

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: DIANE GRIFFIN, Petitioner, V. UNITED STATES

CASE NO: 90-6352

PLACE: Washington, D.C.

DATE: October 7, 1991

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1                   IN THE SUPREME COURT OF THE UNITED STATES

2       - - - - -X

3       DIANE GRIFFIN,                   :

4                   Petitioner           :

5           v.                               :   No. 90-6352

6       UNITED STATES                   :

7       - - - - -X

8                                       Washington, D.C.

9                                       Monday, October 7, 1991

10                   The above-entitled matter came on for oral  
11       argument before the Supreme Court of the United States at  
12       1:00 p.m.

13       APPEARANCES:

14       MICHAEL G. LOGAN, ESQ., Chicago, Illinois; appointed by  
15               this Court on behalf of the Petitioner.

16       WILLIAM C. BRYSON, ESQ., Deputy Solicitor General,  
17               Department of Justice, Washington, D.C.; on behalf of  
18               the Respondent.

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C O N T E N T S

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MICHAEL G. LOGAN, ESQ.	3
On behalf of the Petitioner	
WILLIAM C. BRYSON, ESQ.	26
On behalf of the Respondent	

1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 90-6352, Diane Griffin v. the United States.

5 Mr. Logan.

6 ORAL ARGUMENT OF MICHAEL G. LOGAN

7 ON BEHALF OF THE PETITIONER

8 MR. LOGAN: Mr. Chief Justice, and may please  
9 the Court:

10 Diane Griffin was convicted in a single count in  
11 23 counts of an indictment centering around a major drug  
12 prosecution in Chicago. In the count in which she was  
13 charged, there were two objects of this conspiracy.  
14 During the trial, and at the end of the Government's case,  
15 it became clear, as a lawyer, that the evidence was  
16 insufficient as presented by the Government and the DEA  
17 object.

18 At that time, Griffin made a motion for a  
19 directed finding. The Government made argument, and  
20 during that argument conceded that the evidence was  
21 insufficient on that object. At that time, Griffin made a  
22 motion for a severance for reasons that I set out in the  
23 briefs.

24 At the end of the entire case, the evidence  
25 really didn't change. And prior to submission of the



1 instructions to the jury, Griffin asked for several  
2 things. One of the things that she asked for was that the  
3 insufficient object be removed from the jury's  
4 consideration. And she submitted a jury instruction that  
5 did just that. That instruction was denied.

6 As an alternative, she submitted a set of  
7 special interrogatories, wherein the jury would have told  
8 the court which of the two objects the jury was using as a  
9 basis for the finding of guilt if there was going to be a  
10 finding of guilt. Those instructions were also denied.

11 At the end of the jury's deliberation, there was  
12 a finding of guilty. It was a general verdict. And I  
13 submit to this Court, I submitted to the court at the  
14 time, I submitted it to the court of appeals, that to this  
15 day we do not know upon which basis -- which of the  
16 objects this jury decided guilt.

17 QUESTION: Well, you know if you accept the  
18 presumption that the jury follows its instructions, don't  
19 you?

20 MR. LOGAN: Well, Your Honor, I think that's  
21 exactly the point. Because we follow the presumption the  
22 jury follows its instructions, because we believe that and  
23 we follow that presumption, we do not know because in the  
24 instructions there was error. The error was that the jury  
25 was allowed to use the basis that was insufficiently

1 proven as a basis for guilt. And this is a case where  
2 there was evidence concerning knowledge of the drug  
3 prosecution, of the drug dealing.

4 QUESTION: But doesn't the issue get settled by  
5 the instruction on burden of proof and the quantum of  
6 proof necessary? And every agrees that there was  
7 insufficient evidence, and if the jury followed that  
8 instruction, it could not have convicted on that  
9 particular possibility.

10 MR. LOGAN: Well, I believe that approach makes  
11 sense if you believe that the jury can recognize the legal  
12 insufficiency of the evidence. And it's our view in this  
13 case, and I'm asking this Court to follow that view, that  
14 juries do not always recognize legal insufficiency of the  
15 evidence.

16 The trial lawyer in this case, and I tried this  
17 case, recognized that legal insufficiency. The Government  
18 conceded the legal insufficiency. The court agreed with  
19 both sides that it was legally insufficient. However, in  
20 this case, Your Honor, there was evidence concerning --  
21 circumstantial evidence -- concerning connection between  
22 Diane Griffin and the DEA object.

23 For instance, the Government brought in evidence that  
24 she lived with the kingpin of this major drug conspiracy;  
25 brought in evidence that she knew the major wholesale

1 supplier of drugs in the case, Mr. Suarez. There was  
2 evidence in the case that when Mr. Suarez came in for the  
3 first time to meet Mr. Beverly, he had to go through Diane  
4 Griffin. Diane Griffin knew all of the personalities at  
5 trial, all of the other defendants in trial, including  
6 minor -- relatively minor -- personalities like Jim Dandy.  
7 So there was an association.

8 And I liken this situation, Your Honors, to that  
9 in Cramer. In Cramer v. United States, the defendant in  
10 that case knew Fiel. He knew these German conspirators.  
11 He met with them. And I think as the opinion says --

12 QUESTION: And this in argument there was some  
13 evidence?

14 MR. LOGAN: There was some evidence.

15 QUESTION: But insufficient.

16 MR. LOGAN: Insufficient evidence.

17 QUESTION: Well, and the Government actually  
18 opposed giving the instruction, didn't they?

19 MR. LOGAN: They actively opposed it.

20 QUESTION: And they wanted the jury to be told  
21 that they could convict on either or both?

22 MR. LOGAN: Well, the Government did --

23 QUESTION: I mean, if there was evidence beyond  
24 a reasonable doubt.

25 MR. LOGAN: The evidence told -- the Government

1 told the jury that they could convict on either. In  
2 closing arguments to the jury -- the prosecutor, in  
3 closing argument, told the jury that Diane Griffin was  
4 charged with the conspiracy to defraud the DEA and the  
5 IRS.

6 QUESTION: Why do you think that if the  
7 Government opposed the instruction, but nevertheless  
8 conceded that there wasn't enough evidence to convict, it  
9 may be that both you and the Government were wrong.

10 MR. LOGAN: In what way, Your Honor?

11 QUESTION: Well, there was evidence and your  
12 problem is the jury -- you're suggesting that the jury  
13 found your client guilty on a basis on which just the  
14 Government thought there was insufficient evidence. The  
15 jury may have thought there was sufficient evidence.

