ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: GEORGE C. ROGERS, Petitioner v. UNITED STATES

CASE NO: 96-1279 C-1

PLACE: Washington, D.C.

DATE: Wednesday, November 5, 1997

PAGES: 1-57

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IN THE SUPREME COURT OF THE UNITED STATES

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GEORGE C. ROGERS, :

Petitioner :

v. : No. 96-1279

UNITED STATES :

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

Washington, D.C.

Wednesday, November 5, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

JAVIER H. RUBINSTEIN, ESQ., Chicago, Illinois; on behalf of the Petitioner.

JONATHAN E. NUECHTERLEIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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C O N T E N T S

ORAL ARGUMENT OF	PAGE
JAVIER H. RUBINSTEIN, ESQ.	
On behalf of the Petitioner	3
ORAL ARGUMENT OF	
JONATHAN E. NUECHTERLEIN, ESQ.	
On behalf of the Respondent	29
REBUTTAL ARGUMENT OF	
JAVIER H. RUBINSTEIN, ESQ.	
On behalf of the Petitioner	57

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PROCEEDINGS

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 96-1279, George C. Rogers v. The United States.

Mr. Rubinstein.

ORAL ARGUMENT OF JAVIER H. RUBINSTEIN

ON BEHALF OF THE PETITIONER

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

The question before the Court in this case is whether the removal of an element by the trial court of an essential element of the crime with which a defendant is charged from the jury's consideration is the type of error that can be subject to harmless error scrutiny even if the defendant admitted the element by his testimony. We urge this Court to hold that it is not.

In this case, it is undisputed that the trial court completely removed from the jury's consideration an element of the offenses with which petitioner was charged. Although the court of appeals recognized that there was an incomplete verdict, it nonetheless held that the error was subject to harmless error scrutiny because the trial court removed only one element of the offense.

QUESTION: Well, when you say an incomplete

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verdict, you don't mean that the verdict formed was incomplete, do you?

MR. RUBINSTEIN: What we mean is that the jury -- what the jury found, the elements that the jury found do not constitute a crime, that the jury did not render a verdict on every element.

QUESTION: Let's take a look and -- are you saying that the form of the jury verdict didn't comply with law?

MR. RUBINSTEIN: Well, in the sense that every element of the offense charged was not included.

QUESTION: Well, but that isn't in the form of a jury -- that isn't in an ordinary jury verdict, that they find every element of the offense, is it? They simply find a person guilty or not guilty.

MR. RUBINSTEIN: That is true.

QUESTION: And that was done here, was it not?

MR. RUBINSTEIN: Yes, except that it was done in the context of jury instructions that did not instruct the jury --

QUESTION: Well, yes, but that's a little different than saying the jury rendered a flawed verdict in the sense of some defect in the form of the verdict.

MR. RUBINSTEIN: Our contention is not with respect to the actual form. It is with respect to the

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fact that, as this Court held in Gaudin, a verdict of guilty necessarily means a verdict that the defendant is guilty of every element of the crime with which he is charged, and in this case it is undisputed that the -- one of the elements of that crime was explicitly removed by the trial court from the jury's consideration.

It is in that respect, and as this Court explained in Gaudin, without an element -- without a jury finding on each element of the crime with which the defendant is charged, there is no verdict within the meaning of the Sixth Amendment, and if there is no verdict within the meaning of the Sixth Amendment, as this Court held in Sullivan there is no object upon which the harmless error doctrine --

QUESTION: In Sullivan the failure wasn't to give an instruction about reasonable doubt, was it not?

MR. RUBINSTEIN: Yes, it was.

QUESTION: And there, one could say that the jury had not found anything the way it should have.

MR. RUBINSTEIN: Actually, in our view the error in this case provides an even clearer example of the type of error that cannot be subject to harmless error scrutiny than was present in Sullivan.

As The Chief Justice Rehnquist pointed out in his concurring opinion in Sullivan, at least in that case

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the jury, there could be room for some argument as to whether or not the defective reasonable doubt instruction impacted the jury's deliberations, whereas -- and in the concurring opinion, Your Honor drew a distinction with the case in which an element is explicitly removed.

In the case of an element that is taken away from the jury, there is no room for speculation, because it is clear that the jury did not, in fact, render a complete verdict within the meaning of the Constitution.

QUESTION: Well, I have trouble with your present articulation of the question, too. You seem to be shoe-horning it into an incomplete verdict argument, but I thought the question presented related to the failure of the court to give an instruction, and all of a sudden we're hearing some new articulation. I don't know why you're doing that. Is it to try to get it into some other case or something?

MR. RUBINSTEIN: No, no.

QUESTION: What happened here was, there isn't an instruction on one element. Now, what is that element? That he knew it was a silencer?

MR. RUBINSTEIN: Yes. It is the element of mens rea that this Court required in Staples v. United States.

QUESTION: And what's the specific crime that we're talking about here, the possession of a silencer?

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MR. RUBINSTEIN: Of an unregistered silencer.

QUESTION: Uh-huh.

MR. RUBINSTEIN: And in particular, what Staples would require in combination with the knowing possession requirement is that the defendant must knowingly possess an object, and at the time that the defendant knowingly possesses it --

QUESTION: And you say that that can never be a harmless error, the failure to instruct?

MR. RUBINSTEIN: If the trial court fails to instruct the jury on an element of the crime, and the jury's findings on the other elements do not necessarily encompass the element that was omitted --

QUESTION: Well, what if it's clear from the evidence that the defendant says, yeah, I had a silencer. I knew it was a silencer.

MR. RUBINSTEIN: In that particular --

QUESTION: Harmless error possible?

MR. RUBINSTEIN: It would depend. In light of this Court's decision earlier this year in Johnson v. United States, there would have to be a timely objection to the instruction.

In other words, the instructional error would have to be preserved for appellate review in order for the harmless error doctrine to even be potentially applicable,

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otherwise the plain error doctrine would apply and, as this Court held in Johnson, under those circumstances the analysis would be quite different, so in our --

QUESTION: Well, the plain error doctrine as enunciated in Olano refers back to the Atkinson case and says you don't reverse if the reversal would seriously -- unless it would seriously affect the fairness and integrity or public reputation of judicial proceedings. How do you think a reversal here would affect the public perception of judicial proceedings where your client admitted the element that you say is missing?

MR. RUBINSTEIN: I --

QUESTION: You know, that's what harmless error's all about, is technical things like that.

MR. RUBINSTEIN: I would like to answer your question, Mr. Chief Justice, in two ways. First, Olano presented a circumstance in which there was no objection and so therefore, as this Court held in Johnson, the constitutional objection is forfeit. In other words, the analysis is entirely governed by Rule 52.

