

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: SILLASSE BRYAN, Petitioner v. UNITED STATES

CASE NO: 96-8422

PLACE: Washington, D.C.

DATE: Tuesday, March 31, 1998

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X
3 SILLASSE BRYAN, :
4 Petitioner :
5 v. : No. 96-8422
6 UNITED STATES :
7 - - - - -X

8 Washington, D.C.

9 Tuesday, March 31, 1998

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:19 a.m.

13 APPEARANCES:

14 ROGER B. ADLER, ESQ., New York, New York; on behalf of the
15 Petitioner.

16 KENT L. JONES, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D.C.; on
18 behalf of the Respondent.

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

2 (11:19 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 96-8422, Sillasse Bryan v. United States.

5 Do not talk until you get out of the courtroom.
6 The Court remains in session.

7 Mr. Adler.

8 ORAL ARGUMENT OF ROGER B. ADLER

9 ON BEHALF OF THE PETITIONER

10 MR. ADLER: Mr. Chief Justice, and may it please
11 the Court:

12 This case is about whether Congress' use of a
13 wilful mens rea standard in title 18 U.S.C. 924(a)(1)(D)
14 requires proof of knowledge of Federal licensure.

15 QUESTION: Mr. Adler, our acoustics are very
16 good here. You don't have to speak quite that loudly to
17 get through to us.

18 MR. ADLER: Yes, Your Honor.

19 Petitioner urges the Court and petitioner adopts
20 the reasoning of the Circuit Courts of Appeal of the
21 Third, Fifth, Seventh, Ninth, and Eleventh in following
22 this Court's holding in Ratzlaf v. the United States that
23 wilfully, as used in this statute, requires proof of
24 actual knowledge of licensure.

25 Here, this Court should know that the --

1 QUESTION: Mr. Adler, do you take the position
2 that, in order to act wilfully within the meaning of this
3 particular statute, that the defendant has to have
4 knowledge of the specific statutory provision?

5 MR. ADLER: No, Your Honor. We part company
6 with the Government by indicating that it is knowledge
7 that there is a Federal licensing requirement. Chapter
8 and verse are not required in order to convict the
9 defendant, beyond a --

10 QUESTION: Well, you urge, then, that the
11 defendant has to know there is a Federal licensing
12 requirement for gun dealers?

13 MR. ADLER: Yes, Your Honor, knowledge or
14 suspicion of the existence of a State licensing
15 requirement, municipal ordinance or the like, will not
16 suffice under respect for federalism this statute
17 penalizes, as only it can, a violation of a Federal
18 licensing requirement, and --

19 QUESTION: It isn't enough for him to know he
20 can't sell firearms with out a license, generally? He has
21 to know that he can't sell it without a Federal license?

22 MR. ADLER: That is what Congress wrote. That
23 was the intent of the drafters of the Firearm Owners
24 Protection Act, and let me put this into a context, if I
25 may.

1 The Government in this case has knowingly chosen
2 to pick the most difficult subdivision under section 924
3 by proceeding to prosecute under subdivision (a)(1)(D).

4 It chose not to prosecute on a lesser standard
5 of knowingly for making a false statement in the context
6 of the application to acquire the weapon under
7 924(a)(1)(A). It chose not to prosecute under 18 U.S.C.
8 922(k), trafficking in defaced firearms. It chose not to
9 proceed under a violation of the Travel Act.

10 QUESTION: Well, why would the Congress want to
11 exonerate or not to punish under this statute a man who
12 was quite sure that a license was required but he thought
13 it was a State license.

14 MR. ADLER: Congress --

15 QUESTION: You say respect for federalism means
16 that we have to accept your view that he has to know that
17 it's a Federal statute. It seems to me that Congress
18 wanted to punish people who had a guilty mind and who were
19 dealing in drugs knowing -- or dealing in weapons knowing
20 that it was illegal to transfer without a license, and the
21 fact that State, municipal, Federal license, it seems to
22 me certainly the state of mind is the same.

23 MR. ADLER: Well, quite to the contrary, and I
24 think it has to be viewed in the following context,
25 Justice Kennedy. A majority of the States do not have

1 statutory controls with respect to firearms, and in this
2 case --

3 QUESTION: No, but in the hypothetical case he
4 thinks that -- he knows that there -- what he's doing is
5 illegal, and he knows that it's illegal because he doesn't
6 have a license. He's not sure if the license is State or
7 Federal.

8 And your answer to Justice O'Connor and I think
9 also to Justice Scalia was, he has to know that it's a
10 Federal requirement.

11 MR. ADLER: That's correct.

12 QUESTION: And I'm asking, why would Congress
13 want to exonerate him in the first instance where he
14 thinks it's a State license. What possible function is
15 served by that?

16 MR. ADLER: Part of the background to the
17 enactment of the so-called FOIA statute in 1986 reflected,
18 as the legislative history indicates, a concern by the
19 Congress.

20 A 7-year effort was mounted in order to react to
21 complaints from those who were gun enthusiasts who
22 believed that, since the 1968 statute went into effect,
23 the Federal Bureau of Alcohol, Tobacco, and Firearms had
24 been too overzealous, had targeted unfairly, and basically
25 come down upon those who enjoyed utilizing firearms, going

1 to gun shows and the like. The basis of --

2 QUESTION: What was that statute you said, the
3 FOPA statute? Is that what you said?

4 MR. ADLER: Firearm Owners Protection Act.

5 (Laughter.)

6 MR. ADLER: And, indeed -- and, indeed, the very
7 statute, I respectfully submit, Justice Scalia, sends the
8 message to the court of the intent of the drafters of the
9 Congress.

10 It was intended to provide protection to firearm
11 owners, dealers, and the like. It was intended to make it
12 more difficult for the Government to convict individuals
13 of violating the statute, and this particular subdivision,
14 and the only subdivision which is before this Court in
15 this case, deals with the section of the statute which,
16 following a textual analysis, chose the mens rea standard
17 of wilfully, a --

18 QUESTION: Mr. Adler, supposing you were to
19 accept, hypothetically, the idea that all that was
20 required under (D) was to know that there was a licensing
21 requirement, be it State or Federal, the district court,
22 as I understand this case, charged that the Government is
23 not required to prove that petitioner knew that a license
24 was required.

25 I would think even if you accepted

1 hypothetically the idea that it could be knowledge of a
2 State requirement, that instruction would be contrary to
3 that view.

4 MR. ADLER: That is correct, Mr. Chief Justice.
5 As a matter of fact, Justice Trager, in denying the
6 request to charge, I think wrote the ticket that brings me
7 before your -- this panel today.

8 On page 18 of the appendix Justice Trager
9 directs me, go to the Supreme Court and see if they agree,
10 I will not put the end to this statute, and so at that
11 request I have brought myself to Washington to urge this
12 Court to give meaning to subdivision (1) (D), which
13 indicates that a wilful standard, which as Justice White,
14 writing in Cheek v. the United States, indicated was a
15 voluntary, intentional violation of a known legal duty,
16 and in this case the known legal duty is the duty to have
17 a Federal firearm dealers license.

