ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, Petitioner v. JERRY E. WELLS AND KENNETH R. STEELE

CASE NO: No. 95-1228

PLACE: Washington, D.C.

DATE: Monday, November 4, 1996

PAGES: 1-52

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 95-1228

JERRY E. WELLS AND KENNETH R. :

STEELE :

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Washington, D.C.

Monday, November 4, 1996

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

JAMES R. WYRSCH, ESQ., Kansas City, Missouri; on behalf of the Respondents.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 95-1228, United States v. Jerry Wells and Kenneth R. Steele.

Mr. Dreeben, you may proceed.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE PETITIONER

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

The issue in this case is whether section 1014 of title 18 requires the Government to establish the element of materiality in order to obtain a conviction.

Section 1014 prohibits any person from knowingly making any false statement or report or willfully overvaluing any land, property, or security for the purpose of influencing any one of a number of covered financial institutions in any application, advance, discount, purchase, purchase agreement, or a number of other listed transactions. The text of the statute does not require proof of a materiality element.

Notwithstanding the absence of that explicit element, the United States Court of Appeals for the Eighth Circuit in this case concluded that an element of materiality should be implied into the statute in order to

prevent it from being applied to what it viewed as trivial misstatements.

Our contention is that that holding is incorrect, and that section 1014 does not require proof of materiality, for three reasons. First, the text of the statute does not require proof of materiality. Second, the history of the statute shows it to be a consolidation of a number of provisions, the vast majority of which did not require proof of materiality, and third, the Eighth Circuit's policy concerns are misguided in light of the statutory requirement of proving that the individual knowingly made a false statement and that he did it for the purpose of influencing the institution.

QUESTION: With respect to that argument, I was thinking about hypotheticals. Supposing a buyer, borrower went into the bank and said, I'm a Yankee fan, because he knew that the loan officer was a Yankee fan. That's the crime. That would be enough, wouldn't it, because he did it --

MR. DREEBEN: Assuming that it was a knowing false statement, if he was a Braves fan --

QUESTION: And it was knowingly false. He was really a Braves fan.

MR. DREEBEN: Yes. That kind of hypothetical would theoretically be covered by --

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QUESTION: Well, not theoretically, would be covered by your construction of the statute.

MR. DREEBEN: Yes, it would. I'm talking about what in fact tends to get prosecuted under section 1014, and in our experience, Federal prosecutors do not bring cases based on such extraneous or --

QUESTION: They're mostly Yankee fans, we know.

(Laughter.)

MR. DREEBEN: Currently, yes.

But our main point is, is not that we need section 1014 not to require proof of materiality because we need to go out and prosecute immaterial false statements. Our main point is that first is a implied element of a statute that Congress did not require us to prove, and therefore it should not be read into the statute by courts, and second, it can cause a distraction to juries considering prosecution of false statements when the issue of materiality is in the case, and therefore Congress had particular -- had valid reasons for not requiring the Government to prove the materiality.

QUESTION: Well, I suppose under Gaudin, too, there would be a lot of 2255 proceedings in cases where the court had determined materiality for itself if -- by people who had previously been convicted --

MR. DREEBEN: That is --

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QUESTION: -- if we held materiality was a statutory requirement.

MR. DREEBEN: That is exactly right. The law prior to this Court's decision in United States v. Gaudin was fairly tilted against the Government under this statute with respect to implying the element of materiality, but that element was determined by the trial judge, not by the jury, and as a result there would be an arguable constitutional issue for a defendant to raise on a 2255 subject to defenses such as the requirement of overcoming the cause and prejudice hurdle and of other potential issues as well, but our --

QUESTION: Mr. Dreeben, most courts of appeals have said materiality is an element, haven't they? That's the majority.

MR. DREEBEN: Yes.

QUESTION: And you say they're wrong.

MR. DREEBEN: Yes. They are wrong for three basic reasons, as I began at the outset. Let me first address the text itself. The text of section 1014, which is set out at pages 2 and 3 of our brief, does not require any explicit proof of the materiality of the false statement.

It has three elements. It requires that there be a false statement, which is the actus reus of the

offense, and it has two intent requirements. It requires that the defendant know that the statement is false, and it requires that the statement must be made for the purpose of influencing the institution with respect to one of a number of enumerated financial transactions.

In contrast to the deliberate exclusion of any materiality element from this statute, Congress has enacted a number of other statutes that deal with the problem of false statements that expressly require proof of materiality, perhaps the most prominent being the perjury statutes, 18 U.S.C. 1621, and 18 U.S.C. 1623, both of which explicitly require proof that the false statement be material to the proceeding.

QUESTION: What was the jury instruction given here?

MR. DREEBEN: The jury instruction given here, which is set forth at pages 42 and 43 of the Joint Appendix, informed the jury not that the court had found the statements to be material, I think it's important to emphasize that. What the court said was the materiality of the statement or representation alleged to be false or concealed is not a matter with which you are concerned, and should not be considered by you in determining the guilt or innocence of the defendant. That's on page 43 of the Joint Appendix.

Now, the court had also earlier enumerated the elements of section 1014 to include materiality.

QUESTION: And where is that?

MR. DREEBEN: That's on the prior page of the Joint Appendix, page 42.

But that was a correct statement of circuit law at the time. The Eighth Circuit, like the majority of the courts of appeals, had implied an element of materiality into the statute, and the Government in this case, if it wished to obtain a conviction that it could affirm on appeal, complied with circuit law.

QUESTION: Now, no objection was made to these instructions?

MR. DREEBEN: Well, the defendant -- the defendant did object. The defendant argued that materiality should be decided by the jury in the trial court. The defendant was convicted. Both defendants were convicted.

On appeal --

QUESTION: But the Government was satisfied with the statement that it is -- materiality is an element?

