OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1750

TITLE UNITED STATES, Petitioner v. JAMES RUAL MILLER

PLACE Washington, D. C.

DATE January 16, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner, :

V. : No. 83-1750

JAMES RUAL MILLER :

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Washington, D.C.

Wednesday, January 16, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 o'clock a.m.

APPEARANCES:

ANDREW L FREY, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C.;

on behalf of petitioner

JERROLD M. LADAR, ESQ., San Francisco, California;

on behalf of respondent (appointed by this Court)

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear argument first this morning in United States against Miller.

Mr. Frey, you may proceed whenever you are ready.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: Thank you, Mr. Chief Justice, and may it please the Court, this case concerns the degree of correspondence that is required between the proof at trial and the allegations in an indictment. This question is one of great practical importance because lack of correspondence between proof and charges in an indictment is to some extent a feature of a large proportion of criminal prosecutions.

This is due to two basic factors. First of all, as you are well aware, the grand jury has a different standard of proof for returning an indictment from the one the petty jury has at trial. The indictment need be based only on a showing of probable cause, and, of course, it's entirely possible that a showing of probable cause cannot be elevated into a showing of proof beyond a reasonable doubt at trial.

Secondly, there are often changes in the availability of evidence. Witnesses may die, disappear,

or cease cooperation between the time of indictment and trial, new evidence may come to light and the prosecutor may acquire a reason not to credit some of the evidence that was presented to the grand jury or to feel it's not persuasive enough to justify presenting it to the petty jury.

Now in this particular case respondent was charged with three counts of mail fraud, and the elements of the offense of mail fraud are, first, the mailing, second, an execution or furtherance of a scheme to defraud. The offense in this indictment was described in eight paragraphs, but the essential elements were alleged in the first paragraph and the last paragraph of Count One, which is at pages 2 and 3 of the joint appendix.

The last paragraph alleges the mailing. The first paragraph alleges that respondent did devise and intend to devise a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses and representations from Aetna Insurance Company by making a fraudulent insurance claim for a loss due to an alleged burglary at San Francisco Scrap Metal.

The essence of this scheme, then, was to obtain money to which respondent was not entitled by making a false insurance claim in connection with an

alleged burglary at his place of business. Nothing more than paragraphs 1 and 8 need have been alleged in this indictment; however, in fact the indictment contained six additional paragraphs, 2 through 7, describing the scheme in more detail.

Of particular relevance are paragraphs 6 and 7. In paragraph 6 it was alleged that it was part of the scheme that defendant well knew that the alleged burglary was committed with his knowledge and consent for the purpose of obtaining the insurance proceeds. In fact, at trial not enough evidence was put on to establish this charge of the grand jury or this description of the scheme.

In paragraph 7 the grand jury alleged that it was a further part of the scheme that the defendant well knew that the amount of copper claimed to have been taken during the alleged burglary was grossly inflated for the purpose of fraudulently obtaining $150,000 from Aetna Insurance Company. This allegation was proved beyond a reasonable doubt at trial.

Now the Court of Appeals reversed respondent's conviction. It held that the petty jury convicted Miller, and I am quoting from its opinion at 6(a) of the appendix to the petition, "for devising a scheme to defraud Aetna by inflating the amount of the claimed

loss, even though the grand jury indicted on the basis of a scheme to defraud consisting not only of the inflated claim but also of Miller's knowing consent to burglary."

The Court went on to say that in a mail fraud case the petty jury must find that the defendant participated in the overall scheme alleged by the grand jury because the Court could not be certain that the grand jury would have indicted on the basis that the defendant participated in only a part of the scheme.

They go on to say that because it is possible that if the grand jury had seen only the proof that the petty jury had seen it would not have chosen to indict; therefore, the conviction should be reversed.

Now in this Court respondent relies principally not on this rationale of the Court of Appeals, I think, of speculation about the grand jury, but, rather, on the more direct proposition that the charge and the proof at trial involved essentially different offenses in the sense that the indictment did not really embrace the scheme for which he was convicted and that, therefore, he was deprived of his right to be convicted only on an offense for which he's been indicted.

Now let me begin my legal argument with a

proposition that has generally been treated by this Court as black letter law, and as long ago as 1896 in Crain against the United States, for instance, the Court said "we perceive no sound reason why the doing of the prohibited thing in each and all of the prohibited modes may not be charged in one count so that there may be a verdict of guilty upon proof that the accused has done any one of the things constituting a substantive crime under the statute."

This same thought has been expressed in a number of decisions of this Court and in innumerable decisions of the Courts of Appeals. Now these propositions, this proposition would seem rather clearly to dispose of this case in the government's favor. However, the waters are somewhat muddied by the rather extraordinary decision almost a century ago by this Court in a case called Ex Parte Bain.

Bain was a case in which the defendant, who was an officer of a bank, was indicted for making false statements in the reports of the bank for the purpose of deceiving, and then the indictment charged, for the purpose of deceiving the Comptroller of the Currency and the agent appointed by the Comptroller to inspect the affairs of the bank.

At trial Bain demurred to this indictment on

the ground that the statute did not cover deceiving the Comptroller of the Currency, but only his agent, and on this basis the demur was sustained, whereupon, the prosecution, quite reasonably, in my view, said well, let us strike the allegation that the Comptroller of the Currency was deceived and just leave the part of the indictment charging deceit of his agent.

This was done. Bain was convicted. Then, on review in this Court, his conviction was reversed, and it was reversed on a ground very similar to the rationale that the Ninth Circuit employed here; that is, the Court said maybe the grand jury would have elected not to indict had it been presented only with evidence that the agent was deceived and not with what it may have viewed as a more serious matter, deceiving the Comptroller of the Currency.

