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Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

JAMES TURNER, Petitioner; vs. UNITED STATES OF AMERICA, Respondent.	**Docket No.**	190

Place Washington, D. C.

Date October 15, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

JAMES TURNER,

Petitioner;

vs. No. 190

UNITED STATES OF AMERICA,

Respondent.

Washington, D. C.
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The above-entitled matter came on for argument at 1:40 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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Amicus Curiae for Cleveland Burgess

APPEARANCES (Continued):

LAWRENCE G. WALLACE, Esq.
Office of the Solicitor General
Department of Justice
Washington, D. C.

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: No. 190, Turner against the United States.

ARGUMENT OF JOSIAH E. DuBOIS, JR., ESQ.

ON BEHALF OF PETITIONER

MR. DuBOIS: Mr. Chief Justice, and may it please the Court: I have agreed with Mr. Rivkin, who has filed amicus brief, that with the consent of the Court, he may use any time that is remaining after my principal argument.

MR. CHIEF JUSTICE BURGER: In rebuttal, or as part of your argument?

MR. DuBOIS: As part of my argument. He has filed an amicus brief on my side of the case.

MR. CHIEF JUSTICE BURGER: Have you arranged to see that he doesn't use all your rebuttal time?

MR. DuBOIS: If he does, that is my risk.

MR. CHIEF JUSTICE BURGER: We will leave it up to you gentlemen.

MR. DuBOIS: This case involves convictions under Section 174 of Title 21 of the United States Code, and Section 4704(a) of Title 26 of the United States Code relating to two narcotic drugs, specifically heroin and cocaine.

It is the contention of the petitioner that the presumptions contained in both of these sections of the code are unconstitutional because they discourage the right of a defendant

to remain silent, and specifically, we rely heavily upon the two relatively recent decisions of this Court which are cited in the brief of petitioner, namely, Griffin versus California and United States versus Jackson.

Without repeating in detail all of the argument contained in the brief, I would like to emphasize certain points for consideration of the Court.

First, Section 174 of Title 21 of the United States Code requires that the defendant know that the narcotic drugs in question "to have been imported or brought into the United States contrary to law."

In the Government's brief, it is claimed that it is rational to permit the jury in this case to infer that a person in possession of a relatively large amount of heroin knows that it was illegally imported. In making this argument, the Government's brief quotes from but then apparently ignores the charge of the District Court Judge in which the Judge said specifically, and I quote, "Now, obviously there is no evidence in this case that this particular defendant knew that this cocaine and this heroin had been imported into the United States contrary to law."

The District Court Judge then went on to say, "The statute, recognizing the impossibility of proving knowledge in these cases, and having in mind the welfare of the people, which is the purpose of the Food and Drug Act, says that all you have

to do, all the Government has to do, is show there was possession of this drug by the defendant on trial, and that evidence shall suffice to authorize a violation of the statute unless, by the witnesses presented, possession of the drugs by the defendant, under those circumstances, was satisfactorily explained to the jury.

It is abundantly clear, therefore, that under the instructions from the District Court Judge, the jury did not indulge in any rationalization such as that contained in the Government's brief, namely, the jury, under the Judge's instructions, certainly did not indulge in the presumption that because there was a large amount of heroin that, therefore, the defendant knew it was illegally imported, because the Judge told the jury, "All you have to find, gentlemen, is possession."

So I feel that the whole argument in the Government's brief concerning the so-called the rational inference, in order to be drawn by the jury, by the possession of this large amount of heroin, is completely immaterial.

Secondly, the Government's brief on supplemental memorandum spent a great deal of time in pointing out that heroin is neither produced in the United States nor legally imported into the United States. Now, even assuming we stipulate this fact, it is our position that this statement leads to nowhere. Certainly if this is true, before reading the Government's brief, and there certainly is no evidence in this case

that the defendant knew this to be true. In fact, as I have already indicated, the District Court Judge specifically charged.

Obviously there is no evidence in this case that this particular defendant knew that this cocaine and heroin had been imported into the United States contrary to law.

Q Unless I am mistaken, hasn't the Government conceded the count relates to the cocaine, so far as the presumption is concerned?

A I beg your pardon. Under the Section 174 of Title 21, the Government did concede the cocaine.

Q So you can direct this part of your argument entirely to heroin.

A Yes, right. It is our contention that the presumption, then, that the mere possession of a narcotic drug is sufficient evidence of a violation of Section 174 of Title 21 requiring that the defendant know the drugs have been imported contrary to law is unconstitutional.

To use the words of the Griffin case, it cuts down on the privilege by making the assumption of the right to remain silent costly, and to use the words of the Jackson case, it chills the assertion of that right.

