OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, Petitioner v. ROBERT P. AGUILAR

CASE NO: No. 94-270

PLACE: Washington, D.C.

DATE: Monday, March 20, 1995

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 94-270

ROBERT P. AGUILAR :

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Washington, D.C.

Monday, March 20, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

JAMES A. FELDMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

ROBERT D. LUSKIN, ESQ., Washington, D.C., on behalf of the Respondent.

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PROCEEDINGS

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 94-270, United State against Aguilar.

Mr. Feldman.

ORAL ARGUMENT OF JAMES A. FELDMAN

ON BEHALF OF THE PETITIONER

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

This case arises out of the conviction of respondent, a United States Federal District Court judge, on two counts. The first count charged him with obstruction of justice in violation of the omnibus clause of 18 U.S.C. section 1503, and it was based on his attempt to obstruct a grand jury investigation by making false statements to FBI agents that he knew would be reported to the grand jury.

The second count charged him with disclosing a wiretap application in violation of 18 U.S.C. 2232(c). That -- the court of appeals reversed the first count on the ground that his conduct could not constitute obstruction of justice as a matter of law, and it reversed his conviction on the second count on the ground that the wiretap that he disclosed had already expired by the time he disclosed it.

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QUESTION: Mr. Feldman, no charge was brought under section 1512, I take it.

MR. FELDMAN: That's correct.

QUESTION: And do you think the conduct here would have been covered by 1512?

MR. FELDMAN: I think it likely would have been covered.

QUESTION: Might have fitted it rather closely.

MR. FELDMAN: I think it likely would have been covered under section 1512.

QUESTION: Why was no charge brought under that section, do you suppose?

MR. FELDMAN: Well, I think the main reason is that respondent's conduct, if you looked at what he did, was aimed -- it was felt was aimed directly at the grand jury investigation, and that therefore the count that had to do with obstruction of a grand jury investigation was the most appropriate count.

About a month before he made the false statements to the FBI agents, his coconspirator informed him there was a grand jury investigation going on, and he said he was concerned about what would happen if he was subpoenaed to testify.

At the beginning of the interview with the FBI agents, almost at the very early stages he asked, am I a

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target, a term which he later testified was known to be used by FBI agents in connection with grand jury investigations.

At the end of the interview, near the end of the interview when they asked him, do you have any questions for us, his response -- almost his first response was first whether, again, whether he was a target, and secondly, expressing concern that he might be indicted, and finally, when he testified at trial in this case, he specifically said that he knew that his statements would be reported to the grand jury, at least at the end of the interview.

Now, the --

QUESTION: Did the FBI agents testify before that grand jury, the ones that talked to him in Honolulu?

MR. FELDMAN: At least Agent Carlon did. I'm not sure whether the other one did or not.

QUESTION: Was there any showing, or was it the Government's theory that they were more or less in charge of bringing the matter to the grand jury?

MR. FELDMAN: I don't think there was a feeling that they were in charge of bringing it to the grand jury, because I don't think the count rested on any showing that they were in charge of the investigation. His obstruction of the -- he was trying to get false information to the

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grand jury in the same way that somebody who alters or destroys documents is trying to get that false information to a grand jury.

The medium he chose, which was an effective one, could have been an effective one, was through the -- making false statements to the FBI agents that he knew would be reported to the grand jury, but I don't think their status as being in charge of the investigation was essential to the charge, or even important.

QUESTION: Was he charged under, what is it, 1001, for simply making false statements to an executive official in the performance of his duties?

MR. FELDMAN: No, he wasn't charged under 1001.

QUESTION: That would have applied, wouldn't it?

MR. FELDMAN: In our view that would have applied. I do have to say that the Ninth Circuit has a very expansive view of what's been called the exculpatory no doctrine, and it's not clear to me whether it would have or wouldn't have in the Ninth Circuit. It's kind of hard to make that out.

But in any event, the reason he was charged under 1503 as opposed to that count was, once again, that when the case was analyzed it was seen that his conduct was aimed directly at the grand jury investigation, and that therefore that was the most important and the most

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appropriate charge to bring before the trial jury.

QUESTION: Mr. Feldman, I suppose if we went about statutory interpretation sort of in the usual way and looked at the series of related statutes, 1503 and 1512, and we looked at them cold, we'd probably say, well, 1512 is the one which is obviously aimed at this situation, and so the catch-all in 1503 probably shouldn't be construed to cover it.

As I understand, as I recall your brief, an answer to that is that in fact 1512(b) in fact does not have the same kind of coverage that 1503 would have on your theory. Would you explain to me what the distinctions are?

MR. FELDMAN: Well, 1512 in some respects is broader than 1503, and --

QUESTION: That's the omnibus character.

MR. FELDMAN: Right.

QUESTION: But I thought there was another distinction that you were making, and I don't remember what it was.

MR. FELDMAN: Well, I think the main point would be that section 1503 is a catch-all provision, and it covers a great deal of conduct that doesn't have anything to do with what would be covered by section 1512.

QUESTION: Well, yes, but that's always true of

a catch-all, so --

MR. FELDMAN: Right, and I think it's also, I guess I would -- I'd just --

QUESTION: But I mean, if that were the distinction, then in effect the catch-all would always be duplicative of the more specific statute on your theory, then.

MR. FELDMAN: But I don't think that that's true that it would always -- it has some overlap both with the earlier clauses of section 1503, with section 1512, and with some of the other obstruction of justice statutes, but the fact that it has that overlap is necessarily a result of the fact that it is an omnibus clause and a catch-all clause. Those other statutes in turn cover conduct that's not covered by section 1503.

QUESTION: Mr. Feldman, though, did I understand you correctly in answer to Justice O'Connor's question that you didn't have doubts about the fit of 1512, that you would think that 1512 did fit, but for whatever reason you chose 1503 instead.

MR. FELDMAN: I do think he could have been charged under 1512. It's not uncommon in Federal criminal prosecutions that there's a number of different statutes that would apply to a given defendant's conduct, and it's up to the prosecutor to decide which is most appropriate.

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I'd also point out that under section 1512 the penalties are -- I think the monetary penalty is five times as high, the term of imprison -- the maximum imprisonment is twice as high, and there are differences of that sort between the two statutes that might make one -- that might go into the decision as to which one to charge, but the main reason was that we felt that his conduct was aimed directly at the grand jury, and that that's what should be charged.