And as far as the second part of your question, though, as far as the public perception, the reason why reversal is required when an element is omitted from the trial court's instructions and where there is a contemporaneous objection to the instructional error is

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because it is the right to the jury trial itself that is at stake.

When the -- and in addition to that, what is also at stake when a trial court removes an element of the offense charged, as occurred in this case, effectively what is happening is that the trial court is directing a verdict in favor of the State as to that element. It is taking the element away from the jury.

And when the appellate court, as occurred in this case, is faced with the removal of an element, and decides that to look at the evidence and make its own finding as to whether the element was established beyond a reasonable doubt. The problem, as this Court explained in Sullivan, is that the wrong entity is judging the defendant guilty.

QUESTION: Your rule would carry over to the States, too, I suppose, so that any failure on the part of a State court to charge on some element of a crime would be Federal constitutional error.

MR. RUBINSTEIN: If the jury does not find the element that was omitted --

QUESTION: Well, ordinarily juries don't find special verdicts. They find general verdicts. So it goes back to the question of what a -- what was charged.

MR. RUBINSTEIN: It is certainly true that a

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jury generally will enter a general verdict, but it is a general verdict that is predicated upon the jury's instructions that tell the jury what the elements are.

QUESTION: So what is your answer to my question? Would this affect all failures to charge on an element in all State cases?

MR. RUBINSTEIN: It would affect State cases, but it would only do so if the jury does not find that element.

QUESTION: Well, you're not answering my question. My question is, would this affect failures to charge, the failure of a judge to charge on an element of the crime in all State cases?

MR. RUBINSTEIN: It would not. It would only apply where the failure is a complete one, where the jury's findings on other elements do not embrace the element that was omitted, and where there is a contemporaneous --

QUESTION: Mr. Rubinstein, you're not making any distinction between Federal trials and State trials.

MR. RUBINSTEIN: I'm not.

QUESTION: So whatever the rule is for the Federal trials you're saying, whatever you're arguing here in the Federal trial would apply to the State trial as well.

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You mentioned that this is an example of a type of error that is incurable, and the standard categories, the person who is without counsel, the biased judge, and now you say the failure to instruct on an element when there's a request for the instruction. What else belongs in that category of incurable errors?

MR. RUBINSTEIN: In addition to the type of error that we are dealing with in this case?

QUESTION: Yes.

MR. RUBINSTEIN: Essentially it would be a situation where the right to the jury trial itself has been denied.

QUESTION: Yes, well, if you could be specific about that, and I gave the two standard ones and added the one you're urging. Is there anything else, or is that it?

MR. RUBINSTEIN: As far as I am -- I am only prepared in this case to suggest that -- and I realize that the category of errors that this Court has regarded as essentially being immune from harmless error scrutiny are limited, and we accept that.

QUESTION: May I ask you -- you're saying where the essence of the right to a jury trial is denied and, of course, the principal purpose of the jury is to resolve disputed issues of fact, and is it equally important to have the jury pass on an undisputed issue of fact, where

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everybody agrees what the facts are?

MR. RUBINSTEIN: Yes, it is.

QUESTION: And why?

MR. RUBINSTEIN: And the reason is that as this Court indicated, for instance, in Estelle v. McGuire, where a defendant concedes an element, the prosecution's burden of proof remains the same, and where a defendant admits an element through testimony the weight of that testimony is for the jury to decide. Ultimately, what --

QUESTION: Yes, but it's not merely an admission which, sometimes admissions are more probative than others, but it's also the -- as counsel agreed that the facts -- as I remember the record here, that the facts are that he in fact knew that it was a silencer.

MR. RUBINSTEIN: Yes. Ultimately, as this Court explained in Duncan, the purpose of the jury trial and the purpose -- is to ultimately have the jury pass upon the guilt or innocence of the defendant.

QUESTION: I take it that interstate commerce, which is a jurisdictional requisite to many Federal crimes, and I think can be called an element of the offense, has to be charged and considered by the jury in every case, even though it was obvious that interstate commerce is involved.

MR. RUBINSTEIN: I would say the answer is yes,

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assuming that the defendant objects to -- assuming that there is a failure to instruct on the interstate commerce element, it would only be subject to the rule that we are talking about if the defendant timely objects to the trial court's failure to instruct on that element, and --

QUESTION: And defenses, the same thing? Defenses to the mens rea that's necessary for a crime, those are also included in your rule?

MR. RUBINSTEIN: I would think so. To give an example of entrapment, the burden of production that would be necessary on the part of the defendant to trigger the defendant's entitlement to a defense instruction like entrapment would be subject to appellate review.

But if an appellate court concludes that the burden of production was satisfied and that the defendant did have a right to have the instruction given to the jury, it would not be within the power of the appellate court to declare the omission of that instruction harmless because the appellate court has reviewed the evidence and decided that, in fact, no reasonable jury would have found that entrapment existed.

QUESTION: Mr. Rubinstein, what if the defendant at his arraignment said -- the judge said, well, how do you plead, and he said, I plead not guilty, except that I perfectly well knew that this object that they're talking

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about was a silencer. Would he have the right to a jury trial on that element then?

MR. RUBINSTEIN: That apparently is an open question within the circuits, and I know that there is -- it is a conflict right now as to whether or not a defendant can partially plead guilty.

QUESTION: Well, the -- I mean, I guess it's obvious the theory is that the trial is held to resolve issues which are joined, and that issue is not joined in the hypothesis that I give, so I would suppose there was a pretty good argument there for the propriety of removing that from the jury's consideration.

MR. RUBINSTEIN: If it were permissible to plead to an element in accordance with Rule 11, and all of the normal safeguards are provided to the defendant, that the defendant is waiving his or her right to a jury trial as to that element, and if such a plea were permissible, I think that since we are talking about it --

QUESTION: Then the same thing would be true here, I suppose, if he stands up at a later point and says, look, I know about that. That -- there's no question about that element.

And I take it what your argument would boil down to then would be that the failure here is the failure to conduct a kind of waiver hearing. In other words, if the

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judge had said, now, wait a minute, you can admit that if you want to, and we'll take it away from the jury if you understand that you are waiving your jury trial right and there's a burden of proof and so on, the kind of Boykin thing.

So I take it you would say that if they'd gone through a Boykin analysis on this element it would be perfectly permissible to take it from the jury. Is that true?

MR. RUBINSTEIN: Let me answer that in two ways. First of all, this Court has said that even where an open concession is made on an element, that that does not reduce the prosecution's burden of proof. In fact, even where a defendant stipulates --

QUESTION: I was surprised to hear you concede the point that a -- that Justice Souter began with that a trial is held, in criminal cases at least, only to resolve those issues that are joined.

MR. RUBINSTEIN: I --

QUESTION: I mean, suppose the defendant comes in and says, I am pleading not guilty, Your Honor, but of course I committed the crime, does that mean you don't need a trial?