16 MR. LOGAN: The court also thought that there  
17 was insufficient evidence. There was a --

18 QUESTION: I know, but that isn't the court's  
19 job to do that. It's the jury's job to say whether there  
20 was.

21 MR. LOGAN: Well, I would disagree.

22 QUESTION: Isn't that right?

23 MR. LOGAN: No, Your Honor, I disagree with the  
24 Court, if you please. The court rules as a matter of law  
25 when the evidence is insufficient. I made a motion for



1 judgment.

2 QUESTION: He never granted your motion.

3 MR. LOGAN: That is true. The court did not  
4 grant my motion. I don't know why the court didn't grant  
5 me partial judgment of acquittal. The Seventh Circuit  
6 said the same thing in their opinion. They said they  
7 didn't know why the district court didn't grant partial  
8 summary judgment in this case. It was there.

9 The evidence concerning the association of  
10 Griffin with the drugs is all evidence of association, and  
11 that's why I point out the Cramer case. It's very similar  
12 to Cramer.

13 QUESTION: If you asked someone on the street  
14 whether it was more likely that a jury would convict on a  
15 count where there was sufficient evidence or on a count  
16 where there wasn't sufficient evidence, I suppose the  
17 person's answer would be on the count where there was  
18 sufficient evidence, don't you think?

19 MR. LOGAN: Yes, I do. However, the term itself  
20 is as misleading. As I pointed out in my brief, if there  
21 were a small amount of evidence or if there is no evidence  
22 at all, I think, then, at that point, the court could say,  
23 yes, they only decided on the evidence where there -- on  
24 the case, on the object -- where there was evidence, where  
25 there was sufficient evidence for a conviction.

1 But in Griffin's case what we have is a major  
2 drug prosecution. In essence, this is a drug case. The  
3 Government attempted at the beginning of the case to  
4 convict Griffin on the drug arm of this particular count.

5 What happened during the case was that at a  
6 critical point when the witness, according to the proffer,  
7 was going to say that Griffin was party to a drug  
8 conversation -- the witness testified that the two men  
9 went to the other end of the bar and had a private  
10 conversation concerning the distribution of drugs, while  
11 Griffin was left along. But despite that fact, the  
12 Government insisted that they were going to maintain this  
13 opportunity to have the jury consider the drug evidence  
14 against Griffin.

15 QUESTION: Well, so did the -- apparently, so  
16 did the judge think it ought to be submitted because he  
17 refused your -- the judge may have thought, well, if I  
18 were a juror, I wouldn't think this was enough evidence.  
19 But he nevertheless sent it to the jury. Didn't he?

20 MR. LOGAN: Well, I'm puzzled by that myself. I  
21 don't understand why the court sent it to the jury.

22 QUESTION: Well, he just said that it's my  
23 opinion there's not enough evidence. But he must have  
24 thought there was enough evidence to go to the jury on  
25 that.

1           MR. LOGAN: Well, on that point, Your Honor, we  
2     have the district court's written opinion where the  
3     district court says that there was not sufficient  
4     evidence. The court did not --

5           QUESTION: That may be what he thought. Then  
6     why did he let it go to the jury on that issue?

7           MR. LOGAN: Well, I think that's why I'm here  
8     today, Your Honor. That's the issue.

9           QUESTION: Is one possible reason that there  
10    were other defendants as to whom the evidence was  
11    sufficient. The judge didn't instruct, did he, that they  
12    could find Griffin guilty of either conspiracy? And I  
13    don't think the United States argued that in its closing  
14    argument, although you might correct me on that point if  
15    I'm wrong.

16          MR. LOGAN: If I might, on the jury  
17    instructions, the court directly instructed this jury  
18    according to the statute, and the statutes reads if there  
19    is a defrauding of the United States or either of its  
20    agencies -- or any of its agencies -- you may find guilt.  
21    So there was a jury instruction from the court that  
22    allowed the jury --

23          QUESTION: But he didn't say specific -- the  
24    trial judge didn't say specifically as to Griffin.

25          MR. LOGAN: Well, in the instruction there were

1 three names: Mr. Beverly, Betty McNulty, and Diane  
2 Griffin. There was no distinction between those three  
3 defendants, and that's part of our position in this case.  
4 There should have been a distinction between those  
5 individuals because Diane Griffin could not be lumped with  
6 Alex Beverly and Betty McNulty. The evidence in their  
7 cases was sufficient for them to be convicted by the jury  
8 on the Drug Enforcement Administration aspect of the case.

9 But with respect to Griffin, admittedly it was  
10 not. So she should not have been lumped there. The judge  
11 should have not instructed the jury, yes, you may convict  
12 on the DEA object of this conspiracy.

13 QUESTION: Did the Government argue in its  
14 closing argument specifically that Griffin could be guilty  
15 of the DEA or the IRS conspiracy?

16 MR. LOGAN: Yes. The prosecutor in closing  
17 argument said that the -- all three defendants by name  
18 were charged with the DEA object and with the IRS object.  
19 When I got up and --

20 QUESTION: Did he argue that they could be  
21 convicted on -- that Griffin could be convicted on either?

22 MR. LOGAN: Yes.

23 QUESTION: Specifically as to Griffin?

24 MR. LOGAN: Yes. Because the prosecutor named  
25 all three and said specifically that all three were



1 charged with those two objects. It made no  
2 differentiation between Griffin and the other two  
3 defendants in the case.

4 In my closing argument, I said to this jury the  
5 Government is not going to stand back up in rebuttal  
6 argument and tell you that there is evidence in this case  
7 that says that Griffin is guilty on the DEA object of this  
8 conspiracy. And lo and behold, the Government did get up  
9 and say that Griffin saw drugs.

10 It's at that point, after several more words  
11 were said, that I understood the actual words of the  
12 prosecutor because she said it so fast. And at the next  
13 break, I objected to that. The prosecutor got up and made  
14 a retraction with regard to the evidence being that Diane  
15 Griffin saw drugs.

16 QUESTION: Mr. Logan, the question on which we  
17 granted certiorari is whether a conviction for a multiple  
18 object conspiracy must be set aside when the jury returns  
19 a general verdict of guilty and the evidence is  
20 insufficient to support one of the objects of the  
21 conspiracy. I think we're less interested in the  
22 intricacies of what happened in trial than in arguments on  
23 that legal issue.

24 MR. LOGAN: All right.

25 QUESTION: Did the court of appeals judge this

1 case on the basis that there was not sufficient evidence  
2 for the drug case?