It is to be noted that in the Jackson case, the defendant pleaded not guilty and demanded a jury trial, but this Court still said that the provision in the Federal Kidnapping Act that permits him to get a death sentence if he asks for a

jury trial is unconstitutional because it chilled his right to plead not guilty and to ask for a jury trial, and we say that the right to remain silent is just as precious as the right to demand a jury trial and the right to plead not guilty.

With respect to the convictions under Section 4704(a) of Title 28 of the United States Code, here, again, it is the contention of the petitioner that the presumption contained in this section of the code providing that mere possession of the drugs is prima facie evidence of a violation of the section is unconstitutional, again because it discourages the right of the defendant to remain silent.

It is to be noted -- and this is not brought out, at least in the Government's brief -- that whereas the indictments under this section of the code charge the defendant with unlawful purchase, possesion, dispensing and distributing of narcotic drugs, and whereas a judgment of conviction recites possession as well as purchase and dispensing and distributing, in fact, this section does not make the possession of narcotic drugs a crime.

Specifically, said statute says that it shall be unlawful to purchase, sell, dispense or disdribute narcotic drugs except in the original stamped package. Then the statute provides, as I have indicated, the possession shall be prima facie evidence of violation. There is absolutely no evidence in this case that the defendant purchased, sold, dispensed or distributed

narcotic drugs and here, again, the charge of the District Court Judge, to me, is almost conclusive. He said to the jury:

> "So that, in effect, your problem, your principal problem here will be to determine whether or not certain quantities of heroin and cocaine which have been marked in evidence in this case were in the possession of or under the control of the defendant in this case."

Here, again, the jury was instructed, in effect, that so long as the defendant was found to be in possession of the drugs, that was all that was needed. And here, again, the jury obviously must have determined guilt solely on the basis of possession.

In closing, we say that the presumptions in both of these sections of the statute are unconstitutional and we believe that the decisions of this Court in the Griffin case and the Jackson case dictate that those presumptions be declared unconstitutional.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Rivkin?

ARGUMENT OF STEVEN R. RIVKIN, ESQ.

AMICUS CURIAE FOR CLEVELAND BURGESS

MR. RIVKIN: Mr. Chief Justice, and may it please the Court: There are other issues in this case beyond the issue of self-incrimination arising from the statutory presumptions on which the petitioner has rested.

Because of the presence of these issues, I have filed on behalf of the amicus two briefs in this case and I would now like to make this brief supplementary argument.

I want to dwell on the issue that was preserved in the Leary case last term for resolution here, the constitutionality under the due process clause of the statutory presumption in 21 U.S.C. Section 174 with respect to hard narcotics.

Then, time permitting, I would like to point briefly to the other arguments posed in the briefs of the amicus.

The Leary case invalidated the virtually identical statutory presumption in 21 U.S.C. 176(a) similarly involving a statutory inference arising from mere possession of foreign importation and knowledge thereof with respect to marijuana, and it has specifically left for a future case separate consideration of the similar question with respect to hard drugs.

Subsequent to the Leary case, and in response to the briefs filed in this case, the Government has conceded error with respect to the drug cocaine and has prayed for reversal on Count 3. By so doing, it is our position that the Government has dissolved now any line remaining after Leary between marijuana and hard drugs.

Applying the tests of that in prior cases to the drug heroin, the remaining drug in the petitioner's possession, 21 U.S.C. Section 174 is embraced fully within the prohibition of the due process clause.

This Court has always given deference to the ability of Congress to fashion evidentiary rules, but that deference has always been based, as set forth in the Tot case, on the Congress' ability to see the facts of a particular case in broader relationship than that which might be presented to the jury.

It should be noted at the outset here that what the Congress was doing in 1909, when it passed the Import and Export Act with respect to narcotic drugs, was working a total prohibition against the import and on the domestic possession and use of heroin. It was not making a judgment of a common relationship of facts, such as the Congress was doing in the statute which was involved in the Gainey case and in the Romano case, 26 U.S.C. 5601, in which it was determined that because of the tendency of stills to be located in hidden places, that there may be assumed to be a relationship with regard to anyone who is found present thereat.

Therefore, realizing that we must look behind the normal deference which is to be accorded to the Congress in these matters, we must apply to these presumptions the tests which have been most recently stated in Leary and which have also been stated in Tot. Those tests are that there be a rational connection between the fact in evidence and the fact presumed therefrom based on a connection in common experience and capable of giving rise to substantial assurance that the

presumed fact is more likely than not to flow from the fact in evidence.

If we apply these tests to the possession here in question, both logically and empirically in respect to 21 U.S.C. 174, we must come to a conclusion that we cannot reach substantial assurance that there is a rational connection between the fact in evidence and the facts -- unlawful importation and knowledge thereof -- which Congress would have the courts presume.

