ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JOYCE B. JOHNSON v. UNITED STATES

CASE NO: No. 96-203

PLACE: Washington, D.C.

DATE: Tuesday, February 25, 1997

PAGES: 1-51

REVISED

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

RECEIVED
SUPREME COURT, U.S
MARSHAL'S OFFICE

'97 AUG 12 A11 :39

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

JOYCE B. JOHNSON, :

Petitioner :

v. : No. 96-203

UNITED STATES :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, February 25, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

WM. J. SHEPPARD, ESQ., Jacksonville, Florida; on behalf of the Petitioner.

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

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 96-203, Joyce Johnson v. The United States.

Mr. Sheppard.

ORAL ARGUMENT OF WM. J. SHEPPARD

ON BEHALF OF THE PETITIONER

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

Petitioner Joyce Johnson was tried and convicted on a single count of perjury, in violation of 18 United States Code 1623. Her conviction occurred 6 months prior to this Court's holding in Gaudin. Her trial was conducted in total reliance on the then-existing and long-standing precedent of the Eleventh Circuit, which for more than 50 years had removed the element of materiality from the jury.

That precedent further provided that the judge would instruct the jury that the element of materiality had been found in favor of the Government. Trial counsel's entire preparation, strategy, and performance in the trial was dictated by this now-overruled precedent. This reliance on the wrong precedent from beginning to end of the proceedings caused an infection of the proceedings and rendered them totally different than what our

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Constitution requires.

QUESTION: Mr. Sheppard, the element was still in the case. It was just believed to be materiality was for the judge, not that you didn't have to prove materiality, so what was the difference in the proof you said that shaped trial attorney's strategy?

The element has to be proved. What was different about the proof that was presented of the materiality here from what it would have been if the trier had been a jury rather than a judge?

MR. SHEPPARD: Justice Ginsburg, we agree that the element was there and the Government had the duty to prove it, albeit a footnote under Eleventh Circuit precedent was questionable as to what the standard of proof was, but I submit that when a lawyer gets a case, what he does, he looks to see what are the elements of the case, and I think that's the first thing that a lawyer does.

He pulls the statute. He then goes to the standard jury instructions, and what happened here was that counsel had to persuade a judge, and was -- his opportunity to persuade a jury was taken away, and I submit that cases are tried based on elements starting from beginning to end, with the questions that you prepare to submit to a district judge to ask in voir dire, when we

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

get up and make opening statements. Inevitably, those opening statements focus on elements.

QUESTION: Well, for example, could you show us what trial counsel might have made of the materiality of these statements were the matter tried to a jury?

MR. SHEPPARD: Yes, ma'am, I believe I can.

Ms. Johnson in her grand jury testimony was never asked directly, did you receive the money that went into the renovation of your home from the target of this grand jury investigation, or we assume it is, Mr. Fields?

She told the grand jury that she got money for the renovation of her home from her mama, when indeed she was never asked directly did it come from Fields. Well, if it came from a third source -- suppose she'd robbed a bank and put the money in. It would not have been material as to any investigation of Mr. Fields.

Secondly, I believe that the cross-examination of the jury foreman, and even more specifically of Special Agent William Stull of the FBI, who testified that the -- about what the grand jury was investigating, that cross-examination was severely limited because counsel knew that 50 years of precedent in his circuit and 70 years of precedent in all of the circuits as it relates to a perjury prosecution, that that element was taken away from him.

QUESTION: Well, the Eleventh Circuit certainly didn't -- doesn't agree with your precedent -- they said after reviewing the record in this case, we find overwhelming evidence of the materiality of Johnson's statement. No reasonable juror could conclude that Johnson's false statements about the source of the money were not material.

MR. SHEPPARD: I agree that that's what they said, Mr. Chief Justice. However, they aren't the individuals that our history and the precedent of this Court says ought to be answering those kinds of questions, and as this Court unanimously held in Gaudin, and respectfully, the Eleventh Circuit is just squarely wrong when they say that the right to a jury trial, which is the first codified law in this Nation, isn't a substantial right.

QUESTION: They're not -- they may have said that, they may not have, but I was simply reading what they said about the evidence of materiality, which was what you were talking about.

You say it should have been determined by a jury, but that's a different thing from saying that it was a very thin case for materiality.

MR. SHEPPARD: I'm not here to argue that this was a thin case. I was responding to Justice Ginsburg's

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

case -- question. I'm here to argue that the right to a jury trial for the citizens in this country is so historically in place, and the jurisprudence of this Court has reinforced time and time again the Eleventh Circuit is wrong, just as the Government is wrong. They say we've waived this right or forfeited it by not objecting.

QUESTION: No, every day of the week it's a common thing for a judge to misinstruct a jury on an element of a defense.

MR. SHEPPARD: This is not a --

QUESTION: In which case the jury has not considered whether or not the person did or did not commit that element. That happens every day of the week, very common. Now, how is this case different from that? No one thinks it deprives a person who doesn't object of a right to a jury trial in that case. How does this case differ from that?

MR. SHEPPARD: In two respects, Justice Breyer. One, in this case the court did not misinstruct about the element. It totally omitted the element.

QUESTION: Well, that's true, but so what is the difference? Sometimes that would be more fair, sometimes less fair than a misinstruction.

QUESTION: Your case is one where it wasn't all that unfair.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. SHEPPARD: Well, it's --

QUESTION: In other cases misinstructions are disastrous, but -- so how -- is that -- why should we draw that line?

MR. SHEPPARD: Well, if I could go back to your earlier question to answer it first, sir, the second thing that is different in this case than just a misinstruction on an element, in addition to totally omitting it, the Eleventh Circuit pattern jury instruction number 43, which was taken from cases, and that's found in the Joint Appendix, Your Honor, at page 67, that instruction, which was taken from precedent of the old -- of the Fifth Circuit, prior to Congress creating the Eleventh Circuit and carrying over the precedent of the Fifth to the Eleventh provided, and this jury was indeed instructed, that the materiality of the matter involved in the alleged false testimony is not a matter with which you are concerned, but rather is a question for the court to decide.

