ORIGINAL

In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

PETITIONER,

V.

CLIFFORD BAILEY, ET AL.,

RESPONDENTS.

UNITED STATES OF AMERICA,

PETITIONER,

V.

JAMES T. COGDELL,

RESPONDENT.

No. 78-990

Washington, D. C.
November 7, 1979

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v.

JAMES T. COGDELL,

Respondent.

- -x

Washington, D.C.

Wednesday, November 7, 1979

The above entitled matter came on for argument at 1:49 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

EDWIN S. KNEEDLER, Assistant to the Attorney General, Department of Justice, Washington, D.C.; on behalf of the Petitioner

RICHARD S. KOHN, 733 Fifteenth Street, N.W., Suite 520, Washington, D.C.; on behalf of the Respondents

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: The hearing next is the United States v. Clifford Bailey.

Mr. Kneedler, you may proceed when you are ready.

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

ON BEHALF OF THE PETITIONER

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

These cases are before the Court on a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The cases arise under the Federal statute 18 United States Code Section 751 that prohibits a person from escaping from the custody of the Attorney General or from any custody in which he was placed under Federal law pursuant to court order.

There are two issues presented.

First is whether in establishing the intent element of the crime of escape, the Government is required to prove merely that the defendant left the prison consciously, not inadvertently. In addition, the Government prove that the defendant intended to avoid only those aspects of confinement in the prison that may be regarded as normal. Under the latter formulation which was adopted by the Court of Appeals in this case, a prisoner who deliberately left a prison but did so for the purpose of avoiding certain harsh

conditions there would not commit the crime of the State.

The second issue concerns the nature of the showing a defendant in an escape case must make under Section 751 in order to raise the defense duress. This defense has long been recognized that the common law and generally in Federally criminal prosecutions. The Court must decide here whether a defendant who raises the duress offense in an escape prosecution must show that he was threatened with imminent serious harm at the time of his departure from the jail. And whether he can raise the defense if he remained in hiding after he departed from prison.

Respondents Bailey, Walker and Cooley were convicted following a jury trial and escaped from the District of Columbia jail. Each was sentenced to five years imprisonment to serve consecutively to sentences previously imposed.

Respondent Cooley was convicted in a later jury trial of escaping from the District of Columbia jail as well and he too was sentenced to imprisonment for five years.

Prior to the escape Respondent Bailey had been serving a sentence in the Leavenworth penitentiary on conviction of bank robbery and attempted escape but he was brought to the District of Columbia to testify in a pending criminal case.

Respondent Walker was also serving a sentence in the Leavenworth penitentiary on conviction of bank robbery and he too was brought to the District of Columbia to testify.

Respondent Cooley was serving his sentence in the District of Columbia jail based on a conviction for unlawful possession of firearms.

The evidence at the trial of these three Respondents showed that they left the jail in the early morning hours of August 26, 1976 by crawling through a window in the Northeast 1 Unit of the District of Columbia jail, which was the maximum security facility at the jail.

They were apprehended by FBI agents in the District of Columbia on November 19, December 13 and September 27, respectively, which was from one to three months after their departure from the jail.

Respondents did not dispute at trial that they left the jail without permission and that they had remained in hiding until they were apprehended. But they sought to justify their escape by introducing evidence of what they contended were intolerable conditions in the jail.

Early in the trial and on several occasions thereafter the Government argued that they were not entitled to raise the defense of duress because they had not surrendered to custody promptly after their departure.

The Court agreed with the Government on this point and several times informed Respondents to that point. They chose to allow them to present their evidence of jail conditions and to wait until the end of the trial to determine whether evidence was in the record to support a finding that they had satisfied rhe return requirement.

The three Respondents and several other inmates and several jail officials then testified about certain conditions in the jail. There was testimony that trash, sheets, mattresses and similar items were burned, some of the testimony suggested frequently,during the summer of 1976 prior to the escape.

QUESTIONS: Burned by guards as well as by inmates?

MR. KNEEDLER: There was testimony from several inmates that there had been certain things burned by guards. There was a description of a guard who -- burning some trash.

QUESTIONS: I take it the Government concedes that some of these conditions were "intolerable"?

MR. KNEEDLER: No, we don't.

QUESTION: What do you concede?

MR. KNEEDLER: Well, for purposes of the case in this this Court, the Respondents' evidence has to be read in the light most favorably to them. So to that extent

for purposes of this case we are considering the facts as presented to be true. But we do not concede for example that the conditions of the fires even as described presented the type of threat of imminent serious bodily injury or harm that the duress defense has usually been reserved for.

QUESTION: Well, the jury convicted these defendants, didn't they?

MR. KNEEDLER: That is right, but the -- but after the judge had instructed them at the close of the trial, the judge concluded that there was not evidence in the record from which the jury could find that they had satisfied the return requirement of duress defense; they had not surrendered to custody. And therefore he did not give them duress instruction and directed the jury not to consider the jail conditions.

QUESTION: Well, then how can we be sure just what the jail conditions were, since presumably the jury was entitled to disbelieve the testimony of witnesses heard?

MR. KNEEDLER: Well, surely, yes, that is right. I think on the basis of the record as it comes to the Court that there is not a jury verdict that took into account the jail conditions. So again, the evidence has to be considered in the manner presented by the Respondents.

In addition to the evidence of the fires, Respondents Cooley and Bailey also presented some testimony

that they were beaten by guards during the summer and that they were threatened with similar action.

Respondent Walker did not base his duress on such beating but did allege that he had, and sought to establish that he had received inadequate medical treatment for an alleged epileptic condition.