With respect to unlawful importation, there are at least four alternatives for the source of heroin in the possession of petitioner. This morning Mr. Strauss made reference to the statute 21 U.S.C. Section 513, by which heroin and any other drug may, in fact, be lawfully imported into the United States, lawfully imported for scientific purposes, and for subsequent license, but I would warrant that if petitioner Turner and any other possessor of heroin had come in possession of such a drug without such a license, he could not be prosecuted under this statute.

The second source would be lawful importation of source material and subsequent deviation and manufacture of that source material into heroin. The source material commonly acknowledged for heroin, derived as it is, ultimately, from the opium poppy, is raw opium and morphine. As I have pointed out in my brief, there is also evidence which the Government does not contradict,

indeed it confirms, that codeine may also be a source for heroin.

Using the Government statistics which the Government has applied as the basis for concluding in this case that cocaine may, in fact, not be unlawfully imported into the United States, we come to a conclusion that there is a rather high potential of domestic manufacture of the heroin drug.

The Government concedes both the possibility and the technical ease with which heroin may be manufactured. The Government's reports mention efforts to manufacture heroin, and moreover, the Government, both Federal and State, have attempted to prosecute people for the effort of manufacturing heroin from source materials otherwise present in the United States.

Moreover, the recent concern of the Bureau of Narcotics and Drug Abuse for cough syrups which have low traces of codeine within them, and for paregoric, which contains opium, suggest that the source material for the substance in the possessor of heroin's hands may be as handy as the local supermarket or drug store.

The third element which I would suggest is present to vitiate the assurance of unlawful importation is that the opium poppy may have been grown in the United States. Indeed, that prospect was, itself, the basis on which Congress passed the Narcotics Control Acts in the early part of the century. The Government has acknowledged that it is agriculturally possible to grow opium in the United States.

Moreover, there is a regime of Federal control and licensing over the opium poppy in the United States, and there have been prosecutions reported, which are cited in my brief, for individuals who have attempted to grow that product.

The Government, moreover, in its brief, has also confirmed that there are instances where opium is grown today in the United States.

Q You suggest that the Government, or the Congress, in order to establish this presumption, must negate every possible source, or is the presumption supportable if, on balance, it is more probable than not that it is an imported substance?

A I would not apply, Mr. Chief Justice, either a 100 percent standard or a 51 percent standard to what the Government must substantiate.

Q Your definition earlier was "more probable than not." How far do you go, then, on the percentages?

A The particular language with which one may deal in nice points is substantial assurance that it has more probably than not come about. So I would say even if there were a 51 percent requirement, one must feel quite sure, in fact to a point that one might speak of as to a moral certainty, that the particular substance was unlawfully imported into the United States.

Q Has any case ever held that it had to be to a moral certainty?

A No, and I do not ask that this one does. I merely say that when we think in terms of the burden that the Government must substantiate, we not think in such quantitative terms.

Q Would you think that this presumption, statutory presumption here, is more or less offensive than the common law presumption which is enacted into statute into some States arising from the possession of recently stolen property, unexplained possession?

A I would say, Your Honor, it does in terms that Tot uses, strained ones, tolerance, to apply that test to this substance. Yes, Your Honor.

Q In other words, you could live with the other common law presumption, but you thihk that is not as offensive as the statutory presumption here.

A In the light of the showings which I am making here, Your Honor, I think that is the circumstance.

Finally, I would add there is also the prospect that the drug might be wholly snythesized in the United States from sources which are unregulated and which are commonly available. This possibility has been acknowledged by the Government in its briefs.

On balance, the Government has attempted to come to grips with these alternatives, and they have concluded in their own terms that if heroin is available in the United States,

domestically manufactured and produced, that the likelihood is less than one percent. I would point out that, first of all, one must be aware, when one judges the validity of this projection, of the sources from which the Government's data are drawn. Those sources can only be, in these circumstances, the lists and the numbers and quantities of drugs that have been confiscated at ports and borders and those that may have been confiscated overseas and these, by this very basis, I would submit, have absolutely no basis as a rational source of inference for any substance that may be domestically produced.

Q It is illegal to produce heroin, is it not?

A Yes, Your Honor.

Q Wouldn't it be assumed that that would cut down on the local manufacture?

A It might. On the other hand, it might also raise the incentive for local manufacture, Your Honor, by driving up the price. But that would not be in violation of this statute.

Q I am still, along with the Chief Justice, worried about how far the Government has to prove their point.

