OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, Petitioner V.

DARLINA K. FRANCE

CASE NO: 89-1363

PLACE: Washington, D.C.

DATE: October 2, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 89-1363

DARLINA K. FRANCE :

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Washington, D.C.

Tuesday, October 2, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

WILLIAM C. BRYSON, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

MICHAEL R. LEVINE, ESQ., Honolulu, Hawaii; on behalf of the Respondent (appointed by the Court).

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PROCEEDINGS

(11:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 89-1363, United States against Darlina France.

Mr. Bryson.

ORAL ARGUMENT OF WILLIAM C. BRYSON

ON BEHALF OF THE PETITIONER

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

The issue in this case is whether a defendant may challenge the assignment of jury selection in a criminal case to a magistrate when the defendant has not objected to that procedure in the district court.

Now, this case comes to the Court on writ of certiorari to the United States Court of Appeals for the NInth Circuit. The case was tried in the district of Hawaii, which at the time had a practice and a local rule of permitting the magistrate to conduct jury selection. This was done in a number of districts around the country, and was terminated abruptly, of course, with this Court's decision in the Gomez case 2 years ago.

This case raises the question, of course, what to do with the many cases that were either on direct review or have come up on collateral attack following the Gomez decision, where a magistrate did select a jury, and where

there was, in the case of direct review cases, no objection to the use of the magistrate. The condition was for assault and firearms charges, and an appeal was taken in which the issue of the magistrate's jury selection was not raised in the court of appeals initially.

The case was pending in the court of appeals when this Court decided the Gomez case, and the respondent promptly requested reversal on that ground. The court of appeals did in fact reverse on that ground in response to the Government's principal submission, which was that there had been no objection, and therefore reversal was inappropriate.

The court of appeals said that the so-called Futility Doctrine applied. That is to say that because the court of appeals for the Ninth Circuit had previously upheld jury selection by magistrates on both statutory and constitutional grounds, that it would have been futile for the defendant to object to jury selection by the magistrate, and therefore the requirements of rules 51 and 52 of the Federal Rules of Criminal Procedure were waived. That is to say there was no obligation for the defendant to raise this point in the district court, and there was no forfeiture of the right as a consequence of the failure to raise these points.

The respondent here has made a number of different

arguments. The futility point was the only one addressed by the court of appeals, but we have addressed and will address here each of the various arguments that respondent has raised in support of the judgment below.

Turning first to the futility argument, it's useful I think first to start with the simple language of rules 51 and 52, and as I'll concede, the language of the rules does not contain any reference to any futility exception. The only exception in rule 52 is an exception for plain error, and that is generally understood to be error which was quite obvious and led to a miscarriage of justice, undermined the confidence in the verdict, undermined the confidence in the integrity of judicial proceedings.

QUESTION: What if the error was that the dispute was not -- did not comply with article III requirements? It was the jury was selected by somebody who didn't meet article III requirements. Could that rise to the level of plain error, do you think?

MR. BRYSON: I think in some cases it could, Your Honor, and let me suggest that I think there is a difference because that depends entirely on who that person was. In our -- our submission is that when that person is, as was the case in this case, a judicial officer who is completely under the control of the court, is somebody who is hired an

fired by the court, and who is performing a task which is subject to the review of the court, that if there is an article III violation it is not one which is so grave that you would say that the entire proceeding has to be negated, that this constitute plain error.

However, I would hasten to add --

QUESTION: Is that true even where Gomez makes clear that Congress has not authorized magistrates to carry out this function?

MR. BRYSON: Oh, I think so, Your Honor. The fact that -- it is accepted, of course, that Congress didn't authorize this procedure to be followed, but that does not necessarily mean that that right, and it is a right, we submit, to have a judge conduct jury selection. But our solution is that that is a right which can be waived unless it constitutes plain error. And again, we submit that this doesn't constitute plain error.

QUESTION: Well, the question then becomes whether it is plain error under these circumstances, when it is not an article III judge and Congress has not authorized it.

MR. BRYSON: That is right. We submit and have discussed in our brief the reasons that we feel that that is a waivable defect. It is a forfeitable defect, and it has been forfeited. The -- there are many rights, statutory, constitutional rights even, that can be forfeited

or waived, as this Court has held time and again, that don't constitute plain error even though they may, of course, be cognizable if objected to. Indeed there are some instances -- I would pick for example discrimination in the selection of a grand jury -- in which the Court has held that these errors may not be deemed harmless, yet the Court has further said that if not objected to in a timely basis they may be forfeited or waived under rule 51.

QUESTION: What case comes closest to resolving the issue in this case? Which of our cases?

MR. BRYSON: Well, I think the -- that issue is -- directly addressed by the Davis case, for example, in 411 U.S., in which the Court held that there could be a waiver of a right to have your grand jury selected in a nondiscriminatory fashion. There have been a number of cases in which the Court has said that you can waive such rights as the right to confrontation, the right to compulsory process -- a number of trial rights that can be waived by simply nonassertion. We would submit that this case falls well within that category of cases.

There -- there is a constitutional violation here -- well, we don't concede that there is a constitutional violation, but assuming for a moment that there is a constitutional violation, that does not render the proceedings subject to challenge in the absence and

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objection. I would point out that in the CFTC case against Schor, not a criminal case, but nonetheless I think the analysis in that case is very useful in the --

QUESTION: Yes, but of course in Schor Congress authorized the scheme.

MR. BRYSON: Well, that's true. But the question --

QUESTION: That certainly doesn't exempt --

MR. BRYSON: That is right, but I am addressing -- I am addressing with respect to Schor the constitutional question. And with respect to that the Court pointed out that the fact that article III has both a component that is designed to protect the individual and a component that is designed to --

QUESTION: Mr. Bryson, could a magistrate pick a grand jury?

MR. BRYSON: Your Honor, I think --

QUESTION: Is there any end to it?