I'd also say that I don't think that it's appropriate to construe a catch-all provision such as 1503 by first looking to other provisions and seeing what the coverage of those is and cutting out holes from 1503 to correspond to other provisions.

1503 has always been understood to cover not only some of the territory that the other provisions cover, but some of the territory that they don't cover, and where the conduct comes within the plain meaning of the omnibus clause of section 1503, there's no reason to then look at some other statute to see that even though it's within the plain meaning of that omnibus provision, we're going to cut a hole for 1512, or 1513, or 1508, or any of the other obstruction of justice statutes.

QUESTION: Mr. Feldman, what is the closest case in the courts of appeal supporting your position in this

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case?

MR. FELDMAN: Well, before -- well, I think the closest case probably is the Grubb case, United States v. Grubb. There was also the Wood case, where, of course, the court of appeals in that case reversed the conviction on grounds that are not that clear to me, so we wouldn't agree with the result in that case.

But in addition to that, even before 1982, when Congress made the change and enacted -- when Grubb was enacted --

QUESTION: The Grubb case was testimony before the grand jury, wasn't it?

MR. FELDMAN: I beg your pardon?

QUESTION: Wasn't the Grubb case testimony before the grand jury?

MR. FELDMAN: No. The Grubb case was testimony to an FBI -- it was statements that were made to FBI agents that were investigating, just as the agents were here, and would be reported back to the grand jury.

In addition to that, before -- even before 1982, when section 1512 was enacted, there was a case called Hawkins, which we cite at page 19 of our petition, that involved very similar conduct, also false statements to FBI agents.

QUESTION: In your earlier case, was the FBI

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agent acting sort of specifically as the grand jury's agent at the time? Was he going back and forth and the grand jury, in effect, requested the agent to gather information?

MR. FELDMAN: There's no -- as far as I can tell, and certainly as far as you can tell from the reports of any of those cases, there's no reason to think that he was acting any closer, in any closer connection to the grand jury than the FBI agents were here.

That is -- you have to remember that as the case comes to this Court, there was a pending proceeding and respondent knew that that pending proceeding was going on. He also knew that his false statements would be reported to the grand jury. That's what he told the jury, the trial jury. I think, in fact, he was right, because there was evidence in the record that Carlon did testify before the grand jury. I think that's as close a connection as you need.

Respondent has argued that you need some kind of "direct nexus" between the defendant's conduct and the grand jury in order to be charged under the omnibus clause of section 1503. I don't know what that term means. It's not one that any court of appeals has ever used in connection with this statute.

Insofar as it means that there has to be some

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connection, in that ordinarily people don't -- ordinarily, in order to be said to endeavor to obstruct something, you ordinarily would use some means that has some capability of affecting that proceeding that you're trying to obstruct, we don't have any quarrel with it, but I don't know how directness would be measured, and nor do I see anything in section 1503 that distinguishes between direct and indirect, or allows you somehow to draw degrees of directness and say well, this is direct enough to be prosecuted under 1503, and that is not.

If the defendant's intent is to obstruct the grand jury, and if there's a pending proceeding and the defendant knows that that pending proceeding is going on, his conduct is -- can be prosecuted under the omnibus clause of section --

QUESTION: Well, I suppose under the omnibus clause you could prosecute a person for lying before his own -- at his own trial on the witness stand.

MR. FELDMAN: I think that's probably right. You probably could.

QUESTION: What about the word "corruptly"? Does that add anything to -- is a plain lie enough? If so, then "corruptly" doesn't seem to add anything on your view of it.

MR. FELDMAN: I think "corruptly" has, I think,

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uniformly been construed by the courts of appeals to mean that you need the specific intent to obstruct, and in fact it has a number of different meanings depending on what the specific offense probably is that's being charged, because there's such a broad range of conduct that does come in within the omnibus clause.

QUESTION: Well, then it's still redundant. Doesn't "endeavor" bring in intent?

MR. FELDMAN: I think in combination with "endeavor" it brings into intent. I mean, "endeavor" -- "endeavor" was added -- the history of the statute is that "endeavor" was added in order to eliminate the niceties of the law of attempt of the statute.

QUESTION: Can I read you an entry in Black's Law Dictionary? "Corruptly. When used in a statute, this term generally imports a wrongful design to acquire some pecuniary or other advantage."

It appears in a lot of statutes, and it usually means by bribery, to do it corruptly.

MR. FELDMAN: I -- I don't think --

QUESTION: In other words I think what Justice Ginsburg and I are asking is, how much of a -- you say it's a catch-all. How much of a catch-all is this last clause? It doesn't say, whoever misleads, it says who only does it in certain ways, corruptly, or by threats of

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force, or by any threatening letter or communication.

MR. FELDMAN: I think, first the jury was instructed in this case that respondent had to be trying to obtain some advantage for himself, and they found that he was, and in fact he was trying to obtain an advantage for himself. He was trying to avoid being called before the grand jury, and he was trying to avoid being indicted in improper ways, so that -- as far as the definition that you read, I think that this case satisfies it easily.

QUESTION: But a lie would be a deliberate falsehood, would be for some purpose, and my concern is, you seem to be reading this as though "corruptly" just wasn't there, to add nothing more than a deliberate or conscious factor to it, but that's what a lie is. You consciously tell an untruth.

MR. FELDMAN: In some -- I guess the -- stating the fact that the defendant has lied is not itself a statutory term. I mean, I'm not sure that I understand why that would create a problem. "Corruptly" indicates that you have to have the specific intent to obstruct.

There's been numerous cases, not only about false statements made directly to a grand jury, but about -- I think a core application of section 1503 is the alteration or destruction of documents for presentation to a grand jury, and that conduct really is identical to the

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conduct that respondent engaged in here, except that instead of by altering a document and giving that to the grand jury, you're making a statement to the FBI agent that will bring an equally false piece of information before the grand jury.

QUESTION: Maybe we can get at my problem this way. Can you give me an example of something that would not fit because it isn't corrupt, that is a false statement, but would not fit within the catch-all but is not corrupt?

MR. FELDMAN: I guess -- I don't know if I -- I can't think of an example offhand for that, but again, I'm not sure why the fact of whether -- why you -- false statement cases may, just like alteration or forgery of document cases, may always be corrupt, because whenever they're altering or forging a document knowingly, it's going to be a corrupt action in the sense that the statute means it.

