OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, Petitioner v. RESHAT SHABANI

CASE NO: No. 93-981

PLACE: Washington, D.C.

DATE: Monday, October 3, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 93-981

RESHAT SHABANI :

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Washington, D.C.

Monday, October 3, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

RICHARD H. SEAMON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

DENNIS P. RIORDAN, ESQ., San Francisco, California; on behalf of the Respondent.

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PROCEEDINGS

(10:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 93-981, United States v. Reshat Shabani.

Mr. Seamon.

ORAL ARGUMENT OF RICHARD H. SEAMON

ON BEHALF OF THE PETITIONER

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

This case concerns the Federal drug conspiracy statute which is codified as section 846, title 21 of the U.S. Code.

Respondent was indicted by a Federal grand jury in the District of Alaska on one count of violating section 846 by conspiring to distribute cocaine in Alaska. The indictment did not allege that respondent or any of his coconspirators committed any overt act in furtherance of the conspiracy.

Respondent moved to dismiss the indictment on the ground that the Government is required, in a prosecution under 846, to allege and prove an overt act in furtherance of the conspiracy. The district court denied that motion, and subsequently, at the close of the evidence at trial, the court denied respondent's request to instruct the jury that the Government was required to

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prove an overt act.

The jury found respondent guilty, but the Ninth Circuit reversed his conviction. It held that the Government is required by section 846 to prove that an overt act in furtherance of the conspiracy was committed. That holding conflicts with the holdings of all eleven other regional courts of appeals.

The Government brought the case here on a writ of certiorari. The question presented is whether section 846 requires proof of an overt act in furtherance of the conspiracy.

In our view, the answer to that question is no, section 846 does not require such proof, for three reasons. First, the text of section 846 does not expressly require proof of an overt act in furtherance of the conspiracy, and in contrast, many other Federal conspiracy statutes, including the general conspiracy statute, do expressly require such proof. In light of the many Federal statutes that set forth the requirement expressly, section 846 cannot be construed to impose the requirement by implication.

Second, in United States v. Singer, this Court upheld the conviction under a conspiracy statute that the Court construed not to require proof of an overt act in furtherance of the conspiracy. Singer in an earlier

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decision --

QUESTION: Mr. Seamon, in the Felix case, I guess Justice Stevens in his separate concurrence argued that the overt acts didn't establish an essential element of the conspiracy, and the majority opinion did not seem to accept that view as expressed by Justice Stevens. Is that something we're going to have to explain if we agree with you on this interpretation?

MR. SEAMON: No, Justice O'Connor. The majority opinion in Felix simply didn't address this question of statutory interpretation presented here. Felix was a Double Jeopardy case, and both courts agreed in this Court that section 846 doesn't require proof of an overt act, and the case was litigated in this Court on that assumption.

Furthermore, the court of appeals in Felix, even though it decided the Double Jeopardy issue against us, also recognized that section 846 doesn't require proof of an overt act, therefore the majority's opinion in Felix was directed at explaining why, although a broad reading of Grady might have barred the prosecution, it was rejecting that broad reading.

The decisions of this Court that do control here are Nash and Singer. Those decisions not only construe a conspiracy statute that is silent on the question not to

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require proof of an overt act, but they apply a rule of statutory interpretation that fully applies here.

QUESTION: Mr. Seamon, this was an avoidable controversy, was it not, because the overt acts were proved, but the prosecutor insisted that the charge not include that specification? In other words, the overt act requirement in a case such as this is not difficult to show, it was in fact shown, and yet the prosecutor resisted the charge?

MR. SEAMON: It is correct that overt acts were proven in this case, and that as a general matter they won't be difficult to prove in a conspiracy case.

In the -- the prosecutor examined the state of the law and concluded that proof of an overt act wasn't an essential element of the crime and therefore didn't have to be alleged in the indictment. As a matter of fact, it was actually the district court that first raised the question of whether an overt act needed to be alleged, and it determined that one didn't need to be. Therefore, the district court submitted the case to the jury without instructing it that it was required to prove an overt act.

QUESTION: But the prosecutor could have mooted this controversy by allowing the charge to be made?

MR. SEAMON: Yes, that's correct. He could have done so, and he chose not to, because after studying the

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law on this particular point, he concluded that section 846 doesn't require proof of an overt act.

QUESTION: She chose not to do so, is that right?

MR. SEAMON: Actually, the prosecutor who brought the charge was different from the prosecutor who tried the case. She tried the case, and it was he who brought the charge.

