

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: GARRIT BATES, Petitioner v. UNITED STATES

CASE NO: 96-7185

PLACE: Washington, D.C.

DATE: Tuesday, October 7, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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GARRIT BATES, :

Petitioner :

V. : No. 96-7185

UNITED STATES :

- - - - -X

Washington, D.C.

Tuesday, October 7, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

C. RICHARD OREN, ESQ., Rochester, Indiana; on behalf of
the Petitioner.

LISA S. BLATT, ESQ., Assistant to the Solicitor General,
Department of Justice, Washington, D.C.; on behalf of the
Respondent.

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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 96-7185, Garrit Bates against the United
5 States.

6 Mr. Oren.

7 ORAL ARGUMENT OF C. RICHARD OREN

8 ON BEHALF OF THE PETITIONER

9 MR. OREN: Mr. Chief Justice, and may it please
10 the Court:

11 This case comes before you today as a result of
12 the dismissal of an indictment by the District Court in
13 the Northern District of Indiana in April of 1995, prior
14 to the taking of any evidence in the case. However, the
15 challenge to the sufficiency of the -- of the indictment
16 actually began many months prior to that in an official
17 conference I had with Mr. Bates in my office. At that
18 time we went over the indictment paragraph by paragraph.

19 At the end of that process, Mr. Bates thought
20 for a minute; he looked at me, and he said: Yes, but what
21 is it they're telling me I did wrong? And I said: Well,
22 Mr. Bates, I believe that they're saying that you
23 misapplied Federal student loan funds. Mr. Bates thought
24 about that for a minute and then he said to me: Yes, I
25 understand that, but what is it specifically they're

1 saying I did that was illegal? And I went back and I
2 looked at the indictment and I found that I could not
3 really answer that question for him.

4 I believe that exchange underscores the
5 importance of this Court's standard for judging the
6 sufficiency of an indictment. That being that all
7 elements of the offense charged must be stated and that
8 the indictment should fairly inform the defendant of the
9 charges against him, as well as be sufficiently specific
10 to stand as a bar to further prosecutions should there be
11 a conviction or an acquittal.

12 So what I'm asking of this Court is to strictly
13 examine the indictment that was brought before Mr.
14 Bates -- that was brought against Mr. Bates.

15 QUESTION: When you -- you say strictly examine,
16 Mr. Oren, are you suggesting some extremely skeptical
17 scrutiny of the language of an indictment?

18 MR. OREN: No, not extremely skeptical, Your
19 Honor. I -- I believe I'm using that in the sense that
20 prior to evidence being taken, the only thing we have to
21 look at is the indictment. If -- if there was dismissal
22 after evidence had been taken, then I think that if there
23 was no prejudice shown, then if the indictment was not
24 sufficient, it would still not really --

25 QUESTION: So here you're saying all we have to

1 look at is the indictment and nothing more than that?

2 MR. OREN: That's -- that's correct, Mr. Chief
3 Justice.

4 The indictment here is set forth in the joint
5 appendix at pages 2 through 12. It is actually structured
6 in two portions. The first portion is a series of basic
7 background factual allegations. And the second portion
8 are 12 specific charging counts, if you will.

9 Directing the Court's attention to the first,
10 the factual allegations, it provides, first of all,
11 various background information and then some specific
12 allegations of conduct against Mr. Bates -- or by
13 Mr. Bates. As a background information, it -- it alleges
14 that a James and Laurenda Jackson owned the Ax -- Acme
15 Institute of Technology.

16 QUESTION: Now -- now, Mr. -- Mr. Oren, the
17 question presented here in the petition for certiorari is
18 whether intent to injure or defraud the government is an
19 element of the offense of knowingly and willingly --
20 willfully misapplying Federal student loan funds, in
21 violation of the statutory section. And I -- I think
22 the -- the government apparently agrees that the
23 indictment does not contain any allegation that it was
24 done with an intent to injure or defraud the United
25 States. So the question we have before us, as I would

1 understand it, is: Is that an element of -- of the
2 offense?

3 And I don't see why we need to be concerned with
4 the various detailed allegations of the indictment.

5 MR. OREN: My reasoning for bringing this to the
6 Court's attention is that the -- again, the sufficiency of
7 the indictment depends, I believe, on the actual setting
8 forth of the elements of the offense in the indictment.

9 And --

10 QUESTION: Yes, but we're -- we're not
11 canvassing the indictment for some shortcoming. It's a
12 very precise issues that's -- that you have presented in
13 the question for certiorari.

14 MR. OREN: Yes, all right.

15 Assuming, then, that the government is agreeing
16 that there is no factual allegations alleging -- of the
17 elements of the -- of the offense, as we believe it to
18 be --

19 QUESTION: Well, there's no agreement on whether
20 it's an element of the offense. I mean, whether
21 fraudulent intent is an element, is there -- there's no
22 agreement?

23 MR. OREN: No, there is not. It is my
24 understanding that, at least in the courts below, the
25 government has agreed that conversion, or un --

1 unauthorized use of property to the benefit of the
2 defendant or a third party, is an element of the offense.
3 But where there is no agreement between the government and
4 Mr. Bates is that -- whether or not fraudulent intent or
5 criminal intent is an element of the offense of knowingly
6 and willfully misapplying student loan funds.

7 QUESTION: Well, it doesn't say it's -- here's
8 the statute, 1097(a) -- it doesn't say "with intent to
9 defraud the United States." Why should we read that into
10 it?