MR. BRYSON: I think a magistrate could pick a grand jury in the sense that typically I think a grand jury is selected by the clerk of the court. The clerk of the court gathers the names, and then the names are called and the duty of putting the grand jury into the grand jury room to begin its deliberations is typically quite ministerial. There isn't anything very important that happens as --

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QUESTION: If an objection is made to a grand jury member, could a magistrate pass on it?

MR. BRYSON: If a grand jury member seeks excuse from services?

QUESTION: No, sir. Somebody, a defendant in a case, objects to a member of the grand jury, saying that he was insane.

MR. BRYSON: Well, if that is done after the fact, in the course of -- let's suppose that is done in the course of litigation. After the defendant is indicted, the defendant claims that there was something -- some problem with one of the grand jurors.

QUESTION: Well, as of right now in your experience, how many cases do you know of where somebody has objected to a magistrate picking the jury? Has it ever been done?

MR. BRYSON: Oh, yes, Your Honor. There -- there have --

QUESTION: Before?

MR. BRYSON: Yes. In fact I believe Mr. Levine, counsel, has it in one such case which has just recently been decided by the Ninth Circuit, in which he did object, and in which the Ninth Circuit --

QUESTION: What's the difference between that case and this case?

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MR. BRYSON: Well, we submit that the difference is --

QUESTION: The formality of saying I object.

MR. BRYSON: Well, we believe it is much more than a formality, Your Honor. We believe that it's a very important principle, as this Court has recognized.

QUESTION: (Inaudible).

MR. BRYSON: Well, I think it is more than a formality, and I would like to address that --

QUESTION: (Inaudible) did Gomez object?

MR. BRYSON: Yes. Yes, Your Honor. Gomez did object --

QUESTION: (Inaudible) case.

MR. BRYSON: That's right. That is certainly so. And in fact that, of course, is the basis for our contention that that case is to be distinguished from this one.

I think with respect to the futility exception, it's important to note that that exception, in the context of habeas corpus, where this issue has been litigated extensively, has been firmly rejected by the Court.

The Court has said in Engle against Isaac that, "the futility of presenting," and I am quoting, "the futility of presenting an objection to the State courts cannot alone constitute cause for failure to object at trial." Again, where the basis of a constitutional claim

is available, and other defense counsel have perceived and litigated that claim, it does not constitute cause for failure to object at trial.

Now, respondent claims that although those cases can be distinguished, that case and the -- Murray against Carrier case which followed it, can be distinguished on the grounds that those are habeas corpus cases. But we don't think that that distinction holds water, because the whole cause and prejudice doctrine originated in a Federal case, and originated as an application of a Federal waiver rule, rule 12.

It is clear that the rule with respect to cause is at least as strict in the Federal system as it is under the language with respect to futility that I have just read. Indeed, rule 12 does contain, after all, an exception for cause, while rule 51 and rule 52 do not. So, if anything, there is less room for the futility doctrine in this setting than in the setting of habeas corpus cases where the Court has applied the -- the cause and prejudice.

And I point out that this is not really as harsh perhaps as it may sound, because of course waiting in the wings at all times in the Federal direct appeals setting is the plain error rule. This is in a sense the safety net for errors that we feel are egregious errors. It is -- it is to be applied in a way that is analogous to but even more

restrictive against the Government than --

QUESTION: Plain and harmless error?

MR. BRYSON: Well, the difference is that something in order to be -- there may be errors that -- as to what you cannot say that they are harmless, because you simply cannot say with the confidence that is required for the harmless error doctrine --

QUESTION: Did I read your brief right? Did you say that if it's plain error, the same error would be plain in every case where it happened? Is that it?

MR. BRYSON: Well, I think typically you have to look at each case to decide whether a particular error is plain. Now, there may be some errors that would be plain with respect to all cases, but in looking at plain error you are deciding whether there was a miscarriage of justice in a particular case. And that's the reason I think this Court has distinguished between cases in which there is -- it is impossible to determine whether an error is harmless.

But if the case, if the error is not called to the attention of the court and the later claim is made that the error is plain, then you look at the question of particular prejudice. The -- that -- that point was made in Davis against the United States itself, and again, if I may quote, the Court explained in the context where it was talking about an error that could not be deemed to be harmless --

this was discrimination in the grand jury context -- that the presumption of prejudice that supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner.

QUESTION: May I just ask you a question? I'm a little puzzled by the terms. It would seem to me that an error could be plain but nevertheless be harmless.

MR. BRYSON: Well, I think it is conceivable that --

QUESTION: Because the rule doesn't talk about what's plain. It just talks about when it justifies reversal.

MR. BRYSON: The language of the rule would be open to saying that the error is plain, that is to say it's an obvious error, but it really doesn't effect --

QUESTION: But who cares.

MR. BRYSON: The way this Court has read the rule is, it seems to me virtually makes it impossible for you to have a plain, harmless error, because the rule has been read to include --

QUESTION: You think every plain error is reversible error? That is what you are saying?

MR. BRYSON: Yes.

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QUESTION: Every plain error is --

MR. BRYSON: I think it has come to that, yes, Your Honor. I think because this Court has said that it's a miscarriage of justice that has to be shown in order to establish a plain error, I think that's --

QUESTION: You don't think it's saying in order to establish a plain error justifying reversal?

MR. BRYSON: Well, I think it would be a very hard argument to make, and I am not making it, to say that an error could be both plain and also harmless.

QUESTION: And plain being something other than obvious.

MR. BRYSON: You could use the language that way, but I think the way the Court has used the term plain error incorporates the notion of --

QUESTION: It is both obvious and reversible.

MR. BRYSON: Exactly. That is my understanding of it.

QUESTION: You don't have to go that far to win.

MR. BRYSON: Well, no. No. It is our submission that you have to reach the question of whether the error is plain, but of course if you rule in Mr. Levine's favor on one of the other issues you don't.

