OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-469

TITLE UNITED STATES, Petitioner v. BILLY G. YOUNG

PLACE Washington, D. C.

DATE October 2, 1984

PAGES 1 thru 48

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner : No. 83-469

v. :

BILLY G. YOUNG :

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Washington, D.C.

Tuesday, October 2, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:48 o'clock a.m.

APPEARANCES:

MICHAEL MC CONNELL, ESQ., Assistant Solicitor General, Department of Justice, Washington, D.C., (pro hac vice); on behalf of Petitioner.

BURCK BAILEY, ESQ., Oklahoma City, Oklahoma; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

ORAL ARGUMENT OF MICHAEL MC CONNELL, ESQ.

ON BEHALF OF PETITIONER

MR. MC CONNELL: Mr. Chief Justice, and may it please the Court, Respondent's conviction for mail fraud and false statements was reversed by the Court of Appeals because the prosecutor in his rebuttal argument to the jury expressed his personal opinion that Respondent had committed fraud.

Ordinarily, such a holding would be unremarkable, one that this Court would not be called upon to review. However, there are three aspects of this case that do make the holding remarkable; indeed, that make the holding directly contrary to precedents by this Court.

First, the error, if it was error, was not noticed by trial court or counsel when it occurred. It was not preserved for appeal by an objection, and the trial court was not asked to take any curative action.

Indeed, the first time that Respondent mentioned this alleged error was in his papers before the Court of Appeals.

Second, the issue of the prosecutor's personal opinion on Respondent's guilt was not interjected into the trial by the prosecutor but, rather, by defense

counsel who opened the issue during the course of his argument that the prosecution had been unfair and his argument that the prosecutor did not, in fact, believe his own case against the Respondent.

And, third, the Court of Appeals reversed the conviction without any inquiry into whether the Respondent's rights to a fair trial were substantially prejudiced by the prosecutor's comments.

QUESTION: Is this the case where there was no oral argument in the Court of Appeals?

MR. MC CONNELL: Your Honor, I'm not aware of whether there was oral argument.

QUESTION: In one of our cases today, there was no oral argument. It's a decision on the briefs. But no matter, we'll check that.

QUESTION: Mr. McConnell, may I just ask at the outset, is there a Tenth Circuit rule that if either prosecutor or defense counsel thinks that his adversary has gone out of bounds, that the rule requires that he object to give the trial judge an opportunity to correct?

MR. MC CONNELL: No, Your Honor. That appears not to be the rule. The rule does appear to be that if the defense counsel goes out of bounds, the prosecutor must object but may not pursue that line of inquiry; but

that if the prosecutor goes cut of bounds and there's nc objection by the defense counsel, apparently the practice in the Tenth Circuit, as in this case, is that that has no bearing or very little bearing upon whether the Court of Appeals will take that issue upon on appeal.

Which we would suggest, incidentally, is exactly the cppcsite of the correct rule, because the contemporaneous objection requirement is itself a rule of appellate procedure. It isn't a rule which is designed to govern trial practice when one side opens a line of argument, whether the other side can pursue that line of argument during the course of the trial.

That isn't what the contemporaneous objection requirement is all about.

QUESTION: What I'm getting back to, a long, long time, but I recall in my cwn experience as a trial judge that somebody in summation, whether prosecutcr or defense counsel, stepped outside proper limits, his adversary had better get up and object to give me a chance to say to the jury, ignore it, or forget it, or something like that.

Isn't that the sensible rule?

MR. MC CONNELL: Your Hcncr, I do think that that's a sensible rule, and I believe that it may cften

be the appropriate course for the prosecutor to take, to object rather than to pursue a fair response.

But let me point out just a few factors that make that --

QUESTION: Well, in fact, isn't that the best rule for both sides at the trial court level? Let's forget about the appellate procedure. The trial court has invested a lot of time in the trial of a case. Witnesses have been on the stand, everyone has been put out in terms of spending time and effort on a case, and you reach closing argument.

Why shouldn't you give the trial judge the first opportunity to tell the jury to disregard some improper argument, whether it's being made by defense counsel or the prosecutor?

MR. MC CONNELL: Your Honor, I agree that for the prosecutor to have lodged an objection was an appropriate course. But let me just point out several --

QUESTION: Why isn't it the preferred course?

MR. MC CONNELL: There are several reasons why it may not be. And the most important is that there is a tendency, a tradition if you will, of giving very wide latitude to defense counsel in the course of a closing argument. One of the main reasons for this is that when

defense counsel is pursuing a line of argument, the prosecutor can't always tell where it may lead.

And if the prosecutor cuts off a line of argument that might later have proved to have been a permissible line, he may have created a reversible error where none would have existed before.

QUESTION: Mr. McConnell, you can't have it both ways. Either the defense argument was improper or not. Which is your position?

MR. MC CONNELL: Our position is, in fact, that the defense argument was improper.

QUESTION: Then was there not a duty to object, as Justice O'Connor suggests?

MR. MC CONNELL: There is a duty --

QUESTION: If he wants to take advantage of it, to object rather than waiting until it's his turn to argue and then making an improper argument in response.

MR. MC CONNELL: Your Honor, the question here is whether the Respondent was denied a fair trial.

QUESTION: I understand that ultimately, but we're talking, first of all, about what would be the proper procedure in the trial court. Maybe it wasn't reversible error. I understand you have a separate argument on that.

