OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, Petitioner V.

JOHN H. WILLIAMS, JR.

CASE NO: 90-1972

PLACE: Washington, D.C.

DATE: January 22, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 90-1972

JOHN H. WILLIAMS, JR. :

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Washington, D.C.

Wednesday, January 22, 1992

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

APPEARANCES:

KENNETH W. STARR, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

JAMES C. LANG, ESQ., Tulsa, Oklahoma; on behalf of the Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 90-1972, United States v. John H. Williams, Jr.

General Starr.

ORAL ARGUMENT OF KENNETH W. STARR

ON BEHALF OF THE PETITIONER

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

This case brings before the Court an issue concerning the obligations of a prosecutor before a Federal grand jury. The Tenth Circuit has held that a prosecutor is obligated, on pain of dismissal of the indictment, to put before the grand jury substantial exculpatory evidence. As a result, the court of appeals upheld the dismissal of the seven-count indictment in this case. That indictment charged in effect that the respondent had made false statements to four federally insured institutions.

The Tenth Circuit's rule in our view has no foundation in the history of the grand jury. And if it is adopted, the Tenth Circuit's approach will have very high costs, with complicated preliminary trials on guilt or innocence prior to the trial itself. This represents a

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change, and we believe it's a significant change, in the concept of the grand jury's function.

The grand jury is a screening mechanism. It is there to determine whether probable cause exists. It is not an adversary proceeding, and thus historically, has not been charged with evaluating defenses. Indeed, the traditional role of the grand jury is quite limited. As Justice O'Connor stated in her opinion in Mechanik, it is a group of citizens who are operating with a broad mandated and under a few clear rules. Those rules are embodied in the Federal Rules of Criminal Procedure. That structure, the interposition of the grand jury between the prosecutor and the citizen is itself a protection of individual liberty.

QUESTION: Well, Mr. -- General Starr, do you take the position that never would it be appropriate for a Federal district court judge, as a matter of exercise of supervisory power over the courts, to dismiss without prejudice a case in which there is a glaring failure of the Government to present some evidence to the grand jury that would have a direct bearing on whether the suspect is indeed appropriately charged?

MR. STARR: Our position is no. In terms of failure to adduce evidence, as opposed to what courts have, seen historically is quite problematic. And that is

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the use of perjurious testimony or other forms of flagrant misconduct. But at common law --

QUESTION: Now, if the prosecutor offered known false testimony to the grand jury, do you think the court then can, in the exercise and supervisory power, dismiss?

MR. STARR: I think it can. I think it does need to take the issue through a harmless error analysis to determine whether in fact, under the rules of this Court as articulated in Nova Scotia, that that was harmless error. There are other mechanisms.

In short, if there's been wrongdoing of that kind, it may very well be difficult to establish that it was harmless error, but the court is --

QUESTION: What is your authority, Mr. Starr, for answering Justice O'Connor's question that the use of perjurious would warrant the dismissal of the indictment?

MR. STARR: There is no authority in this Court that directly holds that.

QUESTION: Then why does the Government concede that?

MR. STARR: The Government has no quarrel, Mr. Chief Justice, with the holdings of a number of lower Federal courts that have concluded that the integrity of the grand jury would be compromised if the prosecutor knowingly uses material -- I would insert the word

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material -- perjurious testimony. That is to say, we then at that point lack confidence in exactly what the grand jury was doing.

QUESTION: And so that would be open to try -- that would be open to a contested hearing as to whether the prosecutor did in fact use perjurious testimony?

MR. STARR: It has been, and the system has not suffered as a result of that. That, we view it, as being -- although this Court has not spoken directly to it -- the law in any number of circuits.

The new rule that the Tenth Circuit has now imposed would have enormous costs as well as view the grand jury in a very different light.

QUESTION: But just before we leave this point where you admit or concede, I think, but there is some room for court intervention if there is flagrant misconduct, use of perjurious testimony. But what is the reason why the indictment should be dismissed? Because the grand jury right has not been accorded to the petitioner? Or because we have the duty to supervise the Government in the prosecution of its cases?

MR. STARR: Certainly not the latter. We do believe, with all respect, that while action can be taken with respect to a particular prosecutor for conduct before the court in a particular case, we do have difficulty with

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a broad use of the idea of supervisory power to tell the prosecutor how do discharge his obligation.

If I may now return to what our reason would be for saying, yes, there is a problem in that grand jury testimony because essentially the nest has been befouled. It has been befouled by the knowing use of testimony that is perjurious, and the grand jury may very well have acted on the basis of that.

In contrast, as Blackstone, as we note in footnote 3, Blackstone noted at common law it was unheard of to be adducing defenses before the grand jury. That's not what grand juries are charged with doing. They're not there to evaluation culpability in the sense of guilt or innocence. They are simply there to make a determination of whether there is probable cause and not to evaluate defenses.

QUESTION: A befouled nest is not a grand jury hearing? I mean, is that the formula?

MR. STARR: I use that to make the point that courts have been concerned about the integrity of the grand jury's function that is compromised in terms of the independence of the grand jury's judgement, if that judgment has been influenced materially by evidence that is perjurious or manufactured. It goes to the idea of the integrity and independence of the grand jury. That's what

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the Fifth Amendment --

QUESTION: Have the lower courts that have got into this, as you've suggested they have, do they rely on the supervisory power?

