OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: FLOYD J. CARTER, Petitioner v. UNITED STATES.

CASE NO: 99-5716 C-2

PLACE: Washington, D.C.

DATE: Wednesday, April 19, 2000

PAGES: 1-53

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IN THE SUPREME COURT OF THE UNITED STATES

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FLOYD J. CARTER, :

Petitioner :

v. : No. 99-5716

UNITED STATES. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Wednesday, April 19, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

DONALD J. McCAULEY, ESQ., Newark, New Jersey; on behalf of the Petitioner.

DAVID C. FREDERICK, ESQ., Assistant to the Solicitor General, Department of Justice Washington, D.C.; on behalf of the Respondent.

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PROCEEDINGS

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 99-5716, Floyd Carter v. United States.

Mr. McCauley.

ORAL ARGUMENT OF DONALD J. McCAULEY

ON BEHALF OF THE PETITIONER

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

Federal bank larceny is a lesser included offense of Federal bank robbery. Both offenses draw their language and history and understanding from centuries of common law under which larceny has always been understood to mean a lesser offense of robbery. At common law, robbery was defined as an aggravated larceny or as a compound larceny, all of the elements of the larceny subsumed and embraced by the robbery. The robbery -- it was defined as an aggravated larceny because it had an extra element.

QUESTION: I don't think the Government contests you on that point, Mr. McCauley. I think that what they rely on is a case like Bell against the United States, which says that the bank robbery statute was -- was deliberately altered so as not to be a common law and -- and its successor.

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MR. McCAULEY: I don't believe -- the Prince case reveals that there was not an altering of the common law. The Prince case I -- I think is the precedent here regarding the understanding of the 1948 recodification and explains -- there are two things I think the Prince case explained.

It explained that the recodification in 1948 was a change in phraseology, a tidying up of the entire criminal code. It was not a rewriting and redefining of crimes. And what's significant, it interpreted another provision within 2113, the unlawful entry. And it said -- and it emphasized right in its opinion -- it was manifestly the purpose of Congress to establish lesser offenses.

The Prince case said the heart of the offense is the intent to steal. It was -- that language was emphasized. The intent to steal on the unlawful entry provision. Then the unlawful entry provision merges into the robbery provision. So, the robbery provision had to have an intent to steal.

QUESTION: What do you make -- how do you distinguish or how do you treat the Bell case?

MR. McCAULEY: The Bell case doesn't -- it's not changing the common law understanding. It's not interpreting a statute where this Court said when

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interpreting a statute that is codified a traditional common law offense, we're going to understand all of the elements at common law for that particular offense. That long history and tradition is not going to be eviscerated or revolutionized if -- or -- I think the language in the Morissette opinion -- if there was a mere deletion of a term. And that's what we have here in 1948, the mere deletion of the term --

QUESTION: Well, do -- do you agree that we apply the so-called elements test to determine whether it's a lesser included offense?

MR. McCAULEY: Yes, Your Honor. We do not quibble with the Schmuck standard.

QUESTION: Okay. So, then we have to decide -- even if you're right about intent to steal, what about the requirement in the larceny statute that property be carried away, which doesn't appear in the bank robbery statute? And what do we do about the monetary value problem?

MR. McCAULEY: Well, if I may address the monetary value problem first, Justice O'Connor. There is a monetary element in the robbery provision. You must take the money or the property. The value is the universe of value -- the universe of money, of which $1,000 is embraced. So, that is not an element. And even if it is

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an element, it is embraced.

The reason I say it's not an element is I refer the Court to the Reviser's Notes and Congress in the Reviser's Notes, when it changed the threshold from $100 to $1,000, specifically stated that this change goes to punishment. However, should the Court interpret it as an element --

QUESTION: Well, what if the Court says it doesn't go to punishment, it's an element? Then what do we do?

MR. McCAULEY: Then it is -- then it is embraced in the robbery provision's requirement of money -- a money requirement.

QUESTION: Why isn't the simple answer that the -- that the -- whatever it is -- the -- the lesser degree of -- of larceny is clearly included because there is no particular value requirement there at all? I mean, if the value is anything above 0, you're -- the lesser offense value requirement is made, isn't it?

MR. McCAULEY: Yes.

QUESTION: That's all you have to do to -- to win your -- I mean, on this point, that's all you have to show to win your case, isn't it?

MR. McCAULEY: Show that the elements are a subset of the greater, and I believe the money requirement

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in the greater offense embraced whether it's $1,000, whether it's $100, whether it's above $100 --

QUESTION: No, but let's -- I mean, in order for you to prevail here, I think all we would have to conclude was that there was some value requirement in the robbery statute, as you pointed out, and that there was some value requirement in at least one version of larceny. And in the lesser grade of larceny, there's no requirement to prove $1,000 or anything else. As long as there -- as long as there is proof of something more than 0, the value requirement is made. And that's all you need, isn't it?

MR. McCAULEY: Yes, Justice Souter.

QUESTION: But then -- but then the -- the greater larceny charge would not be a lesser included offense and you would not have give the instruction if you want to get the fellow for -- I'm sorry. You would not have to give the instruction with regard to that.

MR. McCAULEY: The $1,000 I submit is within the universe of the monetary element of robbery.

QUESTION: No, but all you want is a lesser -- maybe I don't understand your case. I thought all you wanted was some lesser included instruction for larceny.

MR. McCAULEY: That's correct.

QUESTION: So, if you get a lesser included instruction for whatever it is, the -- the minor -- the

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lesser larceny, that's all you want. Or do I misunderstand what you're asking for?

MR. McCAULEY: No, you do not.

QUESTION: Well, that's not going to help you very much if -- if your client stole a yacht and the jury is instructed, you need not -- you need not convict him of -- of robbery for stealing the yacht if you find that instead he's guilty of larceny of property worth -- worth less than $1,000. That's not going to help your client. Don't you have to get in the -- both of the two larceny statutes in order to get where you want to get -- want to be?

MR. McCAULEY: And both of them are within that, yes, Your Honor. And my --

QUESTION: You do.

MR. McCAULEY: -- my client has never been on a yacht. He's been in a bank and --

QUESTION: Yes, but this was $16,000. It wasn't under $1,000. This was a $16,000 heist.

