agreement. The question presented is whether two California statutes pursuant to which the jury was instructed to presume commission of the offense from proof of certain predicate facts deprived him of due process of law.

It is our position, as the State of California now concedes, that these instructions violated the bedrock due process principal that the prosecution must prove its case beyond a reasonable doubt.

The fact of the case can be summarized very briefly. Appellant rented a car from a Los Angeles rental agency on March 25th, 1985, left a substantial deposit and agreed to return it by May 3rd of that year. When the car was not returned by that date, the rental agency made several efforts to contact him and

1 eventually reported the car as stolen.

2 Appellant was arrested on June 27th, 1985, and
3 the car was found that same day in the parking lot
4 adjoining the business address he had provided at the
5 time he rented the car. He was charged with two
6 offenses under the California code. He was charged with
7 grand theft and a related offense under the vehicle code.

8 At the close of the evidence, the jury was
9 instructed that grand theft required an intent to
10 deprive the owner of permanent possession; that a
11 conviction under the lesser offense would be authorized
12 even if temporary deprivation was intended; and that
13 embezzlement was a form of grand theft. In addition,
14 over appellant's objection, the trial court instructed
15 the jury on two statutory presumptions at issue in this
16 appeal.

17 The jury was told first that whenever a person
18 intentionally and wilfully keeps a rental car more than
19 five days beyond the expiration of the rental agreement,
20 he shall be presumed to have embezzled it, embezzlement,
21 again, being a species of grand theft in California. In
22 addition, the jury was told that intent to commit theft
23 by fraud is presumed from failure to return rental
24 property within 20 days of the mailing of a demand
25 letter.

1 After seeking further clarification on the
2 meaning of these presumptions, the jury deliberated for
3 an additional nine minutes and then returned a verdict
4 of guilty on the grand theft charge and acquitted him of
5 the lesser offense under the vehicle code.

6 One of the most basic safeguards against the
7 wrongful deprivation of liberty is the requirement that
8 the prosecution prove its case beyond a reasonable
9 doubt. It is our submission today that the instructions
10 to appellant's jury violated that rather simple but
11 fundamental principle. In clear, unmistakable,
12 unqualified language, the jury was told that if it
13 concluded that appellant had willfully kept a car more
14 than five extra days, it was to find that he was a thief.

15 As a consequence of that instruction, the jury
16 was authorized to return a verdict of guilty, even
17 though the prosecution had not proven him guilty. We
18 think that that instruction is plainly unconstitutional
19 under the decisions of this Court. Indeed, as the state
20 of California now concedes, in that respect, this case
21 is indistinguishable from this Court's decisions in
22 *Francis v. Franklin* and *Sandstrom v. Montana*.

23 QUESTION: Mr. Cerf, I take it the State now
24 says, though, that the error in the case might be
25 harmless.

1 MR. CERF: It does suggest that, uh, and
2 indeed, I believe that is the only remaining issue in
3 the case, unless, and let me turn my attention to that,
4 if I may.

5 I, we, seriously question whether a violation
6 of this particular nature is even subject to harmless
7 error but I --

8 QUESTION: Oh, I thought Sandstrom applied a
9 harmless error analysis, didn't it?

10 MR. CERF: Sandstrom, I believe, did not.
11 Rose v. Clark --

12 QUESTION: Rose v. Clark did. In any event,
13 I, I think, uh, it was certainly open to that.

14 MR. CERF: It is certainly subject to that
15 construction. We believe that Rose v. Clark, uh, does
16 not control this case. But let me stress at the
17 outside, before explaining that position, that
18 ultimately the error here, in our judgment, so clearly
19 was harmful that there really is no reason for the Court
20 to address that more abstract threshold issue, and we
21 think the error was harmful for a number of reasons.

22 Assuming that the standard of Rose v. Clark
23 does apply in this case, the issue would be whether the,
24 it, whether permanent intent to deprive the owner of
25 automobile, which is the central element to this, uh,

1 crime, whether a reviewing court could conclude beyond a
2 reasonable doubt that the evidence of that intent was so
3 overwhelming that it could conclude that the jury must
4 not have even relied on the presumption, and we don't
5 think the state has made that argument, and we don't
6 think that the state can make that argument.