A We are concerned with a criminal case. As a criminal case, it is a further question of the degree to which the Government may chop down on a defendant's rights, and that is, I would say, up around the realm of a reasonable doubt, beyond a reasonable doubt. I would not want to put a quantitative test involved here, but I certainly would not say that the

statistics that have been introduced here substantiate that. If the statistics do substantiate that, with substantial assurance, then it is a proposition which our cases would embrace.

But the fact is that the most authoritative judgment that has ever been made about the validity of these statistics was made recently by the White House Conference on Narcotics and Drug Abuse, when it was specifically stated as follows:

> "Adequate data are not available for a precise estimation of the incidence and prevalence of the abusive drugs with psycholotoxic side effects. Because addicts, for the most part, obtain their drugs illegally, existing data are both unreliable and incomplete and are generally limited to individuals apprehended by enforcement agencies."

The White House panel necessarily concluded: "The discrepancies between Federal, State and local enforcement agencies are so great in some instances, more than 100 percent, that the panel prefers not to make any numerical estimates at this time."

The time was 1962. The White House Conference on Narcotics and Drug Abuse, and the citation is to page 290 and 291.

Indeed, even if one makes the assumption that this Court made, without determining the issues in the Leary case, that most heroin is imported to the United States, one must also look beyond that to the question of whether the second part of

the presumption here concerned has met a rational test, that is, whether most users of heroin in the United States know that their drugs have a foreign importation. In fact, the language used in the Leary case was that a majority of possessors of a narcotic drug must know of the high rate of importation or of the actual origin of the drug.

The Government has attempted, wrongly I submit, to substantiate that necessary showing of knowledge, and it has done it solely by pointing to widespread television and newspaper notoriety. I would submit that that offering goes nowhere near as far as Leary teaches the Government must go. In fact, authoritative sources which are cited in my brief show that the heroin user, by and large, is poor, disadvantaged, psychologically an escapist, and far from the sophisticated person from whom one might expect the knowledge of the importation of the drug.

On balance, I submit that both presumptions -- foreign importation and knowledge thereof -- fail to meet the rational connection test which this Court has applied.

If the Court has questions, I would like to --

Q I would like to ask you one question.

A Yes, Mr. Justice Black.

Q Are you challenging the right of Congress to fix the amount of evidence that will authorize or compel a jury to convict?

A I am not directly challenging that, Your Honor.

Q It seems to me you are doing it indirectly. I don't see why you hesitate to do it directly.

A You haven't hesitated to do it directly, Mr. Justice Black.

Q What did you say?

A I submit that you, Mr. Justice Black, have not hesitated to take that challenge up, and that is why you have pointed in the past to considerations other than those arguments.

Q Can the Congress interfere with the constitutional function of the court to try cases any more than the court can interfere with the right of Congress to pass legislation?

A Put in that manner, Mr. Justice Black, I would respond affirmatively, and indeed, it is my further contention, as you have pointed out in your dissent in Gainey, in your concurring opinion in Romano, and in Leary, that these presumptions work a deprivation of due process of law by converting the reasonable doubt test, which must be met, they interfere with the right of a defendant to a trial by jury, in addition to the self-incriminatory aspects which the counsel for the petitioner has pointed out.

As a matter of the separation of powers, I would prefer to respond in those terms; that there are substantive rights which statutory presumptions must meet, and which these statutory presumptions fail to meet.

Q Let's assume that Congress has no such right to establish standards of proof. Does that in any way inhibit judges from applying a standard which Congress may have incidentally defined if judges think it is a sensible standard, as they have with reference to ths inferences to be drawn from the possession of recently stolen property? Judges can adopt it on their own, and not be concerned that Congress has prescribed it, can't they?

A My own feeling is that there certainly are matters that judges may take judicial notice of, but there are restrictions on the extent to which that process may also operate.

Q Is this presumption here fundamentally very much different from the inferences which courts permit juries to draw from the possession of recently stolen property?

A In its operation, I would say it is not, but I think that this Court has applied tests, on a case-by-case basis, on a presumption-by-presumption basis, and I am not attacking all presumptions here. I am not attacking the presumption of recently stolen property. I am attacking on the basis of the facts of this specific case the same kind of test which Leary asked for itself and for any subsequent cases which may follow.

Q Suppose a court were to draw a jury directly that there is a presumption that this defendant is guilty from these facts, and the jury turned him loose. What would happen to his case thereafter, and why?

A He would have so vitiated our constitutional system that at any point thereafter the case should be totally reversed.

Q He would be acquitted, and there is a provision in the Constitution that a man shall not be put in jeopardy twice for the same offense.

A That is correct; that he could not be retried.

I believe that in response to Mr. Justice Black's earlier question I touched basically on most of the additional points that I would have raised.