Now Bain is a little bit different from this case because Bain does not involve a failure to prove what was alleged in the indictment; that is, there is no reason to suppose in Bain that the proof that showed the agent was deceived would not also have showed that the Comptroller was deceived, whereas here one of the descriptive paragraphs in the indictment was not in fact proved at trial.

Nevertheless, the kind of reasoning that the

Court used in Bain does very strongly support the result reached by the Court of Appeals. However, the continuing vitality or validity of Bain can't be discussed here without also considering the Court's holdings 40 years later in two cases -- Salinger against the United States and Ford against the United States.

Salinger is a case that resembles the instant case quite closely. It's a case in which the defendant was charged in numerous counts, at least more than seven, of a rather complicated mail fraud scheme, and the description in the counts alleged 12 different means of carrying out the scheme to defraud. However, at the close of the evidence at trial it was determined that only one means alleged in one count had been sufficiently proven to justify submission to the jury and thereupon the case was submitted to the jury on the basis of only one of the 12 means alleged in one count.

And Salinger was convicted. And he appealed, quite reasonably invoking Bain, and this Court said Bain is no problem. It proceeded to offer some rather, I think, insubstantial distinctions between Bain and Salinger, and it said nobody could -- I'm paraphasing -- nobody could seriously contend that Salinger's right to indictment had been defeated by the failure to prove most of what was alleged in the indictment, as long as

what was proved was sufficient to make out an offense.

In Ford, which came along a year later, the Court was confronted with a case which was almost exactly like Bain. In Ford, what happened was that the indictment charged a conspiracy with multiple objectives, one of the objectives being the violation of a treaty. And as it turned out, the violation of a treaty was not a crime and, therefore, a conspiracy to violate the treaty was not a crime.

But the other objectives charged in the indictment was in fact valid crimes. Ford came to this Court invoking Ex Parte Bain, and, as you see, the case is quite parallel because Ford involved a partial allegation of something that was not in fact a crime, just as Bain involved in part an allegation of something that was not a crime. And the Court said it's mere surplusage and it can be ignored.

Now that would have and in fact in Salinger the Court used language of limitation, limiting Salinger to its facts. That would probably have been enough to put Bain to rest, except for the fact that about 25 years ago Bain was cited favorably in Stirone against the United States and then again in Russell, and that has somewhat raised the question again as to whether Bain somehow remains good law despite what was done to

it in Salinger and Ford.

Now let me turn from a discussion of specific precedents to a somewhat broader effort to fit the issue that is presented here into the fabric of modern grand jury law and considerations of logic and policy that I think quite clearly suggest what the answer ought to be in this case.

Let me first ask the question which is involved in the way the Ninth Circuit looked at this case, and that is whether it is a proper approach to determine the fit between the indictment and the proof at trial to ask whether the grand jury might not have indicted on the basis of the proof at trial.

Now preliminarily, before getting to that question, I would like to say that the premise that the Ninth Circuit relied on here, speculating that the grand jury might not have indicted, is a quite implausible premise. After all, the crime was rooking the insurance company out of money in connection with a claim under a policy to which respondent well knew he was not entitled, and a substantial sum of money at that. That was the gravamen of the crime.

Is it really conceivable that a grand jury presented only with a grossly inflated claim would have elected not to indict?

QUESTION: What you're saying is that the inflation of a claim could have happened without the phony burglary, but the phony burglary by itself wouldn't have stated any sort of a crime?

MR. FREY: Well, the phony burglary by itself would not have stated mail fraud without a claim, but I think what I am saying is that from the standpoint of the decision whether or not to indict, if we are going to speculate -- and I don't believe we should -- but if we were going to speculate about what the grand jury might have done, it seems to me that from the standpoint of the seriousness of respondent's conduct there is very little difference between the offense proved at trial and the offense with the additional element alleged in the indictment and, therefore, such speculation is quite implausible, that the grand jury might not have indicted.

QUESTION: But, of course, once you get into the business of speculation, I suppose you could speculate that if the indictment was off three or four days as to the time, even though there was not a material variance, you know, one particular juror might have felt well, geez, it was a little longer ago.

MR. FREY: Well, that is, of course -- that is, of course, a problem, and as I said at the beginning

of the argument, it is frequently the case that there is some lack of correspondence between the proof at trial and the description of the offense contained in the indictment. That's commonplace.

Normally that is treated as a matter of variance and the courts say we're going to ask whether the defendant was prejudiced by this difference between what was proved and what was alleged. And if it's found that the defendant had adequate notice and wasn't prejudiced, then the court says, as it did in Berger and a number of other cases, that variance is immaterial.

QUESTION: Well, do you agree that we should retain the concept of examining prejudice to the defendant?

MR. FREY: Oh, absolutely. This entire case is here on the premise that the defendant was not prejudiced, not prejudiced in fact, and the question is whether, nevertheless, reversal of his conviction is a per se requirement.

QUESTION: Would the result be different if the indictment had not included paragraph 7?

MR. FREY: Well, our contention would be that the conviction could still be affirmed even if the indictment had not included paragraph 7.

QUESTION: But how, then, would the defendant

have known that he ought to prepare by having witnesses as to value and so forth?

MR. FREY: Well, he could have known by receiving a bill of particulars. He could have known by receiving discovery in advance of what the government's --

QUESTION: Oh, but there would be nothing to tip the defendant off under those circumstances that he ought to even be making an inquiry, would there?

MR. FREY: Well, there might or might not be. I mean, in this case he would know that he was charged with making a claim for money to which he was not entitled from the insurance company. Now it is possible that he could be -- without paragraph 7 that he could be misled, but I view that solely as a problem of notice. That is, you ask yourself was he in fact misled.

