OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-744 & 84-963

TITLE UNITED STATES, Petitioner V. JAMES C. LANE AND DENNIS R. LANE; and JAMES C. LANE AND DENNIS R. LANE, Petitioners V. UNITED STATES

PLACE Washington, D. C.

DATE October 9, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

- -x

UNITED STATES, :

Petitioner, :

V. : No. 84-744

JAMES C. LANE AND DENNIS :

R. LANE; :

and :

JAMES C. LANE AND DENNIS :

R. LANE, :

Petitioners, :

V. : No. 84-963

UNITED STATES :

- -x

Washington, D.C.

Wednesday, October 9, 1985

The above-entiltled matter came on for oral argument before the Supreme Court of the United States at 11:01 o'clock a.m.

APPEARANCES:

BRUCE NEIL KUHLIK, ESQ., Assistant to the Acting Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States.

CLIFFORD W. BROWN, ESQ., Lubbock, Texas, on behalf of James C. Lane and Dennis R. Lane.

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 arguments next in United States against Lane and the consolidated case.

Mr. Kuhlik, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF BRUCE NEIL KUHLIK, ESQ.,

ON BEHALF OF THE UNITED STATES

MR. KUHLIK: Mr. Chief Justice, and may it please the Court, the defendants in this case were each charged in five counts of a six-count indictment alleging mail fraud, conspiracy, and perjury in connection with three arson for profit schemes.

After a joint jury trial, each defendant was convicted on every count in which he was charged. The Court of Appeals held that one of the counts was improperly joined with the other five.

It reversed the convictions and remanded for new trials on all counts without determining whether either defendant was prejudiced in any respect by the misjoinder.

Two questions are before the Court, first, whether misjoinder is an exception to the rule that reviewing courts have a duty to determine whether any error at trial was harmless, and second, whether the

evidence was sufficient to support the defendant's convictions for mail fraud in connection with their arson of a duplex.

We think it is plain that misjoinder, which is a comparatively common garden variety violation of the rules of criminal procedure does not fit within the extremely narrow category of errors that are excepted from harmless error inquiry.

We also submit that it is equally clear that the mailing of insurance forms and fabricated invoices to the defrauded insurance company furthered the defendants' scheme to defraud within the meaning of the mail fraud statute.

The defendants, J.C. and Dennis Lane, are father and son. Count 1 of the indictment charged J.C. Lane alone with the 1979 arson of his failing restaurant business. The sufficiency of the evidence supporting this count is undisputed.

Counts 2 through 4 charged both defendants with mail fraud in connection with the arson of a duplex building that they had purchased for $500 and insured for $35,000. The building was burned pursuant to their direction in early May of 1980.

Shortly thereafter, Dennis Lane submitted a proof of loss form to the insurance adjuster which

stated quite fraudulently that he had played no part in the fire and was making no attempt to deceive the insurance company. At the same time, he received a draft payment of $7,000 with which to begin repair work on the building.

The insurance adjuster later mailed that proof of loss form to the insurance company headquarters and it was this mailing that was charged in Count 2 of the indictment.

As the summer of 1980 progressed, the insurance company made additional payments totalling $5,000 to the Lanes with which to continue repairs, and the defendants continued to submit fraudulent forms to the insurance adjuster. Additional forms were mailed by the adjuster to the company headquarters in August of 1980. It was this mailing that was charged in Count 3.

Finally, the insurance company settled the claim completely with a payment of $12,250 on September 16th of 1980. Two days later, the insurance adjuster mailed fraudulent invoices that the defendants had fabricated to support their repair claim to the company. It was this final mailing on September 18th of 1980 that was charged in Count 4.

These are the counts whose sufficiency is before the Court.

Count 5 charged both defendants with conspiracy to commit mail fraud in connection with their planned arson of a phony flower shop, and Count 6 charged Dennis Lane alone with perjury before a grand jury that was investigating the flower shop scheme.

The defendants were tried jointly. The trial lasted six days. The government produced over two dozen witnesses and over 100 exhibits. The defendants countered chiefly by character witnesses and Dennis Lane's denials that he had done anything wrong. The jury convicted on all counts.

The Court of Appeals held that Count 1, which charged J.C. Lane alone with the restaurant arson, was improperly joined the other five counts under Rule 8(b) of the criminal rules. The court refused to determine whether any -- either of the defendants was prejudiced in any respect by this error, holding only that in its circuit misjoinder was prejudicial per se, and not subject to harmless error inquiry.

The Court of Appeals also held that the evidence was sufficient to support the mail fraud convictions in connection with the duplex, holding that the mailings of the fraudulent proof of loss forms and repair invoices helped to hide the defendants' fraud and served to help them obtain and retain the proceeds of

their fraud, but the court did remand for a new trial on all counts.