7 Indeed, we think the error here was
8 prejudicial under that standard for two reasons. First
9 of all, the evidence of, and by the way, let me, let me
10 make something clear, that this jury was told on four
11 occasions. It was told four occasions that in order to
12 convict appellant of grand theft it had to find an
13 intent to deprive the owner of permanent possession, and
14 that's the crucial element here. Now the evidence --

15 QUESTION: Oh, the state now says, well,
16 embezzlement in California requires less.

17 MR. CERF: It, it does say that now. It
18 certainly didn't say that at trial when the trial judge
19 gave the standard pattern jury instructions that operate
20 and are presumptively correct, correct in California,
21 and those instructions on four separate occasions said
22 grand theft requires a specific intent to keep the car
23 permanently, and embezzlement is a species of grand
24 theft. I think that at this point, it's too late in the
25 day for the state to come forward and suggest that the

1 law of California is different from the law that was
2 applied by a California court.

3 QUESTION: Well, doesn't this suggest the
4 desirability of letting the California Court of Appeal
5 make this determination? They can speak with final
6 authority, uh, make the determination on harmless error.
7 They can speak with final authority on what embezzlement
8 requires under California law. We can't.

9 MR. CERF: They, they certainly can speak with
10 final authority on that. I don't think as a matter of
11 harmless error jurisprudence that makes any difference
12 at all. I think the central issue here is the crime
13 with which this individual was charged, and here the
14 jury was told four times, grand theft, of which
15 embezzlement is a, is a variety, requires an intent to
16 keep the car permanently.

17 I don't think harmless error analysis entitles
18 a review in court to return to the scene and find, well,
19 In any event, he is guilty of a lesser crime than that,
20 which the jury was told to find the crime. For that
21 reason, it would be our suggestion that regardless of
22 what the crime of embezzlement may or may not be in
23 California, nothing turns on that as a matter of
24 harmless error analysis.

25 On this issue of intent, uh, the evidence, uh,

1 we would suggest, was really quite equivocal. This is
2 not a case in which, uh, the evidence suggested that the
3 car had been abandoned, that the person who had leased
4 the car had been caught trying to sell it, that he'd
5 been trying to cross a border or anything of that nature.

6 This automobile was found down Wilshire
7 Boulevard from the place where it was rented, and it was
8 found at an address that had been provided at the, by
9 appellant at the time he had leased the car. Now, we
10 would suggest that the jury could very reasonably
11 conclude that whatever else was going on in this case,
12 that did not suggest an intent to keep the car
13 permanently.

14 Moreover, this is a somewhat unusual case, as
15 harmless error cases go, even assuming that Rose
16 applies, in that the jury need not, rather, in that the
17 Court need not really speculate as to what the jury
18 would have done, whether in fact it found a need to rely
19 on the presumptions.

20 Indeed, uh, we have included in the Joint
21 Appendix a question, and I think it's found on page 23,
22 but it's a question that was submitted to, uh, the court
23 after the period had been deliberating for a while. And
24 that question asks the court in no uncertain terms, what
25 about this requirement of intent to keep the car

1 permanently, and just how do these presumptions work
2 with respect to that element.

3 The Jury, so far as the record reveals, was
4 reinstructed pursuant to the offending instructions, and
5 nine minutes later came back with a verdict of not, of,
6 of guilty. And we think that that chain of events is,
7 simply as a matter of logic and reason, inconsistent
8 with the suggestion that the jury did not find it
9 necessary to rely on the presumptions.

10 Let me suggest, uh, uh, on this issue of
11 remand, I recognize that the issues, and I think we're
12 as guilty as the state, provide something of a mixed
13 message on this as to whether we would like the matter
14 resolved here in this Court or resolved, uh, or handed
15 back. And let me further suggest that we realize that
16 as a matter of precedent, we're sailing into something
17 of a stiff wind here. It certainly is the general
18 practice of this Court to remand on harmless error
19 issues, uh, when the court below has not taken a first
20 cut at it.

21 We would suggest, however, that the
22 considerations that, uh, underlie that practice, are
23 absent in this case. We would rely in particular on the
24 apparent absence of the trial transcript. The record in
25 this case is extremely spare, so far as we have been

1 told by the Clerk's Office of this Court and by the
2 state of California, the trial transcript has, there was
3 never transcribed from the recording, and is simply not
4 to be had.

5 In light of the, the rather spare nature of
6 the record, we don't think that it would be any, uh,
7 more or less efficient for this Court to make that
8 determination than to hand it back, and I would also
9 suggest, if I might, that this case has been kicking
10 around now for over four years in the California
11 system. It is our submission that the error here,
12 particularly in light of the jury question, was so
13 obviously prejudicial, that there really is no reason to
14 keep this case lingering on any longer. And we would
15 ask the Court to reverse the decision below in its
16 entirety.