11 MR. OREN: Well, this does present an issue of
12 statutory construction, Justice Ginsburg. I believe that
13 there are four principles that -- of statutory
14 construction that would support this reading. The first
15 of that is -- the first principle would be the actual
16 language of the statute itself. I believe there are
17 indications in there that -- of the scienter element.
18 That being the words of the term "knowingly and
19 willfully," as modifying "misapplies."

20 QUESTION: Well, he was charged with that --
21 several counts of knowingly and willfully misapplying
22 Federal money, was he not?

23 MR. OREN: Yes.

24 QUESTION: That was the language used.

25 MR. OREN: That -- that is correct.

1 QUESTION: And your argument, as I understand
2 it, is that "knowingly and willfully" somehow incorporates
3 a fraudulent intent, even though the statute otherwise, in
4 describing not merely the -- in describing not the --
5 the -- the offense of misapplication, but a different kind
6 of offense, of obtaining, refers expressly to fraud as one
7 forbidden means of obtaining property. And -- and isn't
8 that the nub of your problem?

9 The statute refers to fraud elsewhere, but you
10 want us to import the concept of fraud into -- into a term
11 which, on its face, has no apparent reference to fraud?

12 MR. OREN: I am using the term "fraudulent
13 intent," I believe, as synonymous with or indicative of
14 what would be called specific intent of the common law or
15 illegal purpose. I think fraudulent intent is actually
16 very descriptive of specific intent when it comes to the
17 use or misuse of money. So what I am suggesting is that
18 fraudulent intent is specific intent or illegal purpose,
19 and that that is in fact an element of the offense of
20 misapplication of funds.

21 QUESTION: Well, leaving aside whether you are
22 entitled to or not, didn't you get -- didn't the Seventh
23 Circuit take the position that the government would have
24 to prove -- under the -- the concept of "willfully," that
25 the government would have to prove that the misapplication

1 was made with an understanding of -- of -- of -- that it
2 violated the law? Wasn't that the Seventh Circuit's
3 definition of "willfully"?

4 MR. OREN: The Seventh Circuit, in my
5 estimation, issued an opinion which was slightly
6 confusing. Because, in one part, they did refer to the
7 burden of the United States to actually prove some
8 knowledge of wrongdoing. Yet, on the other hand, they
9 said that the offense of willful -- of willful --
10 knowingly and willfully misapplying funds did not include
11 the -- the element of fraudulent intent.

12 QUESTION: Yeah, but fraudulent intent, as we
13 normally use the term, is something different from an
14 intent to misuse property with knowledge that the misuse
15 is in fact forbidden by a Federal statute. Those are two
16 different concepts. And I don't see any inconsistency
17 between those two aspects of the Circuit opinion. Why are
18 they inconsistent?

19 To obtain by fraud, as we normally mean it, is
20 to -- is to make a -- a misrepresentation --
21 misrepresentation of fact to someone as a means of getting
22 that person's property.

23 MR. OREN: Yes.

24 QUESTION: And that's something entirely
25 distinct from committing an act, whatever the act may be,

1 with the knowledge that there is a statute that forbids
2 the act. And it seems to me that that's the -- that's the
3 distinction, certainly, inherent in the Seventh Circuit
4 opinion. And I don't see why it's a distinction that
5 isn't a perfectly valid one.

6 MR. OREN: I would -- I -- I guess, rely on the
7 Morissette case, where the -- this Court held that a
8 knowing conversion of government property included a
9 criminal intent, which would require the government to
10 show that the defendant, Morissette, had knowledge of all
11 the facts, which would have made his conduct a conversion.
12 And I do not believe that that holding is exactly what was
13 being stated by the Seventh Circuit.

14 QUESTION: It seems to me that -- it seems to me
15 the equivalent of that in the current context would be
16 knowing all the facts that renders the -- the action a
17 misapplication. Wouldn't that be the precise equivalent
18 of what went on in Morissette?

19 MR. OREN: Yes.

20 QUESTION: And -- and do you think the -- do you
21 think the holding here did not require him to know all of
22 the facts that -- that rendered this a misapplication?
23 Unless I'm mistaken, you're -- you're demanding that he
24 know more than the facts that rendered a misapplication.
25 You're demanding that he not only knew all those facts,

1 but that he also had some -- what should I say -- criminal
2 motive in the misapplication. And I thought that's what
3 we're fighting about. And I don't see that Morissette
4 speaks to that at all.

5 MR. OREN: I believe that Morissette speaks to
6 this issue in this way. Morissette referred to a
7 species -- or it referred to every stealing being a
8 conversion, yet not every conversion being a stealing.
9 What Morissette, I believe, was doing was distinguishing
10 between the tort of conversion as opposed to a criminal
11 conversion. And in -- in -- again, in Morissette, they
12 referred to a type of conversion which could occur when
13 the property first came into possession of the defendant
14 in a lawful manner, but was later misused.

15 And I believe that that type of conversion, that
16 species of conversion, is exactly what misapplication is.

17 QUESTION: Well, Mor -- Morissette was a statute
18 which didn't contain any requirement of intent, wasn't it?

19 MR. OREN: I believe that it stated the
20 modifying term of "knowing conversion" in -- in the
21 statute. To that extent, it -- it did indicate that there
22 was an element of intent -- of intent present.

23 QUESTION: The words of Morissette are -- are
24 these: A knowing conversion requires more than knowledge
25 that the defendant was taking property into his

1 possession. He must have had knowledge of the facts,
2 though not necessarily of the law, that made the taking a
3 conversion.

