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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-177

TITLE ANTHONY R. TANNER AND WILLIAM M. CONOVER, Petitioners
v. UNITED STATES

PLACE Washington, D. C.

DATE March 31, 1987

PAGES 1 thru 47

(202) 628-9300
20 F STREET, N.W.

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY R. TANNER AND WILLIAM M. CONOVER,

Petitioners,

v. : No. 86-177

UNITED STATES

Washington, D.C.

Tuesday, March 31, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

JOHN A. DeVAULT, III, Esq., Jacksonville, Florida, on behalf of the Petitioners.

RICHARD J. LAZARUS, Esq., Assistant to the Solicitor General, Department of Justice, Washington, D.C., on behalf of the Respondent.

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P R O C E E D I N G S

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

ORAL ARGUMENT OF JOHN A. DeVAULT, III

ON BEHALF OF THE PETITIONERS

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

This case is here on petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, which affirmed criminal convictions for conspiracy and mail fraud arising out of the award of contracts by Seminole Electric Cooperative, a private Florida corporation.

Two issues are presented for this Court's consideration. First, whether Section 371 of Title 18 U.S.C., which prohibits conspiracies to defraud the United States or any agency thereof, extends to a conspiracy to defraud a private corporation which is neither an agency nor a representative of the federal government, and which only connection with the federal government is that it is the recipient of a loan guaranteed by the Rural Electrification Administration.

Secondly, where a sworn affidavit that jurors were consuming large amounts of alcohol, were utilizing and dealing in marijuana, and were ingesting cocaine

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throughout the course of a complex criminal proceeding, required an evidentiary hearing in order to make a determination as to whether these jurors were rendered incompetent to consider and decide the case in violation of their Sixth Amendment rights.

Seminole Electric Cooperative is a Florida corporation formed by 11 rural electric cooperatives in the State of Florida for the purpose of generating and transmitting electrical energy in north and central Florida. That corporation in 1979 made application through the REA to borrow $1.1 billion from the Federal Financing Bank in order to construct a coal-fired generating plant near Polacta, Florida.

As part of the construction of that plant, it was necessary to construct a patrol road beneath an electrical transmission line which extended from the coal-fired plant to a substation outside of Ocala, a distance of practically 51 miles. That patrol road was in order to construct the line itself and later to maintain the road and the transmission facilities.

That original contract was awarded to Jernigan Construction Company out of Missouri. In 1979, work on the plant and the patrol road began, and by March of 1981 it became apparent that the materials being utilized by Jernigan were insufficient for the purpose.

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They simply would not compact sufficiently to hold the trucks and vehicles that had to transgress this road.

Accordingly, the officials at Seminole Electric directed the Director of Procurement, the petitioner here, Mr. Conover, to find another source of material to construct the road. Mr. Conover, in his position as Director of Procurement, went to his friend Anthony Tanner who was a local developer and is also a petitioner here.

Mr. Tanner owned a lime rock mine in the area and suggested the use of lime rock overburden as a material to be used in place of the sugar sand material which Jernigan was attempting to use. That material was used on an interim basis under a purchase order after being inspected by the engineering department of Seminole Electric.

The material proved satisfactory. Because of internal policies of Seminole Electric, a bid was required for any project which cost more than $200,000. Accordingly, specifications were drawn up for two contracts, one for a fill contract which utilized the same specifications of the material being submitted by Mr. Tanner under the purchase order, and the second for spreading contract to complete work on the road.

Both of those contracts were let for bid and

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petitioner Tanner was low bidder with respect to each. Accordingly, he was awarded the contracts and completed construction of the patrol roads in late 1981.

Just prior to the completion of construction, one of the electrical cooperatives raised questions concerning the business relationships between Tanner and Conover and whether they violated the conflict of interest policies of Seminole Electric. As a result of that investigation, an indictment was brought in the United States District Court in June of 1983.

That indictment charged in count one a conspiracy to defraud the United States under Section 371 by impeding the lawful function of the REA in administering and enforcing its guaranteed loan program. It contended that Tanner was given an advantage over competitors by the specifications drawn for the contracts, and that Tanner and Conover, by their personal business dealings, violated the conflict of interest policy of Seminole and therefore the program was not honestly and fairly administered.

The Court of Appeals for the Eleventh Circuit affirmed these convictions and found that what the Court termed "collusive and dishonest business practices" amounted to a fraud on the United States under Section 371, based on the interest of the federal government in

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seeing that the entire project was administered honestly, and efficiently, and without corruption and waste.

QUESTION: Was that a divided opinion?

MR. DeVAULT: There was a special concurring opinion by Judge Hill, Your Honor, and he consented and concurred in the judgment because he felt bound by a prior Fifth Circuit decision. But with respect to the conspiracy issue, Judge Hill evidenced, and stated in his special concurring opinion, that if he were not bound by that opinion he would find that these actions did not violate Section 371.

We raise in point one to this Court the fact that this Court has never heretofore upheld a conviction based on a conspiracy to defraud the United States under Section 371, where the defendants neither defrauded the federal government of its funds or property, nor interfered with a U.S. government official or their agents performing an official function of the federal government.

Indeed, given the pervasive nature of federal assistance programs and guarantees, an affirmance of this conviction under 371, we suggest would lead to limitless boundaries and in fact create a new national all-inclusive criminal code.

