OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, Petitioner v.

R. ENTERPRISES, INC., ET AL.

CASE NO: 89-1436

PLACE: Washington, D.C.

DATE: October 29, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 89-1436

R. ENTERPRISES, INC., ET AL. :

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Washington, D.C.

Monday, October 29, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:45 p.m.

APPEARANCES:

WILLIAM C. BRYSON, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

HERALD P. FAHRINGER, ESQ., New York, New York; on behalf of the Respondents.

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P R O C E E D I N G S

(1:45 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 89-1436, United States v. R. Enterprises. Mr. Bryson.

ORAL ARGUMENT OF WILLIAM C. BRYSON

ON BEHALF OF THE PETITIONER

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

The issue in this case is whether a grand jury must make a showing of relevance before obtaining enforcement of a subpoena for ordinary corporate business records. This case comes to the Court from the United States Court of Appeals for the Fourth Circuit. A grand jury in the Eastern District of Virginia served the subpoena on three companies, two of which are respondents in this case. The three companies were related companies, all were owned by the same man in New York, all had the same address, and all were in the same line of business.

The subpoena, the two subpoenas that are at issue here called for business records of a variety of sorts from the two respondent companies. The district court had hearings, and with respect to each of the subpoenas, and ruled that there was no requirement of any preliminary showing of relevance.

But in any event, even if there were, that the

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Government had adequately satisfied the court that the materials sought were relevant, based on the fact that the first company, a company named Model, which is not a respondent in this case, that the Model Company had distributed obscene materials in the Eastern District of Virginia. And the other two companies, which were owned by the same person and occupied the same premises, although they were not shown to have distributed materials in the Eastern District of Virginia, nonetheless they were sufficiently related to the company that had, that the Government was entitled through the grand jury to inquire as to what activities those companies had been engaged in, and what the relationship was between those companies and Model, which had been involved in the Eastern District distributions.

The court of appeals reversed. The court held that it was necessary under Rule 17(c) of the Federal Rules of Criminal Procedure for the Government to demonstrate both relevance of the materials and their admissibility at any potential trial before the subpoena could be enforced.

Now we submit that this decision is clearly inconsistent with prior decisions of this Court, and in order to demonstrate, I think, just how inconsistent what the Fourth Circuit has done is, I would like to -- to read very briefly a passage from the court of appeals opinion

and contrast it with passages from opinions of this Court, because I think the contrast is quite sharp.

The court of appeals said, and I will try to keep it brief, "The grand jury's request for these records --

QUESTION: May I just say, there are several opinions in the case. Which one are you reading from?

MR. BRYSON: This is -- I am reading from the most recent opinion of the court of appeals.

QUESTION: Which is where in the materials?

MR. BRYSON: The one which is at issue on which cert was granted in this case.

QUESTION: And where is it in the materials?

MR. BRYSON: It's the beginning of the Petition Appendix. I believe it starts at Pet. App. 1.

QUESTION: Okay. Thank you.

MR. BRYSON: Yes. I am reading from the section of the opinion that starts at Pet. App. 7 and runs through Pet. App. 10. But I will just read two sentences which I think summarize the holding of the court, and summarize what we feel is the clear error committed by the court of appeals here. "The grand jury's request appears to be premised on nothing more than a mere hope that the documents will reveal a tie between the companies in Virginia." Mere hope, however, does not justify the enforcement of a subpoena under Rule 17(c). And here is the holding of the court,

"The Government must offer some evidence of a connection between MFR and R. Enterprises," those are the two respondent companies, "and Virginia before it can subpoena the companies' business records under Rule 17(c)."

Now contrast that holding, if you will, with the language that this Court employed, and has repeated, I might say, in later cases, but as early as the Blair case, in which the Court said a witness is not entitled to urge objections of incompetency or irrelevancy such as a party might raise, for this is no concern of his. He is not entitled to set limits to the investigation that the grand jury may conduct. And again in the Morton Salt case --

QUESTION: What case was that from?

MR. BRYSON: That is Blair against the United States, 1919 decision, Your Honor. But again, that language has shown up again and again in this Court's decisions. The Morton Salt case was --

QUESTION: Well, if you read that literally you can subpoena anything without any limit, right?

MR. BRYSON: I think there is a limit, Your Honor --

QUESTION: But under Blair there wouldn't be any limit at all.

MR. BRYSON: Well, Blair is talking about a case in which there is no question that the --

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QUESTION: So you don't rely on Blair literally, then?

MR. BRYSON: We don't say that there are no limits, because we believe that a court has a responsibility to ensure that the grand jury is proceeding in good faith and is not engaged in something that is not --

QUESTION: I just suggest that Blair, like this case, perhaps involves some overriding -- you know, written a little beyond the facts.

MR. BRYSON: The Court could have said assuming that the grand jury is proceeding in good faith, and I think that was the assumption underlying the Court's discussion on that point.

QUESTION: Well actually, Mr. Bryson, you really don't go that far as to say that the court has a responsibility to assure that the grand jury is proceeding in good faith. You would put the burden --

MR. BRYSON: Exactly.

QUESTION: So it isn't really that the court has a responsibility to assure it.

MR. BRYSON: Well, the court has --

QUESTION: You would say that if the claimant can show that the grand jury is not proceeding in bad, in good faith --

MR. BRYSON: If the claimant can make a prima

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facie showing, then it puts the court in a position that the court is --

QUESTION: But that showing cannot consist of the, just utter irrelevance to the investigation of what is sought.