MR. DREEBEN: Justice O'Connor, I wouldn't describe the Government's position as satisfied. I would describe the Government's position as attempting to obtain a conviction in compliance with Eighth Circuit law.

If we had gone to the grand jury and said, charge this violation without finding materiality, and had then gone to the trial judge and said, don't make any finding about materiality, let's just let this case go, the judge would have poured the case out. He would have granted a judgment of acquittal against us, because we had not established what the Eighth Circuit --

QUESTION: Well, so how's the question preserved here?

MR. DREEBEN: The question is preserved because when the case was decided in the court of appeals the Eighth Circuit received briefs from both parties before United States v. Gaudin was decided and heard oral argument. At that point, respondents didn't argue that materiality should have gone to the jury, as they do now. The Government didn't argue that materiality is not an element of 1014, as we do now. Both parties simply addressed the question of whether these false statements were material.

Then the United States v. Gaudin was decided, and the Eighth Circuit asked the parties for supplemental briefs on the impact of that decision. At that point, respondents said, there's been a constitutional violation in this case because the jury did not decide materiality.

The Government responded, there has not been a

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constitutional violation in this case because section 1014 does not require proof of materiality.

The Eighth Circuit, which could have applied, I suppose, some version or another of procedural default against either or both parties, decided not to apply any version of procedural default to either party --

QUESTION: And decided the question.

MR. DREEBEN: Exactly, decided on the merits that section 1014 requires proof of materiality in a binding circuitwide decision which we are challenging in this Court. We are challenging the legal ruling that was ultimately rendered by the Eighth Circuit, finding materiality to be an element.

QUESTION: Mr. Dreeben, I don't seem to have the instructions in front of me, but would you help me on this? Did the element of purpose of influencing the action of the agency, was that described in the instructions as a separate element?

MR. DREEBEN: Yes.

QUESTION: It was, and the jury found that?

MR. DREEBEN: Yes. The jury found that element.

QUESTION: Mr. Dreeben --

QUESTION: Mr. Dreeben, in asking the -- in telling the jury to disregard the materiality question, is there some risk that the judge misled them as to the

purpose finding that they were required to make?

That is to say, as you yourself argue to some extent the purpose finding hinges upon materiality. It's going to be a rare case where you have a purpose of misleading an institution where what you're talking about is something that's immaterial. I mean, the Yankee hypothetical is an unusual one.

Now, why wasn't this jury misled by telling them, never mind -- never mind materiality?

MR. DREEBEN: Well, Justice Scalia, we -- I certainly agree that the instruction is not correct as we understand section 1014 to be read. The question is then whether the particular error of the judge instructing the jury that it should not be concerned with materiality is sufficiently harmful as to warrant overturning this conviction.

This case is actually, I think, a -- proof that the purpose-to-influence element can readily be established without inferring that from proof of actual materiality of the statement.

Here's how the purpose-to-influence element is established in this case. These respondents were engaged in a -- the business of leasing copiers, with an integral agreement that they would service the copiers. They had an arrangement with one bank where the bank knew about

that integrated agreement and said, you -- we will buy these agreements from you, cash them out for you, but we will require you to set up a reserve account to protect the service part of your contract.

The respondents needed more money. They went to another bank who also knew about the integrated agreement and it said, we want the same reserve account.

At that point, respondents said, that's not going to give us enough money, we don't want the reserve account, so they entered into this conspiracy to break this integral agreement into two separate pieces of paper and presented to the banks that are the victim banks in this case, only the lease, not the service.

And I think that from that sequence of events alone, a jury was virtually compelled to infer that the false statements about this nature of a contract were for the purpose of influencing the banks, but if that wasn't enough and compelling in itself, one of the coconspirators was a cooperator with the Government and testified explicitly that's why we all did it. That's what we agreed.

QUESTION: But Mr. Dreeben, we don't have directed verdicts in criminal cases, and this judge in his instruction number 20, if you were sitting on the jury, wouldn't you think that the judge had made the

determination that the representation was material, because the judge first says it must be material, and then he says, you don't worry about that, because that's for me to determine.

But if a jury is to come in with a verdict of guilty or not guilty, mustn't the jury assume that a judge has made the finding that this was material?

MR. DREEBEN: Well, Justice Ginsburg, I think the jury could speculate that way, but the instruction doesn't say that. It simply says, don't concern yourself with it, and if the jury is following the instructions given, it won't concern itself with it.

QUESTION: Well, but it says somewhat more than that. It defines what materiality is a few sentence -- a few paragraphs before.

MR. DREEBEN: That is true.

QUESTION: So a knowledgeable jury, as I think Justice Ginsburg is suggesting, would say, well, materiality is important in this case, and it's been established.

MR. DREEBEN: I think --

QUESTION: Suppose in this case the judge said, I instruct you as a matter of law that this is material. He didn't say that. Suppose he said that.

MR. DREEBEN: If materiality were an element of

the crime --

QUESTION: No, no, let's assume -- let's assume that you prevail, and the question is whether or not the case has to go back.

MR. DREEBEN: That's right. Then it's a conventional harmless error question which I think is rather factually confined to the record in this case.

The question would be, would that erroneous inference from the instruction, or if the instruction were explicit, which it is not, was the explicit instruction that the statements were material have tainted the verdict in this case, I think that, given that our position is materiality is not an element, and that there was ample direct evidence, coconspirator admission and sequence of events evidence that established that the purpose to influence element was shown, that the jury would not have needed to and would not have relied on any inference it drew from the materiality instructions in this case. But again --

QUESTION: Did the judge ever later tell the jury he had decided it was material?