QUESTION: But she could not have solved the problem of the allegation. I mean, she, if an overt act was an essential element, she could not have amended the indictment at that point.

MR. SEAMON: That's right. If the district court had concluded that an overt act was an essential element, the Government would have had to reindict, so it wasn't quite as simple a matter as simply amending the indictment, and in --

QUESTION: Mr. Seamon, is it necessary to prove an overt act to establish venue in a particular district where the case is brought?

MR. SEAMON: Yes. The burden is on the -- to establish venue and one way in a conspiracy case to do that is by alleging an overt act in --

QUESTION: So you have to prove it, even if you don't have to allege it?

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MR. SEAMON: It does have to be proven if it's a matter of dispute. Now -- and as a matter of practice, prosecutors typically do --

QUESTION: Normally does, yes

MR. SEAMON: -- allege something to establish venue, and the question here --

QUESTION: Couldn't the formation of the conspiracy establish the venue, that the conspirators convened at a particular place?

MR. SEAMON: Yes, Justice Scalia.

QUESTION: And that wouldn't be an overt act in furtherance of the conspiracy in the normal meaning of that term, would it?

MR. SEAMON: That's correct. Venue can be established either by the commission of an overt act in the district where the prosecution is brought, or the formation of the conspiracy in that district.

The question here really doesn't have to do so much with whether the prosecutor could have alleged and proven an overt act, because overt acts were proven, but the question is whether conduct that Congress has made a crime can be punished in the Ninth Circuit, as it can be in every other circuit of the country.

As this shows, the Government has lost what it considers to be valid convictions because of the Ninth

Circuit's erroneous view of the law.

QUESTION: Or maybe you could put it, maybe, that it should not be punished in all the other circuits in the country, just as it is not in the Ninth. I mean, that's just as much the question before us, isn't it?

MR. SEAMON: I'm sure that's the way our opponent would phrase the question.

(Laughter.)

MR. SEAMON: The -- and our primary argument is based on the text of section 846, which -- and Congress' intent in enacting that statute.

The text of section 846 is set out in relevant part on page 9 of our opening brief on the merits, and page 9 also sets out the general conspiracy statute with which it is useful to compare section 846. Section 846 is at the top of page 9. It does not expressly require proof of an overt act in furtherance of the conspiracy. It punishes "any person who conspires to commit any offense" defined in the subchapter proscribing various drug offenses.

In contrast, the general conspiracy statute, which is at the bottom of page 9 of our brief, does expressly require proof of an overt act. It makes it illegal, in relevant part, "If two or more persons conspire to commit any offense against the United States

and do any act to effect the object of the conspiracy."

That language in the general conspiracy statute, referring to an act to effect the object of the conspiracy, shows that Congress understood that an act in furtherance of the conspiracy is separate and distinct from the conspiracy itself. Thus, under the general conspiracy statute, the overt act requirement is not implicit in the term "conspires." It is spelled out in separate language that specifically refers to the act.

The term "conspires" is also used in section 846, and there, too, the term should not be construed to contain an overt act by implication. Such a construction would be especially unjustified in light of the fact that there are other Federal conspiracy statutes in which Congress used express language to require proof of an overt act.

The construction of section 846 that we're urging also is compelled, I think, by the Court's decisions in Nash and Singer. In both Nash and Singer, the defendant was charged with a conspiracy under an indictment that did not allege any overt act in furtherance of the conspiracy.

In both cases, the defendant argued in this Court that the indictment was defective because of its failure to allege an overt act and, in each case, this

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Court rejected the argument because the statute under which the defendant was charged did not expressly require proof of an overt act in furtherance of the conspiracy.

The Court explained that because the statute was silent as to overt acts, it punished conspiracies "on the common law footing," which is to say, without requiring proof of an overt act.

Nash and Singer provide guidance here in two ways. They give guidance to the court in interpreting conspiracy statutes that are silent as to overt acts, and they give guidance to Congress by providing a blueprint for it to follow when drafting a conspiracy statute, because they make it clear that if Congress wants to require proof of an overt act in furtherance of the conspiracy, it has to say so expressly. If it does not, the statute will be construed not to require such proof.

And it's reasonable to assume that Congress followed the blueprint laid out in Nash and Singer, because Nash and Singer were on the book when Congress enacted the earliest drug conspiracy statute and when it enacted section 846, and their validity has never been called into question by this Court.

Nash and Singer support our position in another way. They apply the rule of statutory interpretation that applies here. The rule is that, when Congress uses a

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common law term, the Court presumes, in the absence of evidence to the contrary, that Congress intended the term to have its common law meaning.