3 MR. LOGAN: The court of appeals used the Turner  
4 approach to the case and said that Turner applies here.  
5 Where there is insufficient evidence, and that's the  
6 insufficiency, Turner applies. If this case had been one  
7 of unconstitutionality --

8 QUESTION: I got you. So they judged it on the  
9 basis that there was -- that it didn't make any difference  
10 if there was insufficient evidence on this one thing.

11 MR. LOGAN: That is correct.

12 QUESTION: And that's the way the case comes to  
13 us.

14 MR. LOGAN: That is correct.

15 QUESTION: And so your job is to convince us  
16 that that's then a case where you can't tell what the jury  
17 did.

18 MR. LOGAN: That is right.

19 QUESTION: Mr. Logan, in a conspiracy case,  
20 typically it's also alleged by the prosecutor that there  
21 have been overt acts committed in support of the  
22 conspiracy -- in furtherance of the conspiracy. Isn't  
23 that so?

24 MR. LOGAN: That is true.

25 QUESTION: Now, would your rule apply there,

1 too? Suppose that the Government charges several overt  
2 acts and there is insufficient evidence as to one of them.

3 MR. LOGAN: Generally speaking, I don't believe  
4 that it would. I think that if you have a case like  
5 Cramer, where the requirement is that the defendant be  
6 found guilty of committing one of the overt acts and be  
7 witnessed by two people, where the statute specifically  
8 says that, I think that it would apply. But generally  
9 speaking, I do not think it would apply because you're  
10 talking about overt acts which support a particular  
11 object, and the object is the end. It's the purpose. So  
12 I don't believe that it would go to the overt acts unless  
13 the statute was the focus -- the statute focused on the  
14 overt acts.

15 QUESTION: Well, normally a statute requires  
16 that there be proof of some overt act and furtherance.  
17 And I just wondered whether your theory wouldn't lead to  
18 the same approach in the case of a deficiency of proof on  
19 one of the alleged acts and furtherance.

20 MR. LOGAN: I don't believe that it would  
21 because what we're looking to is an essential element. As  
22 I believe Ingram v. United States points out, it's an  
23 essential that there be evidence, sufficient evidence, of  
24 an object, to be knowledge of an object. And this -- the  
25 overt acts may support that there are pieces of evidence

1     that may support that object, but I don't believe that  
2     this argument goes to the question of overt acts.

3             In this case, in my case, the jury had to find  
4     one, only one, object. There wasn't any question of that.  
5     They had to find the Internal Revenue Service object,  
6     decide the case on that. If there happened to be overt  
7     acts below it, which as matters of evidence supported that  
8     object, I think the final issue rests on whether there was  
9     sufficient evidence to prove the object as the end, as the  
10    final purpose of the conspiracy. I think you have to look  
11    at it in that way.

12            QUESTION: Mr. Logan, what do you do about  
13    Turner v. United States? Do you ask us to overrule that?

14            MR. LOGAN: No, I don't. I think that Turner v.  
15    United States is a case in which the Court did not address  
16    the issue of where we do not know. In Turner v. United  
17    States, there were three acts. What the Court did in  
18    considering those three acts is say that the only evidence  
19    in the case, and this is an important point, the only  
20    evidence in the case was evidence of possession. And the  
21    Court equated possession with purchase. And that was one  
22    of the three acts.

23            So the Court knew it was not a situation where  
24    someone had to guess which of the two. The other two acts  
25    were distribution, I believe, and sale. And they were



1 separate -- separate theories. But there wasn't any  
2 evidence in the case except the possession. The Court  
3 ruled as a matter of law that possession equated with  
4 purchase, and therefore, knew where the jury was going by  
5 reason of its analysis.

6 QUESTION: I didn't read it that way. I mean,  
7 it seems to me the Court says in Turner is that the  
8 general rule is that when a jury returns a guilty verdict  
9 on an indictment charging several acts in the conjunctive,  
10 as Turner's indictment did, the verdict stands if the  
11 evidence is sufficient with respect to any one of the acts  
12 charged.

13 MR. LOGAN: That's correct.

14 QUESTION: You're at least asking us to go back  
15 on that -- on that statement, no?

16 MR. LOGAN: Well, I'm only asking the Court to  
17 apply the rule that I'm seeking if we do not know. In  
18 Turner, the Court knew. There was no question that there  
19 was -- there's no question in the case that the evidence  
20 did not apply to distribution, the evidence did not apply  
21 to sale. The evidence only applied to purchase. That's  
22 what the Court said. The Court never said in Turner we  
23 don't know what the jury decided in this case.

24 So the rule in Turner is not a rule that affects  
25 a situation where you do not know. The cases that follow

1 Turner have taken the words of Turner and have turned it  
2 in to that type of rule, but Turner originally did not on  
3 its facts turn, if you will, on not knowing. It was not  
4 that kind of case.

5 You notice in Turner, which is a 1970 case, the  
6 Court never makes reference to Stromberg. It never makes  
7 reference to Cramer. It never makes reference to Yates v.  
8 the United States, all which preceded it. Why? Because  
9 they didn't have to. They knew which act the jury found.

10 QUESTION: Mr. Logan, may I interrupt? Does  
11 that mean that in this case there had been absolutely no  
12 evidence tying your client to the drug enforcement aspect  
13 of the case, and only evidence tied her to the tax aspect  
14 of it, that then the verdict would stand?

15 MR. LOGAN: I think that would be correct. I  
16 think that there were no --

17 QUESTION: So we have to differentiate between  
18 cases where there's no evidence on the one hand, and cases  
19 where there's some evidence but it's insufficient as a  
20 matter of law, on the other hand.

21 MR. LOGAN: I think that that's an approach that  
22 this Court can take. I'm not necessarily urging the Court  
23 to take that approach, but I think the Court could do it.

24 QUESTION: But we have to either do that or  
25 overrule Turner, I guess is what you're saying.

1           QUESTION: Well, you still have to ask whether  
2       there's a difference in a case where the indictment  
3       charges the two acts conjunctively and a case where it's  
4       in the alternative. As this case went to the jury, or as  
5       the Government argued, that it's -- the jury could find  
6       the fellow guilty if they found either one.

7           MR. LOGAN: That is correct.

8           QUESTION: But you say that your rule would  
9       apply equally to charges in the conjunctive and an  
10      either/or charge. Is that right?

11          MR. LOGAN: Well, I believe -- yes, Your Honor,  
12      in Crain, it was early decided that when acts are pled in  
13      the conjunctive they're considered to be pled in the  
14      disjunctive, so they would always come across as or  
15      situations.

16          My point here is that we had an or situation  
17      right from the beginning because of the jury instruction  
18      that was submitted to the -- by the court to the jury.