MR. DREEBEN: Not that I'm aware of, Your Honor. Certainly not in the jury instructions themselves, and I'm not aware of any supplemental instructions that were given before the time of verdict, so I think that there should

not be an inference that the jury chose to speculate beyond what the instructions actually said and conclude that the judge made some finding that he should not, and then use that finding contrary to the instructions to infer the existence of a different element --

QUESTION: If we were to rule in your favor on the materiality point, Mr. Dreeben, is the instruction point one that could be determined by the Eighth Circuit just as well as we could on remand?

MR. DREEBEN: Certainly. Certainly, Mr. Chief Justice. It's not a question that has long run factual significance, or long-run legal significance, except for this case. I simply think that the judgment in this case could be affirmed, the convictions could be affirmed based on the instructions that were given.

QUESTION: Does the instruction become the law of the case somehow?

MR. DREEBEN: There is some lower court authority to that effect, that an instruction can become the law of the case, and I think the issue here would have been for the Eighth Circuit, if it had chosen -- it certainly wasn't required to -- might have said the Government in this case charged materiality and requested --

QUESTION: Right.

MR. DREEBEN: -- materiality instruction. It should live with it.

QUESTION: Right.

MR. DREEBEN: But the Eighth Circuit did not do that, and I do not think that the Eighth Circuit was required to do that. In fact, I think the better course --

QUESTION: Should we look at that?

MR. DREEBEN: No. I do not think that this Court should consider that at all. That --

QUESTION: Why not?

MR. DREEBEN: Because at most it would be a question of discretion for a court of appeals to decide whether it should conclude that the Government's posture in the district court precluded it from making the argument that it made on appeal, and I think that quite properly the Eighth Circuit in this case said before we find a constitutional violation based on the failure to have the jury decide materiality, we should at least be satisfied that the statute requires that to be proved, and it does not -- none of the cases that respondent cited in this area of instructions becoming law of the case involved this kind of situation.

QUESTION: So we could say the circuit below was wrong but leave it open on the remand for that application

of doctrine.

MR. DREEBEN: Well, I think the Eighth Circuit has crossed that bridge already, and has said that it is going to look at, on the merits, whether section 1014 requires proof of materiality. It opened up to both parties the opportunity to litigate the issue raised by United States v. Gaudin.

Remember, respondents did not, in their briefs, their opening briefs in the court of appeals, argue that there was Gaudin error by virtue of the fact that the jury did not decide materiality. They raised that issue only -- they raised it in the trial court, but they did not preserve it on appeal. They raised it only after United States v. Gaudin came down, and they make that clear in their own letter to the court, which is at page 76 of the Joint Appendix, where they said initially, because of existing law in the circuit, the issue was not briefed.

Now, the Eighth Circuit I think chose quite properly to address on the merits both parties' contentions, and that should not -- that is the law of the case at this point, not the separate question of whether the jury instruction --

QUESTION: May I ask another question about -- I'm a little puzzled about the facts of this case, but

the judge, I think, drew a distinction between statements and omissions, and he said an omission would not be false in his instruction unless it were of a material fact.

Now, if you had a statement which was literally true in all respects, but there was a material omission that made the overall presentation a violation of the statute, would it not then be necessary to show the omission was material?

MR. DREEBEN: My answer to that is no, Justice Stevens, but I need to explain what I think are the kinds of omissions that are covered by this statute, because this statute in its terms prohibits false statements or false reports. It does not in its terms prohibit concealment or omissions per se.

The conventional kind of application of this statute to -- in omissions cases where somebody comes into a bank and is asked to list their assets and liabilities, and they list their liabilities and they leave out a few big ones. That is occasionally described by the courts as an omission of material information, or an omission of information. I think that under this statute, that's properly construed as a false statement.

The application itself will generally say, I have provided complete and accurate information to you in requesting this loan. In fact, the list is incomplete, so

therefore it's not accurate. That can be called an omission, but I think it's properly viewed as a false statement.

A second kind of omission could occur in a case like this one, where a party has one integrated agreement. I lease you the copier, I service it, but artificially divides the agreement into two parts, gives the bank the lease agreement, withholds the service agreement.

That I think also could be colloquially described as an omission or a concealment, but it really also is a false statement. The contracts in these cases that the respondents drafted said, this is the entire agreement between the parties, the lessee has responsibility for service, in fact the lessee did not have responsibility for service, and it wasn't the complete agreement between the parties, so in those kinds of cases I think we're really talking about false statements.

Now, a third kind of omissions case, I suppose, could be purely the omission of information that might be of interest to a bank, such as, I go in and I apply for a mortgage, and I don't tell the bank that I've previously been declared bankrupt twice. That's not covered by this statute.

Now, another kind of statute might want to try

to cover that, and there are statutes that expressly cover concealing or covering up material facts, and those statutes would apply perhaps to such a scheme, depending on whether the Government had proven all it needs to prove in a concealment case, but that's not a violation of section 1014.

Now, in this case I think the parties in the court of appeals used the words concealment when they really meant false statement, and the district court's opinion rejecting the respondent's rule 29 motion in this case, which is contained in the record, although not in the materials that this Court has available to it in the briefs, very clearly said that the contracts the respondents claim are literally true, and the Court said the contracts without the addenda are not, in fact, literally true, they are false statements and affirmative misrepresentations in the lease as submitted to the banks. So this case does not, I believe, contain a true example of what might be described as an omission.

Now, the trial court did, as Your Honor points out, instruct that it has to be a concealment of a material fact. In our view, the correct understanding of the statute is first doesn't apply to naked omissions, and second, to the extent that it does apply to omissions as I've described, they don't have to be material.

What needs to be shown is that the individual engaged in those particular false statements for the purpose of influencing the bank.

QUESTION: Mr. Dreeben, if your interpretation of the law is correct, how should instruction number 20, which is on page 42 and 43 of the Joint Appendix, how should that have been trimmed? What should the judge and what should the judge in the future instruct in these cases?