Finally, Respondent Cooley also at one time testified that he left on the morning of the 26th because he had been threatened by Bailey and Walker, but he later admitted that there was no one outside the cell when he left, that the threats occurred later and he didn't know whether Bailey and Walker had actually left.

The Respondents also sought to testify about certain actions that happened after they escaped. Respondent Walker testified that he made three telephone calls to the FBI. The agent with whom he spoke, Walker testified, assured him that he would not be harmed if he surrendered but refused to guarantee that he would not be returned in to the District of Columbia jail if he did surrender.

Respondent Bailey testified that he had someone else call the authorities but he didn't identify who that was and he admitted that he didn't make any telephone calls himself or make any other effort to turn himself in.

Respondent Cooley's testimony on this point is somewhat ambiguous but it can be read to suggest that certain

members of his family may have tried unsuccessfully to get in touch with authorities. And the Government did present witnesses in an effort to rebut this testimony and had the duress defense been presented to the jury, then this Government evidence would have come into play.

As I mentioned, at the close of trial the Court denied Respondents' request for jury instruction. It also instructed the jury that escape is a general intent crime and in explaining that the Court stated that general intent only requires to do an act consciously or purposely rather than inadvertently. And by this, I think it is fair to say the Court was referring to the act of leaving the prison.

The evidence at Respondent Cogdell's trial showed that he also left the District of Columbia jail on the 26th and he was apprehended hiding in a closet in a residence in Hyattsville, Maryland about a month later. Respondent Cogdell also offered that his departure was compelled by prison conditions,but because he too had not surrendered the Court rejected his proffered testimony and the duress defense.

The jury returned a verdict of guilty in both cases.

The Court of Appeals, one judge dissenting, reversed the convictions and remanded some new trials.

The Court of Appeals found two bases on which the

jury could have or should have been able to consider the evidence of the jail conditions prior to the departure.

First, the Court of Appeals thought that this evidence bore on the question of intent. In the Court of Appeals view, once a defendant in an escape case has introduced evidence of what the Court would term abnormal conditions of confinement, there is at least a question raised as to whether the defendant actually intended to leave confinement as such or whether he was really motivated by a desire to avoid those unpleasant conditions.

Accordingly, the Court held that it made him guilty of escape only if he had the intent to avoid abnormal conditions of confinement. The Court also concluded that Respondents' evidence of jail conditions was sufficient to raise a jury question under the duress defense, but in doing so the Court stated that the traditional rule of duress defense, that it can be raised only where the defendant acted out of immediate threat of serious harm should be relaxed in the prison escape context because the opportunity for a prisoner to escape may not remain available, while a substantial threat would right that into an immediate one.

Finally, the District Court of Appeals concluded that the District Court had erred in imposing a firm return requirement for defendant after he departed from custody. The Court advocated that the failure of a prisoner to return

to custody was essentially a fact for the jury to consider in determining whether his continued absence might be justified by a possible continuation of the conditions that led him to depart.

Government's suggestion for rehearing en banc was denied and the Government then petitioned for certiorari.

The Court of Appeals decision if affirmed by this Court could have serious ramifications for the courts in interpreting the law of escape and as a result could also have serious consequences for the order and security of the District of Columbia jail, the Federal penal system generally and society at large.

Escape carries with it a substantial potential for violence, even where the inmate himself does not intend to resort to violence.

Escapes also disrupt the order of the prison and cause understandable apprehension among the public.

For these reasons and because escape demonstrates contempt for the rule of law, escape has been traditionally treated as a serious crime. Any effort to justify or excuse an escape must therefore be treated with considerable caution.

The Court of Appeals holding that a prisoner does not commit an offense if he escapes to avoid certain adverse conditions of confinement rather than confinement as such,

finds no support in case law, Federal or State. Moreover, the Court's distinction between what is called normal and non-normal conditions of confinement is not fully articulated in the opinion. And the basis of that distinction is not wrong. For example, it isn't clear whether all jail situations that this Court might find to be in violation of the Eighth Amendment would be considered to be non-normal, at least as traditionally determined, and therefore justify a prisoner in escaping.

There is also no expressed requirement as the intent argument is formulated by the Court of Appeals that these adverse conditions present an immediate threat to the safety or health or life of the prisoner.

Therefore, the manner in which the Court of Appeals dealt with the intent element introduces a great deal of uncertainty and vagueness into the crime of escape and causes prisoners, would cause corruptions officials and juries and judges to speculate and guess as to what types of conditions might excuse an escape.

Finally, the Court of Appeals treatment of the intent element has the effect of converting an escape into a self-help remedy by which the prisoner may seek to avoid the conditions of confinement that are unsatisfactory to him rather than resorting to legal remedies.

In this case the Respondents indisputably intended

to leave the District of Columbia jail, whatever may have been their motivation in doing so. And there is no indication that Congress intended the Government should have to prove anything more than that in making out a prima facie case of escape.

The Court of Appeals evident concern about the dilemma of a prisoner who faces truly threatening conditions in a jail is therefore better dealt with not in the intent element which is part of the Government's case in chief, but where it has traditionally been addressed and that is in the affirmative defense of duress. That defense has over the years embodied the societal and legal judgment there are occasions when it is inappropriate to punish a person because his conduct was compelled by external forces. The duress defense has long recognized that at least in some circumstances a person cannot fairly be blamed for his conduct in those situations. The conduct of one who acts under compulsion is still criminal because all of the elements of the crime are present, including the intent to act. But even though criminal, the conduct is excused for reasons of social policy.