Turning first to the harmless error issue, we think it is -- or this Court has consistently made it clear that reviewing courts have a duty under Rule 52(a) of the criminal rules and 28 USC 2111 to determine the harmlessness or prejudicial effect of any error at trial before predicating a reversal on such an error.

This rule serves important purposes --

QUESTION: Mr. Kuhlik, may I just raise this question before you get too deeply into the argument? The language of Rule 52 refers to error which does not affect substantial rights.

MR. KUHLIK: Yes.

QUESTION: Is it the government's position that misjoinder does not affect substantial rights, or that even if it does affect substantial rights, the harmless error inquiry is --

MR. KUHLIK: Our position is not that joinder under Rule 8 is not a substantial right. Our position is that the language under 52(a) that we would direct your attention, Justice Stevens, is to affecting the substantial right, and this Court has made it clear since at least Chapman that even constitutional errors are subject to harmless error inquiry.

The inquiry is not whether a substantial right has been -- is in question, but whether the right is affected by a violation that contributes to the jury's verdict. That is the inquiry that the Court set forth in Kotteakos and in Chapman.

QUESTION: Well, I still don't -- I am not quite sure what your answer is to my question. Do you agree -- Do you say there is or is not substantial right at stake here?

MR. KUHLIK: We say there may well be a substantial right, but --

QUESTION: And then you say that misjoinder does not affect that right?

MR. KUHLIK: That is the inquiry to be undertaken in this specific case, did the misjoinder affect the substantial right, the substantial right being the right to a jury verdict untainted by whatever error took place.

QUESTION: In the McElroy case as I read it, they said there was a substantial right affected, and that for that reason it was reversible error.

MR. KUHLIK: In the McElroy case, which was decided in 1896, the Court responded to the government's argument that the error of misjoinder in that case did not affect the verdict by saying that they could not say

that the verdict wasn't affected there.

But I would note that the case was --

QUESTION: The government confessed error in that case.

MR. KUHLIK: They confessed error --

QUESTION: They didn't make that argument. They agreed it did affect substantial rights, and they agreed that as to some of the defendants it should be reversed.

MR. KUHLIK: But the portion of the Court's discussion to which you are referring referred, I believe, to the part of the judgment in which the government had not confessed error, which was on the basis of the fact that the three defendants who were charged in all counts had not had their rights affected.

And I would note that McElroy was decided over 20 years before the first harmless error statute was enacted.

QUESTION: Yes, but Rule 52(a) expressly picks up the substantial right language, and that is why I am just not entirely -- still not entirely clear what you are saying.

You are saying that there is a substantial right involved, but it is not affected if one can call

it harmless? Is that it?

MR. KUHLIK: Well, perhaps the best way to put it is that the substantial right in any case is the right to a jury verdict that has not been affected by error, and in that respect we would say that if there has been misjoinder, the Court must inquire into whether the substantial right which is to the untainted jury verdict has been affected in the particular case.

28 USC 2111 does not --

QUESTION: Well, wouldn't that make the rule read exactly -- what you really do, as I understand your interpretation, the rule then should simply read, "Any error, defect, irregularity, or variance" -- I see, "which does not affect substantial rights shall be disregarded."

You are saying if it is -- that is the equivalent of harmless.

MR. KUHLIK: Exactly. I mean, that is - what the rule was called is the harmless error rule, and the rule, which is to be read of a piece with Section 2111 of the code, which does not have the substantial right language, I believe.

Well, Section 2111 was designed simply to make sure that the harmless error rule applied on appeal, and the Court -- Congress, when it reenacted that statute in

1948 specifically did away with the technical modifier on error.

So, the point is that Congress has made it clear both in the rule and in the statute, and this Court has certainly made it clear in Chapman that the harmless error inquiry is not limited to mere technical defects. It applies whether the error is constitutional, whether it is statutory, whether it is a violation of the criminal rules. That is all that we ask here, is that this same inquiry be made with respect to misjoinder.

And in that regard, the harmless error inquiry serves several important purposes, principally the prompt and fair administration of justice, and it gives effect to the central purpose of a criminal trial, which is to determine the factual issue of the defendant's guilt or innocence not to sew the seeds for reversible error upon later review.

And these -- these considerations have special force in the context of misjoinder, which is a fairly common technical violation of the rules that often, as we submit here, have an absolutely minimal effect on the outcome of the trial.

Now, we do not believe that misjoinder can be said to fit within any of the exceptions that the Court

has recognized to the harmless error rule. The principal exception that the Court has recognized is for rights that are so fundamental to the modern conception of a criminal trial that they simply cannot be deemed harmless.