And then went on, you are instructed that the questions asked the defendant as alleged constituted material matters in the grand jury proceedings referred to in the indictment, and respectfully, Justice Breyer, that is a partial directed verdict in a criminal case. It's not just a misdescription of an element.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

And the way cases are tried from voir dire to opening statement to closing argument to instructions are all within the structural framework of elements. That's just the way we lawyers do it, and --

QUESTION: Well, it's also true, is it not, counsel -- isn't it true that in this trial, when the Government tried to put on evidence of materiality before the jury and the court, that the petitioner's own trial lawyer wouldn't allow it on the grounds that it was for the judge.

MR. SHEPPARD: Well, absolutely.

QUESTION: Who said, absolutely keep that evidence out of here.

MR. SHEPPARD: And even before the trial, trial counsel was filing motions in limine because trial counsel and the lawyers who try these cases, we believe in precedent, and we believe that when you're in the face of longstanding precedent, that it is not principled lawyering to waste time making frivolous objections --

QUESTION: Well, could invited error in some case defeat the petitioner's subsequent claim if the petitioner himself had said, you may not consider materiality?

MR. SHEPPARD: I don't think in the face of 50 years of precedent in that circuit that that would be the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

appropriate way to handle it. You can't invite --

QUESTION: I would have thought that invited error could defeat such a claim. Now, the Eleventh Circuit didn't decide that issue, I guess.

MR. SHEPPARD: No, ma'am, and I believe that the Solicitor General has indicated that it doesn't urge that position, but I still -- even if they did, I don't think invited error can be invited without waiver or stipulation, and there wasn't.

There were motions in limine prior to trial in this case seeking to limit evidence going to the jury on the grounds that it would only be relevant as to materiality, and why should the Government be allowed, in violation of rule 403, to put on evidence that was not relevant, and was nothing but prejudicial?

QUESTION: But the judge has to make a materiality determination, and it's relevant to the judge's determination. You don't exclude the jury while the judge hears the materiality evidence, or do you? Maybe I'm wrong. I don't think you do.

MR. SHEPPARD: Well, you know, from reading the cases, Justice Kennedy, that's a good question. I think they're all tried differently in about three or four different protocols, depending upon which circuit you're in.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

But respectfully, I was -- or the trial counsel was seeking to exclude the evidence that could only be relevant as to materiality from going to the jury, and trial counsel was doing that because he was in the face of massive precedent that's dictated.

Not only is this element not going to be going to the jury, but I am also affirmatively going to direct a verdict in favor of the Government if I find it is --

QUESTION: Well, to be frank, I guess what's troubling us is that if you had a really strong materiality case the evidence would have come in and you would have argued it either before the judge with the jury absent or with the jury present, and an instruction to the jury that this is not really of their concern.

MR. SHEPPARD: Well, respectfully --

QUESTION: It's just a little hard for us to grasp the plain error aspect, reversible error aspect in this case when we didn't think the materiality was at question either before the judge or the jury, even under this wall of precedent.

MR. SHEPPARD: Well, but respectfully, the wrong entity is judging the defendant guilty. The trial judge took away from the jury 25 percent of her jury trial.

She got -- it would be like going to a four-dog dog fight and you only get three, because we're going to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

take that one away from you, and respectfully, the wrong entity is judging the defendant guilty, and respectfully, I believe the error goes up the next line to the circuit court of appeals when they'd say the three of us are going to substitute these 12 citizen jurors' opinion of what that evidence might be, and --

QUESTION: Is it your position that there simply couldn't be any harmless error analysis in this situation?

MR. SHEPPARD: There is nothing for harmless error analysis to attach to. There is no jury verdict. There is no object upon which --

QUESTION: Well, there is a jury verdict finding the person guilty.

MR. SHEPPARD: Well, but it's not a valid jury verdict if it's only three-quarters of what the Constitution in the history of our country says to us we have.

QUESTION: Well, but there is a valid jury verdict on the other elements, and it could be possible, could it not, that as we've said in some of our earlier cases, the jury that found elements 1, 2, and 3, would necessarily have found element 4? If that were established, then there would be no problem, would there? Wouldn't that establish harmless error?

MR. SHEPPARD: Well --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: I mean, when the jury has never been given a -- an instruction as to what is, you know, beyond a reasonable doubt, which is what one of our earlier cases involved, then you have a jury that said nothing at all. But this jury said three things. It's conceivable that those three things could automatically and implicitly include the fourth, isn't it?

MR. SHEPPARD: I don't think so in a directed verdict case, as we have here, or a partial directed verdict. Not only was this taken away from the jury, but the judge told them, don't be bothered with it, don't concern yourself with it, and I find it so.

QUESTION: Who asked for that instruction?

MR. SHEPPARD: Both the defense and the Government. That instruction had been in place in the Fifth Circuit, or the Eleventh Circuit pattern jury instructions since 1985, when the District Judges Association promulgated such instructions, and it's interesting, in some circuits -- and you know you have the Tenth Circuit and Ninth Circuit en banc ruling that this is harmful error and per se reversal -- they take different approaches, but these types of cases fall into two distinct categories. Some circuits' pattern jury instructions only say, don't concern yourself with materiality.

I would want to rephrase that and say there's three distinct. Some of them say, don't concern yourself with materiality. Some of the pattern jury instructions that are used say nothing to the jury. They just instruct the jury on the other three elements of perjury. Oath, false statement, knowing, say nothing about false statements.

In the Eleventh Circuit, and we submit adds a double injury to the plaintiff, or to the defendant in this case, the judge says, don't you be concerned with materiality, and I find it, and those are the most egregious instructions, and those that I respectfully submit for two different theories require reversal. They're both violations of the Fifth -- or, they're a violation of the Fifth and Sixth Amendment.