It is apparent however that the defense of duress carries with it the seeds of potential disorder because it allows a judge and jury to excuse conduct in a particular case that the representatives of the people have chosen to

make criminal and because it may also create an incentive for a defendant to claim falsely that he acted under coercion when it will be quite difficult for the prosecution to disprove those suggestions of coercion.

As a result, the duress defense has historically been hedged with restrictions which stick to limit its applications to situations in which the individual had no reasonable choice but to commit the offense. Thus the defendant is excused only if he acted under a threat of what he reasonably believed to be serious personal injury or death. And that is aggravated circumstances in order society requires an individual would stand a threat rather than break the law. Further, the threatened harm must be unavoidable because if there are other legal recourses available there is no reason to permit the individual to resort to illegal methods.

And finally, in order to be excused the criminal conduct may not be of any greater magnitude or duration than is reasonably necessary to avoid the threatened harm.

Duress has always been theoretically available as a defense in a prison escape case. But, the courts have been understandably reluctant to excuse a prisoner when he claims that his departure was compelled by circumstances of confinement, because after all confinement itself is objectionable to many people.

Accordingly, most courts that have considered the issue have required the defendant to satisfy certain prerequisites to raising a duress defense. These are not novel, however; they are merely adaptations of the general rules that I have just articulated for the duress defense generally.

Again, the prisoner must fear an imminent threat. Second, there must be no lawful means available to the prisoner to avoid it, such a resort to prison grievance prison system, prison officials or the courts.

And finally, the courts have insisted that the prisoner return to custody promptly or report to authorities in meaningful fashion after the departure in order to take advantage of the defense.

QUESTION: It is not only a threat from those inside the prison, from people inside the prison -- fellow inmates or custodians -- that might in some circumstances justify escape, is it? Way back in the early 18th century Hale talked about the hypothetical case of a prison catching fire.

MR. KNEEDLER: That is right. It does not have to be caused by a person. Traditionally, the fire situation would have been dealt as part of a defense of necessity which is usually thought of as natural forces as opposed to --

QUESTION: Not duress, but rather necessity.

MR. KNEEDLER: Necessity. The case is discussing these two defenses in the escape context intended to merge them or not rather to significantly distinguish them because in some respects duress is not an especially apt name for the defense either.

QUESTION: Suppose we have a situation right now, a 20th century situation and the evidence was somewhat resembling what is going on in Iran today and the prisoners said they observed that every morning they were taking ten prisoners out into the court yard and executing them, just broadside. But after he watched that for ten days and they had executed a hundred prisoners at random, he decided this was no place to be and made the same efforts that are made here. And, let us lay aside for a moment whether he reported to anyone regularly.

Do you think that would be something like a fire?

MR. KNEEDLER: Yes, I would. We are not suggesting that the defense -- duress defense is never applicable in prison escape cases. But what we are suggesting is that the prison conditions must be severe, perhaps not as severe as you suggested in that example but they must be what Judge Wilkey in dissent called back-to-the-wall situations where the person is truly faced with a human dilemma that the law simply has to forgive.

QUESTION: In this prison, in this institution is

any limitation on the right of the inmates to write to their congressman?

MR. KNEEDLER: No, as I understand it mail is freely permitted to be sent out. This was a maximum security facility however so there limitations, for example telephone calls.

QUESTION: Or to a local newspaper?

MR. KNEEDLER: Local newspapers or to an attorney, church, citizen groups, and that type of thing.

I would like to turn to the return requirement for a moment.

There are two possible ways in which the return requirement could be explained. Some courts have found it useful in discussing the return requirement to characterize escape as a continuing offense in the sense that it is not necessarily consummated at the time the person first gains his freedom but it continues for as long as he remains at large.

Under this approach, this approach to describing the return requirement then --

QUESTION: The real question is whether there is a requirement.

MR. KNEEDLER: That is right; that is right.

QUESTION: So you are assuming there is one?

MR. KNEEDLER: Well, I am explaining --

QUESTION: You are giving an argument.

MR. KNEEDLER: Yes, that is right.

The continuing offense description that I have just given brings the return requirement into consistency in the duress defense generally. As I mentioned before, one of the traditional elements of the duress defense is that the individual can have engaged in the conduct for no longer than the threat remains outstanding. Well, in the situation in which a person escapes from prison unlawfully, his departure is unlawful and his absence from custody is unlawful. So as long as he remains there is no excuse. So as long as he remains at large he is continuing to engage in an unlawful activity. But once he is out of prison he is no longer directly confronted in the back-to-the-wall-type situation by the threats that led him to depart. And so because the imminent harm is no longer present and because he even more readily has legal means available, then he is no longer permitted -- at that point the duress defense stops excusing his continued absence from prison.

Now, another way in which the return requirement may be explained is by giving it as a condition subsequent that the defendant must satisfy in order to raise the defense. Under this approach, as I have mentioned the original departure continues to be a crime but it is one that can be excused, the return requirement is a condition

which the law attaches to the excuse in order for the defendant to take advantage of it.

It is also important to remember that the duress defense in criminal prosecution is traditionally a fashion defense and it is reasonable for the court to fashion it in the escape context by resort to some common sense. And in this particular situation I believe common sense would suggest that Congress could not have intended that a person who may have initially fled confinement because of an imminent fear of serious injury could thereafter remain free with impunity and not have to take some measures to put himself back into custody safely.