For example, the right to access to counsel or to a trial before an unbiased tribunal. But Rule 8 simply does not rise anywhere near this level. It is not even a constitutional standard to begin with, much less one that is so fundamental that unlike most constitutional rights under Chapman should be excepted from harmless error inquiry.

Nor do we believe that there is any other basis for excepting Rule 8 from the harmless error inquiry. As we discussed answering Justice Stevens' question, we do not believe that the McElroy case stands for such a proposition.

Moreover, as we point out in our brief, Rule 14, which applies to prejudicial joinder, does not stand as a directive to exempt Rule 8 from misjoinder.

We would also submit that the error here in this particular case was clearly harmless in view of the strength of the government's case, the District Court's careful instructions to the jury considering the separate consideration to be given to each defendant,

and that the jury not consider the evidence with respect to Count 1 against Dennis Lane, and the fact that much of this evidence would properly be admissible on retrial in any event.

Turning to the mail fraud issue --

QUESTION: I know it is not true in this case, but supposing you had a case in which the evidence on Count 1 were overwhelming, and it was a very close case on the other five counts.

Would you say in that situation it might be considered that it would not be harmless?

MR. KUHLIK: That is the standard inquiry that the Court of Appeals would make in reviewing whether the error was harmless. All we ask is for a chance to get the Court of Appeals to make the inquiry.

QUESTION: But if you would think -- so our duty is to see how overwhelming the evidence is on the five other counts.

MR. KUHLIK: Well, it is not --

QUESTION: I mean, how does the harmless error inquiry proceed?

MR. KUHLIK: Well, I would point first to the fact that we do believe that the evidence of Count 1 would come in on retrial under -- at least under Rule 404.

QUESTION: As to the son?

MR. KUHLIK: No, it would come in as respect to the father, and the son would get exactly the same limiting instruction on retrial that he got here.

Under the Court of Appeals judgment, the defendants do not have to be tried separately on remand. They can be tried on Counts 2 through 6 together.

QUESTION: Right.

MR. KUHLIK: And at such a trial, I would expect the government to offer evidence of the Count 1 arson.

QUESTION: Wouldn't the government be free to elect to try 1 through 6 together as against the father?

MR. KUHLIK: One through Five. Yes, Justice --

QUESTION: One through Five, excuse me, because Six was just --

MR. KUHLIK: They could do it either way --

QUESTION: They could do it either way, yes.

MR. KUHLIK: -- that they wanted to, but I would think that any time that the same evidence would be admissible on retrial, that would be an extremely strong consideration favoring the harmlessness of the error.

But even if that were not so, it is the same inquiry that the Court of Appeals would make whenever evidence were, say, erroneously admitted at trial, how central was that evidence, could it be kept separate, what effect did it have.

And as I say --

QUESTION: Mr. Kuhlik, what would happen in the event of a misjoinder of parties defendant in a criminal case when a defendant joined in the action, makes a Rule 14 motion for severance, for example, and the trial court determines, well, you didn't established prejudice, and I am not going to sever, and after the trial there is a harmless error inquiry, if your position is adopted?

How will that earlier determination under Rule 14 affect the harmless error inquiry?

MR. KUHLIK: Of course, the first inquiry for the Court of Appeals, Justice O'Connor, will be whether Rule 8 was violated at all.

QUESTION: Let's assume it was, or is.

MR. KUHLIK: Well, the -- I think that the District Court's determination that there was no prejudice would be a factor of some moment, but it would not be controlling, because at the time that the District Court makes its Rule 14 determination, that is

before trial, and we would ask that the Court of Appeals would make the standard harmless error inquiry, which is on the record developed at the trial itself.

QUESTION: Rule 14 deals -- isn't that the situation where there is a proper joinder under Rule 8, but the defendant claims that there is some prejudice which entitles him to a severance even though he wouldn't be entitled to it under Rule 8?

MR. KUHLIK: That's right, Justice Rehnquist.

I would like to turn now to the mail fraud issue.

QUESTION: Is the showing of prejudice in that context different from the showing of prejudice necessary to defeat a harmless error claim? In other words, could the -- as long as there is no prejudice, then the government doesn't have to worry about misjoinder. Is that right?

MR. KUHLIK: Well, the showing of prejudice is basically the same, but the burdens and the standards applied by the courts would be somewhat different depending on whether you are in the District Court or the Court of Appeals, and -- but the generic inquiry into the sort of prejudice that can take place is the same, Your Honor.

The scheme that was alleged in Counts 2

through 4 of the indictment was primarily one to defraud the insurance company by running up the repair costs on the building that the defendants had burned after it turned out that their torch was unable to destroy it completely.