QUESTION: Mr. Sheppard, sometimes evidence on a particular element is so strong that the defendant would rather not have the jury confront that element, and we had such a case this term.

MR. SHEPPARD: I'm familiar with Old Chief.

QUESTION: So if we're told that the element, at least the Eleventh Circuit thought that the proof was overwhelming, and we have a trial record where the defense counsel is saying, please, judge, don't say the word materiality to the jury, how do we know that this case

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

isn't --

MR. SHEPPARD: Because you're the wrong entity to be making that decision. In addition, prior to that occurring in the trial, or during the trial -- I won't say it was prior because I don't frankly recall, but the record is clear that counsel made a Rule 29 motion for judgment of acquittal and directed that 29 motion to materiality.

Materiality was hotly litigated throughout the course of this case, returning to my earlier point, with motions in limine, objections, motion for a judgment of acquittal, but it was all done with a mind set knowing what the judge was going to do when he instructed the jury, and that's just a structural defect in these proceedings that render it absolutely meaningless.

There is no meaningful jury verdict. There is no case, I submit, that anybody can cite that says in a homicide case the court can just take away one of the elements. That isn't the way we work. We have the whole idea of the jury's conscience. The conscience of the citizens is greater than that of judges, and that's why, in the early colonial times in this country, that the right to jury trial was just hammered.

It's the only right I've located in the Federal Constitution that is explicitly pointed out in three

different places.

If you ask 100 lawyers, where do we get the right to a jury trial, they will tell you the Sixth Amendment, not knowing --

QUESTION: I don't think anyone disputes the importance of the jury trial, but where I'm -- my difficulty is that there are only a handful of things that this Court has said is a structural right, just a handful.

MR. SHEPPARD: Yes, sir.

QUESTION: And I don't find anywhere in that handful in any of the case law, though I grant you it's somewhat open, though I think in the Roy -- we removed it in the habeas context and made clear it wasn't structural in that context, so why should it be structural the fact that the judge decided a matter that the jury should have decided?

I grant you that's a wrong thing to do, but why is it equivalent to the using a -- you know, not beyond reasonable doubt, failing to do that? I mean, why is it one of the handful of things that's of critical importance? In your case, it doesn't seem to have been wrong that --

MR. SHEPPARD: Well, in order to rule for the Government, you'd have to go along with the Eleventh Circuit, which is to say we're not going to grant relief

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

here because counsel didn't object.

If we'd have made a frivolous objection -- and isn't this the legal irony --

QUESTION: What I'm looking for, actually, is the miscarriage of justice kind of standard here. That's what I'm focusing on -- yes.

MR. SHEPPARD: Well, the constitutional right to a jury trial embodies a profound judgment about the way in which the law should be enforced and justice administered. It is a structural guarantee.

QUESTION: Mr. Sheppard, but we know that all kinds of things go wrong in jury trials, and judges give the most opaque charges, that you could look at the jury and they don't know what the heck the judge is talking about, and we accept that.

MR. SHEPPARD: Well, certainly we do, because that's our system, and it is --

(Laughter.)

MR. SHEPPARD: And that happens. There's no doubt that it happens. But if you ask 100 laymen, if you went to a four-dog fight and you only got to have three dogs in the fight against the Government -- and remember that part of the value of the jury trial is to protect the citizens against the Government. Perjury can only be against the Government. It's one of those specific crimes

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that is only against the Government.

QUESTION: Mr. Sheppard, let me test whether you think this thing is structural in the narrow sense that our opinions have used it. Let's assume a prosecution for burglary, and evidence is introduced that the window was broken, that the -- you know, there was an entry.

The defendant does not counter that argument. His only defense, introduced by other people, is that he was somewhere else. He has an alibi defense.

The judge forgets to tell the jury that in order to convict it must find that the defendant knowingly broke and entered the house. Now, here's a broken window, and the guy walked in, somebody walked in, you know, in the dark, very carefully took things out of the house.

It's possible, I suppose -- well, it's not possible. It's simply not possible that a jury who found that there was a breaking and entering, and that this fellow did it, would not have also found that he did it knowingly. On that evidence, it's just -- the one finding implicitly includes the other.

Now, would you say that that conviction has to be reversed because the judge did not tell the jury that you have to find that this was knowingly done?

MR. SHEPPARD: Probably not.

QUESTION: Well, then, it's not structural. If

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

you say no, then it's not a structural error.

MR. SHEPPARD: Well, but it is -- knowing is different than materiality. They are different elements, totally, and I respectfully submit that in order to follow the reasoning in the Eleventh Circuit you've got to call the right to a jury trial a nonsubstantial right, that it's not a substantial right, and respectfully I don't think it can be.

But I think here, that the directed verdict is not opaque. It's clear. So you have a two-step analysis here, or two-step deprivation here, not only the omission of the knowing, but I'm going to tell you, ladies and gentlemen of the jury, that he knew it.

QUESTION: Yes, but your client --

QUESTION: But Mr. Sheppard, supposing in Justice Scalia's example, the judge did just that and said, don't you worry about the knowing. I'm going to tell you the evidence is strong enough to establish that point.

MR. SHEPPARD: I think it's a total denial of the right to a jury trial.

QUESTION: Well, then you should answer no to Justice Scalia on that one, I think.

MR. SHEPPARD: And I appreciate your correction, Your Honor.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

(Laughter.)

QUESTION: No, but if you -- the trouble with answering no --

QUESTION: I like a man who accepts help when it's offered.

(Laughter.)

QUESTION: Well, I don't.

(Laughter.)

QUESTION: The trouble with answering it that way is your client in fact is better off under what happened in Justice Scalia's hypothetical -- in this case, rather, than would be the case under the hypothetical, because here an actual finding is being made about materiality, whereas in the hypothetical what -- whether it's knowing or not is simply ignored. Your client is better off here.