MR. McCAULEY: Yes, Justice O'Connor.

QUESTION: There's no way that -- that the lesser larceny instruction would have helped you. The jury obviously wouldn't -- couldn't have brought back a verdict on the lesser larceny.

MR. McCAULEY: The lesser offense of larceny, as

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that term is understood, a conviction on that. Then it goes to sentencing as to where the sentencing. And it is the quintessential judgment for punishment under the sentencing guidelines. The first adjustment is the amount of money involved. The definition of this --

QUESTION: Well, what if the court were to think it was an element not going -- not a sentencing factor, but an element? Then what do you do?

MR. McCAULEY: I submit it -- it is not outside the Schmuck understanding and -- as a subset of the universal monetary, 0 to a million, thousand is within.

QUESTION: And you've -- you've not addressed the carrying away problem.

MR. McCAULEY: The carrying away is a common law term signifying asportation. Asportation was understood to mean the slightest movement, a hair's breath some call it. As my adversary spoke the last time this matter was presented to the court, it could involve a movement involving one foot, whether it be the foot or a hand. The common law understood it, and that's why robbery was defined and understood as aggravated larceny. The asportation, the carry away, is in that take language of the robbery statute. When you take from the person or presence of another, there is a slight movement.

QUESTION: Was asportation involved in common

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law larceny too? Did common law larceny require asportation?

MR. McCAULEY: Yes.

QUESTION: And common law larceny was considered a lesser included offense of robbery at common law.

MR. McCAULEY: Yes, Your Honor.

QUESTION: What about the third? That is, as I understand this, you have bank robbery, and that involves taking money from a bank through force or violence.

MR. McCAULEY: Yes.

QUESTION: Then you have larceny, which involves taking money from a bank. I forgot force and violence. That doesn't exist. It looks identical but for the force or violence.

MR. McCAULEY: Yes.

QUESTION: Now, my problem, I guess from the Government's point of view, is I happen to leave out one phrase. It says in the -- in the larceny one, which it doesn't say in the bank one, with intent to steal. All right. So, their basic argument -- I think it's their best argument. Maybe they have a disagreement. But they say that -- that with intent to steal means there's something about larceny that isn't true of bank robbery, and so it isn't true that bank larceny is just three of the four things of robbery. It is three plus. It is

three plus the intent to steal.

Now, what do you say about that?

MR. McCAULEY: That -- that term is no longer there. The Government agrees it was there from its inception in 1934 when bank robbery was codified right through 1948. So, we have to find the meaning with it not being there for today's purposes. I submit you have to look at the context and the context in the 1948 recodification. Context may clarify. Context may --

QUESTION: First, before we get to the clarification, you're saying the word feloniously -- that did it. Not the words of the bank larceny statute, intent to steal, but feloniously takes was adequate because that's what at common law described --

MR. McCAULEY: Intent to steal.

QUESTION: Right.

MR. McCAULEY: Yes, Justice Ginsburg. Feloniously had modified the term to take from the person or presence of another. Steal was not a common law term. Steal was -- the definition of steal was take from a person or presence of another. So, there was common law meaning, common law language and understanding right in the bank robbery provision.

Feloniously falls out. We cannot say it is there today. But why does it fall out? And I submit it

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falls out, explained adequately -- and the only explanation -- in the Prince decision as a change of phraseology, to tidy up the whole code. The code had become very cumbersome with much language distinguishing felonies from misdemeanors. And all of the felony language and misdemeanors had been deleted from the actual definitions of the crimes because a new provision was added, section 1 of title 18, that defined a felony --

QUESTION: If you're right, Mr. McCauley, why didn't they change the other statute too? Because one now says with intent to steal, the other doesn't.

MR. McCAULEY: The term feloniously was not in the larceny provision.

QUESTION: You're saying they thought that feloniously would -- would confuse the reader to think it has -- it was a felony, rather than a misdemeanor.

MR. McCAULEY: That -- that may -- that may explain it. I do not know. I do know, however, that --

QUESTION: But it was a part of a wholesale cleanup operation. They weren't saying it's confusing in this robbery statute. They took out all the words in many statutes.

MR. McCAULEY: Yes.

QUESTION: They took out other feloniously's?

MR. McCAULEY: Yes. In the statute interpreted

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by the Court in Morissette, the conversion statute, 641 of title 18 -- and Morissette previously had the term feloniously.

And I think the wisdom of the Morissette opinion -- and the wisdom of the Morissette opinion and its application to this case is the language in Morissette that the Court --

QUESTION: Well, Morissette is totally different from this case, it seems to me. There there was no intent requirement, and the Court said because at common law there was one, we're going to read it in here. Here you have very specific elements that weren't present in Morissette at all.

MR. McCAULEY: I think there's a subtle difference. What Your Honor says is all correct. The Morissette opinion substituted a knowing mens rea into a statute because the common law understanding of the crime of conversion did not have a specific intent element. It only had a general intent element. The court was interpreting conversion. At common law conversion was understood -- and it was not a common law offense. It was among one of the first statutes codified in the old English law. It required an act inconsistent with the rights of the true owner.

And that's what -- so, what the Morissette

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opinion, I submit, stands for is the missing element. If Congress has not specifically contraindicated that as departing from the centuries of understanding, the missing element that the Court would imply in is what had appeared at common law, meaning a general intent for the conversion offense --

QUESTION: That a criminal statute is going to be -- if -- if it's silent as to intent, there's going to be some mens rea requirement.

MR. McCAULEY: Yes.

QUESTION: But I think that's quite different from the situation here where the elements have been quite -- quite specifically specified and one -- one substantially differs from the other.

MR. McCAULEY: My point is the missing mens rea in the conversion statute interpreted in Morissette was a general mens rea, a general --

QUESTION: Is -- is --

MR. McCAULEY: -- whereas robbery is specific intent to steal. Always it's been understood that in the mere deletion of the felonious word, consistent with Morissette, you're going to imply in the mirror image, the specific intent to steal. And that best fits. This is the best fit with the Court's prior holdings in Prince and Heflin.

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QUESTION: May I just go back to -- I want to make sure that I understood your -- understand your argument. I -- and this is what I think your argument is. If I'm wrong, tell me I'm -- tell me where I go wrong.