I would only point out that there is one additional issue that has been raised by the amicus here, and that is that the operation of 4704(a), aside from the statutory presumption, the prohibition on any dealings in narcotic drugs without tax stamps, is itself a violation of the self-incrimination provision.

I will refer to my brief, to pages 17 through 20, for a fuller development of that argument, but if the Court now pleases, I would prefer to reserve the rest of our argument for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Rivkin.

Mr. Wallace?

ARGUMENT OF LAWRENCE G. WALLACE, ESQ.

ON BEHALF OF RESPONDENT

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

Petitioner stands convicted, after a jury trial, on four counts of narcotics violations and he petitioned this Court to review the constitutional validity as applied to him as of the so-called statutory presumptions of the two Federal narcotics laws under which he was convicted.

The question of the constitutionality of the presumptions was the only question he put before the Court of Appeals, and it was the only question in the petition for certiorari, and in our view of the case under this Court's rules, therefore, no other issues are raised apart from the validity of the presumptions, and that is what we have directed our brief to and what I anticipate directing the argument to.

Because no other issues are raised, the facts of record pertinent in this Court are few, but I think they are worth reviewing for purposes of addressing ourselves to the trial judge's charge to the jury, as well as to the validity of applying the presumptions in this case.

Federal narcotics agents arrested the petitioner and two traveling companions at a Lincoln Tunnel toll booth in New Jersey shortly after their automobile emerged in the course of a trip from New York City, and the automobile was registered in

petitioner's name.

While the agents were conducting a search of the arrested individual, and prior to their actual search of petitioner's person, he threw a metal foil package containing cocaine to the top of a nearby wall. A search of the automobile then revealed another metal foil package containing heroin under the front seat.

The first package weighed 14-2/3 grams and contained a mixture of cocaine and sugar, five percent of which was cocaine. The package containing heroin weighed 48-1/4 grams and consisted of a mixture of several substances, 15.2 percent of which was heroin.

The heroin mixture was divided into 275 small glassine double bags, all wrapped within the metal foil package, and none of the containers had any tax stamps affixed.

On the basis of this evidence, petitioner was convicted of a heroin violation and of a cocaine violation under each of the two statutes set forth at pages 2 and 3 of our brief.

Under Section 174 of Title 21, he was convicted of having knowingly received, concealed and facilitated the transportation of each drug after its illegal importation, with the knowledge that it had been illegally imported.

Under Section 4704(a) of Title 26, he was convicted of having knowingly purchased, possessed and distributed each drug not in or from the original stamped package.

He was given concurrent sentences of imprisonment on the two heroin counts to run consecutively, with concurrent sentences on the two cocaine counts.

Under each of these statutes, the trial court instructed the jury in the statutory language that under Section 174, it was authorized to convict if the defendant was shown to have been in possession of the drug and has not explained his possession to the jury's satisfaction. Under 4704, it was authorized to convict if the drug were shown to be in the defendant's possession without appropriate tax stamps affixed.

These so-called statutory presumptions authorized but did not require the jury to infer the additional elements of each crime from the Government's proof in this case, and the issue before this Court is whether it was constitutionally permissible to apply these presumptions to each of the four counts.

The issue is not a novel one in this Court, because the constitutionality of each of these statutory presumptions has previously been upheld in this Court's decisions, that of Section 174 in Yee Hem against the United States in Volume 268 U.S., and that of Section 4704(a) in Casey against the United States in Volume 276 U.S.

In a series of more recent decisions, beginning with Tot against the United States, and continuing with Gainey and Romano, and most recently, last term's decision in Leary, the

Court has more searchingly analyzed and refined the standard for determining the constitutional validity of criminal statutory presumptions.

A consistent theme of all of these decisions is that a distinction legitimately may be made between the evidence relating to a particular defendant and the question of what inferences in general may properly be drawn from the proof of certain facts, and that as to the latter issue, Congress may properly bring to bear its resources and its wisdom, may bring to bear what this Court referred to in Gainey as the capacity of Congress to amass the stuff of actual experience and cull conclusions from it so as to provide statutory guides that will contribute to consistency in the administration of justice and that will, in most cases, enable the trial to be focused on the evidence relating to the particular defendant without the distraction and the burden of introducing proof in every case concerning complex matters of general application, such as the details amassed in the briefs in this case about the narcotics trade in general, and its possible relation to the scientific properties of the various drugs.

Of course, Congress has not foreclosed either party from introducing expert testimony or other evidence tending in general to vitiate or to substantiate statutory presumptions, but this is rarely done.

In the series of cases I mentioned --

Q Of course, I suppose the Government would admit that Congress couldn't foreclose that.