QUESTION: Mr. Kneedler, it seems to me that in both of your theories, and I may have it entirely right in my mind, but in both of those theories you in effect are saying that there is a sort of a second offense. Take a hypothetical case where a man in fact is subject to duress, in fear of life at the time he leaves and ten days later he has calmed down, he is in the hospital or something and he has had a chance to think it over and he decides, well, I would like to stay out; and I am no longer under duress but I am not going to go back.

Now, clearly he has committed the crime of escape ten days later at that time. Couldn't you prosecute him for that escape in the alternative by saying in effect

(1) you escaped by walking through the doors; and (2) you never came back.

MR. KNEEDLER: That is right; yes.

QUESTION: Now, you don't quite -- is that your theory, that it is a separate crime; and if so, is your indictment good?

MR. KNEEDLER: We are not suggesting at all that it is a separate crime. By my hypothesis on the date mentioned in the indictment he committed no crime. No, he did commit a crime but it is one that is excused by the affirmative defense of duress. Duress does not go to any element of the offense itself. It does not negate the intent, for example. He still intended to leave even though he may have done so in some sense without volition. So he committed a crime.

QUESTION: But in neither submission you are not contending that the fact that he doesn't go back is probative on the issue of whether he really was under duress at the time?

MR. KNEEDLER: No.

QUESTION: You don't argue that?

MR. KNEEDLER: No. That is several --

QUESTION: That theory would have to go to a jury?

MR. KNEEDLER: Right.

Several of the State courts that have considered the issue have looked at the return requirement as nothing more than that, as evidence of what the person did afterward suggests that he really didn't leave out of a good motive but wanted to leave.

QUESTION: It just means that the defense isn't good?

MR. KNEEDLER: That is right. I mean as a matter of law under our approach the return is not simply an evidentiary matter, the importance of which the jury can consider; but it is an essential element of the defense itself.

QUESTION: Does it require that you prove a fair opportunity to return?

MR. KNEEDLER: That is right; yes, sir. I am not suggesting that two minutes later or something that should apply.

QUESTION: Yes.

MR. KNEEDLER: I would like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Mr. Kohn.

ORAL ARGUMENT OF RICHARD S. KOHN, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

The issue presented by these cases is whether juries can be trusted to find the facts in criminal cases. It is as short and as simple as that.

The rule that the Government asks the Court to adopt would deprive the jury of considering relevant facts concerning the events surrounding the departure of a prisoner from the prison.

It is unique and affirmative defenses. I know of no other affirmative defense that would place a substantive limitation on the ability of a defendant to raise an affirmative defense to a charge which is made against him.

The number of State Supreme Courts from very large jurisdictions such as Michigan and Illinois --

QUESTION: There are some things you can fail to do and lose a defense, like present it in a timely manner, like an alibi.

MR. KOHN: There are certain procedural requirements that are sometimes attached to defenses, such as notifying the prosecution that you intend to advance an alibi defense. But nothing that would take an element like failure to return and make that the sine qua non of raising your relevant evidence.

QUESTION: What about a claim of release in a civil action, which is an affirmative defense

and you show the judge what you propose to do for his release and he says as a matter of law that is not a release.

There is no problem there, is there?

MR. KOHN: Perhaps in a civil context there wouldn't be any problem but in criminal context it certainly would.

QUESTION: You say that any evidence that a defendant wants to offer comes in in a criminal case?

MR. KOHN: On the affirmative sense I would say as long as the defendant offers some evidence of duress or coercion, then that would come in and go to the jury.

QUESTION: Well, if the judge says, "I want to share in share in chamber what you propose to offer in the way of duress," and says, "This isn't even some evidence, so I am not going to let you offer it"?

MR. KOHN: There would be a minimum of threshold, Your Honor, certainly if the defendant offered zero evidence the affirmative defense would not be permitted to go to the jury. There are some minimum thresholds which the Court really doesn't have to deal with in this case because the evidence was so substantial.

QUESTION: But -- excuse me.

MR. KOHN: But there are cases, and the Government cites one in its reply in its reply brief State v. Cross where the Court characterized the defense as a prisoner's complaint he got a common cold. Essentially he said that

the conditions in the jail were cold. And even though they talked about the Loverkamp test, that kind of defense probably would be excluded even under the traditional standard. It must mean that there has to be some immediate threat of giving rise to a well-grounded apprehension of serious bodily injury or death, as the traditional standard.

QUESTION: You don't say that the duress defense is constitutionally required, do you?

MR. KOHN: Well, certainly it impinges on the fact-finding function of the jury, Your Honor. But, no, we would argue first before the Court has to reach any constitutional questions that just as a matter of policy --

QUESTION: Well, say some State doesn't have it. Say some State doesn't have it and that a defendant nevertheless says, "Judge, I am going to offer some evidence that I was under duress."

And the judge says, "What for"?

And he says, "Well, I think it ought to be a good defense."

And the judge says, "We just don't recognize it in this State. The evidence is excluded."

MR. KOHN: Well, that raises another issue in this case, Your Honor, which goes to the --

QUESTION: Do you think that is different in this

case, really, if a judge says, "Well, we have a defense of duress but only here are the elements, one, two, three. Three is absent; no defense of duress; evidence is out.

MR. KOHN: Well, that would answer problems I believe under Spence v. Montana, Your Honor. It is exactly the situation in this case. An essential element of the offense is voluntariness. The duress evidence or this type of evidence goes to negate that type of intent. And in this case that evidence apparently was excluded by the judge.

Now, even if Congress abolished the affirmative defense to escape tomorrow, the defendants would still have a right to put in relevant evidence in negating their intent, which is an essential element of the crime.