MR. DREEBEN: Well, first, Justice Ginsburg, there should be no reference to materiality at all. Second, the requirement that the statement or representation be false when it is untrue when made, I think at that point if the court amplifies on it at all it should be done to respond to the particular facts of the case, and should explain that the statement must be false or must be misleading because of omitted information.

And then perhaps in a case such as I've described where the list of liabilities is incomplete, the court might explain at that point that's what's meant by the false statement in this case, but there isn't any requirement of materiality.

What the court and the jury needs to focus on is that the statement needs to be shown subjectively by the defendant to be for the purpose of influencing the

financial institution. The court of appeals, in rejecting the textual --

QUESTION: I would like to make sure I understand you correctly. At a minimum you'd say you would have to delete the two paragraphs of the instruction that deal with material fact.

MR. DREEBEN: Yes, that's correct, since materiality is not an element of the offense.

The court of appeals' concern seemed to be that without materiality this statute would become a vehicle for prosecuting trivial false statements, but I think the answer to that argument is contained in the statute, itself, which has the requirement that the Government show a purpose to influence the institution in a financial transaction. It's the defendant's own purpose that serves to ensure that the statute is not going to be applied in a trivial context, it's going to be applied when the defendant subjectively believes that he is indeed knowingly telling a false statement.

QUESTION: I suppose if Congress wanted trivial misrepresentations prosecuted the courts would go -- have to entertain those cases.

MR. DREEBEN: Well, that's certainly true also, Your Honor, and there's no question that Congress has the power, as it did in this case, to draft a broad

prophylactic statute that accomplishes two main purposes without a materiality requirement. It's a broad deterrent to anyone who wants to influence banks through knowing false statements --

QUESTION: Mr. Dreeben, do any of the statutes that you've cited to us earlier, which contain an explicit materiality requirement, do any of those also contain a purpose requirement?

MR. DREEBEN: Yes, some of them do. The statutes are not uniform in that construction.

QUESTION: So the mere existence of a purpose requirement does not exclude the possibility of materiality being a requirement as well.

MR. DREEBEN: That's right. The legislature has complete control over how it arranges these particular elements of the offense and the language of the statute is the best guide to what it has selected.

QUESTION: May I ask one other question? We necessarily -- perhaps it's not a legal argument -- are concerned about the consequences of a case if we don't accept your position maybe we're emptying the jails of a large number of prisoners who'll bring 2255 proceedings.

I notice in this case the defendant got 2 years' probation. Do you know if that's a typical sentence, or typically they're longer sentences that are given?

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MR. DREEBEN: Typically they're longer, Justice Stevens, and the Government has a pending cross-appeal of the sentence in this case. The sentence is so low because the district judge said, I'm going to find -- and I quote -- somewhat arbitrarily that the loss in this case was only $40,000.

In fact, the probation department had found that the loss was over $1 million, and the Government's pending cross-appeal argues that the sentence imposed under the Federal Sentencing Guidelines is too low, and that the actual correct sentence would require a term of imprisonment.

QUESTION: How long a term, do you remember?

MR. DREEBEN: I believe it's between 26 and 31 months, but I'm not sure exactly what the range is.

QUESTION: Thank you.

MR. DREEBEN: Thank you. I'd like to reserve the rest of my time.

QUESTION: Thank you, Mr. Dreeben.

Mr. Wyrsch, we'll hear from you.

ORAL ARGUMENT OF JAMES R. WYRSCH

ON BEHALF OF THE RESPONDENTS

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

I would like initially to address some of the

matters that were brought up during questioning. First of all, it was very highly contested in the trial court, and we actually briefed it on appeal, as to whether any of these statements that the Government said constituted a violation of a conspiracy to make a false statement to a bank or the substantive violation under Count 2 were in fact material.

I'd like to simply indicate very briefly that with respect to the statements made to O'Bannon Bank and Bank IV that we had testimony that in fact the lease agreements that did provide that a lessee would have the responsibility for the maintenance was in fact literally true, and was done and presented to the banks in that fashion with their knowledge, at least in part as to a separate agreement, because the banks wanted to be not held responsible for those obligations under the second agreement.

With respect to the issue of the signature by the individuals here before the Court or their wives, we had two positions on that, one of which was, it was not required under Federal law, therefore, as a matter of law, not material, and there was a timing issue, timing issue meaning they didn't require that until after there were in fact some purchases by the bank of the income streams from these leases.

I'd like to also point out that the Government had the opportunity in the lower court to make an issue as to whether or not section 1014 required a -- was material.

It is true under the Ribaste case under the Eighth Circuit as we tried the case, materiality had been held by that court to be in fact an essential element of the section 1014. However, as the Government has pointed out, there was the Cleary case in the Second Circuit, and the Government elected not to make an issue of that in the trial court.

In fact, materiality -- the issue of materiality permeates this case. There are substantial references to the issue of materiality, including a direct statement that the statements that were made to these banks were in fact material, not just omissions.

In addition to that, instructions --

QUESTION: What is the last, including a direct statement that they were material?

MR. WYRSCH: That --

QUESTION: By whom? Not in the instructions.

MR. WYRSCH: It is contained in Instruction 13, I believe, Your Honor, and in Instruction 15, in the instructions describing the offense and the indictment, those were set forth --

QUESTION: Thirteen and 15?

MR. WYRSCH: Yes, Your Honor. It was also set forth at length in the indictment.

QUESTION: Where --

QUESTION: I just don't --

QUESTION: Is that in the Joint Appendix? I mean --

MR. WYRSCH: Yes, it is, Your Honor. At page 40 of the -- and this is Instruction 15 -- there's a statement that Jerry Wells and Kenneth Steele made and caused to be made false statements of material fact to O'Bannon Bank for the purpose of influencing the bank.