I suppose if the defendant was not trying to gain any benefit for himself or other, someone else, perhaps it wouldn't be corrupt in that sense, although it's hard to envision a case where the defendant would engage in that --

QUESTION: Is the answer to what's bothering people possibly an historical answer? Is this particular

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point of drafting, the use of the word "corruptly," something from the -- a much earlier statute? What I'm thinking of is, I can remember reading old statutes that speak of feloniously, for example, committing acts.

Well, the fact that they're made crimes by the statute means, in a sense, they're all feloniously done, and all that's trying to pick up is the general notion of criminal intent. Are we in the same boat with "corruptly" in this statute, that it's sort of a piece of antique drafting?

MR. FELDMAN: I think so, except the only thing --

QUESTION: Do you know when it first appeared in the statute?

MR. FELDMAN: It was in the statute at least as far back as the Pettibone case 100 years ago in 1893, or '92. I'm not sure -- I have a feeling it may well go back to the origin of the statute, which was, I think, 1831.

QUESTION: Mr. Feldman, your time is going to be up shortly, and there was another section under which the defendant was charged, section 2232(c), giving notice or attempting to give notice of a possible wiretap interception.

Is it your theory that the defendant was guilty of an attempt to give notice, or what?

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MR. FELDMAN: It's our theory that he actually did give notice, although only an attempt would be necessary for violation of this statute.

I think the dispute about that provision centers --

QUESTION: Is over the fact that at the time of the defendant's action the wiretap authorization had terminated?

MR. FELDMAN: Right, and the question is whether, when the statute says, what he has to disclose is the possible interception, really the dispute concerns the meaning of the word "possible" there.

Now, what the statute requires is that a defendant have knowledge of either an authorization or an application to intercept telephone communications, that he act in order to obstruct such interception, and that he give notice of the possible interception.

Now, when you talk about the interception that might result from an application or authorization for wiretapping, the interception has to be understood to extend not simply to the initial period of up to 30 days that you can get an order for, but any additional extensions of that period that might be added, and respondent plainly thought that that's what had occurred in this case, when 5 months after he found out about the

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authorization he gave notice -- he gave notice to the target of it in order to obstruct it.

In our view, the term, "possible," there, was used to tie back into the first clause of the statute. That is, it ordinarily will be the case that a defendant will not know whether interception actually is going on, and defendant didn't know that in this case. Ordinarily, all the defendant will find out about is an application or an authorization. He doesn't know what's happened to it after that.

And so when Congress referred in the final -- in the last part of the statute to the possible interception, what they -- what Congress was referring to is, what he has to disclose is that of which he has knowledge, that there is a possible interception, and that's the act of disclosure that's prohibited.

In other words, if the defendant goes to someone and says, "There's a possible interception, or there might be an interception on your phone. I heard about it. You better not talk on the phone." Then I think he's guilty of violating the statute.

That, I think, is clearly the meaning of the term "possible" in the statute, and I don't think there's any question that defendant violated -- that respondent violated it.

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Now, respondent says, and the court of appeals believed, that the term "possible" was a term of limitation on the statute, and that Congress wanted to let the people who disclose a statute with -- a wiretap with intent to disrupt it should be -- should not be able to be prosecuted if for some reason entirely unbeknownst to them the interception is not going on, or can't go on.

If, for instance, the target is deceased, if the target's moved to a new house and isn't at the same telephone number anymore, if the target's already been informed of the wiretap, and therefore wasn't going to be talking on the phone under any circumstances, or if the wiretap has expired, as happened in this case.

But I don't think that there's any reason why Congress would have created a -- would have written a statute, and I really find it hard to believe that Congress would have wanted to create those kinds of windfall defenses that are based on the fact that the defendant didn't know about the -- didn't know about the fact that he's now saying precludes his prosecution.

QUESTION: Is there some disagreement in the lower courts about the impossibility question? I gather there is.

MR. FELDMAN: I don't think there is any disagreement. I mean, to be frank, the statute -- there's

only been a few prosecutions under the statute. I think there's only one or two other reported decisions. I don't think that there's -- I don't think anyone -- any other court has directly addressed it the way the Ninth Circuit did in this case.

QUESTION: The charge to the jury with respect to the 1503, would that have been different if the respondent had been indicted under 1512?

MR. FELDMAN: It would have been -- I -- you know, I -- it would have been -- you would have had to show under 1512 was that there was an official proceeding, and in this case you had to show there was a pending proceeding. I think it really, as a matter of law, works out to the same thing.

QUESTION: So could respondent perhaps be retried under 1512 without the bar of the statute of limitations?

MR. FELDMAN: It's possible that he would be able to.

I can't definitively say whether he would or not, but I do think that -- I do think it's important in this case that -- to realize that the omnibus clause of 1503 being a broad clause that's intended to extend or to cover lots of territory, not only territory that's also covered by the earlier provisions of section 1503 and by

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other statutes but also far beyond that, that when Congress enacted 1512, they would have had no way to know the courts would later -- and at that point they didn't change the omnibus clause at all. They would have had -- Congress would have had no way to know that courts later would come along and construe the statute as if they had narrowed the scope of the omnibus clause.

In fact, what Congress knew at that time was that, as in the Hawkins and Haldeman cases that I was talking about before, was that people had been prosecuted for conduct that was very similar to the conduct that respondent engaged in here, and they also knew that the omnibus clause of 1503 was not limited to simply covering gaps that weren't covered by other statutes, that it was instead intended to cover a broad range, including many things that were covered by other statutes.

QUESTION: But there were some changes made in 1503 --

MR. FELDMAN: Yes.

QUESTION: -- at the time 1512 was enacted.

MR. FELDMAN: Yes, there were. There were references to witnesses in the two earlier, very specific clauses of 1503, and what Congress did is took each of those references and made them into a whole separate statute.

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But the omnibus clause, which stands on its own and as a matter of grammar and as a matter of logic, and it's far broader and has never been limited just to the scope of the earlier clauses of 1503, the omnibus clause was not changed at all. In our view, that's the central fact about interpreting what Congress did when it made that change.

QUESTION: I was also wondering about the words "in order to" in the second statute. What do you have to show "in order to"? What's puzzling me, and I don't know the answer to this, is imagine, say, that the defendant says something about the tap, but his motive is simply to tell his relative why he shouldn't come to the house, or suppose that he isn't really interested in whether or not there's been a new application and a new tap.