QUESTION: Suppose the defense offered was the defendant said he heard a voice commanding him to leave the prison and to go and carry out some mission. Now, short of a claim of not guilty by reason of insanity, would you think that defense must be heard?

MR. KOHN: Certainly not in terms that we are discussing in this case. We are concerned with threats to a prisoner of serious bodily injury or harm.

QUESTION: You posed some hypotheticals in other State holdings. Would you say that this would not be -- a matter that the judge would have to submit to the jury?

MR. KOHN: There may be other questions regarding intent. Essentially the Court in this case discussed that, that if someone leaves a jail by mistake or if he becomes so intoxicated he doesn't know what he is doing, it may negate the intent but the prosecution has to prove to make that act criminal.

QUESTION: Or if he argues by invitation of the guards?

MR. KOHN: Yes, sir.

But I don't think that that incorporates the concept that we are talking about in terms of the duress defense.

The Supreme Courts in Michigan, Illinois and New Mexico have adopted a flexible rule which permits evidence of failure to return to go before the jury and which goes to the issue of credibility.

QUESTION: But in one of those cases he came back within a few hours and in the other one he came back within 24 hours.

MR. KOHN: I don't think that a distinction can be made on that ground. And I must say this.

QUESTION: What if he is gone for six months?

MR. KOHN: Well, that certainly would raise a question of fact for the jury.

QUESTION: Fact for the jury, or the judge?

MR. KOHN: No, I think that that would still raise --

QUESTION: Two years, them?

MR. KOHN: Well, at some point perhaps you could say there was no longer a reasonable, temporal relationship between the duress that caused him to leave and his staying out.

But as long as there is some evidence such as was introduced in this case by the defendants that they didn't want to go back because they thought the FBI was going to kill them if they found them, and that they would be returned to the Northeast 1 tier of the prison, that that must be taken into consideration by the jury, it raises a factual question. And, except in the most minimal cases where there is essentially no evidence at all, then those questions create issues of fact for the jury.

A good example of why a flexible rule is needed is set forth by the case of Tidman v. Commonwealth in a Kentucky Court of Appeals case cited by 12 Southwestern Second 488 in which a prisoner had one month left to serve on his sentence and left because he had owed a debt to another inmate which he couldn't pay and wasn't threatened with homosexual assaults and couldn't find a guard and he left.

And two days later he was arrested. At the trial the judge refused to let in the evidence that he had only one month to go on his sentence. And the Kentucky Court of Appeals, which I believe is the highest court in the State, reversed and said that that was very relevant evidence for the jury to consider.

So in a case like that, if a man is arrested before he has a chance to turn himself in or before he has a chance to collect his thoughts and contact the proper authorities, then he is completely barred from raising the duress defense. And we say that is an unreasonable rule.

The problem here is how do you deal with someone who has escaped from prison, an unauthorized leaving of the prison. And when he is captured he will be brought back and he may be prosecuted for escape, and at that time he should be able to give an explanation for why he left.

In most cases it perhaps could be said the jury will not accept his testimony. Juries are not stupid, contrary to what appears to be the major premise of the Government's case. And the defendant will have to convince a jury that his reasons for leaving in fact were valid and that his staying out could be explained in some manner.

QUESTION: Well, just because we have rules against hearsay doesn't mean that those events think the jury is stupid or incompetent, it is just a matter of rules;

isn't it?

MR. KOHN: I think that the base of the Government's case is the feeling that the juries will be duped by prisoners who raise these defenses, that prisoners will get together and conspire to create stories and that somehow the jury will not be able to sort these out. And I think that the basic issue here is whether we have confidence in the juries and our jury system to decide what is the true story and what is a fabrication.

And, in that connection I would point out that in all these cases when the prisoners are captured they will be brought back to serve out their original sentence. The only issue is whether they will have an additional punishment put on them for their unauthorized leaving. So we are not talking about acquittals and we are not talking about turning them loose on society. They will be back in prison, whatever the case.

QUESTION: But they are acquitted for the 20 or 30 or 60 days that they are out?

MR. KOHN: I wouldn't think so.

QUESTION: The Congress has specified that escape is separately punishable felony. It isn't the idea that it is just make good on your original sentence, when you escape you commit a separate felony.

MR. KOHN: That is correct, Your Honor. And in

the proper circumstances that action would be punished. But there is a common law of duress. For a long time it was not applied in escape cases but that is changing now and the Government has conceded that the duress defense is available in this context. So if a prisoner can make out that defense, then he should not be punished under the congressional Act.

If Congress wants to --

QUESTION: What is the status of law in the Federal courts on duress as a defense to escape?

MR. KOHN: I think it is generally permitted in both State and Federal courts, and the only --

QUESTION: Standard defense in any criminal charge?

MR. KOHN: Yes, Your Honor.

QUESTION: Well, it hasn't been duress, historically. It was not a defense to escape, was it?

MR. KOHN: Well, the evidence always came in in some manner. You have cases like --

QUESTION: Well, was it or not; was it a --

MR. KOHN: Historically, it was recognized by Hale and by Cluck originally, at least theoretically but apparently it was not applied for many years by the courts.

QUESTION: In an escape case?

MR. KOHN: Yes, Your Honor.

QUESTION: Although it was other --

MR. KOHN: Yes, Your Honor.

QUESTION: And when did it come into fashion in the Federal courts?

QUESTION: Well, I think that after the Luther and the Harmon and the Unger cases were decided in the State courts and the Lovercamp case, it started to be accepted by the Federal courts.