QUESTION: Where are you reading?

QUESTION: That's in the indictment?

MR. WYRSCH: That's paraphrased in the indictment, yes, Your Honor, that's correct.

QUESTION: What about the instructions? Where is it in 13 and 15?

MR. WYRSCH: Well, on page 40, at paragraph (b), there is a statement to that effect. On the bottom of page 40, "In accordance with the conspiracy agreement made in 1986 James Russell knowingly made and caused to be made a false statement of material fact to Bank IV.

QUESTION: Well, that's true in the indictment, isn't it? Nothing --

MR. WYRSCH: It is true Justice -- Mr. Justice

Rehnquist that when the court submitted the instructions on the elements later on it only referred to material statements in terms of omission when it described the elements, that when it gave a general description, and it had to because much of this -- much of these charges from the indictment had been -- the court had granted an acquittal on. He had to redact the indictment, and so then when he described it he read this to the jury. When he went --

QUESTION: He didn't -- no jury would have taken that as a finding by the judge that it was material, which is what I thought you were saying when you said it was in the instructions.

MR. WYRSCH: We are --

QUESTION: The instruction begins, the crime of conspiracy as charged in Count I has four essential elements, which are, and then -- you know, then he goes through the elements, and then he says that as part of four, who had joined in the agreement knowingly did one or more of the following acts, A, B, C. He's just reciting the indictment. I don't know that that's a --

MR. WYRSCH: Well, and --

QUESTION: An instruction to the jury that --

MR. WYRSCH: The jury --

QUESTION: -- materiality was proved.

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MR. WYRSCH: Your Honor, the jury would have had to find one or more of these overt acts -- this is at section 371 -- in order to --

QUESTION: Well, do you have anything else besides what you've just read which would convince me that the judge told the jury that materiality was proved?

MR. WYRSCH: Was proven? No. The instruction on whether it was proven or not was -- as accurately pointed out by the Government, was in, I believe, Instruction Number 20.

QUESTION: And that's just, don't pay any attention to it.

MR. WYRSCH: That's correct.

QUESTION: Okay.

MR. WYRSCH: That's correct. It is true that, unlike some other cases, the judge in this case, the trial judge, did not say I have found materiality as a matter of law.

In fact, he had done that outside the presence of the jury, so all that he did, Your Honor, was to tell them it was not a matter that they should be concerned about, but the problem is is that now, having heard materiality as an issue throughout the trial, having heard the indictment, or sections of it read during the instructions, and then having the judge says, don't you be

concerned about it, don't you be worried about it all, that caused substantial prejudice to us, and we did object in the trial court.

Now, it is true what the Government says is accurate, although we briefed the issue of the sufficiency of materiality in the court of appeals by letter brief, and this was after all briefing had been done, about a year after oral argument, roughly, the court asked us for a -- what our position was with respect to the issue of materiality and the effect of this Court's decision in Gaudin.

So we said, we have preserved it in the trial court under existing rules as to, it's still on appeal, we're entitled to have the benefit of that opinion, and we submitted a brief.

The Government didn't dispute any of that. All they said -- well, the most part what they said was, materiality now is not an element. This is after they asked for instructions in that, after they did not object to any of those instructions in the court below, and they indicted on that theory.

QUESTION: Well, but that was the law of the Eighth Circuit at the time, and the Government has a number of these prosecutions. I don't think it would be appropriate to frame the indictment in any other way in

the Eighth Circuit.

MR. WYRSCH: The Government subsequent to this case brought an indictment against one of our clients in the Western District of Missouri in which they did not allege that materiality was an element of section 1014. And then what they did was is that when we filed a motion to dismiss they said it is -- the plain language of the statute governs whether an indictment is sufficient, and we'll determine later on whether we want an instruction in that regard, and they have a lower court opinion to that effect, so they had that opportunity.

They could have indicted, or asked the grand jury to indict without that element. They could have argued all they had to do was bring an indictment under the language of the --

QUESTION: Does the later indictment that you just referred to, was that after Gaudin?

MR. WYRSCH: It was after Gaudin.

QUESTION: Yes, but it would have been rather nervy for the prosecutor, given the law of the Eighth Circuit and before Gaudin, to go flatly against the law of the circuit in the indictment.

MR. WYRSCH: The prosecutors did a prudent thing, but now, having done a prudent thing and not taken the bull by the horns, so to speak, and said this is what

the Second Circuit is, we don't think we need to prove it, and so on, they should not now be permitted to say we want to retroactively say it is not an element --

QUESTION: Well --

MR. WYRSCH: -- when, in fact, that's what they indicted on.

QUESTION: Well, the Eighth Circuit allowed them to do this. Perhaps the Eighth Circuit could have said no, but we've now granted certiorari on this question as to whether materiality is an element of the crime, and I hope sooner or later you'll get to that.

MR. WYRSCH: Yes, Mr. Chief Justice. We believe --

QUESTION: And I suppose we don't have to even decide the question of prejudice here. If we just decide what the certiorari petition asks, we can just say the court of appeals below was in error and leave to them what remedy.

MR. WYRSCH: This Court would have that opportunity.

QUESTION: Yes.

MR. WYRSCH: It could send it back to the Eighth Circuit and say, you determine whether these instructions were prejudicial, and if the Court were determined -- or, to determine the issue that materiality is in fact not an

element, then as the Government has properly said, it has to go back to the Eighth Circuit anyway because the Government wants a substantial sentence imposed in this case.

Going back to your point, Mr. Chief Justice, we believe materiality is an element for a number of reasons. We cannot ourselves, as we've looked at it, make any clear determination in our own mind that when this statute was amended, that in fact Congress intended to omit the element of materiality.