MR. SHEPPARD: Well, I agree with that. I believe that here the taking away and then the affirmative statement, coupled with the entire framework in which this case traveled because of the longstanding precedent, I respectfully submit that the fundamental structure of this trial was wrong because counsel relied on longstanding precedent, which has been overruled, and under Griffith, that ruling in Gaudin is retroactive to these proceedings because --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Well, yes, but so you're saying it's better to ignore an element completely than it is to have a finding on an element if the finding is a nonjury finding.

MR. SHEPPARD: I think all elements must be found by a jury. I think that's what Gaudin stands for, and Sullivan, and --

QUESTION: Then why shouldn't your answer have been different on the knowing example, because in the knowing example the jury never made a finding of knowingly, never thought about it.

MR. SHEPPARD: I think our case is stronger simply because of the affirmative direction of the verdict, of the partial verdict.

But returning to Justice Breyer's question, this Court has ticked off a few rights that are structural rights that are per se reversible, and I think it's time for this Court to put teeth into the language of cases that go back to 1945 in Screws, and go back to --

QUESTION: But you see the problem I'm actually having, suppose he told the jury, jury, you know what materiality means? It means, well, sort of likely maybe to make a difference. Then you wouldn't be up here, well, how does that fit? Is that a structural error, too?

MR. SHEPPARD: If I'd have had the opportunity

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

to argue it to a jury, no one can say that I could not have prevailed, or that Ms. Johnson could not --

QUESTION: He just -- really, he says what materiality is, jury, is that materiality means, well, it has something to do with it, a little bit.

I'm trying to focus you on what's bothering me the most, which is how one would draw a distinction -- though it's there in some cases, how one would draw a distinction between misinstructions, really stupid instructions, off-the-wall instructions, no instructions -- it seems like a bog to me.

MR. SHEPPARD: I would --

QUESTION: And if we accept your view, we're right in the middle of it. That's --

MR. SHEPPARD: Well, I think you have to draw the line, because I think that's the way these cases, these post Gaudin cases are going to come through the system.

Number 1, I think if there's an omission and a directed verdict for sure the defendant prevails. If there is merely an omission, I'm not so sure, but I know at that extreme, given the trial of the case totally based on precedent that was so longstanding, that affected the entire performance, strategy, thinking, handling of the case, handling of the witnesses, handling of the jury

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

instructions, had I been clairvoyant and known that you were going to do what you did in Gaudin, do you think I would have asked for jury instruction number 43? Only if I was totally ineffective, because without that this petitioner did not have the right entity making the decision that caused her conviction.

I'll reserve my time.

QUESTION: Very well, Mr. Sheppard.

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE RESPONDENT

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

I'd first like to address why the plain error rule applies in this case, and then turn to the question of why petitioner is not entitled to relief under the plain error rule.

Now, the Federal Rules of Criminal Procedure impose a contemporaneous objection requirement on any party that wishes to assign an error either to the trial court or on appeal, and those provisions are set forth in our brief at the appendix, page 3a.

The first rule is Federal Rule of Criminal Procedure 30, which states that no party may assign as error any portion of the charge or omission there from

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

unless the party objects thereto before the jury retires to consider its verdict.

Rule 51 amplifies that requirement by stating that exceptions are not necessary, but that it is sufficient that a party, at the time the ruling or the order of the court is made, makes known to the court the action which this party -- which that party desires the court to take.

Petitioner did not comply with those two provisions. She did not object to the court's instruction on materiality. Indeed, she had sought it, and she did not make the argument, which was being widely made by defendants around the country at the time of this trial, that materiality should be decided by the jury rather than the judge, and as a result of failing to comply with the contemporaneous objection requirement for these two rules, the source for reviewing any claim of error that she now wishes to make is Rule 52(b) of the Federal Rules of Criminal Procedure.

QUESTION: Mr. Dreeben, I take it that in the Ninth Circuit and maybe some other circuit also the court of appeals rule is that you don't have to make a Rule 30 instruction when it would be futile if you've got clear circuit precedent in point going the other way?

MR. DREEBEN: Justice Ginsburg, I think what the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Ninth Circuit did in its Keys decision in stating the principle that you just articulated is actually to simply say, we allow people to raise claims as if they were preserved error, even if there were no objection, not actually that defense counsel are instructed, don't object.

But if one takes the Ninth Circuit's rule as being an instruction to defense counsel not to object, or that there is no need to object, then I think that the Ninth Circuit has simply violated Federal Rules of Criminal Procedure 30 and 51. The Ninth Circuit cannot announce a supervisory rule of procedure that is in direct conflict with what the Federal Rules of Criminal Procedure actually --

QUESTION: What would your approach be to the case if this case were tried before the Ninth Circuit came out with its decision before cert was applied for here?

Let's assume all of the circuits were of the same view, that materiality is a question for the judge.

MR. DREEBEN: I think it makes no difference whatsoever, Justice Kennedy.

QUESTION: I thought that's what your answer would be.

MR. DREEBEN: The reason is this. If one looks at the way the judicial system works from an appellate

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

perspective, this Court rarely, if ever, will entertain a claim that was not raised and preserved below both in the trial court and in the court of appeals, even if there is on-point authority against the potential petitioner at that time.

The court expects that parties will comply with relevant contemporaneous objection rules even if the objection at the time might be deemed futile under governing authority, and there are good reasons for that.

The first is that it shows that the party really cares about the issue. In this case, if petitioner had really wanted the jury to resolve the materiality issue, petitioner would have manifested that not by acquiescing in an instruction or requesting an instruction taking materiality away from the jury, but by doing everything the petitioner could to make the point that she wanted the jury to decide material --

QUESTION: Well, at least in the regime that we're hypothesizing, where there's no -- I think the trial judge would have been quite amazed at the request.