Section 371 has two parts. The first part of the statute, which is the one most often utilized, prohibits conspiracies to commit any substantive offense against the United States. The second part of the statute which is at issue on this petition, and which is much less frequently used, prohibits conspiracies to defraud the United States or any agency thereof.

Therefore, when an indictment charges the second part of Section 371, it is the conspiracy itself which is the substantive crime. It is not necessary for the government to allege and prove a substantive federal offense as it is in the first part of the statute.

QUESTION: But you have to prove that two or more people conspired to defraud?

MR. DeVAULT: Exactly, Your Honor, of course, in order to reach the conspiracy you would have to prove that initial element, my point being that whereas the first section is anchored to a substantive federal offense, so there is no question as to what the defendant is being charged, the second section is not so anchored. It permits a charge of defrauding the United States or any agency thereof.

Here we suggest on this record there was no evidence that the government, the federal government or any agency thereof suffered any monetary or property

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loss, nor was there any evidence of any interference with a lawful function of government.

QUESTION: Did the indictment name the agency which your client is charged with defrauding?

MR. DeVAULT: It named the REA as the agent which guaranteed the loan, Your Honor. But the allegations can be read that the actual party being defrauded was Seminole Electric. That is the party, of course, that was employed but REA was named as the guarantor and the federal agency that was being defrauded.

Seminole Electric is a private Florida corporation, and the federal government has no proprietary interest whatsoever in that company. The only connection between this conspiracy and the REA or the federal government is the fact that there was a guaranteed construction loan, guaranteed by the REA, two years prior to these contracts which are here at issue.

Looking to the legislative history of Section 371, there is simply no showing that Congress intended to punish a conspiracy to defraud a purely private entity.

QUESTION: Is that the government's argument here, that you defrauded Seminole and therefore you are guilty, or is it the government's argument that you

defrauded REA?

MR. DeVAULT: The government's argument is that we defrauded REA, Your Honor. But the fact is that REA was simply a guarantor of the loan. Thus, we suggest, there was no monetary or property loss to the REA nor was any governmental function of the REA interfered with.

As Judge Hill pointed out, Congress certainly could, had it decided to do so, have required or permitted REA to construct rural electric plants. It chose not to do so. REA does not have that function.

REA, as Mr. Wright, the general manager of Seminole Electric testified, was the banker. He said they had no part in the administration of Seminole Electric. They simply were the banker.

So, I concede that is the government's argument, but we suggest that on the indictment and on the facts of this record there is no showing of any fraud with respect to REA.

QUESTION: I suppose -- would you be making the same argument if these two gentlemen, Mr. Conover, was it --

MR. DeVAULT: Yes.

QUESTION: -- and Mr. Tanner, if they did something that made it more likely that the REA would be

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called upon to live up to its guarantee?

MR. DeVAULT: Justice White, I don't believe that a likelihood of damage would in itself be sufficient, absent some federal purpose.

QUESTION: Well, assume -- just assume that two people conspired to use materials in building a road that were so bad that they had to do it all over again, and they had to -- and the REA had to -- and Seminole ran out of money.

MR. DeVAULT: If there was evidence of a proprietary loss, as in Your Honor's example, then it would fit within this Court's prior decisions which say that --

QUESTION: Well, the loss would be to Seminole.

MR. DeVAULT: I thought Your Honor's example suggested that the REA would be required to extend --

QUESTION: Exactly.

MR. DeVAULT: -- additional funds, and that there would be some loss to the federal government because of the inability --

QUESTION: Wasn't there an allegation in this case that the specifications were so drawn that they favored Tanner?

MR. DeVAULT: There was, Your Honor.

QUESTION: And hence, that perhaps better,

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lower bids weren't forthcoming?

MR. DeVAULT: There were allegations of that, Your Honor, and of course for purposes of this petition we accept those allegations and the proof there under --

QUESTION: It may be that this job cost Seminole more than it should have, under the allegations?

MR. DeVAULT: That was the allegation, Your Honor. But the difference there -- what's missing is the fact that there was not shown in evidence at this trial of any proprietary or property lost to the federal government. The loss was to a private corporation.

QUESTION: Let me get this clear. If the fraud against Seminole had been so severe as to cause Seminole to lose so much money that they could not make the payments on the loans, and REA's guarantee was called in, then you think this indictment would lie? Is that right?

MR. DeVAULT: I believe Your Honor, that if there were shown, on Your Honor's hypothetical, that there was a loss to the federal government because of the defaulting, then you could have, under this Court's decisions, fraud against the United States.

QUESTION: Why does that make it any -- well, this isn't an indictment for fraud against the United States. It's an indictment for conspiracy to defraud

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the United States.

MR. DeVAULT: Yes, Your Honor.

QUESTION: Now, it seems to me basic law that you don't have to achieve the end of your conspiracy to be guilty of conspiracy. So, if I set out to rob enough money from Seminole that it might cause Seminole to have to default and the Government to have to come up with a guarantee, if I set out to do that whether I achieve it or not I should be guilty of conspiracy, shouldn't I?

MR. DeVAULT: Well, first, Your Honor, there was no such allegation on this indictment with respect to the purposes of conspiracy. And secondly, in order to draw such an indictment, there would have to be, we submit, an allegation of a loss or at least a conspiracy purporting to cause a loss to the federal government.