At common law, as the Court said in Nash and Singer, proof of an overt act in furtherance of the conspiracy was not necessary to establish the conspiracy, and there is no evidence that Congress intended to depart from the common law in punishing drug conspiracies.

Now, respondent questions whether Nash and Singer understood the common law of conspiracy correctly, but in a sense, the question is beside the point. The point is that Nash and Singer were on the books when Congress enacted the Federal drug conspiracy statutes, and their understanding of the common law had not been called into question up to that point, or for that matter at any point later, for example, when Congress enacted section 846 in 1970.

Thus, Nash and Singer furnish the background rule for Congress in drafting the conspiracy statutes, and they should also apply the background rule for interpreting the statute.

Respondent's other argument is that Nash and Singer represented, to use his term, an ill-advised expansion of conspiracy law, but Nash and Singer didn't break any new ground. Each began with the recognition

that at common law it was not necessary to prove an overt act, and that principle had been recognized by this Court as early as 1879 in United States v. Hirsch, and it was reaffirmed in a decision that was issued just a few months before Congress enacted the first Federal drug conspiracy statute.

Based on their understanding of the common law, Nash and Singer applied the rule of statutory interpretation concerning Congress' use of a common law term. That rule, likewise, had been applied in many earlier and later decisions. In short, this Court has never disavowed Nash or Singer or the principles underlying them, and so respondent cannot bear his burden of explaining why the Court should not follow Nash and Singer in this case.

If there are no questions, I'd like to reserve the balance of my time for rebuttal.

QUESTION: Very well, Mr. Seamon.

Mr. Riordan, we'll hear from you.

ORAL ARGUMENT OF DENNIS P. RIORDAN

ON BEHALF OF THE RESPONDENT

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

Both parties to this action agree that, if possible, the meaning of this statute should be settled on

its face. Both parties agree that in this case it cannot be settled by simple reference to the text of the statute without reference to any other historical statutory or precedential source, and the reason for that is that it contains the term conspire, and conspiracy.

If Congress had said -- instead of using the term conspire had used the word agree, if you agree to commit a crime, we wouldn't be here today. We all agree that the term agree has a common meaning. It means a meeting of the minds.

We all agree that a meeting of the minds doesn't require or imply further action. People agree with their doctors every day to stop smoking, and further action is neither necessary to that term nor, as we know, frequently none follows, but in this case they use conspire and conspiracy, and both parties agree that there is probably no term in the criminal law less -- less capable of easy analysis or common understanding than the terms conspire and conspiracy.

In an article relied on by both parties, by Benjamin Pollack, Professor Pollack stated that the crime of conspiracy "is the most difficult to define" and it is almost impossible to confine the true law of conspiracy within the bounds of a definite statement.

So we are left, then, with the terms, conspire

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and conspiracy, and the question, what do they mean in 846? The legislative history, we both agree, doesn't help us. There is no legislative history. There is no indication anywhere in the statute whether, when Congress used the terms, conspire and conspiracy, it meant by those terms the definition of conspiracy such as in 371, which contains an overt act requirement, or, on the other hand, it meant some different definition.

QUESTION: You don't regard the comparison of 371 with the language of 846 as being legislative history?

MR. RIORDAN: We do in this sense: we think it helps us, and here's why, Your Honor. If 846 was a statute that was intended to define the elements of conspiracy, it was intended to provide a self-contained definition of conspire and conspiracy, then we would admit that the failure not to include an overt act requirement when it is included in 371 would be very significant.

But one thing that's been missed here is that 846 is not a definitional statute, and it's not a conspiracy statute. It's called, "Attempts and Conspiracies." That's the title of it. It deals with two crimes, not one, attempt and conspiracy, and its function is not to define either attempt or conspiracy, but to set the punishment for attempts and conspiracies.

QUESTION: But at least you have in 846 a

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prohibition against conspiracy which says nothing about an overt act, and you have in 371 a prohibition against conspiracy which does require an overt act.

MR. RIORDAN: Absolutely, Your Honor, and if, as I say, 846 was intended to be definitional, to contain -- if we could discern from it an intent by Congress to state the elements of conspiracy, then that argument would be persuasive.

But the Federal courts have looked at -- for an example, the attempt portion of this, it says that the punishment for attempts and for conspiracies shall be the same as for the substantive offense either attempted or which was the object of conspiracy.

The Federal courts have confronted the issue of what attempt means, and in a long line of cases they have said, there is no definition of attempt in 846. We have to look elsewhere for it.