QUESTION: Without any congressional indictments or anything?

MR. KOHN: That is correct, That is on a common law basis. That is correct. A common law basis.

QUESTION: And this Court has never passed on it?

MR. KOHN: No, Your Honor. But I want to point out that at least in this case the question of whether duress defense should exist at all is not before the Court. It has not been briefed by the parties, it was never raised bwlow, and it would simply be inappropriate for the Court to consider that issue on the present record.

But the trend is certainly to recognize the duress defense in the State context and the only issue here is whether the defendant has to turn himself in immediately in order to be able to avail himself of that defense.

I also want to point out that even though the duress

defense was not available in the escape concept, the same evidence came in under a different theory. And you have cases like Woodring and Jackson which the Government relied on for the proposition that 751 creates a continuing offense where the same evidence was received on the issue of an offense of the defendant. And in both those cases, as I recall it the Court held, or the jury was instructed that the intent required was an intent to avoid confinement. And then they went ahead and they considered that evidence.

And, in both cases it was rejected. Woodring has been out for two years I believe after leaving McNeil Island as a result of a threat and the Court held that the jury had ample basis on which to reject his evidence that he did not have sufficient intent and in Chapman I believe the defendant was out for two years and there was a similar result.

QUESTION: There are two issues in this case, aren't there? You said two questions are enlisted by the Government's petition for certiorari, as I remember, and we granted the petition without limitation.

One is whether a State requires a generalized or specific intent.

MR. KOHN: That is correct.

QUESTION: Quite apart from that question of

duress.

And, secondly, if there is interposed a defense of duress must there be a showing by the defendant that he turned himself in as soon as possible after the escape.

Aren't those two separate issues?

MR. KOHN: Yes, they are two separate questions, Your Honor. And we would say that on the basis of this record even if the Court were to find that the return requirement is an essential prerequisite to raising the duress defense, that the Court of Appeals would still have to be upheld on the other theory that the trial court excluded relevant evidence of going to an essential element of the offense, which was voluntariness and intent.

With respect to the voluntariness issue, as I indicated before I think this raises substantial problems with respect to Sandstrom. This situation would have been no different if the trial judge had instructed the jury: If you find that the defendants failed to turn themselves in, then you must presume that when they left, they left voluntarily.

And wouldn't it have been any different if Congress had passed a statute saying that.

QUESTION; Well, is this the theory, that the Court of Appeals majority preceded that?

MR. KOHN: Well, I believe the Court of Appeals

discussed the issues of voluntariness and intent and in Judge Wilkey's dissent on pages 66-A through 73-A of the Petitioner's petition for writ of certiorari, Judge Wilkey discussed that. And Respondent was to show how the majority was in error, unsuccessfully I believe.

But what was common among the majority in the dissent, and which I don't think there is any dispute about between the parties in this case, an essential element of the offense of escape is voluntariness; and what that means is free will, or as Judge Wilkey said, , the beast compulsive at common law. And if the defendant has evidence that shows that he did not have free will when he left the jail -- in other words, that he was coerced, then that evidence must go to the jury, the factual question. And the effect of what the judge did in this case was to take it away from the jury.

Now, there is a problem with the record. Judge Wilkey suggested in his dissent that in fact all the trial judge did was instruct the jury that they could not consider the evidence with relation to the duress defense. But when you read the judge's instructions, you will find that it is very confusing. And I believe it is a Sandstrom situation where --

QUESTION: Do you assign that as error in the Court of Appeals?

MR. KOHN: I don't believe that is assigned as error, but certainly the issues of what evidence was to go to the jury was before the Court of Appeals. I think it is assumed in these questions. It is just an added reason why the Court may want to decide as a policy matter that the return requirement is not required in these cases, which will avoid you to read some very difficult constitutional questions that are presented by this case.

QUESTION: What are the difficult constitutional questions?

MR. KOHN: The difficult constitutional questions are -- well, first of all the Court would have to interpret 751 to determine whether it just stated a single offense, which is the act of parting or as the Government suggests, it goes further and creates a continuing offense. The Court will have to decide that.

QUESTION: I don't see any constitutional problem.

MR. KOHN: And if the Court agrees that the statute does create a continuing offense, then the Court will have to resolve what I think is a difficult constitutional question of what does that mean for this case. The majority below held that even if the statute does create a continuing offense, the continuing offense theory was not the basis of the prosecution in this case. And that, in effect, you

cannot deprive the jury of considering a defense to the initial departure which they were indicted for and prosecuted for because they failed to turn themselves in, which incorporates a different -- at least a different theory of escape. And that involves questions of --

QUESTION: The majority below didn't rest its holding on constitutional grounds, did it?

MR. KOHN: I believe it did, Your Honor. I believe that the due process violation that the Court of Appeals decided the case on was that the Government in effect had shifted its theory, that these men had been indicted for the initial departure, that that was the basis upon which they were defending. That was certainly the basis on which the jury was instructed and that right in the middle of all this the defendants sought to raise a defense that went to the initial departure and were told that they couldn't do it because they had essentially committed a separate offense of remaining absent without leave. And that is the constitutional violation --

QUESTION: Did you have in mind that page of the record where the Court of Appeals, the jury talks about the constitutional issue? If you don't, I will certainly look at it any way.

MR. KOHN: That is page 25-A of the petition for certiorari.

QUESTION: And it goes over to 26-A.

MR. KOHN: That is right. If I may read it --

QUESTION: Well, where does it say anything about the Constitution?