Those allegations do not appear on this indictment.

QUESTION: You have to actually intend to cause a loss to the federal government; it's not enough that you want to defraud Seminole of every penny it owns, that wouldn't do?

MR. DeVAULT: Absent a connection between Seminole and the federal government or an agency thereof.

QUESTION: Well, there is a very close connection. If Seminole has no pennies left, the

government has to make good on Seminole's obligations.

That's not enough of a connection?

MR. DeVAULT: Your Honor, only if there is a default under the loan would the federal government have to make good on Seminole's obligations. Here, not only was there an absence of proof of such default, but there was no charge in the indictment that the purpose of the conspiracy was such as to cause a proprietary loss to the federal government.

QUESTION: I'm not sure you're wrong about your whole case, but I do think it's very difficult to draw the line where you would do it, and that is to say that so long as the government has to cough up some money the indictment is good, but if it doesn't have to cough up any money the indictment is bad.

I can't see that line at all.

MR. DeVAULT: Well, in point of fact, this Court has not heretofore drawn the line and indicated what the line should be. What this Court has said, beginning, I guess, with United States versus Hirsch in 1879 which was the first case to construe the statute after it was enacted in 1867 as part of the Internal Revenue Code, was that there had to be almost a physical relationship between the alleged conspirators and the government.

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In each of the cases which have appeared before this Court there has been some sort of a direct relationship either of a monetary or proprietary interest or a federal governmental function. And in this instance we suggest that the net that the government seeks to throw out here would take in any company, or indeed any individual, where there is any type of a federal connection.

QUESTION: Does the government allege or prove that there were any fraudulent representations or practices made to the REA by your clients?

MR. DeVAULT: There was no proof, Your Honor, of which I am aware that showed a direct representation that was fraudulent to the REA. There was testimony which, after the fact, concerned the question of whether a bonding company was on a bonding list or not.

But with respect to the contracts themselves which were the contracts which were at issue in the indictment, I know of no such proof.

QUESTION: If your clients had made false representations to the REA and the jury found them, on substantial evidence, guilty, you wouldn't be raising this point, would you?

MR. DeVAULT: If it was a false representation in order to induce the REA to enter into the agreement,

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such as where a non-Communist affidavit was filed to induce the NLRB Act, then, Your Honor, I agree. I would not be making the point if that was an integral part.

In point of fact, here the agreement to loan was made in 1979. The loan was made. It was two years afterwards --

QUESTION: Yes, but that's not the thrust of their theory of the case, as I read the indictment. The theory is that your clients caused Seminole to make a false representation to the REA that they had followed the REA approved competitive bidding practice.

That would be after the contract was entered into, but nevertheless would be during the course of performance and at least theoretically it might have affected the way in which REA policed the loan, or administered it.

Now, they did prove that.

MR. DeVAULT: They did make that allegation, offered proof, Your Honor, of that fact after the fact with respect to these loans.

QUESTION: By after the fact, you mean after the loans had been made?

MR. DeVAULT: Well, not only after the loans, but after the contracts had been awarded.

QUESTION: Right, but not after they had been

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fully performed?

MR. DeVAULT: Correct.

QUESTION: The question, I suppose, is whether a conspiracy to make a false representation -- conspiracy to cause a false representation to be made to a federal agency that might affect the way in which it administers a contractual program, states a violation?

MR. DeVAULT: That is correct, Your Honor. And I think, to make that kind of charge, there would have to be explicit in that that the representation that was made would cause the federal government to act or not to act.

QUESTION: What you are saying is, if I understand you, there is no crime unless the representation harmed the federal government in some way?

MR. DeVAULT: Either harmed the federal government or interfered with a federal governmental function. It doesn't have to be a monetary loss to the federal government.

We concede that there is no necessity of showing a monetary loss but we do not concede that here there is shown any kind of a detriment to a federal governmental function.

QUESTION: In other words, if your clients went to the REA and made a bunch of false statements and

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the guy at the REA says, "Well, I don't believe a word you're saying and I'm not going to pay any attention to you," there is no -- you are not guilty of fraud just from having made the representations if they don't induce action?

MR. DeVAULT: If the REA, as in this instance, is simply a guarantor on a loan with a private corporation and is not engaged in a federal governmental function, Your Honor.

QUESTION: But I mean -- I don't think the point really is that. Supposing that your clients go to the United States Treasury, something that is clearly the United States, and just make totally false representations trying to get the Treasury to do something, and the initial person they contact at the Treasury says "No, I'm not going to have anything to do with you, I think you're liars," now, have they defrauded -- have they conspired to defraud the United States?

MR. DeVAULT: I think they would in that instance, Your Honor, if there is a conspiracy to induce the federal agency to take some action that --

QUESTION: But even though no action is taken.

MR. DeVAULT: If the purpose of the conspiracy is to induce some action, then, Your Honor, there could

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be a crime.

QUESTION: Mr. DeVault, in this circumstance does the REA have rules and regulations and standards to meet for contracts of this type?

MR. DeVAULT: It does, Justice O'Connor, and those that were put in -- and in fact several of them appear in the joint appendix.