I -- I think you were saying in so many words that feloniously, under the statute prior to the revision, had two functions. One function was to say this is a felony and will be punished as such. Second function is to say you must prove intent to steal because that's what feloniously implied at common law.

They dropped the word feloniously when they adopted what is now, I guess, section 1, which explains what crimes are felonies and what crimes are misdemeanors. So, they didn't need feloniously for the first purpose anymore.

But your argument is that when they dropped it as redundant for the purpose of identifying the crime as a felony, they didn't mean to redefine the elements of the crime to omit intent to steal.

Have I got it right?

MR. McCAULEY: Exactly, Justice Souter.

QUESTION: Okay.

MR. McCAULEY: Exactly.

QUESTION: May I just ask one question going back to the dollar problem in the case? Is it correct

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that at common law both petty larceny and grand larceny were lesser included offenses of robbery even though there wasn't that subdivision in robbery?

MR. McCAULEY: Yes. We -- we -- in our brief there's a quote right out of Blackstone where they were -- are distinguished. It's a lesser offense. Petty larceny is the same as robbery. Robbery is an aggravated compound larceny, and petty larceny could be differentiated in terms of punishment, the threshold being the sixpence. And we say --

QUESTION: How about grand larceny? That's --

QUESTION: Grand larceny was greater than the sixpence, but grand larceny was -- Blackstone says it's right within the robbery understanding. The sixpence threshold went to punishment and distinguished between a misdemeanor and felony offense.

QUESTION: I think your answer to my question was what Justice Souter just said, but I'm not sure.

The -- the -- I'm back to -- to the fact that there -- these words do appear in the larceny statute, whoever has -- with intent to steal or purloin. They are there, aren't they?

MR. McCAULEY: Yes.

QUESTION: Yes. But they're not in the bank robbery statute, are they?

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MR. McCAULEY: After 1948 --

QUESTION: Not, not.

But your point was that that's always implied.

MR. McCAULEY: My understand --

QUESTION: Now, this is the case that I think tests it. It's a little hard and it's rather absurd. But I suppose that if I went into a bank and I took some money from the bank and I thought it was mine, I wouldn't have an intent to steal. I was wrong. It wasn't mine. It was the bank's, and so I wouldn't be guilty of larceny.

Now suppose I got so angry at the bank because the automatic teller wasn't working. You know, I had been frustrated, and I got so angry I got a gun. I wouldn't ever do this.

(Laughter.)

QUESTION: I went to the teller. I pointed the gun at it and said give me that $200 thinking it was mine and, lo and behold, it was the teller's. Would I be guilty of bank robbery?

MR. McCAULEY: Yes.

QUESTION: Yes, but there is no intent to steal because I thought the money was mine. You see, that -- that's what they're saying -- that's what they're saying the difference is. They're saying that the difference is that if I think the money is mine, I get off under the

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bank larceny statute, but if I think the money is mine, I don't get off under the bank robbery statute.

Is that -- I mean, I don't know. It may be so absurd, this case, it may never have happened and I don't know that we should turn a serious opinion on something that's never happened in the history of the world. I mean, I think Sophia Loren once got a hatchet and chopped apart a Coke machine because she was so angry at it. So, I -- I guess that it's possible it could happen. But am I right in principle?

MR. McCAULEY: I would say it is a robbery. I did not understand the hypothetical that there was no intent to steal initially when I answered no. Robbery does require an intent to steal is our position.

QUESTION: So, you would -- it requires an intent to steal.

So, you're saying my angry -- my angry, revenge-driven customer who tries to steal his own money and fails is or is not guilty of robbery? Is not.

MR. McCAULEY: Well, the modern statute has done away -- what Your Honor's hypothetical encompasses is the common law defense of a good faith claim of right. And the modern bank robbery provision takes that away specifically by congressional pronouncement when it says take the money in the care --

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QUESTION: All right. So, if that's --

MR. McCAULEY: -- in the care, custody, and control of the bank. So, it's broader than the common law definition, but I don't think it affects the common law understanding --

QUESTION: I don't understand that. The phrase, in the care, custody, or control of another. What does that have the effect of doing?

MR. McCAULEY: At common law, a crime of larceny could be defeated by showing that the perpetrator had a good faith claim of right. We have The Fisherman's Case or where someone thinks they're getting their own money back.

QUESTION: So, it's not intent to steal, I mean, within Justice Breyer's hypo. Right?

MR. McCAULEY: That would defeat the --

QUESTION: You're talking larceny or robbery?

MR. McCAULEY: That was an affirmative defense for both larceny and robbery.

QUESTION: And robbery.

QUESTION: All right. So that on Justice Breyer's hypothetical, if in frustration the depositor goes into the bank with a gun and says to the teller, give me my $200 and that's what he believes, that it is his $200, is he -- is he guilty of robbery or not?

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MR. McCAULEY: He's guilty of violating 2113(a). And the court may not -- no court may ever have to get to the issue of whether there's a specific intent to steal because of 2113(a). He's taking the money by force and violence that is in the care of the bank, and that --

QUESTION: Okay. Then I think you're saying intent to steal is not an element.

MR. McCAULEY: It is an element. It is an element. It has always been understood to be an element.

QUESTION: But in my hypothetical, he doesn't have an intent to steal. He's trying to get his own money. He's wrong. But his intent -- his state of mind is it's my money.

MR. McCAULEY: I submit that a good faith claim of right defense has been taken away, but there's always the intent to steal. There's been no congressional indication and it has to come from --

QUESTION: That makes no sense. You -- you can't have an intent to steal if you have a good faith claim of right. I mean, you -- you say that but it doesn't make any sense. How can you possibly have -- have an intent to steal if you have a good faith claim of right?

MR. McCAULEY: If you're taking from the person or presence of another, you're stealing.

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QUESTION: Mr. McCauley, this -- this same question was asked of you as a prior argument. And I -- there -- there was another hypothetical that you were -- one was I think it's my money. The other was I just want to see how nimble I am, so I'm going to get the money. I'm going to rob the bank. Then I'm going walk around the block and give it right back to them. That was the other hypothetical. No intent to steal in either case. One, I think it's my money; the other, I'm going to walk around the block with it. In -- in all of the annals of criminal law, I don't know that either of those situations have ever come up.