Would you not agree that the right thing for

the prosecutor to do was to object to that argument, rather than save it, and then make an improper argument himself?

MR. MC CONNELL: I would agree that under many circumstances, that that would be the preferred course.

QUESTION: In this case.

MR. MC CONNELL: But there are problems with --

QUESTION: In this case, because you're relying on what you say was improper argument as a justification for the response.

MR. MC CONNELL: In this case, Your Honor, remember that as the defense argument goes on, there isn't -- it builds upon itself. And in this case, the defense counsel began by commenting upon the unfairness of the prosecution.

QUESTION: I understand all that, but can't we agree that the argument was improper by defense counsel? Otherwise, you have no justification for the response.

MR. MC CONNELL: I think we can agree to that. The Court of Appeals found that. So far as I know, that's not --

QUESTION: I mean, and that would be the government's position in this case, wouldn't it?

MR. MC CONNELL: That's right, but there is --

QUESTION: And therefore, should not the government have objected?

MR. MC CONNELL: Yes, Your Honor. But there is a sense in which allowing defense counsel wider latitude that would be allowed the prosecutor is a sensible way for the trial court to operate, because, as I said, you can't always tell where a line of argument is going. And it is preferred to allow the defense counsel as much leeway as possible, and then afterwards if it's necessary to take some corrective steps.

QUESTION: But, if you take that position, does that authorize you to do wrong?

MR. MC CONNELL: No, Your Honor, but it may very well authorize --

QUESTION: If you voluntarily pass up your opportunity to object, can you then use that as the bulwark of doing wrong in your argument?

MR. MC CONNELL: Your Honor, I would suggest that it is not a matter of doing wrong. It is a matter of simply correcting a factual misstatement by defense counsel. In this case --

QUESTION: Shouldn't the judge do that?

MR. MC CONNELL: Well, Your Honor, I would suggest --

QUESTION: And the judge can only do it if you

object.

MR. MC CONNELL: Your Honor, I would suggest to you that many defendants would, in fact, prefer to have the prosecutor discussing the integrity of the prosecution, rather than having the trial court --

QUESTION: Is it part of your position that the defendant failed to object to what you said?

MR. MC CONNELL: Yes, Your Honor.

QUESTION: Well, then can't the defendant raise the point that you didn't object? Isn't what's good for the goose good for the gander?

MR. MC CONNELL: Your Honor, two points. First of all, the contemporaneous objection requirement is a requirement that has to do with appellate procedure. When one side, during the course of a trial, introduces the line of argument, it is not ordinarily required that the other side launch an objection before pursuing the same line of argument. He simply pursues that line of argument.

It may have been irrelevant. It may have been prejudicial in some sense, but the other side pursues that line of argument.

QUESTION: I thought one of your positions anyway was that when the defense counsel opens the door, the government is entitled to respond.

MR. MC CONNELL: That's right, Your Honor.

QUESTION: Well, an objection wouldn't have done defense counsel any good. At that point, you were already entitled to respond.

You say in your papers, as I understand it, that all of the other circuits have held that there is a right to respond.

MR. MC CONNELL: Yes, Your Honor. That is on the point that there was no error here whatsoever.

QUESTION: Right. Exactly.

MR. MC CONNELL: But had there been an error, if Iawn v. United States --

QUESTION: Aren't you going to argue that there was no error at all?

MR. MC CONNELL: I'm sorry?

QUESTION: Aren't you going to argue that there was no error at all?

MR. MC CONNELL: Yes, Your Honor. This case has several layers of problems with it. First of all, we contend that there was no error at all, but secondly, that even if there was error, it certainly was not plain error such that the Court of Appeals should reverse without there having been an objection.

QUESTION: Well, aren't you entitled to take the position that the prosecution had its option? It

could object at the time and ask the court to instruct the jury to disregard the false statements and to reprimand counsel, or wait and do what he did; respond and challenge the statements.

MR. MC CONNELL: Yes, Your Honor, that is our position. We believe that it does not deny Respondent a fair trial when the prosecutor takes the one course rather than the other.

Now, in any given situation, it might be that in some cases it would be better practice for the prosecutor to object rather than to respond.

QUESTION: Interruption of closing argument, though, is something that often doesn't sit well with a jury. I think lawyers are generally much less willing to interrupt closing argument than to make objections during the presentation of evidence.

I would think that would be a factor that could be taken into consideration by whichever side feels it's aggrieved by the argument of the other side.

MR. MC CONNELL: Yes, Your Honor. I would also like to point out that there may be a problem with interjecting the trial court into the question of the prosecutor's good faith.

There is a factual allegation of hypocrisy that was made here. The trial court itself is not in

the best position to evaluate whether that is either true or false. And if the trial court --

QUESTION: Well, the trial court is certainly in a position to advise the jury that the prosecutor's belief in the veracity of a witness is irrelevant.

MR. MC CONNELL: Yes, Your Honor. But the trial court may not be in a position to instruct the jury that, in fact, there's been a factual allegation that was untrue.

QUESTION: But the trial is in a better postion than you and I.

MR. MC CONNELL: That's right, Your Honor. And that is why it is our position that the Court of Appeals erred in reversing this conviction here when the trail court had not been given an opportunity to rule on whether the prosecutor's closing arguments were in error.

