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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :
Petitioner :
v. : No. 01-1184
FRANCISCO JIMENEZ RECIO :
AND ADRINA LOPEZ-MESA. :
- - - - -X

Washington, D. C.
Tuesday, November 12, 2002

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:04 a.m.

APPEARANCES:
MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of the Petitioner.
M KARL SHURTLIFF, ESQ., Boise, Idaho; on behalf of the
Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 01-1184, United States versus Francisco
5 Jimenez Recio and Mr. Lopez-Mesa.

6 Mr. Dreeben.

7 ORAL ARGUMENT OF MICHAEL R. DREEBEN

8 ON BEHALF OF THE PETITIONER

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

11 This Court has made clear that conspiracy is an
12 inchoate offense, the essence of which is the agreement to
13 commit an unlawful act.

14 QUESTION: What does the word inchoate mean? I
15 realize you're getting it from our opinions, but --

16 (Laughter.)

17 MR. DREEBEN: Mr. Chief Justice, I believe that
18 it means an uncompleted offense, activities that have not
19 yet progressed to the point of having violated a
20 substantive provision of the criminal law, yet which
21 represent a sufficient step to warrant legal intervention
22 under the doctrine of either attempt or conspiracy.

23 QUESTION: It's the opposite of a choate
24 offense, I assume, is it not?

25 (Laughter.)

1 MR. DREEBEN: Yes, Justice Scalia, except that
2 word seems not to have appeared in this Court's opinions.

3 (Laughter.)

4 QUESTION: Or in the dictionary.

5 (Laughter.)

6 QUESTION: Well, it is in the dictionary. I'm
7 getting it in a minute. It will take me a minute to
8 noodle while I get it out of the dictionary.

9 But I -- I thought that it meant something
10 that's not yet formed.

11 MR. DREEBEN: Well, in the case of a conspiracy,
12 Justice Kennedy --

13 QUESTION: I thought that's what the word meant.

14 MR. DREEBEN: It -- it may -- it means that
15 with --

16 QUESTION: Incipient I suppose.

17 MR. DREEBEN: -- with -- right. With reference
18 to the object offense. So a conspiracy is an agreement to
19 commit an offense. The offense has not yet been formed.
20 It has not actually been realized, but the conspirators
21 have agreed to commit the offense.

22 And the law of conspiracy deems it appropriate
23 for society to intervene at the stage at which the
24 conspirators have entered into that agreement so as to
25 protect society against two things.

1 QUESTION: And taken some act in furtherance of
2 it?

3 MR. DREEBEN: Justice O'Connor, under the drug
4 statute, this Court held in United States v. Shabani that
5 there is no requirement of proof of an overt act in order
6 to punish a drug conspiracy.

7 QUESTION: When does the conspiracy terminate,
8 in your view?

9 MR. DREEBEN: The conspiracy terminates, Justice
10 O'Connor, either when the conspirators achieve the
11 objective that they have agreed to carry out, or when they
12 have abandoned efforts to do so. That fundamentally
13 reflects the principle that the essence --

14 QUESTION: Or when one of them has abandoned
15 efforts. I mean, if -- if one of them leaves the
16 conspiracy, I suppose you have a different conspiracy
17 then, or what?

18 MR. DREEBEN: No, not automatically, Justice
19 Scalia.

20 QUESTION: Suppose one of them knows that it's
21 no longer possible and he leaves the conspiracy.

22 MR. DREEBEN: That individual will -- in order
23 to accomplish a withdrawal from the conspiracy has to do
24 more than simply leave it. The law of withdrawal of a --
25 on withdrawal from a conspiracy requires that the

1 conspirator do some affirmative act to terminate the
2 existence of the conspiracy either by going to law
3 enforcement, or by communicating to his fellow
4 conspirators that he's done with the venture and he's out
5 of it.