MR. STARR: They typically don't lay this out, Justice White, carefully. At times they speak in terms of due process, that it would be a violation of due process. And not atypically, the analysis is in one or two sentences. Other times they speak in terms of supervisory powers.

QUESTION: They don't say that it's connected with the requirement of having a grand jury indict.

MR. STARR: It has been suggested by authorities like Learned Hand and Henry Friendly that in fact you are getting at the core notion of what the founders had in mind, which is a grand jury whose integrity and independence is respected by the prosecutor, and the prosecutor fails to accord it that respect if it's using perjurious testimony. Again, this issue is light years away from that.

QUESTION: Well, no -- no one in this -- does anyone in this case suggest that there's a constitutional basis for --

MR. STARR: No.

QUESTION: -- this rule?

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MR. STARR: The Tenth Circuit did not. In fact, the Tenth Circuit, both in the Page case and in this case, did not set forth a foundation or basis for the use or exercise of this particular power. And I do think it would be quite extreme to incorporate fundamental fairness due process notions into this, since as we know, under the well-settled holdings of this Court, there is no due process right to grand jury proceedings in many States, or a number of States -- I shouldn't say many. A number of States don't have grand --

QUESTION: Haven't we had a grand jury case here?

MR. STARR: Yes, you've had grand jury cases here, but you've never held that's required as a matter of fundamental fairness, and this my point is this.

QUESTION: Well, how did we get a grand jury case before us?

MR. STARR: Oh, I'm sorry, this is a Federal case.

QUESTION: Yes, I know.

MR. STARR: And the point I'm making is in Hurtado v. California, there was a due process challenge to the failure to use a grand jury proceeding. And this Court rejected the notion that it's fundamentally unfair, as we would say in modern due process analysis, to deprive

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a citizen of that. And thus, in a number of the States, a prosecutor can sit in his or her offices and simply file the charging -- write the charging materials, and not be taking into account any, quote, exculpatory evidence. That's the limited due process point.

I do want to emphasize in terms of this proceeding that not only has the Tenth Circuit failed to adduce a constitutional basis, and clearly there's no Federal Rule of Criminal Procedure that speaks to this. In her opinion, Justice O'Connor spoke about the few clear rules. Prosecutors operate under the aegis of the Federal Rules of Criminal Procedure, and rule 6 has a number of provisions. And we must scrupulously abide by those provisions.

This is new. It is a new invention. It is part of the reform effort to reform the grand jury. But even persons and commentators who have viewed the grand jury as standing in need of reform have not gone this far. Judge Frankel, in his book, says, yes, it's a good idea, but you certainly don't want to turn the process into a preliminary trial before --

QUESTION: General Starr, I'm not sure I agree with you, this is light years away from what you acknowledge can be sanctioned. Suppose a prosecutor reads a document or a deposition to the grand jury and just

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leaves out those passages that render innocuous what otherwise seems quite incriminating. Now, is that -- would that be something that courts could intervene about?

MR. STARR: No, I would draw the line. A line has to be drawn, and I would draw the line -- now, I don't think we can articulate it at general level of are you in any way misleading the grand jury. The question is what --

QUESTION: All right. So suppose the prosecutor puts on testimony of eye witnesses who say they saw this person, but he knows that the person has an iron-clad alibi, iron clad, and he does not present that to the grand jury. Is that really any difference -- different --

MR. STARR: I think it is in --

QUESTION: -- in its effect from failing to read the totality of the document?

MR. STARR: I think it is. I think conceptually it is. That is a defense that comes on at trial. And what courts have held is here -- remember, the grand jury is not sitting there. And if the Court reads the grand jury transcript in this case, they will see the grand jury wasn't just sitting there. They were asking questions.

So they can ask questions and they can

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say -- and that's where -- and that's the line that has been drawn in the lower court cases.

QUESTION: It's -- it may be a line. It's certainly not a light year. It looks pretty close to me.

MR. STARR: I will withdraw the light years, but it is a clear distinction that we think is fundamental in terms of what the function of the grand jury is. You should not, in fact, use -- you should not engage in what courts have come, in a common law form of analysis, to characterize as flagrant misconduct. The use --

QUESTION: Well, what about the situation of the failure to come forward with the iron-clad alibi?

MR. STARR: Well, first all, I view that as distinct for reasons already stated, but here, I think, is a very important point, that this Court has noted in Calandra. What is the rationale, what is the reasoning of a -- what's the incentive for a prosecutor to do that? It makes no sense. He's going to have turn over Brady material, and he is also going to see his case fall apart at trial. And if you look at our conviction rate, our cases don't fall apart at trial. We have over a 90 percent conviction rate. This is a very professional process in the Federal system. And I say that by what --

QUESTION: Well, maybe it's politically motivated or something in terms of timing: have somebody

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charged with something. Is there a remedy there in the court's supervisory power for that sort of --

MR. STARR: Well, certainly this Court in Nova Scotia pointed to remedies such as referral to the office that Attorney General Levy established, the Office of Professional Responsibility in the Justice Department, which receives complaints of this nature. Justice Kennedy, in Nova Scotia, suggested if a prosecutor is engaged in inappropriate or improper conduct, you can note that in a published opinion that has very powerful effects.

