OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, Petitioner v.

GUY W. OLANO, JR. AND RAYMOND M. GRAY

CASE NO: 91-1306

PLACE: Washington, D.C.

DATE: Wednesday, December 9, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

- X

UNITED STATES, :

Petitioner :

v. : No. 91-1306

GUY W. OLANO, JR. AND RAYMOND :

M. GRAY :

- X

Washington, D.C.

Wednesday, December 9, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:59 a.m.

APPEARANCES:

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

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:59 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 91-1306, United States v. Guy W. Olano.

General Starr.

ORAL ARGUMENT OF KENNETH W. STARR

ON BEHALF OF THE PETITIONER

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

This case brings before the Court a single question, whether allowing alternate jurors to be present during jury deliberations in violation of the Federal Rules of Criminal Procedure constitutes automatic reversible error under the plain error rule.

The background of the case and the pertinent events at trial we think are important and can be very briefly described. The case arises out of an elaborate financial fraud scheme culminating in a 3-month trial in the Western District of Washington before now Chief Judge Barbara Rothstein. Toward the conclusion of this trial the district judge suggested to the prosecutor and the defense council that two alternate jurors, who were to be designed as such at the close of trial, be allowed to remain with the jury.

QUESTION: Isn't that rather an unusual thing

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for a judge or a chief judge to do?

GEN. STARR: I don't think so, Justice Blackmun, although we concede, Justice Blackmun, that this was a violation of the Federal rules. And the reason that I suggest that it's not that unusual, at least where it's consented to, is based upon my understanding that the practice does in fact prevail in certain courts in the United States. It certainly is fairly common in the state court systems, it is not at all unusual.

And in this particular case what Judge Rothstein seemed to be pointing to was the fact that this was an extraordinarily long trial, this had been a very dutiful jury, it had been very attentive, permitted to take notes, and it was obvious to all concerned that this jury was a jury that had focus, not falling asleep at the switch, and the like. And so --

QUESTION: General Starr, can I just interrupt you? I was startled when you said this was a fairly normal practice. I had a fair amount of trial work when I was in practice and it startled me that a judge did it, because they always excused the alternates in my limited experience. Can you, do you have some support for your saying that it's done rather broadly?

GEN. STARR: I don't exaggerate the point. If I said -- perhaps I should say not uncommon.

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QUESTION: Talking about the Federal system only.

GEN. STARR: Yes, Justice Stevens, it is my understanding that judges, for example in the Northern District of Illinois have engaged in this practice and do engage in the practice, and that judges in the Northern District of California engage in the practice. Judge Rothstein in her comments said many judges do this where there is consent, and I think that is the key. Is there consent. Because under law of the Ninth Circuit if there is a stipulation, then it's all right. No harm, no foul, which is ultimately what I think this case is about.

QUESTION: But then, but you have conceded that it's error?

GEN. STARR: Absolutely.

QUESTION: And that the practice is improper and should be stopped.

GEN. STARR: It should be stopped, and I think the way to do that, Justice Stevens, is through the vehicle, I think the didactic quality of an opinion issuing from this Court will be helpful. Obviously people are now focusing on it. Recall in our adversary system the difficulty when at the end of a 3-month trial, and you have tried these kinds of cases, it is extremely difficult, everyone is tired, and the prosecutor said on

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the record at about this time, I had no sleep last night. They are moving along very quickly and no one called 24(c) to the judge's attention, and she was obviously laboring under a misapprehension. Several misapprehensions, as a matter of fact, about --

QUESTION: But the problem is very easily solved. They could equally have stipulated if some juror gets sick or something we will have an 11-person verdict.

GEN. STARR: That is correct. That's exactly what the rules provide.

QUESTION: So really, if you had a clear rule we shouldn't have this problem in the future. And therefore nothing is at stake but this particular trial, is that right?

GEN. STARR: Oh, I fully disagree with that because if this is plain error, if this is noted as plain error then this Court will have affected a transformation of plain error law. May I turn to that?

What this Court said is that rule 52(b) simply codified existing law. When we look to what existing law was which was being qualified we were talking about the Wiborg case, the earliest case noted by the advisory committee in an opinion of this Court where there was none, zero evidence of guilt on the part of persons who had been convicted along with the ship captain. The ship

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captain was appropriately convicted of this crime, but several crew persons were also convicted, and this Court said no evidence whatsoever.

That's why this Court in Frady and in Young has spoken very clearly about egregious errors that would result in a miscarriage of justice. Justice Stevens, I think it would be quite a new day and an unfortunate new day if we decided that the plain error rule just means well, it's an obvious error and we're going to send the message to the lower courts. That is not what plain error has been meant to do. That's why we have the Federal judicial center, that's why we have educational programs for judges, that's why we have a responsibility at the Justice Department to educate our prosecutors and to make sure --

QUESTION: But then the message, the educating message you want to convey is that although it violates the rule and it's plain in that sense, there's no sanction if you do it.

GEN. STARR: There is no sanction in the sense of a reversal of a conviction --

QUESTION: Right.

GEN. STARR: -- because of this, yes, Justice Stevens.

QUESTION: But what other sanction would there

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be?

GEN. STARR: I think --

QUESTION: Don't pay the jurors?

GEN. STARR: I think there need be no sanction at all other than the pedagogical didactic sanction of judges now being informed across the country there is rule 24(c) and it should be abided by. And there is no reason to believe that judges, Justice Stevens, will not abide by the rules if it's brought to their attention.

QUESTION: You're willing to --

QUESTION: I'm sorry, go ahead.

QUESTION: You're willing to accept the sanction of reversal if there had been an objection.

