OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ELLIS E. NEDER, JR., Petitioner v. UNITED STATES

CASE NO: 97-1985 C.Z

PLACE: Washington, D.C.

DATE: Tuesday, February 23, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

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ELLIS E. NEDER, JR., :

Petitioner :

v. : No. 97-1985

UNITED STATES :

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Washington, D.C.

Tuesday, February 23, 1999

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:14 a.m.

APPEARANCES:

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

ROY W. MCLEESE, III, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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PROCEEDINGS

(11:14 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 97-1985, Neder v. 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:

This case presents two entirely distinct questions: whether the failure of the trial court to instruct the jury on an element of the crime is subject harmless error review even if the element was not in dispute at trial; and, second, whether materiality is an element of the Federal mail, wire and bank fraud statutes.

QUESTION: The first question is the one that we reserved in our Johnson opinion, is it not?

MR. RUBINSTEIN: It is, Your Honor. Although Johnson did not squarely present the question, in any event, since there had been no contemporaneous objection to the error. And, as a result --

QUESTION: And it was a plain error?

MR. RUBINSTEIN: -- it was a plain error case; that's correct.

QUESTION: May I ask you, before you go on with

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number one. I assume you're going to take number one before you take number two?

MR. RUBINSTEIN: That was the plan.

QUESTION: Okay. Why do you say that it was not in dispute in the trial? Wasn't there a general denial of the indictment?

MR. RUBINSTEIN: Justice Scalia, I assume you're referring to the phrasing of the question presented. The phrasing of the question presented was taken from the government's phraseology of the question. We agree that having pled not guilty to the crime and having specifically requested an instruction on materiality, that no court could constitutionally declare that the element was truly uncontested. However, we are --

QUESTION: Not in dispute. But you acknowledge that you didn't bring in any -- any evidence or argumentation specifically directed to that point?

MR. RUBINSTEIN: Yes. We agree that materiality was not the central focus of the trial.

QUESTION: Not the cent -- it wasn't the focus at all?

MR. RUBINSTEIN: I would -- I would agree with that.

In this case, it is undisputed that the trial court completely removed --

QUESTION: Indeed, if it goes back for some reason, if we agree with you and it's retried, you don't really think the government's going to have any trouble proving materiality, I assume?

MR. RUBINSTEIN: I don't -- I don't believe that, on a retrial, that materiality would be a central focus of any defense to the tax fraud charge. I would agree with that, Justice O'Connor.

Nonetheless, it is undisputed in this case that the trial court completely removed the element of materiality on the tax fraud charge, both by directing a verdict on that element in favor of the prosecution and by then instructing the jury that materiality was not for the jury to decide.

The court of appeals, nonetheless, declared that error harmless --

QUESTION: Let me just -- let me just be sure I understand. How did he direct the verdict on that issue?

MR. RUBINSTEIN: The judge explicitly stated on the record that the question of materiality was for the court to decide, not for the jury to decide.

QUESTION: So, he didn't tell the jury to make a finding of materiality --

MR. RUBINSTEIN: What --

QUESTION: I mean, he didn't direct the jury to

do that?

MR. RUBINSTEIN: What he told the -- he did not tell the jury that the court had found materiality. What the judge instructed the jury several times was that the jury was not to be concerned with the question of materiality because the materiality was not for the jury to decide.

QUESTION: And what was what he told them even on the tax count?

MR. RUBINSTEIN: That's correct.

QUESTION: Where materiality is mentioned in the statute.

MR. RUBINSTEIN: That's correct, Justice O'Connor.

We believe that the 11th Circuit's harmless error holding must be reversed for at least three reasons. First, the trial court's constitutional error is not subject to harmless error scrutiny, in light of the fact that element -- that the element of materiality was completely removed from the jury's consideration.

QUESTION: Well, what if the district court, instead of omitting to charge the jury at all on materiality, had given it an erroneous charge on materiality would that, too, be not subject to harmless error review?

MR. RUBINSTEIN: That would depend upon whether or not the misinstruction on the element was sufficiently serious that the jury did not in fact find the actual element beyond a reasonable doubt.

QUESTION: So, then, we really -- no -- no -- no court would know in advance, no court of appeals would know in advance without -- it's a case-by-case analysis in your view?

MR. RUBINSTEIN: We agree with that. And we believe that it does not -- is not necessary for an appellate court to label the error either as an omission or a misinstruction. In -- in any case, this Court has articulated a single constitutional --

QUESTION: But under your test, in answer to the Chief Justice's question, that would -- the jury would have found those facts despite the misinstruction. That really happened here. The man understated his income. Anybody knows that that reduced his income tax. And he did it willfully. I mean, what -- what more is there to decide?

MR. RUBINSTEIN: What the jury found --

QUESTION: Why didn't the jury in fact find in this case all of the circumstances necessary to show materiality?

MR. RUBINSTEIN: The jury did not, Justice

Kennedy, and for this reason. What the jury found was what it was that was false on the return, and that it was done willfully. To take the next step, to find that the misinformation on the tax return was false as to a material matter, the jury would then have to be instructed and consider whether or not that would be false as to a material matter from the standpoint of whether it would be naturally calculated to influence the audience to which it was addressed.

Regardless of how straightforward it may have been --

QUESTION: Was there evidence as to the amount of the tax that was avoided or the approximate amount?

MR. RUBINSTEIN: The -- yes, there was.

But, nonetheless, the jury was not told, first of all, that it had to consider whether or not that would be naturally intended to influence the audience to which it was addressed. And regardless --

QUESTION: I'm not sure of the difference between the case we have before us and the hypothetical given by the Chief Justice. One, the -- the trial court makes a real hash out of the materiality instruction. The other, he doesn't instruct at all. The other, he says, it's for me. What's the functional difference in those?

MR. RUBINSTEIN: The functional difference is

this. In Sullivan, this Court articulated this concept of functional equivalence. And it was, again, further elaborated by Justice Scalia, in his concurring opinion in Roy. And the test is this:

Functional equivalence occurs where the jury actually finds the element in question, either by its consideration of other elements on other counts or because the jury could not have found what it did find without actually finding the element that was removed.

It is not enough to say that the jury found three things and that surely the jury would have found the fourth element. That is precisely what this Court, in Sullivan, said that cannot be done.