There was -- in the Mechanik case, the district judge in that case was concerned about 6(d) violations in the grand jury room, and so the judge, the district judge said I want an occasional report from the prosecutor as to are you complying with 6(d). I don't want to get this court into the situation of having to hear motions to dismiss and dismissing the indictments. It's an inefficient way to do it.

But the basic point, as Justice Powell, in Calandra pointed out, is there's no incentive for this. And we're talking about what should the system be. Should there be a system that is clearly going to have enormous costs, and a double-header cost, both in terms of what the defense counsel is seeking to do to guide the grand jury

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to say here are my 10 exculpatory witnesses.

QUESTION: General Starr, let me -- may I interrupt you? You say there's no incentive to do this. That's true if you have a professional prosecutor who's only interested in doing his job. It's not necessarily true if you have a politically motivated prosecutor.

MR. STARR: That's quite correct.

QUESTION: So there is a possible incentive.

MR. STARR: There is a possible incentive, but --

QUESTION: My second question I'd like to --

MR. STARR: I'm sorry.

QUESTION: -- I'd like to ask you is, as I understand it, you could win this case on one of two theories: either that there's no duty whatsoever on the part of the prosecutor, or alternatively, that he didn't violate the duty in this case because the evidence isn't all that important.

Now is it not correct that in the lower court, the Government took the position there was a duty, and they complied with it?

MR. STARR: Yes, because we were operating under Page, Justice Stevens. That was the law --

QUESTION: Did you challenge Page in the lower court?

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MR. STARR: We did say -- we have preserved this issue, as we indicated in our certiorari petition. The question was passed on by the lower court. We did not challenge Page directly in the lower court because that was the law of the circuit, and the Government won in Page, and certiorari was denied by this Court by Mr. Page.

QUESTION: I understand. But you did not raise the same question you're raising here in the lower court because you did not challenge Page.

MR. STARR: We did say that there is absolutely no obligation on our part to do what we have been required to do under these circumstances. When we --

QUESTION: Yes, but you didn't say there was no obligation of the kind you're describing here.

MR. STARR: What we are taking issue with is the law of the Tenth Circuit that has now been applied to us in a case that we have lost. And we ordinarily do not, Justice Stevens, go into a court of appeals when the law of the circuit is settled and say we don't like the law of the circuit.

QUESTION: Even if you want review in this Court of that very point that you say is hamstringing your ability to bring cases and all the rest?

MR. STARR: As long as -- and I think this Court has said that, and in cases, with respect to have you

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passed upon the issue of whether in fact there was substantial evidence that was withheld. If that has been, and that was ruled again -- we were ruled against in that particular issue.

And we have now brought before this Court a question. And that question fairly encompasses this rule. The underlying duty that was articulated by the Tenth Circuit in Page, to say you must always adduce substantial exculpatory evidence.

Now our concern, Justice Stevens, picking up with your point, with the way -- and I think it shows the perniciousness of the Tenth Circuit's approach -- if the Court will look at page 8a of the petition appendix, it will see how loose and far reaching the substantial exculpatory standard is, as articulated by the Tenth Circuit. It is very broad and sweeping, indeed.

QUESTION: Yes, but it's quite different say the rule is too broad and acknowledge, as you did in your brief there, that you have certain responsibilities to produce evidence, which you did acknowledge in your brief.

MR. STARR: Well, under the law of the circuit --

QUESTION: Correct.

MR. STARR: -- the United States attorney was not challenging Page, per se, but he was saying the

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substantial exculpatory evidence duty is one that obviously we are going to have to seek to comply with, and we think that we have complied with it. But the question was in fact passed on by this court, by the Tenth Circuit, is there a duty, what is the nature of that duty, and it has determined that we failed in that duty. We --

QUESTION: Well, it passed on in the sense of duty being there because the Government had conceded it had the duty.

MR. STARR: We did not -- with all due respect, I think it is odd to suggest -- and if we want to litigate aggressively everything in the circuits and challenge any particular case before each and every panel, I think that is not --

QUESTION: If you intend to bring it here, yes.

MR. STARR: Well, I think that is not the approach this Court has traditionally used. It is the question that that this Court has looked to is has the Court passed upon the issue. And here, the Tenth Circuit passed upon the issue and resolved it against the Government.

QUESTION: I suppose it would have been proper for you to challenge Page.

MR. STARR: I'm sorry?

QUESTION: I suppose it would have been proper

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for you to challenge Page in the Tenth Circuit and apply for an en banc hearing on it, wouldn't it? It would have been proper. You're just suggesting --

MR. STARR: I don't think it's necessary. And it's especially odd in Page when in fact, in Judge Logan's opinion he articulates the duty, and then he says, there's no problem with the duty here.

If the Court pleases, not to pass on this question would leave a very clear circuit conflict unresolved.

QUESTION: Well, you presented a petition for certiorari to the court embodying the question you're arguing. The Court granted certiorari.

MR. STARR: That is correct. And the other side in its opposition took the position that we had failed to preserve it and the like for these reasons. We responded to that in our reply brief, and the Court granted certiorari on the question presented.