QUESTION: I thought so, and was it not the fact, then, that it was alleged that the conspiracy here was one to avoid those requirements that REA would have imposed on contracting?

MR. DeVAULT: I think not, Your Honor. There is no showing that the requirements that were set out by the REA in their bulletin 40-6 which is in the joint appendix, or otherwise, specified the procedures here.

Indeed, the testimony was that there was not even a requirement for a formal or informal bidding process. It could have been let by informal negotiations.

The restrictions placed by the REA on Seminole Electric were very similar to that, that a bank places on any borrower in connection with a secured transaction.

QUESTION: Well, is it your assertion that none of the requirements imposed by the REA were violated by what was done here?

MR. DeVAULT: Your Honor, I think of no requirement that the REA imposed with respect to the awarding of the contract which was shown to be violated with respect to the entering into of these contracts. Now, certainly there was testimony, as Justice Stevens previously pointed out, that after the fact there were some representations made, but there was no charge nor proof that these were inducements to act with respect to the REA.

QUESTION: You would concede, I take it, that if the whole purpose of the conspiracy had been to get those false misrepresentations made to REA, that would be a different case?

MR. DeVAULT: And that those were material to the program as inducements to act, I would, Your Honor.

QUESTION: Material to the program as inducements to act? I mean REA requires this information for some good reason, even if not for putting out the initial loan.

MR. DeVAULT: Yes, Your Honor.

QUESTION: Then at least for the purpose of securing the future performance for which the loan was given, that is something the government has an interest in, doesn't it?

MR. DeVAULT: It does have an interest, Your

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Honor.

QUESTION: And you would take the position that so long as it's done after the money's been advanced, even if the very purpose of the conspiracy were prominently in mind, to get a false misrepresentation to be made to REA, that would not be enough?

Your case, I take it, is somewhat different. In your case your client really didn't care whether a false representation was made to REA or not. The effect of what they allegedly did would have been to cause a false representation to be made but that wasn't what they were after?

MR. DeVAULT: Correct.

QUESTION: You'd say even if they were after that, even if that was the whole object of their conspiracy, we couldn't --

MR. DeVAULT: We take that position, Your Honor, and it's simply because this REA here, although REA is a federal agency, it was not performing -- in this case it was not performing a federal function with respect to simply guaranteeing a loan made to Seminole.

In summary, with respect to point one, we would urge that the rule of Lenete which this Court has recently reiterated in recent cases would not reach

conspiracy to defraud in this case because the statute on its face clearly does not apply to this instance, nor does the legislative history and congressional intent with respect to the statute.

While we concede that the federal government has an interest in the program's honesty and faithful execution, that interest along is not sufficient to impose a criminal verdict with respect to the crime here at issue.

If this Court holds that the indictment is sufficient to charge and prove a crime under Section 371, then it must reach the second question raised by the petition, which is whether the Sixth Amendment's guarantee to trial by an impartial jury entitles criminal defendants the right, before a trial by jury capable of deciding the case on the evidence, and more particularly whether an evidentiary hearing of jurors is required where there is a sworn affidavit that jurors were utilizing marijuana and ingesting cocaine during the course of the proceedings.

QUESTION: Is this a case of jury -- alleged juror incompetence, or a case of alleged juror misconduct, and does it make a difference?

MR. DeVAULT: I think it makes a difference, Your Honor, and we have specifically cast it as a case

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of juror incompetence because we believe the test should be as to whether a juror would be physically or mentally competent to qualify as a juror initially, under 1865.

If is, of course, also a case of juror misconduct, but in order to reach an evidentiary hearing and a new trial we respectfully suggest it would be necessary to show at the evidentiary hearing that these jurors were incompetent to render a fair and impartial result at the trial.

I would like to reserve the balance of my time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. DeVault.

We'll hear now from you, Mr. Lazarus.

ORAL ARGUMENT OF RICHARD J. LAZARUS, ESQ.

ON BEHALF OF THE RESPONDENT

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

At the outset, I'd like to address Justice O'Connor's question earlier. We have no doubt that petitioners and Seminole Electric here were bound by REA bidding procedures.

Only one of the two contracts required prior approval but both contracts, as the REA bulletins in the record suggest, and as the testimony, uncontroverted by the REA official on pages 24, 27 and 32 of the Joint

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Appendix show, the bidding requirements designed to ensure that the lowest responsible bidder would be awarded the contract, did apply to these contracts.

Petitioners seek reversal of their conviction for conspiring to defraud the United States, and alternatively claim that they are entitled to an evidentiary hearing to interrogate the jury who convicted them. Because we believe that the petitioners' fraudulent activities fall within the scope of Section 371, and because we also believe that the post-verdict interrogation of jurors sought by petitioners in this case is barred by rule 606B of the Federal Rules of Evidence, we would urge the Court to affirm the decision below.

In our view, petitioners conspired to defraud the United States in two distinct respects. First, petitioners' fraudulent activities obstructed the REA's ability to accomplish its own official functions in this case, and that included supervising Seminole Electric to insure that statutory objectives were met, that federal monies were not wasted, and to protect the substantial federal investment in this federal project, over $1.1 billion.

QUESTION: Now, how do you distinguish this case from any case in which a federally subsidized

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entity is defrauded?