QUESTION: Well, so then, then, there will be very little subject to harmless error review even if it's an erroneous instruction rather than, under your view, even rather than an omission?

MR. RUBINSTEIN: We don't believe that it would have that type of broad effect for two reasons. First, Pope was actually a case in which functional equivalence was found. That may occur from time to time. But I think, more importantly, this Court's decision in Johnson will serve to have a very substantial limiting effect.

QUESTION: Well, let's talk about Johnson, because that's a case where the Court found there was

plain error and there was a failure to instruct, and we applied harmless error analysis.

MR. RUBINSTEIN: In Johnson, there was no contemporaneous objection to the instructional error. The defendant had argued that that failure to object should essentially have been disregarded. This Court said that constitutional rights can be forfeit, and that by failing to object on a timely basis to the instruction, that the defendant had in fact forfeited the right to have the jury instruct to be -- have the jury instructed on that element.

QUESTION: So, had there been no objection here, we would be in a Johnson situation?

MR. RUBINSTEIN: That's exactly correct, Justice O'Connor.

QUESTION: Well, why -- if that is so, why couldn't we say just what the court said in Sullivan, that there's really nothing for us to operate on, we can't speculate on what the jury would have found? What -- what's the difference in those two instances?

MR. RUBINSTEIN: Well, in -- in the -- I think the key point -- I want to make sure I understand your question, Justice Kennedy -- we believe that what you just said in terms of Sullivan is exactly correct, and that in this case there is nothing that the harmless error

scrutiny can operate on, since there was no complete verdict on every element of the crime.

The reason that that principle was not applied in Johnson is because the constitutional right that underlied this Court's decision in Sullivan, which is the constitutional right to have the jury render a verdict of guilty beyond a reasonable doubt on every element --

QUESTION: Mr. Rubinstein, I don't understand that there isn't this functional equivalent. Let's -- let's say we accept your theory that you can't leave something out and have the jury never find it and say, well, they would have found it anyway. But the notion, which was not explored by the court of appeals as far as I know, of the possibility that this does meet the functional equivalence test, that's still open isn't it?

MR. RUBINSTEIN: I don't believe it is, Justice Ginsburg, for a couple of reasons. First of all, I don't believe that it's possible in this case to find that the jury actually did find materiality, given the judge's explicit instruction to the jury several times that materiality was not a matter for the jury to decide. And this Court, over and again, has reinforced the proposition that juries are presumed to follow the instructions that they are given by the court.

QUESTION: Well, were they instructed in such a

way that in order to return a verdict of guilty they had to find that the amount charged in the indictment was in fact the understatement?

MR. RUBINSTEIN: What they had to find was that there was in fact false information in the tax return --

QUESTION: And did they have to --

MR. RUBINSTEIN: -- and that it was willfully misstated.

QUESTION: And did they have to find that the false information was -- was the information charged -- in other words, an understatement of -- what was it -- several million dollars?

MR. RUBINSTEIN: I believe that there would have been -- the jury would have been instructed as to what it was that was -- was alleged in the indictment.

QUESTION: Right. If -- if that's -- if that is fairly presupposed then by the jury verdict, why isn't the -- this a situation in which we have to say, necessarily, they must have found an amount that was material?

MR. RUBINSTEIN: Because the jury was not -- in order to take that next step, to make the finding of materiality, the jury would have to find that what it was that was misstated in the tax return would have a natural tendency to influence the audience to which it is

addressed. The jury never gave any consideration to that question.

QUESTION: But you -- you don't -- you don't disagree with Justice Souter -- with what Justice Souter said. It seems to me you concede that the jury found an amount which was material. You -- you said earlier that you wouldn't -- you wouldn't contest that -- on retrial, you thought it would be very difficult to contest that this amount wasn't material.

MR. RUBINSTEIN: Well --

QUESTION: The jury found an amount which was material. But the jury did not find that the amount which it found was material.

MR. RUBINSTEIN: We don't believe that the jury found -- what the jury found was an amount. There is then another step that has to be taken, which is to apply the law --

QUESTION: And you acknowledge -- you acknowledge the amount is material?

MR. RUBINSTEIN: Well, we would agree that the element --

QUESTION: So, the jury found an amount which was material. But the jury did not find materiality.

MR. RUBINSTEIN: That's correct.

QUESTION: That's your objection.

MR. RUBINSTEIN: That's correct.

QUESTION: Could the jury have found anything else? In other words, there -- there -- there are certainly plenty of case -- borderline cases -- in which it may or may not be material, the jury goes one way in one case, another in another case. Is -- is it, as a matter of law, possible for a jury to find -- would it, as a matter of law, have been possible for the jury to find anything but that this was a material amount?

MR. RUBINSTEIN: Well, I'd like to answer that in two ways. First of all --

QUESTION: Well, how about yes or no first?

MR. RUBINSTEIN: Well, I'll answer that I believe the jury -- I don't believe that a jury could not have found materiality had it been instructed to consider it. But I think the critical distinction here is that, as this Court held in Sullivan, when the jury is not instructed to consider a particular element, or when there is not --

QUESTION: That's not what the Court held in Sullivan. The Court held in Sullivan on -- that had they not been charged on a reasonable doubt. They didn't say every single element.

MR. RUBINSTEIN: Well, we actually do have here, at the end of the day, the same error that was --

QUESTION: Well, but you're -- you're talking about what the holding was in Sullivan. I think you've just misstated it.

MR. RUBINSTEIN: Actually, we don't believe that we did. Because what Sullivan said is that when there is not a verdict within the meaning of the sixth amendment, which means a verdict beyond a reasonable doubt on every element of the crime, there is no object that the harmless error scrutiny can operate --

QUESTION: But Sullivan didn't involve charges on the elements of the crime at all.

MR. RUBINSTEIN: That's true. But, at the end of the day, the result is the same here because you still do not have a constitutional verdict within the meaning of the sixth amendment.

QUESTION: But why? Why is that?

QUESTION: Why not?

QUESTION: Suppose -- suppose it stems from a case called Rose, which says almost all error is harmless, subject to harmless error. The only things that are automatic are those basic protections a criminal trial cannot reliably serve its function without no -- in other words -- totally unfair disaster. All right.

Now, the only things this Court has said were just totally unfair disaster are reasonable doubt

instruction, racial discrimination -- a real handful of constitutional matters. They have said, as well, that things like involuntary confession are not in that category.