The Eighth Circuit in the Joyce case, the Fifth Circuit in the Monduhano case said, we can't discern what attempt means from looking at 846, so therefore we have to go to the Model Penal Code, to a Learned Hand opinion in 1951, and in the Joyce case to a 1901 Oliver Wendell Holmes opinion written when he was on the Massachusetts State courts, to find out what attempt means.

If Congress did not, and it certainly did not,

provide the elements of attempt, or a definition of attempt, in 846, then we can't assume that it provided a definition of conspiracy.

What we can assume is it inserted the words attempt and conspiracy knowing that the definition of those terms would be located elsewhere.

QUESTION: Well, one place we locate it is under the general rule of following common law definitions.

MR. RIORDAN: Ah --

QUESTION: If we do that, you lose.

MR. RIORDAN: No, we don't, Your Honor, and here's why, because again, in the sources that we've cited, the Pollack article, the Sayre article, the Harno article, the definitive studies of the common law, there's a consensus that over 800 years of English history, and it hardly should come as a surprise, that conspiracy meant different things at different times.

What the Government has done is said that the term, the meaning of the common law definition of conspiracy, is fixed by the 1611 Poulterers' case, and the Poulterers' case was not even before a common law court, it was before the Star Chamber, which was not -- I'm no legal historian, but it was not a common law court, it was a prerogative court, a court of the king.

And to suggest that when Congress in 1970 looked

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for a common law definition, if that's what it was going to do, it looked to a decision of the Star Chamber, when this country was founded on a rejection of Star Chamber precedent, that Andrew Hamilton thundered against application of the Star Chamber precedents in his defense of John Peter Zanger --

QUESTION: The 1970 view was Sir Edward Cook's view, wasn't it?

MR. RIORDAN: Well, I would suggest to you, Your Honor, if we could be certain of one thing, if there was a celestial magnetic resonance imaging machine that could produce a graph of what Congress was thinking in 1970 when it passed this statute, I'd suggest we'd find that it wasn't thinking about the issue of an overt act --

QUESTION: Well, if we had a celestial resonance machine that could bring up the image of a common law lawyer, we'd get Sir Edward Cook right in the front of the line, wouldn't we?

(Laughter.)

QUESTION: And his view was that you didn't need an act.

MR. RIORDAN: But Congress --

QUESTION: Isn't that right?

MR. RIORDAN: Cook did say that, Your Honor. Cook did say that, Your Honor.

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QUESTION: That counts for the other side.

MR. RIORDAN: But that was hardly the only definition of conspiracy given at common law, but more importantly, what the Government is saying is that when Congress didn't speak to this question at all, the overt act being in or out, it must have been thinking about the common law, and it must have been thinking about those precedents, Nash and Singer, which suggest that if you don't say anything about an overt act, then you're getting the common law definition.

But in 1970, there were also 100 years of decisions from this Court --

QUESTION: If you go back to your first argument, the text of the statute, and you say that 846 was not an attempt to define the word conspiracy, that might be more persuasive if 371, the general conspiracy statute, had read, if two or more persons agree, but it doesn't.

It reads, if two or more persons conspire, and one or more such persons do any act, so conspire -- both statutes say, any person who conspires, two or more persons conspire. The overt act is added on as something additional.

MR. RIORDAN: I'm lucky, because the answer to the two pending questions is the same. In 13 -- in 371,

when it was passed in 1867, they used the term conspire, and they included the overt act requirement, but by 1970 there were 100 years of decisions from this Court which said, as Bannon and Mulkey said, as Hyde said, that Congress had decided to reject the common law, the Star Chamber definition of conspiracy --

QUESTION: On the basis of statutes that did that.

MR. RIORDAN: That's right. That's right. That's absolutely right, Your Honor, but --

QUESTION: That is, on the basis of statutes that included an overt act requirement.

MR. RIORDAN: That's right, and the question is whether, in 1970, after a statute, admittedly a statute which expressly included an overt act requirement, and 100 years of judicial gloss on that statute, Congress, when it was standing around putting two different offenses in a statute, assumed that the word conspiracy meant what it had meant for 100 years under 371, but --

QUESTION: I assume that the majority of people in Congress really had no knowledge of those cases at all and wrote a -- you really think a majority of people in Congress knew all the cases we're talking about?

MR. RIORDAN: No, we're --

QUESTION: Or even knew who Sir Edward Cook was?

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MR. RIORDAN: We're in complete agreement, Your Honor. What we're dealing with here -- what we're dealing with here is legal -- legal fictions which, in a situation where Congress --

QUESTION: We're left with the language that Congress adopted, and we have to take our best shot at what the meaning of that language is.