MR. BRYSON: Unless the showing establishes that there is just no conceivable relevance, that the materials are so clearly on their face irrelevant, anything that the grand jury could legitimately be interested in, that it establishes virtually a prima facie case in and of itself that the grand jury is engaged in some kind of improper action beyond the scope of its responsibilities and authorities.

QUESTION: Well, if that has been done, do you say that the burden of proof shifts, or that simply the burden of going forward then devolves on the Government?

MR. BRYSON: I don't think -- I don't think the burden of proof shifts. I think that there may be a situation in which, if, for example, the district court is satisfied that there is no -- the district court believes, in looking at the claim that is made, that it is very difficult to imagine how this material could conceivably be relevant to the grand jury's inquiry, then the burden in a practical sense of going forward shifts to the Government, because the court is prepared to say, Government, show my

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why the recipient of the subpoena doesn't have a fair point here.

QUESTION: Right. If you can't rebut the claim, you are going to lose.

MR. BRYSON: Now I have to emphasize that. I don't think there are very many cases that are going to arise with this scenario, because the grand jury's authority to investigate is extremely broad and there will be, it will be a rare case indeed in which a recipient of a subpoena can make the kind of preliminary showing of lack of conceivable relevance. But assuming that one were made, and there are a couple of cases in the past in the history of grand jury law that indicate such a showing was made, then yes, I think the court can properly look to the Government to demonstrate what it is about this request that makes it, that brings it within the sphere of the grand jury's responsibilities.

QUESTION: Truthfully, we're not talking about the grand jury. We're talking about the prosecuting attorney, aren't we?

MR. BRYSON: As a practical matter, Your Honor, in most cases that is right. It's not true in every case, because the grand jury does on occasion exercise independent judgment as to what it wishes to pursue and how it wishes to pursue it. But I certainly agree with you, Your Honor, in most cases the grand jury acts as the arm of the

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prosecutor, under the control of the court. And as this Court has explained, the court maintains responsibility for controlling the actions of the grand jury.

QUESTION: Mr. Bryson, do you think the judge should look at each subpoena all by itself in a vacuum, or is it proper for the judge to consider the pattern of subpoenas of which this is just one?

MR. BRYSON: I think it is perfectly appropriate to consider the pattern of subpoenas, any evidence that may bear on the question of whether the grand jury is acting in good faith in pursuing an investigation.

QUESTION: Is it at all relevant that the other subpoenas raised First Amendment issues that may well have influenced the court of appeals in its earlier decisions?

MR. BRYSON: Well, Your Honor, I don't think -- first of all, excuse me -- first of all, the court of appeals did not decide this issue on First Amendment grounds. But in any event, I think that is a consideration that the court, a district court can take into account. But certainly with respect to these subpoenas, which were merely for business records, and in which there is no apparent First Amendment interest to be in effect whatsoever, we submit that this doesn't present a First Amendment issue, that the proper course for a district court to take would be to say yes, this is the context in which this arises.

But I find that these are merely business record subpoenas and don't affect First Amendment interests. And that is exactly what the district court found in this case. In fact, in response --

QUESTION: What exactly were the records that were requested here?

MR. BRYSON: They were sales journals -- well, corporate journals, tax returns --

QUESTION: That would identify the customers and the suppliers of the company.

MR. BRYSON: Well, the customers' identification provisions were limited to those sales that were made in Virginia, which these two respondents claim were none. So presumably --

QUESTION: And there is no dispute about that, is there?

MR. BRYSON: Well, we don't know. That is what the attorneys for respondents have said.

QUESTION: They filed uncontradicted affidavits to that effect, didn't they?

MR. BRYSON: That is right. And we have no basis at this point for believing that they are false, but we also, as the district court found, should be entitled to look behind those affidavits and at least get a representation from the corporation in the form of a

custodian coming in and saying no, there aren't any such materials.

But in any event, setting aside the question of whether there were materials that were distributed in Virginia by these two companies, the grand jury is entitled to know the relationship of those companies with Model and any other corporate forms of doing business of the principal in this case, who is Mr. Rothstein, who is really the person who is under investigation. He obviously does business in a corporate form through a variety of corporate devices, and it's -- the grand jury's investigation would not be complete unless it had a good idea of the relationship among those corporations, even if it happened that one or two of them had not actually done business in Virginia. And that was what the prosecutor explained to the district court as the basis for the subpoenas that are at issue in this case.

Now, the question then is -- the question arises, how could the court of appeals have made an error that seems as fundamental as this, and we submit they made just one mistake, but it was sufficient. And that is the court viewed this Court's decision in the Nixon case, which construed Rule 17, the subpoena rule, as it applied to trial subpoenas, the court of appeals construed that decision to apply to grand jury subpoenas. Once you do that a lot of things happen, and the law goes really awry, because the

Nixon case, and we believe correctly, applied Rule 17(c) in the context of trial subpoenas as a rule which requires a showing of relevance and admissibility, or at least the Court devised principles of trial subpoenas that required admissibility and relevance to be shown.

And the reason for that is clear. The Federal system provides for limited pretrial discovery, it is governed by another rule, Rule 16, and it wouldn't make sense to have Rule 17, the subpoena rule, simply serve as a discovery device. Well, that is fine in the trial context. It won't work at all in the grand jury context, because the grand jury is a discovery device. Talk about how Rule 17 should not be used for fishing expeditions is completely in apposite to grand juries, which are the ultimate fishing expeditions. Grand juries, as this Court said in Morton Salt, investigate merely on suspicion that the law is being violated, or even just because the grand jury wants assurance that it is not. I mean, that's the ultimate definition, I suppose, of a fishing expedition, is to go out and find out what is going on in order to obtain assurance that the law is not being violated.