18 QUESTION: Mr. Adler, why do you need to put
19 Federal in there. If I read from the charge, in this case
20 the Government is not required to prove that petitioner
21 knew that a license was required, nor is the Government
22 required to prove that he had knowledge he was breaking
23 the law.

24 Why can't you just say, whatever the wilfulness
25 means, it can't mean that he doesn't have to know he was

1 breaking the law, he doesn't have to know the license was
2 required, and why are you making this yes, you must know
3 that it was a Federal law?

4 Our federalism may be a big thing here, but not
5 all the public appreciates that distinction.

6 MR. ADLER: I appreciate that, Justice Ginsburg
7 and petitioner respectfully submits that, under the charge
8 as given to this jury, and presuming that the jury
9 followed the law, you're absolutely correct that
10 petitioner should prevail. The Government's view could
11 not be found based on the trial court's charge.

12 QUESTION: Well, but you didn't raise that
13 issue. That's not one of the questions presented. Your
14 questions turn entirely on the need to prove a Federal --

15 MR. ADLER: Yes.

16 QUESTION: -- firearm dealers license --

17 MR. ADLER: Because we do not --

18 QUESTION: That's all you brought here.

19 MR. ADLER: Right.

20 QUESTION: Now, the instructions may have been
21 totally bad, but we don't reach that, presumably. We
22 address --

23 MR. ADLER: Well, it's the second question.

24 QUESTION: Well, I don't think it is. Your
25 section question, was the jury's -- was the jury charge

1 deficient because it failed to require a finding of
2 petitioner's knowledge that a Federal firearm dealer's
3 license was required.

4 MR. ADLER: Yes, and petitioner's position is
5 that the Congress lacks the power to create a Federal
6 crime for failing to follow a municipal county or State
7 statute that may relate to dealership and, indeed, the
8 legislative intent in the statute was clear.

9 The villain perceived by the drafters of the
10 amendment -- and there was a unique legislative history,
11 7-year effort, a discharge petition getting this
12 legislation out of the Judiciary Committee. This was
13 clearly a regional effort of those who were close to gun
14 users and possessors who wanted to trim the tail of the
15 Bureau of Alcohol, Tobacco, and Firearms.

16 The legislative debates, with the greatest
17 respect, Justice O'Connor, are devoid of an indication of
18 a concern that the firearm enthusiasts had a problem with
19 State or local individuals, so the statute was clearly
20 aimed at the Federal Bureau of Alcohol, Tobacco and
21 Firearms.

22 We have a troika of three reasons which
23 basically support our -- petitioner's view that knowledge
24 of licensure is required. The statutory title telegraphs
25 the intent of statute -- Firearm Owners Protection Act --

1 in the same way that the Clean Water Act telegraphs a
2 congressional intent to take a strong line to protect the
3 environment and to hold corporations to a higher standard
4 of proof.

5 The plain wording of the statute, the use of the
6 word wilfully as opposed to the use of the term knowingly
7 in other sections, of section 924 also sends the very same
8 message of congressional intent.

9 And lastly, the congressional report which, as
10 the Chief Justice has noted on prior occasions such as in
11 *Garcia v. The United States*, is marked as the defining
12 document to which the Court, if it reaches legislative
13 intent, should look indicates that the Congress was on
14 notice -- Representative Hughes in the floor debates
15 indicated if you adopt wilfully you're going to require
16 knowledge of the licensing requirement -- that Congress
17 was aware of it, and they voted it, and they inserted that
18 language into the statute which was passed and signed into
19 law and became the law of the land.

20 In addition --

21 QUESTION: Did the President know about it, too?

22 MR. ADLER: In addition to the knowledge of
23 the --

24 QUESTION: Do we know if the President knew
25 about it?

1 MR. ADLER: We must presume that all officials,
2 including the President, had knowledge of the law and
3 followed their duties.

4 QUESTION: Why don't we do that for Congress?

5 MR. ADLER: In addition to the contextual
6 analysis that we have spoken to, the statute itself, 924,
7 uses knowingly as noted on three other occasions.

8 Interestingly, the statute itself, when it
9 speaks to sales by gun dealers to out-of-State
10 individuals, inserts a presumption that the seller of the
11 firearms to an out-of-State buyer is presumed to have
12 knowledge of the law -- Section 922(b)(3) -- once again
13 supporting the notion that the Congress understood that it
14 was actual knowledge that was necessary.

15 And, to the extent that there might be a class
16 of individuals who would not necessarily know the law of
17 the sister State from which the buyer had come, Congress
18 inserted a presumption in order to deal with that
19 situation.

20 No presumption is found in subdivision (D), once
21 again indicating clear support that whether the Solicitor
22 General's Office is comfortable with that view, the
23 Congress knew what it wanted and it intentionally made
24 prosecutions more difficult.

25 QUESTION: How much weight do you put on the

1 distinction between knowingly, the word knowingly, the
2 adverb in sections (A), (B), (C), and the word wilfully in
3 section (D)?

4 MR. ADLER: Oh, I think the use of wilfully in
5 subdivision (D) connotes the highest mens rea standard
6 that our law, our criminal law recognizes, whereas
7 knowingly speaks to only an awareness of one's acts, or
8 conduct.

9 When we speak of wilfully violates, and the
10 section says a provision of this chapter, it is much
11 similar to Justice Ginsburg's opinion for the Court in
12 *Ratzlaf v. the United States*. Wilfully modifies not
13 conduct but this section of this chapter, so when we see
14 wilfully married to a chapter, a clause, a section, then
15 we know that the Congress has telegraphed the intent that
16 wilfully modifies in this case the chapter, and it is
17 knowledge of the chapter which the statute requires.

18 QUESTION: Well, now, you say that we know that
19 Congress has married wilfully to the chapter. I must say
20 I don't quite follow that.

21 MR. ADLER: Well, a reading of section
22 924(a)(1)(D) indicates, most respectfully, that it
23 punishes those who wilfully violate any provision of this
24 chapter, and so the use of the term, wilfully violates any
25 section of this chapter, connotes it is wilfully violates

1 the chapter, not wilfully engages, or knowingly engages in
2 certain conduct.

3 The prior three subdivisions, most respectfully,
4 we concede speak to merely engaging in knowing behavior
5 and not wilful behavior.

6 QUESTION: And you say knowingly simply means
7 you're aware of the act that you're performing.

8 MR. ADLER: And don't act by reason of mistake
9 or misapprehension of the law, but so it's clear, we
10 concede that one could wilfully violate this chapter by
11 engaging in what is frequently called conscious avoidance
12 behavior of a kind such as if there were a sign posted in
13 a gunshop and a particular defendant operated through what
14 is sometimes called straw purchases, sending in an
15 accomplice to purchase the weapon.

16 That would provide no defense in a prosecution
17 for wilfully, because the individual acted in a way to
18 consciously avoid gaining knowledge that was readily
19 apparent.