Now, the elements of a mail fraud offense under Section 1341 are a scheme to defraud and a mailing in furtherance of this scheme caused by the defendant. Now, the defendants here do not challenge the jury instructions which plainly set forth the governing law, nor do they challenge that they had a scheme to defraud, that they intended to defraud the insurance company, or that they caused the mailings that took place.

They say only that the mailings could not have furthered their scheme because they had already received the funds in question. This is plainly wrong. Turning first to Counts 2 and 3, which can be disposed of almost immediately, these counts alleged mailings that took place in May and August of 1980 before the defendants had received the last and largest payment in September.

The scheme was quite plainly ongoing at this time, and indeed Dennis Lane admitted at trial that they would not have received the final payment had not the earlier mailing been made. This leaves Count 4, which charged the mailing of fabricated repair invoices that

the defendants had submitted to the insurance adjuster and that the adjuster mailed to company headquarters two days after issuing a draft for $12,000 to the defendants.

Now, again, the jury was properly instructed that if the scheme had ended by this time, then they had to acquit. Of course, they did not. The draft payment that was made did not irrevocably vest the funds in the defendants. Unlike a check, it still had to be cleared by the insurance company headquarters, and the evidence was clear that if something had been amiss with the policy claim, the insurance company would not have authorized payment, and the bank would have charged back against the defendants for any funds that they had already withdrawn, so the defendants had not received the funds in question.

But even if they had, that does not carry with it a blanket immunity from the mail fraud statute. This Court in Samson and the Courts of Appeals have consistently made it clear that mailings that have the effect of lulling the defendants' victims into a false sense of security, thereby postponing their complaint to the authorities and making it less likely that the defendants will be found out are within the mail fraud statute.

That is precisely what happened here, as the Court of Appeals found. I mean, it is difficult to think of something more directly connected to a scheme to defraud the insurance company than the mailing of the fraudulent proof of loss forms and invoices to the company itself.

The defendants have only one final argument, which is that we neither charged nor proved that they had the specific intent to use the mails. This failure is hardly surprising in light of the fact that the Court has consistently made it clear, for example, in Perrera, that no specific intent to use the mails is required. All that is needed is that the use of the mails be reasonably foreseeable, which the defendants admit that it was.

If there are no further questions --

QUESTION: I do have a question, Mr. Kuhlik. It isn't clear to me whether you take the position that on a mail fraud count the government has to prove an intent to lull in order to convict on that theory under the statute, or whether merely an effect of lulling is enough.

MR. KUHLIK: The latter, Justice O'Connor. As long as an intent to defraud is charged and proven, that is sufficient, and if the mailing then has the effect of

furthering the entire scheme by lulling, that is plainly sufficient. It has never been the law that a further intent that the mailing itself be used or further the scheme to --

QUESTION: Do you think the lower courts are in total agreement with that view?

MR. KUHLIK: In my research, I have not seen a single lower court decision requiring an intent to defraud, and among the cases that we cite in our brief on Page 32 I would point specifically to the Jones and Toney cases as cases that involve lulling mailings, where this Court expressly said that no intent to lull was required --

QUESTION: I guess we don't have to really decide that in this case.

MR. KUHLIK: No, you don't, because the mailings did not -- the funds had not been completely received.

QUESTION: May I -- I am sorry. May I ask one other question on the misjoinder aspect of the case? Do you think the issue is precisely the same as to both respondents? In other words, the government, I know, hasn't challenged the misjoinder in this case, but do you think there was a misjoinder of Count 1 as to the father?

MR. KUHLIK: Had the father been tried alone, then Rule 8(a) would have been applicable, and Count 1 would properly have been joined with the other counts.

QUESTION: How can he claim that there was claim error out of the misjoinder? I am just puzzled. Of course, perhaps I should ask your opponent, but do you agree he has the same right to claim error as the son does out of this misjoinder of Count 1?

MR. KUHLIK: To claim that there has been an error at all --

QUESTION: That affects the judgment as to him.

MR. KUHLIK: Well, certainly, as we point out in the brief, we don't see how the judgment could possibly have -- how the misjoinder could possibly have --

QUESTION: Misjoinder of Count 1 could have --

MR. KUHLIK: Right, because he would get virtually the same trial on remand. Either Count 1 would be included or Count 6 would be included, and we don't see how there could be any prejudice by including both of them together.

QUESTION: I just don't even -- I must confess, I have some difficulty seeing how there is any even error as to him on that -- on this misjoinder as to

Count 1, and why we -- it seems to me that phrasing it in terms of harmless error assumes an error that I somehow have difficulty identifying.

MR. KUHLIK: Well, there is clearly an error with respect to --

QUESTION: The son.