MR. RIORDAN: Right.

QUESTION: Now, in other instances where Congress has wanted an overt act, it's said it. In this instance, it didn't say it.

MR. RIORDAN: That's true, but as I say, Your Honor, if -- if we can say that Congress was focused on the definition -- we know that they did not provide -- they did not suggest one element of the crime of attempt. The Federal courts have looked at the attempt side of 846 and thrown up their hands and said, Congress didn't -- they didn't define it, they didn't give a hint what it meant, and they're all over the lot in attempting to --

QUESTION: 371 doesn't define conspiracy, either. I mean, neither --

MR. RIORDAN: Right.

QUESTION: -- of the two statutes we're talking about purport to define the offense of conspiracy.

MR. RIORDAN: I quite agree, Your Honor, which

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means that we're in the position of attempting to figure out whether Congress put all of the elements in there, and if it didn't put all of the elements in there, where do we look to find them?

QUESTION: Well, but you're also faced with the question why Congress required an overt act in 371 and why Congress didn't require an overt act in 846.

MR. RIORDAN: Right, and I would suggest to the Court that we are in a situation where I think that we could be relatively certain that Congress didn't think at all about this issue.

QUESTION: What reason is there to think that Congress thought about it in 1867 and put in the overt act, but didn't think about it in 1970?

MR. RIORDAN: Because according to the cases that have interpreted 371 from this Court, the Court said that in 1867 when they were writing a general Federal conspiracy statute for the first time, they made a conscious decision to reject the common law model, so we know that's why they did it. They were starting from the ground up.

The question is, with a silent legislative history in 1970, is there anything to indicate that they thought about it at all, or when they used the term conspire and conspiracy, they could have well said that

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what they meant in the situation is whatever conspire and conspiracy has come to mean under the general conspiracy statute.

If you're asking me whether I can demonstrate to you that that is what Congress was thinking, the answer is no. The burden, however, in this case is on a party such as myself to, and the defendant in this case to, suggest that there's a reason to doubt the Government's interpretation of the statute, because if there is a reason to doubt that the Congress expressly intended to delete an overt act requirement, then the Rule of Lenity kicks in, and we have to interpret it in such a way that's favorable to the defendant, knowing that Congress always has the option should we be wrong, should we find out that we have a position on the matter, to correct the statute.

QUESTION: It always has the option to correct it the other way if we rule against you.

MR. RIORDAN: That's absolutely true, Your Honor, and what ultimately we are saying in this case is that there is not only a reason, there are many reasons to doubt the interpretation that the Government relies on here, that they are saying that Congress made a conscious decision to eliminate an overt act requirement.

And let me point out --

QUESTION: Is it your argument that Congress

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would have to say, and there is no overt act requirement, in order to give a conspiracy statute that effect? In other words, there's not enough to leave out, as 371 has it, that there is an overt act requirement, but Congress would have to say, and we do not mean that there should be any overt act requirement?

MR. RIORDAN: It sure would have helped.

QUESTION: But is it necessary? If Congress doesn't want an overt act --

MR. RIORDAN: Right.

QUESTION: -- what must it do to accomplish that intent?

MR. RIORDAN: If it doesn't want an overt act, the easiest and simplest thing to do, since we all agree that if possible this is the way we should interpret statutes, is to put it on the statute.

Secondly, if there was an express statement in the legislative history --

QUESTION: Putting it on the face of the statute means, and we do not mean that there be any overt act requirement, is that it?

MR. RIORDAN: That's right. That's right. Then the whole question of what's the significance of 371, which contains an overt act requirement, would be omitted.

Absent that, it could have a legislative intent

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that suggests that that was its clear intent. Thirdly --

QUESTION: How does it do that?

MR. RIORDAN: Well, the committee reports could make clear that, unlike 371 -- I realize that the --

QUESTION: Why do you look at me when you say that?

(Laughter.)

MR. RIORDAN: I realize that there are some -- there's doubt in some quarters of whether that's a reliable source, but it would be more helpful to either side if it were there rather than complete silence.

Or, Your Honor, if the precedent of this Court, its decisions concerning conspiracy, were uniform as to what the terms meant, it would be something else.

On the one hand, we have 100 years of this Court's decisions saying not merely that 371 has an overt act requirement, but saying why that's a very good thing. The cases --

QUESTION: But you also have Nash and Singer, which say otherwise with respect to different kinds of statutes.

