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Turner Vs. United States

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Decided On : Jan-20-1970

Appeal No. : 396 U.S. 398

Appellant : Turner

Respondent : United States

Judgement :

Turner v. United States - 396 U.S. 398 (1970)
U.S. Supreme Court Turner v. United States, 396 U.S. 398 (1970)

Turner v. United States

No.190

Argued October 15, 1969

Decided January 20, 1970

396 U.S. 398

CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

SYLLABUS

Narcotics agents stopped a car in which petitioner was riding and found a package, which petitioner had thrown away, containing about 15 grams of a cocaine and sugar mixture, 5% of which was cocaine, and a package in the car weighing about 48 grams consisting of a total of 275 glassine bags containing a heroin mixture, 15.2% of which was heroin. Petitioner was indicted and convicted of four narcotics violations: (1) knowingly receiving, concealing, and facilitating the transportation and concealment of heroin knowing the heroin had been illegally imported into the United States, in violation of 21 U.S.C. 174; (2) knowingly purchasing, possessing, dispensing, and distributing heroin not in or from the original stamped package, in violation of 26 U.S.C. 4704(a); (3) same as the first offense with regard to the cocaine seized, and (4) same as the second offense with regard to the cocaine. At the trial, the Government presented evidence of the seizure of the package, but offered no evidence on the origin of the drugs, and petitioner did not testify. Section 174 provides that, when a

"defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Section 4704(a) states that:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package, and the absence of appropriate tax-paid stamps from narcotic drugs shall be *prima facie* evidence of a violation of this subsection. . . ."

With respect to the first and third offenses, the trial judge charged the jury, in accord with 174, that it could infer from petitioner's unexplained possession of the heroin and cocaine that petitioner knew the drugs had been illegally imported. With respect to the second and fourth offenses, the trial judge read to the jury the *prima facie* evidence provision of 4704(a). In the Court of Appeals, petitioner argued that the judge's instructions on the inferences that the jury might draw from

unexplained possession of the drugs violated his privilege

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against self-incrimination by penalizing him for not testifying. The Court of Appeals rejected this claim and affirmed, finding that the inferences were permissible under prior decisions.

HELD

1. The trial court's instructions on the inference that might be drawn under 174 with respect to petitioner's possession of heroin did not violate his right to be convicted only on a finding of guilt beyond a reasonable doubt, and did not place impermissible pressure on him to testify in his own defense. Pp. 396 U. S. 405 -418.

(a) Since it is abundantly clear that little, if any, heroin is made in this country, and that, therefore, virtually all heroin consumed in the United States is illegally imported, 174 is valid insofar as it permits a jury to infer that heroin possessed here is a smuggled drug, whether judged by the "more likely than not" standard applied in *Leary v. United States,* 395 U. S. 6 , or by the more exacting reasonable doubt standard. Pp. 396 U. S. 408 -416.

(b) While there is no proof that petitioner knew who smuggled his heroin or how the smuggling was done, he, like others who sell or distribute the drug, was undoubtedly aware of the "high probability" that the heroin in his possession originated in a foreign country. Pp. 396 U. S. 416 -418.

2. The presumption under 174 will not support petitioner's conviction with respect to the possession of cocaine, as the facts show that much more cocaine is lawfully produced in, than is smuggled into, this country, and that the amount of cocaine stolen from legal sources is sufficiently large to negate the inference that petitioner's cocaine came from abroad or that he must have known that it did. Pp. 396 U. S. 418 -419.

3. The conviction under 4704(a) with respect to heroin is affirmed. Pp. 396 U. S. 419 -422.

(a) The evidence that petitioner possessed the heroin packaged in 275 glassine bags without revenue stamps attached established that the heroin was in the process of being distributed, an act proscribed by the statute. P. 396 U. S. 420 .

(b) When a jury returns a guilty verdict on a count charging several acts in the conjunctive, as here, the verdict normally stands if evidence is sufficient with respect to any one of the acts charged. P. 396 U. S. 420 .

(c) The conviction can also be sustained on the basis of the inference in 4704(a) of purchasing the heroin not in or from a stamped package, as there is no reasonable doubt that the possessor of heroin, who presumably purchased it, did not purchase

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it in or from an original stamped package in view of the fact that no lawfully manufactured or lawfully imported heroin is found in this country. Pp. 396 U. S. 421 -422.

4. Petitioner's conviction with respect to cocaine based on the 4704(a) inference is not based upon sufficient evidence. Pp. 396 U. S. 422 -424.

(a) Petitioner's bare possession of a small quantity of a cocaine and sugar mixture does not establish that he was dispensing or distributing the drug. P. 396 U. S. 423 .

(b) The possibility that petitioner either stole the cocaine in or from a stamped package or obtained it from a stamped package in the possession of a thief is sufficiently real that a conviction cannot be rested solely upon the presumption. Pp. 396 U. S. 423 -424.

(c) To the extent that *Casey v. United States,* 276 U. S. 413 , gives general approval to the 4704(a) presumption, it is limited by this decision. P. 396 U. S.

424 .

404 F.2d 782, affirmed in part and reversed in part.

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner was found guilty by a jury on four counts charging violations of the federal narcotics laws. The issue before us is the validity of the provisions of 2 of the Act of February 9, 1909, 35 Stat. 614, as amended, 21 U.S.C. 174, and 26 U.S.C. 4704(a) which authorize an inference of guilt from the fact of possession of narcotic drugs, in this case heroin and cocaine.

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The charges arose from seizures by federal narcotics agents of two packages of narcotics. On June 1, 1967, Turner and two companions were arrested in Weehawken, New Jersey, shortly after their automobile emerged from the Lincoln Tunnel. While the companions were being searched, but before Turner was searched, the arresting agents saw Turner throw a package to the top of a nearby wall. The package was retrieved, and was found to be a foil package weighing 14.68 grams and containing a mixture of cocaine hydrochloride and sugar, 5% of which was cocaine. Government agents thereafter found a tinfoil package containing heroin under the front seat of the car. This package weighed 48.25 grams and contained a mixture of heroin, cinchonal alkaloid, mannitol, and sugar, 15.2% of the mixture being heroin. Unlike the cocaine mixture, the heroin mixture was packaged within the tinfoil wrapping in small double glassine bags; in the single tinfoil package there were 11 bundles of bags, each bundle containing 25 bags (a total of 275 bags). There were no federal tax stamps affixed to the package containing the cocaine or to the glassine bags or outer wrapper enclosing the heroin.

Petitioner was indicted on two counts relating to the heroin and two counts relating to the cocaine. The first count charged that Turner violated 21 U.S.C. 174 [Footnote 1]

by receiving, concealing, and facilitating the transportation and concealment of heroin while knowing that the heroin had been unlawfully imported into the United States. The third count charged the same offense with regard to the cocaine seized. The second count charged that petitioner purchased, possessed, dispensed, and distributed heroin not in or from the original stamped package in violation of 26 U.S.C. 4704(a). [Footnote 2] The fourth count made the same charge with regard to the cocaine. At the trial, the Government presented the evidence of the seizure of the packages containing heroin and cocaine, but presented no evidence on the origin of the drugs possessed by petitioner. Petitioner did not testify. With regard to Counts 1 and 3, the trial judge charged the jury, in accord with the statute, that the jury could infer from petitioner's unexplained possession of the heroin and cocaine that petitioner knew that the drugs he possessed had been unlawfully imported. With regard to Counts 2 and 4, the trial judge read to the jury the statutory provision making possession of drugs not in a stamped package " *prima facie* evidence" that the defendant purchased, sold, dispensed, or distributed

the drugs not in or from a stamped package. The jury returned a verdict of guilty on each count. Petitioner was sentenced to consecutive terms of 10 years' imprisonment on the first and third counts; a five-year term on the second count was to run concurrently with the term on the first count, and a five-year term on the fourth count was to run concurrently with the term on the third count.