17 QUESTION: Did the defendant test, take stand
18 in the case?

19 MR. CERF: He did not, Justice Kennedy. He
20 represented himself, but he did not take the stand, and
21 therefore, anything he said would not have been under
22 oath.

23 QUESTION: Was the testimony from, I guess his
24 girlfriend, that he went to the, with a lot of money to
25 the gas station next to the rental car place, was that

1 on an affidavit, or was that something she testified to
2 at trial?

3 MR. CERF: The Appeal was conducted pursuant
4 to one of California's what is known as the Settled
5 Statement of Fact on Appeal, in lieu of a transcript.
6 And the Settled Statement of Fact on Appeal says that
7 she, uh, took the stand, his girlfriend took the stand,
8 testified that, uh, appellant had a substantial amount
9 of money with him, uh, when he was in the vicinity of
10 the rental car agency, but she had absolutely no idea
11 what that money was for.

12 There was a subsequently filed affidavit
13 which, I must concede, I don't think is part, was part
14 of the record below in any kind of formal sense. I
15 think it was before the court, but I don't think it was
16 the basis for the court below, and I don't think that
17 this Court can fully take that into account in, in, in
18 its estimation of the case.

19 If the Court has no further questions, I will
20 reserve, if I might, Mr. Chief Justice, the balance of
21 my time for rebuttal.

22 QUESTION: Very well, Mr. Cerf. Uh, Mr.
23 Guminski?

24 ORAL ARGUMENT OF ARNOLD T. GUMINSKI
25 ON BEHALF OF THE APPELLEE

1 MR. GUMINSKI: Mr. Chief Justice, and may it
2 please the Court:

3 As we mentioned in our brief below, little did
4 we anticipate that this case, which resulted in an
5 unpublished opinion without precedential value, would've
6 come before this, uh, Court, uh, as perhaps one of the
7 last mandatory appeals from state court judgments, but,
8 uh, here we are. And being here, what should be done?

9 Of course, via justitia..., let justice be
10 done, though the heavens fall, but coming down to
11 specifics, we agree that the judgment should be vacated
12 and suggest that the case be remanded to the court below
13 for a consideration of the Chapman harmless error rule.

14 QUESTION: Well, did you, what position did
15 the state take in the lower courts?

16 MR. GUMINSKI: The position taken by the state
17 in the lower court was precisely the same, Your Honor.
18 We pointed out to the court below that instructional
19 error was made in violation of due process of law, but
20 we took the position that the error was harmless beyond
21 a reasonable doubt.

22 QUESTION: And, and what did the court do?

23 MR. GUMINSKI: And the court below thought it,
24 in their wisdom, not to take our advice, and, and it is
25 in the nature of meant to err, and I suppose that is

1 true, of course, as well. And, therefore, this appeal
2 is before this Court, and, uh, it is not completely, I
3 hope, without interest, although we have had a tough act
4 to follow.

5 QUESTION: Did you, uh, I don't recall. Did
6 you, uh, what about your oppo -- did you file an
7 opposition to the cert petition?

8 MR. GUMINSKI: Uh, we filed a motion to
9 dismiss the appeal, your Honor.

10 QUESTION: Why did you do that?

11 MR. GUMINSKI: Uh, well, because, we took the
12 position in that that this Court could, in the first
13 instance, review the case for harmless error review, uh,
14 as to whether there was harmless error, and I, we
15 reconsidered our position, and, uh, thought that it
16 would be more appropriate for the court below to
17 undertake that inquiry.

18 Uh, I might add, your Honor, that, uh, in
19 connection with the preparation of any reporter's
20 transcript of the trial, it is true that this case was
21 decided in the court below on a subtle statement. Uh,
22 Mr. Carella failing three times to appear for the
23 conference on the Settle Statement, and uh, the issue,
24 in any event, not being before this Court as to whether
25 this was properly done or not done. Uh, nevertheless,

1 uh, we have determined within the last week that the
2 court reporter, who had submerged somewhere, has
3 surfaced. I have, during the last week, uh, been advised
4 of his, uh, telephone number, his address and that his
5 representation that he does have the notes of the
6 transcript. So, voila!

7 Uh, counsel chastises us, uh, in this case for
8 departing from the general rule that the law of the
9 state should be taken as that of the court below. And,
10 of course, we take the position that the court below,
11 uh, erred in considering that the California statutes in
12 question, 484 subdivision (b) of the penal Code and
13 10855 of the vehicle code, were constitutional, at least
14 implicitly so ruled.