QUESTION: Of course, four votes don't necessarily decide whether that'll decide the case.

MR. STARR: That is correct, but at least the Court was informed by the fact that we had presented this issue, that they were fully aware of the posture of the case before the Tenth Circuit.

On the assumption that the Court is here to

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address this issue, let me focus, in the brief moments that remain, on what we see as the practicality of this. Here is what is happening, and it is what is going to happen.

Defense counsel will file a motion to dismiss. Judges will then be called upon to analyze, for example, five volumes of a bankruptcy deposition and other allegedly exculpatory evidence. There will be many disputes over that.

I commend to the Court's attention Judge Ellison's second opinion. Note that when he first heard the evidence, he said, no. This isn't a violation of the Page duty; they've done all that they need to do. And again, if the Court reads the grand jury transcripts, they will see this was a very thorough-going grand jury investigation.

It then comes back to the judge on a motion for reconsideration. In footnote 3 of his opinion granting the motion for reconsideration after having once denied it, he notes a number of items of allegedly substantially exculpatory evidence that were proffered to him, which he says, I still think those were not substantially exculpatory.

These are going to be difficult judgment calls. It is going to be the exact sort of confusion-producing

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litigation -- litigation producing confusion, I should say, that this Court should seek to avoid. The criminal justice system need predictability and it needs certainty. And this is a sure recipe for enormous uncertainty.

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

QUESTION: Very well, General Starr.

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

ORAL ARGUMENT OF JAMES C. LANG

ON BEHALF OF THE RESPONDENT

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

I think at the outset it's important to note the departmental policy of requiring the submission by prosecutors to the grand jury of substantial exculpatory evidence, which has been in effect for approximately 13 years, if my computation is correct. And we've operated under that in this justice system, and the Government has operated under that as an internal policy for that period of time, without it wrecking havoc on the system. So we have here a rather unique situation, whereby actually the Government has followed, apparently, their policy of submitting this evidence to the grand juries. The system hasn't crumbled.

QUESTION: Well, in the preceding years, Mr. Lang, have people tried to enforce the Government's

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obligation by motions to dismiss?

MR. LANG: No, Your Honor, but I'm addressing again the argument or position that was made by counsel relative to the difficulty that would be incurred in the Government determining what was exculpatory and presenting it to the grand jury.

QUESTION: I think I understand that, but I thought another part of counsel's argument, which there's no need for you to address unless you want to, is that this rule would generate a number of -- contested motions to dismiss in the district court, which do not exist simply with the departmental policy in place.

MR. LANG: Yes. In regard to that aspect of the argument, the Government, under its Brady obligation at the commencement of the proceedings after the indictment, is going to have to marshal its exculpatory evidence in any event. They're going to have to know what is exculpatory at that point in time, because they're going to have, assuming an indictment is returned, a Brady obligation. So subsequently from the viewpoint again of the difficulty of submitting it and knowing what it is, it's going to have to be placed in the hands of the defendant at that point in time.

Now, as far as there being a rash of motions in regard to this proceeding, I think over the past -- as

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cited in the reply brief of the Government, over the past 10 years, there have been fewer than 10 cases that ultimately a dismissal has resulted on some such basis. So the impact, I submit, is not great.

QUESTION: Do the statistics reflect how many such contested hearings there were, as well as how many resulted in dismissal?

MR. LANG: I believe in a reply brief it refers to over 200,000 indictments -- 204,000 indictments as opposed to the 10 cases that ultimately ended in that manner.

QUESTION: Does it refer to the number of those cases in which there were hearings on a motion to dismiss which the Government -- in which the defendant did not prevail?

MR. LANG: No, Your Honor, because again that would not be a statistic gathered by the Government.

I might point out, because there was some question also earlier, in terms of the cumbersome nature of the five volumes of the testimony that were obtained from a parallel bankruptcy proceeding, sometimes, when we're talking about situations involving financial institutions and the element of intent, particularly when it gets to a situation of whether a bank was misled under 18 U.S.C. 1014, the idea gets to be -- well, this is such

a vague situation, how's anyone going to know whether this is actually exculpatory and goes to that issue.

In regard to this particular case, the trial court was quite specific, referring not only to specific items that were explained by the transcript of the testimony that went to the exact issue, the same transcript that was not given to the grand jury, the same transcript that in great detail, in five volumes, explained why the balance sheet and income statement was correct and why the defendant believed it was correct, his beliefs concerning the asset values that he placed on the assets that were the subject of the financial statements, and a very thorough discussion in this particular situation of the venture capital investments that this particular defendant had made and why he believed the numbers that he placed on those venture capital investments were accurate.

So we have here a situation where not only are there documents that are explained, but we have a lengthy explanation by the defendant as to why he felt and why he believed that his financial statements were accurate.

So even though this be, again, a case involving a bank violation, it is a case whereby the exculpatory nature of it is clear. And it was not submitted, of course, to the grand jury, which very well could have

reviewed the five volumes and determined that this man really felt that these values were the values that were correct.

QUESTION: Mr. Lang, what do you mean, presented to the grand jury? What if -- would it have satisfied you if the Government had just walked in and dumped these five volumes before the grand jury and said, here it all is. It's all there. Has it fulfilled its obligation to present the exculpatory evidence?