So, why would we put this kind of thing, which seems so technical, which seems so close to an ordinary misinstruction? Why, when involuntary confessions are not in that category?

Why, when, one after another constitutional errors, there is no constitutional error but for a handful that are automatically reversible? Why is this thing, that would create all kinds of confusion about when -- when -- when it is -- well, you see my point --

MR. RUBINSTEIN: Yes.

QUESTION: -- it will create confusion about when, indeed, you have just misinstructed and when you haven't instructed at all, et cetera. It seems trivial in many cases compared to other things. Why is that a candidate?

MR. RUBINSTEIN: The reason, Justice Breyer, is that this Court has never allowed harmless error review to occur when the jury did not itself actually find every element of the crime beyond a reasonable doubt.

QUESTION: I'm sure you're right in quoting the cases. What I'm asking you is, if I've been reading those

cases, believe the issue is open, why would I decide, if it's open, that this kind of thing, which is so easily like just a misinstruction, which is bad but surely no worse than a -- than a -- than a beaten-up confession, surely no worse than dozens of other things that don't cat -- don't fall in that category, why does this one fall in that category when these other things don't?

MR. RUBINSTEIN: The reason that removal --

QUESTION: In effective assistance of counsel, I mean, you know, a lot of things.

MR. RUBINSTEIN: The reason that removal of an element from the jury's consideration must be regarded as one of the small class of structural errors is because the error in that case is that the wrong entity has served as the finder of fact on the element that was removed. It is a structural error because it -- the right that we are talking about is the preservation of the line that has always separated the constitutional role of the judge and the jury.

QUESTION: Well, supposing you take a mis -- a misinstruction rather than a failure to instruct. Now, there you -- you couldn't say with the same confidence that the wrong entity has made the finding?

MR. RUBINSTEIN: Well, I think the analysis there would be akin to what this Court said in Pope. If

the reviewing court looks at what the jury actually found, and finds that in making that finding it also did find the misinstructed element, then it would be subject to harmless error review.

On the other hand, if you have a situation where the misinstruction is sufficiently egregious, that in fact the jury did not find the misinstructed element beyond a reasonable doubt, then it would not be subject to error review.

QUESTION: Well, but that, in itself, is a very confusing standard, I think.

MR. RUBINSTEIN: Well --

QUESTION: I mean, if -- if we adopt your view, we're opening up to new trial not just failure to instruct at all, but all sorts of misinstruction, it seems to me.

MR. RUBINSTEIN: I think -- well, on that last point, Mr. Chief Justice, the --

QUESTION: Only where there's been objection.

MR. RUBINSTEIN: That's correct.

And so it would only require a new trial in those rare instances where the element is removed, a timely objection is made, and the trial court, nonetheless, insists on refusing to instruct or in giving the misinstruction.

QUESTION: Well, supposing there's -- there's a

fair -- it's a fairly debatable point. Now, materiality perhaps isn't. But you have all sorts of Federal -- you don't have to look at the clock.

MR. RUBINSTEIN: I'm sorry.

QUESTION: There are all sorts of Federal statutes that may have debatable points in them, that a trial judge may say, I don't agree with the defendant or I don't agree with the prosecution. So, it isn't simply a case where the trial judge obstinately refuses to do something that he ought to do. It may be fairly debatable.

MR. RUBINSTEIN: Well, even -- even in the case where it is debatable, if the objection is made at trial, the judge believing it to be a debatable question, refuses to give the correct instruction, and, on direct review, it is determined that the correct element was not actually found by the jury, it would require a new trial.

QUESTION: But it's not clear to me what the reason, the underlying rationale, for your -- for your argument is. Justice Breyer gave you a list -- coerced confessions, really egregious errors. But this is subject to harmless error. Then the judge forgets to -- or doesn't instruct on interstate commerce, over an objection. Everybody knows a car is in interstate commerce. All of a sudden we have some automatic

reversal. I don't see the reason for this.

MR. RUBINSTEIN: The reason, Justice Kennedy, is that, as this Court held in Gaudin, the most important component of the right to a jury trial is to have only the jury serve as the finder of fact, and to have only the jury serve as the judge of guilt or innocence. And even in a case where it is believed by the reviewing court that the element was not in dispute, it is not within the power of the appellate court to declare the removal of an element harmless for the same reason that it is not within the power of any judge to direct a verdict of guilt on the element.

QUESTION: Well -- well, I suppose -- I suppose you could say that it's -- it's wrong to have a coerced confession submitted to the jury. There is nothing for the jury to operate on.

MR. RUBINSTEIN: No, in a -- in a coerced confession case, you would have a jury verdict on every element of the crime, and the court would have the jury's actual findings to use as a backdrop to assess whether or not the error in fact was harmless beyond a reasonable doubt.

QUESTION: What --

QUESTION: I'll make -- no, please, you had started.

QUESTION: What is Roy?

MR. RUBINSTEIN: Roy was a case -- was a State case, a habeas case.

QUESTION: I know. But which -- which is it in your opinion? What was -- it was a failure of the -- the court misinstructed on the intent, saying you just have to have knowledge. Or was it that he failed to give any instruction on intent, which was in fact a basic element of the offense, or perhaps, in other words -- which is it, in your opinion?

MR. RUBINSTEIN: I believe that in Roy there was in fact a misinstruction on the element of intent. Although I grant you --

QUESTION: Oh, why isn't it? You see, whatever you were going to say there, I was then going to take the opposite point of view.

MR. RUBINSTEIN: Well --

(Laughter.)

QUESTION: But does -- does it matter -- does it matter to you?

MR. RUBINSTEIN: It does not matter to us.

QUESTION: It doesn't matter to you?

MR. RUBINSTEIN: It doesn't matter.

QUESTION: I mean, it may be a difficult question but, as far as you're concerned, it's irrelevant.

MR. RUBINSTEIN: Either way, the analysis is the same, in terms of determining whether or not the error is subject to harmless error review. Did the jury actually find the correct element beyond a reasonable doubt? If it did not, then the error is not subject to harmless error review, regardless of whether one characterizes it as a misdescription or an omission.

Either way, if the appellate court declares the error harmless in that setting, where the jury did not actually find it, the wrong entity has judged that element. And the wrong entity has judged the defendant guilty. That is the structural error. And this Court --

QUESTION: But, Mr. Rubinstein, I really don't think your argument squares with the Court's holding in Pope.