MR. RUBINSTEIN: Absolutely not, and I did not mean to concede --

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QUESTION: You still need a trial. You need a jury -- a jury verdict that he committed it.

MR. RUBINSTEIN: Absolutely, and it is our position that if the defendant pleads not guilty, it makes no difference whether the defendant concedes an element. It would make no difference if the defendant openly confessed on the stand that he or she committed the crime.

The Government concedes in its brief that if a defendant were to break down on the stand and openly concede guilt of the crime it would not be harmless for the judge to discharge the jury and enter a judgment of conviction.

QUESTION: Suppose there are two counts, as there were in this case, submitted to the jury and under the law each count requires knowing that it's a silencer, but as to count 1 the judge instructs that that's not an issue, and as to count 2 -- but then he's convicted on both counts. Can you go back and sustain the conviction on both counts?

MR. RUBINSTEIN: It would depend -- if the jury could not have found the elements of -- on one count without also finding --

QUESTION: Well, they --

MR. RUBINSTEIN: Let me rephrase that.

QUESTION: Suppose they found there was a

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silencer on one count which was rather minor so far as the sentence is concerned, but then as to the major count the judge instructs knowledge is not -- this is not for you to consider, what result there?

MR. RUBINSTEIN: In that case the jury will have found that the defendant knowingly possessed an item that he knew to be a silencer.

QUESTION: Well, but they haven't considered the whole crime, pursuant to your earlier discussion. They haven't had this dynamic of facing the whole crime, which you describe in your reply brief.

MR. RUBINSTEIN: In that context, and I think that this Court's decision in Pope is instructive on that, that if the jury could not -- if the jury actually did make the finding of fact that would be necessary to establish guilt beyond a reasonable doubt --

QUESTION: No, but that's on the same count. He's introduced a second count, and there's no reason -- juries may return inconsistent verdicts.

MR. RUBINSTEIN: Right.

QUESTION: See, Pope, it was all one count.

MR. RUBINSTEIN: Yes, I understand that, but if no rational jury could have found what they did find as to count 2 and not find it at the same time as to count 1 --

QUESTION: That wouldn't impeach the verdict.

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You can have inconsistent verdicts.

MR. RUBINSTEIN: Yes. Well, in that particular instance, at the very least the court would have -- the appellate court would have actual jury findings that it can rely on, and it would -- at least will have the confidence of knowing that the jury had to decide whether the defendant -- and all of the elements, whether the defendant knowingly possessed an item that he knew to be a silencer. Here, we have no such finding, because --

QUESTION: Could we look at the instructions so that I see specifically what you're finding fault with? I think they're in the appendix on pages 104 and 105.

MR. RUBINSTEIN: The --

QUESTION: Joint appendix.

MR. RUBINSTEIN: The particular jury instruction that was given is at page 104, and it is the instruction from the trial court that it is not necessary for the Government to prove that the defendant knew that the item described in the indictment was a firearm, which the law requires.

QUESTION: But over on the next page, in 105, the court instructed that the firearm, the term firearm includes a silencer. The defendant can be found guilty of that offense only if all the following facts are proved beyond a reasonable doubt. First, that the defendant at

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the time and place charged in the indictment knowingly possessed a firearm as defined above.

MR. RUBINSTEIN: What that instruction means is that the defendant must knowingly possess an object which the law defines as a firearm. It does not mean that the defendant has to know the characteristics of the item that make it a firearm. That was the basis for this Court's holding in Staples.

QUESTION: In Staples, but in Staples, now we had a situation where a machine gun -- it wasn't clear whether it was a machine gun or a rifle. It could have been either.

Now, a silencer is a silencer is a silencer.

MR. RUBINSTEIN: Actually --

QUESTION: We don't have the same problem with a silencer, do we?

MR. RUBINSTEIN: I think you do, and --

QUESTION: Why?

MR. RUBINSTEIN: All of the circuits that have considered the question have held that Staples does apply to silencer possession offenses, the Seventh Circuit and the Ninth Circuit both.

QUESTION: Well, why isn't there some difference there? I mean, I can understand where there's some reason not to understand that a particular weapon could be a

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machine gun if it had certain characteristics, otherwise it was a rifle, but what's the difference of a silencer?

MR. RUBINSTEIN: I'll give you an example. The -- a silencer as I understand it looks very similar to a flash suppressor, which is also an item that is attached to a gun. A flash suppressor is not subject to registration requirements. It is not defined as a firearm, and the two objects can look highly similar.

And so it is possible, and particularly when the silencer is not attached to the weapon itself it is not necessarily clear that someone will know that the cylinder that they have is a silencer.

QUESTION: Well, you might think it's a grenade launcher.

(Laughter.)

QUESTION: Right?

QUESTION: But if that's so, I don't understand -- I really don't understand this.

As I read these instructions it seemed to me that they did instruct the jury that the jury is supposed to find exactly what Staples says they're supposed to find. At most, it's ambiguous. What the first thing is, jury, you have to find that the defendant knowingly possessed a firearm as defined above.

Well, that's right. That's what we said in

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Staples. You have to know that the machine gun is that kind of thing which the statute is talking about, not a soap box derby racer. It's a thing that looks like this, that has -- et cetera, and the defendant has to know that, and they just said you have to know it.

And then, on the other instruction, it says it is not necessary for the Government to prove that the defendant knew the item described in the indictment was a firearm which the law requires to be registered.

In other words, that's ambiguous, but it's certainly able -- and my natural reading is, defendant, you don't have to know that that thing, which you do know is the very thing described in section 5845, you do not have to know the fact that there's a statute called 5845 which makes it illegal to possess it. Now, that's a natural meaning of that.

Now, given that, what we have here is not an omission. What we have is an instruction that is ambiguous as to whether or not it does or does not tell the jury what we said in Staples was an element.

Therefore, if you are right, every ambiguous instruction ever given by any judge in the United States legal system is suddenly going to be absolutely unreviewable for harmless error, and that, of course, seems like quite a far-reaching proposition.

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MR. RUBINSTEIN: Let me answer your question, Justice Breyer, in two steps. First, with respect to the instructions themselves it was conceded by the Government in the court of appeals that the element required by Staples was explicitly removed.

QUESTION: Did not concede that it was not ambiguous.

MR. RUBINSTEIN: What they conceded was that it was removed.

QUESTION: Fine, and I say, you can say that if you're prepared to say that the reason it was removed is because the instruction was capable of two possible understandings.

MR. RUBINSTEIN: I would take issue that it is ambiguous. In my reading of the instruction the trial court told the jury that it didn't -- that the Government did not have to prove that the defendant knew the characteristics of the item that made it a firearm --

QUESTION: What are the words that do that?