6 But the termination of the participation of one
7 co-conspirator through withdrawal or abandonment or
8 telling law enforcement does not terminate the conspiracy.
9 The very nature of conspiracy is a group of individuals
10 who have come together to carry out an unlawful act, and
11 in order for the conspiracy to do that, it frequently will
12 grow and enlarge its membership. Other members may drop
13 out. But so long as there is a common agreement to commit
14 a definable crime or unlawful act, the conspiracy
15 continues.

16 QUESTION: What if all but one drop out? Does
17 a -- does a conspiracy continue as to that one?

18 MR. DREEBEN: Well, this Court has never
19 addressed the question, and I could find no cases in the
20 common law that had addressed the question. Certainly
21 under the common law, you cannot have a unilateral
22 conspiracy, although the Model Penal Code would have
23 allowed that.

24 There may, however, be policy reasons to hold
25 that once a conspirator has embarked upon his venture,

1 even if all of the other conspirators are arrested and
2 give up the effort, that one lone conspirator who still
3 soldiers on, without knowing that the other conspirators
4 have abandoned it, might properly be held liable for
5 seeking to accomplish the aims of the conspiracy.

6 QUESTION: It's a conspiracy of one, so to
7 speak, right?

8 MR. DREEBEN: If such an animal exists, it would
9 be a conspiracy in which all members but one have
10 abandoned the objective.

11 In a case like this, however, where what happens
12 is that two members of a multi-member conspiracy are
13 arrested, one of them becomes a Government agent, the
14 other one perhaps does not -- and it's not clear that he
15 did abandon the efforts to accomplish the goals of the
16 conspiracy -- but there are many others at large who are
17 continuing to carry out the conspiracy, the criminal
18 agreement persists.

19 And where the Ninth Circuit got off on the wrong
20 foot was by believing that a conspiracy ends when its
21 goals have been defeated. When the object of the
22 conspiracy has been defeated, the Ninth Circuit thought,
23 the conspiracy is over.

24 That, however, is contradictory to the
25 fundamental principle of conspiracy law that the essence

1 of the crime is the agreement between the parties to carry
2 out an unlawful act, and to take the --

3 QUESTION: Mr. Dreeben, what about --

4 QUESTION: Would you -- would you tell me what
5 the conspiracy was that survived the -- the claimed end of
6 the conspiracy? What -- what -- conspiracy to do what?

7 MR. DREEBEN: Conspiracy to distribute and
8 deliver marijuana and cocaine.

9 QUESTION: Was it the marijuana and cocaine that
10 had already been seized by the Government, or some other
11 marijuana?

12 MR. DREEBEN: As the case comes to this Court,
13 the conspiracy that survived was the conspiracy to
14 distribute that cocaine and marijuana that had been
15 seized.

16 But what's crucial is that those conspirators
17 who remained liable were entirely unaware that the
18 Government had intervened and frustrated the objective of
19 the conspiracy.

20 And I think that the hypothetical that makes
21 clear why the Ninth Circuit went wrong is the instance
22 where the Government enters the market in a reverse sting
23 operation and goes into the market as a seller, offering
24 to sell drugs, and a collective of individuals decides to
25 pool their resources and arrange to purchase the drugs

1 that the Government is offering. It is highly likely that
2 the Government has no intention and never had any
3 intention of delivering actual drugs. Therefore, the goal
4 of the conspirators is frustrated at the inception. They
5 don't know it, but they could never accomplish the object
6 of their conspiracy. Yet, it's settled in the Ninth
7 Circuit and elsewhere that the conspirators can still be
8 held liable because their agreement to perform an act
9 which, under the facts as they understand them, would be
10 unlawful.

11 QUESTION: And the difference between an attempt
12 and the conspiracy, in the attempt you need a dangerous
13 probability of success or something along that line, but
14 you don't need that in a conspiracy case.