4 Now, if you apply that same text to the present
5 case, I think you'd say -- you'd say, knowing
6 misapplication requires more than knowledge that he was
7 applying the property; he must have had knowledge of the
8 facts, though not necessarily the law that made the
9 application a misapplication. And -- and there's no
10 quarrel that that's properly charged, is there?

11 MR. OREN: No. That -- I -- I believe that
12 would be a proper statement as to the offense of
13 misapplication. And I don't believe that I was trying to
14 suggest anything more than that in my use of the term
15 "fraudulent intent."

16 QUESTION: But the -- the Seventh Circuit would
17 give you even more than Justice Scalia just suggested that
18 you were entitled to. Under the Seventh Circuit opinion,
19 you would -- you would be entitled to an instruction that
20 the government had to prove that you knew you were
21 violate -- your client knew that he was violating the law.
22 So you're getting more, in fact, than -- than -- on your
23 -- on your own theory, Morissette would give you.

24 MR. OREN: I really do not know how to answer
25 that.

1 I did not read the -- the Seventh Circuit
2 opinion in that -- in that manner.

3 QUESTION: What do you do with the -- the
4 1097(d), which states, in so many words, that there must
5 be an intent to defraud the United States, with intent to
6 defraud the United States? That very language in the same
7 section, in (d), is omitted from (a). So if it's in (d)
8 and it's not in (a), wouldn't one infer that Congress
9 didn't mean it to be read into (a)?

10 MR. OREN: I believe that, first of all, they're
11 talking about two separate types of actions in (a) and
12 in -- and in (d). I think the -- and in subsection (d),
13 they're talking about destroying or concealing property
14 with fraudulent intent. In those words, in normal usage,
15 would not be -- destroying and concealing property would
16 not ordinarily have a criminal consequence.

17 QUESTION: Didn't you win this? I mean, I --
18 I'm trying to put your argument in a way that, to me, was
19 the strongest. And maybe you don't mean it this way. But
20 -- but there seem to be two parts. One, in the
21 "willfully" part -- and I take it you won that -- that the
22 government is going to show that your client knew that
23 what he was doing was unlawful. Didn't you win that part?

24 MR. OREN: I believe perhaps we did, yes.

25 QUESTION: All right. So the government would

1 have to show, whatever your client did, he knew it was
2 unlawful, as far as the lower opinion goes. All right.
3 Then there seemed to be a second part, what you're calling
4 fraudulent intent, which doesn't have to do with the first
5 part.

6 Now, in reading the opinion, but not your brief,
7 I thought they were -- the words "fraudulent intent"
8 covered two separate things: intent to defraud, which
9 isn't involved here because there isn't a
10 misrepresentation, or intent to injure. They worked with
11 that second part, "intent to injure or defraud:" intent
12 to injure the government or to defraud the government.

13 And, of course, the government would show intent
14 to injure, in that it would be the known consequence of
15 what your client allegedly did. He deprived the
16 government of the use of some money. That injures the
17 government.

18 I took the Circuit as saying the issue is
19 whether there has to be a specific intent to injure; i.e.,
20 do they have to show that your client wanted, in the sense
21 of purpose, to hurt the government?

22 MR. OREN: Yes.

23 QUESTION: Now, if you're going to tell me this
24 argument is not in the case, I'm prepared to forget it.
25 And I don't want to make an argument for you, but I -- I

1 -- I want to -- when I read the -- not necessarily the
2 brief, but the opinion below, I thought maybe you were
3 talking about specific intent to injure the government.
4 If you're not, if you're talking about specific intent to
5 defraud the government, I agree with Justice Souter; I
6 don't see that it's here.

7 MR. OREN: Right. I believe I was using the
8 term "fraudulent intent" to refer to specific intent and
9 illegal purpose. As that relates to this indictment, I do
10 not believe that the Seventh Circuit opinion would have
11 provided us with any greater information about what use
12 the government was alleging was the problem with
13 Mr. Bates' conduct.

14 QUESTION: Do you agree that, if all of the
15 facts in the indictment are established, that there was a
16 misapplication?

17 MR. OREN: No, I do not. I do not agree with
18 that. I do not believe that the indictment states facts
19 that show a misapplication, nor --

20 QUESTION: Well, is -- is -- is that the
21 problem, then, and -- and not the precise formulation of
22 the scienter that's required, since we have "knowing and
23 willful"? Why was there no misapplication, in -- in your
24 view?

25 MR. OREN: The indictment does not state any

1 factual allegation of any use of the funds by Mr. Bates.

2 It does -- it states, I believe --

3 QUESTION: Wait a minute. Does -- does he have
4 to use the funds, if he -- if -- if one diverts funds
5 from, say, a trust fund -- I know that that wasn't what
6 this was -- but if one diverts funds for an unauthorized
7 purposes, that's a misapplication, is it not?

8 MR. OREN: Yes. But --

9 QUESTION: So it doesn't have to be for his own
10 use.

11 MR. OREN: The allegation is not in the
12 indictment that Mr. Bates did anything with the funds.

13 QUESTION: But what are the allegations as to
14 Bates' conduct were sufficient to state an offense?
15 That's not the basis on which the District Court dismissed
16 the indictment and that's not the basis on which the Court
17 of Appeals reversed the District Court. And that's not
18 presented in your question here.