MR. McCAULEY: No, but I think they were posed to try to illustrate there was no intent to steal if he was just testing the security of the bank.

QUESTION: Is -- I -- I'm wondering whether there is a case where it would be real and not just hypothetical.

But there's another aspect of this case that -- that may also fall in the academic category. That is, didn't one of the -- didn't the Government urge that in this case there's no way that this could be anything other than robbery? That it could not have been larceny so that whatever we answered this question, it wouldn't matter because in this case you could not -- you didn't -- it

could not have been larceny.

MR. McCAULEY: The Government is arguing a fact-based inquiry that was never presented to the jury, and indeed, the district court in its first instance made no determination regarding the factual evidence in this case whether they could submit -- whether they -- it would satisfy the elements of larceny.

QUESTION: But I thought it was the Government's position that no rational jury -- juror could so find, so you couldn't submit it to the jury.

MR. McCAULEY: The Government is relying upon the district court's decision regarding a motion for judgment of acquittal pursuant to rule 29 at the end of the Government's presentation of the evidence, and saying that amounts to a directed verdict when the district court said, I'm not going to instruct this jury on the bank larceny provision. That just simply is not so. The district court never made a factual determination. It was bound by the Third Circuit's opinion in Mosley that, as a matter of law, I'm not permitted as a district court judge to submit this to the jury. And that's all the district court did.

The district court did summarize the evidence solely for the rule 29 function. Whether or not there was sufficient evidence, giving the Government the best

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benefit of all reasonable inferences to support the elements of robbery. That is the same as what -- if, as a matter of law, we are entitled to a lesser offense of robbery. That inquiry -- if we are entitled to it as a matter of law -- instruction regarding the lesser included offense, the fact that a district court ruled on the -- on a rule 29 motion does not affect the jury's determination, does not affect -- the Government is essentially arguing that it's harmless error, and this Court in its first instinct could say it looks like a -- a robbery to me. So, that's good enough.

An all or nothing verdict, as the Court pointed in Beck v. Alabama, is not proper. As we point out in our brief citing the Keeble case -- it's cited in the Morissette opinion -- we were entitled to these instructions as a matter of law if there's any evidence, a scintilla of evidence, that could support our theory that these elements are met. Just because a jury convicted --

QUESTION: Is there any case that uses the word scintilla in that context?

MR. McCAULEY: There's a case out of the Ninth Circuit --

QUESTION: I mean a case from this Court.

MR. McCAULEY: I don't recall if it was from this Court, Your Honor, the scintilla. That car was --

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that case was United States v. Escobar Debright and it collected a number of cases from around the circuits regarding the quantum of evidence necessary for a theory of a defense or a lesser offense I submit.

If the Court has no further questions, I'd like to reserve my time for rebuttal.

QUESTION: Very well, Mr. McCauley.

Mr. Frederick, we'll hear from you.

ORAL ARGUMENT OF DAVID C. FREDERICK

ON BEHALF OF THE RESPONDENT

MR. FREDERICK: Thank you, Mr. Chief Justice, and may it please the Court:

Bank larceny, felony bank larceny, is a lesser included offense of bank robbery because it requires proof of three elements not found in the robbery provision: the intent to steal or purloin, the carrying away of the property, and that the property is worth more than $1,000.

By contrast, bank robbery requires proof that force --

QUESTION: Mr. Frederick, you said it is a lesser included offense.

MR. FREDERICK: Sorry. Is not a lesser included offense. I apologize.

Those three elements under the Schmuck test require a finding that larceny is not a lesser included

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offense of robbery.

Justice Breyer, to go to your question on intent to steal, this is in our view an important element, and I do not want to digress to the point of hypotheticals where the person steals his own money because --

QUESTION: That's actually a bad example, but I'm just -- it does illustrate that my great difficulty in finding an instance where this intent to steal could make a difference. I mean, can you think of one?

MR. FREDERICK: Yes.

QUESTION: What?

MR. FREDERICK: And we have given you the -- we have given you this fact situation in the footnote in our briefs.

QUESTION: You mean the Tenth Circuit hypothetical.

MR. FREDERICK: Yes. That happens every single year --

QUESTION: What? Can you remind me?

MR. FREDERICK: -- where the defendant commits a bank robbery because he is unable to live in a free society and in a comfortable way and commits a bank robbery with the intent of getting captured. And the important point here --

QUESTION: The intent of stealing and getting

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caught stealing. I mean, but he's still stealing. I don't see --

MR. FREDERICK: He doesn't have an intent to deprive permanently the custodial arrangement of the bank of property.

QUESTION: Well, he would if he knew that that's the only thing that's going to get him in jail.

MR. FREDERICK: Justice Scalia, what is important here is what the prosecution must plead and prove beyond a reasonable doubt, and it is reasonable to infer that Congress, in enacting the bank robbery provision, would not want to subject the Government to proof where the robber had engaged in such unambiguously dangerous activity as using force or putting somebody in fear or intimidation to take property.

QUESTION: Yes, but in the real world, that proof requirement is going to be as simple -- is satisfied as simply ruling on the law.

MR. FREDERICK: Justice Souter, in addition to the instance where the person is not committing the robbery with the intent to steal because he wants to go back to prison, there are circumstances and there -- there are real cases where the defendant commits the robbery with the purpose of having the Bureau of Prisons provide health care for the person.

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QUESTION: Oh, yes. I'm sure that happens. It's, you know, winter is coming and the guy needs new shoes. But we -- we know that. But that -- I -- I can't imagine that Congress was motivated by that kind of -- of concern. Defendants do not customarily take the stand and say, look, I was only doing this because I need a -- a good place to sleep. I --

QUESTION: Or to put it another way, why is leaving it out of the statute any more absurd than leaving it out of the common law?

MR. FREDERICK: Justice --

QUESTION: I mean, the common law didn't include it. Was the common law absurd?

MR. FREDERICK: The common law --

QUESTION: That cannot be.