A We need not admit it, because Congress has not attempted to foreclose that.

Q I wouldn't think it would deny.

A In the series of cases I mentioned, this Court has developed the standard for testing the constitutionality of criminal statutory presumptions in terms of whether there is a rational connection between the fact proved and the ultimate fact presumed, or as it was restated last term in Leary, a criminal statutory presumption must be regarded as irrational or arbitrary and, hence, unconstitutional unless it can be at least said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

Under this standard, we contend as to three of the counts here that the application of the presumptions was rational, and as to the remaining count under which petitioner was convicted, we concede that this requirement was not met and that petitioner's conviction under that count should be reversed.

Q Supposing you had to defend these presumptions on a reasonable doubt standard, which was reserved in Leary. What would you say?

A That would have to be submitted to the jury, as

the instructions of the trial judge did put the case to the jury, that they had to be convinced by the Government evidence beyond a reasonable doubt that all of the elements of the crime had been made out.

The statutory presumptions are just another form of recognizing that circumstantial evidence can be put to the jury under proper reasonable doubt instructions.

Q Could I ask you a question? I gather from this indictment that the conviction was for purchase, sale and distribution.

A That was the way the indictment was phrased; yes, sir.

Q And the statute is "or", isn't it? The statute says "or".

A That is correct.

Q I take it if this inference is invalid, under the indictment and conviction, on the tax stamps, as to either purchase, sale or distribution, then the conviction must be reversed.

A I don't believe that is the law. Under this Court's decisions, indictments always have to be phrased in the conjunctive rather than in the alternative, and then if any of the crimes are made out, that is sufficient to uphold the conviction.

Q If the indictment says "and"?

A The indictments always say "and", because if the indictment says "or", it has been held that that doesn't give the defendant adequate warning of what the Government will try to prove against him.

Q At least you can charge him with one act, I suppose.

A Of course, some of these could have been omitted from the indictment, but that, again, is an issue that is not raised here.

Q You suggested that Count 4 not be reversed.

A That is correct.

Q That deals with cocaine, the cocaine inference with respect to the tax stamps, whether possession indicates sales, distribution or acquisition without tax stamps. You say that shouldn't be reversed.

A That is correct.

Q Because in this case possession is ample inference, is ample basis for concluding those facts.

A That he purchased the cocaine not in or from a stamped package, and that is included in the indictment.

Q And you say, then, that if that inference on these facts is good as to either acquisition, sale or distribution, the conviction stands.

A Yes, sir.

We further urge that except as it may serve to raise

a belated challenge to the trial court's instructions, petitioner's reliance on the self-incrimination in challenging the presumptions should be regarded in this case as not really adding anything to the established rational connection test of their validity, and since we also contend that the jury instructions were adequate, we conclude that the verdict of guilty should be sustained as to the three counts in which the statutory presumptions were rationally applied.

Turning first to the two heroin counts, we contend that both statutory presumptions were validly applied to the evidence of possession of that drug. Under Section 174, it was rational for the jury to conclude from petitioner's possession of the 275 bags of heroin, both that the heroin was illegally imported and that petitioner knew of its illegal importation.

We have documented in our brief, and in our supplemental memorandum, the reasons why, in contrast to the facts concerning marijuana which were before this Court last term in Leary, on the basis of the best information available, available within the Government, available in scientific publications, available in the reports of the United Nations Commission on Narcotic Drugs, and available in the recent report of the Task Force on Narcotic and Drug Abuse of the President's Commission on Law Enforcement and Administration of Justice, the first part of this presumption that the heroin was illegally imported should be regarded as simply reflecting the actuality that heroin

is neither produced nor legally imported into the United States.

We have, in that written presentation, carefully considered and responded to every speculative possibility commendably suggested by counsel for amicus in this case as an alternative source to illegal importation, and we have demonstrated that none of these alternatives could realistically account for more than a negligible fraction of the total supply of heroin in this country.

To the best of our knowledge, virtually all, and at least 99 percent of the heroin in the United States was illegally imported. It then follows, in the words of the Leary opinion, as a matter of common sense, that since all heroin is illegally imported, or virtually all, a jury may rationally infer, and thus may be authorized by Congress to infer, that a person in possession of 275 bags of heroin knows that it was illegally imported.

The drawing of such an inference by the jury from the conduct of the accused and the circumstances of the case is, after all, the ordinary way in our accusatorial system of justice, in which it is determined whether the accused had the requisite knowledge or other mental attributes, such as specific intent, when such a mental attribute is an element of a crime.

Q May I ask you a question there? You combine two things in one sentence. You said that a jury might have rationally found; that is all, standing alone.