He doesn't specifically intend to stop, interfere with the old expired tap. He knows sometimes these things expire, sometimes they don't, sometimes they're renewed, sometimes there's a new one. What kind of specific intent do you have to show in those words "in order to"? Why wouldn't, for example, you have to show that he specifically intended his main motive was to interfere with this old, now expired tap, as compared with some new one?

MR. FELDMAN: Yes, I --

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QUESTION: That's the kind of thing that's puzzling me.

MR. FELDMAN: I think essentially that's right. I think what he has to be shown to do is intend to obstruct or interfere with the wiretap of which the -- of which -- that could have resulted from the facts of which he has knowledge, what his knowledge is.

QUESTION: So if he's thinking in his own mind, sometimes these things expire -- most judges know that they expire. Sometimes they get new ones. I really don't care whether I'm giving away something for an old expired tap. That's of no interest to me. Maybe they have a new one. I don't know. Then he gets off.

MR. FELDMAN: No, I don't think he does get off under the circumstances. I think if he has such -- I think ordinarily in the criminal law if you have that kind of total disregard for whether you're violating the law or not, I think ordinarily that would be shown to have the necessary intent, just as if you shoot a gun at someone and you don't really care if you kill them or something, I think ordinarily you would be charged with murder.

QUESTION: Mr. Feldman --

QUESTION: But if you shot a gun up in the air and it happened to kill somebody, you didn't do that "in order to" kill somebody. That's the kind of thing

that's --

MR. FELDMAN: Right, but I think the "in order to" clause is meant to apply for the purpose of interfering with the wiretap. I think respondent in this case, he told -- he said on several occasions that he had heard about the wiretap at work 2 months after he made his disclosure. He said --

QUESTION: If he knew -- if he knew that the wiretap had expired, would he be guilty of violating this statute? It wasn't clear to me what your position is on that.

MR. FELDMAN: No, I don't think he could be, but the reason he couldn't be is, if you know that the wiretap has expired, then you can't be found to have intended to obstruct it, or at least it would be a very odd situation, which --

QUESTION: You could just be intending to tip your relative off that he's under suspicion for something.

MR. FELDMAN: That's right.

QUESTION: And then he wouldn't be violating this statute.

MR. FELDMAN: That's right, and I think that would obviously be an entirely inappropriate --

QUESTION: So isn't it logical that a Federal judge would understand that the chances were better than

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not that the tap would not have been continually renewed, so that at the time he's tipping off his relative it's still alive?

MR. FELDMAN: I don't think so, and I don't think that that kind of guesswork is what I'm talking about when I say that he knows that it's expired. I don't think it's whether he's guessing that it might be expired, and indeed, in criminal investigations and in complex criminal investigations, it's very common for wiretaps to be extended for successive 30-day periods with or without short breaks for a very, very long period of time.

QUESTION: But if he testified he thought it was more probable than not that this tap had expired.

MR. FELDMAN: If he testified? You know, if the -- I think even more probable than not I don't think would be sufficient. If he testified that he believed that it had not expired and didn't intend to obstruct it, and if the jury believed that, then I suppose the jury could have acquitted him, but I do think at least the jury certainly isn't required to listen to what his testimony would be on that point, nor I think did he -- I don't think he did testify in this case to anything like that fact.

I think the important point is that what Congress intended to do was protect not just the existing

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wiretaps, but the possibility that wiretaps would be continued and would be extended at a later date, and would be extended perhaps with a short gap or perhaps not, and it's precisely because Congress knew that these things only go for a maximum of 30 days at a time.

QUESTION: Or even would expire and a new one be authorized. It doesn't say, "such authorization." It says, "such interception."

MR. FELDMAN: That's correct.

QUESTION: I mean, we've been discussing it as though it said, "such authorization." That's really not what it said.

MR. FELDMAN: That's correct.

I think as long as there's a possibility that the wiretap could be extended, I think the statute could be read to read -- to apply to that.

QUESTION: Do you tie anything to the time when the inventory is given as any kind of, at least at that -- that is the point when the statute no longer applies?

MR. FELDMAN: I think that might well be the case. The fact is that in this case the inventories weren't given until a year after he made his disclosure, or more than a year afterwards, and indeed, the provision that Congress put in the statute for extending the period of giving the inventory and therefore disclosing to the

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target that there's been a wiretap, the fact that Congress allowed for those periods to be extended specifically to protect the ongoing wiretap and the ongoing investigation, I think supports our construction of the statute, that it, too, was intended to protect against the possibility of the extensions.

I'd like to reserve the balance of my time.

QUESTION: Very well, Mr. Feldman.

Mr. Luskin.

ORAL ARGUMENT OF ROBERT D. LUSKIN

ON BEHALF OF THE RESPONDENT

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

By this prosecution, the Government seeks to use two statutes, section 1503 and section 2232(c) of Title XVIII, in ways in which they have never been employed before. Their construction would dramatically and capriciously extend the scope of those statutes without safeguarding a single interest that those statutes are designed to protect.

With respect to section 1503, it's the Government's position that the words of the statute, in particular the words of the omnibus clause, speak for themselves. If they do, they do not speak loudly or very clearly.

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The omnibus clause in essentially its present form has been on the books for more than 150 years, and with the possible exception of the Grubb case, this is the first prosecution in which the Government has attempted to use the omnibus clause to reach simple false statements to undisclosed potential witnesses before the grand jury.

The Government's construction of section 1503 is flawed in at least two distinct respects. In the first place, simply on the basis of its terms, the Government through this prosecution ignores the significant qualitative distinction between the types of conduct that have been traditionally punished under the omnibus clause and the type of conduct it seeks to punish here, and in the second place, the Government's construction of the omnibus clause ignores its place in the statutory scheme of which it plays but a small part.

Since 1982, Congress has made as clear as it could possibly make it that misconduct in relation to witnesses, and specifically misconduct in relation to witnesses that is expressly covered under the terms of section 1512, should be prosecuted there and nowhere else.

QUESTION: Well, are you saying that Congress in 1982, Mr. Luskin, impliedly narrowed the omnibus clause of 1503?

MR. LUSKIN: What I'm saying, Your Honor, is

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that Congress narrowed the scope of 1503 and by doing that, yes, impliedly narrowed the scope of section 1503. There was nothing implied about what it did to section 1503, which was to eliminate --

QUESTION: It took witnesses out.