QUESTION: And in order to reach that question do we have to reach the article III question?

MR. BRYSON: Well, I don't think you have to, because I think that you can resolve the question without addressing the question of whether there actually was an article III violation here. You can decide that if there was, even if there was, it was waived. It is our submission that again, reciting the Schor case, that it is possible to waive even a violation of article III. We think that there is no article III violation here, but even assuming that there is, we think that that claim, just like any other constitutional claim, was waived.

QUESTION: Mr. Bryson, just to -- just to round out what your view of the plain error rule is, what if it produces a miscarriage of justice but is not -- but is not obvious? Once you know what the law is, it is clear that not applying that rule has produced a miscarriage of justice. Nonetheless, the rule itself is a fairly nice point.

MR. BRYSON: Well, I think the way this Court has interpreted the rule, the fact that it was -- if it's a miscarriage of justice I think it's going to be regarded as plain. I guess it's conceivable you could have an error that was not obvious, but I would think that the Court would find that to constitute plain error even if it was not obvious, assuming that it was a --

QUESTION: Well, about the only time anybody has

ever called an error plain is when they reverse something, isn't it?

MR. BRYSON: That's right. Well, that's -- I can't think of a case, and this is again adverting to Justice Stevens' question, I can't think of a case in which a court has said well, the error is plain, but of course we don't reverse. I think there may have been such a case at some time in the past --

QUESTION: What it boils down to is you read rule 52(b) to say plain errors or defects must be noticed. If you find it's plain, within the meaning you now give the word plain, then you have to reverse. So may means must in the rules.

MR. BRYSON: I think that that is effectively what the Court has -- the way the Court has read the rule. I think that is true.

With respect to the futility doctrine, if I can address not just the language of the rule in the cases, but the policies underlying such a doctrine, I think it would be quite mischievous to have a doctrine that allowed counsel to avoid the obligation of raising a particular point just because counsel felt, whether reasonably or not, that the immediately -- the appellate court to which the conviction would be taken would be not likely to accept such a claim with open arms.

First of all, the whole doctrine of futility is based in a sense on a false premise, which is that it would be futile, and these cases only come up where it turns out not to have been futile. If this case had come up with an objection there would be no problem; we wouldn't be here. Mrs. France would have won her case.

Furthermore, it just invites the kind of messy factual determination that makes the application of the contemporaneous objection rule extremely cumbersome if you have to go back and decide whether the degree of foreclosure, if you will, by the court of appeals or by the courts generally was sufficiently -- sufficiently grave that you can regard the question as futile. The kinds of cases will produce questions of that sort in time and time again.

And again, if I can refer to the Akins case, which is cited by respondent, that is a perfect example of the problem here. In this case, for example, it is true that the Ninth Circuit had said twice before that there was no constitutional or statutory violation by virtue of jury selection by magistrates. But at the time of this trial the Fifth Circuit had granted rehearing en banc, to consider en banc that question, and one could have anticipated for that -- from that without a great deal of (inaudible) that it was likely that the Fifth Circuit would go the other way and that it might well produce a case before this Court.

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QUESTION: Why do you say it was likely?

MR. BRYSON: Well, it, the Court granted rehearing en banc from a panel that had gone the same way as the Ninth Circuit. It is -- since there was no split among the circuits at that time, it seems at least that the Fifth Circuit was going to give very close consideration to the arguments that there was a constitutional or statutory problem with the assignment. I think that it would be at minimum prudent for someone to consider that the likelihood was that this issue was going to go farther than stopping with the Ninth Circuit cases. And in fact --

QUESTION: If there had been an objection, then the judge might have picked the jury himself.

MR. BRYSON: He might have, that is right. That's --

QUESTION: Ruled other --

MR. BRYSON: Exactly, and that is our next point, which is that there was absolutely nothing in the Ninth Circuit cases that foreclosed the judge from picking a jury. This was merely, as respondent says, it was a practice that was employed in the district court. But I would point out, however, that this particular judge was a visiting judge, and that there were occasions on which visiting judges, and there were a number of them in Hawaii during this period, there were occasions in which visiting judges would pick a

jury.

In fact in the Akins case the visiting judge offered to pick a jury when an objection was made. So it's by no means clear that the district judge would not have agreed either simply to dispose of this question as a possible appellate issue or, because the visiting judge felt more comfortable picking juries, that the visiting judge would have done it. Indeed, the Peacock case invited courts, in spite of the fact that there was no violation, invited courts to pick a jury, and pointed out that there were many good reason that a court might want to do that.

But in any event, the problem of trying to get into these kinds of hearings, deciding on a case-by-case basis of whether this objection would have been futile or not, as this case well illustrates, would be, would render the rule so cumbersome that it would almost not be worth having, at least with respect to this class of cases.

Now, the next point that I would like to address I have adverted to already, and that is this, the question of whether there is an absence of jurisdiction here, in the jurisdictional sense that the Court uses the term sometimes, that would deprive the -- that would be either automatic reversal or would deprive the district court of jurisdiction to proceed. The article III issue, as we submit, is essentially controlled by the Radats case. Now, it is true

that this Court in Gomez held that the statute didn't permit jury selection, but of course it didn't address the constitutional question.

In our view, if you take the factors that the Radats case found to solve the article III problem, those factors are largely present here, and in some respects this case is an easier case than Radats. Radats, you will recall, was a case in which, as all agreed, the entire case turned on the outcome of the suppression hearing. It was either up or down. If the suppression hearing was decided against the defendant, that was the end of the case. If it was decided in favor of the defendant, that was the end of the prosecution.

In this case we submit that jury selection, whatever importance it may have, and we concede that it has real importance in the system, it can't be said to be the whole case. And in particular in this case, where there was no controversy surrounding this jury selection, there were no challenges for cause. It was a very smooth jury selection. There were no objections made by the defendant at the end when he was -- when she was invited to object to any of the procedures in the jury selection. It is very hard to say that this was a process that -- in which the magistrate as a rogue had gone off on his own and done something which really rendered the district court's control

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over the process to be negatory.