On appeal to the Court of Appeals for the Third Circuit, petitioner argued that the trial court's instructions on the inferences that the jury might draw from unexplained possession of the drugs constituted violations of his privilege against self-incrimination by penalizing him for not testifying about his possession of the drugs. The Court of Appeals rejected this claim and affirmed, finding that the inferences from possession authorized by the statutes were permissible under prior decisions of this Court and that, therefore, there was no impermissible

penalty imposed on petitioner's exercise of his right not to testify. 404 F.2d 782 (1968). After the Court of Appeals' decision in this case, this Court held that a similar statutory presumption applicable to the possession of marihuana was unconstitutional as not having a sufficient rational basis. *Leary v. United States,* 395 U. S. 6 (1969). We granted a writ of certiorari in this case to reconsider, in light of our decision in *Leary,* whether the inferences authorized by the statutes here at issue are constitutionally permissible when applied to the possession of heroin and cocaine. 395 U.S. 933.

I

The statutory inference created by 174 has been upheld by this Court with respect to opium and heroin, *Yee Hem v. United States,* 268 U. S. 178 (1925); *Roviaro v. United States,* 353 U. S. 53 (1957), as well as by an

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unbroken line of cases in the courts of appeals. [Footnote 3] Similarly, in a case involving morphine, this Court has rejected a constitutional challenge to the inference authorized by 4704(a). *Casey v. United States,* 276 U. S. 413 (1928).

Leary v. United States, supra, dealt with a statute, 21 U.S.C. 176a, providing that possession of marihuana, unless explained to the jury's satisfaction, "shall be deemed sufficient evidence to authorize conviction" for smuggling, receiving, concealing, buying, selling, or facilitating the transportation, concealment, or sale of the drug, knowing that it had bee illegally imported. Referring to prior cases [Footnote 4] holding that a statue authorizing the inference of one fact from the proof of another in criminal cases must be subjected to scrutiny by the courts to prevent "conviction upon insufficient proof," 395 U.S. at 395 U. S. 37 , the Court read those cases as

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requiring the invalidation of the statutorily authorized inference

"unless it can at least be 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."

395 U.S. at 395 U. S. 36 . Since, judged by this standard, the inference drawn from the possession of marihuana was invalid, it was unnecessary to

"reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use."

395 U.S. at 395 U. S. 36 n. 64.

We affirm Turner's convictions under 174 and 4704(a) with respect to heroin (Counts 1 and 2), but reverse the convictions under these sections with respect to cocaine (Counts 3 and 4).

II

We turn first to the conviction for trafficking in heroin in violation of 174. Count 1 charged Turner with (1) knowingly receiving, concealing, and transporting heroin which (2) was illegally imported and which (3) he knew was illegally imported. *See Harris v. United States,* 359 U. S. 19 , 359 U. S. 23 (1959). For conviction, it was necessary for the Government to prove each of these three elements of the crime to the satisfaction of the jury beyond a reasonable doubt. The jury was so instructed, and Turner was found guilty.

The proof was that Turner had knowingly possessed heroin; since it is illegal to import heroin or to manufacture it here, [Footnote 5] he was also chargeable with knowing that his heroin had an illegal source. For all practical purposes, this was the Government's case. The trial judge, noting that there was no other evidence of importation

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or of Turner's knowledge that his heroin had come from abroad, followed the usual practice and instructed the jury -- as 174 permits, but does not require, that

possession of a narcotic drug is sufficient evidence to justify conviction of the crime defined in 174. [Footnote 6]

The jury, however, even if it believed Turner had possessed heroin, was not required by the instructions to find him guilty. The jury was instructed that it was the sole judge of the facts and the inferences to be drawn therefrom, that all elements of the crime must be proved beyond a reasonable doubt, and that the inference authorized by the statute did not require the defendant to present evidence. To convict, the jury was informed, it "must be satisfied by the totality of the evidence irrespective

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of the source from which it comes of the guilt of the defendant. . . ." The jury was obligated by its instructions to assess for itself the probative force of possession and the weight, if any, to be accorded the statutory inference. If it is true, as the Government contends, that heroin is not produced in the United States and that any heroin possessed here must have originated abroad, the jury, based on its own store of knowledge, may well have shared this view and concluded that Turner was equally well informed. Alternatively, the jury may have been without its own information concerning the sources of heroin, and may have convicted Turner in reliance on the inference permitted by the statute, perhaps reasoning that the statute represented an official determination that heroin is not a domestic product. [Footnote 7]

Whatever course the jury took, it found Turner guilty beyond a reasonable doubt, and the question on review is the sufficiency of the evidence, or, more precisely, the soundness of inferring guilt from proof of possession alone. Since the jury might have relied heavily on the inferences authorized by the statute and included in the court's instructions, our primary focus is on the validity of the evidentiary rule contained in 174. [Footnote 8]

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We conclude first that the jury was wholly justified in accepting the legislative judgment -- if, in fact, that is what the jury did -- that possession of heroin is equivalent to possessing imported heroin. We have no reasonable doubt that, at the present time, heroin is not produced in this country, and that, therefore, the heroin Turner had was smuggled heroin.

Section 174 or a similar provision has been the law since 1909. [Footnote 9] For 60 years, defendants charged under the

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statute have known that the section authorizes an inference of guilt from possession alone, that the inference is rebuttable by evidence that their heroin originated here, and that the inference itself is subject to challenge for lack of sufficient connection between the proved fact of possession and the presumed fact that theirs was smuggled merchandise. *Mobile, J. & K. C. R. Co. v. Turnipseed,* 219 U. S. 35 , 219 U. S. 43 (1910). Given the statutory inference and absent rebuttal evidence, as far as a defendant is concerned, the 174 crime is the knowing possession of heroin. Hence, if he is to avoid conviction, he faces the urgent necessity either to rebut or to challenge successfully the possession inference by demonstrating the fact or the likelihood of a domestic source for heroin, not necessarily by his own testimony, but through the testimony of others who are familiar with the traffic in drugs, whether government agents or private experts. Over the years, thousands of defendants, most of them represented by retained or appointed counsel, have been convicted under 174. Although there was opportunity in every case to challenge or rebut the inference based on possession, we are cited to no case, and we know of none, where substantial evidence showing domestic production of heroin has come to light. Instead, the inference authorized by the section, although frequently challenged, has been upheld in this Court and in countless cases in the district courts and courts of appeals, these cases implicitly reflecting the prevailing judicial view that heroin is not made in this country, but rather is imported from abroad. If this view is erroneous and heroin is or has

been produced in this country in commercial quantities, it is difficult to believe that resourceful lawyers with adversary proceedings at their disposal would not long since have discovered the truth and placed it on record.

This view is supported by other official sources. In 1956, after extensive hearings, the Senate Committee on the Judiciary found no evidence that heroin is produced commercially in this country. [Footnote 10] The President's Commission on Law Enforcement and Administration of Justice stated in 1967 that

"[a]ll the heroin that reaches the American user is smuggled into the country from

abroad, the Middle East being the reputed primary point of origin. [Footnote 11]"

The factors underlying these judgments may be summarized as follows: first, it is plain enough that it is illegal both to import heroin into this country [Footnote 12] and to manufacture it here; [Footnote 13] heroin is contraband, and is subject to seizure. [Footnote 14]

Second, heroin is a derivative of opium and can be manufactured from opium or from morphine or codeine,

which are also derived from opium. [Footnote 15] Whether heroin can be synthesized is disputed, but there is no evidence that it is being synthesized in this country. [Footnote 16]

Third, opium is derived from the opium poppy, which cannot be grown in this country without a license. [Footnote 17] No licenses are outstanding for commercial cultivation, [Footnote 18] and

there is no evidence that the opium poppy is illegally grown in the United States. [Footnote 19]

Fourth, the law forbids the importation of any opium product except crude opium required for medical and scientific purposes; [Footnote 20] importation of crude opium for the purpose of making heroin is specifically forbidden. [Footnote 21] Sizable amounts of crude opium are legally imported and used to make morphine and codeine. [Footnote 22]