QUESTION: So in terms of the rule, you say that the word unreasonable has one meaning with reference to trial and another with reference to grand jury?

MR. BRYSON: Precisely. The context is

everything. That the word unreasonable in the trial subpoena setting means that it includes subpoenas that, in which there has not been a showing of relevance or admissibility or specificity. The word unreasonable in the grand jury context is limited to cases in which the grand jury really is engaged in abuse of its powers. That is the mistake, in a word, that I think the court of appeals made, and everything is --

QUESTION: Well, doesn't the prior history of the quashing of a whole series of subpoenas demonstrate on its face that the grand jury was abusing its powers in this particular investigation?

MR. BRYSON: Your Honor, first of all we're talking about there was one --

QUESTION: All of which, as I understand, the Government agrees now they were properly quashed, the prior subpoenas.

MR. BRYSON: There was one prior subpoena, Your Honor, which was involved in the previous court of appeals decision in this case several years ago, in which we acknowledged that that subpoena was unduly vague. We went back and redrafted that subpoena. That was a subpoena for tapes, not a subpoena for business records. We believe that the court of appeals in this case made a mistake when it quashed that subpoena in the second time around. We have

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not pursued that issue in this court, but we believe that its decision on that point was erroneous.

QUESTION: I see.

MR. BRYSON: However, the fact that the grand jury made one mistake, as we see it, with respect to one subpoena several years ago, does not mean that these subpoenas are in any way brought under a cloud. These are very routine, run-of-the-mine business record subpoenas which, as the district courts found, were perfectly legitimate ways of trying to get information that the grand jury had every right to obtain. So we see no real relationship between the reversal of the denial of motions to quash in 1987, I believe it was, versus what was done in this case with respect to either the tape subpoenas or the business records subpoenas.

The standard, we believe, as I have mentioned, is that there must be shown to be no conceivable relevance --

QUESTION: In some cases I assume the person to whom the process is served upon will have no knowledge of, really, the subject of the grand jury's investigation.

MR. BRYSON: Exactly.

QUESTION: If that is so, why shouldn't the Government have the burden to show conceivable relevance, at least in that instance?

MR. BRYSON: Well --

QUESTION: How can the person upon whom the process is served possibly meet that standard?

MR. BRYSON: Well, there are cases in which it may be possible to make such a showing. Certainly the party can come forward and say, we certainly can't imagine how this could conceivably be relevant to any criminal activity, and could show that, for example, the activity sought occurred long before the statute of limitations period that is in question, or that there was absolutely no relationship between the district and the company that is involved.

For example, suppose in this case there had been a company in Albany, New York which had no relationship to Mr. Rothstein, Model, or anybody else. That company could come forward and say, what in the world do you want our materials for. Now, the district court might, in that setting, very well say all right, I will hear in camera, for example, from the Government, just to satisfy myself that there is some relationship, because frankly it looks fishy to me, and I can't see what in the world the Government might have that is of interest here.

That is something that can be done quickly, can be done very easily, and if it is done in camera can be done without compromising the grand jury's secrecy concerns. However, we don't submit that this is something that ought to be litigated in an evidentiary hearing where it can be

handled very quickly before the district court, either in an in camera proceeding or simply in an informal motion to quash, exactly as was done in this case.

Now I think, if you will look at the proceedings in this case, frankly I think they were a model of the degree of inquiry that is appropriate for a district court to employ where the subpoenas are perhaps a little out of the ordinary, in this case subpoenas that were sent to a company that is outside of the district. The grand jury in each case had, we think, good reasons which the prosecutor demonstrated, for seeking these materials. And upon the prosecutor's demonstrating those reasons, the district courts -- and there were three different judges who looked at this -- each time were satisfied that yes, you have shown me enough to persuade me that there is, that these materials are relevant. Even though there is no obligation on the part of the Government to make a preliminary showing of relevance, I am certainly not going to quash these materials on grounds of relevance.

That, it seems to us, is a perfectly suitable way for a district court to proceed, and it does not either reveal to an untoward extent what the grand jury is doing, nor does it impede the progress of the grand jury's investigation in a way that this Court in Dionisio and subsequent cases has indicated should not be allowed to

happen. These things do take time, and they, at proceedings all the way through the court of appeals on nice questions of relevance end up depriving the grand jury of materials for long periods of time while the statute of limitations runs.

QUESTION: Mr. Bryson, I thought the Fourth Amendment protected us from unreasonable searches and seizures, not bad faith searches and seizures. You're telling us that even though what the grand jury asks for is really not related enough that any reasonable investigator would ask for it, nonetheless, so long as this grand jury is invincibly stupid so that it is not acting in bad faith, it is all right.

MR. BRYSON: Your Honor, I think that the question of reasonableness depends on the setting. And in this setting I think reasonableness allows the grand jury to inquire throughout the area of bona fide good faith criminal investigation, that is --

QUESTION: No, but good faith is different from reasonable. I mean, if good faith only means reasonable -- if good faith means reasonable, we have no problem. I mean --

MR. BRYSON: Well, I think in this context reasonable is essentially the same as good faith. If the grand jury is misguided and is pursuing --

QUESTION: Well, you don't mean good faith then. You mean something quite different from good faith. I thought you meant by good faith that it was the burden of the person from whom the information is sought to show that the grand jury positively was not proceeding in order to further the investigation, however mistakenly, but rather had some other motivation, to harass, to get publicity, or whatever. You are not saying that now?

