REVISED

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

ORIGINAL

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-6725

TITLE WILLIAM JOHN BOURJAILY, Petitioner V. UNITED STATES

PLACE Washington, D. C.

DATE April 1, 1987

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ALDERSON REPORTING

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM JOHN BOURJAILY, :

Petitioner, :

v. : No. 85-6725

UNITED STATES :

Washington, D.C.

Wednesday, April 1, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:50 p.m.

APPEARANCES:

STEPHEN ALLAN SALTZBURG, ESQ., Charlottesville, Virginia; on behalf of the Petitioner.

LAWRENCE S. ROBBINS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(1:50 p.m.)

CHIEF JUSTICE REHNQUIST: Mr. Saltzburg, you may proceed whenever you are ready.

ORAL ARGUMENT OF STEPHEN ALLAN SALTZBURG, ESQ.

ON BEHALF OF THE PETITIONER

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

When William Bourjaily was arrested by the FBI on May 25th, 1984, approximately a kilogram of cocaine was found in his car along with a large quantity of money. The United States subsequently filed charges against Mr. Bourjaily, a co-defendant, Angelo Lonardo, and Mr. Bourjaily was convicted of conspiracy and of possession of cocaine with the intent to distribute in Federal District Court.

On appeal his conviction was affirmed, the Court of Appeals holding, according to the authority of the Sixth Circuit, that the trial judge properly admitted co-conspirator statements by Lonardo against Bourjaily.

This Court subsequently granted Petition for Certiorari limited to three questions: one, is it required by Federal Rules of Evidence that a trial judge determine, on the basis of independent evidence, that

there was a conspiracy that existed that included both a declarant and a co-defendant against whom conspirator statements are offered.

Two, assuming that such a finding must be made, what quantum of evidence is required to support the finding; and three, is there a requirement that the trial judge make an independent evaluation of reliability, an issue that the parties in this case have treated as raising a confrontation question.

The first two issues upon which the Court has granted review involve, of course, not the Constitution, at least not directly. Those issues involve the interpretation of a statute.

QUESTION: The parties agree on the second issue, don't they?

MR. SALTZBURG: Yes, Mr. Chief Justice, we do. The preponderance of the evidence -- and it was my intent not to argue that unless the Court had questions about it.

QUESTION: I suggest that is a good idea.

MR. SALTZBURG: Thank you. The first issue in the case, whether or not there must be independent evidence of conspiracy and of participation by the declarant and the defendant is an issue that involves a statute, as I have said, a statute because Congress

affirmatively enacted the Federal Rules of Evidence into law, signed by the President, after they were submitted by this Court.

The third question in the case, the reliability question, involves not the statute but a question of whether the Constitution of the United States imposes an obligation in addition to any that this Court might find imposed by the Federal Rules of Evidence.

The key provisions, and the parties agree on this, of the Federal Rules of Evidence are two: Rules 104(a). a rule which talks about the trial judge's determining the admissibility of evidence, and Rule 1101(d)(1) which again has similar language about what the trial judge does when making preliminary determinations of fact.

It is without doubt because it is the plain language of the rule that -- of both rules, excuse me -- that both indicate that in making determinations on evidence questions the trial judge is not bound by the Rules of Evidence. Thus, the first issue is whether that means that there is no requirement of independent evidence to support the admissibility of co-conspirator statements.

It is important, we feel, for the Court to

examine the state of the law prior to and during this Court's consideration of the Federal Rules of Evidence, the drafts, and the Congress's evaluation of those rules.

Prior to 1972, November, when this Court approved a version of the Federal Rules of Evidence, it was unanimously agreed throughout the United States in federal courts and in state courts that independent evidence, proof aliunde, in the words of this Court in Glasser, was one of the fundamental requirements for introducing co-conspirator statements, or for that matter, vicarious statements generally in both civil and criminal cases.

The principle that the Courts had adopted was that these statements, when admitted, rely more on an agency analysis than on a liability analysis, and that traditional agency law said agency may not be proved from the mouth of the agent. Independent or other evidence, as the American Law Institute said in its second version of the restatement of the law of agency, other evidence must be provided.

During the time this Court considered the proposed Federal Rules of Evidence -- excuse me, Mr. Justice.

QUESTION: Well, that may have been the universal rule with respect to proving agency, but what

was the basis for the rule?

MR. SALTZBURG: I believe --

QUESTION: Is it usually an agent suing a principal and you didn't want to rely on just the agent's statement, is that it?

MR. SALTZBURG: In some cases that would be true. In other cases, I think the vast bulk of the cases, involve third parties suing employers, and involved in the criminal area, suits against or prosecutions against persons other than persons who made statements, and in both sets of cases the Courts adopted a principle that it would be too easy to have agents essentially create liability for others by making statements that others were responsible for what the agents did.

QUESTION: Because they thought what, that the agent wasn't reliable, or what?

MR. SALTZBURG: I think that in part, Justice White, that's exactly right, that people generally have incentives in a number of situations to claim to be acting on behalf of or in conjunction with others, and that when the others are called upon to account there ought to be some better basis, at least a minimal basis; that is, some independent evidence sufficient to give us confidence that the statement by the agent ought indeed

be used to impose liability upon the principal.

That, I believe is the basis -- I think in the criminal cases there was, of course, always lurking in the background a sense that maybe the Constitution itself might have something to say about that. That question did not have to be directly addressed very often because the Courts were in fact unanimous on the independent evidence requirement.

During the entire period this Court considered the Federal Rules of Evidence or more accurately the Judicial Conference did, and submitted them to this Court and during the three years between 1972 and 1975, from the time they were submitted by Chief Justice Burger on behalf of the Court to the Congress, no one at any point suggested, in legal literature, in letters to the Judicial Conference, in testimony concerning the rules, in any way, shape or form that the proposed federal rule 104(a) in conjunction with the conspirators' rule which is Rule 801(d)(2)(E), was intended to change what had been viewed as a standard part of American law.