GEN. STARR: Oh, if there had been an objection then we would have quite a different matter. Forgive me, yes. The difficulty here --

QUESTION: Then even without an objection might there not be actual harm in some situations?

GEN. STARR: There might, in rule --

QUESTION: So you're always rolling the dice when you violate it.

GEN. STARR: I am accepting Justice Stevens' question the way it was presented, but let me say, Justice Stevens, that if this is a matter that is suggested to be something went wrong, and that happens. This Court is

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familiar and has had cases involving something going wrong. Rule 606 of the Federal Rules of Evidence provides for such a procedure.

QUESTION: But that would always require an inquiry into what happened in the deliberations of the jury, wouldn't it?

GEN. STARR: I don't think it would require --

QUESTION: Which we just generally don't like.

GEN. STARR: It is delicate, but I think that the court could conduct, and courts do this, conduct a voir dire and not seek to intrude into the deliberative process, but simply to make a determination whether there was a violation and the nature of the violation. Not the impact that the violation may have had, let's start interviewing jurors and say what did that statement mean to you when the alternates stayed there. But in --

QUESTION: Well, General Starr, if it appeared afterwards that the alternate juror had violated the instruction and had actively participated in the jury deliberations, would your answer possibly change? Could it rise to the level of a fundamental unfairness?

GEN. STARR: It could rise to -- I think we would take it through a different -- it might, but I think what we would take it through, Justice O'Connor, is a harmless error analysis. We would then be in 52(a)

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territory. We would be applying the Kotteakos standard of substantial and injurious effect on the verdict. It might very well be that --

QUESTION: Plain error went far beyond just, say, substantial effect.

GEN. STARR: I'm suggesting plain error goes beyond that.

QUESTION: Yes. Exactly.

GEN. STARR: Exactly, Justice White. Plain error is miscarriage of justice.

QUESTION: That's not what the rule says.

GEN. STARR: I beg your pardon?

QUESTION: That's not what the rule says. It says defects affecting substantial rights.

GEN. STARR: It's very interesting, Justice Stevens.

QUESTION: Plain error or.

GEN. STARR: Plain error or defects affecting substantial rights is the wording of the rule. I think you could engage --

QUESTION: You don't think affecting substantial rights modifies the word error?

GEN. STARR: I think it does. I think it does. But this Court has said, and I think -- this is a rule addressed to trial lawyers and trial judges. It is

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against the culture of understanding of what the rules are. And what the rules were, what the plain error rule was meant was not to affect a transformation of the adversary system saying don't worry about the contemporaneous objection requirement, don't worry if the judge seems to be falling into error. Go ahead and enjoy the windfall of a reversal of a conviction that took 3 months.

And this was a very dutiful jury, noted by Judge Rothstein in her dismissal. In her expressing thanks to this jury she said you have been remarkable for your patience, your attentitiveness, and what I think the real miscarriage of justice is here is throwing out the verdict for this kind of violation. That's the miscarriage of justice, to tell Shirley Kinsella --

QUESTION: Do you think this violation affects substantial rights? Do you think having a couple of extra people in the jury room affects substantial rights?

GEN. STARR: I --

QUESTION: Yes or no?

GEN. STARR: No, if they are alternate jurors who are under the instruction --

QUESTION: Well, what if you found out the marshall was sitting in there for 20 minutes?

GEN. STARR: Different case because he is not

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under oath.

QUESTION: What if -- oh, that makes a difference?

GEN. STARR: Justice Stevens, I believe it does. And the Seventh Circuit so found in Johnson against Duckworth. It found that the alternates in that Indiana case, where it is a common practice, were in fact under oath --

QUESTION: How many times are you aware of this practice being followed?

GEN. STARR: I have not conducted a survey, and I am not aware of any survey having been done. I have had --

QUESTION: But you are telling us it's a common practice.

GEN. STARR: I'm not saying it's a common practice --

QUESTION: You just said it.

GEN. STARR: I thought I said it is a not uncommon practice and it does occur in some jurisdictions including, I am informed, in the Northern District of Illinois. And I think if the Court inquires of that --

QUESTION: But you don't know how often?

GEN. STARR: -- it will find as so.

QUESTION: You don't know how often?

GEN. STARR: I do not. But I know that some judges have that practice, and it may be that they brought the practice with them from state court. They should not do that.

QUESTION: Did you say these alternate jurors were sworn?

GEN. STARR: Yes. They were under oath.

QUESTION: Are they sworn just before they retire?

GEN. STARR: No, they are under oath all the way through.

QUESTION: They are sworn at the outset of the case?

GEN. STARR: Yes. There were 14 fungible jurors. They didn't know, Shirley Kinsella did not know she was --

QUESTION: They don't even know who they are, isn't that right?

GEN. STARR: That's exactly right.

QUESTION: I understand that. Let me ask you this. Suppose that during the deliberations one of the regular jurors said now, I forgot, I don't think there was any testimony on this subject, and one of the alternates says oh, yes, there was. John Smith testified to that very point. And the other jurors said oh, you're right.

Violation?

GEN. STARR: Certainly there is a violation of the judge's instruction and thus it makes --

QUESTION: Is it prejudicial?

GEN. STARR: Then we take it through a harmless error analysis, did that substantially affect the verdict. And in that hypothetical I think it's harmless error. It is error, but remember there's no suggestion here -- and I think this is critical, Justice Kennedy, these parties had the opportunity, this jury was brought in, they acquitted some defendants entirely, the exonerated individuals who were convicted of certain counts.