MR. FREDERICK: You know, Justice Scalia, I would want to -- to refer to the common law in this regard. The -- the references to Blackstone and to other commentators are rather imprecise with respect to the elements, and it is important for this Court to focus on the language that Congress actually used.

QUESTION: What about -- what we really want to know is the words --

QUESTION: There was a question before that. Now, answer Justice Scalia's question.

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MR. FREDERICK: The words that Congress actually used in not having an intent to steal requirement were consistent with the modern trend of legislatures, including Congress, to make robbery a general intent crime because robbery is a crime against the person, and the social evil that legislatures are legislating against is the knowing use of force to take property from a person. It's not the interest of many State legislatures to be concerned with what the robber's ultimate intent with respect to the property is. Rather, it is the means that he employs to take the property and that is what Congress was legislating against.

QUESTION: Now answer Justice Breyer's question.

MR. FREDERICK: Could you rephrase your question please, sir?

QUESTION: Sorry. I -- I was trying to think of the actual concrete example. What I've had a very, very hard time thinking of is thinking of an example where a person commits bank robbery but he doesn't intend to steal the money. I did try to give one before, and I don't think actually it was a very good one. You know have the example of a person commits robbery because he wants to go to prison. But Justice Scalia just said in that case he's committed robbery to go to prison.

MR. FREDERICK: Well --

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QUESTION: So, I -- I don't know why that's a good example.

And -- and so, can anybody think of a real example where a person commits bank robbery but he doesn't have an intent to steal?

MR. FREDERICK: I have two other examples to provide the Court for its consideration. One is the hostage situation where the robber takes possession of the bank and has control over the bank for the sole purpose of engaging in a hostage situation. A taking has occurred of the property with force and violence, but the -- but the -- the defendant does not have a demonstrable intent to dispossess the bank of those funds.

A second real world practice --

QUESTION: And you want to get him for bank robbery.

MR. FREDERICK: Yes.

QUESTION: Weird.

MR. FREDERICK: No, it's not.

QUESTION: Isn't there some other provision of the United States Code that -- that would cover this kind of thing?

MR. FREDERICK: Justice Scalia, the elements that Congress provided demonstrate that the defendant has engaged in the kind of behavior that should be held

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criminally culpable. And that is our point here, that when we read the --

QUESTION: But my problem with that argument is do you -- do you consider that until the word feloniously was taken out, it was a lesser included offense?

MR. FREDERICK: No.

QUESTION: Ah, so what was the law pre-1948?

MR. FREDERICK: The Government has consistently charged these as independent provisions, according to their elements, from the time of enactment up until the present day.

QUESTION: So, before 1948, if on a bank robbery indictment, which did not include also a count of bank larceny, counsel for the defense had said, judge, I would like you to give a lesser included offense charge pre-1948. The -- the proper answer for the judge would have been, no, it's not a lesser included offense.

MR. FREDERICK: That's correct for the two additional reasons that we've highlighted as differences between these two provisions, that there is no carrying away, asportation, requirement in bank robbery and that for a felony bank larceny to be made out, the prosecution must plead and prove that the property is worth more than $1,000.

QUESTION: But not for misdemeanor larceny, I

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take it.

MR. FREDERICK: That's correct, as to the valuation element, Justice Souter, but there's no carrying away requirement as a distinction.

QUESTION: Do -- do you know what was the Department of Justice's practice before 1948? Did they object to giving the bank larceny charge as a lesser included offense on the theory that the word feloniously wasn't enough to do it?

MR. FREDERICK: I -- I cannot give you the specific charging practice. I can tell you what the reported cases say, which is that the Government had argued that they were distinct offenses which required proof of distinct elements.

Some courts accepted that view of the Government, some courts did not. And in fact, it was the circuit split that ultimately led up to the Prince decision requiring merger in the entry and in the completed bank robbery offense. That best evidence is the fact that the Government had consistently taken the position with respect to these --

QUESTION: But in these cases, has the Government ever -- ever taken the position that they can charge both offenses and get cumulative punishment for the two?

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MR. FREDERICK: Prior to Prince, the Government did take that position. After Prince, the Government, to my knowledge, has not been -- has not been prosecuting both simply as a way to --

QUESTION: It could under your theory of the case.

MR. FREDERICK: That's correct.

QUESTION: Yes.

MR. FREDERICK: That's correct.

I would point out, though, that with respect to the punishing element, it would have no real practical consequence. In this case, this petitioner was -- he -- convicted of three bank larcenies in a different district, and for sentencing purposes, his -- his sentence was assessed as a result of the bank robbery that he committed in this case after his bank larcenies.

QUESTION: Mr. Frederick, tell me about those three others because one of his points was, it was a -- I did -- I did the job the same way. One time I got indicted for robbery, those other three times for bank larceny and did exactly the same thing. And so, it's got to be a lesser included offense.

MR. FREDERICK: I don't think that's correct, Justice Ginsburg. We don't know what the facts are in those other cases other than what the petitioner has

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represented. And we do not know what proof the prosecution had as to the use of force, violence, or intimidation in those cases.

QUESTION: Yes, but isn't it true that in the typical case -- John Dillinger statute -- he goes in, robs a bank. You could -- under your view of the statute in every single transaction, you could punish him for both crimes.

MR. FREDERICK: No, I don't think that's correct, Justice Stevens, as a matter of the way the sentencing guidelines work. We could prosecute --

QUESTION: Well, forget the sentencing guidelines. Just as a matter of the statute.

MR. FREDERICK: We could prosecute him for both --

QUESTION: Right.

MR. FREDERICK: -- because it requires proof of distinctive elements.

QUESTION: Right.

MR. FREDERICK: And I would point out to you that this is no different from the way many State courts have construed modern robbery statutes. I would direct the Court's attention to the Connecticut statutory scheme, which we have set out the statute at page 17 of our brief, which defines robbery as a larceny plus the use of force.

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And yet, on page 28 of our brief, we quote the Boucino case which holds categorically that there is no double jeopardy problem in charging both grand larceny and -- and robbery because they require proof of distinctive elements. The Court there said robbery requires proof of the use of force, which larceny -- grand larceny does not, and grand larceny requires proof that the money taken had a specific monetary value above a certain threshold, which robbery does not.