15 And their construction, it seems to me, was
16 that yes, these were statutes establishing presumption
17 pertaining to burdens of producing evidence, but that
18 the jury was not required to be instructed as to the
19 effect of the presumption. And reading Sandstrom as we
20 did, we had to concede that that would be an improper
21 construction of the statute.

22 Now, under, as this Court pointed out in Hicks
23 v. Felock, the general rule that this Court will follow
24 the construction of the, uh, the, uh, court, state court
25 of last resort, is open to the exception when there is

1 otherwise persuasive data that would convince this court
2 that the highest court of the state would decide
3 otherwise.

4 And this is precisely the case in this, uh, in
5 this case, because the Supreme Court of California in
6 People versus Jackman, Jackson, a 1903 case, ruled and
7 recognized the effect of penal code section 512 that the
8 intent to restore property is not a defense to an
9 embezzlement case. It recognized that the intent to
10 steal is not an element of the crime of embezzlement
11 under the law of California. The fraudulent intent is
12 the intent to deprive the owner permanently or
13 temporarily of his property.

14 Now, had this problem been presented to the
15 court below, and it was not, everybody like Emmanuel
16 Kant before reading David Hume's works was, were asleep
17 with their dogmatic, dogmatic slumbers. Uh,
18 instructions had developed. But if the question had
19 been squarely presented to the the Appellate Department
20 of the Superior Court, they would, under the doctrine of
21 auto equity sales, uh, be compelled to rule that the
22 crime of embezzlement, yea, even of a automobile, uh,
23 does not include the intent to steal as an element of
24 the offense.

25 So, therefore, our position modestly is that

1 since the intent to steal entails as a lesser intent, as
2 it were, the intent to deprive the owner permanently or
3 temporarily, uh, no harm, no foul as far as the
4 conviction in this case.

5 Similarly, the court below, uh, in
6 interpreting the statutes in question as they did,
7 failed to follow the mandate of the California Supreme
8 Court in People versus Roder that all state statutes
9 creating presumptions, creating or confirming
10 presumptions, are to be interpreted so as to save their
11 constitutionality. And so, therefore, in that case --
12 particular case, a presumption, uh, pertaining to the
13 guilty knowledge in a, uh, receiving stolen property
14 prosecution was, was reinterpreted by the California
15 Supreme Court to create a permissive inference.

16 QUESTION: But that's -- there's nothing we
17 can do about that, Mr. Guminski. I mean, if the Court
18 of Appeal has incorrectly followed a decision of the
19 Supreme Court of California, that's between them, not
20 our problem.

21 MR. GUMINSKI: But we would like to point out,
22 your Honor, that in terms of re -- a remand for
23 determination of the harmless error doctrine, it would
24 be appropriate and would give the court below a
25 reopportunity to rethink what is the applicable

1 California law.

2 I should point out, of course, that of course
3 we are interested in preserving the viability of our
4 statutes, and from the comments of the Court, the
5 constitutional -- constitutional viability of our
6 statutes and from the comments of the Court, I, I have
7 no such apprehension. I should like to certainly agree
8 --

9 QUESTION: -- count on it.

10 MR. GUMINSKI: Uh, no. That is true, your
11 Honor.

12 (Laughter)

13 MR. GUMINSKI: Uh, but, uh, certainly as
14 People v. Roder, uh, has established the judicial policy
15 of the state of California that California presumption
16 statutes aren't to be so construed as to preserve their
17 viability under the doctrines of this Court from
18 Sandstrom and --

19 QUESTION: Well, I take it it's just the
20 instructions at issue in this case. It's not the
21 statutes, is that right?

22 MR. GUMINSKI: Well, is --

23 QUESTION: Is that why you confessed error,
24 the --

25 MR. GUMINSKI: The, the instructions were

1 clearly erroneous. But, however, in terms of a remand,
2 It would, uh, appear necessary for the court below to
3 make an appropriate determination of what is proper
4 California law. Unless the Court has any further
5 questions, uh, we would submit the case.