MR. KOHN: Let me -- it is on probably 6-A, Your Honor, in the first line.

QUESTION: Yes.

MR. KOHN: The Court of Appeals said:

"In effect the trial court denied appellant's right to have the jury consider a duress defense to a crime with which they had been charged, escaping on August 26. Because the court found that they would in any event be guilty of an offense under a theory of failure to return, it was never presented either to appellants or to the jury. We cannot sanction such an obvious violation of appellant's constitutional right to jury trial."

And that was the basis of the majority'a decision.

Now, there is another issue regarding this case that goes beyond the voluntariness concerns, and that is what exactly is the standard of intent in these prosecutions. The Government --

QUESTION: At least I have the impression that you conceded that a person might be at large so long that it would be a legal question, not a fact question, that is the judge may decide not to submit it to a jury.

MR. KOHN: That is only with respect to the affirmative defense, Your Honor, I believe. Well, I think it has been held that if zero evidence is introduced in support of an affirmative defense, then it is not necessary for the judge to give it to the jury. But these are very sensitive areas and I really wouldn't want to speculate as to what the minimum threshold was.

In this case we don't have that problem because there was ample evidence that when these men left they were under duress, there was substantial evidence of threats and beatings and fires and all the rest of it, and there was also evidence that once they got out they felt that they were under the same threats, that they would be taken back to the same jail and that the FBI was going to kill them. And I submit --

QUESTION: The Court of Appeals did not hold that the evidence was sufficient on the issue of duress, did it?

MR. KOHN: I don't believe it had to, Your Honor.

QUESTION: They didn't because of that theory but if we should agree with you our disposition would be to send it back to the Court of Appeals to decide whether or not there is a prima facie case of duress; isn't that right?

MR. KOHN: Well, I think if this Court -- well, let me think about that.

If this Court should hold that the return requirement is not an absolute bar to raising the defense duress, I think that would require a new trial, Your Honor. I don't think the Court of Appeals --

QUESTION: I don't know whether it would be right or wrong, but if the Court of Appeals -- and we agreed with them -- determined that there was not enough evidence of duress that requires ten days before he left, and things like that.

MR. COHN: No. The Court didn't decide that, Your Honor. The only --

QUESTION: That is my point.

MR. COHN: Well, the only reason why the trial judge did not let this evidence in in the first place was because the defendants had failed to return. It was the only issue -- it was the only issue on appeal.

QUESTION: That is the only reason he didn't give the instructions?

MR. COHN: Yes, Your Honor. That was the only issue on appeal.

QUESTION: The instruction would not have been required unless there was prima facie evidence of duress and the Court of Appeals hasn't decided whether or not there was.

MR. COHN: Well, I suppose that is true. It is a

point that has not been raised by the Government and I -- I guess I would think that in the posture of the case if this Court agrees that the return requirement was not properly -- is not a bar, then the judgment of the Court of Appeals should be affirmed and the case should be sent back and the Government can decide whether they want to re-prosecute these people.

QUESTION: What if this court decides that the return requirement is an essential element of duress?

MR. KOHN: Well, then the Court is going to have to reach these other questions about the scope of the statute, the constitutional violation which the Court decided the case on and the sense from problems with the intent issue. The Court would have to go on to decide all those issues.

QUESTION: Or you can say it isn't a constitutional issue at all, there is no constitutional issue, it is just a definition of an element of the --

MR. KOHN: The Court --

QUESTION: It is not a separate crime at all?

MR. KOHN: The Court could resolve that. If I understand what Your Honor is saying, the Court can resolve this whole case just by saying as the Supreme Court of Michigan has and the Supreme Court of Illinois has, that the return -- whether or not the standard of return is

simply a matter of evidence which the jury can consider. The Court can decide that as a matter of policy, because all we are considering here is a common law defense.

QUESTION: Or we could decide as a matter of policy that the defendant must return within a particular time?

MR. KOHN: That is absolutely right. There is certainly no constitutional issue involved.

Well, except that we have argued that the absolute return requirement does impinge upon the fact-finding function of the jury.

QUESTION: On the freedom to escape?

MR. KOHN: No, I am not saying --

QUESTION: The freedom to escape?

MR. KOHN: I am certainly not saying there is a right to escape here.

But even if --

QUESTION: You must be saying there is a right to escape under certain conditions.

MR. KOHN: I suppose you could put it that way. I wouldn't want to characterize it as that.

QUESTION: What else is it?

MR. KOHN: It is just the defense. It is just like a self-defense case.

QUESTION: Well, it is like duress in any criminal

case. it is not a right to kill somebody. But if somebody else forces you to do it, you might have a defense to a charge of murder.

MR. KOHN: In self-defense; exactly.

In any event, there is a constitutional question presented -- I am sorry, Your Honor.

QUESTION: Would you argue that there is a constitutional right to escape from cruel and unusual punishment in the prison?

MR. KOHN: Not in this case, Your Honor.

QUESTION: I did not ask this case. Would you say generally?

MR. KOHN: No, I think there are probably some conditions that might be characterized as cruel and unusual that would not amount to the serious bodily injury that we are dealing with in this area.

On the other hand, there might be some instances of threats or brutality that would not be characterized as cruel and unusual punishment; and I think that those would legitimately be raised in this affirmative defense context.

So I think it is misleading to start using the Eighth Amendment and saying that that should govern this sort of a case. It certainly is arguable and I might like to argue that some day but it certainly isn't before the

Court here.

QUESTION: What about a prisoner who says he escaped because he was facing certain death and he was in death row and about to be executed next Monday?