Indeed, the assumption was to the contrary. While it is fair to say that the rule did not -- that the co-conspirators exception itself did not receive great consideration by the Congress, each time it was

mentioned the mentioners indicated their assumption that it remained unchanged by the Federal Rules.

QUESTION: But there were changes in the whole system wrought by these rules, weren't there, the confiding to the judge of the primary responsibility for making the factual findings that would support admission?

MR. SALTZBURG: Chief Justice Rehnquist, in fact the Rule 104(a) was deemed by the Advisory Committee when it submitted to this Court to be a codification of the orthodox, traditional, well-understood view that the trial judge made the rulings and the findings on evidence questions.

QUESTION: And that he had to find, himself, by a preponderance of the evidence -- I didn't realize it was that clearly spelled out at all in the evidence cases.

MR. SALTZBURG: I have confidence in this statement, Mr. Chief Justice, that in fact the cases were clear that the function was the trial judge's to determine the admissibility of the evidence, but there was in fact some confusion as to whether the judge had to say preponderance of the evidence; whether he could say, "I have reviewed the independent evidence and I find that it satisfies a prima facie standard."

The confusion was --

QUESTION: The government says -- government seems to indicate that under the prior rule admissibility was left to the jury?

MR. SALTZBURG: Justice White, if the government is correct about that, I am wrong and I am wrong in a fundamental way. The cases do not support it and there is no citation of authority in the government's brief that will support that.

Indeed the cases, the key cases, the one most often cited again and again, Judge Hand's opinion in Dennis and the Carbo case, say the opposite. It is true, and this has been well understood that in a number of areas trial judges resubmitted the issue to jury.

They were concerned so much about the danger of this testimony. They gave the defendant a second bite. That second bite as read by the government is to be taken away under its approach along with the traditional rule that the judge is a screener.

QUESTION: But wasn't it true that in many cases before the rules, a trial judge thought with guidance from appellant opinion so that -- that all he had to say was, "There's enough evidence here to support a finding." He didn't have to make a finding himself.

MR. SALTZBURG: Mr. Chief Justice, there were cases in which trial judges said that, "I've looked at

the evidence; there's enough independent evidence here so I will let it in. Then I'll instruct the jury."

They usually gave that instruction to the jury about finding beyond a reasonable doubt that they believed the conspiracy existed and that the people were members -- before relying on the statements. There were a number of appellate decisions saying that was simply wrong but that it may have provided the defendant with more protection than the preponderance standard would have.

Judge Friendly in an oft-cited case once wrote that if the trial judge is essentially saying, "I've got to be satisfied, you could find beyond a reasonable doubt here," that may be higher and more protection. But until this case the suggestion was never made that you would do away with that protection and at the same time do away with the independent evidence rule.

The cases before, during and after, with the exception of two circuits, the adoption of the Federal Rules of Evidence unanimously agreed that independent evidence was basically at the heart of the offering of one person's statements against the other.

QUESTION: May I ask you -- actually I have two questions, Mr. Salzburg.

First, does it make any difference in your

view whether the statement that is being challenged was made in the presence of the defendant who is objecting to its use? There is some language in the case that seems to make that important in some situations.

QUESTION: Justice Stevens, let me answer that. It might indeed make a difference in at least two ways, and I think there is not a disagreement among the parties about this, although it might appear that there is.

First, if a statement were made within the hearing of a defendant, the statement were made by a co-defendant, that fact itself would be not hearsay for purposes of evaluating what was going on, what the defendant knew or should have known, and would be independent evidence. The fact that such a statement were made and heard, independent of the truth, if it involved any kind of accusation of wrongdoing, an independent rules of evidence, the adoptive admission rule which is codified as Rule 801(d)(2)(B), might come into play too and might provide an independent basis for admitting such a statement against the non-speaking defendant.

I think there is no disagreement about that. To go further, we do not contend that in evaluating the independent evidence, the trial judge may not consider

other hearsay. He may.

The independent evidence requirement --

QUESTION: On that point, that is really the second thing I was going to ask you. Is there not a distinction in some of the cases at least between the statement that, "There must be independent evidence of the relationship," or do you say, "The independent evidence itself must be the only evidence that can be used to meet the preponderance test"?

In other words, one might say, "The independent evidence plus the declarations themselves have to establish a preponderance," or one could say, "The preponderance has to apply only to the independent evidence."

MR. SALTZBURG: The traditional rule, Justice Stevens, was the independent evidence had to be sufficient to satisfy the trial judge that the co-conspirator statement should be admitted. The first exception to that was the First Circuit's opinion which is cited in the briefs in United States versus Martorano.

I would note that the First Circuit made its suggestion that maybe Rule 104(a) changed things, in a single paragraph. It did not examine the legislative history. It is not even clear whether the issue was an aside or whether it was fully briefed by the parties.

No other court picked up on that but the Sixth Circuit in a decision in the first case where it looked at the issue, United States versus Enright, in which the issue was not before it but in dictum, in a footnote number 4, the court added, "We note that the First Circuit has said Rule 104(a) appears to change things. It might, but we don't decide it."

The next time the Sixth Circuit took up the issue in Vincent, the very next case, it decided that it had indeed determined in the footnote that it was bound to read Rule 104(a) as the First Circuit had. Since then no other circuit has since read the Rule 104(a) as the First Circuit had.

Indeed, the First Circuit was -- in that one paragraph said, "We don't like this. We feel bound by 104(a). You look at it. It seems to bind us." And because of this Court's opinion in Glasser the court said, "We basically tell trial judges you shouldn't give hardly any weight to the contents of the statements but we feel constrained to say they shouldn't be excluded altogether."