20 QUESTION: I thought they were straw persons
21 used here, and there was misrepresentation of the
22 purchaser's criminal record and, unlike Ratzlaf and the
23 Cheek case, where the conduct looked okay, except that
24 there was a statute that said no structuring on the one
25 case, but here the whole thing looks bad, doesn't it?

1 MR. ADLER: Well, there are individuals who can
2 engage in conduct that may violate a provision of law, or
3 simply is inappropriate behavior. The question is, does
4 it violate this section, which requires proof of knowledge
5 of licensure.

6 Certainly, the Government could have proceeded
7 on a proper charge to prosecute the defendant for crossing
8 State lines with defaced firearms, for making false
9 statements and aiding and abetting in the false
10 statements. They chose not to proceed under those
11 subdivisions. They chose the highest burden, that he knew
12 that he required a dealer's license.

13 QUESTION: But Mr. Adler, is it not correct that
14 one could still draw a distinction between knowingly and
15 wilfully? Knowingly would mean you just knew what you
16 were doing -- you didn't know whether it was illegal or
17 not, but you knew you were doing these various act -- and
18 wilfully, requiring a proof that you knew you were
19 violating the law, without adding a still additional
20 requirement that you had to know exactly what law you were
21 violating.

22 MR. ADLER: Well, it's not our contention,
23 Justice Stevens, that you have to know exactly what --

24 QUESTION: Well, you can know that there's a
25 Federal licensing requirement.

1 MR. ADLER: You have to know it's a Federal
2 licensing --

3 QUESTION: Why?

4 MR. ADLER: -- and -- because the wilfully in
5 this case is followed not by a description of specific
6 factual behavior, it is coupled with the use of the term,
7 wilfully violates this chapter, and this chapter is
8 speaking to in this case the Federal firearm dealers
9 license.

10 Not every transaction is a per se violation of
11 this section. One is only a -- covered as a, quote,
12 dealer within the meaning of this statute if one engages
13 in purposeful activity and so on, so the Congress was
14 clearly concerned about --

15 QUESTION: So you're not merely relying on the
16 difference between knowingly and wilfully, and (A), (B)
17 and (C) versus (D), you're also putting heavy reliance on
18 violates any other provision of this chapter.

19 MR. ADLER: Exactly.

20 QUESTION: You'd read into that he must know
21 he's violating --

22 MR. ADLER: As --

23 QUESTION: That's not a necessary reading, but
24 certainly I understand your position.

25 MR. ADLER: Yes, and the --

1 QUESTION: You'd say if it meant the other it
2 would have been written, or should have been written,
3 wilfully -- wilfully sells a gun without a license. That
4 would arguably be different. All you would have to know
5 is that selling the gun without a license was unlawful
6 under some law.

7 MR. ADLER: Yes. Anything less than actual
8 knowledge will not suffice. The Congress could have used
9 the word --

10 QUESTION: Well, wilfully selling a gun without
11 a license wouldn't necessarily mean that you knew you had
12 to have a license. You wilfully -- you're still wilfully
13 selling the gun.

14 MR. ADLER: With the knowledge that you're
15 intentionally violating a known legal duty. In this case
16 the known legal duty is the acting without a Federal
17 firearms dealer's license.

18 QUESTION: But known legal duty also can mean
19 knowing that you have a legal duty, so you are
20 violating -- you don't have to necessarily know which one.
21 Suppose I -- suppose that's my view of it, that wilfully
22 means you have to know that what you're doing is a
23 violation of the criminal law. Suppose I think that.
24 Then you lose this case?

25 MR. ADLER: No. It -- you have to have the --

1 what the statute penalizes is knowledge of the dealer's
2 license. The fact that there may be other sections that
3 you suspect --

4 QUESTION: No, you're not following what I'm
5 saying. I'm back to where Justice Ginsburg and Justice
6 O'Connor were. I believe -- in fact, I probably do
7 believe this, that wilfully means you must know that your
8 conduct is in violation of a criminal law, not which
9 criminal law.

10 Most criminals are not familiar with the U.S.
11 Code in depth. What they think -- but it is possible to
12 say that they have to know that what they're doing is a
13 violation of Federal criminal law.

14 I also think, as Justice Ginsburg might have
15 suggested, that this instruction is ambiguous in that
16 respect, that it certainly could be read as saying, you
17 can convict this person even though he did not know that
18 what he did violated the criminal law.

19 But then I'm with Justice O'Connor. I don't see
20 your objection to that, and so that's what I would like
21 you to respond to, and that was my question. If taking
22 the view I just take, do you win, or do you lose?

23 MR. ADLER: We take the position that 1) under
24 the judge's charge the Government cannot prevail because
25 even the standard that the court would suggest,

1 generalized knowledge that there's some section of Federal
2 law prohibits the behavior --

3 QUESTION: All right. Now would you go to the
4 point that I think Justice O'Connor raised, which is
5 instruction request number 8 does not seem to request --
6 it seems to request an instruction that he has to know the
7 U.S. code, and then I didn't see here anywhere an
8 objection to the instruction the judge actually gave, and
9 that's why I started this out thinking you must win
10 because the instruction's ambiguous, but I'm not certain
11 that's right. Now I think maybe you must lose.

12 So since I've thought you must win, then I think
13 you must lose, I think that I'd like your response.

14 (Laughter.)

15 MR. ADLER: The charge is deficient and was
16 objected to. The request to charge focused the court --
17 we cited to Ratzlaf indicating that it is knowledge of the
18 licensing requirement that had to be charged. That charge
19 was not given.

20 The judge went further. He told the jury that
21 the defendant did not have to know of the licensing
22 requirement and did not have to know he was breaking the
23 law, so under this charge he took the issue out of the
24 case that you suggested, and we objected to that.

25 QUESTION: You objected to, he did not have to

1 know he was breaking the law?

2 MR. ADLER: Yes, and indeed our request to
3 charge asked the Court to make it clear that this
4 defendant, who was learning disabled and acting in a State
5 which has no licensing requirement in Ohio to begin with,
6 certainly had no basis to know that there was a Federal --

7 QUESTION: I've read -- I've read number --

8 QUESTION: You objected in some manner other
9 than filing the requested charge, which insisted upon
10 knowledge of the Federal --

11 MR. ADLER: Yes, and we had a charge conference,
12 and we objected to it.

13 QUESTION: Fine. Is that in the record?

14 MR. ADLER: Yes.

15 QUESTION: Where? What I've read here is page
16 17, which has your request number 8, which has the details
17 in depth about you have to know the U.S. Code.

18 Then I believe that you said the word objection,
19 but where is it that you -- you know, district judges are
20 busy, they don't catch every mistake, and so someone has
21 to say to the judge, judge, you've made a mistake. The
22 particular mistake that you've made is -- and then you
23 spell it out so he understands it. Where is it?