MR. RUBINSTEIN: Pope was a case in which this Court found that the jury's finding on the misinstructed obscenity instruction was functionally equivalent to the correct element.

QUESTION: No, they concluded by saying, if on remand, the Illinois court can -- concludes that no rational jury, if properly instructed, could find value in the magazines, the conviction should stand.

MR. RUBINSTEIN: Right. As Justice Scalia has pointed out in his concurring opinion in Carella, and as

this Court also explained in Sullivan itself, the reason that the error in Pope was found to have been subject to harmless error review was because no jury could -- no jury could have found what it did find without actually finding the correct element, as well.

QUESTION: Of course, that's now what Pope itself says.

MR. RUBINSTEIN: That's correct.

QUESTION: Okay.

MR. RUBINSTEIN: And I think the -- the key was that, in Pope itself, this Court explained that the jury was not precluded from considering the element of obscenity. It is, therefore, completely different than a case like this, where the jury is given no opportunity to consider the element. And as a result, you do not have an incomplete jury verdict.

QUESTION: But you're saying -- just to be sure I understand your position -- you're saying that even if we conclude that no rational juror, if properly instructed, could fail to find materiality, we should nevertheless say it's not harmless?

MR. RUBINSTEIN: What I -- I think, to complete that thought, no rational jury could have found what it did find, based on the misinstruction, without also finding the correct element, as well. And therefore, you

have what this Court, in Sullivan, described as functional equivalence.

QUESTION: Well, in other words, you're saying no rational juror could find that the amount of money that was withheld from -- left out of the income tax return without also finding materiality?

MR. RUBINSTEIN: Not in this case. Because the jury was explicitly told that materiality was not for the jury to decide. And the jury --

QUESTION: No, but I'm saying your view is that even if we conclude that no rational juror could have failed to find materiality, having found all the other contested issues in favor of the government, we should, nevertheless, say that -- just the exact opposite of what the last sentence of the Pope opinion says?

MR. RUBINSTEIN: We believe that that is the lesson of Sullivan.

QUESTION: Are you drawing -- if I understand this line -- you're saying that if the jury makes a finding -- call it A -- finding A necessarily implies a finding B, which it did not make and was not instructed to make; that in that case, there may be harmless error, because it made a finding and the finding necessarily implies the one that should have been on the issue that should have been submitted to it.

But, by contrast, you're saying, if the jury doesn't make any finding on an issue, an A-B equivalence issue, but on a third issue, C, which necessarily implies the finding B, that's not good enough?

MR. RUBINSTEIN: That's correct. If the jury --

QUESTION: Why, if -- if there is -- in each case, there is a necessary implication. In the first case, the necessary implication is -- is what we call equivalence. In the second case, the necessarily -- the necessary implication is in fact just that. You cannot have C without B. Why is it sensible for us to draw that line?

MR. RUBINSTEIN: Because in the first hypothetical, the jury itself has found the element beyond a reasonable doubt. In the second hypothetical, where the jury makes certain factual findings through other elements, and where the court concludes, well, the jury would have to have found that third element had it considered it, the appellate court, when it declares the error harmless, itself has become the finder of fact on that element.

QUESTION: But isn't it -- isn't it necessary implication that connects A and B in the first case? And if so, why isn't the necessary implication sufficient to connect C and B in the second case?

MR. RUBINSTEIN: It's because of the need to have the jury itself make the finding of guilt of that element beyond a reasonable doubt. And that is the line that has pervaded this Court's harmless error jurisprudence since Chapman itself.

QUESTION: Mr. Rubin --

QUESTION: It's the difference between saying that a finding of X includes a finding of Y and saying that any jury that found X would surely, if it was a reasonable jury, have found Y, even though it isn't necessarily included?

MR. RUBINSTEIN: That -- that's precisely correct.

QUESTION: But isn't -- isn't that an issue -- is -- is that perhaps an issue of characterization, though? Because, on the one hand, you can say a jury that found X would necessarily find Y. Another way, it seems to me, of saying it is that the -- that the jury, in finding X, was necessarily assuming Y; i.e., it was necessarily assuming a proportion which we know as -- or an importance, say -- which we know as materiality.

MR. RUBINSTEIN: Right. Well, but, in this case, the jury, in making the findings that it did make on the tax fraud charges, did not have to make a finding of materiality at all. And in fact, we know that because the

judge specifically told the jury --

QUESTION: Mr. Rubinstein, would you be here making the same argument if the judge had just not mentioned to the jury anything about materiality? He didn't tell them, Don't you consider it.

MR. RUBINSTEIN: If the judge had made --

QUESTION: He just failed to instruct.

MR. RUBINSTEIN: -- no instruction at all on materiality --

QUESTION: Right.

MR. RUBINSTEIN: -- and I assume the judge would not itself -- would not himself have made that finding -- if there had been no instruction at all, I think we would have -- we would be in the situation. Because nothing the jury found would require it to have made the finding of materiality.

I'd like briefly to address the second question presented. We believe that the 11th Circuit wrongly held that materiality is not an element of the mail, wire and bank fraud statutes. The statutes each identically prohibit a scheme or artifice to defraud. By using the term "defraud" in the statute, a well-defined common law term that always has required proof of a material falsehood, Congress necessarily incorporated into these statutes the common law requirement of materiality.

The notion that a scheme or artifice to defraud requires proof of a material misrepresentation or omission is nothing new. This Court already has determined in other contexts that the same language requires proof of materiality.

QUESTION: Well, the common law also required reliance. And yet, it seems reasonably clear we don't consider reliance an element.

MR. RUBINSTEIN: Right. The reason for that, Justice O'Connor, is that the statute does not require a completed fraud. What it targets is the scheme to defraud. Reliance would only arise if the scheme was actually carried out. And there is no requirement in the statute that it be carried out.

However, a scheme cannot be a scheme to defraud unless it includes a material falsehood as one of its essential elements.

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

QUESTION: Very well, Mr. Rubinstein.

Mr. McLeese, we'll hear from you. How many angels do you think can dance on the head of a pin?

(Laughter.)

ORAL ARGUMENT OF ROY W. MCLEESE, III

ON BEHALF OF THE RESPONDENT

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

As to the tax offenses, the district court erred by failing to instruct the jury to decide the materiality of Petitioner's understatement of his income by $5 million. But that error is not comparable to the kinds of pervasive and fundamental errors that this Court has characterized as invariably requiring reversal, no matter what the circumstances in all cases.