Fifth, the flow of legally imported opium and of legally manufactured morphine and codeine is controlled too tightly to permit any significant possibility that heroin is manufactured or distributed by those legally licensed to deal in opium, morphine, or codeine. [Footnote 23]

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Sixth, there are recurring thefts of opium, morphine, and codeine from legal channels which could be used for the domestic, clandestine production of heroin. [Footnote 24] It is extremely unlikely that heroin would be made from codeine, since the process involved produces an unmanageable, penetrating stench which it would be very difficult to conceal. [Footnote 25] Clandestine manufacture of heroin from opium and morphine would not be subject to this difficulty; but, even on the extremely unlikely assumption that all opium and morphine stolen each year is used to manufacture heroin, the heroin so produced would amount to only a tiny fraction (less than 1%) of the illicit heroin illegally imported and marketed here. [Footnote 26] Moreover, a clandestine laboratory manufacturing

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heroin has not been discovered in many years. [Footnote 27]

Concededly, heroin could be made in this country, at least in tiny amounts. But the overwhelming evidence is that the heroin consumed in the United States

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is illegally imported. To possess heroin is to possess imported heroin. Whether judged by the "more likely than not" standard applied in *Leary v. United States, supra,* or by the more exacting reasonable doubt standard normally applicable in criminal cases, 174 is valid insofar as it permits a jury to infer that heroin possessed in this country is a smuggled drug. If the jury relied on the 174 instruction, it was entitled to do so. [Footnote 28]

Given the fact that little if any heroin is made in the United States, Turner doubtless knew that the heroin he had came from abroad. There is no proof that he had specific knowledge of who smuggled his heroin or when or how the smuggling was done, but we are confident that he was aware of the "high probability" that the heroin in his possession had originated in a foreign country. *Cf. Leary v. United States, supra,* at 395 U. S. 45 -53. [Footnote 29]

It may be that the ordinary jury would not always know that heroin illegally circulating in this country is not manufactured here. But Turner and others who sell or distribute heroin are in a class apart. [Footnote 30] Such

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people have regular contact with a drug which they know cannot be legally bought or sold; their livelihood depends on its availability; some of them have actually engaged in the smuggling process. The price, supply, and quality vary widely; [Footnote 31] the market fluctuates with the ability of smugglers to outwit customs and narcotics agents at home and abroad. [Footnote 32] The facts concerning heroin are available from many sources, frequently in the popular media. "Common sense" (*Leary v. United States, supra,* at 395 U. S. 46) tells us that those who traffic in heroin will inevitably become aware that the product they deal in is smuggled, [Footnote 33] unless they practice a studied ignorance to which they are not entitled. [Footnote 34] We therefore have little doubt that the inference of knowledge from the fact of possessing smuggled heroin is a sound one; hence, the court's instructions on the inference did not violate the right of Turner to be convicted only on a finding of guilt

beyond a reasonable doubt, and did not place impermissible pressure upon him to testify in his own defense. [Footnote 35] His conviction on Count 1 must be affirmed.

III

Turning to the same 174 presumption with respect to cocaine, we reach a contrary result. In *Erwing v. United States,* 323 F.2d 674 (C.A. 9th Cir.1963), a case involving a prosecution for dealing in cocaine, two experts had testified, one for the Government and one for the defense. It was apparent from the testimony that, while it is illegal to import cocaine, coca leaves, from which cocaine is prepared, are legally imported for processing into cocaine to be used for medical purposes. There was no evidence that sizable amounts of cocaine are either legally imported or smuggled. The trial court instructed on the 174 presumption, and conviction followed, but the Court of Appeals for the Ninth Circuit reversed, finding the presumption insufficiently sound to permit conviction.

Supplementing the facts presented in *Erwing, supra,* the United States now asserts that substantial amounts of cocaine are smuggled into the United States. However, much more cocaine is lawfully produced in this country than is smuggled into this country. [Footnote 36] The United States

concedes that thefts from legal sources, though totaling considerably less than the total smuggled, [Footnote 37] are still sufficiently large to make the 174 presumption invalid as applied to Turner's possession of cocaine. [Footnote 38] Based on our own examination of the facts now before us, we reach the same conclusion. Applying the "more likely than not" standard employed in *Leary, supra,* we cannot be sufficiently sure either that the cocaine that Turner possessed came from abroad or that Turner must have known that it did. The judgment on Count 3 must be reversed. [Footnote 39]

IV

26 U.S.C. 4704(a) [Footnote 40] makes it unlawful to purchase, sell, dispense, or distribute a narcotic drug not in or from the original package bearing tax stamps. In this case, Count 2 charged that Turner knowingly purchased, dispensed, and distributed heroin hydrochloride not in or

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from the original stamped package. [Footnote 41] Count 4 made the identical charge with respect to cocaine. Section 474(a) also provides that the absence of appropriate tax stamps shall be *prima facie* evidence of a violation by the person in whose possession the drugs are found. This provision was read by the trial judge to the jury. The conviction on Count 2 with respect to heroin must be affirmed. Since the only evidence of a violation involving heroin was Turner's possession of the drug, the jury, to convict, must have believed this evidence. But part and parcel of the possession evidence, and indivisibly linked with it, was the fact that Turner possessed some 275 glassine bags of heroin without revenue stamps attached. This evidence, without more, solidly established that Turner's heroin was packaged to supply individual demands, and was in the process of being distributed, an act barred by the statute. The general rule is that, when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, as Turner's indictment did, the verdict stands if the evidence is sufficient with respect to any one of the acts charged. [Footnote 42] Here, the evidence proved Turner was distributing heroin. The status of the case with respect to the other allegations is irrelevant to the

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validity of Turner's conviction. So, too, the instruction on the presumption is beside the point, since, even if invalid, it was harmless error; the jury must have believed the possession evidence which, in itself, established a distribution barred by the statute.

Moreover, even if the evidence as to possession is viewed as not, in itself, proving that Turner was distributing heroin, his conviction must be affirmed. True, the statutory inference, which, on this assumption, would assume critical importance, could not be sustained insofar as it authorized an inference of dispensing or distributing (or of selling if that act had been charged), for the bare fact of possessing heroin is far short of sufficient evidence from which to infer any of these acts. *Cf. Tot v. United States,* 319 U. S. 463 (1943); *United States v. Romano,* 382 U. S. 136 (1965). But the inference of purchasing in or from an unstamped package is another matter.

Those possessing heroin have secured it from some source. The act of possessing is itself sufficient proof that the possessor has not received it in or from the original stamped package, since it is so extremely unlikely that a package containing heroin would ever be legally stamped. All heroin found in this country is illegally imported. Those handling narcotics must register; [Footnote 43] registered persons do not deal in heroin, and only registered importers and manufacturers are permitted to purchase stamps. [Footnote 44] For heroin to be found in a stamped package, stamps would have to be stolen and fixed to the heroin container, and even then the stamps would immunize the transactions in the drug only from prosecution under 4704(a); all other laws against transactions in heroin would be unaffected by the presence of the stamps.

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There can thus be no reasonable doubt that one who possesses heroin did not obtain it from a stamped package.

Even so, obtaining heroin other than in the original stamped package is not a crime under 4704(a). Of the various ways of acquiring heroin, *e.g.,* by gift, theft, bailment or purchase, only purchasing is proscribed by the section. Since heroin is a high-priced product, [Footnote 45] it would be very unreasonable to assume that any sizable number of possessors have not paid for it, one way or another. Perhaps a few acquire it by gift, and some heroin undoubtedly is stolen, but most users may be presumed to purchase what they use. The same may be said for

those who sell, dispense, or distribute the drug. There is no reasonable doubt that a possessor of heroin who has purchased it did not purchase the heroin in or from the original stamped package. We thus would sustain the conviction on Count 2 on the basis of a purchase not in or from a stamped package even if the evidence of packaging did not point unequivocally to the conclusion that Turner was distributing heroin not in a stamped package.

