ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 86-937
	)	
THOMAS O. ROBINSON, JR.	)	

PAGES: 1 through 34

PLACE: Washington, D.C.

DATE: November 3, 1987

Heritage Reporting Corporation

Official Reporters
1220 L Street, N.W.
Washington, D.C. 20005
(202) 628-4888

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UNITED STATES,

Petitioner,

v. : No. 86-937

THOMAS O. ROBINSON, JR.

Washington, D.C.

Tuesday, November 3, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

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

CAROLOU PERRY DURHAM, ESQ., Nashville, Tennessee; on behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We'll hear argument in Number 86-937, United States against Thomas O. Robinson, Jr.

Mr. Robbins, you may proceed whenever you're ready.

ORAL ARGUMENT OF LAWRENCE S. ROBBINS, ESQ.

ON BEHALF OF PETITIONER

MR. ROBBINS: Good morning, Mr. Chief Justice, and may it please the Court:

The decision of the 6th Circuit in this case reversing the two mail fraud convictions of Thomas Robinson flounders, we submit, on two central misconceptions.

First, the Court of Appeals misread this Court's decision in Griffin against California when it held that the prosecutor's rebuttal summation was an impermissible comment on Mr. Robinson's failure to testify. The rule in Griffin, we suggests, forbids only those comments that serve no proper purpose but, rather, invite the jury to treat the defendant's silence as evidence of his guilt.

The rebuttal remarks under that standard were not impermissible.

Secondly, the Court of Appeals erroneously supposed that it was freer to find plain error in this case because the prosecutor's remarks never objected to at trial implicated Robinson's constitutional rights. We believe that there is no basis to distinguish between constitutional and non-

constitutional errors in applying the plain error doctrine.

Let me begin, if I might, with the Griffin issue. The Court of Appeals discerned the violation of Griffin in the prosecutor's rebuttal summation. Defense counsel, for his part, had summed up prior to the rebuttal and proclaimed at the outset that his theme in the summation would be the Government's failure to play fair with the jury.

After claiming that the Government had unfairly filtered the evidence in its presentation and that it had consistently denied Robinson a chance to explain his actions, defense counsel then posed this rhetorical question to the jury:

"Now, would you like to get indicted for that without the Government being fair and being able to explain before you, members of your own community, rather than before the agents?"

After the defense lawyer completed his remarks, the prosecutor asked for a side bar and both attorneys approached the trial court. At that point, the Government lawyer objected to the remarks and asked for leave to respond. The court granted that motion, agreeing with the prosecutor that defense counsel had wrongfully asserted that the Government was responsible for Mr. Robinson's failure to testify.

Defense counsel, for his part, registered no objection at this time nor did he quarrel with the trial court and the Government's construction of his summation remarks and,

therefore, acting pursuant to the trial court's ruling, the prosecutor stated in rebuttal that defense counsel "has made comments to the extent the Government has not allowed the defendants an opportunity to explain. It is totally unacceptable."

And he stated further, "He", that is the defendant, "could have taken the stand and explained it to you. Anything he wanted to. The United States of America has given him throughout the opportunity to explain." And, again, the defense counsel made no objection.

Now, the Court of Appeals for the 6th Circuit found in these remarks a clear violation of the Defendant's constitutional right not to testify under Griffin. We disagree. Griffin does not prohibit each and every reference to a defendant's failure to testify. Rather, Griffin forbids those comments but only those comments that serve no proper purpose and simply invite the jury to treat the defendant's silence as evidence of guilt.

The Griffin case itself, we suggest, confirms this limiting principle. In Griffin, after all, the prosecutor and the trial court told the jury that from the failure of the defendant to testify, it could infer that each and every fact that he could have but failed to explain was more likely than not to be true and that they could use those findings as evidence against the defendant.

This Court, reviewing that record, found that the comments of the prosecutor and the trial court in Griffin "tendered to the jury for its consideration the failure of the accused to testify." Thus, the Court explained, the comments of the prosecutor and trial court in Griffin "solemnized the silence of the accused into evidence against him."