19 MR. OREN: The argument that I have presented
20 consistently from the District Court's opinion was that
21 there were no factual allegations setting forth the
22 elements of the offense. And if you look at the --

23 QUESTION: You're -- you're limited, Mr. Oren,
24 to -- to the question presented here. And the question
25 presented in your petition is whether intent to injure or

1 defraud the government is an element of the offense of
2 knowingly and willfully misapplying Federal student loan
3 funds, in violation of the statute.

4 MR. OREN: Yes. Yes. I agree that is the
5 question presented. The reason we got to that point as
6 being the question presented is because there was nothing
7 in the factual allegations to suggest the elements of the
8 crime. And if you look at the actual charging counts, it
9 states the words of the statute. And it's our position
10 that the term "misapplies" is intrinsically vague.

11 QUESTION: Well --

12 MR. OREN: And --

13 QUESTION: But, now, it does allege that he did
14 knowingly and willfully misapply; there's no doubt about
15 that, right?

16 MR. OREN: That's -- that's correct.

17 But it is intrinsically vague. Thus, I believe
18 that to meet the standards of actually setting forth the
19 elements, the -- the indictment should have stated at
20 least the conceptual elements of the --

21 QUESTION: But that -- that's not the question
22 you've brought here. The -- you know, I don't want to
23 repeat it again.

24 MR. OREN: Yes.

25 QUESTION: But we granted certiorari on a

1 particular question, and it's not that one. Do you
2 understand what I mean?

3 MR. OREN: Yes. Yes, I do, Your Honor.

4 QUESTION: Would it help if I asked what do you
5 think they should have added -- maybe that would -- in
6 terms of purpose of fraudulent purpose? What I read is
7 that they say that Mr. Bates was the treasurer; that by
8 March '89, the refund liability had grown to 85,000; that
9 there was a report which said that the institution of
10 which he was the treasurer didn't make the refund to the
11 government, and instead loaned a lot of money to the chief
12 trustee and other institutions. And in light of that, I
13 take it, he -- they charged that the defendant knowingly
14 and willfully mis -- misapplied the money, or some of that
15 money.

16 All right. Now, what, in your opinion -- what
17 word should have been added to this indictment that would
18 help, from your point of view?

19 MR. OREN: Well, I think, at the very least,
20 that the -- the indictment should have stated that it --
21 that the defendant did knowingly and willfully misapply
22 funds, in a certain amount, by converting those funds to
23 his use, with --

24 QUESTION: By what? I'm sorry, I didn't hear.

25 MR. OREN: By converting those funds to his use,

1 or the use of a third party, with intent to defraud.
2 That, I believe, would have made this indictment barely
3 sufficient, so that Mr. Bates would have at least known
4 the essence of the charges against him.

5 QUESTION: Well, he knew the charge was -- was
6 that he knowingly and willfully misapplied. If I
7 understand your position, he knows that the statute
8 requires you to use the funds for X. He knowingly and
9 willfully uses the funds for Y, and, according to the
10 Court of Appeals opinion, knowing that that's a violation
11 of the law. He not only knows that he's using it for Y
12 instead of X, but he knows that that is a violation of the
13 law. You say that that's not enough, right?

14 You're saying he must, in -- in addition to
15 misapplying it, intend, by the misapplication, to defraud
16 the government?

17 MR. OREN: I really did not intend for the --
18 I -- fraudulent intent -- I did not mean to convey the
19 thought that -- that fraudulent intent was specific as
20 against the United States. That, I believe, was the --

21 QUESTION: Or to defraud somebody.

22 MR. OREN: To defraud someone.

23 QUESTION: To defraud -- defraud someone.

24 It's not enough that he knows the statute tells
25 me to use the money for X; I'm going to use it for Y. And

1 you say he can do that without violating this statute so
2 long as, in ignoring the command to use it for X, he was
3 not trying to defraud anybody. He's just -- he just -- I
4 don't know -- he thought the statute was silly or
5 inconsequential, so he said, I'm not going to use it for
6 X, I'm going to use it for Y. And you say that's okay;
7 that -- that maybe -- maybe they can get that corrected,
8 but it's not a crime.

9 MR. OREN: I believe my point was that we are
10 not informed of what the factual misuse is.

11 QUESTION: No, now you're back to the pleading
12 question --

13 MR. OREN: Right. Yes.

14 QUESTION: -- that the Chief Justice keeps
15 telling you is not in this case. It's really not in this
16 case. I mean, you've got to get back to tell us what
17 you -- what it -- what it is.

18 QUESTION: Anyway, they do say what the factual
19 thing is. They say that it went to the -- he used the
20 money for these other people. He -- he gave it to the --
21 he loaned substantial amounts of money to the chief
22 trustee and a non-related profit-making institution.

23 MR. OREN: In which paragraph of the indictment?

24 QUESTION: In -- in paragraph 13.

25 MR. OREN: That statement, or allegation, does

1 not say anything about Mr. Bates' conduct. They -- there
2 are a lot of allegations in this about other people; that
3 doesn't inform us about Mr. Bates' conduct. And the
4 reason that I have used the term "fraudulent intent" is
5 that I was using it in the sense that it was used -- in
6 the sense that it is a specific intent, an illegal
7 purpose, to distinguish the same type of -- of behavior in
8 a misapplication scenario, as was distinguished in
9 Morissette, a -- the tort of conversion from the crime of
10 conversion.