QUESTION: So you think the underlying purpose of the Fifth Amendment's grand jury indictment requirement is to put the defendant on notice?

MR. FREY: No, I don't think that is --

QUESTION: No?

MR. FREY: I think that is a purpose of the requirement, but I think that is a purpose that can be served by other means, and if served by other means -- that is, if there were, for instance, a bill of

particulars that fully spelled out the theory of the offense as it was to be proved at trial -- I think there would be no reason to reverse the conviction simply because the defendant got one form of notice rather than another.

Now the indictment does -- the right to have a grand jury consider and decide whether to return an indictment does involve another important interest, and that is the interest of screening cases in order to determine whether enough has been shown, that is, probable cause, to justify requiring the defendant to stand trial.

Now I don't for one moment denigrate the value or significance of that interest. There are at least some cases where grand juries, regardless of what a prosecutor may wish to do, may find the probable cause has not been shown and decline to return an indictment.

QUESTION: Mr. Frey, could I go back for just a second to your suggestion that the indictment would have been sufficient even without paragraph 7? Are you saying that assuming also that paragraphs 3, 4, 5 and 6 were omitted, or were you saying it would be sufficient to describe a conspiracy that seemed to depend entirely on the phony theft on the one hand, or one that was just a general description?

I understand what you're saying, that if it were all left cut --

MR. FREY: Well, I think it's clear that if paragraphs 2 through 7 were all out there would be no problem of misleading. There would -- may be the need for further details.

QUESTION: But would you say the indictment, this conviction could stand if the indictment included paragraphs 1 through 6 and not paragraph 7?

MR. FREY: I wouldn't say that the conviction should be permitted to stand, but I will admit that in that kind of case I would have a problem with Stirone and the Court would need to reexamine the Stirone case.

QUESTION: Because then there would presumably be no reason to ask for a bill of particulars, because he would have thought well, the issue is whether there was really a burglary.

MR. FREY: I understand. But suppose he did ask for a bill of particulars and got one. I think we must put the notice problem to one side in this case, because the reversal of this conviction does not depend at all on lack of actual notice.

QUESTION: Let me ask you this also. Is there any relevance -- I take it the indictment, this is different from Bain because there was not in fact a

striking of the paragraph that turned out to be superfluous.

MR. FREY: That's correct.

QUESTION: But did the indictment itself go to the jury? They apparently knew what the entire charge was.

MR. FREY: They did because respondent asked that they be charged on the -- that is, there was a request by the prosecutor to strike or not submit to the jury specification 6. That request was resisted, and it was denied by the District Court. As I intend to say in just a moment, I think there are practical problems that are created by that kind of -- our position is that it would be better to amend an indictment to strike those specifications that are not supported by proof.

QUESTION: Well, that's really what I was going to ask you -- what your views are, would be with regard to the correct procedure when this problem develops. Would it not be better to simply strike the allegations entirely so that you only have the jury knowing that the government at least thought that this was a phony theft?

MR. FREY: That is our view, and we do not ask the Court to distinguish Bain on the ground that there was not an actual physical change in the indictment.

The point I wanted to make about the screening function, which is fairly obvious when you think about it for a minute, is that it is rather fruitless to ask yourself whether the grand jury would have found probable cause to justify bringing respondent to trial after he has been tried and found guilty beyond a reasonable doubt.

That is, at that point the concern about the screening function is greatly diminished. The people who are meant to be protected primarily by the screening function are people who are going to be acquitted at trial because there's not a valid basis for charging them. This particular kind of remedy does those people no good.

Now the second point that I want to make about the Ninth Circuit's approach is that the idea of comparing what the grand jury may have heard with what the petty jury actually heard is totally inconsistent with the line of cases from Holt through Costello, Lawn, Blue, and up to Calandra, which establish that the grand jury can hear many kinds of evidence that would not properly be admitted before the petty jury. So the grand jury could return an indictment hearing only -- having introduced before it only some illegally seized evidence that can't be introduced at trial.

Now if that is legitimate, as this Court has held it is, necessarily the petty jury will hear totally different evidence from what the grand jury has heard. So what is the point of asking yourself -- I mean, you are totally defeating this whole system of allowing the grand jury to hear all kinds of evidence if you are going to reverse a conviction because the petty jury heard less evidence on some points than the grand jury heard.

Now, third, if you think about it for a moment, this idea of speculating about what the grand jury would have done if it had heard evidence of a less grievous or less culpable or less far-reaching scheme, which is what the petty jury heard, how could you ever uphold a conviction for a lesser included offense or a conviction on only one or a few of numerous counts in an indictment?

Precisely the same rationale would lead you say well, maybe if the grand jury had only heard an involuntary manslaughter case instead of a murder case, or maybe if it only heard larceny instead of armed robbery, it would not have chosen to indict at all. So that would mean that every time somebody was convicted of a greater offense -- indicated for a greater offense, convicted of a lesser included, you should reverse his

conviction and make the prosecution start all over to see if they can get an indictment only for the lesser offense.

Now, fourth, the result reached in this case provides, in practical terms, exactly the wrong incentives to prosecutors. First of all, it tells the prosecutors instead of returning a rather comprehensive indictment that describes the scheme as thoroughly as they see it at the time of indictment, return a bare bones indictment because you return a bare bones indictment, you specify absolutely the minimum, then you will protect yourself against having a conviction reversed because it doesn't correspond, because you haven't proved every allegation in the indictment.

That can hardly be in the interest of defendants as a class, and it doesn't seem to me that it is in the interests of the notice function or the smooth functioning of the system.