15 MR. DREEBEN: That's correct. Conspiracy
16 intervenes at an earlier stage, Justice Stevens. The
17 traditional Federal rule is that in an attempt, you need
18 the intent to perform the illegal act, plus a substantial
19 step towards its completion. The law of attempt has
20 always required a little bit more activity on the part of
21 the defendant before the Government can intervene and
22 penalize it. And that's in part because of the need to
23 have some corroborating evidence that the defendant
24 actually did intend to carry out an illegal act and to
25 avoid penalizing something as a thought crime.

1 QUESTION: Mr. Dreeben, the first trial in this
2 case described a narrower conspiracy, did it not, than was
3 involved in the second trial? And would you explain what
4 the difference was in the conspiracy charge initially
5 made, and the conspiracy charge in the second trial?

6 MR. DREEBEN: Well, the conspiracy charge,
7 Justice Ginsburg, remained the same in both. In the --
8 the indictment was not changed. It was a single
9 indictment that alleged the conspirators formed an
10 agreement at a date unknown to the grand jury, but by
11 November 18th, 1997, to distribute and possess with intent
12 to distribute cocaine and marijuana.

13 In the original trial, the parties were unaware
14 of the Ninth Circuit's decision in United States versus
15 Cruz, which forms the basis for the legal rule that the
16 Government challenges here. And it, therefore, proceeded
17 on the -- what we believe to be the wholly correct theory
18 that respondents could be held liable for joining that
19 conspiracy on November 19th when they agreed to become
20 couriers to move the drugs further down the road in Idaho.
21 They did not know that the drugs had actually been seized
22 earlier by the Government and that the Government was
23 watching them. So the Ninth Circuit's ruling in Cruz
24 meant that what the Government had argued in the first
25 case no longer was sufficient to support conspiracy

1 liability.

2 QUESTION: Is -- is there a temporal component
3 to your argument? If the initial defendants had been
4 arrested and detained for a month and then they got around
5 to the sting operation, would it still be a conspiracy, or
6 does it lapse after some reasonable time?

7 MR. DREEBEN: It doesn't lapse through a period
8 of time, Justice Kennedy. What could cause the conspiracy
9 to end is the conspirators' wholly abandoning pursuit of
10 the objectives of the conspiracy. In other words, if all
11 of the conspirators on the outside -- those who were in
12 Arizona on the sending end and those who were on Idaho on
13 the delivery end -- had all concluded that something has
14 gone wrong with this shipment, the drugs have disappeared,
15 they could have abandoned the narrowest version of the
16 conspiracy --

17 QUESTION: But so long as one of the end
18 delivery people didn't know about it and thought that the
19 drugs were still on the way, he could continue to recruit
20 people and so forth even if the principals had been in
21 jail for a month and the drugs had been seized for a
22 month?

23 MR. DREEBEN: Well, the people who were in jail
24 were the couriers, not the principals.

25 QUESTION: Well, let's -- let's -- all right.

1 But even those -- some couriers had -- had been in jail.

2 MR. DREEBEN: Correct, because so long as those
3 individuals who are involved in the conspiracy are still
4 trying to accomplish its objective, the conspiracy is
5 still alive. And as the -- as in the case of the
6 Government sting where there's never any drugs in the
7 outset, the conspiracy is impossible as a matter of fact
8 for the conspirators to successfully accomplish. But if
9 it is accepted that that can be a crime, where there's a
10 Government sting at the outset, then surely the
11 Government's intervention in midstream doesn't
12 automatically terminate the conspiracy as a matter of law,
13 which is what the Ninth Circuit held.

14 QUESTION: Mr. --

15 QUESTION: But explain again what you mean now?
16 If, instead of cocaine, it had been powdered sugar, can
17 there be a conspiracy conviction?

18 MR. DREEBEN: Justice O'Connor, it would depend
19 on whether the powdered sugar is supplied by the
20 Government under the representation that it is cocaine, or
21 whether the defendants are actually seeking to move
22 powdered sugar knowing that they are seeking to move
23 powdered sugar.

24 QUESTION: No. They think they're -- they have
25 a load of cocaine and that was their intent, but

1 unbeknownst to them, it's powdered sugar.