MR. LAZARUS: We don't suggest that just because Seminole is a recipient of federal financial assistance its because they are actually performing a function on behalf of REA, and we distinguish it because if you look at the terms of the loan contract, the REA bulletin, it is quite apparent that Seminole is being supervised closely with respect to almost all of its actions.

QUESTION: A lot of recipients do. They're not performing it on behalf of REA. REA gave the subsidy in order to achieve a particular result and they are overseeing it to be sure that that result is indeed accomplished.

That is the case with a lot of loan programs.

MR. LAZARUS: And for that reason, when the degree of federal oversight is such that they are in effect acting on behalf, as I believe counsel for petitioners conceded a moment ago, and that is that Seminole, on behalf of the REA, is in effect constructing an electric plant to provide services to rural residents of America.

And we believe that when the degree of oversight is so great that that amounts to a private company acting on behalf, performing official functions

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on behalf of the United States.

QUESTION: They are a federal agent?

MR. LAZARUS: We do not say they are federal agents. Really, all we are asking for in this case is the recognition as in this Court's decision in Dixon, that in certain contexts nonfederal intermediaries perform official functions on behalf of the United States, and we believe that the scope of Section 371 is broad enough to encompass that scenario.

QUESTION: But when the VA loans money to a builder or advances money to a builder to build a house for someone who is entitled to a VA loan, you don't generally say that the builder is doing it on behalf of the VA.

MR. LAZARUS: It would depend on -- we aren't saying that every time that the VA guarantees a loan that that's enough, but in those instances when they are actually being supervised in that capacity.

QUESTION: Well, maybe the contractor that's building the house has to meet certain VA specifications for materials and so forth.

MR. LAZARUS: And if in that case the VA required that oversight, and to see whether or not those requirements were being met, and a third party defrauded the builder in a manner which caused a violation of

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those requirements, we basically have the same case and we believe it would be a defraud on the United States.

Federal functions, the functions of the VA would be obstructed, their ability to supervise, and the result would be that federal monies which were intended for a certain purpose would have, because of the fraudulent conduct, been diverted to an unauthorized purpose.

QUESTION: Do you allege Seminole or the REA, or both?

MR. LAZARUS: We allege that the REA was defrauded in two different avenues, one directly and one indirectly.

QUESTION: So, it's both?

MR. LAZARUS: Yes. As a general matter, we --

QUESTION: I'm not sure I followed that. The direct fraud was the misrepresentation by competitive bidding, is that right?

MR. LAZARUS: That's right.

QUESTION: And the indirect fraud is what?

MR. LAZARUS: The indirect fraud is that by defrauding Seminole Electric, they increased the chance that there would be a pecuniary loss to the federal government and that federal statute objectives were --

QUESTION: You don't allege that in the

indictment, do you?

MR. LAZARUS: Well, we believe that's encompassed within the indictment. The indictment refers to obstructing the lawful function of the REA, but we believe that in this instance, that Seminole was acting out those functions of the REA.

QUESTION: It was not a part of your proof, as I understand your theory of the case? You didn't have to prove that Seminole lost any money?

MR. LAZARUS: No, we did not. And actually --

QUESTION: It could have been the lowest responsible bidder. Everything could have been hunky-dory except for the fact that there happened to be, according to your proof, a misrepresentation as to whether they followed competitive bidding procedures?

MR. LAZARUS: That is right.

QUESTION: So, an awful lot of irrelevant evidence went before the jury, I suppose. That's a fairly simple set of facts, if you are right about that.

MR. LAZARUS: It may have not been irrelevant evidence, maybe unnecessary, but that's not a problem.

As a general matter there must be three elements to maintain a prosecution under Section 371. First, the conspiracy must be directed against the United States, a federal agency, or we believe, an

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intermediary acting on behalf of the United States.

Second, the effect of the conspiracy must be either to deprive the federal government of its monies or its property, or to obstruct federal government official functions, which we believe include any official functions being performed by an intermediary on behalf.

We rely on our construction of Section 371 on four primary sources of authority: first, the unambiguous yet broad statutory language of Section 371 which condemns conspiracies to defraud the United States in any manner. It includes no words of limitation.

Second, this Court's settled precedent which has construed Section 371 to bar any conspiracy that impairs, obstructs, or defeats the lawful functions of government, and not merely conspiracies that result or contemplate the loss of government money or property.

QUESTION: The limitation asserted here by the defendants is the United States. The statute prohibits defrauding the United States in any manner?

MR. LAZARUS: Right, and we believe --

QUESTION: So, the "in any manner" doesn't do you any good.

MR. LAZARUS: No.

QUESTION: What we are arguing about here is

whether this is a defrauding of the United States or not.

MR. LAZARUS: Yes, but we believe that "in any manner" is critical here because as this Court has recognized, nonfederal intermediaries often perform official functions of government on behalf of the United States, and we think that when that happens, and when those official functions are obstructed when being performed by someone on behalf of the United States, that is a defraud of the United States in any manner.

QUESTION: What is "on behalf of the United States"? It seems to me that is the joker in the deck here.

What do you mean by "on behalf" -- you say it's not an agent, but it has to be "on behalf" -- this is a criminal statute, now. People have to know whether they're violating -- how do I know when somebody is acting on behalf of the United States or not?