MR. RUBINSTEIN: -- under the law.

QUESTION: What are the words that do that?

MR. RUBINSTEIN: At page -- at page 104 the Government -- I mean, sorry, the judge said, it is not necessary for the Government to prove that the defendant knew that the item described in the indictment was a

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firearm which the law requires to be registered.

QUESTION: Which the law requires to be registered.

MR. RUBINSTEIN: And when the defendant's counsel objected, he objected on the grounds that it was necessary for the Government to prove, otherwise the counsel was concerned that the element, without that element, that a jury might be inclined to believe, as this Court was concerned in Staples, that simply knowing possession of the object itself was enough to convict.

Ultimately -- and the court of appeals also held that the element was explicitly removed and ultimately, with respect to the question of whether every conviction involving an ambiguous instruction would be subject to reversal, ultimately it will be for the Court to decide whether or not, based on the review of the instructions themselves, whether the element in fact was omitted or not and, in light of this Court's decision in Johnson, it would be incumbent upon defense counsel to object on the grounds that --

QUESTION: That's -- that's the very --

MR. RUBINSTEIN: -- it had been omitted.

QUESTION: You've now put your finger on just the point that's bothering me. This is exactly difficult to understand what those words mean. As I read them first

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I thought they just meant the jury doesn't have to decide whether the defendant knew there's a statute that makes it illegal.

As you read it, you thought it meant something different, namely that the element's missing, and what worries me is if the Constitution of the United States says in respect to that kind of instruction it can never be harmless error, then aren't we saying it virtually in respect to all instructions, or thousands, or tens of thousands, and courts all over the place will have to start reviewing. That's --

QUESTION: Mr. Rubinstein, I didn't think this question was in this case.

QUESTION: Let him answer Justice Breyer's question. Then you --

MR. RUBINSTEIN: To answer your question, I believe that the fact that petitioner's counsel is -- or the defense counsel is obligated to object, and that ultimately it is for the appellate court to decide whether the element has been omitted, provides the safeguard that would prevent all ambiguous instructions from being subject.

It does provide the appellate court with a way of knowing that the omission was perceived at the trial court level and was brought to the trial court's

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attention, and the trial court passed upon the objection, but --

QUESTION: Mr. Rubinstein, the question presented in this case is whether a district court's failure to instruct on an element of an offense is harmless error where at trial the defendant admitted that element. Did the Government contend that this question is not involved in the case --

MR. RUBINSTEIN: The Government never --

QUESTION: -- in its opposition to the petition for certiorari? Did it say that there was no ambiguity -- that there was ambiguity in the charge, and that the element was included? Had it said that, we wouldn't have taken the case.

MR. RUBINSTEIN: The Government has not taken that position. In the court of appeals, the Government stated explicitly at page 10 of its appellate brief that the element required by Staples was explicit --

QUESTION: Well, they actually stipulated that the machine gun count was reversible for this same flaw, did it not?

MR. RUBINSTEIN: They also confessed error with respect to the machine gun count as well, and ultimately, as Justice Scalia pointed out, the question presented assumes that in fact the element was omitted.

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QUESTION: Still, if that -- I mean, I'd worry about lawyers reading an opinion that upheld you in light of the instruction that was actually given, and even if that weren't so, I'm still worried about my basic problem, finding something in the Constitution that says that this kind of ambiguity, or something a little less ambiguous, could never be harmless error.

That's -- why would the Constitution say that? That's --

MR. RUBINSTEIN: And it is not our contention that it would never be harmless error. It would only be where the omission is a true one, and where the jury's findings on other elements do not necessarily embrace the omitted element and, finally, where there is a contemporaneous objection and where it is brought to the trial court's attention and the trial court has an opportunity to consider whether the element has been omitted or not.

QUESTION: Mr. Rubinstein, on the admission, I wasn't clear whether you were saying the admission wasn't even a flat out admission. Were you suggesting that he said, yes, yes, it's a silencer, I know it's a silencer, but not saying that he knew a silencer was a firearm that Federal law prohibited?

MR. RUBINSTEIN: What we have -- what we believe

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to be the case is that he did admit that when he was shown the object he could identify it as a silencer.

QUESTION: I mean, you could say about a gun, but a silencer is -- you might think, oh, yeah, there's a gun registration law, guns have to be registered, but you wouldn't automatically say that about an accoutrement.

MR. RUBINSTEIN: We're not suggesting that he -- that petitioner had to know it had to be registered. That is not our contention. And ultimately, based upon the way the question presented --

QUESTION: Well, what did he -- what are you contending he did have to know?

In other words, you are conceding that what he said he knew is all that is required to -- for the Government to prove that he knew. The only thing is, the element didn't go to the jury.

MR. RUBINSTEIN: Right. We -- we have accepted the Court's premise in adopting the Government's question that he admitted -- that his admission was coextensive with the element.

With the Court's permission, I'd like to reserve the balance of my time for rebuttal.

QUESTION: -- Mr. Rubinstein. Let's go back to page 104 of the joint appendix. I'm having a similar problem, a problem similar to Justice Breyer.

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It says here at the bottom, what must be proved beyond a reasonable doubt is that the defendant knowingly possessed the item as charged. Now, what was that item, as charged?

MR. RUBINSTEIN: Yes. What that charge was that -- it charged knowing possession as an element. It did not charge that the defendant had to know at the time of possession the characteristics of the item that made it a firearm, which is what this Court held is also required.

QUESTION: That's not what we held in Staples. What we held in Staples is that he had to know that the machine gun, or the gun that he had could be converted -- had the characteristics of a machine gun.

MR. RUBINSTEIN: Correct, and in this case --

QUESTION: Not that it was a firearm.

MR. RUBINSTEIN: Right. You have to know the characteristics that make it a firearm. In this case, all that would have to be proven --

QUESTION: No, no, the characteristics that make it a machine gun.

MR. RUBINSTEIN: All right, and in this case what that would -- Staples would require is that the person knew it was, in fact, a silencer.

QUESTION: Well, the item as charged, what I don't understand is that, what must be proved beyond a

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reasonable doubt is that the defendant knowingly possessed the item as charged. The item as charged was that -- is that a 9-inch by 1/3/4 inch silencer?

MR. RUBINSTEIN: What I believe the instruction states at the bottom of page 4 is that the defendant knowingly possessed the item charged, which is described, and then that it was a firearm.

He does not have to find -- and ultimately the judge removed from the jury's consideration the element that the defendant had to know the characteristics, or in this particular case that the defendant had to know it was a silencer.

QUESTION: Very well, Mr. Rubinstein.

Mr. Nuechterlein, we'll hear from you. Do you pronounce your name Nuechterlein or Nuechterlein?

MR. NUECHTERLEIN: It's Nuechterlein, Mr. Chief Justice.