The defendants said, and they were very ably represented by very effective counsel, and the counsel were asked do you want to poll the jury. Yes. The jury was polled. Not a peep, nothing, not a word about gee, perhaps Shirley Kinsella was trying to drive this verdict. None whatsoever. There is no indication at all that the procedure, that the rules of evidence have even occurred to defense counsel. And you know why? It was no big deal. It was nothing major. It was one of myriad activities, claims, issues, questions, that had to be focused on.

As everyone who has tried a case knows, it is very difficult toward the close of trial. You are racing

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to the end, you are making very difficult calls and you are trying to make them quickly. And yes, I would say it is a responsibility of the prosecutor to bring these rules to the attention. Why didn't the prosecutor do it? Prosecutor wasn't focusing on it. Do you know why the prosecutor wasn't focusing on it? I'm not speaking outside the record because we know what happened next. He had his closing argument next. We know what it's like to do a closing argument. It concentrates the mind. This was no big deal, and Judge Rothstein said if any of you have a problem I won't do it. And no one had a problem.

QUESTION: General Starr, does it make any difference if one of the defendants was absent from the courtroom when this occurred?

GEN. STARR: None whatsoever. I think that this Court's decisions in a variety of cases, including Taylor against Illinois, says that the vast majority of decisions are entrusted in the trial process to trial counsel, and counsel speaks for the defendant in any number of terribly important issues. And to suggest that this rises to the level of entering a guilty plea or waiving a jury trial right or waiving a public trial right is simply not, it seems to me is quite far fetched. As Justice Marshall said, it's too extravagant seriously to be maintained. This is not that kind of error.

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QUESTION: I thought the rule said that, after all, this case is about whether an error may be noticed without an objection.

GEN. STARR: That's correct.

QUESTION: And I thought the rule was plain that either plain error or an error that affects substantial rights can be noticed without, despite the absence of an objection. Isn't that what the rule says?

GEN. STARR: Not under this Court's interpretations.

QUESTION: Well, isn't that what the rule says?

GEN. STARR: Well, it depends on how you punctuate -- I disagree, Justice White. I disagree.

QUESTION: Let's just read it. Just read the rule, the plain error rule.

GEN. STARR: Yes. Plain errors or defects, this is set forth in our brief at page 2, plain errors or defects affecting substantial rights may be noticed, notice the word may which this Court has emphasized, although they were not brought to the attention of the court. We believe this Court has not authoritatively --

QUESTION: So there are some, at least on occasion there are some defects or errors that may be noticed even though they, all they do is affect substantial rights.

GEN. STARR: Yes.

QUESTION: And therefore are not harmless.

GEN. STARR: That's correct as long as -- but this is what is not in the rule. Justice Stevens make a valid point. This is not in the language of the rule but it's in the language of this Court's cases in Frady and Young, and it's in the background of the rule which is we have to be talking about a miscarriage of justice. And when we look to what that means, what's a miscarriage of justice, that a right --

QUESTION: You mean any defect that affects substantial rights also has to be a miscarriage of justice under this part of the rule?

GEN. STARR: Correct. Because a defect that affects substantial right is a non-harmless error.

QUESTION: You're relying on a phrase in a footnote, if I remember correctly.

GEN. STARR: I beg your pardon?

QUESTION: You're relying on a phrase in a footnote in Frady.

GEN. STARR: Oh, but that -- and I think that suggests that the matter was --

QUESTION: That's your principal authority.

GEN. STARR: -- no great concern. Footnote 14 was --

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QUESTION: But that is your principal authority?

GEN. STARR: Also Frady, which --

QUESTION: I said Frady, the footnote in Frady.

GEN. STARR: Well, but we also have the text in both Frady and Young speaks of exceptional circumstances and egregious errors. And it seems to me --

QUESTION: Such as those that affect substantial rights like the rule says?

GEN. STARR: Justice White, I'm not trying to be argumentative. What I'm trying to suggest is I accept your two points, that it must be plain in the sense of obvious manifest that jumps out at you. I am willing to concede that that's the case here. Affecting substantial rights, that's not presented here because we don't think that this affects substantial rights in light of what this --

QUESTION: Suppose it did. Suppose it did.

GEN. STARR: Then it may be harmful error if it was objected to.

QUESTION: And noticeable even though there was no objection.

GEN. STARR: That's where I part company, Justice White.

QUESTION: I know you do. I know you do.

GEN. STARR: And the reason I part company is

because of what trial practice meant to the drafters of rule 52(b). Plain error was meant to save the innocent who otherwise would have been convicted, or, as the Seventh Circuit has also noted, to suggest that if there is something plain and just wrong, illegally wrong about a sentence, you may notice it. Notice the discretion, that's why this Court's cases count.

QUESTION: Well, excuse me, why doesn't affecting substantial rights carry that water? I mean, why can't you find all of that, all of that burden resting upon the phrase affecting substantial rights, and say look it, when you have an extra juror who has been sworn, you know, up until this time hadn't even know that she was the alternate, it's a violation of the rule but there is no substantial right affected.

GEN. STARR: Oh, I think I win on the facts of this case. I am very concerned, however -- under that analysis I think I should win on the facts of this case. I am concerned, however, about the development of plain error doctrine. And to suggest that any error satisfies 52(b) when it is plain and affects substantial rights means anything that is not in (a) is automatically in the category of (b) and may be noticeable without the element that I think is very important of whether there was a miscarriage of justice, whether some egregious wrong has

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occurred or --

QUESTION: Maybe the word may would be of some use there.