Even worse, what it does in a case like this is it says to the prosecutor you may not think the jury ought to credit the false burglary evidence, and you may wish not to present it because, as you now see the case, it's just not credible and you doubt you can establish it beyond a reasonable doubt, but you'd better put that evidence in anyway. You better put that evidence in

anyway because that's the only way to protect yourself against the Miller reversal. So it provides exactly the wrong incentives.

And, finally, it is obviously totally inconsistent with Salinger. I mean, in Salinger you had numerous counts, you had 12 specifications, only one of which was submitted to the jury. You cannot possibly square a reversal here with the Court's affirmance of the conviction in Salinger.

Now, let me turn to respondent's tack because I think he does not seek to rely, the way the Court of Appeals did and the way Bain did, on this kind of speculation about what the grand jury would or might have done. Instead he seeks to persuade the Court that what was proved at trial was in reality a difference offense from the one charged in the indictment, so that his right to be tried only on an indictment charging the offense was violated.

And he also suggests, without giving particulars, that he was prejudiced here by the indictment's failure to give notice. And we've answered this contention in the reply brief and I don't propose to spend any more time on that.

But --

QUESTION: Well, on that point, apparently

there was some testimony before the grand jury, I gather, that there was an inflated burglary.

MR. FREY: Yes.

QUESTION: An inflated loss.

MR. FREY: Yes, there was, and we have lodged the transcripts of the grand jury proceeding, but I would say that under Costello and so on I don't think it would matter. We don't ask the Court to make that kind of inquiry and, indeed, if the Court thinks this case turns on that and really it's only in this Court for the first time that the claim has even been sketched out of actual prejudice or actual prejudicial lack of notice, it might be appropriate to send it back to look into that.

I do not think there is any question. I mean, he had notice from paragraph 7 of exactly what was proved, and I think it may be presumed from the presence of paragraph 7 in the indictment that the grand jury heard some evidence to support it.

QUESTION: And the prosecutor's opening statement at trial referred to the inflated insurance claim?

MR. FREY: Only, only to that, in our view, but surely at least to that.

QUESTION: Mr. Frey, since you've mentioned

the reply brief, I just want to mention one thing in that brief that troubles me a little bit. You have -- on page 4 you say the Assistant United States Attorney who tried this case advises us that a month and a half before trial he provided exhibits and the like.

I notice in several briefs the Solicitor General has filed in this argument session you have given us material that's not in the record, and I just wonder if it's a practice that you think should be followed by defense counsel and the Solicitor General and everyone, or should we try to stick to the record.

MR. FREY: Well, in this particular case what had happened was we had not raised the matter in our opening brief and in the answering brief the suggestion was made, which was really made for the first time in this Court --

QUESTION: Was it supported by the record, the suggestion that was made?

MR. FREY: The suggestion? Well, I don't know that the suggestion was supported by the record. Now we don't ask you to take our word for this at all. That is, we are not asking you to decide on this basis because our position is if you think it matters whether he had received these materials or not, the proper thing would be to send it back to the District Court to have a

proper hearing on it.

That is, we are not asking you to base your decision on this, so I don't think it raises a problem of the kind that you are concerned about.

QUESTION: Well, it seems to me the correct answer to a contention that's not supported by the record is simply that the record doesn't support that contention, not -- well, anyway I just want you to know I see this in a number of your briefs lately, this sort of thing.

MR. FREY: Okay.

Well, let me just come back for a moment -- I see my time is running short -- to say one thing. Nobody disagrees about the broadly stated proposition that a defendant should not be convicted for an offense that is different from the one that he has been indicted for. But unfortunately this proposition is virtually useless for deciding actual cases, since, as this case well illustrates, there can be great disagreement about what constitutes a different offense.

We don't think that's a close question here, but I would like to just point out to the Court how we think different offense should be defined for this purpose. We think there should be two inquiries. First, are the elements of the offense proved at trial

the same as the elements of the offense, prove, that is. We don't think you can be indicted for bank robbery and convicted of arson, to take an extreme case, or indicted for wire fraud and convicted for mail fraud.

The second thing that should be examined is whether the indictment concerns the same criminal transaction as the one that the grand jury charged -- that is, a kind of unit of prosecution. Now if this sounds a lot like the double jeopardy test, it is because I think you are trying to make precisely the same kind of inquiry.

Anyway, I would save the balance of my time.

QUESTION: Very well.

Mr. Ladar.

ORAL ARGUMENT OF JERROLD M. LADAR, ESQ.

ON BEHALF OF RESPONDENT

MR. LADAR: Mr. Chief Justice and may it please the Court, the problem presented before reaching the merits of the question of overruling Bain, as the government seeks to do, is more fundamental for a reviewing court than perhaps any case that I have been able to review and see in this court.

This is a case in which there is no trial transcript before the Ninth Circuit. It is a case in which there was nothing but stipulated facts of a rather

bare bones nature before the circuit. At the Circuit Court argument, the oral argument, the question of prejudice to the defendant arose and I again repeated for that court, to the three Justices sitting, that we were prejudiced, as we had alleged in our reply brief in that court.

It is impossible to tell, of course, from the opinion that is before this Court what reaction the Circuit Court had in that respect because the questions of the Circuit Court to counsel at argument and the replies of counsel are nowhere in this record. Indeed, last week I received by Federal Express from the Solicitor General a grand jury transcript which had not been ever provided prior to trial, which no one, neither the District Court nor myself nor the Court of Appeals had ever seen before but which is now lodged before this Court.

It's the testimony of Agent Humphrey summarizing the case, and in that particular transcript, which I assume the United States has obtained pursuant to an order of release of the grand jury transcript under Rule 6(e), or I hope I'm not contempt in having it, even though I didn't call for it, but it was handed to me by the government, in that particular transcript, unknown to all of us below, and particularly to the

Ninth Circuit, one of the grand jurors began an inquiry into whether or not they needed to deal with the inflated value of the copper.