QUESTION: Nuechterlein.

ORAL ARGUMENT OF JONATHAN E. NUECHTERLEIN

ON BEHALF OF THE RESPONDENT

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

The question in this case is not whether a criminal defendant is entitled to a jury instruction on every element of his offense. He is. The question is

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whether a defendant is entitled to an appellate remedy if the district court erroneously failed to instruct the jury on an element that the defendant admitted in open court.

In this case, the question is, at bottom, whether petitioner is entitled to reversal on the ground that the jury was deprived of an opportunity to find that he was not telling the truth when he testified under oath that he knew that a silencer was a silencer.

QUESTION: And you might add in there that he asked for the instruction to be given and it was denied. He did object to its not being given.

MR. NUECHTERLEIN: He did.

QUESTION: Okay. And the issue is, you say he's entitled to have them all given, and even when he objects when one is not given, the issue is whether it makes any difference, whether there's any remedy for it.

MR. NUECHTERLEIN: The question is ultimately whether he was subjected to some kind of procedural unfairness. That is the foundational principle of the Court's harmless error jurisprudence.

And it's one thing for a defendant to claim that he has been subjected to procedural unfairness at his trial if the jury hasn't been given an adequate opportunity to test the credibility of the Government's evidence on some issue, but it's quite another thing for a

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defendant to claim that his trial was unfair if the jury wasn't given an opportunity --

QUESTION: That depends on whether you consider it to be an ipso facto unfairness not to have a jury pronouncement that you committed all the elements of this crime.

I don't think it's unfair, procedurally unfair to say to somebody who comes in and says yes, I did all of the things that constitute the element of the crime, but I want to plead not guilty, I don't think it would be procedurally unfair for the judge to say, get out of here, you admitted it all. You've admitted you're guilty. Go to jail. That's not procedurally unfair.

But unfortunately, the man has a right to a jury trial, and even though he's admitted it, you have to have a jury say he did it. That's what's at issue here, and I don't think it characterizes it fairly to say that what you're talking about is procedural fairness. There is a requirement of a jury trial that may not have anything to do with fairness.

MR. NUECHTERLEIN: Well, I think there is an important distinction, Justice Scalia, between a total and a partial deprivation of any constitutional right. For example, it is categorically unfair and reversible per se to deny someone counsel at his trial, but if counsel's

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appointed, and that counsel sleeps through nine-tenths of the trial, the inquiry then becomes whether there's been some particularized unfairness of the trial as a result of the counsel's failure.

And the same principle is applicable here. The Court has distinguished between total deprivations of Sixth Amendment rights and partial deprivations. Sullivan itself is an example of that.

In Sullivan, it was held to be categorically reversible if there is no -- if there's no finding beyond a reasonable doubt on any of the elements, but by contrast, in the cases where this Court has addressed burden of proof errors that relate only to individual elements, it has held that harmless error analysis is applicable.

QUESTION: Sullivan differs from this case in that there was a jury finding of the element. The question is whether the jury finding was tainted by the presumption that the judge told the jury to -- that it had to make, but the jury did have a finding there, didn't it?

MR. NUECHTERLEIN: That is one distinction, but there is also another, which is that in Sullivan the error spanned the entire trial and affected the entire jury deliberations, and the Court does distinguish between total and partial deprivations of a Sixth Amendment right.

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QUESTION: Mr. Nuechterlein, what is it that the Government concedes was error in the instruction here that we're talking about on the silencer?

MR. NUECHTERLEIN: The failure to give the jury an instruction on the Staples element.

QUESTION: Well, be more specific. What is it that the judge should have said that he didn't say?

MR. NUECHTERLEIN: The judge should have said that you must find that the defendant knew that his silencer was a silencer.

QUESTION: I've never heard -- look --

QUESTION: I mean, he did -- an instruction was given that the jury had to find the defendant at the time and place knowingly possessed a firearm as described above, and described above includes a silencer. Now, they were told that.

MR. NUECHTERLEIN: It is true that --

QUESTION: And that's not correct?

MR. NUECHTERLEIN: There is some ambiguity in this instruction. We have proceeded on the assumption that when this Court granted cert in this case it wanted the parties to brief the issues on the question presented, which is whether, if there is an omission of an element in the jury instructions, whether that --

QUESTION: I just am trying to find out what it

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is the Government says that's missing, instead of just being ambiguous.

QUESTION: Mr. Nuechterlein, isn't it true that the instruction that Justice O'Connor and Justice Breyer focus on related to count 3, and there wasn't a similar description with respect to --

QUESTION: Count 2.

QUESTION: Count 2.

MR. NUECHTERLEIN: Well, there actually was similar language in count 2 also, but the difference is that in count 2 the district court also explicitly said -- let me get the exact language.

QUESTION: It explicitly says that you don't have to know it was a firearm within the meaning of the statute.

MR. NUECHTERLEIN: Right.

QUESTION: And that's the instructions he wanted, but that is not the instruction that Staples requires. Staples merely requires knowledge that it was a silencer, and he did not request the instruction that Staples requires, did he?

MR. NUECHTERLEIN: I think we have assumed for the purposes of this case that he did request that instruction.

QUESTION: You made a lot of assumptions in

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order to have us decide a very important question.

MR. NUECHTERLEIN: No, I think we have addressed this issue by giving petitioner the benefit of the doubt.

QUESTION: Right.

MR. NUECHTERLEIN: This was an ambiguous instruction, and he did -- if you read through the colloquy he did ask for what appeared to be the Staples element, and the district court did deny that request.

QUESTION: But that might be redundant, and certainly what Justice Thomas just read doesn't even seem ambiguous. He says, what must be proved beyond a reasonable doubt is that the defendant knowingly possessed -- knowingly possessed the item as charged. What was charged is that he possessed a 9-inch by 1-3/4 silencer.

Therefore, he told the jury, jury, you must find the defendant knowingly possessed a 9-inch by 1-3/4 silencer. That's what he told them.

Now, what else was he supposed to say, other than that?

MR. NUECHTERLEIN: It is possible to construe that assumption -- it's possible to construe that instruction as telling the jury that it had to find that he possessed the item and that he knew that he possessed the item, but it is also possible for the jury, given his

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subsequent instruction, to find that he was telling them that he might have thought that the item was a pipe.

QUESTION: So in other words, if you charge the defendant with robbing a federally insured bank, or with robbing a bank, you also have to instruct and by the way, you know that a bank is a bank. He had to know that it was a bank. You have to tell the jury he didn't think it was a grocery store.

MR. NUECHTERLEIN: I'm not following your question.

QUESTION: Maybe a Federal bank is a better example. If the crime is that you must knowingly rob a Federal bank, when you say knowingly rob, does it mean that your knowledge just has to extend to the robbing, or does it also have to extend to the fact that it's a Federal bank, and I think it is ambiguous here.