In this case the magistrate acted under the supervision of the district judge. The district judge was available all during the objections to answer the objections, and if there were a serious objection to the way the whole process had been conducted, the district court, of course, could have simply done it again.

Now, we recognize, and the Court in Gomez pointed out that there are real problems with trying to redo or fix these kinds of procedures when they are done by a magistrate. It's inherent in the process of delegating another person to do a task that the judge otherwise would perform.

But that would be the same situation that was present in Radats. In Radats the problem was a suppression hearing, and that suppression hearing was conducted entirely by the magistrate. The Court held that article III was satisfied by the degree of supervision that the district court had over the magistrate in general, in hiring, firing, and supervising its conduct, as well as the availability at least to some extent, of correcting error.

QUESTION: Is there anything in article III history that suggests delegation?

MR. BRYSON: Well, I don't know that there's anything in the history.

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QUESTION: When did we first have delegation?

MR. BRYSON: Well, certainly --

QUESTION: It's the last decade, isn't it?

MR. BRYSON: Well, no, I don't think so, Your Honor. Crewel against Bentsen was essentially a delegation case, and I think the language in Northern Pipeline that talks about the use of an adjunct to the court is talking essentially about delegation. I mean, I am sensitive to the problem of using that term.

QUESTION: I would think that article III was just the opposite.

MR. BRYSON: Well, the language -- the language of article III, Your Honor, has much in it that might support that view, but as I think Justice White pointed out in his dissent in Northern Pipeline, there has been a lot of history that looks the other way.

I would like to reserve the remainder of my time for rebuttal.

Thank you.

QUESTION: Thank you, Mr. Bryson.

Mr. Levine, we'll hear now from you.

MR. LEVINE: It's Levine, Your Honor.

QUESTION: I'm sorry. Mr. Levine.

MR. LEVINE: That's all right, Your Honor. It depends on your level of income, you change the

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pronunciation.

(Laughter.)

ORAL ARGUMENT OF MICHAEL R. LEVINE

ON BEHALF OF THE RESPONDENT

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

There is no question that error occurred here. A magistrate did what Congress had not authorized him to do. The issue is, as explained by the Government, whether the error is waived or forfeited. The court of appeals have found that it was not, and its results should be affirmed on essentially three grounds.

First, as the court of appeals said, the objection would have been futile. Second, in any event the error was plain. And third, whether constitutional or not, the error is sufficiently fundamental that it could be waived, if at all, only by informed consent of the defendant, which is utterly lacking in the case --

QUESTION: Mr. Levine, may I ask a preliminary question?

MR. LEVINE: Yes.

QUESTION: You say we start from the proposition that that's error, and the question is whether it is waived or so forth.

MR. LEVINE: Yes.

QUESTION: Is it not at least theoretically conceivable that one could say that if the parties both consent to the use of a magistrate for the purpose of picking the jury, for conducting the voir dire, that it's not error at all?

MR. LEVINE: Well, of course that didn't happen here. There was no consent.

QUESTION: Well, assume that the -- assume that one treats the absence of an objection as the equivalent of consent, at least hypothetically.

MR. LEVINE: Well, that jumps right to the constitutional question. And in my view, and I have taken the position which I don't think this Court has to reach, but I have taken the position that even with consent --

QUESTION: It would be unconstitutional.

MR. LEVINE: -- it would be unconstitutional, because it is an article III structural right, which as Justice O'Connor intimated in Schor, is a structural right that cannot be waived. It's -- you cannot agree to have a trial before a mob or a panel of citizens. You cannot agree to plead guilty to a charge that has never been charged. There are just some things you can't agree to, even if you want to.

QUESTION: Does that mean if, for example in a felony trial, the judge has a lot of confidence in two

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lawyers with experience such as yourself and an adversary who is equally experienced, and the first 10 questions are kind of boilerplate, where do you live, where did you go to school, are you married. Say there are about 20 questions that the parties agreed on the phraseology that will be used, and they -- the counsel are going to ask those questions. Could the judge, with the stipulation of the parties, leave the room for 10 minutes while those questions are answered to take a telephone call without jurisdiction of the case being lost?

MR. LEVINE: Well, for 10 minutes to answer a phone call, I would be hard pressed to say that there was a structural violation.

QUESTION: Well, by the time he got back they'd be finished with the case.

MR. LEVINE: Well, that's another question. If you have had instructions that were read to the jury, if they were told, as they were in this case by the magistrate about the presumption of innocence, about reasonable doubt, if they were told about the need to put aside their prejudices, yes, I would say there would be a structural violation.

These, as the Court said in Gomez, the atmosphere of the voir dire permeates the whole trial. If the voir dire is bad, if the jury instructions are bad at the

inception, the trial is a charade. If by some mistake there is a prejudiced juror who got on the jury because he took less seriously the magistrate's questions than he would have coming from an article III judge, then that trial is -- is void, yes. It's an article III violation in my judgement that is not waivable because it goes beyond the defendant's power. The public has a right to know that the criminal justice system is being presided over by the most incorruptible and absolutely --

QUESTION: Well, what is your authority for that very -- rather general and ambitious statement, Mr. Levine, that the public has a right to know that the criminal justice system is being presided over by an article III judge?

MR. LEVINE: Well, as I say, I hope the Court doesn't have to reach the issue of whether it is not a waivable right, but my argument for that is this. The framers of the --

QUESTION: I was asking you what case, not what argument.

MR. LEVINE: Well, I don't have a direct case, but I have cases by analogy. I have, for example, a case, in Wheat v. United States this Court suggested that a defendant could not waive his right to conflict-free counsel because it wasn't just his right to conflict-free counsel that was

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at stake, it was the public's right to know -- it was the court's independent right to ensure that the ethics of the profession were being carried on and that the public would have respect for the profession.