CHIEF JUSTICE BURGER: I think we'll resume at 1:00 o'clock, Mr. McConnell.

(Whereupon, at 12:00 o'clock noon, the hearing in the above-entitled matter recessed, to reconvene at 1:00 o'clock, p.m., this same day.)

AFTERNOON SESSION

(1:00 p.m.)

CHIEF JUSTICE BURGER: Mr. McConnell, you may resume your argument.

MR. MC CONNELL: Mr. Chief Justice, before lunch, you asked whether this was a case in which oral argument was dispensed with before the Tenth Circuit. It was, in fact, and so states in the first paragraph of the opinion.

I wanted to return to the issue that we were discussing before lunch and the question specifically whether the doctrine of invited response is not one that encourages the prosecutor to fail to make an objection when he ought to.

I would like to point out that we are not arguing the equivalent of two wrongs make a right here in this case but, rather, that when examining the prosecutor's comments to see whether they constituted error at all, they have to be examined in context. And in the context of the defense provocations the prosecutor's comments were not error, they did not prejudice the accused, they did not have any detrimental effect on the right to a fair trial in that particular context.

Ordinarily, there are two dangers involved

when the prosecutor expresses his personal opinion on a matter at trial. The first is that the jury may conclude from the prosecutor's opinion that there is evidence outside of the record that's known to the prosecutor, but which was not presented to the jury, which would support a finding of guilt or innocence.

Thus, the jury may be tempted to convict not on the basis of the evidence, but rather on the supposition of this extra record evidence. It would suggest that in this context, after the defense provocation, that there was no danger of that whatsoever, just as Long v. United States, the prosecutor did not say or insinuate that his comments were based on personal knowledge.

Indeed, the comments of the prosecutor were repeatedly interlaced with comments on the evidence, and his comments were truly opinions on the evidence and not opinions based upon anything outside.

For example, after reviewing what the various Apco officials had said to Respondent and Respondent had said to them, the prosecutor stated, "I don't know what you call that. I call it fraud. You can look at the evidence and you can remember the testimony. You remember what they said and what he admitted they said. I think it's a fraud."

Note the way the prosecutor continually refers the jury back to the evidence. Admittedly, the prosecutor is expressing his opinion because the defense had raised the issue of the prosecutor's opinion, but in this instance, the response did not infringe upon the right of the accused to have the jury decide the question on the basis of the evidence before it, because the prosecutor's remarks in this context did not imply or suggest or insinuate the existence of extra-record evidence.

The second danger from prosecutors expressing their personal opinions on matters is that, as the representative of the government, they may over-awe the jury with the power or prestige of the government. Thus, it may tempt the jury to convict not on the basis of the evidence before it, but rather out of a respect for the position of the government in the case.

This danger is also remote in the context that we're talking about, that is to say, in a fair response context where the defense has challenged the integrity of the prosecution.

The prosecutor in this case did not invoke the power and prestige of the government. He did not make any of the types of arguments that one sometimes sees quoted, particularly in older decisions in which the

jury was being exhorted to follow the lead of the government.

Indeed, the prosecutor specifically labeled the opinion that he gave as his personal impressions, since it was asked of me. Thus, the jury was informed by the prosecutor that he was just giving his personal opinion because it was asked of him by the defense counsel.

And indeed, there is something a little peculiar about the thought that the jury in this case might have been over-awed by the power and prestige of the government because, after all, it was the defense that had introduced this notion that the prosecution had been behaving unfairly and that it had been reprehensible, and that the prosecution did not even believe its own case.

When the prosecutor responded by saying, "Yes, we do believe in our own case," that did nothing more than cancel out the defense counsel's remarks, thus refocusing the jury's attention where it belonged, namely, on the evidence, instead of upon the baseless accusations by defense counsel.

Thus, in this case, just as in Long v. United States, where the court -- and the court's words there: "Defense counsel's own comments clearly invited the reply which he now attacks."

Now, again, the question for the Court today is whether this type of response constitutes reversible error, whether there was prejudice to the defendant, and whether the defendant was denied a fair trial as a result of this. It is certainly relevant to that analysis of the prosecutor's comments that defense counsel himself had introduced this line of argument, that he had opened the door to the discussion of the prosecutor's views.

QUESTION: Mr. McConnell, what if the defense counsel got up and argued something along the following lines: The defendant has nothing to hide.

Could the prosecutor then comment in closing argument on the fact that the defendant didn't take a stand, as invite, being invited?

MR. MC CONNELL: Your Honor, I would not think that that particular instance would constitute an invitation. But to try to answer your question more fully, I do believe that there can be invitations which would lead to something that would constitute a comment on the failure to take a stand.

QUESTION: That would constitute so-called plain error. Would you agree that there are circumstances when, even though the defense counsel might have opened the door a crack, and the response

would amount to plain error?

MR. MC CONNELL: I can imagine responses that would constitute plain error. Your Honor, we are not contending that whenever the defense does anything that is all improper, that that means that the prosecution has a blank check to make whatever response it cares to.

Our position is simply that where, as here, the response is directly related to the provocation and is proportionate to it, that it is a fair response.

QUESTION: When you say "fair" and "permitted," we're talking basically about what, the supervisory rules for federal courts?

MR. MC CONNELL: Yes, Your Honor; although in the extreme, I would think that there would be a due process component as well, but we are talking here about the federal court system.