The Griffin court reasoned that it is simply improper to infer from the failure to testify that the defendant is guilty of the crime charged and it discerned a number of reasons wholly apart from the defendant's guilt that could account for the defendant's failure to testify.

The court in Griffin reasoned that when a prosecutor or trial judge invites the jury to find a defendant guilty based on his failure to testify, it has, in effect, imposed a penalty on the defendant's exercise of a Fifth Amendment privilege.

But surely not every comment pertaining or alluding to the failure to testify "solemnizes the silence of the accused into evidence against him", and this case, for example, does not fit that profile at all. Here, the prosecutor did not urge the jury to treat the Defendant's silence as evidence against him.

When he advised the jury that the Government cannot be blamed for Mr. Robinson's decision not to testify, the prosecutor simply dispelled a mistaken impression, indeed, a

misleading impression, left in their minds by the defense lawyer in his summation. The rebuttal remarks thus had an entirely lawful purpose unrelated to the evidentiary use and evidentiary significance of the Defendant's failure to testify.

The rule that we suggest should govern Griffin claims in this case and in general is this: when a prosecutor has a lawful purpose in making his comments, a purpose that is unrelated to the Defendant's failure to testify, he does not violate the rule in Griffin. That's true for two reasons.

First, the rule in Griffin --

QUESTION: Can't I adopt that in the rule against you?

MR. ROBBINS: I'm sorry?

QUESTION: Can't I adopt that in the rule against you?

MR. ROBBINS: I don't see how, Justice Marshall. It seems pretty clear to us that, first of all, the prosecutor's remarks in this case did, indeed, have a lawful purpose, and that was to dispel --

QUESTION: The lawful purpose was to convict the man.

MR. ROBBINS: Well, no. I think it had a lawful-- I'm sorry.

QUESTION: What other lawful -- what is "lawful"?

MR. ROBBINS: Well, --

QUESTION: He was there to convict.

MR. ROBBINS: His overall purpose --

QUESTION: Do you dispute that?

MR. ROBBINS: I don't dispute that the Government is charged in a prosecution it has brought to try and persuade the jury beyond a reasonable doubt of a defendant's guilt or else they wouldn't be there. But I do very much believe that there were proper purposes short of that that can account and do account for what the prosecutor did in his rebuttal in this case.

Specifically, the defense lawyer had left the clear and misleading impression that the Government was somehow responsible for Mr. Robinson's failure to testify.

QUESTION: Could that have been corrected by instruction?

MR. ROBBINS: It could have been corrected by instruction, but we don't think that it must be corrected by instruction. We don't think that in a case where the Government has a proper response that can correct a misleading impression, it must forego its opportunity to correct the impression itself, and certainly none of this Court's cases, including its decision in Young, suggest that the Government must forego the opportunity to give perfectly permissible response.

QUESTION: The difference between us is I don't think comment on failure to take stand is "permissible".

MR. ROBBINS: Neither do, but I don't --

QUESTION: You just said so.

MR. ROBBINS: I respectfully must disagree, Your Honor. It seems to me that what I have said and what I say again is that the kind of comment that took place in this case was not a comment on the failure to testify in the Griffin sense.

It was, of course, a comment pertaining, relating and alluding to the failure to testify, but not remotely in the sense that the Griffin court was concerned about. The Griffin court, we submit, was faced with a situation --

QUESTION: You say the Government said, oh, by the way, he failed to take the stand?

MR. ROBBINS: No.

QUESTION: You know, just in passing?

MR. ROBBINS: No, I don't think it was a remark in passing. I think it was a remark very deliberately made, but for a lawful and permissible purpose, that has nothing whatever to do with the concerns that moved the Griffin court.

It seems to us, for example, that this remark was no more a comment on silence than was the instruction given over the Defendant's objection in Lakeside against Oregon. There, too, there was a comment in that case by the trial court pertaining to the failure to testify. Specifically, telling the jury that it may draw no adverse inference from the failure

to testify.

In that case, the defendant made much the same kind of argument that appealed to the 6th Circuit in this case. He said, well, that's a comment on my silence because it is, of course, related to my failure to testify. But this Court flatly rejected that argument. It said that not every comment is a Griffin impermissible comment, and the mere fact that it reminds the jury that the defendant didn't take the stand, a fact which we suggest they rarely need to be reminded about, nevertheless doesn't put it within the Griffin proscriptions, and we think this is no more prohibitive in Griffin than the comments in Lakeside.