MR. LUSKIN: It took everything in relation to witnesses out, and it's important to bear in mind the Government's theory of this prosecution, which is that Judge Aguilar, by his false exculpatory statements to the FBI, influenced the FBI agents as potential witnesses so that they would convey false information to the grand jury.

QUESTION: How, mechanically, did Congress accomplish this process of narrowing the omnibus clause? It didn't rewrite any of the language in the omnibus clause.

MR. LUSKIN: No, sir. I would say that this is a paradigm example of what this Court recognized in Fausto, which is that when Congress reorganizes a coherent legislative scheme, that it's important to go back and look at the prior text with a view towards what Congress attempted to accomplish in the future.

Section -- the omnibus clause of section 1503 had never, ever been used before 1982 in the way in which the Government suggest it be used here.

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QUESTION: Well, that's a perfectly good argument for saying it shouldn't be used that way after 1982, but it's not a very good argument for saying that Congress changed the meaning of the clause in 1982.

MR. LUSKIN: What I think it is, it's an argument to say that in looking at what Congress accomplished in section 1512, it's important to look at the prior statutes, as this Court did in Fausto, with a view to what the Court was trying to accomplish. What Fausto --

QUESTION: What Congress was trying to --

MR. LUSKIN: I'm sorry. That's correct.

In Fausto, Your Honor, the Court went back and said that by enacting the Civil Service Reform Act this Court impliedly intend -- that Congress impliedly intended to repeal a prior construction of the Back Pay Act, which, by negative influence from the new statutory scheme, should no longer be maintained.

QUESTION: Yes, but of course the doctrine of implied repeal is disfavored, and as I understood it, you're not -- are you relying here on the doctrine of implied repeal?

MR. LUSKIN: No, sir. I think as in Fausto what we're saying is that this is a situation in which the doctrine of implied repeal is inapplicable, that this is a

common sense rule of where the Congress enacts a coherent, legislative scheme addressed to a specific area, which is in this case wrongful conduct in relation to witnesses or potential witnesses, it's important to go back and look at other historical provisions with a view towards what Congress was trying to accomplish.

QUESTION: Well, if we disagree with you that somehow the amendment of section 1512 affected the meaning of the omnibus clause in 1503, if we disagree on that, do you place reliance on the meaning of the word "corruptly" in 1503?

MR. LUSKIN: Well, if we were solely to look at section 1503, Your Honor, I think what we place reliance on is corruptly endeavoring to disrupt the due administration of justice. From the beginning, this provision, which arose out of the Court's -- the Congress' effort to codify the contempt provision, required a nexus between the wrongful conduct and something that's going on in court.

QUESTION: Well, certainly something that you tell a witness that you know is going to testify at the proceeding, hoping to affect the proceeding, can have that nexus. I don't accept that -- your theory is that no statement to a witness could possibly affect a juror or judge. I think it could.

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MR. LUSKIN: No, Your Honor, I don't think I'm saying that. What I'm saying is that there are really two components to the obstruction of a due administration of justice.

The first is whether as a matter of almost but-for causation there's a possibility that something that one does outside the court could eventually have some impact on something that happens in the court, but the other thing that I'm suggesting is that it has a qualitative component as well.

And I think this Court's decision in In Re Michael, which was a contempt case but was also considering the question of the due administration of justice in which the Court said that even perjury in court was not necessarily obstructive of the due administration of justice unless it could be demonstrated qualitatively that there was a risk of harm, and all of the cases relied upon by the Government, have one of two defining characteristics that's just not present here.

In the first place, where the grand jury affirmatively exercises its authority to secure particular testimony, for example by a subpoena or by compelling the attendance of a witness before the grand jury, it's perfectly clear in those circumstances that wrongful conduct at that point has a substantial risk of

interfering with the administration of justice.

QUESTION: So you don't think that 1503 is limited by the need to use a bribe or a threat of violence or something of that kind?

MR. LUSKIN: No, ma'am. I think, for example -- and I think the destruction of evidence cases are perfectly good examples of that.

Where the grand jury has expressed its interest in a particular subject matter, or seeing a particular document, then the destruction, concealment or forgery of that document would have the potential for interfering with the due administration of justice. That, of course, is not what was going on here. The Government eschews reliance on any suggestion that the FBI agents were the grand jury's agents, or that they were acting on behalf of the grand jury, that they had directed their inquiry or in any way expressed an independent interest in that subject matter.

The second defining characteristic, Your Honor, is affirmative conduct by the defendant that substantially raises the risk that wrongful information is going to reach the grand jury, and I would give as a paradigm example of that the bribery of a witness, or the situation in Hawkins, where the witnesses went out and caused a third party to pretend to be a fictitious witness to give

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false testimony, and there, by the defendant's affirmative endeavor, there is a likelihood that the false information that that defendant is relating will reach the grand jury and interfere with its process and, of course, that's not present here either.

QUESTION: How do you get all of this out of the word "corruptly"? You say "corruptly" does --

MR. LUSKIN: I get it --

QUESTION: -- does handle destroying evidence, it does cover that, but it does not cover lying. I don't -- I mean --

MR. LUSKIN: I --

QUESTION: -- if you say so, but I don't know why the language leads you to that conclusion.

MR. LUSKIN: I get it, Your Honor, from the concept of obstruction of the due administration of justice, and the gloss that's been placed on that concept by cases such as In Re Michael in this Court, and by other cases which require --

QUESTION: You're not relying on "corruptly" for it, then?

MR. LUSKIN: No, sir.

QUESTION: Okay. Well, what do you rely on "corruptly" for, anything?

MR. LUSKIN: We don't.

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QUESTION: I thought you -- well, but you did on page 22 of your brief: finally, even if in some circumstances section 1503 might be read as to cover a prospective witness, blah, blah, blah, a mere false statement is not one of those. The phrase "corruptly" endeavors to influence, blah, blah, blah, on which the Government relies, should not be construed in isolation.

MR. LUSKIN: In --

QUESTION: It isn't "corruptly" that makes any difference to you?

MR. LUSKIN: It makes a difference only insofar as it helps to characterize the caliber, or quantity, or significance of the conduct that has to take place, and the reason that that's important is because of the risk it carries with it of an undue influence on the grand jury.

QUESTION: It becomes more corrupt if it's -- if it's greater activity?