MR. RIORDAN: They're a very thin read, Your Honor, for this reason. In Nash, Nash dealt with a Sherman antitrust conspiracy statute, which is outside the purview of normal criminal law. In Nash, it does contain

the statute that, absent an overt act requirement, we look to the common law, but interestingly enough, the rest of the Nash opinion says, reverses the conviction there, because the Government failed to prove an act.

That is, in the antitrust context, the Government alleged the specific means by which trade was obstructed, and the Court found that the obstructions in that case were such that they permitted the jury to convict without finding that the means was proven, and the Supreme Court said, given what it says in the Sherman act, we don't have any reason to go further.

Well, the Sherman act, as pled and proved in that case, required action, so it wasn't a case where Nash was saying, we're now going to have a conspiracy statute which does require the Government to plead and prove actions, because they did in the Nash case.

QUESTION: But they did say in the Nash case that an overt act was not required to support a conspiracy conviction under the Sherman Act, did they not?

MR. RIORDAN: They most assuredly did.

QUESTION: Why, then, is it a thin read?

MR. RIORDAN: Well, because we're dealing not with an antitrust statute or a selective service statute, we're dealing with a statute that's traditionally in the criminal area.

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QUESTION: What difference does it make whether -- the particular substantive offenses that we're talking about? I mean, there probably weren't any prohibitions against the use of drugs in 1611, if you're talking about traditional statutes.

MR. RIORDAN: Right, but we're talking about, as this Court said in MCI, the really relevant period of time to figure out statutory intent is the time that the law was passed, which is 1970.

QUESTION: At which time the Congress had the Singer and the Nash precedents which it could have relied on.

MR. RIORDAN: And had it been explicit in doing so, our task would be very easy, but --

QUESTION: You say, then, that Congress, in order to rely on the Singer and Nash precedents in drafting a statute, must say, either in the legislative history or in the statute, we're relying on these precedents, rather than simply following what they suggest?

MR. RIORDAN: Well, if this legislative history indicated the slightest cognizance of Nash and Singer, no, they don't have to state it explicitly, but again, it would help if there was even the faintest footprint of Nash and Singer in the developmental process of this

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statute. There isn't, so we're again confounded as to where to go and what to look for.

And let's remember the practical consequences of this in this sense: Did Congress, could it be said that they felt it was necessary to eliminate the overt act requirement from the drug conspiracy statute? Federal drug laws right now criminalize every drug transaction that goes on in the United States. The Federal Government -- or virtually.

The Federal Government has no desire, nor any capacity, to prosecute anything other than the tiniest, tiniest fraction of those cases that literally come within the scope of the Federal drug laws. The notion that in order to enforce the Federal drug laws which already are far broader than the actual ambit that they're going to focus on, that Congress needed to eliminate from drug conspiracies the overt act requirement, which is satisfied by the most minimal, by the most minimal action, it doesn't even need to be an illegal action, I would suggest simply doesn't make any sense at all.

And on the other hand, what it's doing is cutting up against the cases of this Court such as Yates, such as Hyde, such as Bannon and Mulkey, which say the function of the overt act requirement is to provide a locus poenitentiae, that is, a point where somebody knows

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they're going to be punished if they take even the slimmest overt act step forward.

Secondly, to allow them to form a joint mental state but do nothing about it, terminate that evil thinking before they go forward, and to provide, to assure society that this action has gone forward in some way which begins to threaten its societal interest.

Those are all very, very good objectives of the overt act requirement, and they, this Court has found them desirable in the context of 371. I would suggest that there's as much reason to believe that Congress read those opinions about the function of the overt act requirement as there is to believe that it read Nash and Singer, which are Sherman, you know, a Sherman antitrust case, or the selective service --

QUESTION: But they would have read the cases you're referring to and seen that those cases originated out of a statute, which itself required an overt act.

MR. RIORDAN: Well, I think we --

QUESTION: Would they not have?

MR. RIORDAN: Well, I think that we both agree that we're discussing a level of fantasy here, because this is all legal fiction.

QUESTION: Well, you're the one that began fantasizing.

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MR. RIORDAN: Well, I --

(Laughter.)

MR. RIORDAN: I am, Your Honor, but the difference is that I am not asking the Court to accept my view of the legislative history of 846. I am merely suggesting that it is a reasonable view of what Congress may have been thinking or not thinking in 1970, and if it is a reasonable view of what Congress may or may not have been thinking, if it raises a reasonable doubt about whether there's an element of an overt act in this statute, then we're in the situation of invoking the Rule of Lenity, which ultimately is really our entire case, that is, that the statute is uncertain.