GEN. STARR: Exactly, Mr. Chief Justice. The may use suggests discretion, and this Court has guided that discretion in Frady and in Young. And when we look to the Atkinson case, one of the early cases, what that was getting at as well was concerns about the public reputation. Is the public reputation of the judiciary at stake, is it at risk by virtue of the procedure here.

Let's say a Toomey v. Ohio kind of violation, interested financially, interested judge, but no one notices it. But on appeal in this enlightened appellate system a court of appeals notices that and says this should not be able to stand. We have no doubt about this person's guilt, but we will not allow this judgment to stand because of the integrity and reputation of this judiciary.

This is not that kind of error. This is not the kind of error that should give individuals pause, any lack of confidence in the verdict or any lack of confidence in our judicial system.

QUESTION: Would you think that affecting substantial rights should have the same meaning in the two parts of the rule, that it, an error is harmless unless it

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affects fundamental rights or is a miscarriage of justice? Is that what it means?

GEN. STARR: I don't think that 52(a) has been interpreted quite so narrowly --

QUESTION: Well, it's the same words.

GEN. STARR: Well, the Court has placed emphasis on these different formulations, and the idea of fundamental rights may in fact be a bit broader an approach than substantial rights. But I think, what do we get at, let us not engage just in name, in word games.

What this rule is about is whether something went so badly awry that our entire adversary system should suffer quite a severe blow, that we should in fact be willing to reverse a conviction, reverse a verdict of a jury properly instructed which did its duty, because of this kind of error not brought to the trial judge's attention. And that's why the words of 52(b) should not be interpreted rawly without an appreciation of the backdrop of its culture, the value that it was getting at, and it was getting at fundamental injustices.

I'd like to reserve --

QUESTION: Mr. Starr, do you have injustice cases other than Frady and Young? The interesting thing is the Frady court said in the footnote, if the errors are obvious or if they otherwise seriously affect the

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fairness, integrity, or public reputation of judicial proceedings. But they first said, if they are obvious was the first category and this was the second. But you think the obviousness was just sort of --

GEN. STARR: No, I think that is necessary, but I don't think it was meant to --

QUESTION: It's not and. Obvious or.

GEN. STARR: I don't -- but if you look at the text and the entirety of what Frady says and then what Young says, and Young of course said there is no -- I think one of the dangers in the dialogue that I am detecting is that there has been a suggestion that a per se approach to plain error is appropriate, but that's --

QUESTION: No, it's clear there is no per se approach because the word may is in the statute.

GEN. STARR: Exactly.

QUESTION: But that's one of the things you weigh when you evaluate the significance of an error that affects substantial rights.

GEN. STARR: Exactly. And what Frady and Young also said is are these egregious circumstances, the kind like in Wiborg and our ship's captains case. I think that tells us what the drafters had in mind when they used this language. Plain error didn't just mean oh, gee, that was an obvious one now that we have focused on it. Plain

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error meant, if you will, as Justice Frankfurter might have said, the conscience of this Court has been shocked because these poor shipmates should not be languishing in jail because there was no evidence of their guilt. That was the culture.

QUESTION: Shock the conscience is now the test of plain error, the test for due process violations?

GEN. STARR: In terms of a miscarriage of justice I think that what this Court was wrestling with, Justice Stevens, in Wiborg was that kind of error, not a technical error that was no big deal in the course of a 3-month trial.

QUESTION: But that did affect substantial rights.

GEN. STARR: I'm not willing to concede that.

QUESTION: General Starr, would we analyze this differently if there had been a consent to the alternate jurors?

GEN. STARR: Well, I believe that there was consent, Justice Thomas, and it does seem to me that that does in fact change quite considerably, because it is not just unobjected to but the parties have gone beyond that and said we agree to this procedure. Now, the Court has or the courts have said that certain plain errors may be noted even though there may have been procedure agreed to,

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but we do think that this falls into the category, as we argue at some length in our reply brief, into invited error.

But particularly where the judge is saying this is no big deal but I do want you to at least consider this as an accommodation to the jurors, and then no one, of all those defense lawyers, there were two prosecutors but there were a lot of defense lawyers, no one stood up and said 24(c), judge. And Judge Rothstein obviously wasn't focusing on 24(c). She came out of the culture that many judges do this.

And so it seems to me that where there is consent here there certainly is no miscarriage of justice, as this Court has indicated plain error is all about.

I'll reserve the balance of my time if I may.

QUESTION: Very well, General Starr.

Mr. Phillips, we'll hear from you.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE RESPONDENTS

MR. PHILLIPS: Thank you, Mr. Chief Justice, and may it please the Court:

I'd like to begin by refocusing the attention away from where General Starr's analysis initiates, which is to try to take the case away from the specific language of rule 52 and deal with the question in terms of labels,

whether this is a miscarriage of justice or not. I think it is more appropriate to analyze each of the words in rule 52, and if you do that what you conclude at the end of the process is that this is an error that warrants reversal in this case.

General Starr and I are in complete agreement at least on one point. The district court unquestionably erred in both proposing and in allowing the alternates to attend the jury's deliberations in this case. Well, 24(c) could not be stated more plainly. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

I do not know what Judge Starr believes would be added to the mix by this Court to announce that that unequivocal rule means precisely what it says in terms of somehow enforcing this particular mandate, because I don't know how this mandate could be stated any more plainly than it is in that rule.

The question then is does the error in this case justify reversal. And in order to determine that you have to look at what the plain error rule requires. It's interesting, because the plain error rule requires the same thing --

QUESTION: That's because, Mr. Phillips, it was, this procedure was consented to.

MR. PHILLIPS: As to Mr. Olano, counsel did not object. With respect to Mr. Gray counsel did interpose an objection at one point.