MR. LANG: Well, Your Honor, I appreciate that point, because actually --

QUESTION: Well, it's one of the difficulties in evaluating what you're asking courts to evaluate all the time. It's not just whether the evidence is there.

MR. LANG: That's correct.

QUESTION: Depending on what your answer is. If you say it's okay, then it's easy, I guess.

MR. LANG: Assuming the rule -- assuming the rule, obviously in certain complex criminal situations -- to take that one or several steps further -- when you bring in the 50 boxes, to have a meaningful rule, there has to be a meaningful ability to understand.

QUESTION: So the Government has to go through those boxes and the court's going to have to evaluate the quality of the Government's investigation and presentation

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of the consequences of that to the grand jury.

MR. LANG: In this case, Your Honor, confining it to this case, the --

QUESTION: No, I'm concerned about a general rule. I'm not concerned about this case. I'm concerned about the rule you're asking us to adopt. What do we do in the situation where there are 50 boxes and you say we would have to evaluate whether the Government did a good job of examining those 50 boxes.

MR. LANG: In order for it to be meaningful, Your Honor, and for there to be a meaningful rule, it would be our position that it would have to be a meaningful submission.

QUESTION: And I think that's probably right. I think that's probably right.

MR. LANG: Now, in this particular case, of course we have the luxury of the 5 volumes, which could very well have been read by the grand jury, as opposed to the 40 boxes, which fully explain the particular aspects of the balance sheet.

I might point out also in this case, that the Government could have, as a matter of interest, simply following the decision of Judge Ellison, pointing out that there were certain items that the court felt were exculpatory and should have been viewed by the grand jury,

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simply turned around and submitted those items to the grand jury, or another grand jury.

However, rather than do this rather simple thing, we've gone through this appellate procedure. The point, and my reason in mentioning that is that in respond -- or as a rejoinder to the argument that this would create some massive problem in the criminal system, it's very easy for the Government, once the court finds there's some exculpatory evidence that should have been -- or substantial exculpatory evidence, to simply turn around and present it. There's no prohibition against that.

QUESTION: You're not just saying once it finds; you're saying after it finds, as it is obliged to do. I mean, you're saying the Government has to go through these 50 boxes, I presume -- or not?

MR. LANG: Well, the rule would in our view, Your Honor, be confined to a situation of evidence in the possession of the Government. There'd be no duty to seek out. Because in our case --

QUESTION: No, but the Government has the 50 boxes. You're saying in addition, the Government has some responsibility to go through those 50 boxes and extract the exculpatory evidence so that it could present them to the grand jury.

MR. LANG: If in the course of the

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investigation, and it had the 50 boxes in its possession, which were accumulated in the course of the investigation, it again would have the duty to go through the boxes, to find the -- or the present the evidence in a circumstance.

Now, of course we can take this further down the road and determine how many boxes and how it got it, and what the circumstances were as to how they came by it. But by the same token in -- again, in this particular case, the Government knew it had the evidence in its possession. It's not a question them having something in their investigation they really didn't know about. Here it's confined to knowledge.

QUESTION: Mr. --

MR. LANG: Yes.

QUESTION: Mr. Lang, why should the rule with respect to exculpatory evidence, which is involved in this case, be any different than the rule with respect to hearsay evidence, which the Court said in the Costello case was not a ground for objecting to a grand jury indictment, or to evidence improperly seized in violation of the Fourth Amendment, which in Calandra, the Court said was not a basis for objecting to a grand jury indictment? It seems to me this rule just goes against the grain of that line of cases from this Court.

MR. LANG: That line of cases support the notion

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that the grand jury should have before it all possible evidence, even though it be inadmissible, even though it be seized in some manner that wouldn't be -- where it wouldn't be allowed in the trial of the case. Those case enforce the original notion that the grand jury should have access to all evidence that can come within its scope in order to be fully informed.

QUESTION: They also enforce the notion that the courts are not there to supervise the detailed operations of the grand jury.

MR. LANG: That is correct, Your Honor, but again, assuming there are circumstances that create the supervisory duty of the courts under the Nova Scotia test.

QUESTION: Yes, but in Nova Scotia, we were talking about a very specific part of rule 6 of the Rules of Criminal Procedure, as I recall it. Here, there is no rule laying down this duty. It just comes out of thin air.

MR. LANG: Your Honor, Nova Scotia considered not only the rule 6(e) and 6(d) violations, but also considered conduct before the grand jury, such as the prosecutor yelling at a witness in the presence of a grand juror and also the prosecutor improperly summarizing some evidence. So in the totality of that decision, there were some circumstances outside the rule 6 considered.

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QUESTION: But were any of them outside of these -- some sort of specific provision of law governing the operation of either the grand jury or some other part of the Government? Nothing was pulled out of thin air in Nova Scotia.

MR. LANG: No. Well, Your Honor, these two particular concerns were decided strictly under the -- as part of the totality of the rule 6(e) and 6(t) -- (d) violation, but they were considered as being important in making that determination. So I don't think pulled out of the air is quite right, but by the same token, the Court looked at them to determine whether the prejudice standard was met. And I think --

QUESTION: Yes, but before you get to the prejudice question, you need to find a violation of some obligation. Then you get to the prejudice question.