QUESTION: Let's -- let's do the money. I happen to think that the -- that the $1,000 -- less than $1,000 or more than $1,000 -- that that is an element, not -- not just a sentencing factor. But does that kind of an element deprive the lesser offense of its character as a lesser offense?

Suppose you have a statute that explicitly says after the robbery statute, as a lesser offense there will be the crime of larceny which will be punished to such an extent if the larceny is for less than $1,000, and to a greater extent if the larceny is for more $1,000. I don't see how that -- that causes it not to be a lesser offense.

MR. FREDERICK: Because it requires the prosecution to prove beyond a reasonable doubt that element which changes the offense.

QUESTION: But the purpose of that proof is just

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to decide which of the two lesser included offenses you get into, but to get into the category of lesser included offense, you don't have to prove anything. The only purpose of that $1,000 is to decide whether in this lesser included offense of larceny, you're going to be -- you're going to be in -- in grand larceny or petty larceny. I -- I don't think that that's enough to -- to cause it to be a -- the sort of an element that -- that can deprive something of its character as a -- as a lesser included offense.

MR. FREDERICK: It changes the constitutional requirements, Justice Scalia, because in this provision, felony bank larceny requires that fact to be put in the indictment and found by the grand jury. The constitutional requirement for that is such that it has to be an element of the offense.

QUESTION: Yes, but wouldn't that be taken care of in the instruction to the jury. You'd say to the jury, if you -- if you find he didn't have the intent, you may find him guilty of -- of larceny. And in order to find him of grand larceny, you must find $1,000 or petty larceny, less. But one or the other is a lesser included offense, and the jury would have to make the determination as to whether the dollar amount was satisfied.

MR. FREDERICK: It depends on how the --

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QUESTION: And it just -- let me just ask one question. Was that the rule at common law? Your opponent says it was, and I guess you -- you disagree with him?

MR. FREDERICK: I don't think that there is a conclusive answer at common law because even Blackstone was reciting not just common law decisions, but also the statutes. If you -- if you read the chapter that -- that is cited by both sides from Blackstone, throughout Blackstone is saying that common law rules were changed by parliament in the time of King George II and King George III, precisely because the common law rules were not deemed adequate to meet the evolving needs of British society.

QUESTION: Well, that's a --

QUESTION: Isn't it still the rule? Isn't it still the rule in England even to this day, that larceny is a lesser included offense of -- of robbery?

MR. FREDERICK: Justice Ginsburg, I don't know what the rule in England is now, but I do know that the rule in the States of the United States is that in those places where State legislatures have changed the elements of the crime, robbery and larceny are not lesser and greater included offenses where robbery does not require proof of elements that are found in larceny. And we have set out these cases in our brief. They go unrebutted.

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QUESTION: They go both ways I think.

MR. FREDERICK: They go unrebutted by the other side, Justice Ginsburg, with respect to those specific elements on all three of them.

QUESTION: Aren't there a number of States that have holdings that bank larceny is a lesser included offense of bank robbery? I thought there were a number of States that --

MR. FREDERICK: State courts construing 2113 or State courts construing their own robbery and larceny statutes? Because I think with respect to the former, I'm not aware of State cases --

QUESTION: I wouldn't -- I don't know why a State court would be interpreting 21 -- they wouldn't have the prosecution for that, so it would have to be their own statutes.

MR. FREDERICK: Well, actually that's not correct because there's not exclusive jurisdiction with respect to this provision. But --

QUESTION: Is it -- what is the incidence of -- of State prosecutions under the Federal statute?

MR. FREDERICK: I'm not aware of a large number of those. There are a smattering of cases over the years.

But if I -- if I can get to the gist of your question, it all depends on the jurisdiction that you are

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looking at. And I have not looked at all 50 States, but I've looked at enough of them to be able to tell you with high confidence that virtually every jurisdiction has a slight difference with respect to these various elements.

QUESTION: Given -- that -- that's basically -- you're now right at the point of where my real question is because I -- the -- the serious question is this, that I imagine it's possible -- we were thinking of facts of the Thomas Crowne Affair. You know, it's possible to work out a law school hypothetical where a person would, in fact, maybe be guilty of robbery although he didn't intend permanently to deprive the bank of the property. It's conceivable. And that person wouldn't be guilty of larceny. And so, you know, because he didn't use force, but he -- he didn't intend permanently, so he didn't steal. I could imagine such a thing, though it's -- obviously we're having a hard time finding one.

All right. Should lesser included offense law turn on that kind of law school hypothetical? I mean, if in fact judges who are busy and criminal lawyers who are not experts in weird hypotheticals as -- you know -- which -- and they have to manage a system, is it the case that if it's -- why is it? If it's so hard for us to find even a hypothetical, why isn't that the end of this? That the U.S. Code is written with provisions at many different

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times. The words are not identical. They don't track different things perfectly, and if you have to have a manageable system, there should be a real difference, not a difference that turns on some obscure ability to think of -- of a set of cases that perhaps never occurs.

MR. FREDERICK: Justice Breyer, the Thomas Crowne Affair involved a larceny and not a robbery, and that distinction is critical because if Thomas Crowne had pulled out a gun and used force to take the painting, regardless of what he ultimately intended to do with it, he would have done something that demonstrates criminal culpability.

QUESTION: That is precisely my point. We found a movie that contains your hypothetical.

(Laughter.)

QUESTION: As the sentencing commission -- as a sentencing commission, I had -- we had many thousands of cases, and I'll have to say I never recalled such a case. And so, my real because is if it's so hard for us to find such an example, should we turn lesser included offense law upon that. That's my actual question. I'd like your view about that.

MR. FREDERICK: And if I could get out all the various answers that I have to that question, Justice Breyer, on page 20 of our brief we cite a rash of Federal

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court of appeals decisions that hold that robbery is a general intent crime not a specific intent crime because of the real world situation that defendants come to court arguing they did not intend to steal because they were drunk or they were on drugs or they had some other kind of mental defect that prohibited them from having the full intent to steal.

QUESTION: May I ask a question about intent to steal?

MR. FREDERICK: Sure.

QUESTION: I don't want to interrupt you if you have something else to add.

MR. FREDERICK: I'll get them out. I'll my points out.

QUESTION: All right.