24 MR. ADLER: I don't have that charge reference
25 with me here today, Your Honor. I can supply it to the

1 Court in a post argument submission.

2 But I do recall the charge conference did have
3 specific discussions, and I did take exception, and it was
4 at that point that it prompted Justice -- Judge Trager to
5 indicate, take it to the Supreme Court, so it was in that
6 exchange --

7 QUESTION: In other words, you're saying that
8 even assuming that you'd lost the battle over Ratzlaf you
9 made the further objection that this instruction is
10 wrong --

11 MR. ADLER: Yes.

12 QUESTION: -- even under the Government's
13 theory?

14 MR. ADLER: Yes, we do, and we respectfully
15 submit that where the Government is coming from on this
16 case is attempting to hold that guns are inherently
17 dangerous substances, and relying on cases like Balint,
18 that deal with narcotics, hand grenades, such as United
19 States v. Freed, and silencers, such as in the cases, the
20 circuit court cases cited in our brief.

21 And it's a position, we respectfully submit,
22 which is wholly unsupported by the history of decisions by
23 this Court. The area itself is constitutionally
24 protected, the Second Amendment, and in the context of
25 decisions that Congress has made in other areas it has

1 used wilfully in a very sparing way.

2 They know how heavy this burden is. They've
3 used it, for instance, in areas such as this. They've
4 used it in the OSHA area. There's a recent Seventh
5 Circuit case, United States v. Ladish Moulting, a Judge
6 Easterbrook opinion that came down the end of January,
7 that once again indicates how sparing the wilfully
8 standard is.

9 Once again, the Government's position would have
10 been better had they prosecuted under a different section,
11 or a subdivision of section 924 that had a knowing
12 requirement and not a wilfully requirement.

13 In terms of the Government's view they have
14 created the veritable straw man. They ask the Court in
15 effect to feel sorry for the heavy burden that they have
16 because they selected a particularly difficult section
17 with the highest known burden of proof.

18 The standard that they urge this Court to adopt
19 is a general knowledge of unlawfulness. This invites the
20 greatest conjecture and speculation on the part of lay
21 jurors. It is a standard that was never submitted to this
22 jury. It is a standard that will not be found, we
23 respectfully submit, in the House debates, in the
24 committee report --

25 QUESTION: But you say it was never submitted to

1 this jury, but the instruction -- one of the sentences
2 says, a person acts intentionally if he acts deliberately
3 and with the specific intent to do something the law
4 forbids. That submitted that to the jury.

5 MR. ADLER: But then unfortunately the court at
6 the same time then instructed the jury that in the context
7 of deciding mens rea knowledge and intent the jury should
8 know that the defendant was not -- need not be shown to
9 have known the licensing requirement or, most importantly,
10 Justice Stevens, the knowledge that he was breaking the
11 law. This is a -- the type of a charge I would
12 respectfully --

13 QUESTION: Well, the instructions are internally
14 inconsistent, and the Government -- the Government argues,
15 in effect, that the message was the one that I described,
16 and the question, though, is whether you really focused on
17 that narrower objection, because the portion of your
18 objection that's quoted on page 18, right before the judge
19 says take it to the Supreme Court, relied entirely on the
20 absence of an instruction about the licensee. That's what
21 you -- you call attention to Ratzlaf right there.

22 MR. ADLER: Yes, in the context --

23 QUESTION: I haven't found in the papers that we
24 have the narrower objection to the --

25 MR. ADLER: Yes, sir.

1 QUESTION: You know what I'm talking about.

2 MR. ADLER: Yes, sir, I do. I simply want to
3 point out that the Government urges the difficulty of
4 convictions, cases such as United States v. Rodrigues from
5 the Fifth Circuit, cited in our brief United States v.
6 Allah out of the Second Circuit, provide the kind of fact
7 patterns which we respectfully submit under a fair and
8 correct charge can result in verdicts that are sustainable
9 by the courts of appeal and sustainable by this Court.

10 We respectfully submit that this is nothing more
11 than a red herring in order to encourage the court to give
12 the Government a lesser burden of proof.

13 In essence, what the Government has done here in
14 its brief today is to argue the reverse of Bates v. the
15 United States. In Bates, it was the defense that argued
16 that this Court should somehow read something more into a
17 statute dealing with the fraudulent use of student loan
18 moneys. Now, the statute indicates wilfully violates this
19 chapter and the Government says, well, you should read
20 something out of it.

21 Our textual argument on behalf of petitioner
22 recognized that the bar is set for all. It does not vary.
23 If it help[s the defendant, so be it, if it hurts the
24 defendant, so be it, that's what the Congress wrote, and
25 accordingly we respectfully submit that the Government's

1 approach ought not be followed.

2 Before I sit down, reserving the balance of my
3 time, I simply want to indicate in response to Justice
4 Stevens' question that we rely on Francis v. Franklin as
5 an example of the case of internally conflicting jury
6 instructions as a basis for this Court granting relief
7 under the charge.

8 The Government does not argue harmless error.
9 Indeed, under Sullivan v. Louisiana we respectfully submit
10 they could not, and we respectfully urge this Court to
11 reverse the conviction, and remand it to the United States
12 Court of Appeals for further proceedings.

13 Thank you very much.

14 QUESTION: Thank you, Mr. Adler.

15 Mr. Jones, we'll hear from you.

16 ORAL ARGUMENT OF KENT L. JONES

17 ON BEHALF OF THE RESPONDENT

18 MR. JONES: Mr. Chief Justice, and may it please
19 the Court:

20 In 1992 petitioner began making repeated trips
21 from New York to Ohio, where, with the aid of several
22 accomplices, he submitted false information on Federal
23 forms. He surreptitiously purchased numerous
24 semiautomatic pistols. He undertook to conceal these acts
25 by filing the identification numbers off the guns, and

1 then he transferred the guns to New York, where he sold
2 them for a profit at weed spots on street corner locations
3 in Brooklyn.

4 Now, these facts lie at the very heart --

5 QUESTION: He's only 19 and he had a hard
6 childhood, though. Would that solve something like this?

7 MR. JONES: I'm not -- I can't endorse that
8 conclusion. I'm not -- I do know that he was -- I think
9 that he may have been 19 at the time that he committed
10 this offense.

11 This -- these set of facts lie at the heart of
12 the statutory --

13 QUESTION: Well, wilfully means something more
14 than knowingly, so we have to figure out --

15 MR. JONES: Yes.

16 QUESTION: -- what it does mean, and in any
17 event the instructions seem to be totally confused.

18 MR. JONES: Well, let's start --

19 QUESTION: They could be said not even to
20 require knowingly, so I don't know where we are on this
21 case.

22 MR. JONES: Let's start with what wilfully
23 means. Since this Court's decisions in *Murdock*, *Screws*,
24 and *Thurston* the Court has described what a wilful
25 behavior is. Wilful behavior is an act taken with the bad

1 purpose to disobey or disregard the law. It is act taken
2 with what the Court described in Murdock as an unjustified
3 indifference to the requirements of the law.

4 QUESTION: Well now, Mr. Jones, do you think the
5 word wilfully just has a uniform meaning no matter what
6 the other context in which Congress has used it?