QUESTION: Let me just ask one other question since I have interrupted you so much already. It seems to me that to use the preponderance standard is a little bit misleading anyway because you're looking at the

evidence that has been offered by the prosecution.

I take it the Judge makes his ruling when the government rests, at which time the defense has not yet put any evidence in. So, it would seem to me that in almost every case whatever evidence is in the record is going to outweigh nothing and therefore you will always meet the preponderance standard.

It's not really, in practical effect, much different than sufficient evidence to make out a prima facie case.

MR. SALTZBURG: If I could respond to that, I think that is not quite correct. Could I tell you what I think the courts are actually doing, almost unanimously on that?

Prior to the Federal Rules, and indeed after they were adopted, it was well understood that if someone objected to any kind of hearsay coming in, declaration against interest, the co-conspirator statement, that in theory the objecting party was entitled before the Judge ruled to both have the party who offered the evidence to put on evidence to say it satisfied the rule and the objecting party put on evidence to show that it didn't satisfy the rule.

Indeed, that is exactly what is done in some cases. That is what is done when confessions, of

course, are offered and motions to suppress are made, and there are factual disputes.

QUESTION: Yes, but you won't have a full hearing on whether there was a conspiracy.

MR. SALTZBURG: That is what I was about to say. The Court said that would involve perhaps trying the case within a case.

What the courts have done in this, I think is perfectly consistent with the prior practice. They have said the trial judge shall make a preliminary ruling at the end of the government's case, just as you have indicated.

Is the trial judge persuaded at this point by a preponderance of the evidence, and indeed often will entertain offers of proof by the defendant, offers to decide whether or not some kind of a hearing ought to be held even before the trial goes on.

The defendant will then have a chance to put on evidence and is entitled to ask the trial judge to reconsider the preponderance ruling in the close of the evidence, and indeed the circuits are in agreement that indeed the trial judge must at that point reconsider because that would be the only chance of giving the defense a fair opportunity to be heard on the evidence question.

QUESTION: Mr. Saltzburg, you haven't yet told us what you think the language of the rule means in making its determination, "its" referring to the court, "it is not bound by the rules of evidence except those with respect to privileges."

MR. SALTZBURG: Mr. Chief Justice, I think that if there were no history and no background to this rule and we looked at that, I would say that there is no independent evidence requirement.

I would note, however, that this Court has already acknowledged in the case -- I think you, in fact wrote the case. It was called United States versus Able that involved biased impeachment, decided in September of 1984, that the Federal Rules of Evidence didn't include -- it wasn't like an Internal Revenue Code, it didn't include all of the rules.

Indeed, it is clear from the background that certain interstitial aspects of the rules were going to have to be filled out.

QUESTION: We didn't say that the rules don't mean what they say either, in that case.

MR. SALTZBURG: No, I think there is a reading, and we have tried to supply it in the brief, of Rule 801(d)(2)(E) which -- it assumes, we believe, that

the judge will have found conspiracy and it doesn't say how. Indeed, none of the Rules of Evidence speak to what standard the trial judge should use, preponderance or any other, for making any evidence ruling.

Apparently the drafters assume that would be carried forward under prior law, and our argument is everyone assumes, and indeed that was going to be the case with co-conspirator statements.

QUESTION: But this says, you know, it says -- the whole rule says, preliminary questions about the admissibility of evidence. It's quite sweeping, and in making the determination as to the admissibility of evidence, the court isn't bound by the Rules of Evidence.

MR. SALTZBURG: It is very broad language and, Mr. Chief Justice, we urge upon this Court a very small point which is that it certainly is reasonable to assume that the drafters may have in fact viewed the conspiracy, the independent proof requirement, as a basic agency principle, almost a substantive principle. -- indeed, that's what it is in many civil cases -- and didn't take the time to look and never considered the point.

QUESTION: How much do you really lose if that point is decided against you? I mean, a trial judge can still say that a lot of these unsupported declarations

are not trustworthy, and he can reject them for that reason.

MR. SALTZBURG: I'd like to say that we -- and "we" in this case is not Mr. Bourjaily because "we" in this case is every defendant who will subsequently go on trial. We believe it is so important that it would be better for this Court to hold that as long as the independent evidence requirement is strictly enforced, and as long as the preponderance of the evidence standard is used, that no confrontation clause analysis ought to be employed.

It is that important for, if I may give an example, there is no question in this case that there is certain circumstantial evidence that is highly incriminating against Mr. Bourjaily. He is found with a kilo of cocaine in his car in a parking lot.

But there is also no doubt that the bulk of the evidence in this case involved taped conversations that didn't include him, that didn't mention him, that simply made reference to vague "others." Had, in this case -- had Mr. Bourjaily pulled into that parking lot and seen his friend Lonardo truly in an innocent fashion and gone up and embraced Lonardo, very well might have been enough for a trial judge to say, "We'll let in the statements."

Now, you may fairly say to me, "Do we know that a trial judge would do that?" And my answer, fairly, is "No." I do not know that a trial judge would but I do know from the decided opinions if a trial judge did, the Court of Appeals would view that as within the permissible range of fact finding by the court. It is that important.

That is why, at the risk of losing time on the confrontation argument, I stand here and say that in the view of many this issue of whether the independent evidence requirement will be removed is of such substance that it is not conceivable it would have been decided by silence in the course of an amendment process where all assumed the opposite to be true.

But I would move to the confrontation clause issue next unless the Court has further questions on the evidence issue. An amicus brief has been filed before this Court by the National Association of Criminal Defense Lawyers, and it urges that in all cases, because agency law doesn't involve reliability, but in all cases in which conspirator statements are offered the trial judge should engage in an independent inquiry into reliability.