V

Finally, we consider the validity of the 470(a) presumption with respect to cocaine. The evidence was that, while in the custody of the police, Turner threw away a tinfoil package containing a mixture of cocaine and sugar, which, according to the Government, is not the form in which cocaine is distributed for medicinal purposes. [Footnote 46] Unquestionably, possession was amply proved by the evidence, which the jury must have believed, since it returned a verdict of guilty. But the

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evidence with respect to Turner's possession of cocaine does not so surely demonstrate that Turner was in the process of distributing this drug. Would the jury automatically and unequivocally know that Turner was distributing cocaine simply from the fact that he had 14.68 grams of a cocaine and sugar mixture? True, his possession of heroin proved that he was dealing in drugs, but having a small quantity of a cocaine and sugar mixture is itself consistent with Turner's possessing the cocaine not for sale but exclusively for his personal use.

Since Turner's possession of cocaine did not constitute an act of purchasing, dispensing, or distributing, the instruction on the statutory inference becomes critical. As in the case of heroin, bare possession of cocaine is an insufficient predicate for concluding that Turner was dispensing or distributing. As for the remaining possible violation, purchasing other than in or from the original stamped package, the presumption, valid as to heroin, is infirm as to cocaine.

While one can be confident that cocaine illegally manufactured from smuggled coca leaves or illegally imported after manufacturing would not appear in a

stamped package at any time, cocaine, unlike heroin, is legally manufactured in this country; [Footnote 47] and we have held that sufficient amounts of cocaine are stolen from legal channels to render invalid the inference authorized in 174 that any cocaine possessed in the United States is smuggled cocaine. *Supra* at 396 U. S. 418 -419. Similar reasoning undermines the 4704(a) presumption that a defendant's possession of unstamped cocaine is *prima facie* evidence that the drug was purchased not in or from the original stamped container. The thief who steals cocaine very probably obtains it in or from a stamped package. There is a reasonable possibility that Turner

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either stole the cocaine himself or obtained it from a stamped package in possession of the actual thief. The possibility is sufficiently real that a conviction resting on the 4704(a) presumption cannot be deemed a conviction based on sufficient evidence. To the extent that *Casey v. United States,* 276 U. S. 413 (1928), is read as giving general approval to the 4704(a) presumption, it is necessarily limited by our decision today. Turner's conviction on Count 4 must be reversed.

For the reasons stated above, we affirm the judgment of conviction as to Counts 1 and 2 and reverse the judgment of conviction as to Counts 3 and 4.

It is so ordered.

[Footnote 1]

Insofar as here relevant, this section provides:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of

the United States, shall be imprisoned. . . ."

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Heroin, a derivative of opium, and cocaine, a product of coca leaves, are within the meaning of the term "narcotic drug" as used in 21 U.S.C. 174. *See* 21 U.S.C. 171 (which refers to 3228(g) of Int.Rev.Code of 1939, now 26 U.S.C. 4731(a)).

[Footnote 2]

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package, and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

The term "narcotic drugs" is defined to include derivatives of opium and products of coca leaves. 26 U.S.C. 4731(a).

[Footnote 3]

Decisions of the courts of appeals accepting application of the presumption to persons found in possession of opium, morphine, or heroin include *Gee Woe v. United States,* 250 F. 428 (C.A. 5th Cir.), *cert. denied,* 248 U.S. 562 (1918) (smoking opium); *Charley Toy v. United States,* 266 F. 326 (C.A.2d Cir.), *cert. denied,* 254 U.S. 639 (1920) (smoking opium); *Copperthwaite v. United States,* 37 F.2d 846 (C.A. 6th Cir.1930) (morphine); *United States v. Liss,* 105 F.2d 144 (C.A.2d Cir.1939) (morphine); *Dear Check Quong v. United States,* 82 U.S.App.D.C. 8, 160 F.2d 251 (1947) (unspecified narcotics); *Cellino v. United States,* 276 F.2d 941 (C.A. 9th Cir.1960) (heroin); *Walker v. United States,* 285 F.2d 52 (C.A. 5th Cir.1960) (heroin); *United States v. Savage,* 292 F.2d 264 (C.A.2d Cir.), *cert. denied,* 368 U.S. 880 (1961) (heroin); *United States v.*

Gibson, 310 F.2d 79 (C.A.2d Cir.1962) (heroin); *Lucero v. United States,* 311 F.2d 457 (C.A. 10th Cir.1962), *cert. denied sub nom. Maestas v. United States,* 372 U.S. 936 (1963) (heroin); *Garcia v. United States,* 373 F.2d 806 (C.A. 10th Cir.1967) (heroin).

[Footnote 4]

Especially *Tot v. United States,* 319 U. S. 463 (1943), *United States v. Gainey,* 380 U. S. 63 (1965), and *United States v. Romano,* 382 U. S. 136 (1965).

[Footnote 5]

See infra, nn. 12 13

[Footnote 6]

Under prior decisions, principally *United States v. Gainey,* 380 U. S. 63 (1965), such statutory provisions authorize, but do not require, the trial judge to submit the case to the jury when the Government relies on possession alone, authorize, but do not require, an instruction to the jury based on the statute, and authorize, but do not require, the jury to convict based on possession alone. The defendant is free to challenge either the inference of illegal importation or the inference of his knowledge of that fact, or both. *Harris v. United States,* 359 U. S. 19 , 359 U. S. 23 (1959); *Roviaro v. United States,* 353 U. 9. 53, 63 (1957); *Yee Hem v. United States,* 268 U. S. 178 , 268 U. S. 185 (1925); *United States v. Peeples,* 377 F.2d 205 (C.A.2d Cir.1967); *Chavez v. United States,* 343 F.2d 85 (C.A. 9th Cir.1965); *Griego v. United States,* 298 F.2d 845 (C.A. 10th Cir.1962). Even when the defendant challenges the validity of the inference as applied to his case, the instruction on the statutory inference is normally given. *See, e.g., McIntyre v. United States,* 380 F.2d 746 (C.A. 9th Cir.), *cert. denied,* 389 U.S. 952 (1967); *United States v. Peeples, supra; Vick v. United States,* 113 U.S.App.D.C. 12, 304 F.2d 379 (1962); *Griego v. United States, supra; Walker v. United States,* 285 F.2d 52 (C.A. 5th Cir.1960); *United States v. Feinberg,* 123 F.2d 425 (C.A. 7th Cir.1941), *cert. denied,* 315 U.S. 801 (1942). *See also Erwin v. United States,* 323 F.2d 674 (C.A. 9th Cir.193); *Caudillo v. United States,* 253 F.2d 513 (C.A.

9th Cir.), *cert. denied sub nom. Romero v. United States,* 367 U.S. 931 (1958).

[Footnote 7]

In *United States v. Peeples, supra,* the jury, after deliberating for a time, asked the judge about the percentage of heroin in the United States that is produced illegally in this country.

"As there was no evidence in the record concerning areas of the world where heroin is produced, the judge declined to answer the . . . inquiry. . . ."

377 F.2d at 208. The defendant was found guilty by the jury; however, the Court of Appeals reversed for reasons not directly related to the trial judge's treatment of the question about the origins of heroin possessed in this country.

[Footnote 8]

See Leary v. United States, 395 U. S. 6 , 395 U. S. 31 -32 (1969); *United States v. Romano, supra,* at 382 U. S. 138 -139 (1965); *Bailey v. Alabama,* 219 U. S. 219 , 23235 (1911).