MR. LAZARUS: Basically we ask, in that respect, no more and no less than this Court's decision in Dixon v. United States, where the Court recognized that when a private entity is administering a federally supervised and federally supported project on behalf of the United States, performing official functions under close supervision, that in those instances they are performing official functions and acting on behalf of

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the United States.

We are really asking for no more than application of that standard, recognition that the broad language in 371 includes that possibility, and no less. Simply put, in our view the language of Section 371 is sufficiently broad to account for the realities of modern government and that is that government often and correctly relies on nonfederal entities to perform official functions on behalf of those agencies and the United States.

The administration of federal welfare programs often depends on such programs. Maintenance of our nation's highways often depends on such programs. Public health programs, HUD programs, State Department programs, environmental protection programs, the list is virtually endless.

Congress intended, we believe, to protect the functions of government, of the federal government when they were defrauded in any manner. Congress determined that federal jurisdiction was appropriate with reliance on federal prosecutors to insure that the federal functions would be served and be adequately protected.

In light of this legislative mandate, we believe that a construction of 371, consistent both with its historic treatment, the statutory language and the

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realities of modern government is warranted.

QUESTION: May I ask you one other question, Mr. Lazarus. The indictment alleges that the conspiracy of the defendants would cause Seminole Electric to falsely state and represent to the REA that they followed the approved -- now, would the false statement to the REA itself be a violation, a substantive offense?

MR. LAZARUS: It might be a violation of 1001, and originally the indictment had included a 1001 count, but for tactical reasons the --

QUESTION: So that theoretically, perhaps you could have reached the same conduct by relying on the other clause of Section 371?

MR. LAZARUS: That is right. Of course, the 371 included the conspiracy offense while 1001, you wouldn't --

QUESTION: I understand, but it could have been the conspiracy to commit an offense against the United States?

MR. LAZARUS: That is right.

QUESTION: If you are right about that.

MR. LAZARUS: I think a similar instance was in the Glasser v. United States case, where the manner -- the method of the fraud in that case was bribery and the U.S. charged conspiracy to defraud the United States

even though the fraud was committed through bribery.

The Court upheld the conviction in that case, although of course the U.S. might have tried to allege and prove conspiracy to commit the underlying offense.

QUESTION: Thank you.

MR. LAZARUS: Petitioners alternatively request -- if there are no further questions on the first issue.

QUESTION: The only thing -- some of your argument about the necessity of preserving modern functions of government is reduced by the fact that you have 1001. If, indeed, you are causing a false misrepresentation -- if you're conspiring to cause a false misrepresentation to be made, you have a readily available means of getting the individual without leading the law into this twilight zone of somebody who's acting on behalf of the United States. It wouldn't matter whether you --

MR. LAZARUS: Well, in other instances there may be obstruction without false statements. But in any event, the fact that there may be overlapping federal criminal provisions is no reason, we believe, to read 371 in a manner which ignores the plain import of its broad statutory language.

Petitioners alternatively request that they be

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provided the opportunity to interrogate the jurors who convicted them about possible juror misconduct. We agree with the Court of Appeals that the District Court properly denied petitioners' request for post-verdict relief.

Our position is based on two alternative grounds. First, a reading of Federal Rule of Evidence 606B, which we believe bars such juror interrogation, and second, our determination that even if 606B does not absolutely bar such inquiry, the District Court did not abuse its discretion in denying petitioners' motion.

At stake in this case is the overwhelming need of the jury system to protect juror privacy, to prevent juror harassment, and juror tampering, and to provide needed finality of the juror verdicts. These factors have traditionally demanded a hard, uncompromising and rigid rule that bars at the outset post-verdict testimony by a juror for the purpose of impeaching the jury's verdict.

Such a rule, we believe --

QUESTION: -- What went on in the jury room --

MR. LAZARUS: Well, not just what went on in the jury room but general --

QUESTION: Any juror's testimony about any outside influence?

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MR. LAZARUS: Certainly not with respect to outside influences and extrinsic --

QUESTION: Well, the statement you made covered that.

MR. LAZARUS: There have been inroads made on that, recognizing there are different ties, and we think that Federal Rule of Evidence 606B reflects the proper distinction because, with two discrete exceptions, it bars juror testimony for impeachment purposes. Those two exceptions, as you noted, one being for outside influences and the second for extrinsic prejudicial information.

QUESTION: Would you conceive cocaine to be an outside influence?

MR. LAZARUS: No, we would not, any more than we would believe that anything that a juror voluntarily ate for breakfast, lunch or dinner would be an outside influence.

QUESTION: Bacon and eggs and cocaine.

(Laughter.)

MR. LAZARUS: In each case, though, and we think this is the critical issue, it is an action voluntarily taken by the juror him or herself, and not an action by an outsider taken, calculated to influence the jurors' decision to assent or dissent from a verdict.

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That is a very big difference, because on the one hand you would have -- if the first thing would be outside influence, then there could be investigations and inquiry into the personal habits and lives of jurors, and indeed losing parties in cases would have every incentive --

QUESTION: This isn't personal habit. This is what you did in the jury room under the jurisdiction of the Court, and with the imprimatur of the Court on it, and I can't see you putting the imprimatur of the Court on cocaine.

MR. LAZARUS: We don't --

QUESTION: Do you?