QUESTION: To me that isn't all that clear that that was an objection. I mean, you can read that a couple of different ways.

MR. PHILLIPS: You could read that a couple of different ways, Mr. Chief Justice, but you know it's interesting, the Government in the first two submissions to this Court read it the same way we read it, which was as an objection. If you read the cert petition of the Government and its opening brief, in both instances they describe that as an objection to the proposal of the district court.

QUESTION: At that time it was an objection.

MR. PHILLIPS: At that time it was an objection, Your Honor.

QUESTION: But eventually counsel subsided.

MR. PHILLIPS: Eventually counsel subsided. And I think that the importance of that goes more into the mix of the discretion as to whether or not to notice this error, and I'd like to address that at that point if that's permissible, Justice White.

QUESTION: Maybe it goes to all this confusion at the end of a long trial that we heard so much about.

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MR. PHILLIPS: I'm sorry, Justice Stevens?

QUESTION: Maybe it goes to all this confusion at the end of a long trial when everybody is harassed and trying to get finished up that we heard so much about.

MR. PHILLIPS: It may well go to that, Your Honor.

QUESTION: All errors can be forgiven under that context.

MR. PHILLIPS: Under that standard, that is true. All errors I think could have been forgiven.

It seems clear to me under the language of the rules that the harmless error and the plain error requirements are the same. The question is did the error affect substantial rights. I almost heard General Starr tell us today that this was a substantial right, but then I think he sort of backed off of that. I think it's unquestionably clear that this is a substantial right.

QUESTION: I understood him to argue that even if this was a substantial error under 152(b) it wasn't, it was error to notice it --

MR. PHILLIPS: That's correct. He did claim that.

QUESTION: -- unless it also was a much more serious error than just affecting substantial rights.

MR. PHILLIPS: That's correct, Your Honor. He

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challenged that. But the question then is what's the appropriate legal analysis to determine whether or not it is appropriate to notice the error. And there I think it's clear the court of appeals here exercised its discretion to notice this error. The question is may it notice the error. That's the standard.

QUESTION: But he's --

MR. PHILLIPS: The court of appeals exercised its discretion and noticed this one.

QUESTION: I understand that he, he said that it was error to notice it even though it might affect substantial rights. That isn't enough to even allow noticing. I thought that was his argument.

MR. PHILLIPS: Well, I just wanted --

QUESTION: And you certainly disagree with him.

MR. PHILLIPS: I certainly disagree with him, but I do want to kind of take these in sort of seriatim stages to determine in the first instance do we have a substantial right. If we agree upon that, then we can evaluate whether it made sense to notice the particular error in this particular case, Justice White.

QUESTION: Why don't you go seriatim when you're arguing before nine people?

(Laughter.)

MR. PHILLIPS: I have noticed that over time,

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Mr. Chief Justice.

QUESTION: You notice our error every time?

MR. PHILLIPS: No comment.

(Laughter.)

MR. PHILLIPS: With respect to the question of whether the error here is substantial, it seems to me you need go and look no further than to the advisory committee notes which specifically analyzed what the district judge did here in allowing the jurors to go, or excuse me, the alternates to go back into the jury room and expressly condemned that practice. Why? Because it intrudes into the sanctity of the deliberations of the jury. And that's an important value, and this Court has recognized that as an important value in a whole host of cases with very expansive language. It requires a very significant interest of the state to justify intruding into the jury's deliberations.

And therefore I think it very difficult to say that this is an insubstantial error, and I think particularly since Congress approved this rule against the backdrop of an advisory committee note that regarded this as a very significant matter and specifically rejected this particular approach. It seems to me quite clear that it has to be regarded as a substantial error.

So then the question is should the error have

been noticed by the court of appeals. And it seems to me in this context there are good reasons for why the court of appeals noticed the particular error here and no good reasons on the other side of the equation with respect to the Government's position as to why you should ignore this particular problem.

First, it's important to recognize there is no governmental interest served by this procedure. No value is served by it. The problem of a mistrial which might otherwise exist is taken care of completely by rule 23. The desire to appease or to please the alternate jurors was a consideration both in 1942 and 1983, and was rejected both times by the advisory committee, and that rejection was approved by Congress. Thus there is no countervailing Government interest that justifies what the district judge did here.

Second, what the district judge has done here is to invade a structural element of the trial. This is not mere trial error. This is the jury we're talking about and how it deliberates. This is taking an outside force that has no reason to be there and allowing it to alter the mix within the jury's deliberations.

QUESTION: Well, Mr. Phillips, what if one of the jurors had not been properly sworn and that was never objected to. Would you say that was a structural error

that was kind of reversible per se?

MR. PHILLIPS: I wouldn't necessarily say that it was reversible per se. What I would say is that you have to examine all the circumstances of the case in order to determine whether there is reason to believe that it may have made some kind of a difference. I mean, one of the considerations in this case is that this is a jury that didn't get it right. We have 15 counts in which my clients were found guilty. Five of those counts were dismissed by the court of appeals because there wasn't a shred of evidence in support of those verdicts. In a situation like that I would be far more inclined to find error than I might be in a situation where I was absolutely convinced that the jury had performed its job absolutely perfectly.

And so I don't think you can have a per se rule, and we don't urge a per se rule here. What we say is that if you look at the court of appeals' decision and its decision to notice this particular error, that wasn't an abuse of discretion.

One of the points that Justice Stevens made earlier about how commonplace is this practice, I honestly don't know how commonplace this practice is. I've never seen it before this particular case, but the judge does say that she knows judges who have undertaken this

practice. I think it's important to make two observations about that.