MR. DREEBEN: Well, I don't think that the trial judge would have been amazed at the request at the time that this trial took place in 1995.

QUESTION: Well, I'm talking about our hypothetical.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. DREEBEN: Talking about the hypothetical, there are plenty of examples where petitioners have preserved claims in the trial court, brought them up to this Court, and won by overruling Supreme Court precedent.

QUESTION: Would that trial judge have been able to grant the request?

MR. DREEBEN: No. The trial judge would have been barred by circuit law from granting the request, but --

QUESTION: So you're saying he must make a request which he knows cannot be granted.

MR. DREEBEN: Correct.

QUESTION: A strange position.

MR. DREEBEN: Well, I think that it's not strange at all because it shows, Justice Scalia, one that it's important to this petitioner, which is of value in itself.

The second reason is that it will prompt the petitioner to make an offer of proof or whatever supplementation of the record the petitioner feels is appropriate to show what that petitioner would have done differently if the law had been in its favor, which facilitates subsequent review by the court of appeals or by this Court of whether any error that occurred --

QUESTION: Well, that seems a bit odd, Mr.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Dreeben. I take it proof on materiality would be either cross-examining Government witnesses -- I'm not sure you'd do it greatly differently before a jury than you would before a judge.

MR. DREEBEN: You would not necessarily do it differently, Chief Justice Rehnquist, but it would show what, if any, theory the petitioner had that she wanted to present to the jury, and in this case there was no demonstration of what the petitioner would have done differently.

We've heard today that the course of the trial would have been differently.

QUESTION: How does the doctrine of invited error fit into this whole picture?

MR. DREEBEN: Well, I think, Justice O'Connor, that had the Government made and preserved a claim of invited error that might well be the correct way for this case to be resolved under cases such as Johnson v. The United States in 318 U.S.

QUESTION: Did the Government here at no point raise that question?

MR. DREEBEN: We did not argue invited error in the court of appeals. In the district court, everybody operated on the assumption that materiality would be decided by the judge.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

When Gaudin was decided, petitioner for the first time raised a claim that materiality was decided by the judge --

QUESTION: And that was before the case became final.

MR. DREEBEN: Correct, so petitioner is entitled to say that based on this Court's intervening precedent error occurred, and then the question becomes how do you analyze the consequences of that, and our submission is that the text of the Federal Rules of Criminal Procedure themselves require that it be analyzed as plain error unless we had had available to us an invited error argument and had made it, which we did not.

Petitioner's argument is that you should just disregard the text of the Federal Rules of Criminal Procedure either because an objection would be deemed futile, or because the error here should be characterized as structural and that somehow structural errors are exempt from contemporaneous objection requirements.

Neither of those submissions are correct. In our view, there is no textual exception in the Federal Rules of Criminal Procedure for objections later deemed futile, and this Court indeed, in considering the analogous issue in the habeas context, has held that futility is not a ground for excusing procedural default

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

in failing to raise a claim before the relevant tribunal in the State system.

In Engle v. Isaac the Court squarely held that even if a claim is perceived correctly by a litigant to be futile, it is not cause for failing to raise it.

QUESTION: But didn't those cases turn heavily on the fact there was collateral view, and here you're on direct review.

MR. DREEBEN: Well, yes, Justice Stevens, those cases are on collateral review, but I think the point is that the Court thought that there are benefits to requiring a party to object before the relevant tribunal with power to decide even if on-point governing law at the time was adverse, and it did not carve out, even in an exercise of its discretionary authority, an exception from the procedural default rule for claims that would be perceived as futile.

I think this case follows a fortiori, because here we have express provisions of the Federal Rules of Criminal Procedure that contain no futility exception, and it would be even more of a step for the Court to carve out of an express text of a rule an exception for something that it has not even recognized in its discretionary capacity on habeas review.

QUESTION: I have a hard time imagining, or

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

understanding how your rule would play out. Maybe it would be of no practical consequence. On the other hand, you might be asking us to have a practice where every attorney has a list and says, Your Honor, I make the following list of futile objections.

(Laughter.)

MR. DREEBEN: Well, Justice Kennedy, we too are concerned not with attorneys who would want to try to preserve any conceivable claim in the chance that some day the court might reverse it. What we're dealing --

QUESTION: I know a few who would.

MR. DREEBEN: Justice O'Connor, I think that those few probably would no matter what this Court told them, but the point here is that the class of claims that are likely to result in a reversal of existing precedent between the time of trial and appeal, such that a petitioner similarly situated to the petitioner here might say the law is changed. I didn't object below because the claim would have been futile. Now I have a good claim on my hands.

That class is not a large claim -- large class of claims, and astute defense counsel who care about the issue will watch it.

Defense counsel were raising the materiality objection that this Court excepted in Gaudin all over the

country, even before the en banc Ninth Circuit decision came down. Certainly after that decision came down it was being raised widely.

QUESTION: Mr. Dreeben --

QUESTION: Was this case tried before or after the Ninth Circuit decision?

MR. DREEBEN: This case was tried 6 months after the Ninth Circuit's en banc ruling in Gaudin and 6 months before this Court's ruling affirming that ruling in Gaudin, so petitioner was clearly on notice that this was a claim that had been excepted not only by a Federal court of appeals but by several State courts, and was clearly an issue that was in play.

QUESTION: Mr. Dreeben, has any circuit accepted your interpretation of Rule 52, and absolutely refused to consider any claim not raised below even where the circuit law was clear? Because if anybody has, I guess we could tell from the experience in that circuit whether the horrors that some anticipate will occur if such a rule is enforced --

MR. DREEBEN: No, Justice Scalia --

QUESTION: -- if 52 is enforced the way it's written.

MR. DREEBEN: Well, I think that there are two separate points. One is, is she within rule 52 at all

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

because she -- 52(b), plain error -- because she did not object.