19          QUESTION: Do you think the jury understood here  
20      that either one would suffice?

21          MR. LOGAN: Yes, I do. And I think that's  
22      supported by Richardson v. Marsh, and I think we have to  
23      take that approach.

24          QUESTION: But if -- suppose the instruction  
25      said that the charge is A and B, and if you find that the

1 defendant is guilty of A and B, why return the verdict of  
2 guilty. Do you think the jury then understands that  
3 either one would be enough?

4 MR. LOGAN: I think if the jury instruction said  
5 you must find guilt on A and B to this jury, I wouldn't be  
6 here today because then they would have had to find both,  
7 and I wouldn't be standing before this court. The point  
8 is it went up in the disjunctive.

9 QUESTION: I don't know. If you said, well, the  
10 jury had to find A and B, but it couldn't have found A  
11 because as a matter of law there wasn't enough evidence to  
12 support that finding.

13 MR. LOGAN: Well, no, Your Honor, because if  
14 they had found B in this case, that would have been  
15 sufficient. If we knew that they found B. If we knew  
16 they found her guilty on the Internal Revenue Service  
17 object, then there wouldn't be any question.

18 QUESTION: Well, not if the jury was instructed  
19 that in order to return a verdict of guilty, you have to  
20 find the defendant guilty of both A and B.

21 MR. LOGAN: That's right. I agree. But it  
22 wasn't presented to them in that manner.

23 And I would point out to the Court that this  
24 case is a case in which all of the money, all of the  
25 property that became the property of Diane Griffin is drug



1 based. In other words, what the jury heard in this case  
2 is that the proceeds, at least from the evidence that the  
3 Government provided, the money came from drug proceeds.  
4 Diane Griffin is receiving the money that's the flow from  
5 these drug proceeds. So we have that constant connection  
6 between her and the drug evidence.

7 And I think at this point what we are saying  
8 here, because there was error in this instruction that  
9 allowed the jury to consider the DEA objective, at least  
10 what this Court ought to do is use the harmless error  
11 analysis that was used in Yates v. Eva. I think in Yates  
12 v. Eva, we had a situation where the Court observed that  
13 there was error in Yates. The error reflected or revolved  
14 around the way in which the defendant was found guilty of  
15 murder. The presumption -- the one way that it was done  
16 was through the presumption, and since that was a  
17 unconstitutional burden-shifting presumption, the Court  
18 then had to look and see whether or not it was harmless  
19 error since it was possible that the jury found guilt by  
20 review of the evidence as a whole, and therefore, found  
21 malice.

22 What this Court has said is that it's not  
23 sufficient that the jury could have found guilt by reason  
24 of review of the entire record. The question is whether  
25 or not that's what the jury did. Did the jury decide

1     guilt on the evidence as a whole and not use that burden-  
2     shifting presumption.

3             The State Supreme Court of South Carolina said  
4     all we have to do is determine that the jury could have  
5     found guilt on the evidence as a whole. And this Court  
6     has said, no, that is not the Chapman test. What you do  
7     then in your analysis is look at the jury instructions.

8             I ask the Court here today to look at the jury  
9     instructions in Griffin. Those jury instructions were in  
10    error. Those jury instructions said yes, you may use this  
11    disjunctive object, this DEA object, to find guilt. Then  
12    what you do is you keep in mind at all times that jurors  
13    are presumed to follow their instructions, Richardson v.  
14    Marsh.

15            QUESTION: Where is the instruction that was  
16    actually given on this matter?

17            MR. LOGAN: 20, it was Government's instruction  
18    20, Your Honor. It's on page 31 of the --

19            QUESTION: Yes.

20            MR. LOGAN: And I think that instruction is not  
21    unlike the Yates -- the instruction in Yates v. the United  
22    States where the Government there formed the instruction  
23    from the statute itself. And what the Court said in Yates  
24    v. United States is that the evidence lent itself as much  
25    to the insufficient object as it lent itself to the

1 sufficient object.

2 QUESTION: Well, then you'd really get into the  
3 question that Justice Stevens posed to you earlier. The  
4 closer the evidence was be -- was on the count that it was  
5 insufficient and the closer it was to being sufficient,  
6 the more likely the evidence was -- would be not to be  
7 harmless, whereas if there were virtually no evidence on  
8 that count, then it would be much more likely to be  
9 harmless error.

10 MR. LOGAN: I think that's a fair statement.

11 QUESTION: That somehow doesn't seem like a very  
12 workable rule.

13 MR. LOGAN: Well, I think it's a rule that we  
14 have to employ if we're going to make any kind of solid  
15 determination of what the jury actually did in the case.

16 QUESTION: But isn't it -- isn't it a very  
17 logical presumption to say that if the two counts go to  
18 the jury, one on which the evidence is insufficient and  
19 the other on which it's sufficient, and the jury convicts,  
20 you don't know on which count that they convicted on the  
21 one where the evidence was sufficient?

22 MR. LOGAN: No.

23 QUESTION: Why not? Any layman on the street  
24 would surely disagree with your answer.

25 MR. LOGAN: Well, if laymen on the street

1 understood that, Your Honor, then why do you have  
2 judgments of acquittal? Why do we have judgments not  
3 withstanding the verdict? We have those remedies at law  
4 because juries do not recognize the legal sufficiency  
5 about --

6 QUESTION: Well, I'm not talking about the jury  
7 understanding, I'm just talking about common sense. You  
8 ask someone who, say, just walked into the spectator  
9 section of a courtroom, here's the situation. Two counts  
10 are submitted to the jury, on one there was insufficient  
11 evidence and on the other there was sufficient evidence.  
12 The jury convicted, we don't know on which count. What  
13 can we do? I think most of us would say what's the  
14 problem? We'll assume the jury convicted on the count  
15 where there was sufficient evidence.

16 MR. LOGAN: I think we would be asking the lay  
17 people the wrong premise, because that does not reflect  
18 the case that I have taken to this Court. The case in my  
19 -- the case that I have taken to this Court is that there  
20 were volumes of evidence concerning Griffin's association  
21 with major drug dealers in Chicago. The problem was that  
22 it was hollow and jurors cannot be expected to  
23 differentiate between that.

24 And Griffin sought the protection of the law.  
25 She said to the court --



1                   QUESTION: Then you're asking for a rule for  
2   your particular case, not for the generality of  
3   circumstances?

4                   MR. LOGAN: Well, I'm -- first of all I'm asking  
5   for a ruling in my case that I think is a very common  
6   situation. And I point again to Cramer. And there are  
7   many other cases where there is some evidence in the case  
8   concerning violation of an object, but it's not legally  
9   sufficient. And I pointed out in my briefs there are four  
10   conspiracy -- drug conspiracy cases last year in the  
11   Seventh Circuit. Four of them were reversed for  
12   insufficient evidence.