QUESTION: Mr. Riordan, may I ask you this question? Is it your view that the overt act must be alleged in the indictment?

MR. RIORDAN: It is neither our view nor the view of the Ninth Circuit, and this came up during the argument before, because the Ninth Circuit has never held that the act had to be alleged, it merely has held that it had to be proven, and the Government has --

QUESTION: And there has to be an instruction. The error here was a failure to give the instruction. The indictment was sufficient, according to them.

MR. RIORDAN: That's right. The Government

has --

QUESTION: Are you taking the position that even when the statute on its face requires an overt act, the Government doesn't have to allege it in the indictment, it's enough that they prove it?

MR. RIORDAN: I don't know the answer to that question, Your Honor. I don't know whether -- I suppose it would depend how it were written, but it is possible that if there were explicit statutory requirements it might well have to be alleged. I simply -- it is not --

QUESTION: You have no rule for when it has to be both alleged and proved and when it suffices to have it proved even if it wasn't alleged?

MR. RIORDAN: That's right. The Ninth Circuit in this case has taken the position, in fact it did in this very case below, that there was no failure -- the Government did not err in failing to include the overt act requirement expressly in the indictment, and therefore there would have been no need for a dismissal under Ninth Circuit precedent. They merely would have had to instruct.

So therefore the error below is not the failure to include the allegation, the error was the failure to instruct upon it, and the Government has said a number of times that the overt acts here were proven. We don't know

whether they were proven. We do know that the jury never made a finding.

QUESTION: But given that explanation, your understanding of Ninth Circuit law is that it is still an element of the crime?

MR. RIORDAN: In the sense that it is something that has to be proven beyond a reasonable doubt in order to sustain a conviction, yes, that is the position the Ninth Circuit has taken.

QUESTION: Does the Ninth Circuit hold that any other elements of any other crimes need not be alleged in the indictment but must be proven?

MR. RIORDAN: Well, I should know the answer to this question, Your Honor, but I'll tell you as a lawyer it's never been my impression that there's a statutory requirement that all elements of the offense have to be alleged in the indictment in order to go to the jury, either under State or Federal law. I'm relatively certain that Federal prosecutors as a practice don't include all of the elements of a crime in the indictment. We have essentially notice pleading.

QUESTION: Notice pleading for criminal offenses?

MR. RIORDAN: Well, in the sense -- in the sense that each element of the offense, each mental state

element, for instance, is not included within the pleading. There can be four or five --

QUESTION: I thought it was hard book law that essential elements of a crime must be pled in an indictment. That doesn't mean every detail of your proof, but the requisites to spell out the crime.

MR. RIORDAN: It's a very good thing that the answer to that question isn't critical to the Court's decision of this case, because I will confess that I don't know the answer, Your Honor.

QUESTION: I'm glad you clarified your position, because I thought you were disagreeing with the Ninth Circuit to the extent that they didn't require the act to be alleged, but you think the Ninth Circuit is right in its middle view?

MR. RIORDAN: I want to make absolutely clear that the issue of whether the Ninth Circuit was right in rejecting the contention that the elements had to -- the overt act had to be pled is not before the Court, and I am taking no position on it.

I am certainly not saying that the Ninth Circuit opinion below that says it doesn't have to be alleged is in any way incorrect. I'm merely defending the position that the overt act is an element of the offense that has to be proven beyond a reasonable doubt, which is the

position that the Ninth Circuit has taken, correctly, we believe, in contraposition to Eleventh Circuit's.

I prepared for the argument today by watching Henry Fonda, who argued against 11 in Twelve Angry Men. We acknowledge that other circuits have gone the other way on this question, but I would submit to the Court that I have seen nothing in those decisions that has focused on the fact that 846 is not a conspiracy statute, it deals with more than one offense, and that its primary function is to set penalty rather than to define the offenses, and that's a fact that those opinions simply haven't contended with, and we think it's absolutely critical to the correct decision of this case.

QUESTION: But you're not saying it's any different than 371 in that respect?

MR. RIORDAN: I'm sorry, Your Honor, in which respect?

QUESTION: Well, you say 846 is a statute that doesn't purport to define conspiracy, it just sets penalties.

MR. RIORDAN: Right.

QUESTION: You're not suggesting that in that respect it's any different from 371, are you?