MR. LANG: I understand that, Your Honor, but again, assuming that the violation in this case would emanate from the same source as the consideration in Nova Scotia, then you would have the violation for the purpose of the prejudice problem -- the sources that I mentioned as far as that consideration.

QUESTION: Well, that's a rather substantial assumption.

MR. LANG: Your Honor, I might mention --

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QUESTION: Suppose, counsel, that in the case that we were discussing with Justice Scalia a few minutes ago. There's a series of boxes with exculpatory evidence, and the prosecution said -- tells the grand jury, we haven't read these; they're here if you're interested. And the grand jury says we're not interested. And it contains substantial exculpatory evidence. Is there a problem with that?

MR. LANG: Well, in this particular case, of course, under the Court's -- hypothetical case, the documents would be before the grand jury. And they would have the option --

QUESTION: Well, what I'm asking is suppose the grand jury doesn't do its job. It's very sloppy. And the prosecution says if you've heard enough, tell us. We have more if you're interested. And the grand jury said, well, we don't really care. We've heard enough.

MR. LANG: Well, the grand -- again, the grand -- assuming the grand jury felt that they had heard enough, I don't know what the prosecutor could do in terms of doing more than giving it to them.

QUESTION: What my question is designed to elicit is whether -- a discussion of whether or not there is a standard to which the grand jury must be held or a standard to which the prosecution must be held.

MR. LANG: Well, and that's very correct, Your Honor. Because again, the rule that's involved in this Tenth Circuit case has to do with the relationship between the prosecutor and the grand jury. And the duty that we're speaking of here is the duty relative to the prosecutor to see that if there is in his possession in the course of his investigation certain substantial exculpatory evidence that it is provided to the grand jury.

QUESTION: But so far as the defendant is concerned, if there's a defalcation, it's equally harmful in either case.

MR. LANG: Equally harmful whether the grand jury doesn't accept the --

QUESTION: Whether the grand jury is remiss on its own, or whether the prosecution is remiss. It makes no difference from the standpoint of the defendant.

MR. LANG: That is correct. But by the same token, the grand -- the prosecutor generally in today's world is the sole source of all of the evidence that goes before the grand jury. So the issue then is should some obligation be placed upon the prosecutor, who generally is the spoon feeder to the grand jury, to make sure that if he becomes in possession of substantial exculpatory evidence, that it then is conveyed to the grand jury.

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QUESTION: Well, Mr. Lang, what is the source of the rule that you would have the courts follow, the rule that would require a Federal court to review this and impose some sanction? Is it the supervisory power of the Court, or do you look to some constitutional requirement. And if so, what?

MR. LANG: Supervisory power, Your Honor.

QUESTION: Did the Tenth Circuit make clear that was what it was relying on, do you think?

MR. LANG: I believe the Tenth Circuit did. They followed the language of Nova Scotia in determining the prejudice and spoke of supervisory power, and made the finding or found that the findings of Judge Ellison were not clearly erroneous in that there was substantial exculpatory evidence in the possession of the prosecutor, and that it impacted, under the language of Nova Scotia.

QUESTION: And is that what you think the district court relied on?

MR. LANG: Yes, Your Honor, and that is part of the opinion of the district court.

So we actually have here, for the purpose of the consideration, a finding by the district court that has been found not to be clearly erroneous by the Tenth Circuit, that there was substantial exculpatory evidence, that it was in the possession of the prosecutor, and that

it impacted on the decision of the grand jury to indict, following completely the logic and -- of Nova Scotia, ultimately resulting in the dismissal.

And as I said, the upshot of the whole thing was the prosecutor had the option at that point simply to take what was considered to be substantially exculpatory, and take it back before another grand jury, and then to see if another indictment might be obtained.

If one was not returned, if one were not returned by another grand jury, then perhaps the basic reason why we would have the rule would be proved. It may well be that they would take the deposition, read through it, find that the defendant in this case was a very intelligent and articulate gentleman, find that he was very educated, find that the tried to do what he thought was right in preparing his financial statements, and not indict.

QUESTION: Is that --

MR. LANG: And that's the whole reason behind the rule.

QUESTION: Mr. Lang, is that -- the touchstone is substantial to be defined in terms of the grand jury function or the petty jury function? In other words, is substantial evidence any evidence upon which a reasonable grand jury might conclude that they would not indict, or

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is it some such standard as any -- as evidence upon which a reasonable petty jury might find reasonable doubt?

MR. LANG: If I understand the question correctly, of course the grand jury --

QUESTION: The question is what is substantial evidence. How do you define substantial?

MR. LANG: Okay. That issue was raised in the brief in terms of can the court determine what is substantial evidence, and there were cited in the briefs the other use or uses in other areas of the law --

QUESTION: But what is your definition?

MR. LANG: In the trial court -- and my definition would relate to whether ultimately there might be, or whether it is sufficient evidence which cumulatively or singularly would cause a jury to not be able to find guilt beyond a reasonable doubt. And that's what the trial court in this court did. And he mentions in the opinion that he didn't -- that was his view of that.