For the same reason that the Lakeside comment was not impermissible, because it did not invite the jury to draw an inference of guilt from the failure to take the stand. That is not what the prosecutor said to the jury in this case. What he said is that, in effect, do not be misled into thinking that we are responsible for the defendant's failure to testify, and that's, indeed, just exactly what the defense lawyer had said in his prior remarks.

It seems to us that when, as here, there is a proper purpose for the remarks, unrelated to asking the jury to draw an adverse inference of guilt, it promotes and not undermines the truth-finding function of the trial to permit that statement to be made. That, we take it, is the clear lesson of

this Court's decision in Rafael against The United States, in which this Court held that a defendant's failure to testify at an earlier trial may be used to impeach his credibility when he testifies upon retrial.

It is likewise the lesson, we think, of a broader line of cases, like Harris against New York and Walder against The United States, that make clear that prosecutors must have considerable latitude during impeachment and rebuttal precisely because the demands of the truth-finding function require it.

Now, there's a second reason why we suggest that the rule of Griffin as we have urged it makes a good deal of sense, and that's this: where prosecutor's remarks serve a lawful and proper purpose unrelated to asking the jury to infer guilt from silence, there's no reason to suppose that the jury will understand it in the impermissible way.

As this Court explained in Donnelly against DeChristoforo, remarks by a prosecutor should not be interpreted in their worst possible way, and when a prosecutor's remarks serve, as we suggest they do in this case, an important truth-finding function, courts should not presume that the jury will take those remarks as forbidden comment.

Indeed, that is a particularly appropriate rule to apply in this case because the jury was instructed by the trial court in instructions that were similarly not objected to, to draw no inference or guilt from the failure to take the stand.

In short, we believe the rule in Griffin ought not to be construed to stifle argument that serves a legitimate truth-finding purpose. In this case, the trial court concluded that the prosecutor's remarks would ensure that the jury was not misled by defense counsel's summation. That judgment was plainly correct and should not have been reversed, least of all on the authority of Griffin.

QUESTION: May I ask one question, Mr. Robbins? If the defense counsel's summation had merely said, and it's somewhat ambiguous, that at the time the defendant was interviewed by claims agents and FBI agents and so forth, conditions were very -- were such that he didn't really have an opportunity to explain, they didn't give him an opportunity to explain, clearly he did not have the opportunity to explain at that time before he was indicted, before the case started, if that's all he said, would the rebuttal argument have been proper?

MR. ROBBINS: The rebuttal argument may have been improper, but not because it violates Griffin. The rebuttal argument would still not have been one calculated or on its face likely to have the effect of asking the jury to infer guilt from silence, but it would have been improper for a different reason, and that is because it was not proper rebuttal. It was not responsive to anything that the defense lawyer had said.

QUESTION: Well, supposing the prosecutor said, my opponent made the argument that my client or that the defendant didn't have an opportunity to explain during the claims adjustment process, and maybe that's right, but he has had an opportunity at the trial here to come up with the explanation, he hasn't done so, would that be proper rebuttal? He hasn't done so when he could have gotten on the stand.

MR. ROBBINS: My inclination is to think not. Again, for the reason that it is not calculated to respond to precisely the argument made. It is, I think, a bit of analytical overkill and because it's not narrowly --

QUESTION: And it emphasizes before the jury that the man didn't get on the witness stand.

MR. ROBBINS: That's correct. But it does seem to me that there are --

QUESTION: Well, to put it another way, would you not agree that the rule of Griffin can be violated by some indirect -- by emphasizing the failure to testify in the sort of pre-textual way that you don't affirmatively argue as they did in Griffin, that you can draw this inference, but they just kind of emphasize -- would you not agree that some kinds of emphasis on the failure to get on the stand violate the basic rule of Griffin?