MR. KUHLIK: -- the son, which would lead the Court to have to reach the harmlessness issue on which there is a conflict in the circuits. We haven't raised the factual question.

QUESTION: But looking at it from the point of view of the son, if you prevail in this case and the law is as you advocate now, do you think if the same facts that were present in the McElroy case arose again, the case would be decided the same way or differently?

MR. KUHLIK: I think I would have to know -- I certainly think that the Court would undertake a more complete harmless error inquiry than it professed to do in McElroy itself.

QUESTION: Who didn't do any, in fact.

MR. KUHLIK: Well, I think it --

QUESTION: It just said that misjoinder is obviously prejudicial.

MR. KUHLIK: Well, I think saying that it was obviously prejudicial was a truncated means of saying

that the error was not harmless.

QUESTION: But the reason it was obviously prejudicial is that a person who is defending his own case was being tried with somebody who had a lot of evidence of guilt as to him. I mean, it is the same set of facts. The reason for finding error there would apply in this case as well.

MR. KUHLIK: If there was a misjoined count that had nothing to do with one of the defendants, and the evidence on that count was extremely strong and prejudicial, I would fully expect the Court of Appeals might well find the error not harmless.

But that is the inquiry that would have to be made.

If there are no further questions, I will reserve the balance of my time.

CHIEF JUSTICE BURGER: All right.

Mr. Brown.

ORAL ARGUMENT OF CLIFFORD W. BROWN, ESQ.,
ON BEHALF OF JAMES C. LANE AND DENNIS R. LANE

MR. BROWN: Mr. Chief Justice, and may it please the Court, in the beginning I would state that the government's statement of the case appears to me to be complete and accurate. So it is unnecessary for me to proceed to supplement that. If by --

QUESTION: Do you mean by that, Mr. Brown, that you agree that the evidence of guilt here is overwhelming?

MR. BROWN: No, I do not believe that. I am talking about their factual statement of the background of the case, not their conclusions, Your Honor.

The court, the appellate court said that Count 1 should not have been joined with the others because it was not part of the same series of acts or transactions as Count 2 through 4. The government, of course, their single complaint as to the first part of their brief relates to the failure of the court to make application of the harmless error rule, and they contend that a conviction may not be reversed under Rule 8(b) unless -- if the error was harmless.

Now, it is our contention that the Court of Appeals did not err in reversing without determining the question of misjoinder. I think it is significant, and perhaps we need to note in passing that the government in its brief gives great consideration to the case of U.S. versus Hasting, but never once has counsel argued that. Because it is in the brief, I feel that I need to confront it in order that it not go unanswered but remain for consideration in the brief.

We believe that despite the holding in

Hasting, that the -- that harmless error does not apply to the Rule 8(b) violations in this case, and that there is in fact a basis for excepting misjoinder from the harmless error rule.

QUESTION: You said it doesn't apply to the misjoinder in this case. I suppose your position is, it wouldn't apply to misjoinder in any case.

MR. BROWN: My position is exactly that, Justice White. I believe that misjoinder is per se reversible. Now, before --

QUESTION: No matter what the evidence turns out to be.

MR. BROWN: Beg pardon?

QUESTION: No matter what the evidence turns out to be.

MR. BROWN: Yes, and the reason that I say that, Justice White, is because I believe that the rules to make proof have carefully placed the boundaries under Rule 8(b), and they have established standards, and they say beyond this standard you shall not go, and they say in effect that misjoinder is reversible.

There are numberless reasons to illustrate this. We know what many of these are. We know that there is danger in misjoinder that there will be a transferrence of guilt. We know that there is danger

under King versus U.S. of guilt by association, evidentiary spillover, and the reasons cited in McElroy.

Now, let me say simply this in regards to Hasting. The reason we say Hastings does not apply in this case because Hastings is -- Hasting is not a misjoinder case, and we think that that is very important, because all Hasting really did was to make a global statement of general principles about the harmless error doctrine, and Hasting itself recognizes that there are certain categories of cases to which the harmless error doctrine does not apply.

Counsel stated those, those that deny an impartial magistrate like Tumey versus Ohio, those that Professor Wright mentions, like the Estes case where there is pretrial prejudice, double jeopardy, and then finally the denial of counsel as is set out in Wainwright and in Strickland versus Washington, and Strickland versus Washington says that in some cases that the cost of this case by case inquiry into prejudice would be cost prohibitive because there is such a potential for prejudice in Rule 8(b) violations, and if we turn to McElroy, and incidentally, McElroy is still good, viable law.

QUESTION: What makes you think that?