QUESTION: So it's a petty jury standard. I mean, it looks to the trial jury's function in determining what is --

MR. LANG: In this case, that's what was done.

QUESTION: Well, is that the rule, the definition, that you want us to adopt for all time?

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MR. LANG: Yes, Your Honor, that would be the definition that we would urge on the Court since that was what was done in this case. And that was the view after the judge looked at the evidence in this case and submitted -- tested it in connection with the Nova Scotia analysis to find that there was substantial exculpatory evidence.

QUESTION: Why don't you key it to the grand jury's responsibility rather than to the trial jury's responsibility? Why don't you define substantiality in terms of what you would posit a reasonable grand jury would find as a basis in the totality of the evidence not to indict?

MR. LANG: I'm sorry. I didn't hear the last part of --

QUESTION: Why don't you define substantiality in terms of what a reasonable grand jury would do, if we could figure out what that is, as opposed to what a reasonable trial jury would do?

MR. LANG: Well, I think the logic behind the rule has been that if there's not sufficient evidence before the grand jury, or if the evidence is before the grand jury and is substantially exculpatory, that might be sufficient to cause them not to be able to find ultimately beyond a reasonable doubt that the efficiencies involved

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in ultimately them not returning the indictment and also the protection of the defendant in not being indicted is the focus.

QUESTION: But that implies a fairly radical transformation of the grand jury's function, doesn't it?

MR. LANG: Well, the grand jury's function, of course, is only to find probable cause. And if --

QUESTION: And on your theory that will no longer be the case.

MR. LANG: Well -- and again, I think the focus here is on how we're defining substantial exculpatory evidence, and whether it's entitled to before the grand -- before the grand jury, as opposed to the situation --

QUESTION: Well, anything can be before it. I mean, I suppose the prosecutor can throw in anything he wants to, and the grand jury can call for anything it wants to.

MR. LANG: Correct. But there seems to be two different things we're speaking about here. One is the issue of the standard before the grand jury as far as the proof and regard to probable cause.

And another seems to be the issue of what the definition of substantial exculpatory evidence is, and whether that should be submitted to the grand jury. That is, what -- when is the evidence -- the -- when does the

exculpatory evidence reach a point of becoming substantial. Which seems to be, again, two different, almost an apples-and-oranges analysis in the sense that one has to do with when the evidence has to be presented. The other has to do with what the standard is in regard to the grand jury and in regard to this trial.

So, I may have misunderstood the question, but there seems to be two different analyses involved in that.

The -- in this particular case, and I want to emphasize the difference in what the grand jury is today and get back on a point I made a minute ago in regard to what it was some years ago. Today, the grand jury relies 100 percent, in reality, on the prosecutor. In times past, grand juries were members of the community, they had a good deal of knowledge of what was going on. Today, that's simply not the case, as certain -- certainly experience would tell us.

Today, the grand jury is the recipient of evidence subpoenaed, obtained, acquired by the prosecutor. They have literally no independent source of the evidence. The agencies collect the evidence by either investigation or subpoena, and they're provided to the grand jury through the offices of the prosecutor. The grand jury then looks at the evidence and makes a determination as far as the indictment is concerned.

But the law in all of the cases are clear that in order to make a decision, that the grand jury must be fully informed. They must in all instances, whether they receive the evidence -- excuse me -- whether they receive the evidence that might not be admissible in court, whether they receive the evidence that's substantial exculpatory evidence, the policy is to get before the grand jury all possible evidence.

And this rule that was laid down by the Tenth Circuit would effectuate the same policy as I mentioned a moment ago of getting before the grand jury all possible evidence relative to the particular case.

QUESTION: They don't have to be fully informed. You say that the policy is that they have to be fully informed. I take it -- as I understood your response to Justice Kennedy earlier, you would not argue that an indictment could be set aside if the prosecutor came in with the exculpatory -- after producing considerable incriminating evidence, overwhelming, he then comes in with some exculpatory evidence, but the form that the grand jury discussing it with the other members says never mind, we've heard enough, don't waste our time; we don't want to hear -- this incriminating evidence is so condemning that we've heard enough. That's okay, isn't it?

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MR. LANG: Well, if the rule, again, is that they should have available to them all possible evidence, and there is substantial exculpatory evidence --

QUESTION: They've turned it down. He tries to give it to them, they say, no, we've heard enough.

MR. LANG: That's tendered to them, and they say, stop, we're drowning in boxes, we don't want any more of this.

QUESTION: Right. This fellow should be tried. Take it to a jury.

MR. LANG: A circumstance, again, that we don't have in this case.

QUESTION: Well, I know that.

MR. LANG: I would certainly agree with you on that.

QUESTION: So there is really no rule that the grand jury has to be fully informed.

MR. LANG: Well, fully informed, Your Honor, in the sense of --

QUESTION: You're arguing for a narrower rule that to the extent the prosecutor can assist in fully informing them, he must, even though they may themselves choose not to be fully informed.

MR. LANG: Well, again, fully informed is a term that means they're going to have to have everything in the

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world. Actually, I think the focus is on a balanced presentation in the sense --

QUESTION: They don't even have to be balanced informed if they don't want to be.