13                  Here is a case where jurors received evidence  
14   concerning participation in a drug conspiracy and  
15   convicted people, but the court said the evidence was  
16   insufficient. That's exactly what we have here.

17                  I submit to this court it's very likely that  
18   Diane Griffin was convicted on the drug arm of this  
19   conspiracy because what you had was no differentiation.  
20   What you had was 3 or 4 weeks of the Government attempting  
21   to convict this woman with drug dealers of a drug offense.  
22   And it was beyond the expectation, reasonable expectation  
23   for a court to say, now jurors, ignore all that volume of  
24   hollow evidence. And I'm not going to tell you anything  
25   else, but here's the case. Now you decide the case. And

1 we have two other individuals who are admittedly  
2 sufficiently convicted on the evidence. And there's no  
3 distinction between Diane Griffin?

4 Why wasn't she given the protection of the law?  
5 And that's the question I think Your Honor has asked me.  
6 I don't know. But she was entitled to it.

7 QUESTION: You say that if there had been  
8 absolutely no evidence about her connection with the drug  
9 conspiracy to impede the efforts of the Drug  
10 Administration, then you wouldn't be here.

11 MR. LOGAN: I don't believe -- I believe -- I  
12 think I may be here, but I think that this Court may  
13 devise a rule, from what I've been seeing from this  
14 Court's decisions, that the Court would say that we don't  
15 have any question because there wasn't any evidence on  
16 that. We can say the jury decided on the sufficient one.

17 QUESTION: But I'm looking at the district  
18 court's opinion. It says both parties concede that there  
19 is no evidence showing that Griffin had knowledge of this  
20 object of the conspiracy.

21 MR. LOGAN: I disagree with that statement. I  
22 did not take that position. I think I may have argued  
23 that to the jury in my advocacy on behalf of my client,  
24 but when I spoke to the court, I was speaking as lawyer to  
25 judge and as lawyer to lawyer with the Government, that it

1 was not there.

2 QUESTION: So you would say that the district  
3 court was just wrong in its statement.

4 MR. LOGAN: When it made that statement, yes, I  
5 do.

6 QUESTION: Thank you, Mr. Logan.

7 Mr. Bryson, we'll hear now from you.

8 ORAL ARGUMENT OF WILLIAM C. BRYSON

9 ON BEHALF OF THE RESPONDENT

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

12 If I may, I'd like to first address the factual  
13 setting in which this case arises and then move on to the  
14 broader legal questions that the case raises. But I do  
15 want to address very briefly the facts in the case because  
16 Mr. Logan has suggested that the Government had pressed  
17 the DEA object upon the jury and the court as a viable  
18 basis for conviction when, in fact, that's just not the  
19 case at all.

20 And very briefly what happened in this case in  
21 closing argument was that after the Government's proof had  
22 essentially failed on the piece of evidence that we hoped  
23 would show Diane Griffin's knowledge -- excuse me -- of  
24 the drug dealing that Beverly was involved in was that the  
25 Government argued entirely the tax basis for conviction.

1 The Government started out its closing argument by saying  
2 Beverly, McNulty, and Griffin are charged in count 20 with  
3 defrauding the United States by impeding the activities of  
4 the IRS and the DEA, which, of course, was true. That was  
5 the charge. And, in fact, the evidence was sufficient  
6 with respect to both Beverly and McNulty.

7 But the Government then went to discuss Griffin  
8 entirely in terms of the tax purpose. Defense counsel  
9 came back and argued -- it specifically said, you will not  
10 hear the Government speaking about the DEA object in this  
11 case because there isn't any evidence of Diane Griffin's  
12 involvement in the DEA object. And indeed, in the  
13 rebuttal summation, that is exactly what happened.

14 Now it is true that the Government at one point,  
15 the prosecutor slipped and said something about Diane  
16 Griffin's seeing cocaine. This was because that was the  
17 evidence that we expected to see, but in fact, that was  
18 where the proof had failed and the witness didn't give us  
19 that evidence.

20 But upon objection, the prosecutor then got up  
21 and said, I am sorry, I misspoke. I misspoke earlier.  
22 And I'd like to read this because it makes the point, I  
23 think, very graphically, that this issue was not argued to  
24 the jury. "I misspoke with respect to Diane Griffin, and  
25 that is that I said there is evidence that she saw cocaine



1 and there's none. And we're not arguing that. Diane  
2 Griffin is charged in this case with assisting, knowingly  
3 assisting Alex Beverly in hiding his assets from the IRS.  
4 It's that simple. And we believe that the evidence has  
5 shown that that's what she did."

6 So there's not an effort here, as I think  
7 counsel suggests, to try to get the best of both sides and  
8 somehow hope that the jury would find a DEA purpose.

9 QUESTION: I take it -- I see the district court  
10 also said that the only evidence implicating Griffin  
11 related to this -- to the IRS object.

12 MR. BRYSON: That's correct.

13 QUESTION: The Government did not even agree that  
14 Griffin had knowledge of the efforts to impair the DEA.

15 MR. BRYSON: Exactly. Relying on this passage,  
16 among others, in which we specifically and explicitly  
17 conceded that there was no evidence of anything other than  
18 the IRS purpose. So the way the case went to the jury, it  
19 is, I submit, virtually inconceivable that the jury could  
20 have convicted on the DEA object.

21 QUESTION: What if it had be otherwise? Would  
22 you be arguing differently? I mean --

23 MR. BRYSON: Yes, Your Honor, we would.

24 And then let me move with that question to the  
25 broader question of whether -- setting aside the facts of

1     this case, even if there had been some evidence --

2             QUESTION: I didn't really think we took this to  
3     sort of review the instructions.

4             MR. BRYSON: No. Absolutely. And the only  
5     reason I start with that is because I want to make sure  
6     that the factual basis on which we're proceeding is clear.  
7     And that is that whatever you may think as to the broader  
8     question, this is a case in which the risks of an improper  
9     conviction were minimal.

10            But in any event, let me move to the broader  
11     question --

12            QUESTION: Mr. Bryson, wouldn't it be a lot  
13     simpler if the Government would simply charge multiple  
14     object conspiracies in separate counts?

15            MR. BRYSON: Well, Your Honor, I think that it  
16     would not for the following reason. That typically when  
17     you have a conspiracy that may involve two closely related  
18     objects, typically that is regarded as a single agreement  
19     in which there is only one agreement, even though it may  
20     have two objects, and which can't support -- indeed, it  
21     would be a multiplicitous charge if we tried to charge it  
22     as supporting separate judgments.