MR. BRYSON: No, I am saying that. I am saying that --

QUESTION: But that has nothing to do with reasonableness. I can be really stupid and make a, in the best of good faith, a really unreasonable request for information.

MR. BRYSON: Well, Your Honor, I disagree. I think in this context -- it may be that your request for information was misguided, but because the grand jury has the, is an independent constitutional body which is entitled to pursue criminal investigations wherever they may lead it, the judgment of a court that this is an unwise line of inquiry, or a line of inquiry that is not apt to be fruitful, is not enough to deprive the grand jury of the right to pursue, albeit fruitlessly, an investigation.

QUESTION: Why can't -- I am impressed with the fact that we shouldn't have to, that it will hamstring

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investigations if you allow these things to be litigated up front all the time, I understand that. But why can't one have a different rule for whether if the individual refuses to comply with the request and adamantly refuses and is subjected to criminal penalties for that. The validity of his refusal is then tested on the ground of simply good faith.

MR. BRYSON: Well, that is how these cases are all litigated, at the point at which the individual adamantly refuses.

QUESTION: Well no, it's usually a motion to quash, isn't it?

MR. BRYSON: Well, but that's right.

QUESTION: I'm talking about we will not allow any motions to quash. You take your chances. If you want to stand there and refuse to comply and get hit with contempt and a jail term, we'll litigate it. And if you're right that this was an unreasonable subpoena, you'll win. And if you're wrong, you'll go to jail for something different from the investigation. What would be wrong with that solution?

MR. BRYSON: Well, it would be completely inconsistent with the way things have always been done, which is -- the fact that it would be a different way of doing things doesn't necessarily make it wrong, but the way

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we do it now is to have a motion to quash, which is where the question of the validity of the subpoena is decided, then --

QUESTION: And use bad faith for that, that is fine. But the Constitution does say that I shouldn't have to comply, it seems to me, with an unreasonable request for any of my information.

MR. BRYSON: Again, our submission is that the definition in this context of unreasonable is not something that a judge thinks is not a fruitful line, or not likely to be a fruitful line of inquiry, but rather something in which the grand jury is clearly out of its bailiwick. The grand jury has virtual unimpeded independence within the sphere of conducting good faith criminal investigations.

QUESTION: Well, certainly our case of Walling v. Oklahoma Press Publishing Company, which is the leading case for administrative subpoenas, pretty much adopts the test you say, I think, that if you, the person objecting has to show that it isn't going to lead to any relevant evidence.

MR. BRYSON: I think that is essentially the rule both in that case, in Endicott Johnson, which is another administrative subpoena case, and in Morton Salt. One could have done it differently, but --

QUESTION: Are all of these cases, did they come up on motions to quash, or did they come up --

MR. BRYSON: They came up because they were --

QUESTION: Motions to enforce.

MR. BRYSON: -- administrative subpoena cases. They came up on motions to enforce.

QUESTION: Oh, seeking to enforce them in the courts.

MR. BRYSON: That is right. But that's not the way grand juries --

QUESTION: But it's still -- I see.

MR. BRYSON: Grand juries -- subpoenas are self-enforcing. You don't get to the court of appeals until you get to the point of contempt. That's the only way you can take an appeal to pursue it. Whereas in the administrative subpoena area, of course, you --

QUESTION: Of course, quite a few of the judges were formal prosecutors.

MR. BRYSON: That's true.

QUESTION: So they know what is being done and they know what's --

MR. BRYSON: They have, I think the district courts often are quite sensitive and aware of what is going on --

QUESTION: If I understand, your position is the judge is perfectly well to say I don't think this leads anyplace, but if you want to go, go.

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MR. BRYSON: That is exactly right. I think that is our position, that the judge can say I certainly wouldn't pursue it, I think you are barking up a tree that has nothing on it, but I can't tell you that you're not free to do so.

QUESTION: Are the search and seizure provisions of the Fourth Amendment applicable here?

MR. BRYSON: Well, Your Honor, this Court has, since the Boyd case and in subsequent cases including the Walling case, has regarded them as applicable. I think there is a substantial theoretical question as to whether they ought to be. Certainly with respect to oppressiveness of the subpoena this Court has said, and said in the Walling case, for example, that if you have a request for a huge number of documents, that creates a Fourth Amendment problem. But I think that the Court, frankly, took a wrong turn in Boyd on this in regarding the Fourth Amendment as applicable at all to subpoenas. And one, if one started afresh and examined this question, one could well conclude that this is really a due process problem, not a Fourth Amendment problem. But I do concede that the Court has repeatedly said that the Fourth Amendment is applicable.

I would like to reserve the rest of my --

QUESTION: Could I ask you just one question, Mr. Bryson, because I kind of got lost. You take the position

that there is a different rule for grand jury subpoenas than for trial subpoenas, and --

MR. BRYSON: Yes.

QUESTION: -- I can understand the reasoning. Have we held that?

MR. BRYSON: Your Honor, you have not to my knowledge had a case in which that question in that form was presented, so I think the answer to that is no, not to my knowledge.

QUESTION: The Bowman case came up in kind of a funny way, I know.

MR. BRYSON: That was a trial subpoena.

QUESTION: The defendant subpoenaed the Government's materials.