In Richmond Newspapers, not in my brief, Richmond Newspapers v. (inaudible), this Court held that the defendant and the prosecution could not agree to a secret trial, in essence, that the public and the press had a right to attend the trial. It was a structural right. The defendant couldn't waive it. That was extended to voir dire in the Press Enterprise v. California.

QUESTION: Those -- those are, as I understood them, First Amendment cases.

MR. LEVINE: True.

QUESTION: It -- this partakes of nothing of the First Amendment, so far as I can tell.

MR. LEVINE: No, it -- that's true, but the interests at stake are similar. What is the interest at stake in the first amendment? It's the right of the people to come into court to see the criminal justice system. That is the same with article III, it seems to me. What is the point of -- one of the grievances in the Declaration of Independence against the King of England was that the judges were in the king's pocket.

One of the -- one of the purposes of setting up

independent article III judiciary was to ensure that an incorruptible and absolutely independent judge ruled, and that, I believe, that the public perceive, as they weren't perceiving when they were colonies, that the public perceive that justice was being done. Just as the litigants come to this Court, win or lose, we know that you judges with life tenure are absolutely incorruptible, have reached a totally fearless decision, independent of the Government, independent of the executive, independent of Congress. That is why the public abides by your decisions. Darlina France had that same right, and she didn't get it.

QUESTION: Well, a -- a right? You mean in a constitutional sense?

MR. LEVINE: A requirement in a constitutional sense. Article III, in my judgment, requires, and again I have no case authority for this proposition except what the framers of the Constitution intended, and it is my belief it is not merely a right, it's a requirement that an article III judge sit at every critical stage of a felony trial brought in Federal district court. Without an article III judge you have an incompetent court, you have no trial, you have no judgment.

QUESTION: Well, any Federal judge who sits by designation in the country has to have my assignment to do so, the assignment of the Chief Justice. And take for

example a judge who is sitting in the Central District of California by -- by assignment, only by mistake the assignment says the Southern District of California. Nobody has noticed that. He should be in San Diego; he is in Los Angeles. Now is that an article III structural violation?

MR. LEVINE: No. That's an error in an order, but there is an article III judge sitting. All she, all the defendant is entitled to is an article III judge. She got the article III judge. She may have got the wrong one, but she got the article III judge.

Turning to futility -- again the Court does not have to reach the constitutional issues. There is a lot easier way, and I suggest a lot simpler way, to affirm what the Ninth Circuit did here, and that is simply to -- if I just may go back for one moment, the Solicitor General suggested that there were a lot of cases not only on direct review but on collateral review. The issue of collateral review is an entirely separate matter. That has to do with the Teague doctrine, cause, and prejudice. That is not before this Court. That is a whole other matter.

We can win here, that is Ms. France can win here, it doesn't necessarily mean that it's going to affect collateral review. Of course, depending on how the Court rules, if the Court makes a constitutional decision that could have a greater effect, certainly. But even then it

is not necessarily true that people on collateral review would prevail.

Returning to futility, the Government argues that Federal --

QUESTION: Excuse me, could you tell us a good reason why they shouldn't, if on direct review they do? I reason -- is there a logical reason why the fact that they thought the, it would be futile to go as high as the State supreme court, although you might go further to U.S. Supreme Court and get it reversed, why should that make a difference --

MR. LEVINE: This is just in Federal -- this case is only going to arise in Federal courts, Your Honor. These are only Federal magistrates, so we're never going to have the State case.

QUESTION: But I'm talking about the futility doctrine.

MR. LEVINE: Oh, I'm sorry.

QUESTION: Why shouldn't the futility doctrine, if it applies in this context, not apply as well in habeas corpus cases?

MR. LEVINE: Well, the futility doctrine is really in Federal court --

QUESTION: Which we said it doesn't.

MR. LEVINE: You have said that. You have said

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that, and I will concede that. I am not going to fight that proposition. All I am suggesting is that on direct review of a Federal conviction, when the Ninth Circuit says futility, you can have a futility doctrine on direct review because that is just one aspect, in my judgment, of a court's discretion, an appellate court's discretion, to reach an issue where there is no objection below. Now the Government says where is that in rule 51? It isn't there.

But the Government concedes that the novelty exception exists. It cited cases for that proposition and would twist Grosso into novelty exception. But novelty is not set forth in Federal rule 51, so their argument defeats itself.

What about 28 United States Code section 2106? The Government has made no mention of that statute, and yet this Court in Grosso referred to that statute, and that statute says in essence that this Court and an appellate court, even on its own motion for that matter, presumably, can reverse a conviction in the interests of justice. The Court in Grosso cited that statute for the purpose of allowing an authority to reach an issue below when it was not raised -- when it was not raised below.

The court, Ninth Circuit, in Henri v. United States, 1950 case, this Court allowed a -- said that the court of appeals was within its discretion in reaching an

issue below, whether or not the conversations should have been suppressed, even though they weren't -- the precise grounds for the objection wasn't raised below.

Singleton v. Wolf, holds -- or doesn't hold -- excuse me. There is strong language in Singleton v. Wolf which says in essence that the matter of what issues are to be taken up by a court of appeals is within the discretion of the court of appeals. This is not a futility habeas corpus doctrine where you have the problem of trying to bypass the state court system.

QUESTION: You say really that the Ninth Circuit didn't need a futility exception to reach this question?

MR. LEVINE: That's right. They didn't really need it, and so the court should have found the result, because the result is correct. They could have reached this on the basis of their supervisory powers, for example. This Court in Thomas v. Arn - it is not cited in my brief -- Thomas v. Arn held that courts of appeal have supervisory power to -- to reach the issue of whether or not -- they have supervisory power to decide the effect of a failure to object to a magistrate's report and recommendation.

In some circuits, when a magistrate issues a report and recommendation, the rule is if one party doesn't object to that report and recommendation, the issue is waived on appeal. They cannot raise the issue on appeal.