First, the ABA's standards on criminal justice categorically state that no jurisdiction follows this procedure. It is condemned in all jurisdictions as a matter of the law. Nobody has said this is the appropriate way to proceed with regard to jury deliberations.

But the second point about it my assumption is that the judge in this case was probably considering what other judges in the Ninth Circuit do, and if that's the case then it seems to me perfectly legitimate for the Ninth Circuit to have adopted a rule that said this is enough. We don't want this procedure. It has no legitimate justification, it creates a great potential for harm, and therefore we want it stopped.

QUESTION: Well you, surely the Ninth Circuit could stop it by simply saying that we don't want anybody to do it in this circuit any more without reversing a judgment that took 3 months to get tried.

MR. PHILLIPS: I don't know how you could say it any more plainly than the Federal Rules of Criminal Procedure say it. They say dismiss the alternate, discharge the alternate. There is no ambiguity in those rules. And if the district courts have undertaken this

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practice in the face of a very specific and clear rule, then it seems to me that adding the weight of a court of appeals opinion which requires you to go looking into the digest is not going to advance that cause. If you want to send a message to the district courts you have to send it in one way, and that's by requiring a reversal in a particular instance.

And I think the district, excuse me, the court of appeals correctly chose this vehicle in which to reverse because these convictions look seriously flawed.

QUESTION: Well, Mr. Phillips, are we going to sustain that or not depending on an abuse of discretion standard?

MR. PHILLIPS: I would urge this Court to follow an abuse of discretion standard. I see no reason why this Court would reweigh and reevaluate the decision of the court of appeals to exercise its discretion to notice the particular error in a particular case.

QUESTION: So plain -- but you accept as a general rule that all plain error questions are reviewable simply on an abuse standard?

MR. PHILLIPS: In the -- yes. I think that would be an appropriate -- well, no, not all plain errors. It depends if you're talking about a plain error that affects substantial rights. That you have to have

satisfied. Then it seems to me you move to the next stage of whether you may notice those --

QUESTION: So it's the point of may that gets --

MR. PHILLIPS: Yes.

QUESTION: Did the court of appeals here say that it was exercising discretion?

MR. PHILLIPS: I'm sorry.

QUESTION: Did the court of appeals here say that it was exercising discretion or does this opinion indicate that dismissal is mandatory?

MR. PHILLIPS: It was analyzing the full range of considerations, including the weight attached to the advisory committee's condemnation of this particular practice and the fact, against the background of course of --

QUESTION: Is it a fair reading of the opinion to say that the court of appeals thought that it was exercising a discretion in this particular case?

MR. PHILLIPS: I don't believe the Ninth Circuit says specifically that it was exercising discretion in this particular case, although again I think it's inherent in any analysis of the plain error rule which says that you may notice. Obviously you have to, it's not enough simply to have a substantial right and it's not enough simply to have plain error, and the court of appeals

didn't say that those were enough. What it said was --

QUESTION: Well, it would be rather difficult for us to sustain a judgment on the basis of a discretion that wasn't exercised.

MR. PHILLIPS: Well, Justice Kennedy, this is not a case where you are reviewing a judgment or a decision by an administrative agency where you would focus specifically on the record before the agency and the grounds asserted by it. Routinely appellate courts review district court decisions and lower, other lower courts decisions involving exercises of discretion, and do so on appeal. I'm sorry.

QUESTION: Well, suppose the court of appeals had said we have no choice in this matter but to reverse the conviction. Then would we have to send it back?

MR. PHILLIPS: Then it seems to me it would be appropriate to remand it to the court of appeals for the exercise of discretion. But the court of appeals clearly did not say that, and the way I would read the court of appeals' analysis in light of the may notice language of rule 24 is that it obviously was exercising its discretion to send a message. I mean, it has to be an exercise of some discretion otherwise you don't, the notion of whether you will notice it doesn't come into play.

QUESTION: Do you know if there are cases in the

court of appeals where the court of appeals say that they have discretion under this rule?

MR. PHILLIPS: Under rule 52?

QUESTION: Yes.

MR. PHILLIPS: I don't know of any frankly right off the top of my head in terms of rule 52 itself, but again it seems to me it's plain from the precise language of the rule that they have to, they have to exercise some discretion. It's not a per se rule. The Government was quite right in condemning the notion of a per se reversible rule, just as this Court was in Young in condemning the notion of per se analyses as appropriate under the rule 52(b).

QUESTION: Did the Ninth Circuit's opinion refer in terms to rule 52?

MR. PHILLIPS: Off the top of my head -- I mean, I'm assuming that it must have. Yes, Your Honor, it had to have analyzed rule 52 because the whole question was whether there was plain error here because it hadn't been objected to.

QUESTION: Well, did it, did the opinion really talk in terms of plain error? I mean, I kind of read it saying there has been a violation of rule 24(c). This is inherently prejudicial, there is no consent, therefore it is reversed.

MR. PHILLIPS: That may well be the precise, I mean that may be a distillation of the court of appeals' opinion, but again --

QUESTION: Well, that, I think that's rather important because if the court of appeals doesn't refer to rule 52 or even if it doesn't refer to the may language in rule 52, I think it's hard to say they're exercising their discretion.

MR. PHILLIPS: Well, there is at least language in the court of appeals' analysis that says that it's undertaking to analyze this in terms, I gather, of rule 52. So they recognize that it was a plain error in this case and that it had to consider that or take that into account. You know, that's, I mean that's the problem with the analysis.

But again, I don't think that it's appropriate for the Court to parse out the precise language that the Ninth Circuit employs if it is quite plain that under a reasonable evaluation of all the conditions of rule 24, or excuse me, of rule 52(b) they are satisfied, and this error ought to be noticed under those circumstances.