MR. BROWN: I think that it is because it continues to be cited by the differing authorities throughout the land. It continues to be cited by this Court. And even more important than that, McElroy included a discussion of the very elements that are presented by the Rule 52(a).

QUESTION: You think under the Court's decision in McElroy it is perfectly consistent with the terms of Rule 52(a).

MR. BROWN: Yes, and let me tell you, Justice White, why I believe that, because the -- because I believe that the reasoning that McElroy confronted exactly the same issues as involved in Rule 52(a), and Your Honor, I apologize. You are Justice Rehnquist, and I apologize for my error.

QUESTION: I don't know to whom the apology is due.

(General laughter.)

MR. BROWN: I hesitate to say, Your Honor. I apologize to both for my error.

(General laughter.)

QUESTION: What do you say about the Kotteakos case?

MR. BROWN: I say --

QUESTION: It has not made any dents in

McElroy?

MR. BROWN: I say that Kotteakos -- no, I do -- well, let me say this. I say that Kotteakos applies more to the question of joinder or misjoinder in relation to 52(a), because Kotteakos says that misjoinder is a violation of a substantial right, that right being not to be tried en masse, and of course we know McElroy is exactly what happened. There were eight defendants, originally nine.

One somehow was dropped, and eight in two separate indictments, six in one and two in the other, were consolidated for trial, and McElroy said that it is the substantial right not to be tried en masse, and Kotteakos picks up on that.

Kotteakos says that it is rather even so whether the error itself had substantial influence. It says, if so, or if one is left in grave doubt, the conviction cannot stand.

I believe it important to mention as one of the Justices has the fact that there are two people charged in this case, father and son, and when we are talking about the question of harmless error, there are evidentiary facts that make for differing interpretations as to the relative guilt of these individuals, and certainly as to the relative prejudice.

We know that Rule 8(b) prevents the necessity of a defense of a multiplicity of offenses, and we know that it also preserves the integrity of the factfinding process.

Of course, the other side of that is the argument that joinder promotes judicial economy, but we believe that any benefit in this regard is outweighed by the inherent prejudice of misjcinder.

I would like to talk with the Court briefly about the government's construction in its brief about Rule 8(b) and 52(a), and we say that their argument for the construction of Rule 52(a), the harmless error rule, in application to all cases would simply eviserate Rule 8(b), because Rule 8(b) sets the limits, and says that misjoinder exists if you have a joinder in violation of it.

Now, it is interesting to note that in the case of Ward versus United States, that Chief Justice Burger himself when writing as a circuit judge relying upon McElroy said that where multiple defendants are charged with offenses in no way connected and are tried together, they are prejudiced by this very fact, and the trial judge has no discretion to deny relief.

QUESTION: When was that said?

MR. BROWN: That was cited out of the D.C.

Circuit in 1961, Your Honor, and that which I read was a direct quote from Ingram, which Your Honor cited along with Schaffer and Welch and McElroy. Now --

QUESTION: Has McElroy been cited favorably by this Court in a Court opinion in recent times?

MR. BROWN: Your Honor, unfortunately, memory escapes me of the name of any. I believe that I have seen such. I do know this, that the McElroy -- in my opinion, and I was asked about Kotteakos, I believe that the McElroy analysis of misjoinder is completely consistent with Justice Black's opinion in Chapman versus California and Justice Rutledge's opinion in Kotteakos versus U.S.

Now, Professor Wright has said that cases holding that misjoinder cannot be harmless error have consistently relied upon McElroy in their reasoning and in their language as well, and I think it is important to note as Justice Stevens' question indicates that Rule 52(a) in talking about harmless error has a specific exception in it when it says any error, defect, irregularity, or variance which does not affect substantial rights, and as I have said previously, Kotteakos says that misjoinder is a violation of a substantial right, because it is a violation of the right not to be tried en masse.

QUESTION: Mr. Brown, can I ask you a question? Kotteakos, of course, was a variance case, and they did say harmless error inquiry was appropriate, at least in reviewing variances, and this is a misjoinder case, and all the other examples you have given where there was no harmless error are constitutional error cases.

Can you give me any example of a nonconstitutional error which is not subject to harmless erorr inquiry other than misjoinder?

MR. BROWN: I cannot think of any right now, Your Honor. In that regard, I do think that it is important that we remember that Rule 16(b) itself -- I am sorry, that Rule 8(b) talks about the competing considerations that exist in these cases, and it just -- it just simply says -- oh, wait a minute. I remember now the answer to your question.

You were asking me if I knew of any other cases that didn't have constitutional errors. I cannot name any. But what I wanted to say in response, Your Honor, is this, that the rulemaking authority that was delegated by the Congress to the Court under the necessary and proper clause of the Third Amendment makes the enunciation of this rule literally in my opinion a constitutional mandate.