MR. BRYSON: That's right. That was a trial subpoena. Of course, when I say you haven't held that, you have held again and again and again that standards different from the ones that were applied in Nixon are applicable to grand jury subpoenas, but you have never sat down and said Rule 17 doesn't apply in the same way to trial subpoenas and grand jury subpoenas.

QUESTION: Thank you, Mr. Bryson. Mr. Fahringer.

ORAL ARGUMENT OF HERALD P. FAHRINGER

ON BEHALF OF THE RESPONDENTS

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

may it please the Court:

I think it is absolutely critical in this whole criminal justice system at the very least that we maintain a mechanism whereby a citizen can come into a court of law who has received a subpoena, and I submit to Your Honors most respectfully that this is a very, very small minority of the cases, and register a constitutional complaint under the Fourth Amendment, the First Amendment, or even under Rule 17(c), all of which may coalesce, and say the Government has no right to take my private papers, and make a showing. I don't suggest for a moment that the, at that juncture by simply raising those complaints and doing it in the fashion we did here with affidavits that ran some 45 pages, that all that is required is a standard whereby which the Government stands up in that circumstance and the court either says yes, I believe the grieved party has made out a complaint here, and you should give some indication, even in ex parte, even minimal, but you must give me some indication as to why it is these records are relevant based on the affidavits that have been supplied with it. If the judge then concludes, I believe they have made the substantial showing, that may well be the end of it. In this --

QUESTION: Do you say that is what the court of appeals held?

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MR. FAHRINGER: Yes, Judge, I do, and let me tell you --

QUESTION: Well, it doesn't sound to me like you really were, in your brief that you were really defending what the court of appeals said. You may be defending what it did.

MR. FAHRINGER: Well, Your Honor, let me just -- the court of appeals said our only concern with respect to the business records requested from Model, R. Enterprises, and MFR is the relevancy of those documents to the grand jury's investigation. Now most unhappily, Your Honor, and I am sure the court is embarrassed by this, that is to say the Fourth Circuit --

QUESTION: Were you, at least you say if you come in and object to the subpoena you have got to do something more than just object.

MR. FAHRINGER: Absolutely, Your Honor.

QUESTION: You have to prove what? What do you have to prove, or what do you have to convince the judge of?

MR. FAHRINGER: I have to, Your Honor, set forth facts as to why I believe there is at least a basis for making the Government -- in our case, Your Honor, we came in and it has never been disputed; this little bookstore in Brooklyn does no business in Virginia. Your Honor, R.

Enterprises --

QUESTION: You don't need to argue the facts now. What burden do you have?

MR. FAHRINGER: The burden we have, Your Honor, is a reasonable showing that there is absolutely no relevance for the records requested. I could give you a hypothetical where --

QUESTION: Reasonable showing absolutely --

MR. FAHRINGER: Well, a reasonable showing, Your Honor, that we feel there is no basis for requiring us to turn all of our records over to the grand jury.

QUESTION: And would an affidavit by the defendant be that sort of a reasonable showing?

MR. FAHRINGER: I think, Your Honor, it can be done in an affidavit either by the lawyer or by the defendant, at least --

QUESTION: The lawyer on hearsay presumably?

MR. FAHRINGER: Well, Your Honor, in this instance we indicated in our papers we had conducted an investigation, but Judge -- they never really challenged the sufficiency of our papers. From time to time the mention was made that it was done on lawyer's affidavits. That's the way I had always done it. But no one ever really moved to dismiss these papers because it wasn't on the defendant's affidavit.

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MR. FAHRINGER: Did the Government make any, ever offer to explain why --

MR. FAHRINGER: Your Honor, their position was all along, their official stance was we don't have to show relevance, Your Honor. Now, I want to be fair and say that from time to time there were suppositions, there was some hypotheticals, it may well be we want to know what other companies Mr. Rothstein has. But the Third Circuit said, but you never indicated that MFR was doing any business in Virginia, you never indicated that they were engaged in any kind of conduct that would give jurisdiction in Virginia, or were not full outside their powers of investigation. And I think that was a fair conclusion.

In most cases, Your Honor, I am convinced, I am convinced that in most district courts the prosecutor will come forward and he will make, in every single case, I believe, that is reported in our briefs, the Government has made such a showing. They have either met the standard of a substantial showing in a First Amendment case or a reasonable showing in a Fourth Amendment case. The records were directed to be produced. They were produced. They're content --

QUESTION: Mr. Fahringer, wasn't it shown in this case that these companies that were being subpoenaed were in fact alter egos of one principal?

MR. FAHRINGER: Your Honor, they were shown that he owned all of the companies, but --

QUESTION: Yeah, well, okay --

MR. FAHRINGER: But I don't think that's enough, Your Honor.

QUESTION: Why shouldn't the grand jury be entitled to inquire on that basis alone?

MR. FAHRINGER: Well, Your Honor, if I may say, as the Third Circuit said, that --

QUESTION: Are you talking about the decision of the Fourth Circuit in this case or the Third Circuit in some other case?

MR. FAHRINGER: I'm sorry. Forgive me, Your Honor, I'm talking about the Fourth Circuit. I apologize. The Fourth Circuit indicated that because the man owns several companies, there is no logical inference from that that MFR, this bookstore in Brooklyn, is doing business in Virginia or shipping books to Virginia.

QUESTION: Well, there may not be any logical inference of the sort that would convince a jury by a preponderance of the evidence, but surely the Government need not show that much when they are just investigating.