QUESTION: Right.

MR. DREEBEN: To my knowledge, every circuit but the Tenth Circuit and the Ninth Circuit has accepted that view.

In other words, all of the circuits that have addressed this issue except for the en banc Tenth Circuit and the en banc Ninth Circuit have held that if you do not object at trial, even if the objection was futile, you are within the plain error provisions of Rule 52, and the claim must be evaluated for plain error and not reversed unless it is plain error.

Two circuits have said plain error is out of balance. That's the position that I say is squarely incorrect.

Now, turning to the question of how Rule 52(b) is applied if this is treated as a plain error case, we have two arguments on why this error at the trial should not be reversed under the plain error rule. The first is that the plain error rule should be read to require that the error be plain both at the time of trial and at the time of appeal, not simply at the time of appeal.

Now, as to that claim, Justice Scalia, I will acknowledge that the courts of appeals have not gone down

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that route.

The D.C. Circuit does read Rule 52 the same way that we do, and has required parties to raise -- has said that if the claim is clear at the time of appeal it must also be clear at the time of trial in order to come within Rule 52, so the D.C. Circuit agrees with us on that point, but then the D.C. Circuit has improvised what it calls a supervening decision doctrine that allows it to review claims when new law comes along at the time of appeal.

QUESTION: It seems to me sort of counterintuitive to say that it has to be clear at the time of trial, because what you're saying then is that you're going to forgive counsel for not raising an objection that clearly should have been raised. He'll be able to get it in later under the -- but if he -- if it was, you know, not clear at that time, then his failure to raise it is going to be conclusive against him. Isn't it just the opposite of what you'd expect?

MR. DREEBEN: I don't think so, Justice Scalia. I think that the purpose of the plain error rule as described by this Court in United States v. Frady is to permit the court of appeals to remedy error that was so gross and so egregious that the trial judge himself was derelict for not noticing it, even though the defense counsel or the prosecutor had not brought it to his

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

attention.

And in a case like this the trial court was certainly not derelict in its duties in not sending materiality --

QUESTION: So you're saying it depends on kind of the frame of mind of the judge, of the trial judge as to whether an error is plain or not?

MR. DREEBEN: No. It depends on, Chief Justice Rehnquist, on the clarity of the law at the time of trial. If the law at the time of trial is clear, so that the trial judge is on notice that what I'm supposed to do is send materiality to the jury, and if the defendant and the prosecutor both fail to bring that to the trial court's attention, the trial court is nonetheless under an obligation to comply with the governing law.

And as this Court described in Frady, we then have a situation where the court of appeals may notice that plain error, because the trial judge should have figured it out on his own even though the parties --

QUESTION: What would worry me about that is it sounds from the history of the plain error rule that it was meant to codify cases from this Court that described it as a kind of grab bag, not having a clear definition but designed to permit a court of appeals to correct a really serious problem that can be serious for -- it was

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

described in one case as a matter of fairness, integrity, or public confidence in the proceeding. You know, general, but what it shares in common is that something really important went wrong.

MR. DREEBEN: I think that, Justice Breyer, that the cases from this Court with perhaps only one exception, did involve errors that were clear to the trial judge at the time --

QUESTION: Yes, but it could be a terribly bad -- I mean, it depends on what it is. I -- you couldn't say in advance you could never have a terrific miscarriage of justice but for the circumstance where the trial judge knew what was going on. I mean, why restrict it in that way?

MR. DREEBEN: I -- the first reason is, I think that the language of Rule 52(b) itself contemplates that what was not brought to the attention of the trial judge is the same thing that is now being recognized on appeal, namely, obvious error, and it is hard to say that it is obvious error for the trial judge to miss a claim like this.

QUESTION: No, but his basic point is, as I take it, that look, if it's the language of the rule, this is error that was plain at the time of appeal, so the judge isn't foreclosed from dealing with it. Moreover he says

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the appellate court should have realized this is a structural error. There was an element of the crime that the jury never considered at all.

Everyone would say if the judge had said I'm not going to submit the whole case to the jury, that's a pretty big problem.

MR. DREEBEN: That's correct.

QUESTION: It's the same with an element.

MR. DREEBEN: Well --

QUESTION: It's the same with an element, and therefore we should hold that it is a matter of the integrity of the proceeding and just say it's automatically reversible.

Now, your response to that is first that -- this requirement you just mentioned, and then you have a second response.

MR. DREEBEN: Well, my first response, just to clarify, is that I think the language of the rule itself does not say plain at the time of appeal. It describes the character of error that is both not called to the judge's attention and raised on appeal as plain error, and in our view that requires that the error be obvious at both stages.

Now, there may be other forums for a defendant to raise a claim that a horrible miscarriage of justice

occurred, but the question is whether this rule is the vehicle for that, and our submission is that it is not.

QUESTION: Isn't the difficulty with the plain error analysis, though, Mr. Dreeben, that the plain error rule I think we would all agree was simply not devised to address the situation of the new rule, and therefore you either take the tack -- if you're going to apply it to the new rule situation, you either take the tack that you do, says it has to have been plain at the time of trial, in which case there will be, any new-rule case is automatically going to be decided in the Government's favor -- it's like sort of a Teague bar in a case in which there was no objection below -- or we're going to say, well, we're not going to cut him off like that, so we'll say it's sufficient if it's plain at the time of appeal, and then the real issue is going to be decided on the fourth Olano prong.

And would it make more sense to say, this isn't truly a plain error case, and simply have a rule for new rule cases and go right to something like the fourth Olano prong, or something like the harmless error standard if it's not structural?

MR. DREEBEN: Well, I think that if the Court is going to ultimately ask the same question that is comprehended by the fourth prong of Olano, and considering

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

all the circumstances, is it an infringement on the fairness, integrity, and public reputation of judicial proceedings to affirm this conviction, so long as that inquiry is part of the mix, at the end of the day I think the Government could live with a formulation such as Your Honor is describing.