There were some 13 statutes at the time that the consolidation was designed to bring into one statute. Three contained a requirement of materiality. I think of the remaining 10, seven had a requirement that there be an intent, or the intent element was for the purpose of influencing, and three did not.

The reviser's note simply says that no substantive change was intended here, and if that was the case, then presumably at least on some of the statutes materiality was still an element.

QUESTION: But may I ask, had any of the 10 statutes that did not have the materiality element expressly in the statute, had any of them been construed judicially to include such an element?

MR. WYRSCH: Not that I know of. We have looked

high and low and cannot find, other than -- now, there's this Kay case which is before the Court, and the Government argues that the Kay case in fact has language in it to support the idea that Congress must have intended that materiality not be an element. We think that the Kay case really is whether actual damage is an element of the case.

There is some language that the Government we think is urging upon the Court, and, with all due respect, may be pushing it a bit too far. We don't think the Court's holding in Kay really was on that issue. It was on a separate issue.

QUESTION: But Kay did have the language in it. I don't have it exactly, but it was something to the effect that those who lie cannot -- it does not -- it is not open to those who lie to claim subsequently that the lies were unimportant and/or did not have influence, and I mean that -- isn't that fairly read as indicating that materiality just is not part of the concept that the statute was including?

MR. WYRSCH: It could be read in that way. It also could be read as mere dicta in the case. It also did not precisely say that. It said that it is not for a defendant -- or, I use the word defendant, but it's not for defendant to complain that the information was not

important.

It is true that language is there, but it does not determine the question in this case. It actually dealt with a different -- a somewhat different statute.

QUESTION: But it's about the only indication that we have as to what any of those 10 statutes might mean, and I would suppose Congress could reasonably say, based on that language, dicta though it may be, that the statutes, in the absence of a material -- or in the absence of an expressly stated element of materiality would not have one.

MR. WYRSCH: That is true, Your Honor, but I'd like to point out several things, one of which is that subsequently Congress has amended this statute many times, and has never come forward and said in a report or in any kind of a legislative history that materiality was not an element, despite the fact that some 10 circuits have said it is an element, and we think that's something for the Court to consider with respect --

QUESTION: Well, but of course the text just doesn't include it.

MR. WYRSCH: That's correct, but that --

QUESTION: And Congress may be aware of what it said.

MR. WYRSCH: It may be aware of it, or it may

not be aware of it, and we don't believe that Congress really intended that --

QUESTION: We certainly have to assume, do we not, that our assumption must be that Congress knew what it was saying --

MR. WYRSCH: I don't think we can make that assumption.

QUESTION: -- based on the language of the statute itself.

MR. WYRSCH: I don't think it -- Justice O'Connor, that that ends the inquiry at all, because I don't think it's clear what Congress meant by it. I think if Congress did intend that, they could have expressly said that in some kind of a legislative history or report, and they didn't do that, and the reviser said --

QUESTION: Well, why would you give more credence to a legislative history or a report than the actual language that Congress has used, which was to omit a requirement that had been present in some of the other statutes?

MR. WYRSCH: I think that that may be precisely the point, Mr. Chief Justice, because I'm not certain in my own mind that this legislative history indicates one way or the other, but the fact that when we look at the statute then without the history contains no element of

materiality did not end the inquiry.

It did not end the inquiry, for instance, for this Court in Staples, and it's cited in Justice Breyer's article, it's not cited here.

In Green v. Bach Laundry this Court said, look, we want to look here to make sure -- to find out whether they had any intent or not, and if they didn't have any intent one way or another to cause this result, then at that point we're free to put a reasonableness requirement into this.

This Court on many occasions when it's looked at the --

QUESTION: In Green v. Bach Laundry we found the provision would have been absurd without implying a statutory requirement.

MR. WYRSCH: That's correct.

QUESTION: This one wouldn't be absurd.

MR. WYRSCH: It would be absurd. If you -- the Government is -- to say this statute is saying the intent to influence necessarily involves a requirement of materiality, or involves the same concept, we say regardless of what that position is we're still entitled to reversal.

But if I might go back to that, there are others that say that if you look at the literal language of this

statute it just says intent to influence, so if one were to apply for a loan for $5,000 secured by a car worth $5,000, and you put on the loan application that all that his income was was $60,000 when in fact his income was $100,000, the Government would win.

Why would they win? Because the representation of 60 was in fact a representation that they intended to influence the bank to grant the loan, but it was a false statement. It would be an absurd result.

QUESTION: Well, the falsity has to be for the purpose of influencing, not the statement.

MR. WYRSCH: Well, the --

QUESTION: It has to be the misrepresentation that is for the purpose of influencing to grant the loan, and certainly understating your income is not likely to cause the bank to grant you the loan.

MR. WYRSCH: If you understate your income and you agree with the Government that an omission is also part of this statute, and the bank concludes that you lied about it for some reason, for instance, you say I didn't lie about it for purposes of getting this loan, I lied about it because I'm in a divorce action, a different purpose, the Government still makes its case under that example.

Now, it's an absurd example, absolutely,

Mr. Justice --

QUESTION: Well, that's true, it is rather an absurd example. I don't know that you would find the Government prosecuting that. What's unreasonable about Congress saying, look, materiality has to do with whether the statement really would influence the bank. Purpose has to do with whether or not the defendant intended to influence the bank.

We don't want to let defendants go make the argument, although I intended to influence the bank, it didn't really do it, so we want to take that out of the case, and that's what this statute seems to say, and I don't really understand yet, but I want you to focus directly on it, what's unreasonable about writing a statute in that way.

MR. WYRSCH: Because if the concepts are different, and if, in fact, the statement made about, you know, the Yankee example that was given there earlier, if that, in fact -- does the Government have the opportunity in that instance to prosecute? Absolutely.

If this Court says, well, it'll never bring that, which is the Government's response --

QUESTION: My actual point is the same as Justice Scalia's on that one.