MR. FAHRINGER: But Judge, they showed nothing, except that one man owned them all. If they came forward --

QUESTION: Well, why isn't that enough?

MR. FAHRINGER: Well, Your Honor, I think what would be a sounder rule for the litigation of these matters is for a prosecutor to come in and say Your Honor, we think those records will show that this company, MFR, is engaged in a conspiracy --

QUESTION: What you want is a bill of particulars.

MR. FAHRINGER: I beg your pardon?

QUESTION: What you want is a bill of particulars. Isn't that what you want?

MR. FAHRINGER: No, Your Honor, it isn't. What I really -- I am not asking for anything as much as that.

QUESTION: Well, what, what do you want? What more do you want?

MR. FAHRINGER: I think, Your Honor, instead of -- we are entitled, instead of a prosecutor coming in and saying we don't have to show relevance, that they show some relevance. And they can do it, Your Honor, verbally. They can make the assertion --

QUESTION: Well, that's what I'm asking. What could they do?

MR. FAHRINGER: Your Honor, in this instance I'll give you an example. If they had facts, and I would assume as a responsible U.S. attorney they would stand up and they would say, Your Honor, we believe that records of the MFR books will indicate that they are shipping books to

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Virginia.

QUESTION: I thought the grand jury proceedings were secret --

MR. FAHRINGER: They are.

QUESTION: -- and that you didn't have to give all the records of the grand jury out in the open courtroom.

MR. FAHRINGER: I am not suggesting, Your Honor --

QUESTION: Isn't that what you're asking?

MR. FAHRINGER: Your Honor, what I'm saying is --

QUESTION: Aren't you asking for the Government's case, or a little peep at it?

MR. FAHRINGER: Not at all, Your Honor. What I am asking for is that they give some indication to the court as to why MFR's records would be relevant to the investigation, not disclose the nature of their investigation. And Your Honors, in all due respect, I think this is a First Amendment case, even though the Fourth Circuit did not feel they had to reach that issue in this case and decided it on relevancy grounds, we have argued the First Amendment from the beginning here. This is an investigation into books and film themselves. This isn't tangential, and these records are intimately involved with the distribution of books. We stood before the courts in the district court and we said Your Honor, without some showing, and please understand --

QUESTION: But this was looking towards a prosecution for obscenity, wasn't it?

MR. FAHRINGER: That is correct, Your Honor.

QUESTION: And you agree that obscenity is not protected by the First Amendment, don't you?

MR. FAHRINGER: Absolutely, Your Honor. The question is whether -- they have never, Your Honor, established in any way -- the Fourth Circuit has, the Fourth Circuit has held twice now that you haven't even shown the relevance of these tapes as being obscene. They come in there and they say by the titles we think they are obscene, and the Fourth Circuit says, we don't think that is enough.

QUESTION: Well, doesn't that get to the issue of whether the, whether there has got to be a demonstration that the evidence would be admissible?

MR. FAHRINGER: No, Your Honor.

QUESTION: Do you concede that the Fourth Circuit was wrong in imposing that condition?

MR. FAHRINGER: I concede, Your Honor, that they do not have to establish admissibility for a grand jury. I was about to say to Mr. Chief Justice that if you read this opinion they say our main concern is relevancy. At the end of that section they say, and we note in passing that as far as Mr. Rothstein is concerned, in all likelihood the MFR bookstore up in Brooklyn wouldn't even be admissible

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in a trial down here. I don't think that by any means is a holding of the case. The holding of the case is they found that there was no showing of any kind that these records were relevant.

QUESTION: And therefore failed to meet the requirement that any documents subpoenaed must be admissible?

MR. FAHRINGER: No, Your Honor, not at all, because Judge --

QUESTION: Well that's what it says.

MR. FAHRINGER: If I can answer that question, what they did in this case was we have to deliver -- Your Honor, it has been affirmed, 50,000 records of Model, Model Distributors is going to have to deliver 50,000 of their business records. Those records aren't all admissible. The Third Circuit, I think it's an insult to the scholarship of that court to suggest that they meant that all of Model's records had to be admissible as well. They obviously found them to be relevant, but they may never be admissible at trial, 50,000 documents that we are going to comply with. And incidentally in this case, from the day we received the subpoena we have turned over every single piece of paper --

QUESTION: Mr. Fahringer, why don't you slow down and calm down.

MR. FAHRINGER: I'm sorry, Your Honor. Forgive

me if I lost my composure. From the beginning of this case we turned over every single document of Model, the first person subpoenaed, that had anything to do with Virginia. We gave them every invoice of every sale down there. We gave them our tax returns. We gave them our business corporate records. What we said is we don't think we should have to turn over 400,000 pages of records of who we sell in Vermont or New Hampshire or New York or Connecticut or anyplace else. That is what we were -- and ultimately the Government to a degree agreed with us on that.

Then when we came in on MFR books we took the position that you ought to make some preliminary showing at least, after we raised these charges, after we file affidavits and indicate there is no relationship, you ought to come forward at least and indicate how it is that there is some --

QUESTION: May I ask, where are the affidavits in the record? Are they in the printed materials?

MR. FAHRINGER: They are, Judge, in the court of appeals Appendix --

QUESTION: In the Appendix.

MR. FAHRINGER: -- which I believe has been transmitted to this Court.

QUESTION: Thank you.