MR. ROBBINS: I think I am not willing to defend pre-textual arguments, and I think they can happen. In one of this

Court's cases, there's a rather lengthy quotation from an instruction that the jury may draw no inference from the failure to testify, and it was repeated about thirty-five times, until the jury finally got the message that perhaps they should have drawn an inference.

QUESTION: Lakeside against Oregon.

MR. ROBBINS: But let me suggest, Justice Stevens, that there is a danger on the other side of the ledger as well with these indirect references to silence.

We think, frankly, that the lower courts have gone a little bit overboard in what constitutes indirect comment. At a point of indirection, there's no good reason to think that the jury is going to take those comments in an impermissible way.

I have in mind the legions of cases dealing -- in which the prosecutor says, the evidence is uncontradicted, is unrefuted, and in which the Courts of Appeals nevertheless feel constrained to struggle with that as a Griffin problem. It isn't, and it isn't for a variety of reasons, and the rule that we have urged today, we think, will settle a great many of those and reduce disputes that have nothing to do with the meaning of Griffin.

It will not solve cases of pretext and we're not prepared to defend cases of pretext. Where it's clear that the prosecutor is trying to get through the back door what the law

prohibits through the front door, we don't defend it, and it ought to be impermissible. But those are rather a small class of cases compared to cases that Griffin simply doesn't control.

QUESTION: If the prosecutor here had not asked for the judge's permission in advance, it seems to me this would be rather close on the factual question that I give you, because I can read some of the comment.

I'm not really sure there's ever an unambiguous statement in defense counsel's argument that he's referring to the fact -- suggesting that he didn't have a chance to get on the witness stand. He seems to be talking about the adjustment process.

MR. ROBBINS: I am, Justice Stevens, not prepared to assert that the defense counsel's remarks are a model of clarity. I think there is a good deal of ambiguity to them, which is exactly why the law insists that the participants in the trial make their views known to the trial court.

In this case, there's every good reason to indulge the presumption that the trial judge understood these remarks as inviting the response that were made, the response that was made. The language that was used is one that we still don't have an accounting for, except in the way that the trial court understood it. After all, the defense lawyer said, used the words, "being able to explain, have him explain before you, members of your own community".

At a minimum, those can be understood the way the trial judge understood them. Beyond that, of course, the fact that the trial judge understood them that way is a pretty good, indeed, in our view, the best barometer that that's the way they want to be understood.

We refer in this connection to the Court's remarks in a different context in Patent against Yount, in which the Court said that demeanor, inflection, the flow of the questions and answers can make confused and conflicting utterances incomprehensible and, therefore, went on to hold that the trial court's understanding, the trial judge's interpretation is the best barometer for making sense of what happens during a trial proceeding.

And, of course, here was a case where the defense lawyer stood at side bar with the other participants, heard what the trial judge and the Government lawyer thought his remarks meant, and said nothing, and it's not just that he said nothing, but he objected to some other claim that the Government wished to make in rebuttal. He objected to that, but conspicuously said nothing about the claim that brings us to court today.

It seems to me that that goes beyond inadvertence and calls to mind Justice Frankfurter's remarks in Johnson against The United States that sometimes the failure to object should be understood as acquiescence that nothing is objectionable at

all.

QUESTION: Is there now some rule prevailing in the federal courts that the United States Attorney has to clear his closing argument with the trial judge?

MR. ROBBINS: No, there is not, Mr. Chief Justice, and we don't think our position would be any different had he not done so in this case.

We do think, however, that the fact that he did so bears on the analysis to this extent: it gave the defense lawyer a chance to give his side of the story, to give his interpretation. If he believed then as respondent's counsel states now that his remarks should have a different meaning, there was his opportunity to say so.

No, I think in answer to Your Honor's question, the Government could have proceeded to rebuttal and said exactly what he said without any clearance from the trial court. It is, however, good procedure to do so. It does give the people a chance to air the views and the trial court has an opportunity to rule.

QUESTION: I'd like to place some emphasis on it. Not only is it a good procedure, but it also gives the trial judge a chance to clear up something by instruction that would avoid a significant risk of error. I'm not suggesting that there's error here, but certainly, I think, he was to be commended for raising this with the trial judge.