MR. WYRSCH: Well, I understand that, but I

still say that if the concepts are different no one should be subject to harsh penalties, which is what many of the courts of appeals have said. No one should be subject to the penalty for 26, 31 months if he had a bad intent but it was immaterial to the bank's decision, and that's why the courts have said we need to read a materiality element into the statute. It is a harsh result.

QUESTION: Well, a bad intent to influence the bank plus a false statement made to the bank, well, that may be a somewhat harsh statute in your view, but it's certainly not ridiculous or absurd. Maybe Congress just wanted to clamp down on people who made false statements to banks.

MR. WYRSCH: If they had said that, Mr. Justice -- Mr. Chief Justice --

QUESTION: Well, perhaps the way they said it was to omit the word materiality.

MR. WYRSCH: Perhaps they did, but perhaps they didn't, and we can't tell from this legislative --

QUESTION: Well, what is the difference here and in the Kay case, where the Court said that it doesn't lie with someone who has knowingly made a false statement with intent to mislead, then to argue that the information wasn't important, that Congress was entitled to require the information be given truthfully and without intent to

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mislead?

MR. WYRSCH: That language can be construed to mean that the Court said that there was no materiality element with respect to that statute, but if you go on and read exactly what the Court held, which was -- and this is how subsequent courts of appeals have read that decision -- they read that decision as meaning actual damage is not an element in the case. Actual loss to the bank is not an element.

And if you go on and read the language that follows the language that Your Honor has just read, then that is the holding of that case, and there have been subsequent cases that have said that's what Kay says, but at the same time they have said, and this is the court of appeals, we believe that materiality is an element, and they have not been -- they have not believed themselves bound by the Kay decision.

The Government also urged -- and I might also say that there is precedent in this Court for the proposition that materiality is an element with respect to the immigration statutes. The Government cites the Kungys case, but in the Kungys case there was another reference to, I think, the Fedorenko case, and in that case this Court expressly held with respect to an immigration statute that materiality with respect to

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misrepresentations was an element, and cited an old Costello case, so that case is in fact before this Court, and the Government has not distinguished it.

We distinguished the Kungys case on the basis that there Congress' intent was to reach acts that constituted a bad character for purposes of excluding people from citizenship. In this case, we don't find any such thing.

I might also note that we have some precedent in the antitrust statutes. Repeatedly the Government has successfully urged on this Court and many lower courts that a price-fixing agreement is per se a violation of Section I of the Sherman Act, and yet there is no such language in section I of the Sherman Act that ever says that a price-fixing agreement is, in fact, per se liability, and the Government is successfully in -- is successful in prosecutions in price-fixing matters of taking that element away from the jury as to whether it was unreasonable and whether or not the defendants can, in fact, present evidence or instructions with respect to those kinds of agreements being subjected to the rule of reason, and so their position in that regard is inconsistent.

It is inconsistent, we believe, with a number of decisions by this Court where the literal language of the

statute with respect to the intent element is not -- does not have any intent element, but in the Staples case and X-Citement Video, to name two, and in the Liparota case, where it said knowingly, and this Court went on to say well, Liparota means more than simply that you know you're dealing in food stamps. You mean -- it almost means you have to have the intent to violate the law.

This Court has said, I don't -- we are not stopped by looking at a statute that does not have an element. We can imply an element, and this is what 10 courts of appeals have done.

QUESTION: Yes, but this statute does contain a mens rea element. It's there.

MR. WYRSCH: It does --

QUESTION: You just want to add to it.

MR. WYRSCH: We want to simply indicate that it is subject to a reasonableness requirement, Justice O'Connor, and it is subject to -- and that reasonableness requirement in this instance is that it be material, and that the statements be material. There are certainly many different avenues to punish someone, or to deprive them alone, or do something in a civil arena if you make a statement to a bank that is in fact immaterial but yet is false.

But what we are saying, that if you're going to

subject some people, and then -- one of these people is a lawyer of longstanding in Joplin, Missouri -- to a harsh criminal penalty, then the statute must be read reasonably, that if, in fact --

QUESTION: Are you suggesting, then, that in order for Congress to make this take out the element of materiality it would have to negate that expressly by saying, and materiality is not an element of this offense, because if it doesn't negate it then the courts will imply it? Is that essentially your position?

MR. WYRSCH: I believe so, and I don't have the citation in the case in our briefs, but there was a case, and I think Justice Scalia offered the opinion as to whether or not a statute, what it required in the way of attorney fees, and I think that there was a '38 case, and there was an amendment in '46, and I think that the decision was, well, they must have meant this is the meaning of that term, because in fact there is a 1938 case and then a report with respect to this statute. They mentioned that case.

That would be much different than the case here. This case has no legislative history to indicate that, no legislative history that they're adopting the Kay case, no legislative history that they are in fact eliminating materiality, and in fact what there is are reviser notes

saying we don't intend to make any subsequent change.

Now, the Government's argument is, we win 3 to 10 on that, because there's only three statutes that said materiality, but I'm not sure a numeric argument in that way necessarily is a clear indication that they're in fact intended to eliminate materiality, and beyond that.

QUESTION: Well, I mean, either way, the Government -- it doesn't prove the Government's case, but it certainly neutralizes your point. I mean, that statement can't be true. It is impossible for the statement, we intend no material change, or no -- did they say material change, or no substantive change?

MR. WYRSCH: They said no substantive change.

QUESTION: That can't be correct. It obviously did make a substantive change. It either eliminated the materiality requirement that existed in the three statutes, or it added the materiality requirement that didn't exist in at least four.

QUESTION: Well, that's not quite correct, because isn't it true that the -- it may well have been that the 10 other statutes were construed the way Sir Edward Coke construed the common law crime of perjury.