Arguably, in declaring possession to be ample evidence to convict for trafficking in illegally imported drugs, Congress in effect has made possession itself a crime as an incident to its power over foreign commerce. *Cf. Ferry v. Ramsey,* 277 U. S. 88 (1928). But the crime defined by the statute is not possession, and the Court has rejected this basis for sustaining this and similar statutory inferences. *Leary v. United States, supra,* at 395 U. S. 34 , 395 U. S. 37 ; *United States v. Romano, supra,* at 142-144; *Harris v. United States, supra,* at 359 U. S. 23 ; *Roviaro v. United States, supra.,* at 353 U. S. 62 -63; *Tot v. United States, supra,* at 319 U. S. 472 .

The Court has also refused to accept the suggestion that, since the source of his drugs is perhaps more within the defendant's knowledge than the Government's, it violates no rights of the defendant to permit conviction based on possession alone when the defendant refuses to demonstrate a legal source for his drugs. *Leary v. United States, supra,* at 395 U. S. 32 -34. *See also Tot v. United States, supra,*

at 319 U. S. 469 -470. The difficulties with the suggested approach are obvious: if the Government proves only possession, and if possession is itself insufficient evidence of either importation or knowledge, but the statute nevertheless permits conviction where the defendant chooses not to explain, the Government is clearly relieved of its obligation to prove its case unaided by the defendant, and the defendant is made to understand that, if he fails to explain, he can be convicted on less than sufficient evidence to constitute a *prima facie* case. *See Tot v. United States, supra,* at 319 U. S. 469 .

[Footnote 9]

The original provision, applicable to opium and derivatives, was contained in the Act of February 9, 1909, 2, 35 Stat. 614. It was revised and extended to cover cocaine and coca leaves by the Act of May 26, 1922, 1, 42 Stat. 596. The provision establishing the presumption was adopted without extended discussion or debate; it was consciously modeled on a provision of 3082 of the Revised Statutes (now in 18 U.S.C. 545), originating in the Smuggling Act of 1866, 4, 14 Stat. 179. *See* H.R.Rep. No. 1878, 60th Cong., 2d Sess., 1-2 (1909); H.R.Rep. No. 2003, 60th Cong., 2d Sess., 1 (1909). *See also* Sandler, The Statutory Presumption in Federal Narcotics Prosecutions, 57 J.Crim.L.C. & P.S. 7 (1966).

[Footnote 10]

In 1955, the Subcommittee on Improvements in the Federal Criminal Code of the Senate Committee on the Judiciary held hearings throughout the country on the illicit narcotics traffic in this country. The subcommittee heard 345 witnesses, including government officials, law enforcement officers, and addicts and narcotics law violators; the testimony heard covers several thousand pages. Hearings on Illicit Narcotics Traffic before the Subcommittee on Improvements in the Federal Criminal Code of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. (1955) (hereinafter cited as 1955 Senate Hearings). The evidence gathered in these hearings was the basis of S. 3760, 84th Cong., 2d Sess. (1956). The Senate bill contained a section (proposed 1402, Tit. 18) very similar to 174 but applicable exclusively to heroin; this proposed section included the 174 presumption. Another

proposed section (proposed 1403, Tit. 18, enacted with minor changes and now codified in 21 U.S.C. 176b) authorized special, severe penalties for the sale of unlawfully imported heroin to juveniles; this section contained a provision that possession of heroin was sufficient to prove that the heroin had been illegally imported. *See* S.Rep. No.1997, 84th Cong., 2d Sess., 30 (1956) (proposed 1402, 1403). The presumption that heroin found in this country has been illegally imported was based on findings of the Committee that foreign sources supply all important quantities of heroin circulating in this country, *id.* at 3-7, and these findings were, in turn, based on ample evidence presented to the Subcommittee on Improvements in the Federal Criminal Code. *See* 1955 Senate Hearings 90 (testimony of Commissioner Anslinger of the Federal Bureau of Narcotics).

[Footnote 11]

President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Narcotics and Drug Abuse 3 (197) (hereinafter cited a Task Force Report). *See also* U.N. Commission on Narcotic Drugs, Report of the Eighteenth Session, U.N.Doc. E/CN.7/455, p. 15 (1963); S. Jeffee, Narcotics -- An American Plan 12-14, 63-71 (1966).

[Footnote 12]

Title 21 U.S.C. 173 makes it unlawful to import any narcotic drug except amounts of crude opium and coca leaves necessary to provide for medical and legitimate uses. In addition, for more than 45 years, it has been unlawful to import opium for the purpose of manufacturing heroin. Act of June 7, 1924, 43 Stat. 657 (now codified in 21 U.S.C. 173). Though 21 U.S.C. 513 permits the Secretary of the Treasury to authorize the importation of any narcotic drug for delivery to governmental officials or to any person licensed to use the drugs for scientific purposes, the Secretary has never authorized the importation of any heroin under this provision. Brief for the United States 18 n. 12.

[Footnote 13]

The Narcotics Manufacturing Act of 1960, 74 Stat. 55, 21 U.S.C. 501-517, prohibits the manufacture of narcotic drugs except under a license issued by the Secretary of the Treasury for the production of an approved drug. Since heroin is not considered useful for medical purposes, no production for medical use has been authorized; heroin used in scientific experimentation is supplied entirely from quantities seized by law enforcement officials. Brief for the United States 17 n. 10.

[Footnote 14]

21 U.S.C. 173. *See* S.Rep. No.1997, 84th Cong., 2d Sess., 7 (1956). In 1956, all heroin then lawfully outstanding was required to be surrendered. Act of July 18, 1956, 201, 70 Stat. 572 (codified as 18 U.S.C. 1402).

[Footnote 15]

The clandestine manufacture of heroin from opium or morphine is said in one report to be "child's play." Vaille & Bailleul, Clandestine Heroin Laboratories, 5 U.N. Bulletin on Narcotics, No. 4, Oct.-Dec.1953, pp. 1, 6. The possibility of producing heroin from codeine (with a yield of about 22%) was first reported in Rapoport, Lovell, & Tolbert, The Preparation of Morphine-N-methyl-C^14, 73 J.Am.Chem.Soc. 5900 (1951), and was verified in Gates & Tschudi, The Synthesis of Morphine, 74 J.Am.Chem.Soc. 1109 (1952). The Bureau of Narcotics and Dangerous Drugs reports that conversion of codeine into morphine (from which heroin may be produced) is relatively simple, and requires inexpensive equipment but produces an extremely noxious and penetrating odor which would make concealment of such conversion operations virtually impossible. Supplemental Memorandum for the United States 2.

[Footnote 16]

The Bureau of Narcotics and Dangerous Drugs reports that it knows of no case in which synthetic heroin has been produced; it reports that experiments indicate that production of synthetic morphine would be extremely difficult. Brief for the United States 20 n. 17. *Amicus* Burgess suggests the possibility of synthetic production of heroin, but cites in support only a case involving an unsuccessful attempt to

synthesize morphine, *United States v. Liss,* 137 F.2d 995 (C.A.2d Cir.), *cert. denied,* 320 U.S. 773 (1943). Brief for Cleveland Burgess as *Amicus Curiae* 11.

[Footnote 17]

Opium Poppy Control Act of 1942, 56 Stat. 1045, 21 U.S.C. 188-188n.

[Footnote 18]

The regulations provide that a license to produce opium poppies shall be issued only when it is determined by the Director of the Bureau of Narcotics and Dangerous Drugs that the medical and scientific needs of the country cannot be met by the importation of crude opium. 21 CFR 303.5(a). Imports of crude opium have been sufficient to meet all domestic medical and scientific needs, and the United States is therefore not an opium producing country. Blum & Braunstein, Mind-Altering Drugs and Dangerous Behavior: Narcotics, in Task Force Report App. A-2, at 40. *See also* Brief for the United States 23 n. 25.

[Footnote 19]

The most recent reported case involving a prosecution for unlawful production of opium poppies is *Az Din v. United States,* 232 F.2d 283 (C.A. 9th Cir.), *cert. denied,* 352 U.S. 827 (1956). Unlike the case of marihuana, *see Leary, supra,* at 395 U. S. 42 -43, there are no reports of the discovery in this country of fields of opium poppies requiring destruction. This fact, together with the facts that opium poppies are hard to conceal because of their color and that the harvesting of opium is only economically feasible in countries with an abundant supply of cheap labor, justifies a conclusion that little if any opium poppy production is going on in this country. *See* Brief for the United States 21-23.