11 I believe this is just a subset of that, and
12 that, at the very least, that element of fraudulent intent
13 should have been set forth in the indictment, inasmuch as
14 that would have --

15 QUESTION: Well, it really boils down to what
16 does the word "misapply" or "misapplication" mean. They
17 said "knowingly misapply," and you say, when you say
18 "misapply," it includes a lot of other stuff other than
19 doing the wrong type of thing with the funds -- knowing
20 what the right thing was. But this all turns on what the
21 word "misapply" means, doesn't it?

22 MR. OREN: Yes, it does.

23 QUESTION: You read a lot into it; they read
24 very little into it. They wouldn't even read the -- as I
25 read their brief, they wouldn't even require you to know

1 that it was a misapplication. All you have to know is
2 what you did with it. Which seems a little extreme to me.

3 MR. OREN: Yes.

4 QUESTION: Yes.

5 QUESTION: Thank you, Mr. Oren.

6 MR. OREN: Thank you.

7 QUESTION: Ms. Blatt, we'll hear from you.

8 ORAL ARGUMENT OF LISA S. BLATT

9 ON BEHALF OF THE RESPONDENT

10 MS. BLATT: Mr. Chief Justice, and may it please
11 the Court:

12 The decision below is correct, because both the
13 text and structure of Section 1097 compel the conclusion
14 that an intent to injure or defraud is not an element of
15 the misapplication offense.

16 QUESTION: But would you agree with the -- with
17 the Circuit that the misuse has to be knowing, that it's
18 an exercise of control or dominion that's a violation of
19 the law?

20 MS. BLATT: No -- I mean, yes, we disagree. In
21 our view, the word -- all that's required is that the
22 defendant know that his use of the money is unauthorized.
23 The defendant does not also have to know the source of the
24 prohibition or that using the money in an -- in an
25 unauthorized manner was a violation of the law.

1 QUESTION: If the term "misapply" is not clearly
2 established in the law, then does not that argue in favor
3 of -- of interpretation of "willful and knowingly" such as
4 the Circuit gave, knowing that is a violation of the law?
5 Because "misapply" is -- is, I take it, not a well-settled
6 term in -- in our jurisprudence -- or is it? Perhaps. I
7 don't know.

8 MS. BLATT: The Court said in United States v.
9 Britton, in 1883, that misapplication was not a technical
10 or a word at common law; it was a word created by statute.
11 And in that case, the Court gave it a definition of
12 misapplication to one's use or the use of another of
13 someone else's funds. And that meant it was a conversion.

14 QUESTION: These funds did not have to be
15 segregated at -- at the time of the conduct here, did
16 they? They didn't have to be put in a segregated account,
17 did they?

18 MS. BLATT: That's correct.

19 QUESTION: Could a third-party creditor have
20 levied on them?

21 MS. BLATT: I -- I don't know the answer to
22 that. I don't.

23 QUESTION: Ms. Blatt, let me -- let me just
24 raise the difficulty that I have with -- with the
25 government's position that the -- the source of the

1 prohibition need not be shown; that the knowledge of
2 specific illegality need not be shown. The mens rea
3 requirement is knowingly and willingly.

4 QUESTION: Willfully.

5 QUESTION: And if -- if we exclude from the
6 possible meaning of "willingly" this intent to defraud --
7 and I -- I will so assume, what's left for the meaning of
8 "willingly" as -- or "willfully" -- I'm sorry -- as
9 something in addition to "knowingly"? The -- the Circuit,
10 I thought, made a pretty good -- good guess at it. And I
11 realize that our prior cases that have construed it that
12 way have been tax cases, but what else could it plausibly
13 mean?

14 MS. BLATT: Well, we think here it means what it
15 means in almost every case. And that is "deliberately."
16 Which is -- which is how the Court construed the words
17 "willfully and knowingly" in United States v. Browder.
18 And the -- and so the common understanding of the word
19 "willfully" is intentionally. And --

20 QUESTION: What -- what is "knowingly," then?

21 QUESTION: Yeah, that's the -- that's the
22 trouble. Because --

23 QUESTION: It just repeats "knowingly." I mean,
24 surely "knowingly" means "intentionally," you know.

25 MS. BLATT: Sure. Let -- let me address that

1 in -- in several parts. This Court, in Morissette,
2 said -- used the words, both "intentional" and "knowing."
3 And you could certainly have a knowing act that's not
4 deliberate. I agree that it would be very difficult to
5 have a deliberate act that's --

6 QUESTION: Well, you could have a knowing act
7 that is not purposeful, in the sense that the model penal
8 code makes the distinction. But how can you have a
9 knowing act that is not deliberate?

10 MS. BLATT: I -- I push you into someone and you
11 knowingly hit that person, but you're not deliberately
12 hitting that person.

13 QUESTION: It's not voluntary.

14 MS. BLATT: Right, it's not vol -- right --

15 QUESTION: So that that's --

16 MS. BLATT: -- right. In our view, the word
17 "willfully" means voluntary, deliberately, in the sense
18 that the act is -- is done voluntarily.

19 QUESTION: But when you --

20 QUESTION: Excuse me. I'm sorry.

21 MS. BLATT: Which is, again, I think, the way
22 the Court construed it in Browder. But let me make one
23 other point. If you construe the word "willfully" to mean
24 a voluntary, intentional violation of a known legal duty,
25 as in Pomponio, I -- I still think you have the same

1 problem with the word "knowing." Because it's hard to
2 have an unknowing, intentional violation of a known legal
3 duty.