MR. WYRSCH: That's correct.

QUESTION: We don't know that.

MR. WYRSCH: In the Shabani case, which the

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Government has urged this Court to follow, there was a statement in that opinion that -- to the effect that one of the canons of construction is to look at the common law, and what common law there has been, certainly since these folks were prosecuted, has been that 10 circuits have said that materiality is in fact an element.

QUESTION: Is that common law or is that statutory construction?

MR. WYRSCH: I think it can be construed probably more as statutory construction, but in one of these cases, and I believe it was the Williams case, Mr. Chief Justice, they expressly referred to Coke and Blackstone in the common law, and they said at common law materiality was, in fact, an element.

QUESTION: But I --

MR. WYRSCH: So I think it was both, at least under that Williams case.

QUESTION: Do I remember correctly that you had earlier said, I think it was in response to a question of Justice Scalia, earlier said that none of the 10 had in fact been construed to require materiality?

MR. WYRSCH: I think one of the 10 under the Kay case had been construed --

QUESTION: Not to require.

MR. WYRSCH: -- as not re --

QUESTION: Right, and the others --

MR. WYRSCH: That was the --

QUESTION: -- had not been construed on the point of issue at all, had they? I thought that -- I just --

MR. WYRSCH: Yes, that's correct --

QUESTION: Okay.

MR. WYRSCH: -- Justice, to the best of our knowledge. We have looked high and low on that, but I believe that the only statute had been construed was the one on the Kay case, I believe. I will tell you we made a very strong effort to find something else and could not.

QUESTION: So you have only one case which comes out the other way, and yet you maintain that all of those statutes have a subterranean materiality requirement.

MR. WYRSCH: Well, we're not going that far in our case. We're just saying that the survivor statute has that requirement, and I will say that we have the support of at least 10 circuits, and I think the footnote in the D.C. Circuit case recited would also support that.

I might also add that in the Williams case, which this Court decided when it set out the elements and the Government to some extent relies upon, in fact, made reference in the trial court to instructions that did, in fact, require materiality, and the Court didn't comment on

that one way or the other, so I don't think Williams is a good case for the Government.

I don't really think, to be honest with you, as I look at this history, that they really considered it one way or the other. There's just nothing there to indicate that, and I think that was a reason why we have so many circuits that say that in fact materiality is an element.

The one case of Cleary in the Second Circuit is not as strong for the Government as it urges. It's certainly on its face for the Government, and we don't disagree with that, but they at some point say in any event materiality is for the jury -- or, not for the jury, it's for the court, so there is some language to indicate that perhaps they don't have that position.

In candor, in another statutory section, I believe Section 287, the Second Circuit has found that materiality is not an element when it's not in the statute.

I might also say that the Government in this case, in terms of the posture in which this case is here, I don't think that it is for them to say at this point, given what they did in the trial court, to actually have preserved this issue. It is not a case -- that is, Gaudin and whether or not materiality is an element -- that will cause a great deal of difficulty for this Court or any

other court in terms of collateral consequences.

The law is pretty clear that these matters would have to be preserved in the trial court and, given the status of the law at the time, I don't think that's a serious concern.

But beyond that, I think that in terms of whether or not this Court would even attempt to say that these folks that were tried in the lower court in fact were not prejudiced.

QUESTION: That's what I don't quite understand, if you're going back to that. The instruction, as I read it, defines separately and completely purpose and then, having turned from what it called the second element, namely purpose, it then turned to the third element, namely, falsity. It discussed materiality, and refused to give the issue to the jury.

The Government says, well, the judge was right in not giving it to the jury for a different reason. It's not part of the statute, and there was no prejudice because purpose was defined separately and completely.

MR. WYRSCH: We believe that the --

QUESTION: What is the prejudice?

MR. WYRSCH: -- if the Government's correct, that purpose necessarily involves the issue of materiality or prejudice. The second point we made in our briefs,

Mr. Justice, is that on the false statement issue, that materiality is a part of that definition, and when the Court in effect took materiality --

QUESTION: But purpose was not.

MR. WYRSCH: Purpose was not --

QUESTION: Purpose was not part, so --

MR. WYRSCH: -- on the false statement part.

QUESTION: Yes, all right, but where's the prejudice, if in fact the judge was right in not giving the materiality issue to the jury, but for the wrong reason? What's the prejudice your client suffered?

MR. WYRSCH: We urge you not go beyond the purpose requirement, but on the false statement requirement, because the definition of false statement would have required it be material, when the court took that away from the jury, it took away from them the determination as to whether or not these statements were false.

QUESTION: If you're wrong about whether materiality is an issue of the part of the statute --

MR. WYRSCH: Yes.

QUESTION: If you're wrong about that, what prejudice did your client suffer from the judge having mentioned it when he didn't let the jury decide it?

MR. WYRSCH: First of all, in two ways. The

case wasn't tried that way, and we have a jury finding now that necessarily would have included in some way or not these issues of materiality.

Secondly, with respect both to the intent issue and purpose, and with respect to whether it was false, we were greatly prejudiced by the judge taking it away from the jury, because those two elements necessarily would require the issue of materiality, and in fact, and I know I'm repeating myself, that's exactly what the court defined.

In it's, and I think it's Instruction 20, he said that a false statement wouldn't necessarily have to be material, and then he said, but you're not to be concerned with that, so it took away from them a very substantial element with respect to that matter, and therefore we were very substantially prejudiced, and I will also say that the whole -- for an example on prejudice and whether materiality is an element --

QUESTION: Thank you, Mr. Wyrsch, your time has expired.

Mr. Dreeben, you have 3 minutes remaining.

MR. DREEBEN: Unless the Court has any questions, the Government waives rebuttal.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 12:00 noon, the case in the

above-entitled matter was submitted.)

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