And another grand juror said no, no, you don't have to worry about that. It wasn't ever stolen. These are the kinds of things that may have led, particularly Justice Pregerson, to the conclusions that the Ninth Circuit was dealing with as to whether or not the case ever would have been indicted.

Those were the questions asked at the Ninth Circuit oral argument. This is a most inappropriate case, under these circumstances, for this Court to begin to speculate about what the Ninth Circuit thought it had before it, because what went on at the Ninth Circuit is again partially hidden from this Court.

The government originally proceeded on the basis that they would live with certain facts in the courts. They tried to get out of that in the Ninth Circuit. They have now lodged materials which either were never available before or which have been produced, such as the trial transcript, but were never available to the Ninth Circuit.

And indeed it is the most inappropriate vehicle for the granting of certiorari, let alone the determination that it stands as a proper vehicle to go

back into the system, saying this is where the Ninth Circuit erred.

QUESTION: Well, I think you can assume we granted certiorari on the basis of the government's petition, your response, and the opinion of the Court of Appeals, which, of course, is written out and not necessarily on nuances that may not be apparent in those papers.

MR. LADAR: Well, I do assume that, but what I could not assume and I'm sure was not apparent to the Court is that the government seeks to rely now upon materials which were never mentioned in the petition for cert, let alone the --

QUESTION: Well, I thought the government said it was not relying on it, and it did not ask us to consider that in rendering a decision. That's what I just understood Mr. Frey to be saying.

MR. LADAR: He did say that to you because I think that he wishes to be in a position in which he can counter the statement of trial counsel that we were prejudiced without having you look into the matters which indicate that in fact -- pardon me, that we were not prejudiced, by having you not look into the facts as they existed below.

I think that is a terrible mistake because it

denigrates the whole process into one in which, as a reviewing court, you are accepting propositions that were different from the ones presented to the Court of Appeals, and I think that it would be naive to suggest that Court of Appeals Justices do not listen to what is said in oral argument in making decisions of the type that that Court made in the Miller case.

The substantially different scheme language which is used in the Court of Appeals opinion must to some extent arise from the inquiry that they made at the oral argument in respect to these matters in which a government counsel sat to my left and never contradicted a statement which was made in my reply brief in the Ninth Circuit, which again is never contradicted until a week before oral argument the government desires to send matters to this Court over the transom, so to speak, and say here they are but don't look at them.

QUESTION: In this Court I think the practice is if in writing an opinion one is -- the author is going to rely for part of the conclusions of the opinion on something that isn't apparent in the record but, rather, is dependent on the statement of counsel, then that is footnoted in the opinion. I would assume the Ninth Circuit would do the same thing.

MR. LADAR: They do on occasion and they don't

on other occasions. It depends on the nature of the representations. Since the representation of prejudice was in the reply briefs but not addressed by the Ninth Circuit, but the oral argument focused on that area --

QUESTION: Well, all we have before us is the written opinion of the Ninth Circuit.

MR. LADAR: That's correct, and it's in that respect that that opinion breaks no unusual new ground. It states essentially that there is one scheme and artifice to defraud. The scheme and artifice to defraud is made up of three elements.

One is the inflation of the insurance limits. Two is the alleged burglary. And, three, as a component element, is a "grossly exaggerated" claim. That --

QUESTION: What's the difference between one and three? You say an inflated representation and then you say a grossly exaggerated. That's the same thing.

MR. LADAR: Well, "grossly inflated" is the language used in the indictment.

QUESTION: Well, but you are saying there are three elements that the government charged and one of them, you say, is the burglary, the alleged burglary. Now you say there are two other elements?

MR. LADAR: No, I think I'm not being clear.

QUESTION: I don't think you are either.

MR. LADAR: A scheme and artifice is the charging element. In a mail fraud case the only item is the scheme and artifice or scheme or artifice. That scheme or artifice has to be made up of something. In this particular case it was our position in defending it, it was the government's theory in presenting it until the very last minute, that the scheme was a unitary action involving Miller's raising his limits, faking a burglary and putting a claim in.

The "grossly exaggerated" is from one dollar-on, in other words, any claim that raised any issue about the loss of the copper. That is the scheme and it is that that the Ninth Circuit says that's not the scheme he was tried upon.

QUESTION: But the one essential of those three elements so far as mail fraud is concerned is the false claim to the insurance company, isn't it?

MR. LADAR: No.

QUESTION: Would just a phony burglary, without anything more, you don't have a mail fraud count.

MR. LADAR: There would have to be a mailing of some sort in connection with going to the insurance company, that's correct.

QUESTION: Yes.

MR. LADAR: Without the mailing, there is no mail fraud. That's the reason Count Three was dismissed.

QUESTION: And without the effort to defraud the insurance company there's no mail fraud?

MR. LADAR: That's right. That effort to defraud, the fraud is made up of a scheme which involved Miller setting forward to do a particular action, and it's that basis that the Ninth Circuit determined and made a finding that the grand jury indicated. It was a scheme and one which they reviewed and viewed as a different one if the first two elements were missing.

QUESTION: And that's what's before us now -- the correctness of their decision?

MR. LADAR: That's right. They found that neither -- they found a substantially different scheme, and, as the trial transcript shows or as the stipulated facts show, there was an absence of the raising of the inflated claim, and there was an absence of the consented-to burglary. All that, the facts demonstrate, is that Mr. Miller had not bought a certain amount of copper from a couple of companies. The jury believed after the trial that that was sufficient because the trial judge told them that if you find that there was a willful exaggeration of claim that's enough in this

case.