QUESTION: Mr. McConnell, do you think it would ever be appropriate for a court of appeals, in the exercise of its supervisory power with this kind of an issue, to take into account similar comments in other cases. Say it had a recurring problem in the circuit; they thought the prosecutors needed to realize the court was serious about enforcing a rule.

Or do they always have to confine themselves

to the particular case before them?

MR. MC CONNELL: Your Honor, I think that it is perfectly permissible for that to be taken into account. When the Court is considering whether an error is plain, there are two determinations that should be made.

The first is that the error was plain in the sense of its being obvious or clear, and the fact that the Court has spoken to that precise issue on other occasions would certainly contribute to that portion of the finding.

But there's a second determination that needs to be made as well, which is that the error, as well as being obvious, was an error of substantial prejudice to the accused.

In this instance, we would submit that the error failed under both of those considerations since we do not consider it plain in the sense of being obvious. We believe, rather, that it was quite permissible under the precedents of this Court. And in any event, it is not plain in the sense of prejudicing the substantial rights of the accused.

QUESTION: I thought your position was it wasn't error.

MR. MC CONNELL: That's our position as well.

QUESTION: At one time you say it's not error, and another time it's not plain.

MR. MC CONNELL: That's right, Your --

QUESTION: You take both positions.

MR. MC CONNELL: Yes, Your Honor. We believe that it is not error at all, and it falls a fortiori that it was not plain error.

In this instance, because the defendant failed to make an objection at the time of trial, the trial court, who was able to see the gestures, tone, emphasis, and so forth of the argument, was not able to --

QUESTION: Isn't that equaled out? The government didn't make objection, and the defendant didn't make objection. Isn't objection pointed out?

MR. MC CONNELL: Well, Your Honor --

QUESTION: Both sides gave up the right to object.

MR. MC CONNELL: In which case, one would expect that the conclusion would be that the conviction would stand because there's no --

QUESTION: Not in my book. I don't think two wrongs make a right.

MR. MC CONNELL: There is a requirement in appellate procedure of preserving the error for appeal. There is no requirement in trial practice that an

objective proceed pursuing a line of argument, even where that line of argument might have been improper on the part of those that initiated it.

QUESTION: Improper and unethical. It's unethical for a lawyer, in argument, to comment on his personal views. Isn't that right?

MR. MC CONNELL: That certainly is the usual rule, Your Honor. Where the defense has charged the prosecutor with hypocrisy in bringing the charges, however, the prosecutor is certainly within his rights in informing the jury that that is certainly -- that that is not the case; that they have been misled by defense counsel.

Just as in Long v. United States, this Court held that the prosecutor was entitled to express his view on the credibility of the witnesses before the Court because of the fact the defense counsel made an improper attack upon that issue of credibility.

When the defense chooses to open a line of argument, it is to be expected that the prosecution is going to follow it. This is a very different principle than the principle, the contemporaneous objection requirement, which has to do with the relationship between appelllate courts and trial courts.

The contemporaneous objection requirement is

needed in order to narrow the issues for the appeal, in order to make sure that the trial court, which is in the best position to judge this kind of error, gets a first crack at it, and in order to make sure that an error that can be cured is --

QUESTION: What has that to do with the appellate process, the right of the trial judge to move? That has nothing to do with appellate practice, does it?

MR. MC CONNELL: Well, yes, Your Honor. The appellate court, when considering a possibility of an error, has the benefit of the trial court's ruling.

In this case, for example, neither the defense counsel nor the trial court apparently saw anything amiss in the prosecutor's argument. Had there been an objection, we would have had the benefit of the trial court's view. The trial court that had seen the prosecutor's argument could have ruled either yes, this was, in context, a fair response given the gestures and the context and the tone and the emphasis; or no, it was not.

But in the absence of an objection, there was no such ruling, and thus the appellate court was denied the benefit of that.

Just to summarize -- and I see that my time is

growing short -- it is our position that the prosecutor's comments in this case were not error. And that is because once the defense had opened the door to the line of argument concerning te prosecutor's integrity in bringing the prosecution, the prosecutor was within his rights in making a moderate, perfectly direct, not disproportionate response to that.

We do not believe that in anyway that that interfered with the respondent's right to a fair trial. But, in addition to that, the failure of respondent to lodge an objection required a still more exacting review of the nature of the error and the nature of the prejudice which the court did not engage in.

And then, finally, since the court failed to consider the issue of prejudice, at least as a matter of their burden to ensure that they're not reversing on the basis of harmless error, they should have done so.

Having not done so they reversed, we contend, needlessly on the basis of an error that was, in fact, invited by the defense and not noticed by defense at trial. We believe that this is a serious and needless drain upon the resources available within the criminal justice system.

If there are no further questions, I would like to reserve the remainder of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Bailey.

ORAL ARGUMENT OF BURCK BAILEY, ESQ.

ON BEHALF OF RESPONDENT

MR. BAILEY: Mr. Chief Justice, may it please the Court, Bill Young's defense was that he had no fraudulent intent whatsoever. The evidence showed that he had worked for Apco Oil Company for, oh, several years and his best friends were the people he was dealing with on this transaction.

Apco's refinery at Cyril, Oklahoma, a small town in southern Oklahoma, was chronically in need of product. It was land-locked and had difficulty getting product down there, and the evidence showed it could not very efficiently meet its fixed costs without a lot of product.