The government says in no cases, ever, under any circumstances no matter what the case may look like,

should a trial judge be permitted to engage in a confrontation inquiry. In the brief filed last term by the government in the Inadi case, the government didn't say that the rule should be never. The government referred to a presumption of constitutionality for long standing, well established, firmly rooted, one of those terms, hearsay exceptions.

This Court used similar language to that in Ohio v. Roberts, and indeed I think it's not unfair to say that some of Justice Stewart's plurality opinion for the Court in Dutton v. Evans, used similar language in saying that there must be some point at which you stop repeating every evidence argument in the form of a constitutional debate.

That, to us, is persuasive. Indeed, the cases show that where defendants do no more than say, "This is a co-conspirator statement; should therefore violate the confrontation clause," the courts have paid little heed to such claims.

It is our position that they should continue to basically treat such claims as being frivolous. But we believe that Dutton v. Evans, the case in which this Court addressed the Georgia rule, signifies something important which is, the co-conspirators rule has changed over time.

The rule the government describes as originating in England in the 1600's to this Court in Inadi is not the rule that is used day in, day out by state and federal courts that have the Federal Rules or similar rules. The co-conspirators rule, and the very doctrine of conspiracy even in the way in which it may not in some instances even require overt act proof, is very different now than it once was and it may continue to change.

Our position is that indeed, presumptively, any statement which would be supported by independent evidence so that a trial judge finds by a preponderance of independent evidence there was a conspiracy, the declarant was a member, the defendant against whom it was offered was a member, should be admitted and the confrontation clause would not be violated.

But that a defendant who was prepared with specificity, with clarity to say to a district judge or to a state trial judge, this evidence is critical in this case, it is a rare kind of evidence in which most of the assumptions that have been made about co-conspirator statements like this Court discussed in Inadi, recent memory, it's a statement that goes back in time and distance by a co-defendant who has perhaps a motive because he knew the government was investigating,

who is out to shift blame.

That at some point to say that, no matter how bad the circumstances are, that the judge wouldn't look, is wrong.

QUESTION: As the government asked in its brief, Mr. Saltzburg, can you imagine any counsel for criminal defendant who wouldn't make that argument with regard to any testimony by a co-conspirator?

MR. SALTZBURG: Justice Scalia, a fair answer to that is -- I have examined the cases and many are cited to this Court. Very few criminal defense lawyers, no matter how able, have been able to say very much about co-conspirator statements in the vast run of cases other than, they don't like them because they're out of court statements by co-conspirators.

They have not sought, nor do I believe they could in the typical conspiracy case, seek to make the kind of foundation that I have just described. Now, if you say, but won't they strain -- I am sorry, Justice White?

QUESTION: The rule would have been against them. I mean, they would lose that under the existing law?

MR. SALTZBURG: If they had tried in some of the circuits, no matter what they said they were

basically out of luck.

QUESTION: Exactly.

MR. SALTZBURG: That is true. In other circuits the courts said, we don't think the case --

QUESTION: Only relatively recently.

MR. SALTZBURG: Well, we would quarrel with the government on that, Justice White. After Dutton, most courts assumed because this Court entertained the confrontation attack in Dutton.

QUESTION: I guess I am getting old. Dutton isn't so old.

MR. SALTZBURG: There was a long hiatus between Dutton and this Court in Ohio versus Roberts, and during that decade many courts assumed that when this Court looked at the confrontation analysis in Dutton, it should look -- I think that Justice Blackmun's opinion in Ohio versus Roberts when talking about firmly rooted exceptions did cause some courts to say, "We need not look as hard."

That is our position. It is simply, to borrow a phrase from a movie, never say never, and that's not a lot to leave open, we submit.

If the Court has no other questions I would like to reserve the remaining time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr.

Saltzburg. We will hear now from you, Mr. Robbins.

ORAL ARGUMENT OF LAWRENCE S. ROBBINS, ESQ.

ON BEHALF OF THE RESPONDENT

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

The rule of evidence that the government in its brief has characterized as the bootstrapping rule, substantially and unjustifiably, we believe, skews the decision making process, the admissibility of co-conspirator statements.

A brief example illustrates how bad the rule can work. Suppose some FBI agents secure a wiretap and in that wiretap is a conversation between Mr. Seller, the declarant, and Mr. Buyer, a known confederate in the stolen car business.

In that conversation Mr. Seller says that he met the day before with the defendant at Clark's Garage and he says that he received from the defendant a stolen green BMW, which he drove away with, for $1,000. He says to the Seller, you ought to contact the defendant and he can give you all the stolen cars you want.

And it turns out the agents also secure the following two pieces of so-called independent evidence: one, surveillance that establishes that the Seller and the defendant did indeed meet at Clark's Garage and that

the Seller drove away in a green BMW; and second, a single slip of paper bearing the defendant's handwriting and found in the trash can at Clark's Garage that has the notation, "$1,000" on it.

Now, a trial judge faced with just that information, and it's information like that that comes up daily in federal criminal trials, a trial judge with that information would in all likelihood conclude the following: one, the statement clearly took place. It's on a wiretap.

Two, it was amply corroborated by the so-called independent evidence. Three, it was made to a long-time confederate and was substantially against the declarant's penal interest.

In short, applying the factors that this Court identified in the Matlock case the judge would in all likelihood conclude that the declarant's statement was highly probative, almost assuredly true, and certainly the least equivocal evidence there would be that the Seller and the defendant were members of the same conspiracy. Yet, because of the bootstrapping rule, the Seller's statement could not be used to establish the existence of a conspiracy between the Seller and the defendant.

That is because the so-called independent

evidence standing alone might very well not satisfy the preponderance standard.