Other circuits, such as the Ninth, have held, no, it's okay. We are not going to institute that rule. And this Court in Thomas v. Arn essentially said that is okay. That is within the supervisory power of the courts.

I might just point out that the Ninth Circuit has used its discretion to reach issues that the Government has not raised below. I would -- you can imagine what those briefs say about the courts of appeals' authority to reach issues when not raised below. I bet they'll say something a lot different from what is in the Government's brief in this case. Several times the Ninth Circuit -- I listed two cases in my brief, but there are others -- where the Ninth Circuit reaches issues, and other circuits do, too.

This is -- the Federal Rules of Criminal Procedure are there to promote justice, not injustice. And it would have been an injustice in this case for the court of appeals to tell me, Mr. Levine, we told you that an objection was irrelevant, was immaterial, was a waste of time. We told you that in Bezold. And then for them to come up and for them to have said to me oh, you should have objected. This time you should have objected.

QUESTION: Let's assume that -- let's assume that there was an express waiver, and that the waiver would not be subject to your structural argument. There is an express waiver that says I want the magistrate to do it. Now, can

the court of appeals then on appeal say, take the issue up?

MR. LEVINE: I think it could. It's within its discretion. As I say, the court -- a court of appeals can reach an issue if there is an injustice. I think probably in that case, though --

QUESTION: That's, you say that -- yeah, but then you are arguing plain error.

MR. LEVINE: Well, I'm arguing -- first of all I'm arguing if it's a structural error of the magnitude such as I -- I suggest to the Court that it is, a court of appeals, even in an express consent, is going to say I'm sorry, parties, you can't consent. It's a structural error, and either it's plain error or it's constitutional error.

QUESTION: Well, suppose Gomez had never been decided, but the issue came up? Or there was a case where there was a waiver and the magistrate picked the jury, and in the court of appeals, the court of appeals said we think that is contrary to the statute. Could they do that?

MR. LEVINE: I am sorry, Your Honor. Could I have that question again?

QUESTION: Suppose Gomez had never been decided.

MR. LEVINE: Yes.

QUESTION: And -- but there was a waiver of --

MR. LEVINE: Express waiver.

QUESTION: An express waiver says let's go ahead

with the magistrate. And on appeal the court of appeals on its own motion says this is contrary to the statute.

MR. LEVINE: The -- the court of appeals can do that. I think a court of appeals has inherent power in the interest of justice, when it thinks that -- it could reach it on plain error.

QUESTION: But you have to get to --

QUESTION: You're saying we don't -- we don't need any futility doctrine. We don't need any doctrine at all. The court of appeals can reach whatever it wants to reach.

QUESTION: Rule 51 then really doesn't limit a court of appeals in any way.

MR. LEVINE: Well, no. I'm going to --

QUESTION: Supervisory power. I mean --

MR. LEVINE: In the interests of justice, as it was in this case. It isn't just an abstract question of reaching an issue, and I am sorry I suggested --

QUESTION: But that is plain error. You're really now arguing plain error.

MR. LEVINE: Well, I'll move to plain error then. But -- this is plain error. It's plain error because it fits the definition of plain error, whatever definition you want. The first definition is rule 52(b), which says an error is plain if it effects substantial rights. What more substantial right could there be?

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This Court in Gomez unanimously said, in an opinion written by Justice Stevens, says that a defendant has a basic right to have a person with jurisdiction preside at every critical stage of the proceedings. There was no person with jurisdiction to preside at this trial, therefore her --

QUESTION: When you say jurisdiction to preside, do you mean anything more than Congress had not authorized the magistrate to preside here?

MR. LEVINE: I am not sure what I mean when jurisdiction to preside. I have argued --

QUESTION: Then maybe you should use a different phrase.

MR. LEVINE: All right. Well, this Court used jurisdiction. This Court used jurisdiction in Gomez. What I -- I think it could be construed to say that the court lacked subject matter jurisdiction over the question of jury selection. And I'll use the word authority. In Gomez this Court said that the magistrate lacked authority to rule over the subject -- over the question of jury selection. But a court that is without authority is a court -- is not a competent tribunal. If the tribunal is not competent, the verdict cannot stand.

Now the Government argues, yes, you just had, you had an incompetent tribunal, perhaps, at the beginning, but

you had an article III judge at the end. Now -- but that doesn't save it, because it seems to me that your cases suggest, the cases suggest that you need a competent tribunal, at least in a felony case, at every critical stage of the trial, owing to, by analogy, Ward v. Monroe case. And in Johnson v. Zerbst, Justice Brennan suggests that you can lose jurisdiction once the competency of the court is gone.

Now, take the other definition of plain error, the one that the cases use, Young and Frady -- seriously affect the integrity or public reputation of the judicial proceedings. This case fits within that. Integrity or public reputation of judicial proceedings is harmed when the public sees that a person is presiding at a critical stage of a felony trial when Congress has not authorized that person to do so. Here the trial is supposed to be adjudicating whether the defendant has violated the laws against the United States, when the very judicial officers have in a sense violated the laws against the United States by acting without authority.

QUESTION: You know one point you haven't touched, I don't think, if the magistrate committed error you could go to the judge then and there and get it corrected. Is that right?

MR. LEVINE: Theoretically, except that this Court

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in Gomez --

QUESTION: No, no. I didn't put theoretically in there. Wasn't the judge there?

MR. LEVINE: The judge was there. And I am not arguing --

QUESTION: Was he available?

MR. LEVINE: He was available. He was available.

QUESTION: Well, how are you injured by that?

MR. LEVINE: I was injured --

QUESTION: It's about 5 minutes, that's all.

MR. LEVINE: I was injured in the same way the defendant in Gomez was injured. He too did not have any error that he raised with the district court. He too had essentially no prejudice.

QUESTION: All you have is Gomez?