MR. KOHN: I think that is a unique situation, Your Honor, because there are plenty of avenues for appealing convictions and death sentences and practically inexhaustible review procedures.

QUESTION: Recommend them all?

MR. KOHN: Well, no, because then if he has been duly found guilty and all of his legitimate avenues are over, I don't believe that is the situation with these other case. That is unique.

QUESTION: You don't think that coercion defense would be available, then, under any circumstances?

MR. KOHN: Well, if someone on death row is brutalized --

QUESTION: No, the finest prison in the world -- the finest death row in the world and he is to be executed next Monday.

MR. KOHN: I don't think if he escapes he would have a coercion defense, because there the difference is -- and the whole reason why we have this affirmative defense that there are some situations where normal avenues of review are just not available to a prisoner. The situation

where he is attacked by a homosexual, the situations that exist in a case, State v. Horne, who was a prisoner in Hawaii where there was evidence that the prison was totally out of control of the authorities. Prisoners were walking around carrying guns and the argument was made that every prisoner in the place was in apprehension of serious bodily harm. And the Court in Horne said that that can go to the jury, a duress defense can go to the jury.

But the difference between that case and the case the Chief Justice has mentioned is that the authorities were totally out of control, there are no legitimate avenues of review.

QUESTION: Maybe it is partly because the threat of death is a lawful threat --

MR. KOHN: Exactly.

QUESTION: -- in which due process has brought it to that point.

MR. KOHN: Exactly.

Now, I do want to make a point about the Government's other intent theory, the whole specific general intent controversy.

The Government has not been consistent on their theory since this whole matter began. The trial judge instructed the jury that the intent element was that they must have acted consciously and not inadvertently. On

appeal they argued that there were three levels of intent. Consciousness and not inadvertence is the first; the second is wrongful and the third is purpose or specific intent.

So they switched the, the theory it appears as though it was called the Arkansas situation. We said that in our brief, that they are arguing on appeal in that the standard intent of law is wrongful and the jury was instructed that all they had to do was find consciousness and inadvertence, then that was called the Arkansas situation. Today they have gone back. They have switched back, and today they have argued that the proper standard of intent is consciousness and inadvertence. Well, we think that alone would require reversal of the trial court and affirmance of the Court of Appeal's decision on intent.

But just to speak briefly to the specific intent issue, in many cases such as Woodring and Chapman even though the courts felt that the statute might not have covered specific intent, the juries were instructed in those terms. The case went to the jury and in both those cases the jury came back with a conviction.

The whole point of the Court of Appeals attempt here was to clarify the law and to get away from the labels of specific intent and general intent which really are meaningless unless you try to figure out what the purpose of the crime is, what the purpose of the offense is.

And the Court quite recently said, well, in the escape statute what society is trying to do is punish someone who escapes with the intent to avoid confinement. If he escapes for another reason, to save his skin, essentially it is a self-defense measure, then the matter is not what Congress intended to punish. It is really no different than what Judge Wilkey described as the free will of these compulsive notion of intent, that if you escape because of some form of coercion that creates in your mind a reasonable apprehension of fear of death or bodily injury, then you don't have the requisite state of mind and perhaps you don't pose the same threat to society as someone who just gets out and wants to regain his freedom and goes for broke.

And I must point out that anyone who escapes, if he commits other crimes while he is out, of course is subject to prosecution for those crimes and will be treated the same as anybody else.

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Kohn.

MR. KOHN: Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Kneedler?

REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,
ON BEHALF OF PETITIONER

MR. KNEEDLER: I would just like to make a few points.

The Government did not concede voluntariness as an element of the crime of escape. What we contended was that the intent was an element of the crime of escape. The intent to do the act in the escape context is intent to avoid confinement. Voluntariness -- when a person is compelled to do something because of external forces, he still intends to do the act but he is excused from liability for that under the duress defense, under the affirmative defense of duress.

I would also like to point out that the Government has not conceded in this case that the evidence presented constituted satisfaction of the immediacy requirement of the duress defense.

And, in response to Mr. Justice Stevens' question, the Court of Appeals did find that the evidence presented to the jury was adequate to support.

The District Court did not have occasion to rule on that question and the Government did not focus on it at the trial court level because the focus was on the return requirement.

And, finally, I would like to reiterate that the significance of the return requirement again is not simply that it is evidence that the prisoner's intent when he first

left the jail was in fact to just get free rather than to avoid harsh conditions.

The return requirement is a subsequent development of the defense of duress itself and there has to be adequate evidence presented in the record on every element of affirmative defense in order for the judge to send that defense to the jury.

QUESTION: Of course if he is apprehended very promptly after his escape, he can always testify that he intended to return.

MR. KNEEDLER: Well, again I think it might depend on the type of duress to which he was subject. If the duress he is claiming is a threat from one inmate who had just gone mad or something on occasion, I don't think there would be any particular excuse for remaining at large very long after that because it would be possible to simply climb out of a window or whatever the avenue of escape was and go around to the front door and say, so and so has --

QUESTION: He might be apprehended when he was going around the block?

MR. KNEEDLER: Oh, right; sure; yes, exactly. But I --

QUESTION: He could testify he was on his way back.

MR. KNEEDLER: True.

QUESTION: That he was ready to turn himself in. That was the Lovercamp case.

MR. KNEEDLER: Sure. Exactly. O.K.

The Government respectfully requests that the judgment of the Court of Appeals should be reversed.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:45 o'clock p.m., the case was submitted.)

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