MR. FAHRINGER: Eight copies of that. And we go

on and on at great length on this matter. Incidentally, Your Honors, I think it is fair to consider that there is a pattern here, a very unhappy pattern of coming in the first time around and saying that we should turn over every single tape in the place to a grand jury down there without any, any allegations that they are obscene. And we were sustained on that. The Fourth Circuit wrote a very lengthy opinion, and no one sought review in this Court. And they have, as they stand here today in this Court, to indicate yes, we were wrong on that.

And the 400,000 records that they wanted of Model, they ultimately pulled back from that. And the second time around, when they wanted 193 tapes without any allegation the tapes were obscene, we were sustained on that as well, and they haven't sought review in this Court, for that matter. So that there is, it seems to me, a matter of record of, call it what you will, overreaching, overzealousness, or bad faith, whatever you want. But this is the way this case ended up in the Fourth Circuit.

And I believe that did have some influence on the court, when they said, now, what do you want the records from a bookstore in Brooklyn for down before your grand jury. And when they took the position we don't have to say, we don't have to give any reason, I believe the court correctly concluded that that was inappropriate.

I believe, Your Honors, that in all fairness the price to pay for preserving the right of privacy under the Fourth Amendment and the First Amendment, because I believe as deeply as I stand here that this is a pure First Amendment case and the consequences of this case, if anybody can come in and not make any showing at all, and the impact this would have of us giving up our customers, our suppliers, and the inhibitions and the chilling effect that that would have would set an awful dangerous precedent.

What it would be a much better rule is to simply hold that in these cases a prosecutor must make some showing. If he makes a showing and he satisfies the judge, and let me say very candidly to the Court it's a very flexible standard, and I suspect that a great many district judges will be satisfied with their representation, then that will be the end of it, and they will have satisfied their burden. No one is suggesting for a moment that we don't have to turn over all of these records, that we won't have to deliver them. All we are saying is that there ought to be at the very least some indication as to how they are relevant. And once they meet that, and they have done it in all the other cases, the cases that have come up here before you and in the circuit courts where contempt convictions have been affirmed, they have met that standard. Wouldn't that be a much better rule than to say, and to

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abolish a rule, to say that prosecutors never have to make, even in a First Amendment case, any showing of relevance whatsoever. And for all those reasons, Your Honor, I would most respectfully --

QUESTION: Let me just ask you one question. As I recall their briefs, they say they did represent to the, and the district court was apparently persuaded, that there might be enough similarity between the operations of these two companies in New York and what goes on in Virginia to show some kind of a pattern or intent by engaging in similar acts or possibly conspiracies. It is sort of speculative, but they did, as I understand it, at least in their briefs they say they made some kind of a showing to the district court, and he allowed the discovery.

MR. FAHRINGER: Your Honor, you are partially correct. What they said is, and it was stipulated, that these companies are all owned by Martin Rothstein.

QUESTION: Right.

MR. FAHRINGER: I don't believe it was ever said they are similar. They are all, obviously, the bookstore sells adult material. R. Enterprises also distributes adult material. What we said is that R. Enterprises and MFR books have never sold anything in New Jersey, have never bought anything from New Jersey, have never had any dealings with -- I am sorry, with Virginia whatsoever. And as a

consequence the Fourth Circuit then held that they thought there had to be more facts supplied to the district judge than just that one man owned the three companies.

I also want to, in all candor, Your Honor, tell you that throughout the proceeding they did from time to time indicate collaterally gee, well maybe there might be a conspiracy here, or they might have said at times that we'd like to know more about what Mr. Rothstein owns. None of the district court judges relied upon that. All the district court judges relied upon was the common ownership of all three companies by the same person, Your Honor. And the Fourth Circuit said that wasn't sufficient, and I don't think it is either, certainly not in a First Amendment case.

QUESTION: Well, was the grand jury bound to believe the submission that this, that there was no business done in Virginia by these two other companies?

MR. FAHRINGER: No, but Your Honor, it has never been disputed by the Government, and the Government never stood up and said --

QUESTION: Maybe that's what they wanted to find out.

MR. FAHRINGER: But Your Honor, what we're saying is -- all we believe the prosecutor would have to say to a district judge is -- Your Honor, we believe, instead of agreeing with us and saying it doesn't make any difference

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whether they do business down here or not, we believe they should have been required to say either one, we think the records will show they do do business down here, and that is why we want them, and that may have been the end of it right then and there.

QUESTION: Do you think it would be enough to say well, we want to find out whether they do or not?

MR. FAHRINGER: Judge, I think --

QUESTION: Do they or not? Would that be enough?

MR. FAHRINGER: No.

QUESTION: Why not?

MR. FAHRINGER: Because, Your Honor, I think it requires more. If we come forward with affidavits in good faith as officers of the court and indicate, and they don't dispute it, and simply say well, we want to be sure, I think that is inadequate.

QUESTION: You're saying then that the Government has to take the word of a potential defendant as to something unless they have some sort of independent evidence.

MR. FAHRINGER: Judge, what, I think --

QUESTION: I'm the Chief Justice, not Judge.

MR. FAHRINGER: I'm sorry. I beg your pardon, Your Honor. I apologize for that. Mr. Chief Justice, what I say is this. I think some representations have to be made

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to the district court to contravene, or controvert what we say. It is not enough to say you know, and I quote Your Honor from the record, when one of the district judges said to the prosecutor what do you hope to find in the MFR records, he says I don't know. I don't know. I think the district judge was putting the question what do you think that would turn up? How is it you think that it's relevant?