[Footnote 20]

21 U.S.C. 173.

[Footnote 21]

Ibid. *See supra,* n 12.

[Footnote 22]

In 1966, the United States imported 173,951 kilograms of crude opium; in the same year, 715 kilograms of morphine and 30,662 kilograms of codeine were produced from imported opium. U.S. Treasury Department, Bureau of Narcotics, Traffic in Opium and Other Dangerous Drugs, Report for the Year Ended December 31, 1967, p. 41 (1968).

[Footnote 23]

The manufacture of narcotic drugs is very carefully controlled and monitored under the Narcotics Manufacturing Act of 1960, 74 Stat. 55, 21 U.S.C. 501-517. The subsequent distribution of narcotic drugs is controlled and monitored under the laws enforcing the taxes imposed on those dealing in narcotic drugs. 26 U.S.C. 4701-4707, 4721-4736, 4771-4776.

[Footnote 24]

Because of the controls and reporting requirements applicable to those handling narcotic drugs, *see supra,* n 23, the Bureau of Narcotics and Dangerous Drugs can compile accurate figures on the quantities of narcotic drugs stolen from legitimate channels. From 1964 through 1968, total thefts of medical opium per year ranged from 9.6 kilograms to 12.9 kilograms; thefts of morphine for the same period ranged from 6.7 kilograms to 10.2 kilograms per year; annual thefts of codeine for the same years ran between 30.0 kilograms and 81.8 kilograms. Brief for the United States 44. On the possibility of clandestine manufacture of heroin from opium, morphine, and codeine, *see supra,* n 15.

[Footnote 25]

See supra, n 15.

[Footnote 26]

Using figure on the number of known addicts and the average daily dose, federal agencies estimate that roughly 1,500 kilogram of heroin are smuggled into the United States each year. Task Force Report 6. The Bureau of Narcotics and Dangerous Drugs estimates that no more than about one kilogram of heroin could have been produced if all the opium stolen in any recent year had been clandestinely converted into heroin. The largest total amount of morphine stolen in a recent year would have yielded about 10.2 kilograms of heroin if it had all been converted into heroin. Brief for the United States 19 n. 15.

If it were assumed that all stolen codeine is converted into heroin, the figure for the possible clandestine domestic production of heroin would be well over 1% of the total heroin marketed in this country. Codeine can be made to yield about 22% heroin. *See supra,* n 15. Applying this conversion rate to the largest annual amount of codeine stolen in the last five years (81.8 kilograms, *see supra,* n 24) would give a figure of about 18 kilograms for the maximum amount of heroin that might have been produced from stolen codeine in any recent year. On the assumption that all stolen opium, morphine, and codeine is converted into heroin, the amount of heroin domestically produced from stolen opium and its derivatives would amount to no more than about 30 kilograms, only about 2% of the 1,500 kilograms of heroin estimated to be illegally imported each year. Whether such a percentage, rather than the figure of less than 1% obtained by excluding codeine from consideration, would alter our conclusions need not be discussed, for the fact that the conversion process creates a stench makes it unrealistic to assume that stolen codeine is clandestinely converted into heroin. *See supra,* n 15.

[Footnote 27]

Statement by the United States Delegation on the Illicit Traffic to the Twenty-third Session of the U.N. Commission on Narcotic Drugs, January 1969, U.N. Doc. SD/E/CN.7/131, Annex A, p. 3. One respected work on narcotics makes the claim, without further elaboration, that "recent information" leads to the conclusion that some illicit laboratories used for the conversion of opium or morphine into heroin are located in the United States. D. Maurer & V. Vogel, Narcotics and Narcotic Addiction 64 (3d ed.1967). However, the same statement, without elaboration,

appears in the 1954 edition of the work, D. Maurer & V. Vogel, Narcotics and Narcotics Addiction 50, and this fact, together with the absence of any cited basis for the claim and the lack of supporting evidence elsewhere in the literature, leads us to believe that the statement, if it was ever correct, is no longer accurate.

[Footnote 28]

It is, of course, possible for the situation to change either through the development of a simple method of synthesizing heroin or through the creation of substantial clandestine operations utilizing opium or morphine which has been illegally imported or which, though legally here, has been stolen.

[Footnote 29]

The Court in *Leary,* 395 U.S. at 395 U. S. 46 n. 93, employed the definition of "knowledge" in Model Penal Code 2.02(7) (Proposed Official Draft, 1962):

"When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."

[Footnote 30]

Though the federal narcotics laws are, in terms, applicable to most possessors of illicit drugs regardless of whether the possessor is a user or a dealer, the enforcement efforts of the Bureau of Narcotics and Dangerous Drugs are directed to the development of evidence against "major sources of supply, wholesale peddlers, interstate and international violators." Hearings on the Narcotic Rehabilitation Act of 1966 before a Special Subcommittee of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., 448 (1966) (hereinafter cited as 1966 Senate Hearings) (testimony of Commissioner Giordano of the Federal Bureau of Narcotics). The undisputed evidence that Turner possessed 275 glassine bags of heroin clearly shows that Turner was more than a mere user of heroin, and was engaged in the distribution of the drug.

[Footnote 31]

See Task Force Report 3. *See also* 1955 Senate Hearings 3889, 4219.

[Footnote 32]

For example, a seizure of a large amount of pure heroin in Montreal, Canada, caused a "panic" in New York City that lasted almost three months. 1966 Senate Hearing 87.

[Footnote 33]

Such a conclusion is also justified with regard to those users and addicts who frequently purchase supplies of heroin on the retail market. Such persons are, of course, aware of the variations in price and availability of the drug, and of the fact that the success of anti-smuggling efforts of law enforcement officials affects the supply of heroin on the market. *See supra* this page and nn. 31 32

[Footnote 34]

See Griego v. United States, 298 F.2d 845, 849 (C.A. 10th Cir.1962).

[Footnote 35]

"The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances, and not from any form of compulsion forbidden by the Constitution."

Yee Hem v. United States, 268 U. S. 178 , 268 U. S. 185 (1925).

[Footnote 36]

In 1966, 609 kilograms of cocaine were produced. U.S. Treasury Department, Bureau of Narcotics, Traffic in Opium and Other Dangerous Drugs, Report for the Year Ended December 31, 1967, p. 42 (1968). Annual seizures of cocaine at ports

and borders for the years 1963 through 1967 ranged from 1.44 kilograms to 17.71 kilograms; the Bureau of Narcotics and Dangerous Drugs estimates that no more than about 10% of cocaine that is attempted to be smuggled into the United States is discovered and seized at ports and borders. Brief for the United States 31 n. 31.

[Footnote 37]

From 1963 through 1968, the amount of cocaine stolen from legal channels annually ranged from 2.8 kilograms to 6.2 kilograms. Brief for the United States 44.

[Footnote 38]

Brief for the United States 282.

[Footnote 39]

Since the illegal possessor's only source of domestic cocaine is that which is stolen, the United States urges that the 174 presumption may be valid with respect to sellers found with much larger amount of cocaine than Turner had, amounts which, it is claimed, are too large to have been removed from legal channels, and which must therefore have been smuggled. Brief for the United States 31. We find it unnecessary to deal with these problems, and postpone their consideration to another day, hopefully until after the facts have been presented in an adversary context in the district courts.

[Footnote 40]

See supra, n 2.

[Footnote 41]

The indictment charged Turner with possessing heroin as well as purchasing, dispensing, and distributing the drug. The instructions to the jury made the same error. No objection was made in the trial court, and the issue was not raised in the Court of Appeals or in this Court. The error was harmless, in any event, since the

possession evidence proved that Turner was distributing heroin. *See infra* this page.