MR. LAZARUS: We're not asking anyone to condone or sanction the nature of the conduct that is alleged in this case. What we believe is at stake, however, is what evidence can be allowed to prove what conduct, and a very hard and fast and important principle is at stake in this case, and any exception in this area, we believe, would invite the grossest abuse.

QUESTION: Mr. Lazarus, your opposition seeks to characterize what happened as a question -- raising a question of juror incompetence rather than misconduct.

MR. LAZARUS: We believe that properly read, and indeed the way the petitioners themselves

characterized their concerns in the lower courts, was really a matter of juror inattentiveness. But I can't suggest -- or temporary mental incompetency, impairments of reasoning ability, I think.

QUESTION: Would there be a difference in how we would view it?

MR. LAZARUS: We don't believe there would be a difference. The issue may not be raised by this case. We would not -- I would not be answering the questions any differently.

QUESTION: Could juror misconduct or temporary incompetence rise to such a level that it becomes a constitutional question of due process and a fair trial?

MR. LAZARUS: Well, it might in a different context, if there was evidence independent of juror testimony.

All we are asking here for is the exclusion of one possible source of evidence. We are not suggesting that if there was other evidence, perhaps a bailiff or a marshal has some independent evidence of such misconduct, and brought that to the attention of the Court, that that might not provide the basis for a motion for a new trial.

All we are suggesting is that there is no constitutional requirement that this particular source

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of evidence be allowed, nothing more.

QUESTION: Mr. Lazarus, of course it may be the only source of evidence. Supposing you had a case, and you rely very heavily as I understand your brief on the outside influence exception. This is not an outside influence, it happened inside.

What if one of the jurors physically intimidated his colleagues in the jury room, threatened violence to them if they didn't vote a certain way. Could testimony of that event be --

MR. LAZARUS: No, that's -- we believe that absolutely no line can be drawn there. That's precisely the problem that we have.

If you get into the interactions between jurors during the deliberations, trying to draw a line between when a juror uses browbeating and intimidation and when a juror uses persuasion.

QUESTION: Even if he had weapons with him and physically abused another juror, that would be --

MR. LAZARUS: Our answer would be precisely that --

QUESTION: I guess what you're relying on is the fact that anything that goes on in the jury room is observed by the other jurors, and if somebody pulls a gun presumably one of the jurors could tell the Court

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about it and the Court can conduct an inquiry right then and there.

MR. LAZARUS: That's right. The more egregious --

QUESTION: Whereas outside influences can't be observed by the other jurors necessarily, so it wouldn't necessarily come to light?

MR. LAZARUS: The more egregious the hypothetical, the more unlikely that it would ever escape observation and only arise six months or so after the verdict.

QUESTION: But if that is the adequate answer, you are totally satisfied, assuming the most glaring version of the facts of what happened here which were not called to the attention of the judge, perhaps some were afraid to do it, and so maybe they don't always immediately run to the judge. That is still no problem?

MR. LAZARUS: That's right. We think that it's no mere happenstance that these kinds of cases don't seem to come up very often, and perhaps in a few isolated cases, if these allegations are in fact true, some cases might slip through the cracks.

We don't think that you should fashion a rule of evidence, and we don't believe that Congress has fashioned a rule which basically accommodates that rare

possibility because of the great potential for abuse if we do so.

The choice, we admit, is between the lesser of two evils in this case: the exclusion of potentially relevant evidence versus undermining the jury system. Congress however, we think, carefully considered this issue and opted for adherence to the general principle in order to preserve the sanctity of the jury system.

They recognized that an isolated case, that the only evidence might be excluded, but they thought it would be unwise to fashion such a rule. The rare occurrence, in other words, simply does not justify the risk posed by creating an exception.

QUESTION: What is supposed to happen if the bailiff or somebody else says that when the -- at intermissions or overnight he furnished juror so and so with cocaine and saw him using it just before they went into the courtroom, and it's pretty obvious that a juror was under the influence of cocaine. Then what happens?

MR. LAZARUS: Well, in such an instance that would undoubtedly arise before the verdict was handed down, and there would be absolutely no bar at all to the judge calling and --

QUESTION: Let's just say it didn't. It didn't arise. There was a verdict of guilty and then

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this evidence comes up, and the claim is the juror didn't know what he was doing. What happens then?

MR. LAZARUS: The judge would have to evaluate the credibility of the bailiff's --

QUESTION: Well, he says, "I believe you." He says, "I believe the juror was under the influence of cocaine when he was in the jury room."

MR. LAZARUS: If the judge thought, based on that evidence that it had reached a sufficient level --

QUESTION: He may not call any juror or investigate through any of the jurors?

MR. LAZARUS: That's right. If it happened during the trial, which undoubtedly it would in those circumstances, of course he could. But if in that unlikely circumstance, if for some reason the bailiff himself didn't bring it to the Court's attention until afterwards, then that would necessarily follow.

Our second ground for affirmance of the District Court and Court of Appeals ruling on denying petitioners' motions for an evidentiary hearing to interrogate the jurors rests on the notion that the District Court, we believe, even if 606B did not and does not absolutely bar juror interrogation, that the judge did not abuse his discretion in denying those motions.