And I think that while it may not rise to the height of a constitutional error, that it still is a significant mandate of the Congress through its authorized rulemaking authority, and that it should not and cannot be denominated as harmless error.

There were -- I want to turn now to my consideration of the second point, but before I do that, I want to talk with the Court about the government's contention that the misjoinder in this case could be taken care of by considerations such as the overwhelming weight of the evidence and the fact that much of the evidence would be admissible in the trial of another case upon remand, and their matters in regards to retrial.

We think that an attempt to retry these defendants together would again accentuate the inherent prejudice that inurred to Dennis Lane by having this particular Count 1 presented and evidence presented in regard to that brought to the attention of the trial jury.

There are -- I believe that one of the Justices mentioned the possibility of error to the various parties, and I think this is something that we need to consider here. The evidence that was admitted under Count 1 in this case obviously contributed to the

conviction of Dennis Lane on the other cases.

Now, the Count 1, we need to remember, related to a fire over a year in advance of the fire alleged in Counts 2, 3, and 4, and it was charged alone against J.C. Lane, who was the father of Dennis Lane. Now, when you come along and consider the one charge against J.C. Lane in the first count, Counts 2, 3, and 4 involve both defendants, and Count 5 involved both defendants in a conspiracy to commit arson for profit.

Now, if we had only Counts 2, 3, and 4, and we had a father and son alone involved there, and one fire, we might think that was an accidental catastrophe, but if we add to that the Count 1 which relates alone to J.C. Lane, then we have two fires involved in a single family, and certainly a suspicion that this was not accidental or the overpowering urge to consider that there may be some connection..

And then when we add Count 5, which relates to the conspiracy between father and son to carry out a scheme for profit in Lubbock, Texas, we have evidence there presented of three separate fires.

Now, there is danger to J.C. Lane in Count 1 because of the possibility of the jury saying here is a father who not only did something himself, but he involved his son in a later and still -- a later

transaction and still later conspiracy.

So, we think clearly the danger is evident in Count 1 as to both of them, and then the misjoinder of Count 6 resulted in prejudice, we believe, tc J.C. Lane because -- and certainly to Dennis because Dennis is charged with perjury, and he is charged with perjury directly in relation to Count 5, which is the conpiracy to commit arson in Lubbock, and in Counts 2 through 5 of the indictment, in addition to alleging his own criminal activity, then J.C. Lane is involved in arson with his son, and then Count 6 in regard to perjury involves him in perjury in relation to another count on conspiracy where he is charged with his father.

And so there is a possibility for it to begin to look like that father influenced son and the son is supporting the father.

QUESTION: Well, couldn't some of that evidence come in as the government says -- pattern or practice and things like that?

MR. BROWN: Well, some of it might, Your Honor. We do not believe that the evidence in relation to Count 1 could ever be properly admissible against Dennis Lane on retrial.

QUESTION: I mean, the misjoinder rule isn't designed to prevent relevant evidence from being

introduced against a defendant.

MR. BROWN: No, I would admit to that, Your Honor. It is not meant, but it is meant to try to keep out prejudice because of misjoinder that permits evidence of multiple offenses.

QUESTION: That otherwise would be inadmissible.

MR. BROWN: Yes.

I want to turn now to a consideration of our contention that the evidence is insufficient to support the conviction on Count 2 through 4 of the indictment. Now, the Article 18, USCA's 1341, requires that the government prove that the alleged use of the mails was for the purpose of executing the scheme.

We cite Kahn versus U.S., which says that the statute only reaches those instances in which the use of the mails is in the execution of the fraud. Our allegation is that in Counts 2, 3, and 4, which relate to arson in regards to an address of 1105 South Jackson in Amarillo, that the scheme had reached its fruition as to each count or each offense, 2, 3, and 4, because Dennis Lane had received the money prior to the mailing.

Now, there is a chart at Page 29 of our brief, and I call it to the Court's attention because it sets out very clearly the counts, the date that the check was

received, and the date of the mailing of the proof of loss or other paper in connection therewith.

Count 2, Dennis Lane received the check on 5/9/80 in Amarillo, Texas, from a local adjuster who wrote it out in his front of him and delivered it to him. Dennis Lane delivered to the man a proof of loss at the same time. The mailing was not until 5/15, some six days later.

The evidence actually showed that Dennis Lane had that check in his bank account and had spent almost all of it before the mailing occurred. Count 3 was on the 21st of May, 1980, and the mailing was not until August the 6th of 1980. Now, the same --

QUESTION: Well, the government relies, counsel, on the lulling of the victim cases.

MR. BROWN: That is correct, Your Honor.