And the error was harmless here. Because the materiality of the Petitioner's understatement of his income by $5 million was both uncontroverted and incontrovertible, there is no risk here that there was an inaccurate jury verdict. There is no possibility that the jury's verdict would have been different had the instructions been otherwise.

QUESTION: How many elements does -- does this convenient theory apply to, Mr. McLeese, just -- just one element, or can we apply it to all elements, and just say, we've amassed all of this evidence, look at all of this evidence, no reasonable jury in the world could possibly see all of this evidence and not find this person guilty --

MR. MCLEESE: Not --

QUESTION: -- and therefore, we don't need a

trial?

MR. MCLEESE: Not to all elements, Justice Scalia.

QUESTION: How many? One out of three? Two out of three? What?

MR. MCLEESE: It's difficult to imagine a case in which more than one element would be omitted or misdescribed, and each of those omitted --

QUESTION: So, one is your limit? Only -- only one?

MR. MCLEESE: No. I'm making the point --

QUESTION: Two -- two might be enough?

MR. MCLEESE: So long as those issues that are contested and reasonably contestable are submitted to the jury, harmless error analysis is available.

QUESTION: So, as long as the jury finds something -- the jury just has to find something?

MR. MCLEESE: No. So long as --

QUESTION: It doesn't have to find the whole crime?

MR. MCLEESE: No. So long as those issues that are contested in front of the jury and are reasonably contestable are submitted to the jury, harmless error analysis is available.

Now, of course, affirmance will be available --

QUESTION: Mr. McLeese, it may be angels dancing on the head of a pin, but I don't see any other line that we can take. I mean, that's the problem. Our -- our Bill of Rights requires that you be found guilty by a jury. And that means that -- you can say it either means every element has to be found by the jury or else we're left, as you are, to say, well, gee, I don't know how many elements. A jury has to find something; that's all.

I don't see any -- any line between the two. And if you say a jury has to find all elements, it means that a judge cannot say, well, you know, had they been asked this, the evidence was so massive, they surely would have found it. That's not trial by jury; it's trial by judge.

MR. MCLEESE: The Bill of Rights requires that the jury find guilt on all elements. And that establishes that there was error here. The question is -- is whether appellate courts can find such errors harmless. And you -- it -- it is no more depriving defendants of their right to jury trial for an appellate court to say, had the elemental instructions been otherwise, the verdicts would have been the same, than in the well-established situation where the jury does not hear evidence that the defendant constitutionally is entitled to before the jury.

There, the -- the defendant had a constitutional

right to have the jury enter a judgment on this evidence as well as others. And what happens is that the appellate court can't cure that error. The jury did not hear that evidence. What the --

QUESTION: But the jury found him guilty of all of the elements of the crime. Now, you can say the procedures by which they found him guilty, there may have been something wrong with them, and we'll inquire as to whether that was harmless or not, but the jury found him guilty of every element of the crime in -- in --

MR. MCLEESE: But the finding of guilt, Justice Scalia, is equally composed of the legal information a jury uses and the factual evidence. And if there is an omission in the one, as in the other, there is power in the appellate court to find harmless error. And there is no, I think, warrant to treat omissions of law -- had the jury heard this law, its verdict might have been different -- as insusceptible of harmless error review. But omissions of evidence -- had the jury heard this evidence, its verdict would have been the same as available.

QUESTION: The fact that the two are different in kind and not just in degree is demonstrated by the fact that we do not allow judges to direct verdicts in criminal cases. If what you said were correct -- if there is no

difference between saying, you know, since this evidence being left out made no difference, it's okay, and saying, well, the jury didn't make a finding on this, but that's okay -- if the two are equivalent, then we should allow judges to direct verdicts in really easy cases.

MR. MCLEESE: I disagree, Justice Scalia.

QUESTION: And save us a lot of money in -- in the whole jury process.

MR. MCLEESE: I disagree. Equally, we do not allow judges to exclude constitutionally admissible evidence. And when judges do that, we find error. But appellate courts have the authority, under this Court's cases, including Van Arsdale, to say, although the jury that decided this case never considered that evidence, we can make the judgment with sufficient confidence that any rational jury that heard that evidence would have reached the same verdict on the constitutional record that should have been in front of it as the judgment that it reached on the record that was curtailed by omission that it had in front of it.

And there is no more invasion of the power of the jury in the one setting than in the other.

QUESTION: Mr. McLeese, I have a more practical, less fundamental, question than Justice Scalia's. And that is, in an income tax fraud case, we're talking about

a failure to report, what, many millions, if you're right about the harmless error, then the materiality element for the jury really would have nothing -- no teeth.

Because it would always be harmless when you have a case of understating income by large amounts. When -- when would the failure to tell the jury you decide materiality ever be harmful? I mean, it always be harm -- harmless error.

MR. MCLEESE: I think, typically, in situations where you had the failure to report large quantities of income, as here, and the defendant had not contested it, the error would be harmless under the rule that we propose.

QUESTION: Then calling it a material -- then calling materiality a jury issue really has nothing behind it.

MR. MCLEESE: I think, in the setting where the evidence of materiality is so overwhelming and so uncontested that no rational jury could reach a different conclusion. But that's a subset, a significant subset --

QUESTION: Well, in a tax fraud -- I can't imagine a tax fraud case where that wouldn't be so.

MR. MCLEESE: I think there might well be tax -- again, this is not a tax fraud case. This was a false reportment -- reporting of income. And it might well not

always be the case that the overstatements would be so great that any rational juror would have to conclude that the overstatements would be material. That -- that might be true in some settings and not in others.

QUESTION: But if you adopt a -- a rational juror test, I don't see why that simply doesn't take you to a sufficiency of the evidence test of -- of a particularly stringent variety. You're saying, as long as the evidence is not only sufficient, but overwhelming, that's enough.

MR. MCLEESE: I -- I think we would argue for that broader view in a case which required that it be presented. I don't think that's the inevitable -- inevitable consequence of accepting the narrower view that we press here. Which is, not only that the evidence is so overwhelming that no rational juror could have reached a different conclusion, but, in addition, it's not even reasonably contested and was not contested.