MR. LANG: But again, we get back to the situation what was raised earlier, and that is when we have some kind of misdirection or some type of a --

QUESTION: No misdirection. They just don't want to be balanced informed. The court would not set that aside because it had a grand jury said we've heard enough on one side, we don't want to hear the other side. Would a court set that aside?

MR. LANG: Certainly not, Your Honor.

QUESTION: All right.

MR. LANG: Thank you.

QUESTION: Thank you, Mr. Lang.

General Starr, you have 8 minutes remaining.

REBUTTAL ARGUMENT OF KENNETH W. STARR

ON BEHALF OF THE PETITIONER

QUESTION: Mr. Starr, could I ask you a question before you start? In your brief, you state that internal Department of Justice policies are sufficient to compel prosecutors to disclose substantial known exculpatory evidence to the grand jury. Was anything along that line done in this case?

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MR. STARR: Yes, it was. Two individuals were called before the grand jury to testify about the joint venture investments in which Mr. Williams had invested very heavily and in which he, according to his bankruptcy testimony, had confidence, into the efficacy of that. I won't characterize the testimony. This is obviously protected by grand jury secrecy, but this is in the record.

Secondly, he -- the United States Attorney who personally conducted this grand jury investigation, called before the grand jury two representatives from the accounting firm, the in-house accounting firm that handles the Williams' family accounts. And in fact, that had been suggested that that be done. And so they testified with respect to what the accounting techniques were. I commend that testimony as well.

What was also before the grand jury here was a criminal referral from the Office of the Comptroller of the Currency and statements by a number of bank officers, who testified not only about his financial statements, and how -- and I don't think there's any dispute here that the financial statements do not conform to GAP. But more than that, what he was saying to the bank presidents when he was seeking these loans.

The grand jury had a very full picture before

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it. With respect to the bankruptcy proceeding, transcript itself, that is classic hearsay, self-serving testimony. It was not subject, by definition, to cross-examination by the Government.

And frankly, although I'm sensitive to revealing anything before the grand jury, I think that a review of the grand jury transcript will satisfy the Court in this case that the grand jury had before it the fact that Mr. Williams had the sense of optimism. In fact, the United States Attorney put before the grand jury testimony about his character, his character in a very positive sense.

The United States Attorney did not seek to cut this off. When witnesses would say, I wish we could have done better with these investments, he didn't cut him off. The grand jury transcript shows a very moral prosecution conducted with integrity.

With respect to the rule, now, that is being urged upon this Court, the Department of Justice policy speaks in terms of substantial evidence that directly negates guilt. For starters, that's not the Tenth Circuit's standard, either at Page or in this case.

Secondly --

QUESTION: Well, are you suggesting that it be all right to have a rule, a supervisory rule, that just tracks your manual?

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MR. STARR: I am not. And that brings me to my second point, Justice White. That is Department of Justice policy. It has historically been the policy. It is not, however, legal error.

QUESTION: Suppose there's a motion to dismiss the indictment, and the allegation is that the Government had in its -- had in its possession information that it knew would necessarily bar an indictment. For instance, they knew that this person was a minor and couldn't -- just couldn't be indicted. And they just withheld it. And they were going to withhold it all though the trial, apparently. But there's a motion that says -- and there's a -- do you suppose that the district court should just dismiss the motion? I have no power to do anything about it? I guess you would.

MR. STARR: Well, he has power to do something about it, but he should not dismiss the indictment. No. Even under those circumstances, if there was not flagrant misconduct in the use of perjurious testimony and the like, then no.

QUESTION: Well, there's flagrant misconduct. The Government knew he wasn't subject to indictment.

MR. STARR: But again, what is being urged here is a rule that goes against what is a pathological case. To trap that pathological prosecutor, what the Tenth

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Circuit is urging essentially upon the system is a very costly rule when the incentives are entirely to the contrary.

QUESTION: Well, that may be true, but there may be a valid narrow -- much narrower rule than the Tenth Circuit.

MR. STARR: But there are also narrower remedies than dismissal of the indictment. If there is in fact a bad apple in the prosecutorial barrel, there is hardly anything more effective than sanctioning that attorney for contempt of court, for singling him out, or her out, for criticism in a published opinion, which again, this Court has emphasized as a remedy. That is a powerful remedy.

It is not easy simply to go back to the grand jury, Justice White, as my colleague has suggested.

These issues, by the way, arise in white collar crime cases. They don't arise in other kinds of cases, typically, where the issue is intent. These are complicated proceedings. These financial fraud investigations are enormously complex. You don't simply go back at almost zero cost and get an indictment. You've got to present this elaborate case once again.

QUESTION: General Starr, has the statute run in this case? If we affirm the court below, does the prosecution still --

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MR. STARR: This prosecution can go forward because this case still lives and the statute is tolled while this issue is being litigated.

But again, one of the things in terms of the presentation before the district court is the district court did not have the benefit of testimony of bank presidents who will talk about oral representations. That's a part of this indictment. And that has not been before the district court at all.

I thank the Court.

CHIEF JUSTICE REHNQUIST: Thank you, General Starr.

The case is submitted.

(Whereupon, at 11:02 p..m., the case in the above-entitled matter was submitted.)

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(REPORTER)