Based on the Court's own observations during the lengthy trial, and the failure of any courtroom personnel or any of the parties to suggest to him that such misconduct was occurring during the trial, the District Court could well conclude that no extraordinary remedy of juror interrogation was appropriate. The judge in the hearing reprinted in the joint appendix describes his ample opportunity to observe the jurors, and how whenever problems had occurred in the past he had been notified by courtroom personnel.

The judge directly refuted the suggestion in the affidavits filed that jurors had been inattentive and had been sleeping throughout the proceedings. A judge, we believe, must be entitled to tremendous deference in this context because meaningful post hoc evaluation of juror attentiveness during trial, how jurors might have been thinking, the clarity of their minds at isolated points during the trial, is simply not possible.

Subjecting jurors to tests of brightness is simply not a practical approach. The jury system is a fundamental aspect of the American system of justice, yet it simply cannot withstand the detailed prodding and analysis to which much of judicial decision making is often subjected.

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In isolated cases we admit that might seem a high price to pay, but given our commitment to juries, our belief in the basic fairness of peer judgment, including the mysteries of jury reasoning and jury decision making process, it is a price, however, that we believe is worth paying.

If there are no further questions.

QUESTION: Yes, I have a question. Suppose we don't agree with you on Section 371. Can the mail fraud conviction stand?

MR. LAZARUS: Yes, we think --

QUESTION: The indictment with regard to mail fraud charged defrauding both REA and Seminole. Now, don't you have to prove both parts of that?

MR. LAZARUS: No, because it is clear in this case that the jury, we believe, relied on the private fraud portion of the indictment. By looking at the jury instructions, the Court focused exclusively on that aspect and indeed, even if they hadn't found the defendants guilty here under 371, they would have had to find a fraud on Seminole itself.

No one really in the Court of Appeals disputed that, although they did not directly address the issue.

QUESTION: You couldn't defraud REA without defrauding Seminole in the process?

MR. LAZARUS: Not in the manner of the fraud that occurred in this case.

QUESTION: I don't understand that. Why not? If Seminole just filed a false statement about competitive bidding, wasn't hurt at all itself, how would they have been defrauded?

Suppose they didn't lose any money by this. How were they defrauded?

MR. LAZARUS: They were defrauded in this case because it affected the material that they received and they did not --

QUESTION: Yes, but maybe the jury didn't believe all that. Maybe the only thing the jury believed was that they filed a false statement with the REA that they had engaged in competitive bidding when they in fact had not done so.

That doesn't prove they --

MR. LAZARUS: Seminole itself, on that basis, did not receive the benefits of competitive bidding, and might have received a better and more appropriate contract and that itself --

QUESTION: Maybe they didn't want the benefits. Well, I don't know. It doesn't seem to me one necessarily -- I see your point is that -- okay, I understand.

QUESTION: Let's assume we disagree on that too, okay. It comes to the point, then, whether the jury had to find both fraud on REA and fraud on Seminole?

MR. LAZARUS: That's right.

QUESTION: Was that necessary under the indictment?

MR. LAZARUS: We think it was necessary based on the proof at trial. I don't think the indictment may have been specific enough in that regard but certainly, looking at the jury instructions and the proof at trial, and I think it would also follow from the indictment in terms of all the allegations.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lazarus.

Mr. DeVault, you have two minutes remaining.

ORAL ARGUMENT OF JOHN A. DeVAULT, III

ON BEHALF OF PETITIONERS - REBUTTAL

MR. DeVAULT: Mr. Chief Justice, just two brief points. With respect to the indictment and the jury charge, Justice Scalia, it was charged both a conspiracy to defraud the United States by defeating the lawful functions and Seminole Electric, and the jury was so charged with respect to both.

Indeed, in the Court of Appeals, the majority opinion when we raised the question of the sufficiency

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of the evidence on mail fraud, the Court of Appeals' opinion at page 14 of the Appendix to the Petition for Writ, they conceded that they were sustaining the mail fraud convictions because -- should be affirmed if the evidence establishes the use of the mails in connection with Section 371 in violation of count one.

QUESTION: Just because it is in conjunction you have to prove all of it? I mean, I accuse you of conspiracy to kill three people and I only prove that you conspired to kill two people, you walk free, is that the way the world works?

MR. DeVAULT: Where the indictment here charged, and the jury was instructed that the conspiracy consisted of both, Your Honor, as it did here, then the charge made by the mail fraud charge was bound up in the conspiracy to defraud the United States and both, we submit, had to be proved.

The second point with respect to 371, the government is seeking to have this Court extend the provisions of Section 371 to an intermediary acting on behalf of the United States. That phrase does not appear in the statute. That phrase does not appear in any prior opinion of this Court.

The government relies on the Dixon case where a closely divided Court looked to the legislative

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history and found because of that legislative history, it would uphold the conviction. Here there is simply no legislative history by which this Court can look and extend Section 371.

In such instance, we suggest it more appropriate to apply the rule of Lenete and say that a criminal defendant who is charged and convicted under statute about which he has no knowledge, the conviction should be reversed.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. DeVault.

The case is submitted.

(Whereupon, at 10:58 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

#86-177 - ANTHONY R. TANNER AND WILLIAM M. CONOVER, Petitioners

v. UNITED STATES

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BY Paul A. Richardson

(REPORTER)