It was that issue with which we took contention. That's contained in the trial transcript with respect to objections to the instructions, which are premised on the same point that is made in this Court.

QUESTION: And you never -- did you make a challenge to the sufficiency of the evidence in the Ninth Circuit?

MR. LADAR: No. We made a challenge to the sufficiency of the evidence to support a scheme, and I think that's slightly different. That was the contention made in the District Court. In terms of the instruction which Judge Peckham gave to the jury, then there is no question that there is evidence and was evidence that the claim had been inflated. It was more than what could be proven to have been on the premises.

QUESTION: And there was evidence of the increase in the insurance coverage?

MR. LADAR: Oh, yes, indeed. The problem came when the --

QUESTION: And the mailing?

MR. LADAR: The witness came and said I am the insurance broker. I suggested raising these insurance limits. It was not Mr. Miller's idea and he left the

trial. So that was the failure of proof in respect to the idea that Miller had concocted anything in respect to raising the insurance levels.

A great deal of the trial was spent in countering government evidence that the burglary was a fake. Much of the trial testimony related to alarm people, experts, to a police officer and the rest, who were saying something was wrong with the break-in. That is why we had focused and were led to focus by the prosecution upon a defense based on a consented-to or faked burglary, and it wasn't until the very last part of the trial, almost the closing of the trial, that the key witness for whom all of this foundation had been laid by the prosecution, who was to walk in and stand upon a stage of evidence which inferred that there was a fake burglary, Mr. Fisher, did not appear.

And at that point the prosecution, finding that they could not call Mr. Fisher after they had arrested him and been unable to persuade him to testify, decided to change theories, and it was that which we told the Court of Appeals we were hurt by. It is that which the Court of Appeals says that's a different scheme that you faced.

QUESTION: Well, did the opening statement not focus on the exaggerated insurance claim to the

exclusion of the reference to the phoney burglary?

MR. LADAR: I have trouble with the word "focus". It certainly -- Mr. Robinson had said I'm not going to mention Mr. Fisher because we're looking for him. We have a warrant out for him. I want to be cautious. So we all understood he wasn't going to say something.

He then proceeded to do that.

QUESTION: Well, wasn't that clear at that stage, that the government was talking just about the inflated insurance claim in the opening statement?

MR. LADAR: No, not to me in the defense of that case. Mr. Robinson said I expect to get Fisher here because we're going to arrest him and bring him in on a material witness warrant. We have gotten immunity for him. He has counsel. But I'm just going to take it easy here in case I have a problem. I don't know what kind of trouble I'm in is the statement that Mr. Robinson made in the beginning of the trial.

So we proceeded on the basis that Fisher was going to make a grand entrance and we prepared for the case on that line. We also were told by the government that they would not give us the statements of Fisher or others until five days before trial.

Even though the Solicitor General has

mentioned that the Assistant has advised them that it was a month and a half before trial, there is a letter in the material furnished to this Court, addressed to me from Mr. Robinson, which says I am still holding back until five days before trial before I give you materials.

We started the case. We defended the case, and we proceeded through the trial of the case, understanding that the false burglary, some allegations of some arson or tampering-like conduct by Miller, and the action of his accomplice, Fisher, was the underpinning of the case.

We focused the defense in that respect, and in so doing we were led to a very serious prejudicial position when the case fell apart in respect to both the inflated insurance limits evidence and Fisher's failure to show up, and the failure to be able to prove a false burglary.

So in that respect if this Court --

QUESTION: Well, did you move -- you say you were misled on that. Did you move for a continuance?

MR. LADAR: No, on the basis that once that case had stopped, Fisher didn't show, the government rested, we put on the short amount of evidence that we had, which had to do, again, with whether or not Mr.

Miller was a man running a substantial copper business and had no motive to fake a burglary, because the jury had kept hearing time after time about inferences, something is faked about the burglary, but he never got quite to the point during the case.

QUESTION: What was faked was the insurance claim.

MR. LADAR: Yes, but the government's position in proceeding with that is that the burglary was faked and, therefore, the claim of the burglary, of any burglary at all, was wrong.

The inflation aspect we fought from the standpoint that all of that evidence as to how much the copper was worth or how much the trucks were worth, which was also part of the claim that had been faked, was probative of Miller's state of mind regarding a false burglary. This indictment, the minute you begin to read it, does nothing but continue to state that everything is premised upon a false burglary.

QUESTION: Let me just interrupt you, if I may, there. Paragraph 7 is not. Paragraph 7 quite clearly alleges a grossly inflated claim, and it seems to me that would state a claim for a cause of action in civil terms if -- even without the false burglary.

MR. LADAR: I think that --

QUESTION: And, therefore, it would seem to me you would have been on notice of the fact that the government was going to prove the copper was not worth $123,000.

MR. LADAR: We certainly were on notice that the government claimed that there was no copper on the premises, except for a bale or two, from the material we received. That is the way the government had represented it was going to proceed in the case, and we defended, to some extent, against that.

When the government's theory switched at the end of the trial to the idea that what really is involved here is solely an inflated claim and nothing else, we had not at that point been in a position to contest all of the value of all the materials. The focus in the defense --

QUESTION: Well, why not? I don't understand. It seems to me that full trial preparation would have required that you do everything you could to resist that claim as well as the balance of it. I don't understand why you --

MR. LADAR: Well, I think this is the problem with the defense of a criminal case in this spot. You take a theme, you listen to what the government purports it is going to put on and what their -- the underpinning

of their case is, and you prepare to meet that.