MR. NUECHTERLEIN: I --

QUESTION: At least ambiguous, and maybe less than that.

MR. NUECHTERLEIN: I think it is ambiguous, and we have briefed this case on the assumption that he was denied the right that this Court --

QUESTION: Rightly so, in my view.

MR. NUECHTERLEIN: -- thought he was denied when the Court granted certiorari.

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QUESTION: The Moats case, which you cite at the outset of your brief, I think somewhat unfairly, you later explain I think quite accurately. I don't think it really supports your position. Moats is not an elements case. Moats is easily distinguishable by the petitioner, is it not?

MR. NUECHTERLEIN: Moats was not an instructional error, but it does support the general principle that a defendant is uniquely ill-positioned to claim on appeal that he was denied --

QUESTION: Well, but it's not an element, it's not instructional error. It's just not this case.

If we rule for the petitioner, do we have to overrule any of our cases?

MR. NUECHTERLEIN: I don't think you have to overrule them, but what you do have to do is, at least in this context, curtail the principle that there is some important relationship between harmless error analysis and the underlying fairness of the defendant's trial.

Again, I think Moats does support the general point that a defendant is uniquely ill-positioned to be claiming on appeal that his trial was unfair because the jury was given an inadequate opportunity to find that he was lying about some issue, and that's --

QUESTION: Yes, but Mr. -- I'm sorry. Finish

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your answer.

MR. NUECHTERLEIN: That was my answer.

QUESTION: In the normal question when we apply a harmless error analysis, we ask, can it be found beyond a reasonable doubt that the error did not contribute to the verdict. What we are asking is, did they return a verdict on the necessary elements despite the fact that there was an error, and sometimes the answer is, sure, because we can tell from what they found, assuming they followed the rest of the instructions, that they must have covered this point as to which specifically the instruction was inadequate.

But we can't do that in the case that at least we're assuming we have here in which there was a complete omission of any reference to the element, and it is not claimed that in finding some other element, or some other subsidiary fact, they must have found this element.

So the harmless error analysis is functioning, if it is applied here, I think, in an essentially different way from the way it functions in the normal case. Do you agree with that proposition?

MR. NUECHTERLEIN: I don't think I do agree with that proposition. I think -- it is true that in the context of instructional errors in a typical case, it is the appropriate rule.

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The question is whether or not the error had an effect on the jury's deliberations, but those cases all dealt with contested issues, and the defendant's claim was that the jury wasn't given an adequate opportunity to assess the credibility of the Government's evidence.

We have a quite different case here, where the defendant's claim is that the jury wasn't given an adequate opportunity to find that he had lied, in effect, about the element that he admitted under oath.

QUESTION: That it was a directed verdict, I mean, that's the strongest -- to put their case in the strongest terms, you can't direct a verdict in a criminal case, and the way you have agreed that this case is shaped presents that question.

You said yes, there was a missing instruction on an essential element, but he admitted that element, not at a plea hearing or anything like that, and so pro tanto there is a directed verdict.

Now, that's the case that you agreed is presented here. I think maybe from the charge it -- you should not have made that agreement, but you did, so can a trial judge direct a verdict on an element in a criminal case on the basis that the defendant has admitted it but hasn't waived his right to a jury trial?

MR. NUECHTERLEIN: I don't think that this case

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would be different if there had been a directed verdict on this element so long as the jury was able to assess all the other elements that he did not admit under oath, and so long as the jury played an essential role, but the important point is this. This is not --

QUESTION: Is that because the element was admitted, or because the element is somehow trivial compared to the other elements?

MR. NUECHTERLEIN: It is because the element was admitted, and I think the important point is --

QUESTION: Admitted.

MR. NUECHTERLEIN: Admitted, and I think the important point is that this is --

QUESTION: So that you could direct a criminal -- a verdict of guilty if the defendant admits all the essentials of the crime.

MR. NUECHTERLEIN: No. I think that that is different, because that is a total deprivation of his right to a jury trial.

QUESTION: Nine-tenths, 9 out of 10 elements you can direct a verdict on, is that it?

MR. NUECHTERLEIN: I think --

QUESTION: I mean, you know, how close do we slice this?

MR. NUECHTERLEIN: So long as the jury plays an

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essential role in the determination of guilt or innocence --

QUESTION: I see --

MR. NUECHTERLEIN: -- and so long as the jury --

QUESTION: Essential as to what? We normally define essentiality with reference to elements, and if that essential jury function is missing on one, why, even on your premise, is there not an essential denial or failure of the jury role?

MR. NUECHTERLEIN: I think the public perceives that the jury has a very important role to play. If he admits every element under oath and the jury is then instructed to resolve the remaining elements that he has not admitted under oath, it is error not to let the jury address all of the elements, but that is not the question here.

The question is whether he is entitled to an appellate remedy on the premise that the jury wasn't given an opportunity to find that he had lied under oath --

QUESTION: Mr. Nuechterlein, when I practiced, and perhaps things have changed, when a judge directed a verdict he sat up there on the bench and told the jury, now, stand up, I'm going to -- you know, this is not for you to deliberate, I'm going to direct you how to return, so either the jury was handed a piece of paper and they

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handed it back and did exactly what the judge -- that, to me, was the judge directing a verdict, not omitting an element in the chart. No such directed verdict took place here, did it?

MR. NUECHTERLEIN: That is correct. Actually, the -- there have been directed verdict cases where this Court has upheld convictions. Last term's Johnson decision was such a case.

But even in the harmless error context, this Court has held that mandatory conclusive presumptions can be harmless error if certain conditions are met. There is no substantive difference from a juror's perspective between an omission of an element and a mandatory conclusive presumption.

QUESTION: When there's a mandatory conclusive presumption, the jury comes in with a finding that that element was met pursuant to the presumption, and when you say certain conditions are met, the conditions are that that -- either some other finding would have inevitably led to that, or that it have been admitted, but the jury would have come in with a finding, nonetheless.

MR. NUECHTERLEIN: But I think that that finding, Justice Scalia, is an empty formalism, because the jury has been told that it must conclude that that element has been satisfied if it finds that the predicate

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element has been satisfied, so there is -- from a juror's perspective there is absolutely no distinction between a mandatory conclusive presumption and the omission that occurred in this case.

QUESTION: Mr. Nuechterlein, can I ask you to comment on a rather broad point that is troubling me about this case.

It's been apparent from some of the questioning by Justice Thomas and Justice Breyer in particular that the Government elected not to make what was a fairly strong argument that the issue really isn't presented in this case, and this is a terribly important constitutional question affecting State trials all over the country, and this Court, too, and our normal practice is not to address constitutional questions unless absolutely necessary to resolve the case, and you failed in your opposition to the cert petition to tell us, to even make the argument that this -- we didn't have to reach this question to decide this case. Did you do that because you thought you might win a huge victory that would cover all these cases?