The point about the obviousness at the time of trial is that we are dealing with a rule with a text, and there are various situations that can arise under that rule where the error was not clear at the time of trial but is clear at the time of --

QUESTION: Oh, I quite agree. I think the only point I'm trying to make is, maybe we simply cannot sensibly make this into a situation covered by the rule. Maybe we've got to devise something on our own here.

MR. DREEBEN: Well, I don't think that the Court has general authority to essentially take this kind of a case out of the rule. That was the point of my description of Rules 30 and 51. She did not object. Therefore, she did not preserve her error. Therefore, Rule 52(b) is the essential source for reviewing her claim.

QUESTION: Well, but structural errors that we discussed in Fulminante -- we did not find that that was structural error -- might well be something that's just

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

different than plain error, as Justice Souter has suggested.

MR. DREEBEN: I think this Court has already crossed that bridge, Justice Kennedy. The Court has held that discrimination in the selection of a grand jury is a structural error, and that's Vasquez v. Hillery, but the Court has twice held, both in the Shotwell case and in the Davis case, that if a party fails to make a contemporaneous objection to the racial composition of the jury, that party may well forfeit any opportunity to get relief from such a claim, so --

QUESTION: Well, of course, there the right was known and was established. What we're talking about here is the hypothesis -- we don't know we'll hold this way -- the hypothesis of a structural right that had not been established.

MR. DREEBEN: I accept the hypothesis that the structural right that's claimed -- I don't agree that it is structural, but I'll take that in a second -- that the right that's established didn't become known to the world until this Court ruled in Gaudin, but by hypothesis, this Court did not invent the constitutional right. That constitutional right was one that was possessed at the time of trial and was being actively asserted by litigants around the country who wanted to have that ruling applied

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

to their cases.

QUESTION: Well, as a matter of art, when we wrote Gaudin it seemed to me that it would have been rather difficult to say, and this was plain error.

MR. DREEBEN: Well, the Court did not reach the question of plain error. That's the question that we have before us today. The rules themselves, however, do not provide any room for the Court to say, we simply are not going to enforce the contemporaneous objection requirement.

QUESTION: Why not? Why -- I -- you've said that several times now. I don't see that it says -- if the rule read, errors that were plain, or defects affecting substantial rights, then I would understand your argument, but it doesn't say that. It says plan errors may be noticed. I think that's susceptible of the interpretation that errors that at the time you evaluate them are plain.

MR. DREEBEN: Justice Scalia, you're reading Rule 52(b)?

QUESTION: Yes, and that's not what you're referring to?

MR. DREEBEN: No. I was referring to the contemporaneous objection requirement.

QUESTION: Oh, I'm sorry.

MR. DREEBEN: I'm -- I was discussing with Justice Kennedy the question of whether the Court should treat this as a plain error case --

QUESTION: I see.

MR. DREEBEN: -- or whether it should just analyze it as if the error had been preserved.

QUESTION: All right. If it is a plain error case, just assume for the sake of argument --

MR. DREEBEN: It is a plain error case.

QUESTION: -- that I think plain error can be like a grab-bag, including errors that are plain only to the court of appeals.

MR. DREEBEN: Right.

QUESTION: Now, on that assumption -- on that assumption, then do you lose?

MR. DREEBEN: No. We then proceed to our second argument on why the error in this case does not entitle petitioner to relief under the plain error rule.

The fourth and final prong of Olano requires the Court to examine whether correcting the error serves the fairness, integrity, and public reputation of judicial proceedings. More precisely, the Court has said the error shall not be corrected unless it seriously affects the fairness, integrity, and public reputation of judicial proceedings.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

It is our view that when you have a case like this one, it would not serve the fairness, integrity, and public reputation of judicial proceedings to reverse.

Petitioner has never articulated a theory on which a properly instructed jury might have returned a determination that the statements here were not material. Until her reply brief in this Court, she never even articulated anything that she would say on that issue. In the trial itself, she objected when evidence of materiality was put on.

I think that a fair reading of the record is that there was no defense to materiality in this case. The evidence of Earl Fields' drug-dealing which was being investigated by the grand jury was deemed by the petitioner to be prejudicial to her interests, and she wanted if at all possible for the jury not to hear that and not to think about it.

Her defense was that the statements were true. She had an opportunity to argue to the trial judge that these statements were immaterial. Her sole argument consisted of a one-sentence remark, I think that these statements are immaterial.

The trial judge who heard the evidence and examined her record concluded that the statements were material. The court of appeals agreed.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

I think that as a bedrock principle, when you have a case like this one, where there is no reasonable probability that a retrial would produce a different outcome, that the plain error rule dictates affirmance, not reversal.

QUESTION: Mr. Dreeben, are you then saying this is a case-by-case determination, so that the court of appeals would have to look at the record and see how much evidence there was of materiality so that the materiality evidence was controversial then send it back for a new trial?

MR. DREEBEN: Correct, Justice Ginsburg.

I think that the right balance of interests, if the Court doesn't accept our argument on obviousness at the time of trial, and one is looking at this from the overall weighing process at the final step of Olano, that the question that should be foremost in the Court's mind is, is there any reasonable probability that this constitutional error made any difference in the outcome of the trial?

If there is no reasonable probability of that, and by that I don't mean that it's more likely than not that the jury might have acquitted, it's just is the Court confident that this is a fair verdict, then the Court should affirm.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

If the Court believes that the evidence is such that the jury might have come out the other way, the petitioner had a plausible theory, the trial judge didn't agree but maybe the jury would, then the interests of justice probably do counsel in favor of giving the petitioner a new trial, and this is how all of the courts, except for the Ninth and Tenth Circuits, have approached the issue.