MR. RIORDAN: Well, it is different in this respect, Your Honor: Many States have classified felonies

A, B, C, and D, and there's a whole group of felonies that fit in each class. If we found a statute that said, Class A felonies will be punished by a sentence of death or life without parole, we would not be surprised that they didn't, in that same statute, list all the elements of those offenses. Even if --

QUESTION: Are you explaining now why you think 846 is different from 371?

MR. RIORDAN: Yes, I am, Your Honor. I am, in the sense that 371 deals with the crime of conspiracy, and conspiracy alone, and 846 deals with more than one offense, and --

QUESTION: Why does that make any difference?

MR. RIORDAN: Well, I suggest that since we know from the case precedent that Congress -- the courts have uniformly declared that Congress wasn't focusing on the elements of attempt, I think it's fair to infer in this very statute that they weren't focusing on the elements of conspiracy.

QUESTION: Well, and what makes you think they were focusing on the elements of conspiracy in 371?

MR. RIORDAN: Well, the legislative -- the courts' interpretations of that seems to be that since this was the first general conspiracy statute in 871, they were focused on the fact that they wanted to create a

statute that had an overt act requirement that didn't exist at the Star Chamber and at English common law, and we would suggest that, 100 years later, there may well have been Congressmen thinking the overt act requirement had worked its way into the warp and woof of the definition of conspiracy in this country, that that's the American definition of conspiracy.

QUESTION: Mr. Riordan, what Federal criminal statutes do define crime? My impression is, all of them just say whoever commits this shall be punished by that. I mean, this is not an unusual statute in that it, as you say, it does not define the crime. Most Federal statutes read like this, don't they?

MR. RIORDAN: Well, I --

QUESTION: They use a common law term and say, the punishment shall be thus, or a common sensical term.

MR. RIORDAN: I'm sure that's true, Your Honor, but in Joyce and Monduhano, the Federal court said, look, we don't get any guidance on what the term means from the statute itself, and all we're saying is, we think the same is true of the conspiracy end of the statute, and that the courts have to look elsewhere to figure out what the heck this means, and we think that one reasonable interpretation is that Congress thought that when it uses conspiracy and conspire, it was referring to the kind of

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offense contained in the general Federal conspiracy statute.

Admittedly, that is not -- that is not -- that's not the only reasonable interpretation of 371. The -- of 846. We concede that the Government's reading of 846 is indeed reasonable. We could concede that perhaps there's a probability that it's right, but we think there's a very reasonable reading of the statute which suggests that Congress was not focused on deciding that one way or the other, and we have to look elsewhere for the answer to the question.

QUESTION: Thank you, Mr. Riordan.

MR. RIORDAN: Thank you.

Mr. Seamon, you have 16 minutes remaining.

REBUTTAL ARGUMENT OF RICHARD H. SEAMON

ON BEHALF OF THE PETITIONER

MR. SEAMON: Unless the Court has further questions, I have nothing further.

QUESTION: I do have a question, actually. What do you say in response to Mr. Riordan's argument? That is, I take his argument basically to be that by the time this particular statute was passed, 846, by that time in 1970 it had become fairly widely accepted practice that, in the Federal law, conspiracy included overt acts.

Indeed, the only exceptions to that were really

criminal provisions that aren't even printed in what we think of as the criminal section of the U.S. Code, 18, 21, 26, et cetera, but rather, sort of outliers, the Sherman Act, which isn't in the West Publishing thing, the Selective Service Act, and so by that time anyone who was a drafter would have thought, of course it includes an overt act when we use that word conspiracy.

Indeed, this particular statute doesn't define a crime. It seems to refer back to 371. It just says, those who commit this kind of offense shall have the same penalties, et cetera, and so at least the matter is ambiguous. After all, a drafter would have looked far and wide for any other normal criminal section with conspiracy if it didn't include overt act.

I mean, that's, I think that's his argument, so that's at least a good enough argument to invoke the Rule of Lenity.

MR. SEAMON: We --

QUESTION: So what is your specific response to that? Maybe you've made it already and you'd just be repeating yourself, in which case, I don't want you to repeat yourself, but I wanted you to have a chance to focus directly.

MR. SEAMON: Thank you.

Although the Court has focused on 371, the

general conspiracy statute which was enacted in 1867, there were many subsequent statutes that expressly require proof of an overt act in furtherance of the conspiracy in so many words, including a number of statutes that were on the books in 1970 when Congress enacted section 846.

Those statutes are evidence that the word conspire did not change to include implicitly an overt act element.

I thank the Court.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Seamon.

The case is submitted.

(Whereupon, at 10:51 a.m., the case in the above-entitled matter was submitted.)

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BY Ann Mari Federico

(REPORTER)