MR. NUECHTERLEIN: That is not it at all. In fact, we looked at the instructions very carefully and we made the determination that in fact the element was not instructed, and we did that because we resolved that issue and there --

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QUESTION: You thought it was so clear that even though some of us are troubled by the instruction you didn't even want to point it out to us.

MR. NUECHTERLEIN: No, we didn't think it was clear, but where there is a deep ambiguity and the jury can reasonably construe that ambiguity against the need to find the element, we thought that this case was an appropriate vehicle for addressing the question presented the petitioner raised.

QUESTION: Mr. Nuechterlein --

QUESTION: Can I ask --

QUESTION: No.

QUESTION: Well, if we go to the merits of it, and say totally -- which I'm not sure, you know. I mean, this ambiguity is a slight problem, but the question, the sort of deep -- the question I have on the merits is, imagine that you do fail to charge on an element. You fail to let the jury decide whether the person who is the bank robber used a threat, or force.

Well, I would think in such a case it couldn't be harmless, that the guts of the crime weren't -- don't you agree with that?

MR. NUECHTERLEIN: In the ordinary case also the defendant doesn't admit that element.

QUESTION: So if you have a murder case and you

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forget to say that they have to find that there was a victim, you see, I mean, that would seem a serious problem.

MR. NUECHTERLEIN: Right.

QUESTION: So you agree in that case. All right. Then there are only three possibilities. One is, you don't agree and it's never -- you always look for harmless error.

The second possibility is that if it's an element of the offense that's omitted, it's never harmless error, and the third possibility is something in between, where you don't think the first two, so you must think something in between, and as to when the omission of the element is, per se, bad, no matter if it's harmless, and when it isn't.

Now, the only standard that I've been able to find that might do it is, you'd look to Olano, which is a different context, and you'd say, it is harm -- you can't look for harmless error. It's per se harmful. It's structural -- if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Otherwise, you look to see if it's harmless.

I don't know if that's a good standard. I know we need some standard if we're not going to take either extreme, and so I'm asking you what the standard is.

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MR. NUECHTERLEIN: I think the standard is --

QUESTION: That one or some other.

MR. NUECHTERLEIN: -- if the defendant admits the element under oath then the jury is not instructed on that element. That is not structural error.

QUESTION: Well, even if he -- in other words, if he admits, under oath, I murdered the victim, and what the judge does is walk in and say to the jury, jury, is the defendant guilty or not guilty, and the jury says, of what, they think to themselves. Huh, I won't tell you.

(Laughter.)

MR. NUECHTERLEIN: Well, I think that, you know, Justice Breyer, is a total deprivation of his right to a jury trial, and again I think that is distinct from the sort of case that you have here.

QUESTION: But then you're not agreeing with proposition 1 that -- you're saying that -- you're saying there is no omission, no omission of an element.

MR. NUECHTERLEIN: What I'm saying --

QUESTION: That wouldn't be subject to harmless error no matter how central the element if a person admits it.

MR. NUECHTERLEIN: Centrality is not an important part of our test. What is important is that the jury have -- play a role in the determination of guilt or

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innocence, and if the jury does do that and finds every element of the offense correctly described under the appropriate burden of proof, then the district court's failure to instruct the jury on an element that the defendant admitted under oath can be harmless error.

QUESTION: Well, part of your discussion with Justice Breyer I think is fairly academic. I mean, if there's an omission of a central part of the charge, whether you say it's never subject to harmless error review or whether you say it's never harmless under a harmless error review may be a nice question for academic discussion, but it comes out the same way.

MR. NUECHTERLEIN: I think it does, and the -- it is also the case that where the jury has not addressed an issue like that it may very well be that the error is not harmless. In fact, I would imagine that is the case in almost all the circumstances, but that's not what we have here.

What we have here is a defendant who asked the jury to accept his statement of fact with respect to his own state of mind, and then, on appeal, has predicated his claim for reversal on the premise that he may have been lying when he told the jury what he told them.

QUESTION: Mr. Nuechterlein --

QUESTION: And how does the fact of the

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defendant's admitting the element bear on your centrality analysis? Your test that you offer is us whether or not the jury played a central role in the proceeding. I hope I'm not misinterpreting -- that's the way I understand your position.

MR. NUECHTERLEIN: That is the limiting principle on our general theory of this case, but that's --

QUESTION: What does the defendant's having admitted the element as opposed, say, to 10 witnesses having testified to it, have to do with that?

MR. NUECHTERLEIN: I -- again, I think it comes down to your question of procedural fairness, which is what the harmless error doctrine is all about.

It's one thing for a defendant to argue that his trial was unfair because the district court didn't give the jury enough of an opportunity to assess the credibility of the Government's evidence, no matter how compelling that evidence may seem on appeal, but it's quite another thing for a defendant to claim that his trial wasn't fair because the jury didn't have an adequate opportunity to find that his trial testimony, an issue within his knowledge, was false.

QUESTION: Mr. Nuechterlein, I don't -- taking those two central elements of fairness and substantial

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activity by the jury in reaching the verdict it does render, I don't know why we shouldn't -- if those are of such significance I don't know why we shouldn't change our standard for harmless error review in a very essential respect.

Because we say now, however overwhelming the evidence may have been, however adequate the evidence may have been to convict, despite the fact that the jury certainly, let's say, considered 9 out of the 10 elements clearly, and the instructional error only goes to one element, despite the overwhelming power of the evidence on that element, if we cannot say beyond a reasonable doubt in effect that the jury did find what was necessary, we reverse. It's not a sufficiency of the evidence test.

Why shouldn't a sufficiency of the evidence test be appropriate so long as the evidence is so overwhelming that there's no unfairness in sending someone away with a record like that, and number 2, in reaching whatever verdict the jury did reach, it certainly engaged in a substantial amount of fact-finding, even if there was an error with respect to one element.

Why doesn't each of your central conditions get satisfied on, we'll say, a sufficiency of the evidence test, whereas in normal harmless error review that isn't enough?

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MR. NUECHTERLEIN: I think that the difference is with respect to the first of those that you identified.

There is an extremely important qualitative difference between a claim that the jury should have been interposed between the Government's proof on some element and the defendant. That is very different from the circumstance that we have here, where the defendant's claim is that the district court should have interposed a jury between the defendant and his own unequivocal testimony.

QUESTION: It's not in a case in which a stipulation is involved, and yet if a stipulation of fact is involved and nothing more, we don't say sufficiency of the evidence is enough.

MR. NUECHTERLEIN: I actually think that a defendant's sworn testimony on an issue within his peculiar knowledge should be more binding on appeal than a stipulation would be.