So that we know, for example, that at a retrial, the issue at the retrial is not going to be whether these statements were material. The issue at the retrial is going to be for the defendant to try to get a second opportunity to -- to litigate issues that a properly instructed jury already resolved against it.

And so, although I think we might well argue in

a case which presented the issue for that broader view, that's -- I don't think that that's an essential component of the rule that we're pressing here.

QUESTION: Are you arguing for us to cut back somewhat on the rationale of the Sullivan case?

MR. MCLEESE: There is reasoning in Sullivan that I think would be inconsistent with the view that we espouse. I think the Court's subsequent decisions -- for example, in Johnson -- made clear that this issue was left open. I don't think we -- the outcome in Sullivan is entirely consistent with our submission.

In Sullivan, the Court concluded that there was a -- a constitutional error in the reasonable doubt instruction that provided the framework for the entire trial. And it concluded in a line of reasoning that is consistent with our submission --

QUESTION: Well, are -- are you saying that there are some flawed reasonably doubt instructions that are subject to harmless error?

MR. MCLEESE: No. No. I think that the Court held that --

QUESTION: So, you're isolate -- you're isolating harmless error from the failure to instruct on an element? You're -- you're taking the precise holding of Sullivan and -- and accepting that, but not its

reasoning? I'm not quite sure.

MR. MCLEESE: Well, there were two lines of reasoning in Sullivan. And one of the -- and one of them is entirely consistent with our submission. And that is that reasonable doubt instructions are part of the fundamental structure of the entire trial. And constitutional defects in that structure require reversal without more, because the defendant has not received the kind of a trial that we will insist upon, whatever else happened at the trial. That line of reasoning is entirely consistent with our submission.

There is a line of reasoning in Sullivan which suggests, as Petitioner argues here, that harmless error analysis is always unavailable if the jury did not actually find what -- all of the elements. And our submission has been that that line of reasoning in Sullivan is inconsistent with other important lines of this Court's authority.

It's inconsistent with the cases --

QUESTION: And you really think that line makes a difference? Do you find that the court's reasonable -- any reasonable doubt instruction is really informative to the jury? So that if -- if you don't give that usually, utterly uninformative reasonable doubt instruction, there has been a total disaster? Whereas if the jury doesn't

find some elements of the crime, no harm is done?

I mean, that seems to me a strange line. Or -- or what we've approved as reasonable doubt instructions are -- are notoriously uninformative.

MR. MCLEESE: Well, I think the problem in Sullivan was not so much that the elaboration of the reasonable doubt instruction was not affirmatively helpful. I think the concern was that it was affirmatively incorrect and had the effect of watering down the concept of reasonable doubt.

QUESTION: Sure.

MR. MCLEESE: So, I do think that instructions which -- which reasonably communicate to the jury that they may convict on less than reasonable doubt on all of the elements of all of the offenses are more fundamental and more pervasive in a way that justifies treating them in the same class as complete denials of the right to counsel and other errors that have been treated as completely insusceptible to harmless error --

QUESTION: Well, one could, Mr. McLeese, expand on Justice Ginsburg's point with respect to materiality in the tax case and materiality in fraud, too. I mean, it's -- it's rare that a con man is going to tell you it's raining outside when it's sunny. So, that doesn't make any difference. He's going to make material

representations.

MR. MCLEESE: I think he will try. I completely agree. And if the -- the question suggests the appropriateness of moving to the second issue, I'm happy to shift to that topic.

QUESTION: Go ahead.

QUESTION: I just have one -- one more question. It seems to me that a requirement of the kind that Mr. Rubinstein was requesting is -- is easier -- rather easier for the government to meet. I mean, you said that -- yeah, there was an error here. This is an error that's easy to see will not happen again. Is that -- in -- in contrast to reasonable doubt, where the end result, it seems to me, you don't define it at all, then you won't define it incorrectly. But here, it's very easy for a judge to give the right charge. There's no administrative problem with meeting the requirement.

MR. MCLEESE: I don't think -- the reason that an incorrect charge was given here was because the stated case was tried before this Court's decision in Gaudin --

QUESTION: Yes.

MR. MCLEESE: -- suggested that materiality was in fact --

QUESTION: But prospectively, there's not a problem?

MR. MCLEESE: Prospectively, in this setting, no. However, because, as Petitioner acknowledges, the logic of his view applies equally to any incorrect description of the elements of any of the offenses in the Federal Code, I think a rule that treats all of those as insusceptible --

QUESTION: Well, he -- I thought he made a distinction between misdescription and taking the element away from the jury altogether.

MR. MCLEESE: I had understood him to answer Justice Scalia's question by indicating that it made no difference to him which of those things you properly characterize an error as.

And I think it's -- it's ultimately impossible --

QUESTION: I understood it that way, too.

MR. MCLEESE: And I think it's ultimately impossible -- as Justice Breyer's question suggested, it's ultimately an impossible inquiry. I don't think there's any well-defined distinction that you can get a hold of.

So, I don't understand him to be proposing such a view. And I think that, because the logic of his view does expand so widely -- I think, therefore, the logic of his view does expand widely.

If I could turn to the -- the materiality issue

with respect to the fraud count.

Under the instructions that were given to it, the jury could find Petitioner guilty on the fraud counts only if it found that he intended, by means of deception, to obtain money or property from others. That means that the jury necessarily concluded here that Petitioner subjectively intended that his deceptions be effective in -- in causing the victims to transfer their property or money over to him.

In other words, put a different way, the instructions essentially required -- you might call it subjective materiality. He planned and hoped and intended that they would be material. He wanted them to be effective as operating on his victims, to cause his victims to give him their property and money.

The Petitioner's claim is that more is required under the statute. And the more that is required is that not only does he have to intend that they have that characteristic, but that in fact they have that characteristic. And the wording of the statute is to the contrary.

What the statute punishes is schemes and artifices to defraud. And not merely that, but even defendants who intend to devise a scheme or artifice to defraud. And as this Court said in Durland when it first

interpreted that provision, that language makes clear that the significant fact is the defendant's intent and purpose. A defendant who --

QUESTION: Well, we normally interpret Federal statutes that adopt common law offenses to incorporate the common law elements, don't we?

MR. MCLEESE: And there's a sense --

QUESTION: I mean there is language in several of our opinions to that effect. And normally you would think that wire and mail fraud, any Federal fraud statute, would incorporate the notion of materiality as an element.