QUESTION: Well, but if we're talking about discretion in the first place can we say as, can we say that we would -- are you saying we should have reversed a court of appeals which affirmed this conviction after

going through the same analysis and saying we choose not to notice it?

MR. PHILLIPS: Well, there is no question that there would have to be an independent analysis of the considerations that go into it, which is what I was trying to do here, is to say what supports the decision of the court of appeals to notice this error and then what would weigh on the other side, and is there such an abuse in this context that it would justify saying the court of appeals could not have noticed this error under these circumstances.

QUESTION: What if the court of appeals didn't know that it had any discretion? What if it felt that it was simply obligated once it found plain error to reverse?

MR. PHILLIPS: I think that's the same question Justice Kennedy asked, and I hope I'll be consistent, but I think the answer to that is if they say we're not exercising discretion because we believe we don't have any, then it would be appropriate for this Court to remand for the court to exercise its discretion.

QUESTION: But that's really not what they said. They said they thought this error, this kind of error was inherently prejudicial.

MR. PHILLIPS: Yes, that's correct.

QUESTION: And one reason was that you can't

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always tell what happens case-by-case, so they adopt really a per se rule for this kind of error.

MR. PHILLIPS: For this kind, but I think that --

QUESTION: But that is, one could argue that's an exercise of discretion for a class of errors.

MR. PHILLIPS: Yes, I think that is an exercise of discretion for the kind of structural errors that I was trying to identify a minute ago, that there are two different kinds of errors that this Court has recognized, some of which it is unwilling to notice, those are trial errors where it can evaluate the affect of the error on the outcome of the case, and others are structural errors where the Court has been much more reluctant to simply shunt those aside and say that they don't count.

QUESTION: Well, but for that, then what you were talking about earlier, the inconsistency of the verdict, the fact that five defendants were just set free because there was no evidence, that's all irrelevant.

MR. PHILLIPS: It's not irrelevant. I think it --

QUESTION: Well, for that theory it is.

MR. PHILLIPS: Oh, sure, on that theory. But the point is -- and that's one theory for why you ought to affirm the court of appeals, the one I just identified

about the structural nature of the error. But you can independently affirm the court of appeals because there are lots of good reasons. I mean, this was a flawed conviction and therefore there is a very real serious, a very real risk that prejudice arose in this context as a consequence of the violation that was found in this case.

Just, you know, in addition to that you could conclude that the court of appeals properly tried to stop this practice throughout the Ninth Circuit. In addition to that it seems to me you could reasonably conclude that the court of appeals would say that we think that any deliberate, even if in some sense inadvertent but nevertheless clear disregard of a Federal Rule of Criminal Procedure, which the judge entertained in this case, does cast out on the public confidence and reputation of the court in a way that this Court has recognized is appropriate in order to find that there has been plain error.

I think my basic point here is that there are substantial grounds that fully support the court of appeals' decision to notice the error here, and either on an independent assessment of that issue or on an abuse of discretion standard I think it would be fair to say this error should have been noticed.

Let me just take a few minutes to discuss what

does the Government offer on the other side of the may notice equation. One, it claims that this was a 3-month trial and begrudges the fact that it would be required to retry these particular defendants. That's grossly overstated. Remember, these were seven criminal defendants initially. Five of them have been completely exonerated. Of the 15 counts for the last two, fully one-third of those counts have all been set aside for having no evidence.

The 3-month trial in this case obviously is not attributable just to the claims that are now before this Court. The retrial in this case would be significantly shorter, I submit, than the original one, assuming the Government decides to pursue the prosecution. And it cannot be that simply the cost of having to reprosecute is alone a ground to say that a court of appeals should not notice a plain error affecting substantial rights, otherwise rule 52(b) is rendered a nullity.

The second argument the Government put forward is its invited error argument, that somehow the defendants here created this problem. The record is absolutely clear. This was the judge's idea. She asked for the defendants to go ahead and agree to this, and they did. Whatever else this may be, this was not invited error by the trial lawyers on the defense side in this case.

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And finally, the Government says we can't prove the prejudice. And I'll have to concede, I can never prove that the invasion of the deliberative process by the, in this case was prejudicial to my client.

QUESTION: Well, you can't prove it, but there are still degrees of plausibility. And don't you have to confront the fact that the degree of plausibility is much lower in this case than it would be, let's say if a bailiff had spent 3 days in the courtroom with them or a witness had spent 3 days in the courtroom with them, and so on? Aren't we entitled and required to take this varying degree of plausibility of prejudice into account?

MR. PHILLIPS: Yes, Justice Souter, I think you can take that into account. I think, however, it probably weighs differently than the way that you characterize it because one of the things that we know is that at least one of these jurors, one of the alternates was absolutely the last person that these defendants wanted in that jury room. That was the person they selected, based on the non-verbal behavior of that juror during the trial, that they wanted to be designated as an alternate and therefore not participating in any way in the deliberations.

So it seems to me that I would certainly temper my assessment of the overall likelihood of an affect against the backdrop of knowing that in this case this was

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the one person we would most have preferred not to be in the case at all. And therefore I think the potential for prejudice is there. It is always there. It has been recognized generically. I think it also exists with respect to this specific case.

I guess I would end my analysis of this issue and of the appeal by going back to Brasfield v. United States, which I think actually provides an exceptionally good model for exactly what happened here. You will recall in Brasfield the question was whether or not the judge should poll the jurors as to their division when they were deadlocked, and this Court condemned that practice in language that I think applied, and condemned it categorically and on a plain error basis, it had not been objected to. And the reasoning of the Court in Brasfield --

QUESTION: Was rule 52 in effect at the time of Brasfield?