So the president or the vice president of Apco in charge of that end of their business, a man named Hugh Bradley, asked Billy Young if he could get any product. Billy had been called by a fellow named Ross many times, saying that he had fuel oil he could certify as crude oil under the then-existing tier procedures under the regulations of the Department of Energy.

And Bill Young then bought condensate, which is very rich in hydrocarbons -- it's gathered at the wellhead -- and paid more for it than he could charge,

for that matter, and blended the condensate with fuel oil, and his testimony was he was putting the barrel back together.

There were two things that strongly, we felt, supported the proposition that he was acting without any fraudulent intent. First, for the six or seven months that Compton was selling this product to Apco Oil Company at Cyril, they had no difficulty with their output of the refinery. They still got the same gasoline, the same products they always had.

It was only after another company, totally related to any of the parties or procedures in this case, started selling to Apco pure burner fuel, a residue product that has no other products in it, that the Apco Oil Company noticed a change in their output and tested it, and found that there was fuel oil going in.

Also, the government witnesses who knew Mr. Young testified that he was an honorable and honest person, a person of integrity and, in their opinion, had no intent to defraud Apco. In fact, Hugh Bradley, the very person that he contracted with, the Apco vice president, so testified.

So it was in that situation that we reached closing argument. The government used the blending as

an indication of fraud. That was the view the government took of it; that yes, that increased the gravity of the oil; that was designed to cover up the fraud.

Young's version was, no, that's just quite the reverse. It was designed to give Apco the equivalent of what they were getting elsewhere.

QUESTION: How does this bear on the legitimacy of the comments of either counsel?

MR. BAILEY: It's because of the issue of good faith, Your Honor, and that was the issue in the closing summation. When counsel was confronted, when counsel for the government was confronted with this state of affairs -- this was immediately after Mr. Young had testified that he was putting the barrel back together, he had no intent to defraud anybody -- that, we submit, the prosecutor felt he needed something outside the evidence to carry the day, and started in the closing part of his -- excuse me -- the opening part of his closing argument, to talk about the victims. That word had never been used in this trial. No one had ever used the word "victim."

But the prosecutor says, "They say there's no victim." There's never been any such statement made in the whole transcript. "You and I are victims because

we're getting charged for this indirectly." No testimony at all, Your Honor, that that was so. No testimony that remotely supports that.

QUESTION: Well, isn't it a perfectly permissible inference for a prosecutor in a fraud case to say that people are victims of fraud? I mean certainly some latitude is allowed in closing argument.

MR. BAILEY: I think a great deal of latitude should be permitted if there is any evidence to support it, Your Honor. Here, we submit there is no evidence at all. It is quite the reverse.

Apco stated that they had not been requested, that is, their accountant, to make any kind of reimbursement or any kind of adjustment under the Denver Bailing regulations. There was no evidence whatever.

QUESTION: Are you saying that in order for a prosecutor in a closing argument in a fraud case to refer to the public as a victim, you would have to put someone on the witness stand and say, yes, the public is a victim of this fraud that we allege?

MR. BAILEY: Oh, I don't think that, Your Honor, but there should be some proof that someone lost something. And here, there was no such proof. It seems to me there should be some. That's my submission.

And this went on for several pages, talking

about fictitious victims and talking -- also, the FBI agent who investigated the case said that he had studied it for a year or more, and there was no evidence of any coming back to Bill Young.

QUESTION: So then what did you do about all this?

MR. BAILEY: Yes, Your Honor. When I made my closing argument, I said this is what they're complaining about. And I submit to you -- well, let me back up.

The indictment says that Billy Young is charged with intending to devise a scheme to defraud Apco and to obtain money and property by false and fraudulent pretenses. And I submit to you that there's not a person in this courtroom, including those sitting at this table, who think that Billy Young intended to defraud to Apco.

Now, if you think that Billy Young intended to defraud Apco, if that was his scheme and intent, Billy Young is dead. But that's an element of this charge that the government is obligated to prove beyond a reasonable doubt.

QUESTION: But you also said, "I submit to you, this case has been presented unfairly by the prosecution."

MR. BAILEY: Yes, I did, under what I've just described, Your Honor. And I think it has.

QUESTION: And you said your client was the only one in this whole affair who has acted with honor and integrity.

MR. BAILEY: That's correct, Your Honor. I say I never recall a case in 20 years where virtually every government witness that was called, that knew Billy, testified to his honorableness, his integrity, his rectitude, and I say that makes the case unique. And it goes to undercut any contention that that man had any intention to defraud anybody.

I think that was a fair comment on the evidence. It was what the testimony was.

And then in the closing portion of the government's argument, the prosecutor just went berserk. He went far in excess of what any reasonable rule would permit.

QUESTION: Do you think that any of the comments were not responsive to your own closing argument?

MR. BAILEY: Your Honor, I think -- yes, some were not, and I think they were excessive. I think the first comments --

QUESTION: Well, which ones? Could you

identify any that were not responsive to your argument?

MR. BAILEY: I will. I think the repetition of the statement that in his opinion it's a fraud, that the jurors are not doing their duty as jurors if they don't find him guilty --

QUESTION: Do you think -- he talked about the evidence, and then he says, "I don't know what you call that; I call it fraud." Now, is that an erroneous comment?