4 QUESTION: The government didn't cross-petition
5 here, did it?

6 QUESTION: That's right.

7 MS. BLATT: No.

8 QUESTION: So we really don't have to decide --

9 QUESTION: Right.

10 QUESTION: -- whether the Court of Appeals was
11 right in what it said?

12 MS. BLATT: That's exactly correct. We just
13 wanted you to know our view. And -- and, in our view, the
14 words "willfully and knowingly" would just require that
15 the defendant know that his use of the funds was
16 unauthorized.

17 QUESTION: But you -- but you -- you do seem to
18 say that he had to know that it was unauthorized. So he
19 has to have some knowledge of the duty, some knowledge of
20 what his duties were. Isn't that your position?

21 MS. BLATT: Yes, the defendant must know that
22 the money in -- in this case belonged to the -- the lender
23 after the student withdrew. He did not have to know that
24 the source of the -- of the prohibition of holding on to
25 the money when it belonged to someone else.

1 QUESTION: But did he not, un -- under your
2 view, have to know that there were regulations out there
3 that required him to use the funds in one way rather than
4 another?

5 MS. BLATT: No, not in the sense of specific
6 regulations. No. It so happens in this case that it is
7 alleged that the defendant was familiar with the
8 Department of Education's regulations.

9 QUESTION: Well, at page 15 of -- of your brief,
10 you say the element requires that the defendant be aware
11 that his use of the funds is unauthorized or wrongful.

12 MS. BLATT: That's correct. And --

13 QUESTION: I -- I'm not quite sure how that
14 squares with the answer you just gave Justice Stevens.
15 Suppose he doesn't know about the regulation?

16 MS. BLATT: Right. Well, he'd have to have some
17 other way of knowing that the use was unauthorized, such
18 as the school's manual required the refunds back to the
19 lender in order to reduce the student's debt.

20 QUESTION: So there -- there's a -- a felony if
21 you violate the -- the -- the provisions in a school's
22 guidebook or manual?

23 MS. BLATT: There's a felony if you knowingly
24 and intentionally convert money when you know the money
25 truly belonged to someone else. And that's a -- it's

1 definitely -- it's a property crime. It's the crime of
2 conversion. And all we're saying here is that the
3 defendant's acts must be deliberate and the defendant must
4 know that this money belongs to someone else.

5 QUESTION: Well, the ordinary person, I guess,
6 knows when he takes somebody else's money and uses it to
7 buy something that the other person doesn't really want
8 him to do, that that's probably a crime -- ordinary
9 conversion.

10 MS. BLATT: Right. And what this --

11 QUESTION: And, all right, what about the 40,000
12 pages of -- of rules that govern, in detail, how one is
13 supposed to apply Federal money; anyone who violates any
14 one of those rules is -- is guilty of a crime?

15 MS. BLATT: No. I mean, there would have to be
16 two things. There'd have to be the requisite criminal
17 intent, and there -- there would also have to be the
18 conduct of the conversion. And just a -- a technical
19 violation of the rule -- for instance, if the defendant
20 miscalculated the amount of the refund, that would be a
21 violation of the regulation, but you wouldn't have the
22 requisite criminal intent.

23 QUESTION: What do you mean by requisite
24 criminal intent? I don't understand.

25 MS. BLATT: That the defendant -- that his

1 conduct be deliberate, and the defendant know that the
2 money should have been returned.

3 QUESTION: For what reason should it have been
4 re -- just have some general hunch it should have been
5 returned or must he know why it should have been returned?

6 MS. BLATT: In this case, and in most cases, the
7 source of the knowledge is going to be the law, because it
8 will be the Department of Education's regulations. Our
9 point is that the word "willfully" does not have this
10 meaning of requiring knowledge of illegality. Which is
11 the way the Court of Appeals construed it.

12 QUESTION: But do you -- do you understand this
13 indictment to require the prosecutor in this case to prove
14 that this defendant knew that there were regulations that
15 he'd violated?

16 MS. BLATT: No. No. The indictment just said
17 he had to act willfully. Which, again, in our view, would
18 mean he had to act deliberately.

19 QUESTION: But you also said with criminal
20 intent -- he could have criminal intent even if he did not
21 know that the regulations prohibited what he did.

22 MS. BLATT: As long as he has another -- some
23 knowledge that his conduct was prohibited.

24 QUESTION: But the only thing that prohibited
25 the conduct was the regulations. That's the -- that's the

1 source of his duty to do something else. And you say he
2 does not have to know -- he has to know the duty. How
3 could he know the duty without knowing what the
4 regulations require? I don't understand.

5 MS. BLATT: He could have -- the source of the
6 duty could not only come from the school's manual, it
7 could come from his boss --

8 QUESTION: But -- but it didn't in this case.

9 MS. BLATT: Right.

10 QUESTION: We're trying a particular case in
11 which it -- there was a misapplication, because what he
12 did, did not conform to some regulations.

13 MS. BLATT: Right.

14 QUESTION: You agree you must prove that he knew
15 what he did was wrongful. And the only reason it would be
16 wrongful was that he didn't comply with the regulations.
17 But you say you don't have to prove he -- he knew he was
18 not complying with the regulations.

19 MS. BLATT: In this --

20 QUESTION: Your position is inconsistent.

21 MS. BLATT: In this case, Justice Stevens, I
22 think the proof would come, and the indictment does
23 allege, that the defendant knew of the legal requirement
24 to pay refunds.

25 QUESTION: So, then, you are -- are agreeing

1 that in this case you must prove that he knew he was
2 violating the regulations?