MR. LEVINE: Well, that's -- that's all. With respect --

QUESTION: And you say that is enough.

MR. LEVINE: -- that's 9 to 0, very strong holding in the United States v. Gomez. I wish that was all I have in all my other cases, Your Honor, because I'll be happy to go with that. But even apart from that, we have -- thank you, Your Honor. Say I'm right and I'll sit down.

(Laughter.)

MR. LEVINE: The Government concedes that it's

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plain error to delegate to a panel of citizens trial functions. In my judgment that disposes of this case. If they concede that it's error to delegate trial functions to a panel of citizens, I would argue it's just as much error to delegate trial functions to a magistrate, because both lack authority.

QUESTION: It's just as much error, but is it just as much plain?

MR. LEVINE: I -- I believe it is. That is a judgment that you are going to have to make, but I believe it is because both lack authority. Both are incompetent tribunals. You might as well have the panel of citizens selecting the jury.

QUESTION: One is plain enough that -- well --

MR. LEVINE: Well, what is the real distinction? It is only plain enough -- all right, granted, the magistrate is used to making judicial decisions. But suppose you had a series of law professors pick the jury, or brilliant attorneys pick the jury?

QUESTION: But Mr. Levine, say the function of drafting jury instructions was delegated by the trial judge in the first instance to the lay -- two citizens who are the lawyers for the respective parties. They can agree on a set of instructions, and the judge never looks at them. Has that been a fundamental error -- he just gives the

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instructions the parties agree are appropriate for the case.

MR. LEVINE: No.

QUESTION: Done entirely by this panel of two citizens.

MR. LEVINE: No. No, but they are different citizens. They are authorized --

QUESTION: But here in our case the two citizens that are involved are the lawyers for the parties, plus a magistrate who is not a total stranger to the process.

MR. LEVINE: Yes. That's the -- that's the rub. The difference is the lawyers are authorized to agree on jury instructions. That's their job.

QUESTION: By the judge.

MR. LEVINE: Well, not only by the judge, by the Constitution and by the structure of the system. The magistrate has not been authorized by Congress or by anybody -- by Congress, and that is where he needed authorization. He may have been authorized by the trial judge, but that wasn't sufficient.

QUESTION: Mr. Levine, rule 51(b) says that, it is headed up "Plain Error. Plain errors or defects affecting substantial rights may be noticed, although not called to the attention."

MR. LEVINE: Yes, sir.

QUESTION: Now I suppose -- are the, do you think

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plain error and defects affecting substantial rights are the same thing, or is plain error different from --

MR. LEVINE: I read it as the same thing, but I can't say.

QUESTION: So you say at least this error affected substantial rights?

MR. LEVINE: Yes. Clearly. It affected the substantial right identified by this Court in Gomez.

QUESTION: Which Gomez would -- would prove, I gather?

MR. LEVINE: Yes, exactly.

QUESTION: Counsel, is there anything in the record to show what Judge Kalaherst's practice was in his own district in delegating the selection of the jury?

MR. LEVINE: No, nothing in the record, Your Honor, in fact, and I don't know.

QUESTION: Because he was a visiting judge, and it might -- it's perfectly plausible that if there had been an objection he would have instructed the -- selected the jury.

MR. LEVINE: I beg to differ with Your Honor, because first of all magistrates conduct the jury on Mondays. The jury is presented as a fait accompli on Tuesdays. The judge -- that is the first time the judge typically, in Hawaii, always in Hawaii when the judge enters

the arena the jury is already there. They are about to be sworn.

QUESTION: Well, but there could be an objection at that time.

MR. LEVINE: Well, I submit that that would be futile, given that the policy is established by the chief judge of Hawaii. Of course it isn't binding on -- on a visiting judge, obviously. But to expect that a visiting judge is going to say, have a jury panel right there, selected, ready to go, and there's going to be an objection, and then the judge says well, what is the policy? Oh, no, you've got Ninth Circuit law. It's perfectly proper. Cert. denied twice. This is the policy in the district court. Chief judge has said it. I don't think a visiting judge is going to do it, and the Government, most importantly, cannot point to a single case, Your Honor, not a single case after the solid wall was erected -- they couldn't point to it in the court of appeals and they can't point to it here, where an objection to a visiting judge or otherwise caused the judge to delegate -- to take away the delegation to the magistrate.

Now, the Akins case is different, because the Akins case arose -- that was also a case that I litigated, but at the time the Akins case was litigated, the solid wall was crumbling and crumbling very badly. For the first time

you had an en banc circuit in Ford. At the time the Akins trial took place, the Fifth Circuit in Ford en banc had said it was error, albeit harmless. That is why I filed the new objection in the Isoemi. It came as a stunner.

QUESTION: Well, what if there had been no Ninth Circuit precedent at all on this point, but the chief judge of the District Court of Hawaii had made it very clear in earlier cases that you had tried that this was his view of the law?

MR. LEVINE: No, then there's no excuse. I think you have to raise the objection to the court of appeals to press it, in my judgment.

QUESTION: Well, you can't rely on a ruling of the district judge?

MR. LEVINE: No.

QUESTION: You have -- but you can rely on the court of appeals, even though you could have brought the case further and brought it here?

MR. LEVINE: Well, Your Honor, I asked this Court to grant certiorari. This Court denied certiorari. In January of 1986, the Peacock panel, Justice Kennedy came to the same ruling. Certiorari was sought in that case.

QUESTION: But we did finally grant certiorari in Gomez.

MR. LEVINE: But who -- who -- all I am suggesting

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is, as Justice Scalia wrote when he was on the D.C. Circuit in the Byers case, could a reasonable attorney in essence have fought objection futile in that case, when the attorney did not object to the admission of the psychiatrist's testimony. All I am saying is that at the time of jury selection in this case, and it is a time question. On April 17th, 1987 a reasonable attorney in the District of Hawaii could have fought objection futile. That's all the Ninth Circuit ruled.