QUESTION: And so it seems to me that is what you have to deal with, and of course the government takes the position that merely having the effect of lulling is enough without intending to do so.

MR. BROWN: And, of course, we join issue with the government, Your Honor, at that very point.

QUESTION: All right. Did the jury in this case require -- did the trial court instructions require the jury to find an intent to lull in order to find mail

fraud?

MR. BROWN: No, Your Honor.

QUESTION: Did you object on that ground at the time, to those --

MR. BROWN: We did --

QUESTION: -- instructions for that reason?

MR. BROWN: Your Honor, that objection does not find its way into this record to the best of my --

QUESTION: I didn't find it, no.

MR. BROWN: -- to the best of my knowledge.

QUESTION: And you really didn't raise any question here, did you, in your cross petition with regard to the sufficiency of the instructios to the jury.

MR. BROWN: No, we did not, Your Honor. What we do argue, Your Honor.

QUESTION: So all we would have to do, then, is to see whether there was sufficient evidence in the record to at least support a finding of an intent to lull, and that would resolve this case.

MR. BROWN: That perhaps is so, and for that reason, Your Honor, I would like at this time to discuss that aspect of our brief. We believe that the -- now, the cases, of course, say that the foreseeability -- in other words, that there is, of course, foreseeability of

mailing, and we think that the Court of Appeals actually confused the foreseeability of mailing with the preconceived intent to lull by the use of the mails.

Intent in this case is knowing and wilfully, charged in the indictment. The mens rea is criminal intent, and knowing --

QUESTION: Why do you say that? I mean, the government takes the position that the intent to defraud is all the statute requires, and I think reading the statute that is a pretty fair inference from it. Why do you think that intent to lull is a kind of a substantive element of the crime rather than just something to conform to the commerce requirement.

What I am saying is that I think the government says intent to lull should make the difference between that and -- in other words, that the government is not arguing intent to defraud. They are arguing that there was an intent to lull when there is no evidentiary basis for that.

QUESTION: I thought the government took the position that intent to lull was not necessary so long as the defendant's conduct has the effect of lulling. Do you disagree with that?

MR. BROWN: I do not disagree with Your Honor's interpretation of the government's argument,

no. But what we do say is this, that the fraudulent intent necessary must be present at the very time that the defendant uses the mail or knowingly causes the use of the mail.

Now, Gibson versus -- U.S. versus Gibson says this, and we think that the Court of Appeals opinion overlooks this basis, and the opinion in fact imputes an intent to lull which was neither alleged nor proved, and which was expressly disputed by Dennis Lane.

Dennis Lane expressly said that -- and this is found at Page 797 of the statement of facts. He testified that he absolutely did not know that the proofs of loss had to be mailed. Inherent in that is his denial of intent to cause the mailing. And at another place, at Page 859 of the statement of facts, he says that he did not consciously cause the adjuster to mail anything.

In summary, because of my diminishing time, we believe there is insufficient evidence of an intent to lull, that the mental culpability that is necessary in this kind of a case can neither be imputed to the respondent nor can it be supplied by proof of the criminal act alone, and that it cannot be said that the alleged use of the mail was for the purpose of executing the scheme.

CHIEF JUSTICE BURGER: Very well.

Mr. Kuhlik, do you have anything further?

ORAL ARGUMENT OF BRUCE NEIL KUHLIK, ESQ.,

ON BEHALF OF THE UNITED STATES - REBUTTAL

MR. KUHLIK: Two points, Your Honor.

First, Justice O'Connor asked me earlier about the effect of a District Court's finding that there was not sufficient prejudice to require a severance under Rule 14. I would like to clarify that a greater amount of prejudice could certainly be tolerated under Rule 14 than would be tolerated on a harmless error inquiry under Rule 8, so that the District Court would have the discretion to refuse to grant a severance under Rule 14 because the additional amount of prejudice would be tolerable where that amount of prejudice would result in a reversal under Rule 8 on appeal.

The second point is simply to emphasize that under the mail fraud statute there is no separate crime of lulling. The crime is a scheme to defraud. Lulling is simply one way that the mailing can further that scheme.

If there is nothing further.

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

(Whereupon, at 11:55 o'clock p.m., the case in

the above-entitled matter was submitted.)

CERTIFICATION

lderson Reporting Company, Inc., hereby certifies that the ttached pages represents an accurate transcription of lectronic sound recording of the oral argument before the upreme Court of The United States in the Matter of:

#84-744 - UNITED STATES, Petitioner V. JAMES C. LANE AND DENNIS R. LANE;

#84-963 - JAMES C. LANE AND DENNIS R. LANE, Petitioners V. UNITED STATES

nd that these attached pages constitutes the original ranscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)