3 MS. BLATT: No; I'm saying in this case we can
4 prove that. I'm not saying that we must prove it.

5 QUESTION: Well, how else could you prove a
6 knowing misapplication in this case?

7 MS. BLATT: Oh, in this case, if the defendant
8 had read the manual or if the defendant had a discussion
9 with the financial aid director and the financial aid
10 director said the Department of Education requires this.
11 He would understand that okay, this money needs to go to a
12 lender. And he's intentionally engaging in a wrongful act
13 by holding on to it.

14 QUESTION: But that's because you would have
15 proved that he knew that the regulations required it. His
16 knowledge may have come through an oral conversation; he
17 doesn't have to read the regulation. But I -- I do think
18 you either have to agree that you have to prove that he
19 knew he was violating a government command or you don't
20 have to prove it. And I think you've admitted you do have
21 to prove it.

22 MS. BLATT: No; I -- I've admitted we can prove
23 it. I don't think we do have to prove it.

24 QUESTION: But what other way could you prove
25 know -- knowing misapplication in this particular factual

1 context?

2 MS. BLATT: If the school's manual set forth --
3 which, in this case, it did -- the duty to return money
4 after a student's withdrawal. You could also have a
5 situation where the person --

6 QUESTION: Do you think that would be a crime
7 even if the government regulations didn't require it?

8 MS. BLATT: No. That wouldn't be a crime -- not
9 because of the intent, you just wouldn't have the crime of
10 conversion. If the money is in fact not used consistent
11 with its authorized purposes, you would not have a crime
12 to begin with.

13 QUESTION: Yeah, but, Ms. Blatt, I'd -- I'd
14 really like to at least get a -- a few of your thoughts on
15 the issue that was actually brought up before us. And --
16 and if -- if no one else thinks it's even worth talking
17 about, I do anyway.

18 Let's assume -- it seems to me it -- it's --
19 it's not as cut and dried as -- as you make it out.
20 You -- you have a list of words: embezzles, steals,
21 obtains by fraud, false statements or forgery. And in the
22 midst of those words you have another word thrown in
23 that -- that doesn't have as much currency in -- in the
24 common law, "misapplies."

25 Now, it's a rudimentary canon of

1 interpretation -- it's called ejusdem generis -- that
2 when -- when you have a general word that's in a catalog
3 of other words, you give it the same -- the same
4 coloration that those other words bear. That seems very
5 extraordinary to me to find the word "misapplies," as you
6 interpret it, just, you know, well, I know it ought to go
7 in this account, but, you know, I'm going to put it --
8 what -- what's the difference, you know. I'm not -- I'm
9 not stealing it. It won't hurt the government. I'm just
10 going to put it in this other account. I know it's the
11 wrong account, but I think it's just as good, you know.

12 To find that word, as you interpret it, in the
13 middle of these other ones -- embezzles, steals, obtains
14 by fraud, false statement or forgery -- and then, you
15 know, to have a -- a 1-year -- a 1-year imprisonment for
16 it. Why shouldn't I apply the -- the -- the canon of
17 ejusdem generis and say, yeah, well, I know, you know,
18 it's -- it's a strange word, "misapplies" -- but if it
19 said "takes," I certainly wouldn't say, if -- if you -- if
20 you took it without any intent of -- of keeping it or
21 anything like that, I -- I think it's -- it's very
22 plausible that you have to have some wrongful intent in
23 the misapplication, other than you just know you're
24 putting it in the wrong account number. I put it in
25 account 1001 instead of 1008. Who cares? That's not

1 embezzles, obtains by fraud and so forth.

2 MS. BLATT: Justice Scalia, we interpret the
3 word "misapply" to mean convert. Which is -- in
4 Morissette, this Court construed, in -- in connection with
5 similar words, such as "stealing" and "embezzlement." And
6 the Court said that there are distinctions between those
7 terms. And there's nothing innocent about using property
8 in a way you're not supposed to use it.

9 And -- and -- and as long as you are performing
10 an act that's deliberate and you know that you're use is
11 unauthorized, it should be a crime. You don't separately
12 need to prove fraudulent or injurious intent. And, again,
13 not only do we have the -- the text of the statute, where
14 fraud is separately prohibited, but we have the words
15 "with intent to defraud the United States" in -- in
16 subsection 1097(d).

17 And it's -- it's those textual features and
18 structural features that make it clear that an intent to
19 defraud or an intent to injure is not an element of the
20 misapplication --

21 QUESTION: Suppose that -- that you have a
22 university where you're a financial officer and you are
23 dealing with lots of money. And there are probably rules
24 that are -- fill dozens of manuals. And you perhaps know
25 them. And one day you say, my goodness, I'm going to pay

1 the grounds men and not the professors for a week. And
2 the reason you're doing it is there's some kind of odd
3 shortage and they're poorer, so you want to pay them. Is
4 it against the manual rule? Yes. You know it. You'd
5 never think it was a crime.

6 Now, on your interpretation of the law, they're
7 guilty. Very well.

8 On that interpretation of the law, looking at
9 your statement of the question, which you thought was a
10 rephrasing of his statement, why wouldn't you read the
11 statute that there would not only have to be knowledge
12 that your conduct was injuring the government, but that
13 you would have to want to injure the government; i.e.,
14 you'd have to have a specific intent to injure the
15 government before you would be guilty under such
16 circumstances of a felony?