MR. PHILLIPS: No, Your Honor, rule 52 wasn't in effect. What the Court analyzed it and concluded, and I think rule 52 -- I mean I think Brasfield is the evidence of plain error being noticed that would have given rise to the creation of rule 52. And what the Court said there, which seems to me to apply absolutely and completely to this case, is that such a practice, which is never useful

and is generally harmful, is not to be sanctioned. I would urge this Court to follow that mandate in this case and affirm.

Thank you.

QUESTION: Thank you, Mr. Phillips.

General Starr, you have 6 minutes remaining.

REBUTTAL ARGUMENT OF KENNETH W. STARR

ON BEHALF OF THE PETITIONER

GEN. STARR: Thank you, Mr. Chief Justice. Several brief points. First, there is no need, as Mr. Phillips suggests, for a court of appeals to reverse a district court in order to send a message. Courts of appeals frequently carry on a didactic function in their opinions. That's why opinions say something more than affirmed and reversed for the following three reasons.

It is an extraordinary expense for the system to send a message, a powerful message that can't be ignored, but it is indicative of the extravagance of the remedy below that the trial counsel in this case chose not to send a message to the district judge nor even to the courts of appeals, for in this multi-defendant case only Mr. Olano, an able lawyer in his own right who went into the savings and loan business in Louisiana, chose to present this issue to the court of appeals. None of the other respondents raised this, none of the other

defendants in their various appeals even asserted the point.

It was so unplain in the sense of a miscarriage of justice that not even counsel, including a professor at the University of Southern California law center, bothered to note it. This is not the arena of miscarriage of justice, which is not in the footnote of Frady, it's in the text of Frady that that is what the plain error rule is all about.

QUESTION: General Starr, I guess you're urging us to find that this doesn't rise to the level of a plain error recognizable under rule 52?

GEN. STARR: Yes.

QUESTION: But if it did, you would say subject it to a harmless error analysis?

GEN. STARR: Well, plain error in the sense of obvious, I think it does satisfy that. But yes, we would still take the error through a harmless error analysis if it had been objected, assuming that it had been objected to.

And that's one of the things, by the way, when he began, when Mr. Phillips began with his reading of the rules he focused on 24(c). He never got to 51 and the premises of the adversary system. That's in our brief at page 3. That is the way our system works. We have a

system where individuals have counsel, counsel represent them, and counsel are there to guide the judge, to express reservations, to interpose objections, to say no, your honor, with all respect that procedure is not permitted under the Federal rules. No one did that here.

The Chief Justice is quite correct. At most there was this ambiguous statement moving very quickly through this process where one counsel said, and all counsel, by the way, the understanding at this trial, the record is clear on this, is one counsel spoke for all.

QUESTION: General Starr, can I interrupt just for one question? Would you agree that the standard for review of plain error on direct appeal is less strict than the standard for collateral review under 2255?

GEN. STARR: Yes. This Court has so held in Henderson against Kibbe and also --

QUESTION: So it has to be at least less than whatever that standard is.

GEN. STARR: That is correct. We're not quarreling with that, but we do think nonetheless this Court has been clear that there must be a miscarriage of justice. Here there is so plainly, I think to the reason --

QUESTION: Well, that's why I used the word miscarriage of justice. That's the standard under 2255.

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GEN. STARR: But it is also the standard that this Court has articulated in Frady itself as to what this is all about.

QUESTION: Then what's the difference?

GEN. STARR: It's difficult to say, but it seems to me, because the Court has not elaborately articulated what it is, I do think, despite, if I may say so with all respect, the looseness of the language, that rule 52(b) is aimed at getting at miscarriages of justice. That is I think what 52(b) was all about.

Now, in terms of cause analysis and the sorts of things that we would be focusing on and the additional interests that are at stake with respect to a collateral challenge, obviously those do not obtain here.

Much has been said about discretion, but it does seem to me that what this Court has been saying for a number of years, and I hope that message does not change, is that this is a rule that is to be used very sparingly because of the premises of our adversary system. It is --

QUESTION: Do you think a judgment like this really is a recurring problem for the Government?

GEN. STARR: No. No, because I think no harm, no foul, to the extent that it is being used, I think it is used only with consent and --

QUESTION: Well, I suppose if it really, if

judgments like this really bother you, I suppose the Justice Department has a representative on the rules committees. And if it's just a rule problem you could at least propose that it would be changed.

GEN. STARR: Well, there's no question, we don't have a problem with a rule. We're not suggesting one. The question here in this case is what happens when, as frequently happens at any trial, there are mistakes, there are errors, how do we treat those errors. Do we say we're going to disrupt the justice system, including the considered verdict of a jury that, if I may say one word about this jury verdict --

QUESTION: Well, you could say a little more clearly than rule 151 does what happens. I mean 52.

GEN. STARR: Yes, rule 52(b). I think that is true, that 52(b) could be more, could be clearer.

QUESTION: May I just ask, General Starr, I am assuming that the colloquy between defense counsel and the court were outside the presence of the jury?

GEN. STARR: That is our understanding, and it is my understanding and I so represent to the Court that the two prosecutors were not privy to those conversations. So I cannot represent what took place, but it is clearly outside the record. When they went back -- I'm sorry.

CHIEF JUSTICE REHNQUIST: Thank you, General

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Starr. The case is submitted.

(Whereupon, at 11:51 a.m., the case in the above-entitled matter was submitted.)

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BY Leona M. Mayo

(REPORTER)