The second was, or might have been authorized by

Congress. What provision of the Constitution do you rely on to say the Congress can say what a jury may rationally consider to be the truth?

A Under this Court's decisions, Mr. Justice Black, the test of whether Congress can authorize the jury so to find is whether it would be rational for the jury to do so. I recognize that if one accepts your premise as to separation of powers in this area, the internal logic of your position is indisputable, but the majority of the Court has not accepted that premise. I am addressing my argument in terms of this Court's decisions.

Q I admit that on that you have a good, sound argument.

Q Although I joined the Leary opinion and said it was simply a matter of common sense that if you show, as a matter of fact, as you have shown, that, let us assume, in your submission, that the fact is that the lion's share of all the heroin in the United States is illegally imported, I don't see at the moment how it does, as a matter of common sense, follow that anybody knows that. The fact is, I didn't know it until these cases came along.

Let's assume I now accept that part of the presumption, but how does it follow that everybody knows that?

A Mr. Justice Stewart, petitioner is not anybody. Petitioner was somebody found with 275 bags of heroin in his

possession, and he is comparable, perhaps, to a dealer in Rolls Royce automobiles. As a matter of common sense, a jury might infer that someone dealing in a product, or found in circumstances which suggest that he is dealing in a product, knows more about that product than someone who doesn't deal in it.

Q But it is not suggested that he, necessarily, or people similarly situated, go down to the pier and get it illegally off the ship or go out to the airport and get it illegally off the airplane. There is internal commerce in this product, I assume. Why does it follow, as a matter of common sense, that a person -- he may know he is violating the law; he does know that he is violating the law -- but how does it follow that he knows, or should be presumed or there should be an inference that he knows that this has in all probability been illegally imported?

A If one is knowledgeable about heroin, he would know that all heroin in this country has an illegal foreign origin. I think that as a matter of common sense, a jury might infer that a dealer is knowledgeable about a product in which he is dealing.

Q Was there evidence that he was a dealer?

A No.

Q Could he have been a messenger?

A It is possible.

Q I am just saying that you have put so much weight

on what he knows. He might just be a facilitator. I just don't think you need that part of your argument, the fact that there was so much cocaine. In my own mind, I don't think it makes that much difference.

A In any event, Congress has seen fit to make knowledge of illegal importation an element of the crime and to give an opportunity to someone to prove his innocence by proving that he did not know of the illegal importation.

Q How would he prove it?

A Just by submitting his testimony to the jury and seeing if they would believe him.

Q I guess he could take the stand and say, "I am stupid." He would have to take the stand.

A He could disclaim the origin of the narcotics.

Q But he would have to take the stand.

A Unless he had some witness who was willing to swear to some evidence other than hearsay, it can be conceived, that would indicate thathe was not knowledgeable.

Q There have, indeed, been cases where professors of chemistry and other experts in drugs have been tendered by the defense; is that not so?

A I don't know of any such case, but there is nothing to foreclose such evidence being introduced.

In any event, as the Chief Justice indicated in his reference to the principle that possession of the fruits of

crime recently after its commission justifies an inference that the possession is guilty possession, knowledge if frequently inferred from the circumstances of the case in situations comparable to that contemplated by this statute, and this is widely done in both State and Federal law, for example in the enforcement of the National Motor Vehicle Theft Act, the so-called Dyer Act.

In the words this Court used in Gainey, for Congress to authorize the jury to do this is to authorize it to do no more than accord to the evidence, if unexplained, its natural probative force.

We also contend that the presumption in the tax stamp statute validly applied to petitioner's possession of the heroin since, as we have documented in our brief, heroin is not available in tax stamp packages, there is no way petitioner could have procured it in or from the original stamped package, and it follows that Congress could constitutionally authorize the jury to infer from his possession of the heroin, that he had purchased it in violation of the tax stamp statute, which in contrast to Section 174, does not include specific knowledge as an element of the offense.

As to the cocaine counts, we first concede that the application of the Section 174 presumption to petitioner's possession of the relatively small amount of cocaine involved in this case was not warranted under the constitutional standard

explained and applied last term in Leary. This is because in contrast to heroin, there are, as indicated in our brief and its appendix, substantial quantities of cocaine stolen from legitimate sources in this country every year, while comparison of these figures with the admittedly rough estimates set forth in the footnote set forth on page 31 of our brief of the quantities of cocaine annually smuggled into this country might justify an inference that the cocaine found in the illicit trade was, in fact, illegally imported, we do not believe that the further knowledge of its illegal importation meets the Leary standard in such a case as the present one involving less than three-quarters of a gram of cocaine.

Q The practical result of that concession would be what -- that automatically five years comes off that total sentence, or that the Court, in case we agree with you on the rest of your argument, remand to the sentencing judge to re-sentence entirely?