QUESTION: So let's follow Justice Stevens' hypothesis, or the hypothesis which he mentioned. Suppose the Government says here we know from the admission that the, Mr. Rothstein owns all three of these companies. We think it's possible that the MFR bookstore in Brooklyn might have been operated the same way as these others. We want to take a look at their sales records and see. And the defendant comes in and says MFR has never sold any books in Virginia. Now does the Government win or lose at that point?

MR. FAHRINGER: They win. I think --

QUESTION: How is that different from what happened here?

MR. FAHRINGER: Because they didn't say that, Your Honor. They never made those representations to the court. What they said is it doesn't make any difference whether they do business down there, we just want to see the records. That was the difference. It's a critical factual

difference, Your Honor.

QUESTION: So that on these same facts if the Government had just said different words the outcome would have been different?

MR. FAHRINGER: Your Honor, what I'm suggesting --

QUESTION: No, you can answer that yes or no.

MR. FAHRINGER: Yes, Judge. Of course it would, Your Honor. What I am suggesting is this. If they come in and had said to that judge Your Honor, we believe that MFR books is in some way involved with distribution of books down here, even --

QUESTION: Okay. What more do they have -- is it enough to just say we have a hunch -- supposing they say we have a hunch? We can't prove it in any way, we just have a hunch.

MR. FAHRINGER: I don't think that's enough.

QUESTION: So they have to have outside evidence.

MR. FAHRINGER: A good faith basis for arguing that it's relevant.

QUESTION: Okay, which would -- the good faith basis would have to have outside evidence, I take it, from your answers to the questions.

MR. FAHRINGER: Well, Your Honor, it would either be through their investigation, through informants, through --

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QUESTION: Okay, but you're talking about outside evidence.

MR. FAHRINGER: That is correct, Your Honor. Unless the Court has any other questions, I conclude my argument. Thank you.

QUESTION: Thank you, Mr. Fahringer. Mr. Bryson, do you have rebuttal? You have 4 minutes remaining.

REBUTTAL ARGUMENT OF WILLIAM C. BRYSON

ON BEHALF OF THE PETITIONER

MR. BRYSON: Just very briefly, Your Honor. The respondents quoted from a section of the transcript, and this is at page 645 of the Joint Appendix, and noted that the court had asked the prosecutor what you would expect to find in MFR's business records, as to which the prosecutor responded, "I am not sure, Your Honor, I don't know." That is where respondents stop, both here and in their brief. But the prosecutor went on, and he said "I assume we'll find that Mr. Rothstein's statement is accurate, that he is the owner of all three, that he controls all three, that the assets of all three are intermingled." And the court then asks, "Would this be pertinent to the investigation?" And the prosecutor says "Absolutely." And the court asks "How?"

And the prosecutor gives this explanation. If the grand jury were looking at the possible application, for example, of the Rico statute, and Model were found to

have shipped obscene material into the Eastern District of Virginia, a jury could find, if we had the records to support this, that the assets of Model which were generated by the sale of obscene material were used to fund or support the business, the ongoing business of MFR books. This is one of several theories that the prosecutor laid out for the district court. This isn't just an I don't know, we're just on a wild goose chase type of answer. He had an explanation and he gave it.

The prosecutor also was responding, responded to the point that was raised in the district court and has been raised here, that the companies really are not shown to have been engaged in the same business --

QUESTION: May I just be sure I catch this. You're saying that they might -- this is a different point than you made in your brief, at least I think, if I am not mistaken. He might have shown that the proceeds of the sales of obscene materials in Virginia were used, were siphoned off into the -- why couldn't you find that by looking at the Virginia records?

MR. BRYSON: Well, you wouldn't know what happened to the New York assets that -- MFR is based, excuse me, Model is based in New York. You don't know what Model did with the proceeds of its sales in Virginia. What it may have been doing is using those proceeds --

QUESTION: Those proceeds would only be relevant if they were sales of obscene materials.

MR. BRYSON: Yes. But we do know that Model did sell obscene materials in Virginia, so we have that predicate. That is clear --

QUESTION: I thought all the subpoenas for the particular tapes had been quashed.

MR. BRYSON: Well, in another prosecution that was brought previously, Model's tapes were adjudicated to be obscene.

QUESTION: I see.

MR. BRYSON: So we know that they have in the past distributed materials in Virginia. I would add this wasn't the only theory of relevance. There were several theories of relevance, and we have discussed them in our brief. But --

QUESTION: Under that theory you could of course get all the records of all the companies that this man had any investment in.

MR. BRYSON: Yes, that is right, we could. And I think that would be entirely reasonable if there is a good faith basis for believing there may have been a racketeering violation here. Now the --

QUESTION: Which would be established by the sale of one obscene book, I guess?

MR. BRYSON: It would have to be multiple sales, Your Honor.

QUESTION: Two books, that's right.

MR. BRYSON: Well, that's right. A pattern of racketeering activity. I mean, the Rico statute would have to be established, that is right. In addition I would point out in response to the point that there was no showing that there was a relationship between these companies, the president himself when he was served with the subpoena, and this is in an affidavit that appears at page 401 of the Joint Appendix in the court of appeals, said with respect to the three companies, it's all the same. I am the president of all three. I mean he, it is clear that this is really just a set of companies that are alter egos of this man and engaged in the same business. The grand jury, we submit, was entirely suited, entirely entitled to get those materials. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bryson. The case is submitted.

(Whereupon, at 2:33 p.m., the case in the above-entitled matter was submitted.)

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