The Ninth and Tenth Circuits have concluded that an instructional error like this is structural error. We don't think so. We think that a structural error is the kind of error that affects the entire integrity of the proceedings and is not susceptible to harmless error analysis at all.

Errors that relate to one jury instruction in a trial are not of that species. This Court has held that over and over again, most recently in California v. Roy, so the premise that this error is structural in our view is incorrect. So whatever rule the Court might think would be appropriate in cases of true structural error that emerged only at the time of appeal, this case is not that case.

When you then turn to the question of whether it serves the interests of justice to give petitioner a new trial, all of the courts of appeals except the Ninth and

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Tenth Circuits have concluded that it doesn't if there really was no case to be made on the issue of materiality before the jury.

That is frequently the case, because the issue of materiality is often proved up, as the Court well knows, by the testimony of the grand jury foreman who says, we were looking at drug-dealing and money-laundering by this person, and we therefore asked these questions to find out the answers to those things, and then the testimony was given, and now the jury is going to decide whether the testimony was true or false. Materiality is not the centerpiece of most of these cases.

Occasionally, there is a case in which materiality is hotly contested, and a court of appeals might feel that in cases where there's a hot contest and the case might have come out differently, a new trial is in order.

QUESTION: Was there some indication in the record that the trial judge might have not have applied the beyond-a-reasonable-doubt standard to materiality?

MR. DREEBEN: I honestly do not think it's clear, Justice Kennedy, what the trial judge thought about the standard that he applied to it. The Eleventh Circuit had never expressly spoken to that question.

Before this Court's decision in Gaudin, all of

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the courts of appeals except the Ninth Circuit said materiality is a legal question. Some courts nonetheless said well, the appropriate thing to do is to decide it as a question of law. Other courts --

QUESTION: Yes.

MR. DREEBEN: -- just treated it as a question that got decided beyond a reasonable doubt.

What is clear from this trial judge's findings is that he reviewed the record, he understood what the focus of the grand jury investigation was, he understood why it was relevant to the grand jury to know the source of funds for a house that petitioner purchased potentially with laundered drug money from her boyfriend, said all of that on the record, and he then articulated the standard in what I think is the correct legal standard for materiality.

He said, this may have been within the purview of what the grand jury was investigating, which I think was a loose fashion, per se. This was reasonably calculated to affect the decision of the grand jury.

Petitioner, of course, never objected in the trial court and said, oh, no, you're applying the wrong standard of materiality. Nor did petitioner ever say you haven't found it to the requisite degree of proof, and I don't think that there's any real question that the trial

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

judge was firmly convinced that this false testimony was material, as was the court of appeals.

So our final submission to this Court is that in a case like this the appropriate response is to apply the plain error rule because the objection was not preserved at trial, to treat the error as nonstructural in character, to examine what its actual impact was --

QUESTION: Thank you, Mr. Dreeben.

MR. DREEBEN: Thank you.

QUESTION: Mr. Sheppard, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF WM. J. SHEPPARD

ON BEHALF OF THE PETITIONER

MR. SHEPPARD: Thank you, Mr. Chief Justice.

I think the language in Bollenbach v. United States and in Cabana v. Bullock -- if I may refresh the Court: in other words the question is not whether guilt may be spelled out in the record, but whether guilt has been found by a jury according to the procedures and standards appropriate for criminal trials. That was in Bollenbach.

In Cabana, the language: findings made by a judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the crime.

The entire rationale of the plain error rule is to prevent lawyers from sand-bagging. Is it sand-bagging to follow a half-a-century of precedent? Certainly not. To follow the Government's argument here is going to cause lawyers, experienced lawyers to object to everything, and for the Solicitor to say that there was a lot of precedent out there going on in the country before this trial is flat wrong.

If you read the Ninth Circuit opinion in Gaudin, you will find that's a 1001 case. This Court characterized the Ninth Circuit as a maverick circuit on that issue and, finally in that regard, the Ninth Circuit case was a 1001 case. This is a 1623 case, and at the time of this trial the precedent in the Ninth Circuit was that materiality on a perjury case was different than 1001, and that is not an argument that helps this Court.

QUESTION: Mr. Sheppard, what do you say to the Government's argument that most circuits had adopted the rule that if you don't raise the objection you come within these provisions even if the objection would have been futile, and it hasn't produced, apparently, in those circuits the flood of futile objections that you contend will occur.

MR. SHEPPARD: Well, I would respectfully submit

that in at least two circuits they've got stay orders on en banc cases awaiting the decision in this case, so I don't know that any lawyer knows what to do in those circuits yet, and I think this is an important case to signal to the trial bar what to do.

As to the structural matter, I would ask the Court to harken to the language in Duncan v. Louisiana, which is the case that applied the Sixth Amendment right to a jury trial to the States through the Fourteenth Amendment.

It is a structural guarantee that reflects a fundamental decision about the exercise of official power, a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges, and if you apply 52(b) -- 52(a) here, that is indeed what you are doing. You are pulling the rug out of the Sixth Amendment, and that is contrary to our history, and I think history -- and we tried to set forth some history.

QUESTION: Mr. Sheppard, isn't it so that in the cases where there were complaints about a Sixth Amendment violation because women weren't being put on juries that the only defendants who got the benefit of that rule were the ones who had made a contemporaneous objection? I'm thinking particularly of Doran v. Missouri.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. SHEPPARD: And I cannot in good conscience answer that question directly, because I do not know, but I respectfully submit that many of these cases, the structural cases, had objections and some didn't, but I say that if the rule requiring a contemporaneous objection --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sheppard.

MR. SHEPPARD: Yes, sir.

CHIEF JUSTICE REHNQUIST: The case is submitted.

MR. SHEPPARD: Thank you.

(Whereupon, at 12:05 p.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

CERTIFICATION

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

JOYCE B. JOHNSON v. UNITED STATES
CASE NO: No. 96-203

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

BY Ann Marie Federico

(REPORTER)