QUESTION: When you say the bootstrap rules contended for by Petitioners, as you understand, is that the independent evidence has to satisfy the preponderance standing by itself?

MR. ROBBINS: Precisely. That's the way the courts have applied this rule, uniformly. What they do is they take the statement -- some courts have been sophisticated enough to recognize that you can look at the co-conspirator statements' non-hearsay aspects.

But a number of courts are reading the bootstrapping language in Glasser quite -- we think overreading it, have taken the co-conspirator statements, put it sort of under a box and looked at everything else in the case.

And in the hypothetical that I've given I think it's quite clear that looking at that independent evidence by itself, a court would probably conclude that there was no conspiracy.

QUESTION: Under existing law do you think the tape without the corroborative evidence could come in?

MR. ROBBINS: I think, Mr. Chief Justice, that the answer is, "It depends." It could in a case in which a trial judge found by a preponderant standard

that because of the context in which the statement was made, the extent to which it might be against the declarant's penal interest, or the person to whom it was given, the stage of the conspiracy in which it was made; a statement standing alone could -- could in the judge's discretion be enough evidence.

QUESTION: You are saying, then there need not be any independent corroborative evidence?

MR. ROBBINS: We say that. That doesn't mean -- I mean, our position has been sort of extravagantly construed in petitioner's reply brief to suggest that we will be inevitably opening a floodgate of unreliable evidence.

All we are contending for is that the trial judge doesn't have to put on blinders and ignore highly probative, highly reliable evidence. There may be cases in which the statement standing alone meets that standard but it won't necessarily be the case.

QUESTION: The judge, can he ever exclude it?

MR. ROBBINS: Yes, of course he can. His finding would be that, "I've looked at the statement. I've considered it in the context of the case."

QUESTION: Then it doesn't prove a conspiracy?

MR. ROBBINS: It doesn't.

QUESTION: So, it's what, excluded?

MR. ROBBINS: No, it's not excluded.

QUESTION: It is excluded for proving a conspiracy?

MR. ROBBINS: It will not be sufficient to make the predicate finding of conspiracy necessary to admit co-conspirator statements under Rule 801(d)(2)(E).

QUESTION: But now, can the trial judge, listening to that tape say, "I know the Seller said that but I simply don't believe the Seller"?

MR. ROBBINS: Yes. He could conclude --

QUESTION: Now, under the old rules I'm sure that the trial judge had to accept the prima facie case analysis. In other words, he couldn't find credibility but you say now that it's entirely up to the judge, the judge can make a credibility finding just on a tape?

MR. ROBBINS: Precisely. It's important to see that Rule 104 made a fundamental change in the way these decisions were made. The old rule was, petitioner's representations this afternoon notwithstanding, the old rule was that the final word on the admissibility of co-conspirator statements was the jury's, and you don't have to look any further than the 1977 edition of Devitt and Blackmore to find that they recommend a charge that leaves in the jury's hand --

QUESTION: I don't think that's inconsistent

with anything that Mr. Saltzburg said. He didn't deny that the jury's was the final word. He asserted that there was a prior word by the judge, however.

MR. ROBBINS: Well, my impression is that there was not a prior word by the judge but the important thing is that --

QUESTION: And it's just your impression?

MR. ROBBINS: It's not my --

QUESTION: You don't mean to say that the judge would just willy-nilly let everything in and then instruct the jury on what to disregard?

MR. ROBBINS: No.

QUESTION: He certainly screened some of the evidence in conspiracy trials; you agree to that, don't you?

MR. ROBBINS: I agree that trial judges may well have done some kind of screening. The important thing --

QUESTION: Well, they were required to, weren't they? If it was perfectly obvious that a statement was hearsay, it couldn't -- you'd just leave it up to the jury?

I'm sorry. You go ahead and make your argument.

MR. ROBBINS: Well, no. Justice Stevens,

we're not suggesting that trial courts have somehow capitulated on determinations of hearsay. What we are saying is that it was the standard practice, routinely given in trial courts.

The cases that we have cited in the brief are for the most part actual jury charges given in the first half of the 20th Century.

QUESTION: That doesn't mean there was no preliminary screening by the trial judge.

MR. ROBBINS: No, and we're not saying that there was no preliminary screening. What we are saying is that the final word, the final determination as to how --

QUESTION: But that doesn't make a lot of difference, really, if the judge let's it in and just, you know, in charge number 26 in a long list of items, the jury is told they can use it or not use it, the chances are the jury is going to use it.

I mean, a defendant would much rather have it kept out by the judge than submitted to the jury, I think.

MR. ROBBINS: Well, we think it makes a good deal of difference for purposes of explaining how it came to be that the rule against bootstrapping hearsay evidence emerged. The fact is that at the time Glasser

was decided, and for the next 33 years it remained the case that juries were sent co-conspirator statements and told that, "You are free to use it or not use it, but you may only use it if you first make your own determination beyond a reasonable doubt."

The concern, I think, was that as long as juries were making that final determination, they might well be relying on incompetent evidence that they ought not rely on.

QUESTION: That makes a lot of sense. I can entirely understand how that could be a good explanation of bootstrapping that would render it inapplicable to the new situation with the new rule.

But what the other side says is that in fact it wasn't only the jury making the determination. It was the judge making a determination and the judge also was applying the rule of the necessity of extrinsic evidence.

That can't explain -- that wouldn't be changed by the new rule.

MR. ROBBINS: Well, we think it is changed by the rule because the rule says that the judge can consider all evidence, and it's quite clear, all other evidence is non-privileged.

QUESTION: All right. But now, you are just

relying on the language of the rule and you are not relying upon a rationale as to why things should change. Your rationale was, look the rule has taken the call away from the jury and given it to the judge.