And to the extent that we did not run a defense saying well, we're going to attack the question of the economic amount of the loss and then at the same time run a defense saying that we are going to show that Miller is an operating businessman who wouldn't think of burglary, I felt -- and that's my responsibility -- that those two defenses -- I could dilute our position from those two defenses if I didn't focus on where the government was coming from with respect to Mr. Fisher.

So to the extent that we did not go on and do that, we can say the defendant was incompetently represented by reason of counsel's determination that one theme made the most sense, and it did, based upon what had been told to us and what I perceived was the underpinning of the government's case, both as represented by the Assistant U.S. Attorney but, more importantly, because I had lived with that case and understood what it was that was the underpinning of the scheme.

And it's for that reason that you see the case in the condition that it is, with paragraph 7 as an addition or description of part of the scheme.

QUESTION: Well, I don't see paragraph 7 as an addition or a description. When they used the term

"grossly inflated", that suggests that there was some amount other than the grossly inflated amount that would have been correct. In other words, I think when you use the term "grossly inflated" you're talking about not a non-existent burglary. You wouldn't describe a claim from that as grossly inflated; you would say it's absolutely false.

"Grossly inflated" suggests there was some lesser claim that would have been true.

MR. LADAR: No. I think that --

QUESTION: Why do you say no?

MR. LADAR: One dollar is grossly inflated when you understand the government's position was this burglary never happened.

QUESTION: Well, but --

MR. LADAR: If -- I'm sorry.

QUESTION: Do you disagree with me that the term "inflated" suggests an upward shifting of value over an amount which would have been the true value?

MR. LADAR: Yes. And the "grossly" is an adjective added to that.

QUESTION: You disagree with me on that.

MR. LADAR: No, I don't.

QUESTION: Your answer is yes --

MR. LADAR: I do agree with you that the word

"inflated" means an upward shifting; "grossly inflated" means even more of an upward shifting. I didn't treat that and I don't treat that in respect to the way this case was presented as meaning that anything over one or two bales of copper, which is all that was ever testified to really exist on the premises, meant anything more than a few dollars or a claim that something happened that didn't.

QUESTION: Well, you didn't read the indictment very carefully, then.

MR. LADAR: Well, neither did the government ask for any instruction to the jury as to what "inflated" meant. No one knew what the government meant by that, because I proceeded on the basis that the false burglary claim was the scheme; the government was satisfied at trial to have an instruction from the trial judge that any faking of the claim, any increase whatsoever, was necessary.

The government disregarded its own language in that respect. If Your Honor will look at the instructions, "grossly inflated" is never mentioned, never defined, never delineated to the jury. They are simply told that a willful and deliberate false insurance claim is sufficient.

QUESTION: But it isn't the instructions that

you rely on to put you on notice; it's the indictment.

MR. LADAR: No, it is -- the indictment starts the notice, but what theory the government will use is evidenced by the ongoing process of the trial. In the preparation of that defense, what instructions are presented by the trial -- by the government is part of the preparatin for that defense, and that preparation depends upon what you see the government putting in.

When they give you the instructions, as Judge Peckham requires, in advance of trial, and you go through them, you see what they are --

QUESTION: Even before the instructions, you could have cleared that up by more specific allegations in the indictment, couldn't you? Couldn't you have asked them what they meant by "grossly"?

MR. LADAR: Discussions were had on a regular basis in attempting to settle this case.

QUESTION: I'm not talking about off-the-record discussions. I'm talking about motions and on-the-record discussions.

MR. LADAR: We are discouraged in the United States District Court for the Northern District of California from making those kind of motions because they are pursued in discovery.

QUESTION: Discouraged?

MR. LADAR: I beg your pardon?

QUESTION: My question is are you prohibited?

MR. LADAR: No. No, but you are discouraged from it, and when the Chief Judge of the United States District Court practices his -- runs his court in a certain manner, then you follow that. There's nothing wrong with that. The government was talking to me regularly about what they felt the case was all about.

QUESTION: Well, is all of that in the record?

MR. LADAR: Certainly not.

QUESTION: Well, I know it's not. Why isn't some of it in the record if you're relying on it?

MR. LADAR: Because I didn't take the position that the Ninth Circuit misunderstands the case. The government had an opportunity, if they wished, to have supplemented this case in the Ninth Circuit by ordering the trial transcript and presenting material to those Justices so that they could deal with these kind of problems.

And yet at no time, including the petition for rehearing or supplemental petition, did anyone in the government seek to do that. The trial transcript wasn't prepared until the Solicitor General's office decided they wanted to read it, and that is when much of this

material began to filter into the case.

So that the difficulty with much of what is said here is that it's not for the Ninth Circuit below.

QUESTION: Is a part of this difficulty that the Court of Appeals didn't send for this material on its own?

MR. LADAR: No.

QUESTION: Well, for instance, I assume counsel's supposed to do something.

MR. LADAR: That's correct. We presented a certain set of facts to the Court of Appeals. We made certain representations, both sides, in the Court of Appeals. The Justices listened to that and then they wrote an opinion and it's that opinion that the government contests, and the Court of Appeals read that indictment, and I think they say so very clearly in their opinion, to charge one scheme, which was substantially different than the one they heard and believed was tried.

QUESTION: Well, Mr. Ladar, on the supposition that some of us on this Court might read paragraph 7 in a way which you don't, apparently, do you plan to address the legal arguments involved, beginning with Ex Parte Bain and the issues that the Solicitor General addressed?

MR. LADAR: Ex Parte -- I do. Ex Parte Bain is a decision raising to a proper level the grand jury protection that a citizen should have. Ex Parte Bain is a case which has caused, as far as I can tell from the same cases, no substantial confusion in the courts.

It is -- there's no argument with the fact.

QUESTION: Well, do you think that Stirone and Salinger and Ford and Bain are all easily reconciled with each other?