Now, did he really think it was futile? The Government gives us this parade of horribles about subjective. It's an objective standard. All we are saying is defer to the Ninth Circuit's sound exercise of discretion, as this Court deferred in the Henderson case to the Ninth Circuit's interpretation a local rule.

QUESTION: So on this point you think what is futile in the Ninth Circuit might not be futile in the Fifth?

MR. LEVINE: That's right. That's right. It's a sound judicial discretion determination to be made by the circuit, and it should be deferred to.

QUESTION: May I ask you to comment on another argument they make, that -- especially when you got a new judge you haven't tried cases before, and you know the magistrate. You might think well, we know we can ask

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questions X, Y, and Z of the magistrate. We're not sure we could ask those with the district judge, so I think we'd rather go with the magistrate. We'll just keep our mouth shut and we won't object. How -- your rule really allows that kind of what we sometimes refer to as sandbagging.

MR. LEVINE: All right. That is a very good question -- as are all the questions, but --

(Laughter.)

MR. LEVINE: The question is how do we know that trial counsel in this case did not prefer the magistrate, did not really sandbag here. And first of all, I would suggest the circumstantial evidence in the record, that that's not the case, because as the Court sees in documents, public documents that I file, this particular trial attorney objected twice to the same magistrate in the past. But the real answer to the question is we don't really know. We don't really know. But we don't really know in the case of plain error when -- what was really going on --

QUESTION: You do know there's a difference, because most cases of plain error, it is perfectly obvious when you look at the matter later. Maybe the lawyer didn't realize he had a valid legal objection, but it's pretty clear that what he failed to object to was harmful to his client.

MR. LEVINE: Well --

QUESTION: Which isn't necessarily true in this scenario.

MR. LEVINE: Plain error, that's a funny thing. You know, obviousness is 20/20 hindsight.

QUESTION: That's right.

MR. LEVINE: I mean, Gomez seems obvious now. But it wasn't so obvious to two panels of the Ninth Circuit, to a Ford panel in the Fifth Circuit, to Rosales Lopez in the Second -- to Rivera-Sola. It wasn't obvious to anybody until nine judges told us it was obvious. Then it was very obvious.

QUESTION: It became obvious.

MR. LEVINE: It became obvious.

(Laughter.)

MR. LEVINE: That -- that's the nature sometimes of plain error. Besides, even when there's -- this -- this same argument would defeat the novelty exception, because you say well, novelty will excuse the failure to object below. But how do we really know that the attorney wasn't pulling a fast one? It -- it proves too much, the argument. It destroys all power of the court to reach issues. How do we know, for example, that in Byers the defendant really didn't really want, for some reason, the evidence from the psychiatrist to come in? You really didn't know what was on -- what was going on in his mind.

QUESTION: I considered myself bound by D.C. Circuit precedent in Byers.

(Laughter.)

MR. LEVINE: Well, but that didn't say it could have been futile, I don't believe. Maybe it did. Maybe it did.

QUESTION: Thank you, Mr. Levine.

MR. LEVINE: Thank you, Your Honors.

QUESTION: Mr. Bryson, do you have rebuttal?

REBUTTAL ARGUMENT OF WILLIAM C. BRYSON

ON BEHALF OF THE PETITIONER

MR. BRYSON: Very briefly, Your Honor.

First it's I think important to focus on the breadth of the claim here with respect to article III. The contention is that even with consent article III bars trials in which a magistrate plays any material role. That would, I take it, take care of, throw out all misdemeanor trials which are triable by magistrates under the statute, and probably as well all civil trials. There are a lot of them. I think you have to understand the degree of the disruption to the system, as well as the degree to which you would be holding the Magistrate's Act unconstitutional. Because there is nothing in article III, as far as I can tell, that distinguishes between felonies and misdemeanors. You can have a felony which results in a smaller sentence than a

misdemeanor, which is up to a year's term in jail.

Second, the contention is made that Darlina France had the right to an article III judge and she didn't get it. Well, she did have that right. She just didn't ask for it, and that's the whole point here. She had the right to have a judge conduct the jury selection, and she might well have gotten that opportunity had she asked for it. She didn't ask for it. As to the suggestion that it was because the jury was selected on a Monday, she should have gone in the previous Friday and said, judge, I move for jury selection by a judge and not by the magistrate. Now --

QUESTION: Had the visiting judge arrived the preceding Friday?

MR. BRYSON: I -- I don't know whether the judge had arrived --

QUESTION: Then we really don't know whether she could have done that.

MR. BRYSON: -- but the judge would certainly have been aware of any motions that had been filed in court, and would have been in a position to act on them. And if the judge had not acted on them, counsel should have stood up at the time the jury selection began and said my motion has not been acted on, please postpone the proceedings until it is.

As to the question of waiver of -- the question

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of the novelty exception, we do not concede that the novelty exception applies in the rule 51-52 context. Those cases in which the novelty exception has been recognized have been either cases in which this Court has addressed questions that were subjects to, as the Court perceived them, a Johnson against Zerbst waiver, or habeas corpus cases such as Reed v. Ross, in which the Court was applying a cause and prejudice standard and construing cause. There is, as we pointed out earlier, no cause exception in rule 51-52.

However, we don't need to go that far. The Court doesn't need to go that far. In Engle against Isaac and in Reed against Ross the Court made very clear the distinction between a novelty exception and a futility exception. It said that yes, novelty is -- is something that constitutes cause for the failure to raise an issue below because novelty comes up in a case where there simply -- the lawyer simply did not have the means to make the argument. And went on to say that if the argument was one that others were making at the time, this is one that should have been made, it doesn't constitute novelty. That is this case.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bryson.

The case is submitted.

(Whereupon, at 12:06 p.m., the case in the above-entitled matter was submitted.)

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#89-163 - UNITED STATES, Petitioner V. DARLINA K. FRANCE

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