A I would say the latter, Mr. Justice. Otherwise, the reversal just eliminates a part of the concurrent sentence.

Q It would eliminate a 10-year sentence, which is running concurrently with a five-year sentece.

A That is correct.

Q Practically, it would reduce a total 20-year sentence to a total 15-year sentence, as I understani it.

A That is correct. Either alternative would

accomplish the same thing, presumably, and I think either would be an acceptable procedure.

We do not contend that this conviction met the Leary standard, but in conceding this, we do contend that this Court need not and should not now decide whether the Section 174 presumption could validly be applied to possession of cocaine in an amount so large as not reasonably likely to have been aggregated from individual thefts, or in other circumtances pointing to a foreign source.

There is no necessity in this case to decide whether the presumption can ever validly be applied.

We urge, on the other hand, that the tax stamp presumption was validly applied to petitioner's possession of the cocaine in circumstances of this case, as we have elaborated in our brief.

Turning now to petitioner's claims based on the privilege against self-incrimination, we recognize that when a statutory presumption is applied without adequate rational foundation, as we concede was the case as to one count here, one way of articulating the constitutional infirmity is to say that, so applied, the presumption impermissibly impaired defendant's right to remain silent, and thus violated his Fifth Amendment privilege.

When, however, such a presumption is applied in compliance with the standard of rationality established by this

Court, then the alleged coercion to testify stems not from any unconstitutional compulsion, but from the legitimate force of the Government's case. It is not uncommon in a criminal trial for the defendant to be faced with evidence justifying a rational inference of guilt, and to have to decide whether, despite attendant risks of doing so, he will testify in an effort to overcome the force of that evidence.

There is no reason relevant to the policies of the privilege of self-incrimination for holding that the status of such a defendant differs, depending on whether the jury's inference of guilt is authorized by a judge-made rule of evidence, or by a rationally warranted statutory provision. In either instance, as the Gainey opinion recognized, the courts have the same responsibility to decide whether the Government has made a submissible case, and if the Government's evidence meets that standard, as we contend it did here with respect to three counts, submission of the case to the jury does not violate the constitutional privilege, as this Court definitively held in Yee Hem against the United States in the passage quoted on page 36 of our brief.

Turning finally to the instructions to the jury, although petitioner did not except to them at the trial, and did not request that the jury be charged not to draw any adverse inference from his failure to testify, he now contends that the reading of the statutory inferences to the jury in the course of

the instructions constituted adverse comment on his silence.

Substantially the same contention was properly rejected by this Court in Gainey, in which very similar instructions to the jury were upheld in a situation involving a similar statutory presumption.

It is true there were passages in the instructions which were read by counsel for the petitioner which have to be understood in the context of the trial, in which the matter put in issue by the defense was the question of possession. That was what they were contesting at the trial, and naturally the trial judge emphasized to the jury that that was the crucial issue for them to decide.

But here, as in Gainey, reading the instructions as a whole, the jury was merely permitted to draw rational inferences from the unexplained circumstantial evidence presented by the Government, and the jury was specifically admonished that they were to be the sole and exclusive judges of the facts and that the burden of proving guilt beyond a reasonable doubt was on the Government, notwithstanding the statutory presumptions.

While it might have been better practice, as the Gainey opinion suggests, to omit from the charge any explicit reference to the statutory provisions authorizing the inferences, the instructions as given were adequate, especially in the absence of an exception, and do not differ significantly from those upheld in Gainey.

It is, therefore, our position that except as to Count 3, this Court should affirm the judgment upholding the jury verdict.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wallace.

You have two minutes left, Mr. DuBois, and we would like to let you get back to New York tonight.

REBUTTAL ARGUMENT OF JOSIAH E. DuBOIS, JR., ESQ.

ON BEHALF OF PETITIONER

MR. DuBOIS: I just want to say that the Yee Hem and Casey decisions were decided before Jackson, and reading the Yee Hem decision, particularly the part quoted in the Government's brief, and the Jackson decision, is like day and night.

Secondly, I would like to say that the argument here still seems good in view of the fact that the lower court judge said obviously there is no evidence that this defendant knew that this cocaine or heroin had been unlawfully imported, and then he added that the statute recognizes the impossibility of proving that. It is right in his charge.

Thirdly, I merely point out, as I did before, that the section relating to stamps does not make possession a crime, although the indictment contained the word "possession" and the conviction contained the word "possession".

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. DuBois.

Mr. Rivkin and Mr. Wallace, thank you for your submissions.

The case is submitted.

(Whereupon, at 2:40 p.m. the argument in the above-entitled matter was concluded.)