MR. BAILEY: I think that's an improper comment, Your Honor. But my observation backs up further than that, Your Honor.

At the outset of the close, the prosecutor says, "I think he said," -- to me -- "that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco.

QUESTION: Right.

MR. BAILEY: "Well, I was sitting there, and I think he was. I think he got 85 cents a barrel for every one of those 117,250 barrels he called, and every bit of the money they made on that, he got 1 percent of."

So I think that's totally incorrect, Your Honor. That's a misstatement of -- there's no support of that in the record at all, that he got -- that there

was any profit at all on the sales to Apco. There was testimony that --

QUESTION: Was your objection that he just misstated the evidence?

MR. BAILEY: Well, that he gave his opinion of guilt, which we think is grossly improper. And then didn't stop there. If that had been --

QUESTION: But that was responsive to your statement that nobody believed, including the prosecutor or himself, in your client's guilt.

MR. BAILEY: I think if he had stopped there, Your Honor, that it would be a closer case. I think that he, under the Tenth Circuit, of course, he was obligated to object to my closing argument if he thought it was in any way improper.

QUESTION: May I ask why no objection was made by you, as defense counsel, to anything that you thought he said was improper at the time?

MR. BAILEY: Our understanding of the Tenth Circuit rule was, if he objected to my closing statement, then that was the way he preserved his record, and I was not obligated to object to his because it was plain error.

In retrospect, I don't know whether we would do the same thing again. The point made so often in

these other cases from the Fifth and Sixth Circuit is that it emphasizes this point to the jury and only magnifies the opinion of the prosecutor to get up and call attention to that in the jury's presence. And I think there is substantial --

QUESTION: But you didn't think you were making an error or making any kind of an improper statement.

MR. BAILEY: I did not.

QUESTION: And perhaps the prosecutor didn't think you were doing anything improper. He just wanted to respond to it.

MR. BAILEY: Well, that could well be.

QUESTION: And it's also possible, isn't it, to approach the bench and make an objection outside the presence of the jury, if you really thought the prosecutor was getting out of line?

MR. BAILEY: Oh, it could have been done.

QUESTION: But none of that was done, of course.

MR. BAILEY: That was not done.

He goes on to say, "I don't know what you call it; I call it fraud. I think it's a fraud." And then at the --

QUESTION: Well, what is the reason that it is

said -- and I know it's said by other people -- that a prosecutor's expression of his personal opinion of guilt is improper?

MR. BAILEY: Your Honor, there are a number of reasons advanced for that. I think that -- let me see if I can put my hands right quickly on some of those points.

QUESTION: Well, if they're not immediately at hand, perhaps you could come up with it later in your argument.

MR. BAILEY: Yes. Well, here, for example, is a statement by the Sixth Circuit in United States v Bess. "An Assistant United States Attorney purports to represent the people of the United States, and thus carries a special aura of legitimacy about him. Implicit in an assertion of personal belief that a defendant is guilty is an implied statement that the prosecutor, by virtue of his experience, knowledge, and intellect has concluded that the jury must convict."

QUESTION: Does that make any sense to you? Certainly a defendant -- a defense lawyer can express his view that his client is not guilty; why shouldn't a prosecutor be able to say he thinks the defendant is guilty?

MR. BAILEY: Well, Your Honor, it's just

totally unethical.

QUESTION: Why?

MR. BAILEY: Well, because it makes the prosecutor a witness.

QUESTION: But when the defense lawyer expresses his view that his client is not guilty, then it must make the defense lawyer a witness.

MR. BAILEY: I think it's improper for a defense lawyer to say his client's not guilty.

QUESTION: You think it's perfectly all right though, to change the words a little and say, "Ladies and gentlemen of the jury, the evidence in this case clearly shows that my client is not guilty."

MR. BAILEY: I wouldn't think that would even be proper. There are cases that discuss that problem.

QUESTION: How do you make a factual argument and suggest that the facts refute the guilt?

MR. BAILEY: Well, the statement here from Mr. Drinker, writing on legal ethics in this case, which is quoted, I think addresses that point, Your Honor: "There are several reasons for the rule, long established, that a lawyer may not properly state his personal belief, either to the court or to the jury, in the soundness of his case. In the first place, his personal belief has no real bearing on the issue."

QUESTION: In my example, he didn't say what his personal beliefs were. He just says, "The evidence in this case should raise a reasonable doubt in your mind."

MR. BAILEY: I think that's slightly different, Your Honor, and I --

QUESTION: "The evidence in this case clearly shows that my client is not guilty."

MR. BAILEY: I think that one could get by with that sort of statement. It seems to me it's getting close to the line. But that's not the case we have here.

QUESTION: Well, the prosecutor should say, "I think the evidence in this case clearly shows that the defendant is guilty."

MR. BAILEY: I think that's very different from saying, "I say that it's a fraud. I think he intended to fraud."

To me, that's very different, Your Honor. And it's recognized in cases as being very different.

QUESTION: Mr. Bailey.

MR. BAILEY: Yes, Your Honor?

QUESTION: Suppose in this particular case, after you made this statement that everybody at this table agrees to this, and the prosecutor got up and

said, "Well, I object to that statement because I don't agree to it," and then said exactly what he said there, would that be objectionable?

MR. BAILEY: I think it would be a more appropriate respone than what was done. "I object; I don't agree." And I suppose that would be the end of that, and we wouldn't have all of this statement here later on.