17 Now, that's -- that's taking your -- I don't
18 know that I agree with your interpretation --

19 MS. BLATT: Right.

20 QUESTION: -- but assuming that I did agree with
21 your interpretation of "willfully," then the question
22 that's raised here would immediately come into mind: At
23 least would you not have to -- before putting people in
24 prison because they violated 1 of 5,000 accounting manuals
25 that are in a university, shouldn't that person at least

1 have to want to hurt the government, rather than just
2 knowing that the government will be deprived of 10 minutes
3 use of some funds that he put in a different account?

4 MS. BLATT: We do not think an intent to injure
5 is required. And even under the common understanding of
6 conversion and embezzlement, the law is quite well -- well
7 settled that an intent to replace the money is not a
8 defense. So you could take your employer's money --

9 QUESTION: Your view, then, is what Congress
10 intended is to take any person in a university educational
11 institution anywhere, and all they do is have to know that
12 somebody in the organization told them, put the money over
13 here rather than there, they're guilty of a felony?

14 MS. BLATT: Well, you still have to have the
15 underlying conversion. And in the example you gave, I
16 don't --

17 QUESTION: The underlying conversion, according
18 to you, is to take some government funds and use them in
19 any manner, for however short a period of time, contrary
20 to what your boss told you should be done --

21 MS. BLATT: Well, and -- and --

22 QUESTION: -- and the regulation supports the
23 boss?

24 MS. BLATT: No. And of course you have to
25 convert it to your own use or the use of another.

1 QUESTION: Well, the use told about was not
2 necessarily your personal desire.

3 MS. BLATT: Right.

4 QUESTION: You desired to put it in account A
5 rather than account B. It may --

6 MS. BLATT: Well, it still has to be for either
7 your use or the use of a third party.

8 QUESTION: I suppose, under Justice Breyer's
9 hypothetical construction, it would be a defense for a
10 person to say, I knew I was taking \$40,000 of the
11 government's money, but I didn't intend to hurt them; they
12 have millions back in Washington?

13 (Laughter.)

14 MS. BLATT: Right. And it's -- it's not a
15 defense to --

16 QUESTION: That suggests that something is wrong
17 somewhere.

18 QUESTION: Yeah --

19 MS. BLATT: No --

20 (Laughter.)

21 QUESTION: Just another --

22 MS. BLATT: No. No. You can't -- I mean, it
23 is -- really, it is quite well settled that it's not a
24 defense to either embezzlement or conversion to take
25 money, hoping that the person is not hurt because you're

1 going to give it back. And here, the school cannot defend
2 on the argument that, well, we didn't intend to hurt the
3 government, because these students are ultimately going to
4 repay the loan; the government is not going to be hurt.
5 Or we intended to pay the refund some day.

6 QUESTION: Well, this wasn't embezzlement,
7 because the funds could be commingled and -- and be used,
8 I take it, for other purposes, provided some other funds
9 were adequate, ultimately, to make up the shortfall; isn't
10 that the rule?

11 MS. BLATT: The -- the crime here, Justice
12 Kennedy, is -- is on the failure to refund on the 60th
13 day. And so the -- how they spend the money up until the
14 student withdrawal and the amount --

15 QUESTION: So if -- if a thief comes in and --
16 and takes -- and takes the money, it's still a violation
17 not to refund it?

18 MS. BLATT: Oh, if -- if they can't -- if
19 it's -- if they -- if it's not a voluntary act, because
20 someone stole the money --

21 QUESTION: But I -- I thought you said the vi --
22 the violation is not making the refund within 60 days.

23 MS. BLATT: With the requisite intent. And that
24 would have to be both a voluntary act and a knowing act.
25 And if someone stole other monies --

1 QUESTION: Well, they don't have the money
2 because they -- A, somebody stole it; B, they paid some
3 other account.

4 MS. BLATT: Well, the distinction, again -- and
5 I think the words "knowingly and willfully" would take
6 care of that and you wouldn't, in any event, need to read
7 intent to defraud into the statute -- but the issue would
8 turn on whether the act is voluntary and knowing or if,
9 for some reason, it was beyond the defendant's control.
10 And -- but that would be the -- the guiding principles.

11 And if a defendant is intentionally spending
12 this money that's not theirs and that's not earned until
13 the student finishes the term, and doesn't pay the refund
14 obligation, knowing the money has got to go back to the
15 lender within 60 days, you have a misapplication of Title
16 IV funds.

17 QUESTION: Suppose they think they're going to
18 get other sums to make up the shortfall, and they just --
19 and they -- and they don't, something just happens?

20 MS. BLATT: They should not have been spending
21 unearned money. And if they're intentionally spending
22 that unearned money -- and -- and these schools are
23 fiduciaries with respect to this money as well -- if they
24 do not organize their affairs, or intentionally organize
25 their affairs such that money is not available and

1 students withdraw, in our view, the statute would cover
2 it.

3 But -- but -- but, again, I mean, the issue is
4 whether an intent to defraud or injure would be required,
5 when there's nothing in the text or the history or the
6 structure of the statute to suggest that it should be read
7 into it.

8 I don't -- in conclusion, if there are no
9 questions.

10 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Blatt.
11 The case is submitted.

12 (Whereupon, at 1:50 p.m., the case in the
13 above-entitled matter was submitted.)
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CERTIFICATION

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GARRIT BATES, Petitioner v. UNITED STATES
CASE NO: 96-7185

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BY Don Mari Fedilo-----

(REPORTER)