In Prince v. United States, we considered whether the crime of entering a bank with intent to commit robbery is merged with the crime of robbery if robbery is consummated. And we said, yes, there's a merger because the heart of the crime of entering the bank with intent to commit robbery is the intent to steal. And apparently we thought at the time of Prince that that was the intent element of bank robbery.

MR. FREDERICK: I respectfully don't think that's correct, Justice O'Connor. The provision as it was

worded then is as it is worded now, and it was intent to commit a felony or larceny. There was no intent to steal word in second paragraph (a). The court used that as a very loose shorthand.

It did and it also said that with respect to two provisions, paragraphs, that are not directly at issue here. Second paragraph (a) prohibits entry into the bank with the requisite intent, and what the court there said was that for punishment purposes, the two shall merge if the person enters with the intent to commit the robbery and then actually commits the robbery.

QUESTION: Well, is it -- is it possible that in -- that in interpreting a statute like the bank robbery statute, which doesn't spell out anymore the intent to steal requirement, that the court could interpret it as incorporating the old common law intent to steal element?

MR. FREDERICK: We would suggest not for the following reasons. Congress had before it a decision about how much of the common law to import when it drafted the bank robbery statute. Of the eight elements of bank robbery, only three track the common law: the word takes, the use of force, and in the person or presence of another. As to the other five elements, Congress expressly departed from the common law.

The theory of reading back in an intent element,

notwithstanding the fact that Congress specifically omitted it in 1948, would lead to some very strange results that would --

QUESTION: In 1948 is the felonious. But you told me that -- nothing turned on that. I -- I had thought that up until '48, bank robbery meant intent to steal. And you told me no.

MR. FREDERICK: Justice Ginsburg, if I could correct your understanding of our previous colloquy, you asked me whether intent to steal was encompassed within the word feloniously. I said it was. You asked me whether or not that meant that before '48 bank larceny was a lesser included offense of robbery, and I said no because of the other two elements.

QUESTION: Oh, because of the --

MR. FREDERICK: Carrying away and the monetary valuation element. That's correct.

QUESTION: And the carrying away -- I think the last time you were before us you did say, well, he didn't even have to make it to the door of the bank to carry it away for purposes of bank larceny.

MR. FREDERICK: What I said before was that we would prosecute that person, and what I also said before was that it was unclear whether we would prevail because numerous jurisdictions held that a carrying away would not

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be completed until the person --

QUESTION: But we asked you your view of the Federal statute, and you said that -- you said a step, in effect, would be enough.

MR. FREDERICK: To prosecute. There are no reported cases on that hypothetical, but there are cases from State jurisdictions which hold that when a person is taking property within a store or other kind of business, an asportation is not satisfied until the person leaves the premises. And every year -- every year -- we prosecute people who attempt to get out of the bank and we catch them before they leave. And in those cases, the effect of a carrying away element would transform completed bank robbery in our view into an attempted bank robbery. That would be the effect of your reading in an asportation element that Congress made an explicit decision not to read in. And --

QUESTION: Mr. Frederick, on -- on that point, just a historical question. Is it correct that in the 1948 revision, one of the things that clearly was being done by Congress was to substitute a -- a general definition to distinguish between felonies and misdemeanors to take the place of individual statements -- or provisions in individual statutes?

MR. FREDERICK: That was one of the purposes for

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deleting feloniously as to certain offenses, Justice Souter. And what we have done in describing what the Reviser explained with respect to certain robbery offenses is that feloniously was taken out of those robbery offenses, but the Reviser used a different explanation, did not rely on section 1, but simply said that changes in phraseology were made.

And we would submit that that was perfectly consistent with the decision Congress had made in 1946, which was to define robbery under the Hobbs Act by not including an intent to steal or feloniously element. Congress defined robbery as a general intent crime, which was the precursor, we argue, to the modern trend of treating robbery as a crime against the person where the person's demonstrable criminal conduct is to use force to take property away from the person --

QUESTION: Okay, but it would also -- I think it would also be consistent, based on -- if I understand what you've told me, it would also be consistent with the -- the 1948 action to say that the change in phraseology, i.e., dropping the word feloniously, was a change in phraseology which was justified by the fact that the need for particular phraseology to indicate a felony had been superseded by a general felony/misdemeanor definition.

MR. FREDERICK: Well, I think it was this

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Court's --

QUESTION: You could read it either way I -- I would think.

MR. FREDERICK: And the point is what the Reviser said is ultimately irrelevant to what Congress enacted and the words that are in the statute now. This Court in Wells said that the Reviser had been wrong before in making -- in describing the change by Congress as substantive. And we submit there's no difference --

QUESTION: There's nothing -- nothing dispositive about it. It's just one thing for us to look at, and I think it's still relevant.

MR. FREDERICK: That's correct. And ultimately what you should be looking at is the text of the statute which contains these three very clear elements that the prosecution does have to prove beyond a reasonable doubt.

QUESTION: But your -- your argument -- I think your argument for the plausibility of concluding that dropping feloniously dropped the intent to steal requirement is that in the earlier Hobbs Act provision there had been, in effect, a conversion of the concept of robbery from a -- a primarily -- from a -- let's say from a -- a property plus personal violence crime to something closer to a personal violence crime. And -- and that's your -- I think that's your best argument for saying,

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therefore, dropping feloniously in '48 was -- was probably meant to signal not merely that it was no longer necessary to define felonies in particular provisions, but to signal a -- a conceptual change in giving -- giving emphasis to the personal violence part of robbery. I mean, that's your argument --

MR. FREDERICK: That's correct, and the Congress did the same thing with section 2111, the robbery in the special maritime jurisdiction of the United States. It took the word feloniously out. It made that crime a general intent crime.

QUESTION: What year did it do that?

MR. FREDERICK: 1948 in exactly the same revision. The Reviser note explained that that was a change in phraseology, and what Congress had done in defining all three of these robbery offenses, Hobbs Act, bank robbery, and robbery in the maritime, was to convert them from specific intent to general intent crimes.

QUESTION: As far as the same offense at least -- well, let me ask you it this way. Indictment for a bank robbery. Acquittal because the evidence of force or intimidation is equivocal, as it is in this case, or at least as the defendant alleges. Could the Government then re-indict for bank larceny?