QUESTION: Mr. Nuechterlein, can I ask about the sworn testimony here. Did he really admit in open court that he knew that a silencer was a silencer at the time that he possessed it? Did he make that admission, or did -- was it very clear from his testimony that generally speaking he now knows what silencers are.

MR. NUECHTERLEIN: What he --

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QUESTION: He was shown a silencer. He says, sure I know what that is. How do you know? I've used them in Vietnam. You knew exactly what the silencer were the moment they were shown to you at trial. Yes, absolutely, sir. When you depend for your life on silencers, you know how to take them apart.

So it was conclusively shown at trial that this is a person who now knows very well what silencers are, but he never really got up at trial and said, at the time that I had this silencer in the car I knew what it was. In fact, he denied he ever had it in the car, so he couldn't have made such an admission.

MR. NUECHTERLEIN: His account of why he knew that silencer was a silencer is inconsistent with a rational jury's determination that --

QUESTION: Ah, so we now do not have a precise admission of the very element that has to be proven.

MR. NUECHTERLEIN: No, we do, and in fact --

QUESTION: But something which makes it almost incredible that that element didn't exist, but nonetheless not a precise admission of that element.

MR. NUECHTERLEIN: It is a precise admission of that element, because no rational juror -- and one --

QUESTION: We have an interesting little colloquy here, because it seems that several colleagues of

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mine have different points of view on the question presented, first whether there was really error here, and second whether it was really an admission and, of course, the question presented is whether a district court's failure to instruct the jury on an element of an offense is harmless error where at trial the defendant admitted that element.

(Laughter.)

MR. NUECHTERLEIN: The defendant did admit this element. The fact is, what he told the jury was, I knew this was a silencer because I was in Vietnam and I depended for my life on silencers. I knew it from the moment that I saw it, which was in his claim 2 hours --

QUESTION: I knew it when? Not at the time the crime was committed. I knew it when it was shown to me at trial, because he claimed he didn't have it --

MR. NUECHTERLEIN: No. No, he claimed he knew what it was when it was shown to him right after his arrest.

QUESTION: Right after his arrest.

MR. NUECHTERLEIN: Yes.

QUESTION: You're saying his admission was, if I had that, I knew what it was. It was a lawyer's admission, wasn't it?

(Laughter.)

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QUESTION: Mr. Nuechterlein, before you conclude, you say admission, and there are admissions and admissions. This one looked like it was very forthright and repeated, but sometimes a defendant can admit something when he's testifying from the stand. When he finishes he says, oh my gosh, I never should have admitted that.

So the admission comes in many sizes and shapes, and how, if we adopt your rule, do we guard against the possibility that a defendant will be trapped by an inadvertent admission?

MR. NUECHTERLEIN: Well, I -- I mean, I think that it is always the role of a reviewing court to determine what the facts of the case are, and there is no particular impediment in determining that he testified about some -- about his own state of mind, which is an issue within his peculiar knowledge, and that he did so under circumstances where there was no question about whether he was telling the truth.

In other words, this is a case where, if his admission was false, it was knowingly false. If it was false, it was because he lied on the stand at trial.

I think it's also -- I mean, it's significant to think about what would happen if this trial were -- if in fact his conviction were reversed and a new trial ordered.

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The new trial would not be about this element at all, because the testimony of his admission here would be introduced, and presumably he wouldn't contest it. In fact, in his reply brief, he alleges that this is an essential element of his defense.

What he wants is a new trial so that he can have an -- a second bite of the apple on all of the elements that he did not admit under oath at his first trial and that the jury resolved against him at his first trial.

QUESTION: Mr. Nuechterlein, just a couple of clarifications. In the court of appeals' opinion, the court of appeals says, as discussed above the district court, over defense objection, refused to inform the jury that the Government had the burden of showing Rogers knew the item in questions were firearms under the act.

In the question presented in this case, in the cert petition, the petitioner says that the trial court, over the objection of the defense counsel, the timely objection of defense counsel, refused to instruct the jury that the Government as an element of the offense charged was required to prove that petitioner knew the item in question was a firearm within the meaning of the statute.

Now, does the Government concede that the failure to object that the silencer was a firearm is an error?

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MR. NUECHTERLEIN: Does the Government concede --

QUESTION: That the failure to instruct that the silencer was a firearm is an error?

MR. NUECHTERLEIN: I don't think that's the error. No, I don't.

QUESTION: That's the error that the court of appeals found.

MR. NUECHTERLEIN: I had understood the court of appeals to find that the error in this case was that he did not find -- that the district court did not instruct the jury that it must find that the firearm possessed the characteristics that made it a firearm within the meaning of the statute.

QUESTION: I think he knew that.

MR. NUECHTERLEIN: Yes, that he knew that.

QUESTION: So your answer is, the Government does not concede that the failure to give a particular instruction was in error.

MR. NUECHTERLEIN: That is --

QUESTION: That that was --

QUESTION: No, that's -- my question is -- this is from the court of appeals opinion, and you -- that the -- as discussed above, the district court, over defense objection, refused to inform the jury that the

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Government had the burden of showing Rogers knew the items in question were firearms under the act.

With the benefit of the Supreme Court's opinion in Staples, we can now indubitably state that the district court's action effectively omitted the instruction an -- from the instruction an essential element of the crime.

MR. NUECHTERLEIN: Yes. I -- is your question whether or not Staples applies to silencers as well as --

QUESTION: No, whether Staples requires that there be an instruction that the silencer was a -- that he knowingly possessed a firearm under the act. Not a silencer, a firearm.

MR. NUECHTERLEIN: The error in this case was the district court's failure to tell the jury that it had to find -- I guess I'm just not understanding your question. It had to find that he knew that the silencer was a silencer, that he knew the silencer possessed the characteristics that made it a firearm within the meaning of the act.

QUESTION: And you think that the court of appeals says that in this opinion?

MR. NUECHTERLEIN: That's how I understood the court of appeals opinion.

QUESTION: Thank you, Mr. Nuechterlein.

Mr. Rubinstein, you have about a minute

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remaining.

REBUTTAL ARGUMENT OF JAVIER H. RUBINSTEIN

ON BEHALF OF THE PETITIONER

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

First of all, pointing to the same passage that Justice Thomas just read from, the court of appeals did find, as a predicate to its opinion, that the element in this case was omitted from the trial court's instructions.

And at page 10 of the Government's brief in the court of appeals it said that the instruction did not pass post Staples muster insofar as it explicitly withdrew from the jury's consideration the issue of appellant's knowledge that the firearm he possessed fell within the statutory definition.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rubinstein. The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

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CASE NO: 96-1279

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BY Ann Marie Federico

(REPORTER)