MR. ROBBINS: We agree. The Court of Appeals compounded its misreading of Griffin, we think, by its flawed application of the plain error doctrine.

Now, once before in this litigation, this Court granted certiorari to the 6th Circuit and remanded the case in light of The United States against Young. In Young, the Court had reiterated the bed rock principle that contemporaneous objections are the rule and plain error a narrow exception. The plain error exception, the Court explained, is available only to correct particularly egregious errors and, more specifically, those errors that seriously affect the fairness, integrity or public reputation of judicial proceedings.

On remand, however, the Court of Appeals adhered to its earlier judgment and it did so, at least in part, because it believed it was freer to find plain error where, as in this case, the error implicated constitutional rights. Four reasons counsel against adopting such a distinction.

First, the text of Rule 52(b) of the Federal Rules of Criminal Procedure and the accompanying Advisory Committee Notes offer no basis for making that distinction. Neither the rule nor the notes treat constitutional claims in any special way.

Second, directing a distinction of this sort violates what we think is the contemporaneous objection rule which is the governing rule to which the plain error doctrine is, as the

Court noted in Young, a narrow exception. Objections, after all, alert the trial judge to the fact that a party actually disapproves of something that happened at trial. It permits the trial court to rectify that error before it irrevocably taints the verdict, and it frames the issue on appeal.

None of those purposes, we suggest, is well served by distinguishing between constitutional and non-constitutional claims. To the contrary, this issue, this case, rather, illustrates why any such distinction would be terribly counter-productive.

QUESTION: Well, Mr. Robbins, I suppose if you're right, that it wasn't error in the first place, we wouldn't reach the plainer problem.

MR. ROBBINS: Exactly. It is only because the Court of Appeals thought that this was a Griffin violation that it felt constrained in the first place to treat it as a harmless error and then, on remand, in light of Young, it went on to consider what it took to be the plain error rule.

As I say, in this case is a terrific illustration of why you need objections. Had an objection been made after all in this case, the trial court would have been alerted to defense counsel's view, at least his presently-held view, that the summation remarks had a different meaning. An objection here, had it been made, would have allowed the trial court to refuse to permit the rebuttal just as he refused a second

request made by the prosecutor to make a different argument in the rebuttal.

Third, this Court's cases construing the plain error doctrine do not stand for any distinction between constitutional and non-constitutional claims. Now, Respondent has suggested otherwise in his brief, but that's only because he is taking every claim, every case that the Court has decided under the plain error doctrine, and recharacterized them as constitutional cases. In some instances, by calling them fair trial cases or due process cases.

In any event, we think that that misreads the cases which did not, in fact, turn on any constitutional claim, but in a larger sense, Respondent's position illustrates precisely why no such distinction should be made. Because the fact that these kinds of claims can be so easily restyled in constitutional terms suggests that trial courts need to hear objections no matter what we label the claim, constitutional or otherwise.

QUESTION: But you would agree, wouldn't you, Mr. Robbins, that the test for harmless error is different, depending on whether it's a constitutional error or non-constitutional error?

MR. ROBBINS: No question about it. We believe --

QUESTION: Doesn't that sound like one of them's maybe a little more important than the other?

MR. ROBBINS: Well, we don't think, Justice Stevens, that the Court is required to treat plain error distinctions in the same way, primarily because the plain error doctrine serves a different function in the trial system than the harmless error doctrine does.

Second of all, we are not entirely persuaded that Chapman and Kotteakus should have different rules and, therefore, we are not certain that the analysis that has developed in the harmless error should be made in the context of plain error.

This much we are sure of, however, that this Court's cases --

QUESTION: Which rule would you change? Kotteakus or Chapman? Do you think they should be the same?

MR. ROBBINS: I am inclined to change Chapman and make it much more like Kotteakus, but I am sure of this much, there's no good reason to apply the same distinction in this case. After all, what would the distinction look like? If the plain error rule requires that constitution -- if non-constitutional errors must be egregious to apply the plain error rule, may constitutional errors be almost egregious or really awful but not quite egregious?

The problem is the rule is incapable of rational application. It leads to inconsistencies, additional layers of review, and is subject to terribly inexplicable results.