6 QUESTION: Via con dios.

7 (Laughter)

8 MR. GUMINSKI: Thank you, Your Honor.

9 REBUTTAL ARGUMENT OF CHRISTOPHER D. CERF

10 ON BEHALF OF THE APPELLANT

11 MR. CERF: I too have a hard act to follow,
12 being limited to the English language, but I only have
13 one or two very, very brief points. I, I, I just want
14 the record to be clear here that the State of
15 California, as I understand it, is, uh, conceding that
16 if the trial transcript is found, it will be germane to
17 harmless error review, and I would just point out that
18 throughout Mr. Carella's travels in this case, he has
19 tried very, very hard to get this transcript for many
20 years. And I now understand the state of California to
21 be telling him for the first time, that the transcript
22 is available and that it indeed is germane.

23 But I would also suggest that an error so
24 clearly harmful as this one isn't going to get any more
25 harmful by reviewing the transcript, and for that

1 reason, I would again ask the Court to make what I would
2 hope would be a very brief evaluation harmless error
3 issue and to reverse the judgment below.

4 QUESTION: Don't you agree that an evaluation
5 of the harmless error issue does require us to decide
6 what California is, uh, law is on, on the permanent
7 versus temporary, uh, deprivation of property?

8 MR. CERF: I don't agree with that.

9 QUESTION: You don't agree with that, why?

10 MR. CERF: Because this jury was charged on
11 four different occasions that intent to deprive the
12 owner of permanent possession was an element of the law
13 of theft in California. I don't think in undertaking a
14 harmless error review the Court does anything other than
15 look at the crime as charged and measure it against the
16 record evidence to determine whether that record
17 evidence overwhelmingly demonstrates proof of the crime
18 as charged. I don't think --

19 QUESTION: Charge to the jury goes beyond, uh,
20 what is necessary to establish the, the crime, and --

21 MR. CERF: I believe that's right. I believe
22 that, uh, --

23 QUESTION: Do you have any many cases for
24 that? I, I, see, I wouldn't think, I would think that if
25 the Judge mistakenly tells the jury to find something

1 that they don't have to find, and that it's very clear
2 that that isn't necessary under the state's law, that we
3 could find -- and the only issue in the case becomes
4 whether, whether a jury could possibly have found that,
5 I would think we could say harmless error, even if a
6 jury couldn't have found it since it wasn't necessary to
7 the conviction, uh, no harm done.

8 MR. CERF: With respect, I would, I would
9 disagree, and I would disagree on two grounds. First of
10 all, obviously, that is not the law as it comes to this
11 Court, as, as it arrives today. There is a theoretical
12 possibility that the court below would reach a different
13 determination.

14 QUESTION: Sure, sure. I understand that.
15 But do you have any cases that say that everything you
16 charge the jury with you have to prove?

17 MR. CERF: I have no cases precisely for that.
18 However, I can suggest that if an individual is found
19 guilty of murder, for example, I think the case is
20 Presnell, it's not incumbent on the court to come back
21 and say that, well, in any event he's guilty of assault.
22 And for that reason, we're going to hold him guilty of
23 that, anyway. That certainly would be improper.

24 QUESTION: Well, Mr. Cerf, I gather that on
25 the Appellate Review, which was granted without opinion,

1 that it upheld the conviction below in, in California.

2 MR. CERF: It did. It upheld it against --

3 QUESTION: So it's more than just a trial
4 court instruction. We have, we have it approved on, on
5 the one Appellate Review it had.

6 MR. CERF: The instruction was approved. That
7 is correct. That is correct. I, I would agree with the
8 state of California that it is not necessary to go
9 beyond the instruction. We think the statutes are
10 unconstitutional in all their applications, but I don't
11 believe it's necessary to go beyond --

12 QUESTION: Where is the record in this case?

13 MR. CERF: I'm sorry?

14 QUESTION: Where is the transcript?

15 MR. CERF: Well, there has been some back and
16 forth on that over the last, uh, several months. The
17 case, there is no transcript. There is a tape recording
18 --

19 QUESTION: Well, how in the world can we
20 decide that it's harmless error without a transcript?

21 MR. CERF: I think, I think you can, Justice
22 Marshall, because the case was decided by the court
23 below on something called a Settled Statement of Fact on
24 Appeal, which under the law of California stands in the
25 place of a transcript, and that is before this Court,

1 and it's in the Joint Appendix today.

2 QUESTION: -- law in California is a good law
3 here.

4 MR. CERF: I believe it is. I believe it is.
5 Thank you very much.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cerf.
7 The case is submitted.

8 (Whereupon, at 11:29 o'clock a.m., the case in
9 the above-entitled matter was submitted.)
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CERTIFICATION

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

No. 87-6997 - EUGENE JOHN CARELLA, Appellant V. CALIFORNIA

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BY Judy Freilicher

(REPORTER)

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