MR. LUSKIN: It becomes more corrupt because it raises the risk that the lawful functions of the grand jury will be impeded or obstructive.

QUESTION: It seems --

QUESTION: Mr. Luskin, you've referred several times to the Michael case. Do you cite that in your brief?

MR. LUSKIN: No, sir, I don't think we did.

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QUESTION: Why was that?

MR. LUSKIN: I think, Your Honor, that the issue has been framed by the Government's reply brief, in which they suggested essentially that any kind of misconduct in any fashion that might sort of float downstream on a current of causation might affect the grand jury.

QUESTION: Do you have a citation now for the case?

MR. LUSKIN: Yes, sir. Michael is found at 66 Supreme Court Reporter, at page 78, and it is cited in the Grubb case, on which the Government relies.

QUESTION: Thank you.

MR. LUSKIN: And Michael, Your Honor, was a contempt case. It was not under 1503, but the issue was what constitutes interference with the due administration of justice, and section 1503 is, if you will, a cousin of the contempt statute, and both of them arose together out of an effort to codify the same concept.

QUESTION: What, in your opinion, is the proper method of limiting both these statutes, i.e., 1503 and 1512? I mean, 1512 is enormously broad as well. It talks about using misleading conduct possibly to influence the testimony of a witness.

Well, literally, I guess, somebody goes and smiles in a certain way, thinking, aha, wears a certain

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kind of tie, or goes out and gives some kind of statement to a fourth cousin, or says something publicly that they know will be reported in such a way that it would influence a witness, or -- I mean, you can spin it out endlessly, and is all that caught by this statute?

Is it totally up to the Attorney General, or is there some kind of limiting principle that will separate conduct which might have a bad motive, but be very common, from conduct that's very specific, like yourself testifying falsely, or knowing a person is going to submit tampered documents? I mean, what's the limiting principle so that this statute, or both of them, don't encompass the earth?

MR. LUSKIN: Well, two things, Your Honor. In the first place, I think what Congress expressly sought to do by enacting section 1512, and it's reflected in the legislative history, is two things. One is to broaden the expansion for witnesses, but the second was to dispense with this very amorphous concept of "corruptly" --

QUESTION: Well, the amorphousness is over in 1512 as well --

MR. LUSKIN: It is, Your Honor --

QUESTION: -- and therefore, really my question goes to both, and it's a general question, but you've thought about it --

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MR. LUSKIN: That's right.

QUESTION: -- and it's relevant, and the question really is, how do you separate out what is perhaps quite normal but very indirect conduct, but badly intended? I wear a certain tie, I talk to the fourth cousin, I talk about -- I say something to the press, I say something very general to fourteen other people whom I hope will be repeated back, et cetera, et cetera.

How do you distinguish that in the law, which would fall within the words, from yourself testifying falsely, sending false documents which are very specific? How do we draw that line?

One possibility is, there's no way to do it. Just leave it up to the good sense of the Attorney General. The other possibility is, there is a way to do it, and that's what I'm trying to explore.

MR. LUSKIN: And I think where that is captured, Your Honor, and it's been captured by the decisions of the Tenth and Eleventh Circuits in the Wood and Thomas cases, is to impose a requirement that in addition to this wrongful intent, the conduct itself, qualitatively, viewed qualitatively in isolation, has to have a natural and probable consequence of influencing the due administration of justice. That's the standard which is imposed in those circuits on prosecutions under 1503. The Second Circuit

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has adopted a foreseeability concept.

I think what's called out for here is some notion in addition to the but-for causation which the Government relies on, is some notion that's analogous to approximate causation, which actually establishes a nexus between the character of the conduct itself and the risk of harm to an official proceeding.

QUESTION: You don't assert that that --

QUESTION: Did you ask for an instruction on -- I'm sorry.

QUESTION: You don't assert that that doesn't exist here, do you?

MR. LUSKIN: Oh, absolutely, Your Honor. We do assert it doesn't exist here.

QUESTION: And it's not proximate enough, so it wouldn't even be covered by 1512?

MR. LUSKIN: I think it could be charged under 1512. I think --

QUESTION: But not successfully.

MR. LUSKIN: I think that we --

QUESTION: I mean, anything could be charged under 1512.

MR. LUSKIN: Anything could be charged. I think that this conduct could be charged, if at all, under 1512. I think that there is a significant issue on the facts of

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whether or not Judge Aguilar had any idea that there was an official proceeding going on, or whether he had any desire to influence anybody who might be a witness in that official proceeding.

I think the closest charging analogy here would be, of course, 1001, which is the provision under which these charges are traditionally brought and, of course, it's our speculation here that the reason that it wasn't done so was that Judge Aguilar was initially charged also with a substantive RICO offense under section 1962(c), of which this act was charged as a predicate offense of racketeering. Section 1001 is not a RICO predicate. Section 1503 is.

QUESTION: What intent did the jury have to find in order to convict Judge Aguilar on the counts that it did?

MR. LUSKIN: On section 1503, Your Honor, and the instruction is found at page 127 of the Joint Appendix. The jury was instructed that they must find that the conduct of Judge Aguilar was designed "in some way" to impede the functions of the grand jury.

QUESTION: And the jury found that it was.

MR. LUSKIN: Yes, sir.

QUESTION: Did you object to the instruction and submit an instruction which encapsulated the theory that

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you've just presented to Justice Breyer?

MR. LUSKIN: We filed a motion to dismiss on the grounds that the Ninth Circuit ultimately affirmed, and we objected to the instruction insofar as it implied that there was some natural relationship between the role of the grand jury and the function -- the FBI agents on the one hand, and the grand jury on the other.

QUESTION: It's not clear to me why there's no necessary nexus between the success for the outcome of the grand jury investigation and giving -- trying to lead the FBI agents down a false trail. I'm not sure why there isn't that proximate connection that you say is necessary for a conviction.

MR. LUSKIN: Well, as a practical matter, Your Honor, the grand jury doesn't hear exculpatory evidence, and had the FBI agents actually believed the exculpatory false statements that Judge Aguilar had made, as a practical matter in 99 out of 100 cases those exculpatory statements would not have been reported to the grand jury, and there's no evidence that the FBI agents were or did, in fact, testify to the grand jury on this matter.

QUESTION: Well, if the Government abandons the grand jury investigation because it's been led down a false trail, you say that's not impeding the due administration of justice?