MR. MCLEESE: And -- and there is a sense, as I was just trying to suggest, in which it does. In the sense that the defendant has to intend that his scheme use material misrepresentations. So, in that sense, because the whole -- the statute does not punish completed frauds, is not limited to completed frauds, nor is it limited even to people who successfully generate a scheme to defraud, but it extends even to people who are trying to generate a scheme to defraud, it clearly reaches someone who is --

QUESTION: How about people who try to make false representations but don't succeed?

MR. MCLEESE: And the example -- because what you're --

QUESTION: But that -- see, that seems a bit of

a stretch.

MR. MCLEESE: I think it falls comfortably within the language. And let me try to give -- because materiality is kind of an illusive concept, it may be helpful to use something more concrete.

If the statute said, if it reached schemes or artifices to poison by means of a toxic substance, a defendant who generated an idea, whereby he was going to secure some chemicals and he was going to mix them together and administer them to the victim, but who was not a very good chemist and he picked some substances that weren't really toxic, such a defendant would have clearly created a scheme to poison somebody or to -- to kill someone by administering a toxic substance. He didn't pick a good one. It's not a good scheme. It's not very well crafted. But it is clearly a scheme to --

QUESTION: I mean, that sounds like conspiracy.

MR. MCLEESE: -- and -- and, moreover, and -- and -- and beyond that, because the statute here extends not just to people who successfully create schemes to defraud --

QUESTION: What is your common law precedent for the scheme to kill by toxic substances?

QUESTION: That's the problem.

QUESTION: There is no common law precedent for

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that kind of statute, is there?

MR. MCLEESE: No, there isn't. But, in fact the --

QUESTION: I suppose --

MR. MCLEESE: -- the wording of this statute is very different from the common law concepts of -- of fraud. This statute is not a completed fraud statute. What it says is it's not just those who commit fraud -- if this statute said, if you use the mails in commission of a fraud, clearly the Petitioner would have a very strong argument that all of the -- the requirements of fraud be carried forward. But it doesn't say that.

What it says is, any scheme to defraud, which is an effort or plan to defraud. And then it goes beyond that even yet, and says, people who use the mails intending --

QUESTION: Yes, but I don't -- I really still don't understand that. Because if the word "fraud" at common law implicitly included an element of materiality, why wouldn't a scheme to defraud include an attempt to do something that has materiality?

MR. MCLEESE: And it does. But my point is that if the reason your attempt fails is because you pick means that aren't very well adapted to your purpose, you're guilty of attempt in that way -- and that's what the

poison example was meant to suggest -- if --

QUESTION: Then you don't need anything special in this statute. Then materiality is simply an element, like any of the others -- in the bank fraud statute, in the Federal -- in the mail fraud statute and the wire fraud statute. If you come across this case that you're thinking of, which is like picking the pocket of a stone idol -- I mean that's the example they used to -- can you pick the pocket of a stone idol? That's my criminal law class 48 and a half years ago.

(Laughter.)

QUESTION: But if in fact that should come about, the answer to that law school hypothetical was no, he hasn't violated the statute; rather, he's guilty of the attempt. And so -- so, I take it you're conceding that's the same thing here. In which case, that's the end of this part of the argument, isn't it?

MR. MCLEESE: No, I don't think so. Because there is no general Federal criminal attempt provision. And this -- what happened instead --

QUESTION: Well, is there any reason why we treat the element, materiality, which is hoped for, tried for but, through some concatenation of comets, fails, is there any reason we would treat that any differently than any other element in the statute -- say the element, as

the Chief Justice just said, of -- of the false statement itself, which, through some incredible accident, turns out to be true?

MR. MCLEESE: No, you should treat them the same. But the only point is --

QUESTION: All right.

MR. MCLEESE: -- the statute is not a completed offense provision. If the statute said "completed fraud," then we would -- in these hypotheticals, we would be trying to figure out whether those were attempts for a completed fraud.

QUESTION: All right.

MR. MCLEESE: But it's not.

QUESTION: Then you would be satisfied with the following statement: That the element of materiality in this statute is there, it is an element, and is to be treated the same way as every other element in the statute?

MR. MCLEESE: No, not actual materiality. What I would say is --

QUESTION: In other words, you said the others weren't actual either. I just want to treat them alike.

MR. MCLEESE: Yes. I would say, if what you -- if -- if your point is materiality is in the statute in the same way that reliance is, I would agree with you.

And what I would say is this -- that in order for something to be a scheme or artifice to defraud, the defendant has to intend that -- he has to intend that the victim is going to rely on his deception. That's his -- that's the feature of the fraud.

And just as reliance is in the statute in that way, it's -- it's -- it has to be the intended feature of these schemes or artifices to defraud that they have those features that existed at common law. But they don't actually have to exist. He doesn't actually have to cause reliance. Neither, too, does he actually have to select effective means.

QUESTION: No. But the government has to prove that he intended to use effective means.

MR. MCLEESE: Yes.

QUESTION: So that, in point of fact, he can come in and say, look, I'm such a bad con artist that I was going to tell him it was raining when it was -- when -- when the sun was shining, and I thought that would get me the money. But the government has still got to allege and prove, I would suppose, on -- on the reasoning that I think you accept, that the representation he meant to make would have been a material representation.

MR. MCLEESE: Crucially different, but very close. Our position is that he intend that they be

objectively material, not that he --

QUESTION: Intend that they be sufficient for his purpose, but not necessarily material; that's a fine line.

MR. MCLEESE: No, no. What I mean is if the defendant comes in and he says -- this is a somewhat silly hypothetical -- but if a defendant sent out a mailing in a mail fraud case, and he sent out a mailing which said -- not intending to perform at all; it's a pure scam -- if you give me $1,000 in advance, I will give you, you know, a week's lodging in Disney World. And the day before he mails that out, Disney World was burned to the ground and everybody knows it. So that -- that's -- no one is going to find that a material inducement.

That's not going to cause any reasonable person, or any person, to respond favorably to his scam. That's mail fraud. And it's mail fraud even though he's picked very poor means to achieve his end. And it's mail fraud because he intended that his deceptions be effective on the victim, although he failed in picking good deceptions that will have --

QUESTION: Yeah. But assuming the -- the deception may be an implicit deception, the deception is Disneyland exists. That's material.