[Footnote 42]

Crain v. United States, 162 U. S. 625 , 162 U. S. 634 -636 (1896); *Smith v. United States,* 234 F.2d 385, 389-390 (C.A. 5th Cir.1956); *Price v. United States,* 150 F.2d 283 (C.A. 5th Cir.1945), *cert. denied,* 326 U.S. 789 (1946). *See also Claassen v. United States,* 142 U. S. 140 (1891); *The Confiscation Cases,* 20 Wall. 92, 87 U. S. 104 (1874).

[Footnote 43]

26 U.S.C. 4721, 4722. *See also* 26 U.S.C. 4702(a)(2)(C).

[Footnote 44]

26 CFR 151.130, 151.41.

[Footnote 45]

Heroin is reported to sell for around $5 per "bag" or packet. Task Force Report 3.

[Footnote 46]

Brief for the United States 33.

[Footnote 47]

Supra, n 36.

MR. JUSTICE MARSHALL, concurring in the judgment.

I concur in the judgment of the Court, affirming petitioner's conviction on Counts 1 and 2 and reversing his conviction on Counts 3 and 4. In so doing, however, I can agree with the majority on Count 2 only insofar as it concludes that evidence of possession of 275 glassine bags of heroin proved beyond a reasonable doubt that Turner was distributing heroin in violation of 26 U.S.C. 474(a). That same

evidence does not establish that he had purchased the heroin in violation of that statute.

The opinion of the Court establishes convincingly the virtual certainty that the heroin in Turner's possession had been illegally imported into the country. It was thus proper with regard to Count 1 for the trial judge to instruct the jurors, in effect, that, if they found that Turner did indeed possess the drug, they could infer that the heroin had been illegally imported, and impute knowledge of that fact to Turner. However, the instruction that possession is *prima facie* evidence of a violation of 4704(a) is quite different. It may be true that most persons who possess heroin have purchased it not in or from a stamped package. However, Turner

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himself may well have obtained the heroin involved here in any of a number of ways -- for example, by stealing it from another distributor, or by manufacturing or otherwise acquiring it abroad and smuggling it into this country. Given the dangers that are inherent in any statutory presumption or inference, some of which are set out in the dissenting opinion of MR. JUSTICE BLACK, I cannot agree with the wholly speculative and conjectural holding that, because Turner possessed heroin, he must have purchased it in violation of 4704(a).

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

Few if any decisions of this Court have done more than this one today to undercut and destroy the due process safeguards the federal Bill of Rights specifically provides to protect defendants charged with crime in United States courts. Among the accused's Bill of Rights' guarantees that the Court today weakens are:

1. His right not to be compelled to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury;

2. The right to be informed of the nature and cause of the accusation against him;

3. The right not to be compelled to be a witness against himself;

4. The right not to be deprived of life, liberty, or property without due process of law;

5. The right to be confronted with the witnesses against him;

6. The right to compulsory process for obtaining witnesses for his defense;

7. The right to counsel; and

8. The right to trial by an impartial jury.

The foregoing rights are among those that the Bill of Rights specifically spells out and that due process

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requires that a defendant charged with crime must be accorded. The Framers of our Constitution and Bill of Rights were too wise, too pragmatic, and too familiar with tyranny to attempt to safeguard personal liberty with broad, flexible words and phrases like "fair trial," "fundamental decency," and "reasonableness." Such stretchy, rubber-like terms would have left judges constitutionally free to try people charged with crime under will-o'-the-wisp standards improvised by different judges for different defendants. Neither the Due Process Clause nor any other constitutional language vests any judge with such power. Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind that brings new political administrations into temporary power. Rather, our Constitution was fashioned to perpetuate liberty and justice by marking clear, explicit, and lasting constitutional boundaries for trials. One need look no further than the language of that sacred document itself to be assured that defendants charged with crime are to be accorded due process of law -- that is, they are to be tried as the Constitution and the laws passed pursuant to it prescribe, and not under arbitrary procedures that a particular majority of sitting judges may see fit to label as "fair" or "decent." I wholly, completely, and permanently reject the so-called "activist" philosophy of some judges which leads them to construe our Constitution as meaning what they now think it should mean

in the interest of "fairness and decency" as they see it. This case and the Court's holding in it illustrate the dangers inherent in such an "activist" philosophy.

Commercial traffic in deadly mind-, soul-, and body-destroying drugs is, beyond doubt, one of the greatest evils of our time. It cripples intellects, dwarfs bodies, paralyzes the progress of a substantial segment of

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our society, and frequently makes hopeless and sometimes violent and murderous criminals of persons of all ages who become its victims. Such consequences call for the most vigorous laws to suppress the traffic, as well as the most powerful efforts to put these vigorous laws into effect. Unfortunately, grave evils such as the narcotics traffic can too easily cause threats to our basic liberties by making attractive the adoption of constitutionally forbidden shortcuts that might suppress and blot out more quickly the unpopular and dangerous conduct. That is exactly the course I think the Court is sanctioning today. I shall now set out in more detail why I believe this to be true.

Count 1 of the indictment against Turner, as the Court's opinion asserts, and as I agree,

"charged Turner with (1) knowingly receiving, concealing, and transporting heroin which (2) was illegally imported and which (3) he knew was illegally imported. . . . For conviction, it was necessary for the Government to prove each of these three elements of the crime to the satisfaction of the jury beyond a reasonable doubt."

Ante at 396 U. S. 405 . The Court in the above statement is merely reaffirming the fundamental constitutional principle that the accused is presumed innocent until he is proved guilty, and that the Government, before it can secure a conviction, must demonstrate to the jury beyond a reasonable doubt each essential element of the alleged offense. This basic principle is clearly reflected in several provisions of the Bill of Rights. The Fifth and Sixth Amendments provide that, as a part of due process of law, a person held for criminal prosecution shall be charged on a presentment or indictment of a grand jury, and that the defendant

shall "be informed of the nature and cause of the accusation." The purpose of these requirements

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is obviously to compel the Government to state and define specifically what it must prove in order to convict the defendant, so that he can intelligently prepare to defend himself on each of the essential elements of the charge. And to aid the accused in making his defense to the charges thus defined, the Bill of Rights provides the accused explicit guarantees -- the privilege against self-incrimination, the right to counsel, the right to confront witnesses against him, and to call witnesses in his own behalf -- all designed to assure that the jury will, as nearly as humanly possible, be able to consider fully all the evidence and determine the truth of every case.

Having invoked the above principles, however, the Court then proceeds to uphold Turner's conviction under Count I despite the fact that the prosecution introduced absolutely no evidence at trial on two of the three essential elements of the crime. To show this, I think one need look no further than the Court's own opinion. The Court says:

"The proof was that Turner had knowingly possessed heroin; since it is illegal to import heroin or to manufacture it here, he was also chargeable with knowing that his heroin had an illegal source. For all practical purposes, this was the Government's case."

Ante at 396 U. S. 405 .

"Whatever course the jury took, it found Turner guilty beyond a reasonable doubt, and the question on review is the sufficiency of the evidence, or, more precisely, the soundness of inferring guilt from *proof of possession alone.* "

Ante at 396 U. S. 407 . (Emphasis added.) These passages show that the Government wholly failed to meet its burden of proof at trial on two of the elements Congress deemed essential to the crime it defined. The prosecution introduced no

evidence to prove either

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(1) that the heroin involved was illegally imported or (2) that Turner knew the heroin was illegally imported. The evidence showed only that Turner was found in possession of heroin.

I do not think a reviewing court should permit to stand a conviction as wholly lacking in evidentiary support as is Turner's conviction under Count 1. *Bozza v. United States,* 330 U. S. 160 (1947). *See also Thompson v. Louisville,* 362 U. S. 199 (1960). When the evidence of a crime is insufficient as a matter of law, as the evidence here plainly is, a reversal of the conviction is in accord with the historic principle that

"independent trial judges and independent appellate judges have a most important place under our constitutional plan, since they have power to set aside convictions."