Take this case, for example. Believing itself free to relax the plain error rule, the Court of Appeals held that the prosecutor's rebuttal remarks in this case violated its conception of the plain error doctrine. The Court so held despite the fact that the prosecutor explicitly was responding to defense counsel's remarks, despite the fact that the trial court gave the jury an instruction on drawing no inference from the failure to testify, despite the overwhelming evidence of guilt, we suggest, and despite the fact that the jury's split verdict indicate their ability to parcel the evidence fairly.

The Court, this Court, should not approve a novel standard for plain error that is capable of producing a judgment like this one.

We believe, in short, that the Court of Appeals decision in this case is flawed at every turn. It over-reads Griffin and under-reads Young, and in the context of a trial with enough evidence to convict Mr. Robinson ten times over, the Court of Appeals relied upon a purported defect so abstract that it escaped even defense counsel's notice at the time.

I'd like to reserve the balance of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Robbins.

We'll hear now from you, Ms. Durham.

ORAL ARGUMENT OF CAROLOU PERRY DURHAM, ESQ.

ON BEHALF OF RESPONDENT

MS. DURHAM: Mr. Chief Justice, and may it please the Court:

I respectfully submit that the question presented is a fascinating question. Question Number 1. But that it is hypothetical and it does not apply to the facts in this case.

The question presented assumes that the defense counsel argues that the Government prevented defense -- the defendant from explaining his side of the case. In fact, no where in defense counsel's argument is there any claim that the Government prevented the defendant from explaining his side of the case.

You have heard read aloud to you an excerpt --

QUESTION: Were you counsel below?

MS. DURHAM: No, sir, I was not.

QUESTION: Were you counsel at trial? Well, if what you just said is true, it would have been so easy for defense counsel to make that point to the trial judge. I mean, that would be a good argument if there hadn't been the side bar conference before this rebuttal was made. But, surely, the time to make that argument would have been -- if defense counsel agreed with you, he would have said to the judge, what are you talking about. We didn't urge the jury that he hasn't had a chance to testify here. Why didn't counsel say that?

QUESTION: Your partner was defense counsel?

MS. DURHAM: Yes, sir.

QUESTION: Are you husband and wife?

MS. DURHAM: No, sir. We are not. In fact, Mr. Durham, I don't want to mislead you, is not a partner. A junior member of the first at best.

To respond to your comment, at the side bar, defense counsel heard the prosecutor say, I object to defense arguing about the defendant not getting a chance to explain, and the court sustained that objection and in sustaining that objection, the court went on and gave a speech, as it were, covering the constitutional issue, the Fifth Amendment privilege, not to testify and not to have that taken as an inference of guilt, and the trial court further dealt with the legal question of whether or not under the invited response doctrine it would be permissible to comment on the defendant's silence.

The trial court ruled on an objection. A little later on in that same bench conference, at another objection that the prosecutor presented to the trial judge, the trial judge turned to Mr. Durham and said, "What do you have to say for that?", and Mr. Durham said, "I appreciate the opportunity of being heard before I am condemned." I contend that in that record, without any testimony from defense counsel at this point, in that reference, he's referring back to the comment

that the judge had just said he would allow the prosecutor to make.

When an objection is made in a trial court and that objection is sustained, as a practical matter, as an advocate in the trial procedure, it would be tremendously impossible, really, to object again to each ruling of the court that's adverse to my side. If that were the case, then what we have done is re-established the rule that exceptions be taken to rulings which are adverse and which you would have the court have an opportunity to correct contemporaneous with the alleged error, so that, later, you could appeal it.

QUESTION: I am not going to the point of whether there's an objection or not. It's really much more basic than that. One would have expected him not merely to object, but assuming he objected, to say what are you talking about, I didn't make any comment about his being prevented from testifying here. That's the reading of this language that you're urging upon us, and if that was the reading that defense counsel took of it, it seems to me he would have been outraged at the suggestion that the Government should be able to reply to a comment that he never made and there's nothing in the transcript that suggests anything like that.