7 MR. JONES: No. It clearly has a meaning that
8 can depend upon context.

9 QUESTION: And here you have it juxtaposed with
10 three previous sections, all of which used the word
11 knowingly.

12 MR. JONES: Yes, and the word knowingly, as this
13 Court has said in cases like Staples, is simply knowledge
14 of the facts.

15 QUESTION: Knowledge that -- conscious of your
16 actions.

17 MR. JONES: That's right. Knowledge of the
18 facts that constitute the violation. The ordinary
19 definition of wilfulness is something in addition. It is
20 knowledge of those facts plus action taken with the bad
21 purpose to disobey or disregard the law. I mean --

22 QUESTION: Wilful --

23 MR. JONES: -- wilful behavior is.

24 QUESTION: Just a minute, Mr. Jones.

25 MR. JONES: Yes, sir.

1 QUESTION: Actions taken with a bad purpose to
2 disregard the law. Does that mean knowing that the law
3 prohibits something?

4 MR. JONES: It could include that, certainly,
5 but it could also include the situation where someone is,
6 as the Court said again in Murdock, unjustifiably
7 indifferent to the requirements of the law.

8 It is -- if you think about where the word
9 wilful comes from, wilful behavior, what does that mean?
10 It means doing what you want to do because you want to do
11 it without sufficient concern for the interests and rights
12 of others.

13 QUESTION: Well now, how does a judge charge the
14 jury? Without sufficient concern for the law, what on
15 earth does that mean?

16 MR. JONES: Well, the basic charge that this
17 Court has approved in cases like Pomponio is exactly the
18 charge that the Court gave, which is --

19 QUESTION: This confused --

20 MR. JONES: Not all of it, but the portion of
21 the charge the Court gave that says that the act must be
22 with the -- the Government has the burden of showing that
23 the act was with the bad purpose to disobey or disregard
24 the law. I mean, that's the fundamental elementary
25 concept.

1 QUESTION: Well, okay. Now, you -- let's think
2 that through. The bad purpose to disobey or disregard the
3 law. Does that mean knowledge that the law prohibits it?

4 MR. JONES: Certainly that would satis --

5 QUESTION: Well, I mean, answer my question.

6 MR. JONES: It includes that, Justice -- Chief
7 Justice. It includes that. If you have knowledge of what
8 the law is then you are disobeying it. If you --

9 QUESTION: But what else does it include?

10 MR. JONES: Well, it can include an appreciation
11 or an understanding that's short of knowledge that there
12 are legal requirements that apply here. That is what the
13 Court talked about in Murdock as indifference to the law.

14 QUESTION: How would one prove in a trial that a
15 person was indifferent to the law although not knowing
16 that it was violative of the law?

17 MR. JONES: The --

18 QUESTION: He failed to look up the U.S. Code?

19 MR. JONES: Well, no. The Court has approved
20 something quite different from that. What the Court has
21 approved in cases like Spies is -- would be exactly
22 applicable here, and that is that evidence of concealment
23 or of covering up of illicit activity is the type of
24 evidence that shows a bad purpose to disobey or disregard
25 the law.

1 QUESTION: So if you act furtively, that
2 would --

3 MR. JONES: Furtively, or as Spies said, to
4 cover it up or to hide it.

5 Now, in only two cases has this Court imposed a
6 higher standard for wilfulness, the standard for which the
7 petitioner argues, which is a knowing violation of a known
8 legal duty, and in those two precise contexts the Court
9 made clear that it was adopting a special rule for the
10 special facts of the statutes that were then before it.

11 QUESTION: That's the tax case --

12 MR. JONES: The tax cases --

13 QUESTION: -- and the welfare -- the food
14 stamps?

15 MR. JONES: No. The tax case in Cheek, and the
16 structuring case in Ratzlaf, and the special reasons that
17 the Court said justified this higher standard in those
18 particular contexts just don't apply here.

19 In Cheek the Court was concerned about an
20 Internal Revenue Code that applies with intricate
21 complexity to almost every facet of the economic life of
22 every citizen.

23 QUESTION: I -- let me think that wilful
24 sometimes means two totally opposite things, sort of like
25 unpeeled. I mean, let's forget the instance where it

1 means intentional and knowing, you know, words meant to be
2 very broad. Let's focus only on the instance where it's
3 supposed to mean something more than knowing, all right.

4 Now, focusing on that instance, which I think we
5 have here, I go back to the Chief Justice. We could say,
6 in order to clarify earlier cases, that the defendant, the
7 jury must be charged the defendant must know that he is
8 violating the law, though not which law, criminal law, and
9 add, of course, reckless disregard for the law in this
10 instance, i.e., reckless disregard for whether or not
11 there exists a criminal law that forbids it is equivalent
12 to knowledge.

13 MR. JONES: Or is a sufficient substitute for
14 it.

15 QUESTION: Or -- now, we could say that.

16 MR. JONES: And you have said that.

17 QUESTION: If you -- if we said that, is there
18 anything in your opinion that would wrongly be left out?

19 MR. JONES: I think that that sort of
20 description can be found in decisions like --

21 QUESTION: I'm no asking whether it could be
22 found.

23 MR. JONES: Well --

24 QUESTION: I'm asking, if we clarified it in
25 that way --

1 MR. JONES: You're --

2 QUESTION: -- is there anything that would be
3 wrongly, in your opinion, left out?

4 MR. JONES: I -- the only -- the only -- the
5 hesitation that I have is that the Court has adopted a
6 variety of formulations that address this ordinary meaning
7 of wilfulness, and I'm a little bit uncomfortable in
8 saying that you can pick out a single one of them and be
9 certain that it accomplishes everything that the Court has
10 done with the other formulations. For example --

11 QUESTION: Another thing we could say -- could
12 we say this, because you can't think of an example.

13 MR. JONES: That's true.

14 QUESTION: Could you say, it includes --
15 normally it means --

16 MR. JONES: Yes.

17 QUESTION: Normally it means you must know the
18 legal duty, as in this case, know that there is a legal
19 duty. We leave up in the air whether there could be
20 instances where they are equivalent to knowledge, though
21 not actual knowledge. Is that, in your opinion, what the
22 Court should say?

23 MR. JONES: No. I think that it's -- that you
24 can act with indifference to a legal requirement that you
25 do not know, as you may have been intending when you used

1 the word, and so I think that's precisely why the Court
2 has adopted broader formulations.

3 I want to -- I think one thing that's a little
4 bit confusing here is the fact that the statute talks
5 about what is criminal as a wilful violation and
6 petitioner says, oh well, how can you wilfully violate a
7 law if you don't know what the law means?

8 The answer to that is in the Court's opinion in
9 the International Minerals case, where the Court had a
10 similar statute, and what the Court explained was that
11 that is a shorthand. When Congress says wilfully violate
12 A, B, C, D, E, F, G, which is essentially what it did
13 here, that that's a shorthand for saying wilfully engaged
14 in the conduct that is proscribed under A, B, C, D, E, F,
15 G, and so what we're focusing on here is, what is the
16 wilful behavior, and --

17 QUESTION: Well, except that that conflates it,
18 it seems to me, with knowing, and we weren't trying to
19 distinguish knowing and wilful, were we?