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MR. LUSKIN: But that, Your Honor, is the distinction between the grand jury on the one hand and the FBI on the other. Those statements might well be viewed to be material under 1001 insofar as they affect the functions of the FBI and the FBI's investigation, but the FBI's investigation is not the grand jury's investigation. The grand jury's investigation is something which is distinct, and which it controls.

QUESTION: But the hypothetical is that the two are linked.

MR. LUSKIN: But they're not linked, Your Honor, as a matter of law.

The Government's theory is that they were linked by the fact that the FBI agents as potential, undisclosed witnesses before the grand jury, might have carried Judge Aguilar's false statements in to the grand jury and thereby confused them.

What we're saying is that that link is so attenuated that it does not fall within the scope of an obstruction of the due administration of justice.

QUESTION: Well, in fact one of the agents did testify, didn't he?

MR. LUSKIN: The testimony is only, Your Honor, that one agent did testify. There's nothing in the transcript which would indicate whether he testified

before he interviewed Judge Aguilar, or after he interviewed Judge Aguilar, or whether he testified concerning the subject matter.

There were three other individuals who were indicted, and for all we can tell from the transcript of the grand jury foreman's testimony, Agent Carlon might well have testified long before this interview took place.

QUESTION: Well, but we review evidence after conviction in a light most favorable to the Government, do we not?

MR. LUSKIN: Yes, sir, you do, but in this case there's really no evidence at all from which one could infer that Agent Carlon testified after this interview, or about this interview, or in relation to this interview.

Let me turn, if I may, to section 2232(c). The difference between our position and that of the Government is that first we believe that the decision of the Ninth Circuit accurately and fairly accounts for all the terms of the statute.

The second difference is that the Government wishes to extend section 2232(c) to cover those situations in which someone who is under the mistaken impression that a wiretap or an authorization may be in effect discloses that. This is not a case in which the Government seeks to prevent windfall defenses. It's a case in which it seeks

to preserve windfall prosecutions.

Section 2232(c), by its terms, is a temporally limited statute. It is designed in all of its aspects to protect the integrity of wiretap applications and authorizations during the period of time in which they are operating, and not before, and not after.

When an application has been filed, or an authorization is in effect, an interception is possible, and a defendant, by specifically intending to interfere with such interception, can impede that interest which Congress wishes to protect.

After the expiration of an interception, no harm is possible, no interest protected by the statute can be jeopardized, and that conclusion emerges from two aspects of the statute. The first is the specific intent provision, which requires that the defendant, having knowledge of an application or an authorization to intercept electronic communications, discloses that with the specific intent to impede such interception. The term refers back to the initial clause in which the knowledge takes place.

QUESTION: Well, may I interrupt you there? He doesn't really have to have knowledge of the application. He has to have knowledge that there has been an authorization or an application. He doesn't have to know

what's in it, isn't that correct?

MR. LUSKIN: Yes, sir, that's correct.

QUESTION: So that the knowledge which is spoken of in the first clause is a knowledge of possibility, it's not a knowledge of specifics.

MR. LUSKIN: Well, it's --

QUESTION: Specifics will satisfy it, but possibilities will, too.

MR. LUSKIN: Not a possibility about the existence of an application or an authorization. There my be some speculation --

QUESTION: Possibility about its content, duration, and so on.

MR. LUSKIN: Yes, sir --

QUESTION: Yes.

MR. LUSKIN: -- that's correct. But when he acts with specific intent, it's got to be an intent to interfere with such interception of which he has knowledge.

If a defendant, for example, were to disclose the existence of a wiretap for some other purpose -- for example, if a defendant were to infer from the existence of an authorization or a wiretap that a particular individual must be a Government witness, and were to disclose the existence of the wiretap to someone else for

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the purpose of killing that witness, it would be a horribly wrongful act. It would not be an act comprehended within the terms of the statute. It would not violate section 2232(c).

The statute is designed by Congress to protect one, and one thing only, and that is the integrity of an authorization or an application while it's in place, and the second place from the statute from which that conclusion emerges is the fact that Congress defines the class of disclosures which would be wrongful to be disclosed, and it defines that through the use of the term "possible interception."

Now, an application which has been made but not yet approved is possible, an authorization which is in place but has not yet expired is a possible interception, but an application which has been denied --

QUESTION: And an application which the agent believes to be possible is also a possible interception.

MR. LUSKIN: But the problem with that, Your Honor, is that the term "possible interception" defines what may or may not be disclosed. It doesn't modify the defendant's state of mind, or his intent.

The difficulty with what the Government wants to do here --

QUESTION: Well, it may not modify it, but it

may refer back to it in the sense of taking the meaning of possibility from it.

MR. LUSKIN: It could indeed, Your Honor, but where it sits in the statute, the possible interception refers back to the initial clause, which is, an application has been made, or an authorization is in place, and in our view it defines the class of disclosures which are prohibited. In that sense, it's really no different than --

QUESTION: It may do that simply by referring to what the defendant understands or believes to be the application, or the authorization. That is a perfectly consistent reading, I would suppose, and I thought a moment ago you conceded that.

MR. LUSKIN: No. No, I don't, because what that would do is put the possible interception back in the knowledge component, that the defendant has to have actual knowledge of an application or an authorization, and in this respect, really it's no different than the requirement which has been imposed judicially in section 1503 that there be a pending grand jury --

QUESTION: No, but isn't the answer to your objection, to your argument that he does not have to know the particular content or details of the authorization, he does have to know that there has been an application or an

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authorization, and the knowledge, the reference of possibility, is back to what he knows, i.e., understands to have been the application or the authorization, and if, in fact, what he knows is indeterminate, then the possibility, I would suppose, is likewise indeterminate?

MR. LUSKIN: I understand what Your Honor is saying, but what the statute says is, you have to have knowledge of an application or authorization. You have to have specific --

QUESTION: Not necessarily knowledge of its content or specifically the content of any order that may have been issued?

MR. LUSKIN: That's correct, but in the final clause, which defines the class of disclosures which may not be made, the way in which Congress has defined that is to say he may not disclose a possible interception, and that doesn't modify the defendant's state of mind, it defines the class of things which may not be disclosed, and I think the Government moves "possible" back into the state of mind.

QUESTION: Mr. Luskin, you're discussing possible interception as though it means possible interception. You cannot give notice of a possible interception of something that does not exist. Surely the phrase, possible interception, means the possibility of

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interception, does it not?