23            If you have two different agreements, in other  
24     words, if I conspire with someone to, let's say  
25     manufacture narcotics, and I later conspire with someone

1 else to distribute narcotics, I may well have engaged in  
2 two separate conspiracies that can be charged in separate  
3 counts.

4 But if I conspire with a group of people to both  
5 manufacture and then distribute the same narcotics, even  
6 though there are technically two different objects to the  
7 conspiracy, it's just one conspiracy. And the Government  
8 can't separately obtain judgments on both parts of that  
9 conspiracy and obtain, among other things, cumulative  
10 punishment.

11 So there are limits on what we can do. And we  
12 have in good faith, only one agreement. And that's what  
13 we had here. Even though it may have multiple objects, we  
14 can only charge it in the single count. Our options were  
15 just limited in that respect.

16 Now, the basic principle, I think, that's  
17 involved here is a principle that is at the heart of  
18 appellate review of jury verdicts. And that is we ask  
19 whether a hypothetical, rational jury could convict on the  
20 evidence in the record, could find the defendant guilty  
21 beyond a reasonable doubt. We don't ask what route this  
22 jury may have taken to conclude that the evidence was  
23 established beyond a reasonable doubt.

24 Now the defendant in this case says that we  
25 don't know what route this jury took. It may have gone

1     IRS, it may have gone DEA. We just don't know. But  
2     that's true in every single sufficiency case. You  
3     invariably have the situation in which we don't know, and  
4     indeed, we don't even ask, what route a jury took. We  
5     ask, did that hypothetical, rational jury have enough  
6     evidence that looking at the whole record, they could have  
7     found a way toward conviction.

8             And to underscore the point, suppose you have a  
9     case in which the indications from the way the evidence  
10    comes in and the way the case is argued, the indications  
11    are that the jury may well have been particularly  
12    interested in a particular theory of liability and that  
13    you might well guess that that's what the jury may have  
14    been induced to convict on. But in fact, the reviewing  
15    court says that theory of liability is insufficient. It  
16    just -- there isn't enough evidence to support a  
17    conviction on that theory. But there is other evidence in  
18    the record which could have supported the jury verdict.  
19    Then that's enough to uphold the verdict as sufficient,  
20    legally sufficient. You don't ask how did this jury get  
21    to this result. And if you conclude that this jury  
22    followed an improper path, you reverse.

23             Now --

24             QUESTION: But isn't there an exception for  
25    cases in which the second ground was one to be



1 constitutionally impermissible?

2 MR. BRYSON: Absolutely, Your Honor, and that,  
3 it seems to me, is at the heart of this case. The  
4 distinction between --

5 QUESTION: And what if in such a case, where you  
6 have a plain -- you know, Stromberg type -- a plainly  
7 insufficient count as a matter of law, and another one  
8 sufficient. Could the Government defend the jury verdict  
9 on the ground that well, there really wasn't any evidence  
10 at all to support the defective count?

11 MR. BRYSON: Well, I think you would have a  
12 question of harmless error in that setting. And let me  
13 give you an example taken from Stromberg, perhaps, if I  
14 understand your question.

15 Suppose in the Stromberg case, you had multiple  
16 bases for the charge. One of which was using a red flag  
17 to organize opposition to Government, which was  
18 essentially the ground that was struck down in Stromberg.  
19 Suppose further that in that particular case, there was  
20 absolutely no evidence of any red flag at all. There was  
21 the -- the evidence was that there was whatever, violence,  
22 anarchism, or whatever, but no red flag.

23 Now even if the judge charged the jury that you  
24 could convict on the basis of finding a red flag that was  
25 used to organize opposition against the Government. We

1 submit that would be error because that would be  
2 impermissible ground for conviction as a legal matter, but  
3 it would be harmless because there was no evidence in the  
4 case of any red flag.

5 That would be the situation if you both had  
6 essentially factual sufficiency and legal error with  
7 respect to the same evidence. But that's a harmless error  
8 question. This is not, we submit, a harmless error  
9 question at all. This is simply a matter of how you look  
10 at sufficiency of the evidence.

11 Now, Turner, it seems to us, answers this  
12 question quite clearly. What Turner says, and I'd like to  
13 read, if I could, the specific quote from Turner because I  
14 think it puts the point better than I could put it by  
15 arguing from the case. It says, "When a jury returns a  
16 guilty verdict on an indictment charging several acts in  
17 the conjunctive, the verdict stands if the evidence is  
18 sufficient with respect to any one of the acts charged."

19 If the evidence is sufficient, that is to say  
20 it's sufficient to get to the jury, with respect to any of  
21 the acts charged, that's enough. You don't have to -- and  
22 this is the following sentence. Here the evidence proved  
23 that Turner was distributing heroin. The status of the  
24 case with respect to the other allegations is irrelevant  
25 to the validity of Turner's convictions.

1 In other words, once you satisfy yourself that  
2 the evidence is sufficient on one of the grounds for  
3 conviction, then you need look no farther. And even if  
4 the evidence is insufficient with respect to others, that  
5 the conviction must be affirmed.

6 QUESTION: Now that wasn't a conspiracy case,  
7 was it?

8 MR. BRYSON: It was not a conspiracy case, Your  
9 Honor.

10 QUESTION: So it is a sense that's dicta, just like  
11 the Haupt case got square dicta on the other side, saying  
12 the other way. That footnote in Haupt, you know, clearly  
13 reads like a blanket on this case, but the answer is it's  
14 dicta, and I agree with you.

15 MR. BRYSON: Yes, of course. It does. Well --

16 QUESTION: So we have got one dicta against  
17 another.

18 MR. BRYSON: Except that I think Haupt can be  
19 distinguished -- first of all we think that that --

20 QUESTION: Sure it can. In this case it can be  
21 distinguished because it's not a conspiracy case.

22 MR. BRYSON: It is not a conspiracy case.  
23 However, Haupt, you can say, is a case in which there were  
24 multiple specifications within the same count which is, in  
25 a sense, like a duplicitous count. And this comes up

1 sometimes in perjury cases and obstruction of justice  
2 cases where we say there are five specifications of  
3 falsehood. You could charge those, as in Justice  
4 Blackmun, in response to Justice Blackmun's questions.  
5 You could charge those as separate counts. So we're not  
6 locked into a single count.

7 And in fact, you could argue that such a count  
8 that charges five different specifications of perjury is,  
9 in fact, duplicitous. So you could say, all right, in  
10 that setting, you're going to have to establish that each  
11 one of them is proved. We don't agree with that rule, but  
12 you could certainly characterize Haupt as standing for --  
13 excuse me -- no more than that.