20 MR. JONES: You have distinguished knowing from
21 wilful, and we want to make -- I want to be clear on that,
22 especially since this the statute distinguishes it.

23 QUESTION: No, but did we do it -- and I just
24 don't know the answer to this. Were we distinguishing
25 those two terms in the case that you cited?

1 MR. JONES: In Murdock -- Murdock would have
2 been a statute that contained separate offenses for
3 knowing and wilful, but that's not the issue there.

4 QUESTION: I guess my only point is, sure, I can
5 understand circumstances, textual circumstances in which
6 it would make perfect sense for us to explain wilfully
7 just as you have done.

8 The tough thing for me here is, that sounds like
9 a shorthand for knowingly in a statute that uses
10 knowingly, and if we've got to make the distinction, it
11 does not seem to me that that is a legitimate distinction,
12 is a legitimate definition for wilfully when we've got the
13 two of them together in the same statute.

14 MR. JONES: Well, what this Court's cases have
15 explained to me in reading them is that the Court has
16 distinguished between a knowing violation in cases like
17 Staples and Freed, which is simply proceeding with
18 knowledge of the facts that constitute the violation, and
19 a wilful violation in cases like Murdock and Screws and
20 Thurston, which is knowledge of the facts plus action with
21 taking those acts with the bad purpose to disobey or
22 disregard the law.

23 There is an additional requirement to wilfulness
24 that's beyond knowing, but it's not, except in two
25 exceptional circumstances, this higher level of specific

1 proof of --

2 QUESTION: Mr. Jones, I'm not sure Ratzlaf is an
3 exception, because there the violation was structuring the
4 transaction in a way that --

5 MR. JONES: That's --

6 QUESTION: -- evaded the reporting requirement,
7 but the -- my understanding of the facts was that the
8 defendant in that case didn't even know that it was
9 unlawful to structure the transaction. He knew about the
10 reporting requirement, but he didn't know that evading the
11 reporting requirement was prohibited by a criminal
12 statute, so even that case, it seems to me, fits your
13 general category.

14 MR. JONES: Yes. The peculiarity of the statute
15 in Ratzlaf was that the statute contained as part of its
16 substantive element this additional bad purpose to disobey
17 or disregard the law that was the -- that is the component
18 of wilfulness, and since the statute contained both
19 wilful, and then this language about, for the purpose of
20 evading the law, what the Court said in Ratzlaf was, we
21 have to give wilfully in that statute a special meaning,
22 or it will be surplusage.

23 QUESTION: Well, I'm not sure it even needed a
24 special meaning, other than the meaning you have here,
25 because the assumption was that a person would not

1 necessarily know that breaking up a \$100,000 transaction
2 into \$10,000 components was itself prohibited, and that
3 had to be found in order to satisfy the ordinary
4 definition of wilfully. I mean, I don't --

5 MR. JONES: Especially since the statute only
6 applied if it was with the purpose of evading the other
7 requirement.

8 QUESTION: Right.

9 QUESTION: Are you going to talk about the
10 ambiguity of the instructions under any test?

11 MR. JONES: Yes. Yes. The -- first of all I
12 want to point out that we certainly agree with Justice
13 O'Connor that this aspect of the contention that this
14 portion of the instruction was invalid wasn't raised or
15 preserved below.

16 QUESTION: Do we have that? I mean, are we
17 supposed to get the record on that? I mean, I imagine
18 we'd get it and look at it, and when I go and look at the
19 charging conference, they say when we look at the charging
20 conference we'll discover that they did object.

21 MR. JONES: Petition -- the charging conference
22 is not in the record to the -- whatever --

23 QUESTION: Well, we can get the record, can't
24 we? We can get it.

25 MR. JONES: But our point is beyond that, and

1 frankly I don't mean to stand here telling you that I am
2 certain whether he's wrong about what he says he may have
3 said at the charging --

4 QUESTION: All right. If he said that, then why
5 doesn't he win?

6 MR. JONES: Because he didn't raise it in the
7 court of appeals and he didn't raise it in this Court in
8 the question presented.

9 The question presented -- I mean, his point
10 throughout this case has been, he was entitled to an
11 additional instruction that the Government had to prove
12 that he had a knowing violation of a known legal duty. He
13 wanted to use the Ratzlaf, the Cheek special rule which
14 doesn't apply in this case.

15 Now he's saying, well, but accepting the
16 Government's understanding of what a wilful violation,
17 this instruction doesn't do it. That's not a contention
18 raised in the court of appeals nor in the question
19 presented in this Court.

20 Now, is the instruction adequate to do what we
21 think it's supposed to do?

22 QUESTION: Just before you get there, when the
23 defendant proffers an instruction, which he did, and it's
24 rejected, and the judge then gives his instructions, does
25 he have the duty to make the further objection?

1 MR. JONES: He has a duty to preserve the
2 objection for sure, and I think he should -- yes, he
3 should object to each instruction given that's
4 inconsistent with his theory of the case, but beyond that
5 he has to raise it in the court of appeals. He has to
6 present it as a question for this Court to properly
7 preserve it.

8 QUESTION: I was talking just about at the
9 trial, at the trial court level.

10 MR. JONES: At the trial court he should object
11 to any instruction that he thinks is improper.

12 Now, what he did was, certainly what the record
13 in this Court and the court of appeals reflects is that he
14 asked for an additional instruction, which was denied, and
15 it was denial -- the denial of that instruction that has
16 been the focus of this case.

17 QUESTION: No, he --

18 QUESTION: It's a little hard for him to object
19 when he's already in disagreement with the whole theory of
20 the instruction and say, well now judge, even if you're
21 right you're still wrong. That's a little hard --

22 MR. JONES: Litigants bear the burden --

23 QUESTION: -- to do in the trial context.

24 MR. JONES: Well, that's precisely for the
25 reason the court mentioned. Litigants bear the burden of

1 focusing the court on any defects that they believe --

2 QUESTION: Mr. Jones, he did object on page 18
3 of the joint appendix -- he objected, but he gave as the
4 reason for it the failure to require specific knowledge of
5 the license. Now, the question whether that preserves
6 this objection is a little different than --

7 MR. JONES: If it hypothetically preserved the
8 objection at that point, it has been waived by not raising
9 it in the court of appeals or in this Court.

10 Now, is the instruction adequate to accomplish
11 what the Government thinks that it should have done, and
12 the answer to that is, as the Court knows, you have to
13 look to the context of the entire instruction.

14 And that rule is especially applicable here,
15 because the language that now defendant objects to is both
16 preceded and followed by language that directs the jury to
17 determine that this particular defendant acted with the
18 bad purpose to disobey or disregard the law.