MS. DURHAM: If the Court please, it's the Solicitor General's Office who has framed the question presented, that the Government prevented the defendant from explaining his side

of the story. It is the Solicitor General's Office on appeal in this Court that gives rise to my objection to that really hypothetical situation that doesn't apply to this Court.

QUESTION: Trial judge understood defense counsel's argument to -- like the Government.

MS. DURHAM: I'm sorry? I don't understand.

QUESTION: Didn't the trial judge understand defense counsel's argument like the Government did?

MS. DURHAM: If --

QUESTION: At least he permitted the Government to answer it.

MS. DURHAM: If I may quote the prosecutor at the side bench conference, he said, "Several things in that argument I took quite a bit of offense to."

QUESTION: Where are you reading from, Ms. Durham?

MS. DURHAM: I beg your pardon. Page 24 of the Joint Appendix.

QUESTION: Thank you.

MS. DURHAM: At the bottom of the page. "Several things in that argument I took quite a bit of offense to. He comes up and starts going to the jury and he, as in his ethics, said they tried to bring proof of other claims that they submitted were false and he stands as an attorney and he knows darn well that the Government fully intended to bring other claims that were false. Mr. Durham, I think, has stepped

beyond the bounds of good argument when he's talked about the defendant's were not given by the Government the right to explain. I think he has opened the door and has, in fact, allowed me to comment."

If I may further quote the paragraph which has been pointed out by the Solicitor General as being the paragraph in which defense counsel is said to have told the jury that the Government prevented the defendant from explaining, if I may refer you to page 19 of the Joint Appendix, it comes immediately after discussing the large difference between the value in the inventory list of a $106,000 to offer as proof on a $30,000 insurance claim; that is, to get $30,000 worth of money from the insurance company, the defendant offered an inventory list of burned furnishings that amounted to $106,000 and on that basis of that large difference between the amount of money claimed and the value of the furniture listed on an inventory list that was headed by the defendant at the time it was submitted to the insurance company, --

QUESTION: Well, Ms. Durham, to get back a moment from what the trial court understood, if you go back to page 25 of the transcript, right after that section that you just read about where the prosecutor, Mr. Washko, says, "Mr. Durham, I think, has stepped beyond the bounds of good argument, that defense was not given by the Government the right to explain", then the Court says, "That is the part that bothers me." Mr.

Washko says, "That bothers me. I think he opened the door." The Court, "Yes, Mr. Washko, I will tell you what, the Fifth Amendment ties the Government's hands in terms of commenting on the defense failure to testify, but tying his hands is not putting you into a boxing match with your hands tied behind your back."

It seems to me it's very difficult to argue from that transcript that the trial judge didn't understand the defense summation just as the Government says it should be understood. Do you disagree with that?

MS. DURHAM: Yes, Your Honor, I do.

QUESTION: Why?

MS. DURHAM: Because immediately before this paragraph in the defense counsel's argument on page 19 of the Joint Appendix, what led up to this statement --

QUESTION: But you are just asking us to interpret in the abstract what do these bunch of words mean that defense counsel said. Now, that may be a perfectly proper part of your argument, but insofar as the point as to how the trial judge, who is sitting right there and heard it, goes, it seems to me that you can't just go back to another section of the argument because the trial judge indicates he understood it the way the prosecutor understood it.

MS. DURHAM: Well, I submit to you, Your Honor, that the trial judge was mistaken in his interpretation. I submit

that he took the worst possible interpretation to the defense counsel's entire argument, and that if the prosecutor is allowed some leeway in the mixture of syntax and the disjointed statements that occur in the extemporaneous nature of the closing arguments, that certainly it should be allowed to the defense counsel.

In the defense counsel's argument, he said to the jury, "In trying to address the evidence given by thirty-eight witnesses who offered, for the most part, very circumstantial incidents, almost all of which could in the record be explained by an innocent interpretation of the circumstances", --

QUESTION: Ms. Durham, assume you can't persuade us on that and that we sort of think it was to be understood the way the trial court understood it, all right, that's not the end of your case. You would still say, you would still say that we should affirm you, right?