14 QUESTION: Do you feel that Turner and Yates can  
15 stand together?

16 MR. BRYSON: Oh, yes, Your Honor. And the  
17 reason is because Yates was a case that held that where  
18 there is legal error, where the jury in effect is told  
19 that something is a crime which isn't a crime, and the  
20 jury may have based its conviction on that theory, then  
21 you have to reverse. In Yates there was no reason to  
22 assume, as there is here, that the jury based its  
23 conviction on some other ground because there was plenty  
24 of evidence to support the conviction if the legal ground  
25 that was given to the jury on which to convict was



1 correct. But it wasn't. This Court said no, that was an  
2 improper legal ground for conviction. Therefore, we can  
3 simply not assume that the jury didn't convict on that  
4 theory.

5 Here we can assume that the jury didn't convict  
6 on the theory that was insufficiently proved.

7 QUESTION: Well, certainly Turner did not  
8 overrule Yates.

9 MR. BRYSON: No, not at all. And I think they  
10 stand together. And in fact, I think Yates continues to  
11 be applied, and properly so, in cases in which there is a  
12 legal flaw, in which -- in the theories -- one of the  
13 theories that was presented to the jury in which there is  
14 some basis on which the jury's instructed, for example,  
15 that conduct that is not a crime is, in fact, a basis for  
16 criminal liability.

17 QUESTION: Well, can one say that there's a  
18 legal flaw where evidence is so insufficient that as a  
19 matter of law it shouldn't go to the jury?

20 MR. BRYSON: Well, that -- you can say, of  
21 course, that that is -- it is a legal error to submit a  
22 count on which there is insufficient evidence.

23 I would have two answers to the question,  
24 though, Your Honor. First, we think that is a legal error  
25 of an entirely different sort from a legal error of the

1 Yates sort, where what you're talking about is telling a  
2 jury this is a crime, and in fact, it isn't a crime.

3 Here what you are saying by submitting the case  
4 is there -- the jury may consider this evidence, and as we  
5 say, the -- where the evidence is insufficient, that is  
6 the jury's -- it is the jury's task to determine on which  
7 basis it wants to convict.

8 QUESTION: But it isn't the jury's task  
9 normally. If evidence is insufficient as a matter of law,  
10 then it's up to the judge to say so and not give it to the  
11 jury.

12 MR. BRYSON: Your Honor, that's correct at least  
13 to cases in which the judge is striking a whole count or a  
14 whole charge. This isn't that kind of case. And we  
15 submit -- and this is the second half of my answer to you  
16 -- is that this is not a case that comes within rule 29,  
17 which refers to granting motions of acquittal -- judgments  
18 for motions -- motion for judgment of acquittal with  
19 respect to any offense or offenses. This is a case in  
20 which some piece of the case, some piece of the offense is  
21 deemed insufficient.

22 QUESTION: How do you distinguish Cramer?

23 MR. BRYSON: Well, I think Cramer is a case in  
24 which what the Court is saying is there is, with respect  
25 to these alleged overt acts --

1 QUESTION: That was a piece of the case.

2 MR. BRYSON: Well, it was, Your Honor. But what  
3 the Court was saying was, the case as it went to the jury,  
4 and as it was decided by the court of appeals, was decided  
5 on a legally erroneous ground. And that is, the court of  
6 appeals assumed that an overt act was legally sufficient  
7 if it merely did something, as in a conspiracy context, to  
8 promote the treason.

9 What this Court held was no. Overt acts require  
10 much more by way of proof. That was a legal ground. The  
11 Court was saying as a matter of law, constitutional law,  
12 overt acts must actually show that aiding and comforting  
13 the enemy is going on.

14 QUESTION: Well, I asked Mr. Logan earlier  
15 whether he would extend his rule to overt acts, and he  
16 said oh, no. And yet listening to you makes it sound as  
17 though you would concede that certainly as to overt acts,  
18 if one was insufficient --

19 MR. BRYSON: Oh, no, Your Honor, no, in fact --

20 QUESTION: Wouldn't that be different?

21 MR. BRYSON: Not at all. I think the -- it's  
22 quite clear that in fact the mischief of the rule for  
23 which petitioner is requesting here is precisely that,  
24 that you would have to take every conspiracy charge and  
25 say was there any overt act that was not sufficiently

1 proved. And then the logic of this position would be to  
2 say, all right, if there was one overt act that was not  
3 sufficiently proved, the jury may have rested its verdict  
4 on that overt act. Therefore, we have to reverse.

5 In this case, for example, there were 10 overt  
6 acts. What if the evidence failed with respect to one of  
7 them? Wouldn't his argument compel reversal if you accept  
8 it. He says no, I didn't understand what the rationale of  
9 the distinction was, but I think when you get down to it,  
10 there is really no reason not to extend that rationale to  
11 the overt act setting. That's one of the principal  
12 reasons that we think would be extremely mischievous to  
13 adopt the position that petitioner is arguing for.

14 The same thing could be said, for example, the  
15 identity of co-conspirators. You could say, all right,  
16 there were 10 co-conspirators named in the indictment.  
17 The proof was sufficient as to nine, but insufficient as  
18 to one, but that one co-conspirator may have been the  
19 co-conspirator that the jury found the defendant to have  
20 conspired with. The jury may further have found that the  
21 defendant did not conspire with any of the others.  
22 Therefore, the verdict may have been premised on an  
23 insufficiently proved basis and we, therefore, have to  
24 reverse.

25 QUESTION: Is there anything to prevent the



1 Government, the prosecution from just loading up an  
2 indictment with all kinds of alleged objects of a  
3 conspiracy and overt acts, and just tossing everything in  
4 but the kitchen sink?

5 MR. BRYSON: Well, yes, Your Honor. We -- there  
6 are two things, I think. First of all, we do have an  
7 obligation, I think both an ethical obligation and a legal  
8 obligation to ensure that everything that goes into an  
9 indictment is established to probable cause -- at least to  
10 the degree of confidence of probable cause, which is the  
11 degree that the grand jury has to find.

12 The second ground is a practical matter. If you  
13 have a lot in the indictment that your proof is not going  
14 to establish, you give defense counsel a lot to shoot at.

15 And in fact, to some extent, that's what  
16 happened here because defense counsel made pretty good use  
17 of the fact that our proof had failed on the DEA object in  
18 order to say that well, all right, Diane Griffin is  
19 already half way out of the soup. It looks like the  
20 Government's case is already in trouble, why not go the  
21 other half.