That explains why the clear words of the rule mean what they say. But once you concede -- which you haven't conceded, but if it is conceded that the judge used to make that determination himself, then you are just left with no explanation for the plain language of the rule other than the plain language.

Now, maybe that is enough, but it would help to have an explanation for it.

MR. ROBBINS: Well, we would prefer, actually, not to look behind the plain language of the rule. We think the rule says what it says. It says the judge is not bound by the rules of evidence.

It is quite clear that when this Court decided the Glasser case, the rationale of the bootstrapping rule was that if you didn't have such a rule, hearsay would be raised to the level of competent evidence.

The concern was about hearsay. Rule 104(a) tosses that concern out for good.

QUESTION: Well, what rules -- isn't the judge to be bound by the Rules of Evidence?

MR. ROBBINS: I'm sorry, Mr. Justice White?

QUESTION: Well, the judge, you say, isn't bound by the Rules of Evidence. What Rules of Evidence, the printed Rules of Evidence, the Code of Evidence, the code of which Rule 104 is part?

MR. ROBBINS: I would take that statement to be that the Rules of Evidence are the Federal Rules of Evidence that he is not bound by, part of which is the rule against hearsay of which the bootstrapping rule is one aspect.

The bootstrapping rule is a rule about hearsay. You go back to read Glasser and it's quite clear that Mr. Justice Black in describing and defending the rule to the extent it was defended in that opinion stated that, "Our concern is that hearsay will be elevated to a level that it doesn't deserve."

It's quite clear from Rule 104(a) and from the Advisory Committee notes which talked about the fact that quite often you'll have to use the statement itself before it's admitted --

QUESTION: Mr. Robbins, are you going to get to Judge Friendly's opinion in U.S. against Gainey, or whatever that name is?

MR. ROBBINS: I am familiar, Justice Marshall, with Judge Friendly's opinion.

QUESTION: You don't have any trouble with it?

MR. ROBBINS: Well, unless I am wrong, Gainey is a pre-rules decision in the Second Circuit, and although it has been followed by the Second Circuit in two of the Second Circuit's most recent decisions, United States against Chakali and United States against de Jesus, Judge Winner has had occasion to suggest -- and it is no more than a suggestion, I acknowledge -- that the continuing vitality of Gainey may be a bit up for grabs in light of Rule 104(a).

Our contention is that it is not up for grabs; that Congress enacted a rule. The rule has a plain meaning. The Advisory Committee notes confirm that plain meaning.

And courts, although they have felt constrained to follow the rule in Glasser because it's still on the books, nevertheless are obliged under Rule 104(a) to give the judge the freedom to take off blinders and make a rational decision in light of all the non-privileged evidence. I realize Gainey is still on the books but we think if has been superceded by Congress.

Now, there have been some defenses of the rule against bootstrapping, the defense that it comes from an agency rationale, the defense that it provides additional reliability. Our view is that additional

reliability is promoted by allowing district judges to do their jobs, to look at the evidence that's before them without the skewing of a rule that was invented, we believe, to preserve against juries' misusing incompetent evidence.

The mere fact that a judge may have had the first look doesn't take away from the fact that the jury had the last look, and it's the last look that may have been regarded as endangering the rights of defendants against the use of incompetent evidence. That last look is completely in the judge's hands now. The jury has no role at all in the determination of the admissibility of evidence.

It's gone, and once it's gone, we believe that vestigial rules that belong to another era are swept away along with them, and it makes no sense to skew the judge's determination process. I think it's significant, by the way, to note in this regard that Glasser itself was briefed on the theory that the jury got the last word and that system continued straight through the enactment of the Federal Rules.

QUESTION: Mr. Robbins, are you certain that the drafters of the new rules did not assume that judges would still be taking a preliminary look at some independent evidence of a conspiracy? Was that

assumption in their minds in drafting the rules, do you think, whether you term it as a form of reliability inquiry or whatever?

MR. ROBBINS: There is nothing that I would call legislative debates that enlighten the question beyond what the framers of the rule decided in the final analysis to enact as the rule. And therefore, we are unable to move away from what the final rule said.

The only evidence --

QUESTION: Would we expect to see in the explanation of the rule an indication of change if they had intended a change?

MR. ROBBINS: The only explanation they give is an explanation in the Advisory Committee notes that I think is a hypothetical right out of this case wherein they say that there would be certain kinds of decisions by the trial judge that will require him to consider the statement itself to assess its own admissibility.

In the Advisory Committee notes, of course they don't use the co-conspirator exception. They use, I believe, a declaration against interest.

The analysis, however, is exactly the same. There are simply going to be occasions when the trial judge will need to be free to look at the statement itself to assess is own admissibility. The only

evidence there is, is the plain meaning of the rule and the accompanying Advisory Committee notes.

The petitioner's contention, it seems to me, is that there is no evidence in the legislative debates of an affirmative decision to abandon a particular logic. And our view, I guess, is simply that the absence of any legislative debate is not a very persuasive reason to gainsay the plain meaning of the language and the accompanying Advisory Committee notes.

QUESTION: In some cases would you concede that evidence of -- independent evidence of the existence of the conspiracy would enhance reliability?

MR. ROBBINS: Well, there is no question that the more evidence you have, the greater your confidence that it is good evidence.

QUESTION: You would concede more than that, I hope. I hope you concede that in some cases you couldn't get it in unless there were independent evidence because on its own face it's just not enough?

MR. ROBBINS: Sure. All we are saying is that the judge ought to have the opportunity to look at the statement itself as part of all the evidence in the case. He shouldn't put it behind door number 3, and only look at door number 1.

We are not contending that it's, you know, a

good idea to only look at the statement itself or even principally the statement itself. All we are saying is that it is a bad idea to ignore the statement itself.