19 And it's also accompanied by an instruction that
20 says, which we think is clearly correct, that the
21 Government doesn't have to prove he had specific knowledge
22 of the Federal licensing requirement, and to us the two
23 sentences that follow that he didn't -- that we don't
24 have -- that the defendant doesn't have to be shown to
25 have known about the licensing requirement or to have

1 intended to violate the law refer to that specific law,
2 the Federal licensing requirement.

3 QUESTION: What about this one? It says, nor is
4 the Government required to prove that he had knowledge
5 that he was breaking the law.

6 MR. JONES: I believe that's the sentence that
7 follows the instruction.

8 QUESTION: Yes.

9 MR. JONES: That he doesn't have to -- the
10 Government doesn't have to show that he had --

11 QUESTION: That's right. He's applying what
12 he's just said to this case.

13 MR. JONES: Yes.

14 QUESTION: And he says in this case the
15 Government is not required to prove that the defendant
16 knew that a license is required.

17 MR. JONES: That's correct.

18 QUESTION: Nor is the Government required to
19 prove that he had knowledge that he was breaking the law.

20 It's pretty hard to take the words following the
21 nor and say they meant the same thing as the words
22 preceding the nor.

23 MR. JONES: Well, in the context of this
24 instruction which, as I said, was preceded by the clarity
25 that you don't have to -- the Government doesn't have to

1 prove he had specific knowledge of this requirement, it's
2 our understanding that this adequately informed the jury
3 that the witness -- that the defendant does not have to
4 have been shown to have known that by not having a Federal
5 license his conduct was unlawful.

6 And that's followed again by the instruction,
7 but the Government does have to show that he did
8 something -- that he acted with the intent to do something
9 that was unlawful. That is, that he acted with the bad
10 purpose to disobey or disregard the law.

11 QUESTION: Are you prejudiced in any way if we
12 were to say, take your interpretation of wilfully and then
13 say that on -- even on that interpretation the judge
14 didn't apply it because of the language I quoted? If we
15 thought that --

16 MR. JONES: It would just be the expense and
17 delay. It would not be a fundamental prejudice, because
18 the fundamental --

19 QUESTION: I mean, you've argued it, I mean. I
20 notice the last point in your brief argues that the thing
21 was correct.

22 MR. JONES: Yes. I mean, we believe that --

23 QUESTION: Yes. Yes.

24 MR. JONES: -- I mean, instructions are reviewed
25 with a certain amount of latitude for the realities of the

1 concrete problems that the court has addressed, and
2 especially when we don't have this objection preserved
3 throughout the case. It seems inappropriate for the court
4 to try to parse the instruction at this point to come up
5 with a better one, because it's almost always possible to
6 come up with a better one --

7 QUESTION: This was not urged in the court of
8 appeals.

9 MR. JONES: No, sir. Nor is it within the scope
10 of the question presented in this Court.

11 I would like to address a couple of arguments
12 that weren't -- that I didn't hear made --

13 QUESTION: Mr. Jones, do I understand that to
14 the extent that the defendant made requests to charge and
15 they were denied it's not necessary to say exception after
16 that. If the request is denied, then it may be that it
17 wasn't raised on appeal, but there's no further need to --

18 MR. JONES: We're not contending that he can't
19 continue to raise the objection that he wanted the
20 instruction that was denied. We're just saying he didn't
21 preserve any objection to the instructions that were
22 given.

23 In the brief, petitioner relies on some pre-
24 1986 cases involving the use of the word wilfully under
25 other provisions of the act and says that those cases

1 reflect that courts had understood this term to talk about
2 knowing violation of a known legal duty before Congress
3 added the word wilfully in 1986 to section 924.

4 All I want to say about that argument is that
5 the cases that they cite don't support it. In fact, the
6 principal appellate authority that they cite, the Stein's,
7 Inc. case, applies the longstanding rule that a wilful
8 violation, a wilful behavior is action taken with the bad
9 purpose to disobey or disregard the law, and cites
10 appellate authority of its own circuit, which in turn
11 cites this Court's opinion in Murdock.

12 So actually, to the extent that preexisting
13 precedent is relevant, it supports the understanding that
14 Congress used the term in its ordinary meaning.

15 QUESTION: Mr. Jones, you focus exclusively on
16 the word wilfully, but it seems to me that in lining up
17 all these cases you have to look at what follows wilfully,
18 wilfully what, and it's particularly hard in this case to
19 argue your point.

20 If it had said, wilfully sells a firearm without
21 a Federal license, then I think it's much easier to say he
22 did it with a bad purpose, with a bad intent, what-not,
23 but it says wilfully violates -- wilfully violates a
24 provision of this chapter --

25 MR. JONES: But actually --

1 QUESTION: -- and that just brings to mind, you
2 know, knowledge that he is violating the provision of this
3 chapter.

4 MR. JONES: Justice Scalia, that's the point I
5 was addressing earlier about the Court's opinion in the
6 International Minerals case, that the right way to read
7 this statute is that it -- that what has -- what Congress
8 has proscribed is a wilful, in this case dealing in
9 firearms without a license, because what the statute says
10 is, wilfully violate any other provision of this chapter.

11 And what Congress -- I mean, what this Court
12 said in International Minerals that phrasing means is that
13 it's a shorthand, that it's a simplified way of
14 essentially adding wilfully to each of those other
15 subsections and making it a crime, and so the statute --

16 QUESTION: With the same -- the same -- the very
17 same text?

18 MR. JONES: Yes. It said -- the text that was
19 involved in the International Minerals was wilfully
20 violate any regulation, and in the Court's -- and the
21 Court said, well, that doesn't mean that they knew that it
22 was a regulation they were violating. It means that they
23 knew that their conduct was wilful, and so you -- I'm
24 sorry. That case --

25 QUESTION: Was that a statute that also had a --

1 had knowingly --

2 MR. JONES: Actually, that was what I was about
3 to correct myself. What that statute said was knowingly
4 violate a regulation, but what the Court explained was
5 that knowingly violate is just a shorthand way of saying,
6 knowingly doing the acts that are elsewhere in the statute
7 described as violations of the acts, and so -- and that it
8 was simply a shorthand.

9 Congress doesn't have to write for each of these
10 criminalizations of various violations of the subchapter a
11 separate subchapter that says, and knowingly -- and
12 knowingly dealing in firearms without a license, and
13 knowingly doing this and knowingly doing that, or wilfully
14 doing this.

15 That's the point of the International Minerals
16 case, and Congress surely can rely on that decision in its
17 choice of draftsmanship.

18 The legislative history of this statute, if
19 it --

20 QUESTION: You flatter Congress to think that
21 they had that case in mind in --

22 MR. JONES: Well, I certainly think --

23 QUESTION: -- this careful drafting that they
24 do.

25 MR. JONES: They're entitled -- I would think

1 that they would have that case in mind, because it's not
2 uncommon for Congress to have this sort of provision
3 that -- about a --

4 QUESTION: But that's a case that doesn't have
5 knowing, for some section, wilful for others, and so would
6 you just clarify once more what the difference would be if
7 this statute had read knowing instead of, as it does,
8 wilful? You agree that wilful adds something, and I don't
9 understand quite what that something is.