MR. LUSKIN: No, sir, I don't think so, and the reason that it doesn't is that the statute covers not only the wrongful disclosures of authorizations, but applications, and --

QUESTION: How can you give notice of an interception that does not now exist and may never exist, it is just possible? You cannot possibly give notice of a possible interception. You can give notice of the possibility of interception, to be sure. Isn't that what it reasonably means?

MR. LUSKIN: No, sir. I think that allows Congress to punish the disclosure of an application.

If you were to find out from me, and I were an FBI agent, that I'd applied for a wiretap but the court had not yet ruled on it, and you were to disclose that fact, you would be disclosing the existence of a possible interception, and the interception is possible because I have applied for it but it hasn't been received.

QUESTION: How can it be the existence of a possible interception? When you say it's a possible interception, you're saying it doesn't exist.

MR. LUSKIN: That's right, and that --

QUESTION: And yet you're giving notice of the existence of something that doesn't exist.

MR. LUSKIN: You're giving notice of a possible interception.

QUESTION: Of the possibility of interception, is what you're giving notice of.

MR. LUSKIN: You're giving notice that as a matter of law, an interception is possible, because it's been applied for. If you said only interception, it would not comprehend the wrongful disclosure of an application, which is what the statute specifically seeks to do.

QUESTION: Mr. Luskin, what about Judge Hall's view that interception is still possible until the district court -- as long as the district court orders the secrecy of the tap maintained?

That seemed to be what her position was on the three-judge panel. The interception, even if expired for the moment, remains possible until the time that the district judge says, I'm taking this out from under the secrecy cloak.

MR. LUSKIN: And I think that that confuses two separate statutory provisions, Your Honor.

Section 2518(8), which allows the continuation of a secrecy order, allows that secrecy order to be continued for good cause, and that good cause can include any number of things, including protecting the integrity of an ongoing criminal investigation.

Under 2232(c), if I were to disclose an expired wiretap which I found out about wrongfully for the purpose of interfering with the criminal investigation and not with a wiretap, which I know to be -- to have been -- to expire, I would not violate the statute. There would not be a violation of the statute, because I would not have satisfied the intent provision, and the problem with Judge Hall's analysis is I think she collapses section 2518 under section 2232(c).

I think looking at it precisely the opposite way, the Government's construction of this statute would lead to altogether absurd results, which is that if an individual under section 2518 were to receive notice of the existence of a wiretap and were mistakenly to believe that that statutory notice under section 2518 meant that a wiretap was still possible, or might, indeed, be in existence, and were to disclose that fact for the purpose of thwarting the wiretap, under the Government's view of the statute, that individual who has received required statutory notice would violate section 2232(c). It would lead to an absolutely absurd result in which, of course, there's no possibility of harm.

If the Court has no further questions, thank you very much.

QUESTION: Thank you, Mr. Luskin.

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Mr. Feldman, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF THOMAS A. FELDMAN

ON BEHALF OF THE RESPONDENT

MR. FELDMAN: I just had two brief points I wanted to make. First, with respect to section 1503 and the questions that arose concerning Agent Carlon's testimony, section 1503 is a statute that prohibits endeavors, and the one principle that's been quite clear from this Court's decisions about the statute is it prohibits endeavors to obstruct justice.

Therefore, although it's not important whether Agent Carlon actually testified, what is crucial, especially in light of counsel's argument, I think, is that respondent himself testified at trial that he knew that the false statements that he made to Agent Carlon would be reported to the grand jury, and I think that's what makes it sufficient to violate the statute.

With respect to section 2232(c), I think that I'd just like to make two other brief points. One is that the statute was clearly designed not just to address, to be retributive of an actual evil that occurred, an obstruction of an interception, but to have a broader deterrent effect.

That's clear from the legislative history of the -- aside from the language of the statute. I think

it's clear from that, but also the legislative history, which where the -- both the Senate and House committee reports on the statute describe in identical terms the coverage. That is, it is intended to deter.

QUESTION: May I ask you a question that's troubling me, Mr. Feldman? Supposing the defendant knows there's a wiretap, and knows that it authorizes interception of X's conversations with Y, thinks it authorizes X's conversations with Z, but in fact, it doesn't. He tells Z. Does he violate the statute?

MR. FELDMAN: I guess that would -- I think that would depend on whether in the first clause of the statute it -- what it is that he has to have knowledge of, when it says he has to know of an application or authorization.

QUESTION: He knew about the application. He knew --

MR. FELDMAN: Right.

QUESTION: There was an existing application. He knew -- he thought it was a little broader than it was, and he, for bad purposes, told the person who's not affected by it at all, with the intent to violate it. Would that violate the statute?

MR. FELDMAN: I think -- it's hard -- I tell you, frankly, it's hard for me to tell --

QUESTION: It's very similar to this case, it

seems to me.

MR. FELDMAN: I --

QUESTION: It's -- that's sort of lateral rather than vertical, but it's the same sort of impossibility.

MR. FELDMAN: No, I really don't think it is. Well, at least in this case it's clear that what he knew and what he repeatedly said he knew was that there was an interception going on.

QUESTION: He's wrong about that, just as in my hypo he's wrong about the person who might be affected by it.

MR. FELDMAN: Yes, well, I mean, I suppose in that -- in the case that you posit, I think he could be prosecuted for that, too, if he acted in order to obstruct the interception that he knew about -- so long as he knew about it, and as long as what he acted was in order to obstruct it, and what he said was, there's a possible interception, again referring back to what his actual knowledge was.

QUESTION: What do you do about the last example that Mr. Luskin gave about someone who receives notice of a wiretap and --

MR. FELDMAN: I don't -- I do a couple of things. One is, I don't think that -- the statute talks about having knowledge of an application or an

authorization, and what you get at the end of the process is knowledge of a completed wiretap, not necessarily an application or an authorization. In some sense --

QUESTION: So you're saying that the knowledge he gets would preclude the intent which is necessary?

MR. FELDMAN: I think it would be likely to be.

QUESTION: But for that, though, you'd have him.

MR. FELDMAN: Well, I think also because there would be the question of whether you would construe that to be knowledge of an application or an authorization, not just merely because of the fact that it's completed, but it's not -- what he's finding out there is the inventory of the actual conversations, not the application or authorization.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Feldman.

The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)

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BY Ann Marie Federico

(REPORTER)