Before turning to the confrontation clause issue, I would like to make one further point about the rule against bootstrapping and that is this: should the Court ultimately decide in resolving the issues in this case, to retain the language in Glasser, we think it is important particularly for the disposition of this case that the scope of the Glasser rule be clarified.

There is in the lower courts, we believe today, a significant degree of over-reading of the rule against Glasser. Some courts believe that the rule in Glasser tells you that you take the statement and ignore it regardless of whether it's hearsay, non-hearsay or subject to a hearsay exception, and that is not the rule.

This Court in deciding, for example Anderson against the United States, recognized that very often co-conspirator statements have non-hearsay aspects. And our contention is that should the rule in Glasser be reaffirmed in this case the Court, in deciding this case, ought at a minimum to clarify the scope of the rule to make clear that it does not preclude a district judge from considering co-conspirator statements in making the Rule 801(d)(2)(E) finding, from considering

those statements to the extent that they are non-hearsay or subject to a hearsay exception.

That is particularly important in this case because as we contend in our brief, virtually every statement but one that we could locate in the case that was urged to the trial judge as a basis for making his finding by the government, only one statement was hearsay. The others were either state-of-mind evidence or not offered for their truth or in the nature of a command or, in one respect or another, non-hearsay.

So, we would just ask that the rule, if it is to be retained, be clarified to that extent. We believe beyond that, of course, that Rule 104(a) abolishes the rule altogether.

QUESTION: May I ask you, going back to your original hypothetical, you started out with a constructed hypothetical. Are there any recorded cases that you could cite to me that contain as persuasive a hypothetical as you are able to imagine, because I am wondering if we are in the real world or are we in a classroom where you use a hypothetical?

MR. ROBBINS: Justice Stevens, I can assure you that it's a real world hypothetical because --

QUESTION: Then the 71 --

MR. ROBBINS: We had to drop some cases that

looked a lot like this one.

QUESTION: I see.

MR. ROBBINS: No, they --

QUESTION: You can't cite me any litigated cases?

MR. ROBBINS: They tend to be more, you know, not quite as spare as this one, but that doesn't change the fact that there is evidence that is lost at the trial court level that doesn't sort of percolate up through the system and find its way into F.2d.

The fact remains though that I think this hypothetical puts sparely, and in sort of, in relief the kind of problem that in perhaps less extravagant ways is met by district judges.

QUESTION: Because your hypothetical included things like, he was a well known associate and so forth, which I suppose had to be established by independent evidence, you had a little independent evidence that itself was fairly persuasive in your hypothetical?

MR. ROBBINS: I suggest that I could have deleted the "well-known confederate" characterization.

QUESTION: And then made it even harder to find the case in the reported decisions. It would be like -- I am just saying, if the answer is no you can't give me a citation of one just like it.

MR. ROBBINS: I am advised -- reminded by my colleague that one of the reasons you might not find cases like this one is that when we lose them we can't appeal. The fact remains that this hypothetical, I think while taking a strong -- you know, putting the issue squarely, nevertheless enlightens cases that are different from it.

Now, I have spent, I notice, a good portion of my time this afternoon devoted to issue one, and that is because it's by far the most contested issue of the three in the case. I should not wish, however, that that decision about allocating time, to suggest that the government believes in any respect that issue three, this independent reliability test, is somehow less important to the day to day practice of criminal trials because nothing could be further from the truth.

Our view is that opening the window even a little to the kind of separate reliability inquiry that petitioner urges in this case would impose substantial burdens on the practice of criminal law while promoting almost no legitimate aspects that are intended to be promoted by the confrontation clause.

Our contention is basically this, in a nutshell: In Ohio v. Roberts this Court said that a statement that falls within a firmly rooted hearsay

exception is reliable without more, and these statements are.

They are that for two different reasons: first, because the rule 801(d)(2)(E) codifies the co-conspirator exception in its most ancient form. It is in fact the version of the co-conspirator exception that was on the books at the time the Sixth Amendment was framed and ratified. It was adopted by the State of New Jersey, for example in the very year that the Sixth Amendment was ratified.

It is in the same form that would be as familiar to Greenleaf and Wigmore as it is to Professor Louisell and Chief Judge Weinstein. It is the same form as it appeared in this Court's Gooding decision, the first decision by this Court by Mr. Justice Story adopting the co-conspirator exception.

Since, as this Court noted in the Salinger case, the confrontation clause is intended to incorporate the common-law meaning of confrontation, together with all its historical exceptions. It cannot be the case that at this late date, exceptions that have been around this long must nevertheless be subject to an independent reliability scrutiny.

There is a second reason, however, why we believe the co-conspirator statements admitted under the

Rules of Evidence are also firmly rooted, and that is because the requirements of the rule by themselves ensure sufficient reliability to send the statements to the jury.

We describe in our brief how the pendency requirement, the in furtherance requirement, the proof to a preponderance standard that the defendant and the declarant were members of the same conspiracy, all tend to insure reliability to a sufficient threshold to allow the jury to do its job of assessing the weight of that evidence which, after all, is the jury's function and not the trial judge's function.

Now, the empirical proof, we think, that Rule 801(d)(2)(E) is doing its job is that when you take a look at all the courts of appeals that insist on this independent reliability inquiry, not a one of them, not once, has been able to conclude that a statement otherwise admissible under rule 801(d)(2)(E) is nevertheless not sufficiently reliable to meet the confrontation clause standard.

Now, we put that challenge to petitioner in our brief, and they came back in their reply brief with two Ninth Circuit cases that they say go the other way. Those are the Ordonez case and the Mussin case, decided by the Ninth Circuit.