QUESTION: No, I said he makes that whole statement. In his objection he makes that whole statement.

MR. BAILEY: Well, I think it is clearly reversible error, Your Honor. If he makes this whole statement that -- for example, he goes on to say that --

QUESTION: I mean if he gets up and -- if you get up there and say, "The prosecutor agrees with me that this man is innocent," and the prosecutor gets up and says, "I don't agree with it at all. I think he's guilty." Would there be anything wrong with that?

MR. BAILEY: I think there would be, Your Honor.

QUESTION: Yes. You shouldn't have said --

MR. BAILEY: I would take the position that there would be, but that's not this case. I didn't give my personal opinion on innocence.

QUESTION: Well, what's wrong with it? That's his objection. You're telling a lie.

MR. BAILEY: I think his objection is, Your Honor, we object to counsel stating what is in the minds of others. I don't think that you then use that as a platform to make a speech to the jury as a witness. It seems to me that's totally improper.

QUESTION: He's no more a witness than you were.

MR. BAILEY: Well, I don't -- Your Honor, I agree. But I don't think that there was anything stated by me that put my personal testimony before the jury.

He goes on to say --

QUESTION: What was your intent in saying nobody at this table believes thus and so?

MR. BAILEY: It was meant to be a comment on the evidence, that there was no evidence of any intent to defraud, Your Honor. There was none.

QUESTION: Well, that's your personal opinion, isn't it? I just asked you, did you say, "In my view, the evidence doesn't show guilt." I take it that's all right. You just said that.

MR. BAILEY: I don't recall saying anything quite like that, Your Honor, but I think that if there was such a statement made, the prosecutor has an

obligation to protest it if he doesn't like that.

He goes on to say, "I don't think you're doing your job as jurors in finding facts as opposed to the law that this judge is going to instruct. Do you think that's honor or integrity? Stand up here in an Oklahoma courtroom and say that's honor and integrity. I don't believe it."

It was an invasion of the province of the jury. It was highly improper, and it was rendered in an extremely aggressive and loud finger-jabbing tone. It was not in the measured tones of counsel here today.

QUESTION: Of course, Mr. Bailey, we don't know. I mean, of course, accept your representation that's how it was done, but that doesn't come through in the transcript.

But it is necessary for you to prevail for this to be plain error; right?

MR. BAILEY: That's correct, Your Honor.

QUESTION: Therefore, do we not have to assume that if you had made an objection, that the trial judge would have sustained it?

MR. BAILEY: I think you'd have to assume that.

QUESTION: And, therefore, I can't understand why you didn't make the objection, because I don't see

how that could have possibly hurt you.

MR. BAILEY: Well, there were two. The first reason was that the way we construed the Tenth Circuit rule, it was not -- we felt that there was plain error committed under the --

QUESTION: But you certainly aren't going to gamble on a reversal by the Court of Appeals rather than getting your client off.

MR. BAILEY: There was the deep concern that this would only emphasize this to the jury. It had already been said. It's not like an objection to an improper question. This was already out there. And maybe in retrospect, it would have been better to have done so.

I take comfort in the notion that all these cases that we have cited, where there is no objection made, that was done by a lot better lawyers than I, and they apparently reached the same conclusion.

QUESTION: Do you not agree, or do you agree that a lawyer objecting to argument of another lawyer, interrupting, takes considerable risk of having the jury have a negative reaction to the interruption?

MR. BAILEY: Very much so, Your Honor. I think there is no question about that.

QUESTION: So that probably explains why you

didn't object, and why the prosecutor didn't object.

MR. BAILEY: I think that's very true, Your Honor. It does have a negative impression to the jury. They resent it, I think. I think it works to the detriment of counsel and his client.

QUESTION: Does that not suggest, then, that lawyers and trial judges should be allowed quite a latitude in that respect?

MR. BAILEY: Oh, I think they should be allowed latitude, considerable latitude, and I think that that's done all the time, and properly so. But it just seems to me that one cannot have a prosecutor -- here, the prosecutor, at the very first sentence of his opening statement, said "I am a trial attorney from the United States Department of Justice, the Fraud Section, in Washington, D.C. and I am here to --

QUESTION: Do you think that would have hurt him with the jury or helped him in Oklahoma City?

(Laughter.)

MR. BAILEY: I think that's in with what they refer to as aura, the power and prestige and legitimacy that is very strong. And when he gets up and says, "I think, regardless of the evidence, I think -- I'm telling you that I am now becoming an expert witness. I am testifying. And I think that the man is guilty."

That's just wholly improper and carries a weight, as this Court noted in United States v. Berger, that transcends vastly anything that can be done to offset it.

There is no response possible at that point.

QUESTION: But, Mr. Bailey, again if I may just throw this thought out. Did you make any request of the trial judge or any instruction of the jury after the argument was over, so you would have avoided the harm of interruption?

MR. BAILEY: No. Did not. And that is a tighter fit, I think, Your Honor. That is what I looked back on and wondered. I think it probably would have been no good. I don't think it would have done any good, but had it been done, there is the tactical consideration of yes, you get some kind of instruction that statements by counsel are not evidence, which was incidentally said by the judge anyway at the very outset, but does that rob you of your possibility on appeal? You know, they say it's been corrected.

QUESTION: What about -- did you make a motion for a new trial on this ground?