10 MR. JONES: A knowing violation, this Court has
11 said in numerous cases, is acting with knowledge of the
12 facts that constitute the violation. For example, in
13 Staples it was acting with knowledge that this thing that
14 the guy had was a machine gun. It doesn't mean that he
15 had to know that it was improper for him to have such a
16 machine gun. He just had to know that it was one.

17 Whereas a wilful violation would be knowing that
18 it was a machine gun plus holding it with the bad purpose
19 to disobey or disregard the law. That's the ordinary
20 meaning of wilful.

21 QUESTION: In other words, knowing that there
22 was some law that prohibited this.

23 MR. JONES: That would certainly be evidence of
24 the bad purpose --

25 QUESTION: No, but what else would suffice?

1 What else would suffice? Sure, it would be evidence.

2 What else would --

3 MR. JONES: This Court has never really tried to
4 answer that question except --

5 QUESTION: Well, we're trying now.

6 (Laughter.)

7 MR. JONES: No -- well, maybe you are, but
8 you've answered it only indirectly by saying, as in Spies,
9 well clearly evidence of concealment, covering up would be
10 sufficient.

11 QUESTION: Because that is circumstantial
12 evidence that he knew what he was doing was prohibited by
13 some law, so ultimately that gets us I think to a standard
14 that says there's got to be knowledge with some degree of
15 specificity that he is violating the law in doing these
16 acts which he understands he's doing.

17 MR. JONES: I don't think that there has to be
18 evidence of that. I mean, that may be where --

19 QUESTION: Well, that is the conclusion --

20 MR. JONES: -- I'm having trouble --

21 QUESTION: -- that has to be drawn. That is
22 what the jury ultimately has to find, isn't it?

23 MR. JONES: Yes. The jury ultimately has to
24 find, as they were instructed in this case, that the
25 action was taken for the purpose of disobeying the law or

1 disregarding it.

2 QUESTION: The purpose --

3 QUESTION: That presupposes that you know
4 there's a law that you are disobeying or disregarding.

5 MR. JONES: I think that the general knowledge
6 instruc -- the general knowledge articulation given by the
7 court of appeals in this case is directed at that.

8 What they're trying to describe is a sufficient
9 knowledge. It may be of the law. It may be of some fact.
10 It is a sufficient knowledge that it is appropriate to
11 find that this particular defendant acted with the bad
12 purpose of disregarding the law --

13 QUESTION: Why do you keep saying --

14 MR. JONES: -- acted, as the Court said in
15 Murdock, with unjustified indifference to it.

16 QUESTION: Why do you keep saying purpose,
17 because again, if we're supposed to clarify, it seems that
18 purpose isn't right.

19 I mean, the defendant here didn't want to
20 violate the law. He would have been perfectly happy if
21 the law had made what he did legal, I guess, or many
22 would, so why do you -- normally people wouldn't have the
23 purpose to violate the law. They would have the knowledge
24 that what they are doing is a violation of law, so why do
25 we want to say purpose?

1 MR. JONES: One of the formulations the Court
2 has given is, with the bad purpose or evil intent of
3 violating the law.

4 QUESTION: Well, is there any reason to use --

5 MR. JONES: It's a blameworthiness standard.
6 We're talking about something that's sort of like
7 fundamental to the criminal law, that the party has done
8 something blameworthy, and that the court has used
9 numerous formulations to accomplish that essential goal.

10 And our own -- and what this case is really
11 about is whether there's any requirement that we have some
12 extraordinary standard that applies in this particular
13 case, and for the reasons our brief said, and that I've
14 tried to summarize, no, the extraordinary standard isn't
15 applicable. The ordinary standard is.

16 And if I can't tell you exactly what that
17 ordinary standard is, it's because this Court has given us
18 several different descriptions of it, and so if I were to
19 say that only one applied, I think it would be an
20 incomplete description, because criminal blameworthiness
21 is maybe not something that is capable of crystalline
22 definition.

23 QUESTION: Yet criminal statutes are supposed to
24 be clear, are they not?

25 MR. JONES: Well, it's -- I think jurors in

1 their common experience understand what wilful behavior
2 is, and certainly this Court has long upheld statutes that
3 impose that as an element of the offense.

4 QUESTION: Are you suggesting the judge just
5 read them wilful and not define it for them?

6 MR. JONES: The purpose of instructions is to
7 assist the jury. I think that the instructions that the
8 Court approved in Murdock and in Pomponio about bad
9 purpose to disobey and disregard the law, it appears in
10 form instruction manuals. I think it assists the jury.

11 QUESTION: No, but the question was, does he
12 have to instruct them at all? Do you simply --

13 MR. JONES: Pardon me?

14 QUESTION: I think Justice Ginsburg's question
15 was, is wilful sufficiently clear so that there is, in
16 fact, no need to instruct at all? Just say, got to act
17 willfully, period.

18 MR. JONES: I think some assistance is
19 appropriate. The Court has always approved the
20 instructions for wilfulness. I mean --

21 QUESTION: It's sort of like, beyond a
22 reasonable doubt.

23 MR. JONES: Perhaps. I mean, I frankly -- I
24 don't know the criteria that the court applies in deciding
25 whether to give an instruction. I've never seen that

1 discussed. But certainly I can tell you that the court
2 has customarily given instructions on terms like wilful.

3 QUESTION: But the reason you've said purpose --
4 I'm thinking of the clarification, my impression of what
5 you just said. Tell me, is -- and I -- is it if we were
6 to abandon the word purpose, there's an -- there are a
7 large number of books there that have that word purpose in
8 it, and that would make you -- that's your reason. Is
9 that right, basically? I mean, is that what --

10 MR. JONES: I don't --

11 QUESTION: I'm trying to pin down what's making
12 you nervous about it.

13 MR. JONES: You've asked me what my reason was.
14 I didn't have that particular reason in mind, but now that
15 you've mentioned it I certainly think that that would be a
16 problem.

17 QUESTION: Yes.

18 MR. JONES: It would be -- the Court's treading
19 here over decades of statutes, and it's important that we
20 don't reinvent the wheel in a way that maybe leaves a
21 spoke out that we need somewhere and that, frankly, I'm
22 not in a position to describe at this point.

23 QUESTION: Thank you.

24 MR. JONES: If there are no further questions --

25 QUESTION: Thank you, Mr. Jones.

1 Mr. Adler, you have 3 minutes remaining.

2 MR. ADLER: Petitioner waives rebuttal time.

3 Thank you for your time.

4 CHIEF JUSTICE REHNQUIST: Very well. The case
5 is submitted.

6 (Whereupon, at 12:14 p.m., the case in the
7 above-entitled matter was submitted.)

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CERTIFICATION

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

SILLASSE BRYAN, Petitioner v. UNITED STATES
CASE NO: 96-8422

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Donna Marie Fedilo-----

(REPORTER)