United States ex rel. Toth v. Quarles, 350 U. S. 11 , 350 U. S. 19 (1955). I would therefore reverse Turner's conviction under Count 1 without further ado. Moreover, as the majority opinion and the record in this case indicate, petitioner's convictions under Counts 3 and 4 are also based upon totally insufficient evidence, for, as in Count 1, the prosecution failed to introduce any evidence to support certain essential elements of the crimes charged under these counts. They, too, should be reversed for lack of evidence.

The Court attempts to take the stark nakedness of the evidence against Turner on these counts and clothe it in "presumptions" or "inferences" authorized by 21 U.S.C. 174 and 26 U.S.C. 4704(a). Apparently the Court feels that the Government can be relieved of the constitutional burden of proving the essential elements of its case by a mere congressional declaration that certain evidence shall be deemed sufficient to convict. Such an idea seems to me to be totally at variance with what the Constitution requires. Congress can undoubtedly create crimes and define their elements, but it cannot, under our Constitution, even

partially remove

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from the prosecution the burden of proving at trial each of the elements it has defined. The fundamental right of the defendant to be presumed innocent is swept away to precisely the extent judges and juries rely upon the statutory presumptions of guilt found in 21 U.S.C. 174 and 26 U.S.C. 4704(a). And each of the weapons given by the Bill of Rights to the criminal accused to defend his innocence -- the right to counsel, the right to confront the witnesses against him and to subpoena witnesses in his favor, the privilege against self-incrimination -- is nullified to the extent that the Government, to secure a conviction, does not have to introduce any evidence to support essential allegations of the indictment it has brought. It would be a senseless and stupid thing for the Constitution to take all these precautions to protect the accused from governmental abuses if the Government could, by some sleight-of-hand trick with presumptions, make nullities of those precautions. Such a result would completely frustrate the purpose of the Founders to establish a system of criminal justice in which the accused -- even the poorest and most humble -- would be able to protect himself from wrongful charges by a big and powerful government. It is little less than fantastic even to imagine that those who wrote our Constitution and the Bill of Rights intended to have a government that could create crimes of several separate and independent parts and then relieve the government of proving a portion of them. Of course, within certain broad limits, it is not necessary for Congress to define a crime to include any particular set of elements. *But if it does,* constitutional due process requires the Government to prove each element beyond a reasonable doubt before it can convict the accused of the crime it deliberately and clearly defined. Turner's trial therefore reminds me more of Daniel being cast into the lion's den than it does of a constitutional proceeding. The Bible

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tells us Daniel was saved by a miracle, but when this Court says its final word in this case today, we cannot expect a miracle to save petitioner Turner.

I would have more hesitation in setting aside these jury verdicts for insufficiency of the evidence were I confident that the jury had been allowed to make a free and unhampered determination of guilt or innocence as the jury trial provisions of Article III of the Constitution and the Sixth Amendment require. The right to trial by jury includes the right to have the jury and the jury alone find the facts of the case, including the crucial fact of guilt or innocence. *See, e.g., United States ex rel. Toth v. Quarles,* 350 U. S. 11 , 350 U. S. 15 -19 (1955). This right to have the jury determine guilt or innocence necessarily includes the right to have that body decide whether the evidence presented at trial is sufficient to convict. Turner's convictions on each count were secured only after the jury had been explicitly instructed by the trial judge that proof of Turner's mere possession of heroin and cocaine "shall be deemed sufficient evidence to authorize conviction" under 21 U.S.C. 174, and "shall be *prima facie* evidence of a violation" of 26 U.S.C. 4704(a). App. 15-18. In my view, these instructions to the jury impermissibly interfered with the defendant's Sixth Amendment right to have the jury determine when evidence is sufficient to justify a finding of guilt beyond a reasonable doubt.

The instructions directing the jury to presume guilt in this case were not, of course, the trial judge's own inspiration. Congress, in enacting the statutory presumptions purporting to define and limit the quantum of evidence necessary to convict, has injected its own views and controls into the guilt-determining, factfinding process vested by our Constitution exclusively in the Judicial Branch of our Government. The Fifth Amendment's command that cases be tried according to due

process of law includes the accused's right to have his case tried by a judge and a jury in a court of law without legislative constraint or interference. These statutory presumptions clearly violate the command of that Amendment. Congress can declare a crime, but it must leave the trial of that crime to the courts. *See Leary v. United States,* 395 U. S. 6 , 395 U. S. 55 (1969) (concurring in result), and *United States v. Gainey,* 380 U. S. 63 , 380 U. S. 84 -85 (1965) (dissenting opinion).

It is my belief that these statutory presumptions are totally unconstitutional for yet another reason, and it is a critically important one. As discussed earlier, the Constitution requires that the defendant in a criminal case be presumed innocent, and it places the burden of proving guilt squarely on the Government. Statutory presumptions such as those involved in this case rob the defendant of at least part of his presumed innocence and cast upon him the burden of proving that he is not guilty. The presumption in 21 U.S.C. 174 makes this shift in the burden of proof explicit. It provides that possession of narcotic drugs shall be deemed sufficient evidence to justify a conviction "unless the defendant explains the possession to the satisfaction of the jury." However, so far as robbing the defendant of his presumption of innocence is concerned, it makes no difference whether the statute explicitly says the defendant can rebut the presumption of guilt (as does the provision of 21 U.S.C. 174 just quoted), or whether the statute simply uses the language of " *prima facie* case" and leaves implicit the possibility of the defendant's rebutting the presumption (as does 26 U.S.C. 4704(a)). Presumptions of both forms tend to coerce and compel the defendant into taking the witness stand in his own behalf, in clear violation of the accused's Fifth Amendment privilege against self-incrimination. This privilege has been consistently interpreted to establish

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the defendant's absolute right not to testify at his own trial unless he freely chooses to do so. As we observed in *Malloy v. Hogan,* 378 U. S. 1 , 378 U. S. 8 (1964), the privilege is fulfilled only when the person is guaranteed "the right . . . to remain silent unless he chooses to speak in the unfettered exercise of his own will. . . ." The defendant's right to a free and unfettered choice in whether or not to testify is effectively destroyed by the coercive effect of the statutory presumptions found in 21 U.S.C. 174 and 26 U.S.C. 4704(a). *See United States v. Gainey,* 380 U. S. 63 , 380 U. S. 71 -74, 380 U. S. 87 (1965) (dissenting opinions). Moreover, when the defendant declines to testify and the trial judge states to the jury, as he did in this case, that evidence of possession of narcotics shall be deemed sufficient to convict "unless the defendant explains the possession to the

satisfaction of the jury," such an instruction is nothing less than judicial comment upon the defendant's failure to testify, a practice that we held violative of the Self-Incrimination Clause in *Griffin v. California,* 380 U. S. 609 (1965).

How does the Court respond to the grave constitutional problems raised by these presumptions of guilt? It says only that these presumptions are, in its view, "reasonable" or factually supportable "beyond a reasonable doubt." In other words, the Court has concluded that the presumptions are "fair," and apparently thinks that is a sufficient answer. It matters not to today's majority that the evidence that it cites to show the factual basis of the presumptions was never introduced at petitioner's trial, and that petitioner was never given an opportunity to confront before the jury the many expert witnesses now arrayed against him in the footnotes of the Court's opinion. Nor does it apparently matter to the Court that the factfinding role it undertakes today is constitutionally vested not in this Court, but in the jury. If Congress wants to make simple possession of

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narcotics an offense, I believe it has power to do so. But this Court has no such constitutional power. Nor has Congress the power to relieve the prosecution of the burden of proving all the facts that it as a legislative body deems crucial to the offenses it creates.

For the reasons stated here, I would without hesitation reverse petitioner's convictions under Counts 1, 2, 3, and 4.

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