MR. LADAR: I believe -- yes. I believe, for example, that Stirone, which involved simply the interstate transportation or the interstate movement of a product, is far different than Bain's protection because Stirone alleged and dealt only with the aspect of whether or not a jurisdictional element had been met. The extortion is the crime, much like the scheme is the crime here.

And, therefore, the change in respect to whether the sand came from Pennsylvania or whether it was steel that was involved, leaving aside the prospective shipments which the Supreme Court decided to ignore and the Court of Appeals had dealt with, simply did not raise any new issue or deal with any difficulty with the proposition that the grand jury indictment must, even though it may cover up guilt from time to

time in respect to the double jeopardy protections that the Solicitor General is interested in, that Bain simply did not change any fundamental protection.

What this Court is embarking upon if it overrules Bain is to make a truism out of the criticism that is leveled at the grand jury in the Federal system today, that what it does doesn't mean anything because we'll figure out afterwards whether the defendant looked like he was guilty of something pretty close.

If the scheme and the trial simply narrow the charges, I have no quarrel with that. The problem in this case in respect to Bain is that the grand jury indicted for something totally different. That proposition should not be changed. Bain should not be overruled because Bain affords an important protection; it's one that requires that there really be some screening process.

And in that respect, if this Court were to believe that you should proceed to analyze those cases, then I suggest the materials lodged by the government be carefully read, because when you see the process of the grand jury in those materials you will see that the protection was in fact operating and that if Mr. Fisher had not testified, there would most likely have been no indictment.

That proposition is what is stated in Bain. It doesn't require any speculation any more because I think these materials demonstrate that. I am just somewhat sad that it starts only here in this Court.

QUESTION: Speaking to that point, Mr. Ladar, may I ask you, the motions you made before Judge Peckham were for judgment of acquittal, both before and after the verdict, I gather.

MR. LADAR: Yes.

QUESTION: And I notice that he says the ruling will be reserved, and he eventually denied it. Did he write an opinion?

MR. LADAR: No.

QUESTION: He did not.

MR. LADAR: No. We simply came back for sentencing and at the sentencing time he said the motion will be denied. Therefore, nothing, either oral or written, that indicated the process by which he had reached the denial.

In closing, I believe, and I think that the cases support, the proposition that in a case such as this the Bain rationale, the idea that we should equate an analysis of the trial with what the grand jury generally may have indicted on is not a sound vehicle for distinguishing all of the cases that the prosecution

has cited.

The overruling of Bain would cause a fundamental shift in the process. None of the policy arguments that the Solicitor General has suggested are really problems which can't be addressed by a more careful analysis of cases by prosecutors in the U.S. Attorney's office.

QUESTION: Well, what if there is a multi-count indictment, grand jury indictment? Do you think that the government is precluded from offering evidence and convicting on only one of the multi-counts?

MR. LADAR: Certainly not. They may withdraw any count that they wish, because each count is a separate allegation. They also, just as Mr. Frey suggested, if suppressed evidence is taken out of the case, as long as you proceed to prove the scheme and artifice, or the narcotic transaction that was alleged, you can do it by any evidence coming in from anywhere.

The question is whether you are still proceeding on the same scheme and artifice. That is the nub of this case, not the kind of case in which the scheme and artifice stays the same but they're bringing different witnesses to testify to the scheme.

I have no quarrel with this latter

proposition. It is the first proposition that is difficult, and each of those cases cited by the government is one in which there was not any fundamental change in the charge, the extortion or the scheme. It simply was a change in evidence in the trial court. That is not what had happened in this case.

Thank you.

QUESTION: Do you have anything further, Mr. Frey? You have two minutes remaining.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.

ON BEHALF OF PETITIONER - REBUTTAL

MR. FREY: Thank you.

I want to be clear on one thing. The notion that this is a substantially different scheme is not part of the Ninth Circuit's decision. In its initial opinion, before we filed our petition for rehearing focusing on Salinger, it had talked about a substantially narrower scheme, and the case on which it relied, Mastelotto, dealt with a substantially narrower scheme.

We pointed out that Salinger dealt with a substantially narrower scheme, and the way they dealt with that was simply to change the word "narrower" to "different" in their opinion, which puts me in mind of the old riddle about if you call a horse's tail a leg,

how many legs do five horses have. Of course, the answer is not 25, but it's still 20, because calling a horse's tail a leg doesn't make it one. And in this case, too, just calling the scheme substantially different will not do.

Now when we got to the Supreme Court we have suddenly had suggestions about what happened or what didn't happen. If there was a claim of actual prejudice, that claim should have been made in the Court of Appeals and considered. If there was a claim that the indictment was inadequate to describe gross inflation, that claim should have been made in the Court of Appeals and considered there.

None of that has to do with the question that is here today, which is simply the correspondence between the indictment and the proof.

And let me close with one other question that I think the Court needs to think about: If Miller is right and the Ninth Circuit is right here, what happens with this case? Are we barred from reprosecuting it at all, or can we go back and return an indictment which is pegged to paragraph 7 and reprosecute this case?

Now I think it's important to think about that because the result, if we are barred, we are being barred from prosecuting a case even though we have

proved guilt of a crime beyond a reasonable doubt simply because of a defect in the way the case was indicted relative to the way the case was tried, which is not what the double jeopardy clause is really concerned with.

If we're not barred, which I think must be the result, from going back, getting a new indictment charging the same scheme based only on the narrower description of it, then we're sure that's the way we want the system to work.

Thank you.

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

(Whereupon, at 11:01 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

#83-1750 - UNITED STATES, Petitioner v. JAMES RUAL MILLER

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BY Paul A. Richardson

(REPORTER)