Those are striking counterexamples because in point of fact, in both cases what the Ninth Circuit held was that the statement did not satisfy Rule 801(d)(2)(E) and also did not satisfy the confrontation clause and that shouldn't surprise anybody because the exact, same analysis that accounts for the failure to satisfy the rule turns out to be the same analysis that accounts for not passing the confrontation clause.

QUESTION: Mr. Robbins, can we rule with you without getting into that at all? I mean, you are challenging the answer. We don't need that, do we, for your argument?

MR. ROBBINS: The third question presented?

QUESTION: Yes. Do we need it?

MR. ROBBINS: Well --

QUESTION: If you say so, go ahead.

MR. ROBBINS: Well, it seems to me that in this case the Sixth Circuit held that no independent reliability inquiry was required in light of the statements falling within the Ohio v. Roberts language, and so we believe that the question is presented -- we think that whether the confrontation clause does or does not require it, these statements met the test.

The point is, they always meet the test and the only time they don't meet the test is when they also

don't meet the rule, and that's the empirical evidence from the circuits that have grappled with this test. And of course, grappling with the test is one of the problems with the test itself because the fact of the matter is, as this Court noted in Inadi, in rejecting the independent availability tests that what it does is, it overlays the system with yet another round of appellate inquiry and trial court inquiry.

It turns out that this independent reliability test imposes these costs at no apparent gain to defendants because defendants keep losing them. The reason they keep losing them is that it just reformulates 801(d)(2)(E) with a confrontation clause label.

There is no reason to indulge in this kind of wheel spinning with so little apparent gain. There is also no reason to think that this can be cabined as narrowly as petitioner believes.

If the rule is that it can only come up when the defense lawyer makes the objection, says the statements are crucial and unreliable, it is a safe bet it will happen every day and given that there is no apparent benefit from it to defendants, it can't be that the confrontation clause requires the system to absorb it.

In conclusion, it seems to us that one overarching principle has guided the framers of the Federal Rules of Evidence and that principle is stated in 402: all relevant evidence is admissible.

In urging this Court this afternoon to reject the bootstrapping rule and to reject an independent reliability test for admissible co-conspirator statements, we believe that we are being most faithful to that presumption of admissibility.

We free the trial judge to look at all non-privileged items and by so doing allow him to send relevant evidence to the jury without the encumbrance of an exclusionary rule that is no longer fit to this system. By rejecting a redundant test for the reliability of otherwise admissible statements we leave to the jury its traditional function of examining all relevant evidence and separating for itself the wheat from the chaff.

We believe that when judge and jury perform their assigned functions, the rules of evidence function as they were expected to by their framers.

If there are no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Robbins.

Mr. Saltzburg, you have four minutes remaining.

ORAL ARGUMENT OF STEPHEN ALLAN SALTZBURG

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. SALTZBURG: Mr. Chief Justice, I have two points, if it please the Court.

Number one, Justice O'Connor, you asked a question about how this Court should go about interpreting rules when there is silence and I would address, if I might, there are three examples of cases I would like to cite that are not in the briefs but I think it would, if I may make reference to them, might enlighten the answer to your question.

The government, the United States, has argued that, let the relevant evidence come in, let silence be disregarded, when it came to interpreting the twin of Rule 801(d)(2)(E) the twin is (d)(2)(D).

That covers agents' statements generally, not just co-conspirators as argued to the courts of appeals, that the pre-rules approach should be taken, that even though Rule 801(d)(2)(D) draws no distinction between the government and a defendant, between the government and a corporation, that pre-rules decisions did and that the silence -- it was so important in the pre-rules decisions, the silence should be taken as determinative.

A good example is the case, United States versus Kempiles, 609 Fed. 2d 1233, Seventh Circuit, 1979

in which this Court denied review. No rule was thought clearer --

QUESTION: Maybe that's wrong.

MR. SALTZBURG: Justice Scalia, it could be but I think that in other cases the United States has indicated it too understood that silence might be meaningful when it came to a process like the Rules of Evidence which are, I think on their face, not meant to be complete unto themselves.

But a second case where it is the best example of the plain meaning you could have is Rule 410. Rule 410, which has been amended a couple of times when it was adopted, covers statements by a defendant in plea bargaining and offers to plead.

It only says, "by the defendant," and it says, "These statements are not admissible against the defendant." The government argued immediately after the rule took effect, although it said, "Statements by the defendant and offers by the defendant, the rule must apply to the government," because it did before, rejecting the plain meaning and persuading indeed the Eighth Circuit in the United States versus Verduren at 528 Fed. 2d 103.

In a series of cases, in a series of cases involving Rule 8038(b) which says that, "Observations by

law enforcement officers should not be admissible in criminal cases." The government has persuaded a series of appellate courts that the rule should not be read as it seems to be written. That is, that is too broad an exclusion. The United States would suffer too much.

The silence, we submit -- point number one is that silence can be meaningful. Point number two is that -- what came through from both sides of this argument is an indication as to how important the independent evidence rule was prior to and during the debates on these rules.

That is why the fight was waged the way it was before this Court. It would be, in our judgment, a great injustice to have this Court overturn a principle of such long standing by holding that no one paid attention to it and therefore it is gone.

I submit to you that if the United States sought to amend these rules by doing away with the independent evidence requirement following a decision by this Court that that requirement still exists, it could not get the Congress to be interested. It could not get the Committees that supervise the rules to be interested, and it could not persuade this Court.

What it could not do directly in the sun, it should not be permitted to do in the shade, which is

what it asks this Court to hold.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Saltzburg.

The case is submitted.

(Whereupon, at 2:50 o'clock p.m., the case in the above-entitled matter was submitted.)

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5-6725 - WILLIAM JOHN BOURJAILY, Petitioner V. UNITED STATES

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BY Paul A. Richardson

(REPORTER)