MR. MCLEESE: My point is, even if it were true,

that that would -- no -- no reasonable person could even believe that anymore. We all know that that's no longer true.

QUESTION: Oh, they've all heard the news?

MR. MCLEESE: Yes, everyone has all the heard the news. That's -- the hypothetical is everyone has heard the news. And so it's just utterly ineffective.

QUESTION: Well, mail --

MR. MCLEESE: His plan was it would be effective, but it is in fact utterly ineffective. Our -- the -- the difference is --

QUESTION: For -- for -- for wire fraud, mail fraud, the thing that's transmitted by wire or through the mail doesn't have to have any of the elements of the fraudulent scheme, does it?

MR. MCLEESE: That's correct.

QUESTION: I mean, it just has to be something to accomplish the scheme?

MR. MCLEESE: That's correct. And in fact, in -- in some ways I think that supports the view that we're taking. Because at the time I send out a mailing, all I have to have done is to devise or intend to devise a scheme to defraud. It's a very inchoate offense in certain respects. I might not even have settled on which material -- which -- which representation, material or

otherwise, I -- I intend to make in my scheme.

QUESTION: Do you take the position that if someone makes what would otherwise be, by everybody's concession, a material misrepresentation, but the victim, by some idiosyncratic bit of luck, happens to know that it is untrue, that the -- that the misrepresentation, therefore, is not material?

MR. MCLEESE: No, I was picking an example --

QUESTION: Why isn't that the Florida case? It just happens that everybody has heard that the -- that the representation, the implicit representation, that there is a Disneyland, is -- is untrue. It's -- the world happens to know it in that case, but in my hypothetical the victim happens to know it. In each case, the -- the representation, if true, would have been material, and isn't that enough?

MR. MCLEESE: Well, I think --

QUESTION: If believed -- I'm sorry -- if accepted.

MR. MCLEESE: Yes. Perhaps my hypothetical was not as well crafted as it might have been. The point I'm trying to illustrate is that if materiality is defined as having a natural tendency to influence people, a defendant who generates a scheme, and he picks out a misrepresentation which he thinks has that character,

because he intends to have it be effective, to give -- to cause people to give him his money, and for whatever reason, he picks one that is -- is not material -- which is hard to imagine, but imagine that he did -- that is mail fraud. Because all that the statute, by its language, requires is that he intend to devise a scheme to defraud. And if he fails because he picked misrepresentations that are not effective and therefore would not have amounted to fraud at common law, he's violated the plain terms of the statute.

QUESTION: What if -- what if -- what if it isn't the materiality element that he's mistaken about, but the -- but the defrauding element? He is so stupid that -- that in fact what he does ends up putting $10 -- additional dollars in the pocket of the victim rather than in his own pocket. He -- you know --

MR. MCLEESE: I can't imagine that anyone --

QUESTION: -- a Buster Keaton thing.

MR. MCLEESE: I can't imagine that anyone would ever prosecute such a situation. But, to give an example --

QUESTION: But -- but you say that would be prosecutable because he did intend to defraud?

MR. MCLEESE: In pure theory, if I send out a letter, saying, buy my gold mine --

QUESTION: Right.

MR. MCLEESE: -- believing, based on geological information that's totally worthless --

QUESTION: Right. But --

MR. MCLEESE: -- and I send it out, I've committed mail fraud right then. And I don't need to know whether, as it turns out, the victim got it, was duped, bought it, and then later found gold there, to -- to the geologists' surprise. That's mail fraud even if I happen to be wrong. What's required is that I intend that my scheme --

QUESTION: You're -- you're consistent. That's a scheme to defraud.

MR. MCLEESE: And -- and it's certainly -- I mean, whether or not it's a scheme to defraud -- I think it is -- by the statutory language is people who intend to devise a scheme to defraud. And it is certainly that. I can't -- I just don't see how it falls short of intending to devise a scheme to defraud. It falls, inevitably, within that language.

If the Court has no further questions, we would request that the judgment of the court of appeals be affirmed.

QUESTION: Thank you, Mr. McLeese.

Mr. Rubinstein, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF JAVIER H. RUBINSTEIN

ON BEHALF OF THE PETITIONER

MR. RUBINSTEIN: The government incorrectly suggests that the test we are advocating for whether or not an error is subject to harmless error review is somehow a new test or that it would present new practical problems. The test that we are urging the Court to follow is precisely the same test that it articulated in Sullivan and in Yates: Was -- did the jury actually find every element of the crime beyond a reasonable doubt?

That is the question the Court has to answer. If the jury did not, then the error is not subject to harmless error review.

The government also places heavy reliance on the evidence concerning materiality. But as this Court has pointed out, when the jury is told to ignore an element, the evidence pertaining to that element vanishes. The jury has nothing to assess that evidence through. That is what the jury's instructions are for.

Ultimately, we believe, as the government correctly concedes, not every jury would be required to find that a failure to report income is material. That's exactly our point. It is for the jury to decide, under the circumstances of each particular case, whether or not materiality was established. At the end of the day, if

the element of materiality is taken away from the jury, no appellate court can declare that harmless for the same reason that a court cannot direct a verdict of guilt.

QUESTION: Mr. Rubinstein, what do you say about -- about Mr. McLeese's gold mine hypothetical?

MR. RUBINSTEIN: The gold mine hypothetical would obviously have involved a material misrepresentation. If someone --

QUESTION: Never mind the materiality, I'm -- I'm talking about when in fact the gold mine is -- is a gold mine, and -- and what he's mistaken about is -- is not -- not the materiality but whether he's defrauding.

MR. RUBINSTEIN: Well, ultimately, if the -- if the defendant makes a statement he believes to be false but that actually turns out, by sheer luck, to have been true --

QUESTION: True. The statute is not violated?

MR. RUBINSTEIN: That's correct.

QUESTION: So, you're consistent.

(Laughter.)

QUESTION: But if we didn't merge completed offenses, I suppose we could say the statute would be violated. Because the -- the attempt made at the time prior to the discovery that there was all this gold there would survive and -- and that -- that could be prosecuted.

MR. RUBINSTEIN: Well, in our view, certainly. But we agree with the government that the statute covers not only the actual devising, but the intent to devise. But it must include a material misrepresentation.

Thank you.

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

(Whereupon, at 12:10 p.m., the case in the above-entitled matter was submitted.)

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BY: Ilona M. May
(REPORTER)