22 QUESTION: Should the judge have given a  
23 clarifying instruction in your view?

24 MR. BRYSON: Your Honor, I think in this case it  
25 would not have been an error had she done so, but it was

1 not error for her not to do so. There's no -- I think  
2 there's no obligation --

3 QUESTION: Would it have been the better  
4 practice?

5 MR. BRYSON: In this case, I can't quarrel with  
6 the court of appeals that it would have made things easier  
7 to do it, except, and this is a big except, the problem is  
8 that if you instruct with respect to somebody who is one  
9 of three defendants in a count, as was the case here, then  
10 the suggestion is -- and if you say, well, with respect to  
11 this defendant, you can only find her guilty if you find  
12 the IRS object, the suggestion is you're making some kind  
13 of suggestion that the evidence insufficient with respect  
14 to the others with respect to both DEA and IRS. It is  
15 something which, if I were representing McNulty, for  
16 example, I would not want to hear the judge saying --  
17 specifically picking out Griffin and saying the evidence  
18 on Griffin will only support a conviction on one theory.

19 QUESTION: I take it that if we rule for the  
20 petitioner, it would necessitate increased use of special  
21 verdicts, special interrogatories.

22 MR. BRYSON: It would certainly requires some  
23 dramatic changes in the way cases are tried. I think  
24 that's a fair statement. Because of what I have just  
25 said, in this case, if we simply went to the jury in a

1 case in which there were 11 overt acts, in which there  
2 were 10 different paragraphs listing the manner and means  
3 by which this conspiracy was carried forward, in which  
4 there were two co-conspirators, and in which there were  
5 two purposes, we would have potentially 25 different  
6 sufficiency questions, not 1, with respect to that one  
7 count.

8 QUESTION: Can you tell me what are the reasons  
9 -- I've noticed that in some of our cases we comment  
10 somewhat negatively against the use of special  
11 interrogatories and special verdicts in criminal cases.  
12 Is the reason for that that it unduly constricts the  
13 jury's deliberations? Is that the profferer rationale?

14 MR. BRYSON: It think there are a variety of  
15 concerns. The Spock case, which is one of the leading  
16 cases on this, said that the problem is that it can be  
17 prejudicial to the defense because it leads the jury down  
18 the road to conviction.

19 QUESTION: Well, of course, if the defense asks  
20 for it, that argument's out of the --

21 MR. BRYSON: Well, it may be. The other  
22 concerns, I think, that have been raised are that you ask  
23 the jury to parse the case in ways that may be confusing,  
24 that may ask the jury a series of questions that can  
25 mislead the jury, rather than being helpful. It can be

1 useful, and I'm reluctant to say there should be any  
2 across-the-board prohibition because there are instances  
3 in which it could be useful.

4 But there are also instances in which it can  
5 just confuse. And I think in a case such as this one when  
6 you are having special verdicts with respect to one  
7 defendant on one purpose, it can give the jury a  
8 misleading impression as to a particular facet of the  
9 case.

10 QUESTION: And, I take it, it could also make it  
11 harder on the Government in some cases to prove its case?

12 MR. BRYSON: Well, it can -- in some cases I  
13 think it can actually make it easier. And sometimes we  
14 ask for special verdicts when, for example, we want to  
15 insure that if we think there may be a legal flaw in one  
16 of, let's say, the predicate acts in the Rico case. We  
17 want to insure that the jury marks off each of the  
18 predicate acts so that we still have plenty of predicate  
19 acts left.

20 So it can be easier -- it can actually be  
21 something that's easier for the Government rather than --

22 QUESTION: As a matter of tactics, though, don't  
23 the party -- don't parties with the burden of proof  
24 generally not want special interrogatories because they're  
25 easier to -- it makes it easier to upset a case on appeal?



1 And it also makes it easier to find some flaw in the  
2 jury's reasoning process.

3 MR. BRYSON: Well, that's right. The jury may  
4 make a strange mark on a special verdict form because they  
5 didn't understand how the form was to be filled out.  
6 there -- any number of things can happen in the context of  
7 a special verdict, and only one of them is good.

8 QUESTION: The party with the burden of proof  
9 wants the jury to come back with one word, really.

10 MR. BRYSON: That's right. That's right. I  
11 think generally so. I think I would put as a footnote, I  
12 would say there are instances in which we do want a little  
13 more than just one word, but it's not typically the case.

14 QUESTION: You don't want two words in a  
15 criminal case.

16 (Laughter.)

17 MR. BRYSON: That's exactly right.

18 QUESTION: Mr. Bryson, in a case in which there  
19 is not a concession as there was here -- I think it's set  
20 out on page 19 of the brief, but you read it a moment ago,  
21 the Government's concession that there was not sufficient  
22 evidence on the DEA issue. Absent that kind of  
23 concession, isn't the jury's most reasonable  
24 interpretation of the judge's act in sending an issue to  
25 it that there is at least evidence upon which it could

1 find for the Government?

2 MR. BRYSON: I don't think, Your Honor, that  
3 juries are so sophisticated typically that they understand  
4 that when they get an issue for their resolution, that it  
5 is somehow past a judge's rule 29 scrutiny. In fact,  
6 there are instructions which are designed specifically to  
7 rebut that suggestion.

8 QUESTION: They -- they're not given as a matter  
9 of course, are they? And in any case, there was no such  
10 instruction here.

11 MR. BRYSON: No, there wasn't. Typically what  
12 they're given -- where some defendants have been given a  
13 judgment of acquittal at the close of the evidence and are  
14 missing, where the judge will say something to the effect  
15 that it is none of your business to inquire why X, Y, and  
16 X are not here, because the judge does not want to let the  
17 jury thing that X, Y, and Z are not here because the judge  
18 has decided that the evidence is insufficient to them, but  
19 aha, that the evidence is sufficient as to all the rest.

20 So the assumption, I think, of our system, is  
21 that the jury does not take the fact that they get a case  
22 as an indication from the court that there is sufficient  
23 evidence to take the case to the jury. And there  
24 certainly was no suggestion to that effect here.

25 QUESTION: Any other assumption would run afoul

1 of the presumption of regularity, wouldn't it?

2 MR. BRYSON: I think so, yes.

3 If there are no further questions, thank you.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr Bryson.

5 The case is submitted.

6 (Whereupon, at 1:54 p.m., the case in the  
7 above-entitled matter was submitted.)

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## CERTIFICATION

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

90-6352 - DIANE GRIFFIN, Petitioner v. UNITED STATES

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*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Michael Sander

(REPORTER)



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