MS. DURHAM: Your Honor, I would say that if I assumed arguendo that, in fact, the question presented did occur and there was some case in which the defense counsel argued to an American jury that the Government prevented the defendant from taking the witness stand and explaining his side of the story, I submit to you that a group of American jurors already know that. In fact, this Court has long recognized in a long tradition of cases that were reiterated and cited in the Griffin case that juries have a natural inclination to be

suspicious of a defendant who does not take the witness stand and deny the allegations and the charges.

It's one thing for the jurors to have a natural suspicion of someone who doesn't deny charges, but it's quite another for the United States Attorney to reinforce those suspicions by commenting on the defendant's silence.

QUESTION: Well, now, I'm giving you a situation in which, if you accept the trial judge's interpretation of it, defense counsel has said the Government has prevented my client from testifying and explaining to you what really happened here, now what could have been done to remedy that, if he had said that? You're saying nothing, nothing need to be done at all?

What the Government says is all we want to do is come up and say that's not true.

MS. DURHAM: Certainly, Your Honor, if the defense-- under the Young decision, if the defense counsel were standing there saying that to the jury, the Government has prevented this defendant from explaining his side of the story, at that point, ideally, under the Young decision, the court should interrupt and take jurative measures in the form of instructions to the jury and admonishments to the --

QUESTION: This is what your case hangs on. You would rather have the judge tell the jury this man could have taken the stand himself if he wanted to. It wasn't the

Government that prevented him. It was his own decision. You'd rather have the judge tell that to the jury than have the United States Attorney tell it to the jury? Wouldn't you much rather have the United States Attorney tell it? They might be inclined to disbelieve it.

MS. DURHAM: I do not believe --

QUESTION: If the judge tells them, --

MS. DURHAM: I believe there is more than the two alternatives you suggest. If the defense counsel is saying or if the trial judge is interpreting the defense counsel as saying that the Government is preventing his client from taking the stand, then, at that point, the trial judge can interrupt the defense counsel and say, I believe you are misleading the jury. It is the Government, in fact, who is keeping the defendant from explaining his side of the story now.

QUESTION: Why is it okay for the trial judge to do that, but not okay for the United States Attorney to do that? Certainly, the trial judge cannot comment upon the defendant's failure to take the stand, can he? The trial judge can't say, by the way, ladies and gentlemen, you may have noticed that the defendant didn't take the stand. The U.S. Attorney can't do that nor can the trial judge, but somehow, in this case, you're telling us it would have been all right for the trial judge to do it, but it's not all right for the United States Attorney. I don't understand how that can be.

MS. DURHAM: If the trial judge should interrupt defense counsel's argument and call him to the bench and tell them that he's misstating the law or if he simply said it in the presence of the jury, you are misstating the law, counsel, and then counsel, if he doesn't understand, if the judge has interpreted what he's saying as meaning that the defendant wasn't allowed to take the stand, counsel can say, may I approach the bench, and then find out that the judge is interpreting what he's saying in that way.

QUESTION: To a violation here is that the United States Attorney said what the -- the very thing that the trial judge should have said, and that's a constitutional violation.

MS. DURHAM: Sir, I am not suggesting that either the judge or the United States Attorney should say in the presence of the jury that the defendant could have taken the witness stand and testified and explained himself. I am not saying that.

There are other ways that a court can deal with such a statement if it should occur. Even to the extent of declaring a mistrial according to the Young decision.

Crucially, though, an essential question here in this and in any question about a comment on the defendant's failure to take the witness stand is the context in which it was heard by the jury, and the ultimate question is whether or not it injected into the jury deliberations something outside of the

lawfully, validly-offered evidence.

I submit to this Court that this jury, in fact, was prejudiced in arriving at its decision that Mr. Robinson was guilty as charged.

If there are no further questions, then I will rest.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Durham.

Mr. Robbins, you have two minutes remaining.

MR. ROBBINS: I have no rebuttal, Your Honor.

CHIEF JUSTICE REHNQUIST: Very well. The case is submitted.

(Whereupon, at 1:44 o'clock p.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-937

CASE TITLE: United States v. Thomas O. Robinson, Jr.

HEARING DATE: November 3, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States, and that this is a true and accurate transcript of the case.

Date: November 3, 1987

Margaret Daly

Official Reporter

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