MR. BAILEY: No. Went straight to the Tenth Circuit.

QUESTION: You mean you wanted to let the

error stay in the record without giving the trial judge a chance to correct it?

MR. BAILEY: No. Frankly, never thought of it, Your Honor.

QUESTION: Mr. Bailey, what's happened in this case, what I understood was the Tenth Circuit rule, that if you didn't object, then you're foreclosed from raising it.

Isn't there a Tenth Circuit rule that says that, whether it's prosecutor or defense counsel, if your adversary goes out of bounds, you have to object if you're going to, in order to give the trial judge a chance to correct.

MR. BAILEY: My understanding of the Tenth Circuit rule has always been that the prosecutor is obligated to object to defense counsel's statements and cannot respond to them improperly, and if they do so and express their own opinion, it's plain error. And you do not -- defense counsel is not required or obligated to object to an expression of a personal opinion of guilt.

QUESTION: That is exactly what the result was in this case.

MR. BAILEY: That's correct.

QUESTION: Now, you said a moment ago, Mr. Bailey, that -- as I understood you -- that the reason

you didn't ask for a curative instruction at the close of all the argument was that you were afraid of losing the argument on appeal?

MR. BAILEY: No. The truth is, Your Honor, that it never occurred to me. But I was just responding to Justice Stevens's remarks that one can see in retrospect where, from a tactical point of view, you could come to that conclusion; that, well, here we have a situation where the jury has been fatally prejudiced by what has been said, and no curative instruction, as is pointed out in some of these cases, would rectify that or cure it.

But if you ask for it, and it was granted, then presumably you would be in a dramatically weakened position to argue on appeal.

QUESTION: Don't you think that the appellate court would be perfectly capable of perceiving that the jury proceedings had been fatally infected beyond the point of curative instruction if, in fact, that was the case?

MR. BAILEY: I certainly hope so, Your Honor. I certainly hope so.

QUESTION: If, at the close, as part of the instructions, the trial judge had said, "Now, both of these lawyers have been engaging in expressing some

personal opinions, and I remind you they have no place in the process of deciding," would that have cured all of this?

MR. BAILEY: Not in my judgment, Your Honor. I think that the statements of the prosecutor, of his personal opinion of guilt of the defendant, cannot be cured by any curative instruction. I don't think it's possible to do that.

I think that the weight that that carries is so heavy, that there is no way to cure it. And it simply cannot be permitted.

The statement by this Court in Berger that the prosecutor has a duty to try the case fairly, not just to see victory, and that he cannot give his personal expressions of the defendant's guilt, as language as emphatic as this Court could write, is the proper rule; that it is simply denial of a fair trial for the prosecutor to make himself a witness and to say that -- it suggests that there are things he knows outside the record that have not come forward at trial, or else we would not bring this case.

QUESTION: Well, that isn't necessarily the case, because it depends on how the question or statement were -- if I say -- I'm the prosecutor and I say, "I am satisifed myself that the facts adduced

before you, ladies and gentlemen of the jury, show guilt beyond a reasonable doubt."

Now, there is certainly no implication there that I am relying on facts outside the record.

MR. BAILEY: Your Honor, that's just -- with all due respect, that's just totally improper and --

QUESTION: What's totally improper?

MR. BAILEY: For the prosecutor to do as you say.

QUESTION: But it must be improper for some other reason than indicating that there's a lot of evidence outside the record that would support it, because the prosecutor is expressly negative, that inference, in his statement.

MR. BAILEY: Well, I think I see what you mean. You're saying based on the evidence, I say that in my opinion he's totally guilty.

QUESTION: Yes.

MR. BAILEY: It still makes the prosecutor a witness. It has no place in a trial. Drinker goes on to say if expression of personal belief were permitted, it would give an improper advantage to the better-known lawyer whose opinion carries more weight, an undue advantage to an unscrupulous lawyer if such were permitted. It would be something -- let's see -- it

might be taken as admission that he lacked faith in his own case. It would turn it into not a trial on the merits.

QUESTION: Well, didn't you suggest that the prosecutor not only lacked faith in his own case, but didn't believe in it at all?

MR. BAILEY: I think that's -- I think that's too strong, Your Honor. But I think that I suggested that they didn't intend

QUESTION: That's the way I read your statement.

MR. BAILEY: -- that Billy Young intended to defraud, based on the evidence developed at trial; no suggestion that the case was not brought in good faith, but what had occurred in the courthouse at trial.

QUESTION: Mr. Bailey, can I ask one other procedural question?

MR. BAILEY: Yes.

QUESTION: As the Chief Justice pointed out, this case was apparently not argued with the Court of Appeals. Did you get notice that it was not to be argued? How do they do that there?

MR. BAILEY: My recollection is, Your Honor, that both I and the other side had a conflict, and I don't recall who said that we would like to move it to

another docket, and the court said well, it will just be submitted.

If the Court has no further questions, I complete it.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. McConnell?

MR. MC CONNELL: I'd be happy to answer any questions. If not --

CHIEF JUSTICE BURGER: Apparently not.

Thank you, gentlemen. The case is submitted.

We will hear arguments next in United States v. 50 Acres of Land.

(Whereupon, at 1:40 c'clock p.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:

#83-469 - UNITED STATES, Petitioner v. BILLY G. YOUNG

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)