MR. FREDERICK: Yes.

QUESTION: It could.

MR. FREDERICK: There would be no double jeopardy problem. That's correct.

QUESTION: Yes. I -- I wanted to --

MR. FREDERICK: The elements are --

QUESTION: I wanted to be sure that that was a consequence of the argument that you are making today, that the Government would have two bites by doing this. It could -- it could indict just for robbery. If it loses on that, it could come back with a bank larceny.

MR. FREDERICK: Justice Ginsburg, that is the -- that is the logical result of our position because the elements are different. It no different than in the Blochberger situation for double jeopardy. They are distinctive cases.

QUESTION: I just wanted to be sure that you are -- you are saying that. That's the discretion --

MR. FREDERICK: Yes, I am.

QUESTION: -- under the -- under the statute.

MR. FREDERICK: Yes.

QUESTION: And that's what Congress had in mind when it made this -- took out the word feloniously, which appeared to be, from what the Reviser said, part of this cleaning up, taking out the felony misdemeanor. There isn't anything that indicates -- you -- you said it might

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be this and it might -- but there's nothing in -- in removing that word feloniously that we have to go on other than the -- the Reviser's note, is there?

MR. FREDERICK: No, Justice Ginsburg. Just the text of the statute as it currently exists.

And I would just point out that there is nothing illogical about making that decision because of the emphasis of the robber on using force. That is a social evil Congress is perfectly justified in legislating against irrespective of what the robber intends to do with the property. But larceny has a special intent to steal because otherwise innocent conduct would be subject to the criminal sanction. Larceny is a crime against the -- its property and robbery is a crime against the person. And because of these distinctive evils, it is perfectly logical to think that Congress would have gone in the same way that States have gone in changing robbery from a specific intent crime to a general intent crime.

Finally, I would just like to point to the Court's -- several points in the record. The joint appendix at A indicates that the element of bank larceny that the petitioner here asks for was felony bank larceny, so even if the Court were to disagree with our submissions as to the carrying away and intent to steal element, he's not entitled to a special jury instruction here because he

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asked for felony bank larceny with the monetary element.

And finally, he did get his -- his instruction to the jury in this case. The joint appendix at page 57 makes absolutely clear that the theory of the defendant was that he had not used force or intimidation. The jury had to make a finding in rejecting the defendant's theory in this case and it did so because the defendant here had a ski mask on, he pushed a customer twice, he vaulted over the bank counter, he -- he terrorized the -- the tellers there in taking the money. They were -- they were too startled to react.

QUESTION: This is an argument that we should dismiss the writ as improperly granted because it doesn't raise the question that you have been arguing up until now.

MR. FREDERICK: Justice Ginsburg, whether the Court decides to dismiss the writ is up to the Court. We pointed this out in our brief at the cert stage. We pointed it out in the Mosley case. The truth of the matter is, as a legal matter, this question hardly ever arises. The last footnote of our brief points out that in virtually all cases where the defendant asks for this instruction, the facts do not justify the giving of the instruction. So, there is an academic quality to this case. We would concede that, but we did not bring the

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petition for a writ of certiorari here. And we are entitled to defend the judgment on an alternate ground.

Thank you.

QUESTION: Thank you, Mr. Frederick.

Mr. McCauley, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF DONALD J. McCAULEY

ON BEHALF OF THE PETITIONER

MR. McCAULEY: Thank you, Mr. Chief Justice.

I just have some brief points.

I do not believe the common law understandings of these two offenses is as malleable as my adversary says, and I -- both sides have addressed all the citations. I just again point to the understanding of robbery as being defined and understood for centuries as an aggravated larceny. Blackstone's specific words -- they are the exact same understanding with all the elements of taking and carrying away. They only differ by punishment. It's all there. They cannot say the common law is fuzzy about this issue. These two offenses have always been looked upon --

QUESTION: Does the common law include any statutes? Does the common law include any statutes?

MR. McCAULEY: There were statutes based upon the common law, taking the common law terms. The common law was an -- an understanding and there were writings and

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case law publications explaining what the requirements were for the offense. They were codified in judicial opinions.

I would also draw the Court's attention to a structure argument. The structure of 2113 supports a finding that larceny is a lesser included offense of robbery. If you look to 2113(c), the receiving stolen property provision, which makes it a crime to receive stolen property and then points to 2113(b) as to how you punish that receiver of stolen property and you punish him equally the same as you would punish a larcenist.

And we point out the anomaly of that at page 8 of our reply brief, that that would allow a receiver of stolen property from a bank robber to go unpunished if only the receiver of a stolen property can be punished as to (b). But this mystery disappears if the understanding is 2113(b) is a lesser offense of (a). So, receiving the proceeds of a bank robber as well as receiving the proceeds of a larcenist are punished. And that structure, the congressional structure there, explains and gives meaning to this whole centuries -- many, many centuries of the understanding that larceny is a lesser offense of robbery.

Policy arguments cannot trump the text. The Government points to what States are doing now, that

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robbery is bad, so we're going to make it easier to prove. That cannot trump the congressional text here.

And the change in phraseology is not a specific pronouncement by Congress that it's acting contrary. It's a mere deletion of a word, as was pointed out in Morissette. And I believe Morissette understanding is that tradition -- centuries of tradition and understanding and our whole criminal jurisprudence is not revolutionized by the mere deletion of one word. And I submit that the mirror of the offense that's being interpreted, just as it was in Morissette, the offense of conversion that required a knowing element that was read in as a mens rea -- it's always been the requisite element of intent to steal at robbery. And that's what it was from 1934 to 1948.

And I think to square with the Prince holding, that the heart and the gravamen of the offense -- and the Prince court said that the gravamen of the offense of robbery is the intent to steal. When you put the Prince case with Morissette, the only square reading is to imply the mens rea of a specific intent to steal, and there's nothing radical about it. It's consistent with many, many centuries.

Thank you, Your Honors.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. McCauley.

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The case is submitted.

(Whereupon, at 12:04 p.m., the case in the above-entitled matter was submitted.)

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CASE NO: 99-5716

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BY: Ilona M. May
(REPORTER)