2 MR. DREEBEN: Liability. Because the -- the
3 question of conspiracy liability is judged by what the
4 actor perceives to be the facts.

5 QUESTION: How is that different from an
6 agreement to receive stolen goods and then we find out
7 the -- goods are not stolen? That's -- that's not
8 actionable I -- I had thought.

9 MR. DREEBEN: Well, it is the same, Justice
10 Kennedy, and -- and the uniform position in the Federal
11 courts is that it is. That would be a mistake of fact,
12 and when the conspirators or the person who's attempting
13 to commit a crime has the intent to commit a crime and
14 takes a substantial step for it, the fact that unbeknownst
15 to him some aspect of the universe is such that he can't
16 complete the crime does not defeat the accomplishment of
17 the objective.

18 QUESTION: Well, if -- for a conspiracy
19 conviction, I mean, because the whole -- the whole purpose
20 is to prevent people banding together for wicked purposes,
21 but if -- if there's no conspiracy involved and he's
22 mistaken in the fact, I assume there's no crime.

23 MR. DREEBEN: No. The -- the modern rule,
24 Justice Scalia, is that there is a crime. In this
25 country, the earliest case that addressed it and the case

1 that all of us are familiar with from law school is People
2 versus Jaffe, a New York Court of Appeals case from 1906.
3 And that case did, indeed, hold -- as Justice Kennedy has
4 described it -- that if the person is receiving what he
5 believes to be stolen goods and the goods are not stolen,
6 he is not liable.

7 But the modern focus on attempt law is on the
8 intent of the actor to commit an illegal act, and the fact
9 that unbeknownst to him there are circumstances that
10 prevent him from accomplishing the completed crime does
11 not defeat his liability for an attempt.

12 In other words, attempt law and conspiracy law
13 have, to an extent, converged on the policy that the
14 importance of inchoate crimes is to get at dangerous
15 actors.

16 QUESTION: What case would you cite to us for
17 this notion under attempt law? Is -- is there anything
18 from this Court?

19 MR. DREEBEN: There -- the only thing that there
20 is from this Court, Justice O'Connor, are two opinions
21 that have addressed the obstruction of justice statute,
22 Osborn versus United States and United States versus
23 Aguilar. In both of those cases, the Court was dealing
24 with a statute that didn't use the word attempt. It used
25 the word endeavor. And the Court made quite clear that

1 the impossibility of the defendant accomplishing the
2 objective of his crime doesn't defeat liability.

3 In Osborn, it was an individual who was
4 attempting to bribe a juror. Unbeknownst to him, the
5 intermediary, who he was using to pay the bribe, was
6 working with the FBI. And of course, the bribe was not
7 going to be paid. The juror was not going to be
8 corrupted. And yet, the Court held that an endeavor to
9 commit the crime is punishable.

10 QUESTION: Does the Model -- Model Penal Code
11 take a position on this?

12 MR. DREEBEN: Yes. The Model Penal Code goes
13 very far in the direction of the intent-based focus of
14 attempt law and conspiracy law. In the Model Penal Code,
15 there is no defense for impossibility of any kind, fact or
16 law.

17 What the Model Penal Code does, however, is
18 allow, in certain extreme cases that it wasn't able to
19 craft a principle for, a power to a judge to either reduce
20 the grade of a crime or to dismiss it.

21 And the Model Penal Code was thinking about
22 hypotheticals which have not come up in any cases that --
23 that anyone has actually found, such as where an
24 individual believes that he can kill through incantations
25 and voodoo and sets about to do so. Under an orthodox,

1 doctrinaire approach to principles of attempt law, that
2 individual has the intent to kill, and has carried out a
3 substantial step. Many commentators have said that should
4 not occasion liability because it's inherently impossible
5 that the actor will achieve his goal and in reality that
6 person is probably not a dangerous individual who warrants
7 punishment.

8 QUESTION: Well, what -- what's the difference
9 between being inherently impossible and the other kinds of
10 impossibility?

11 MR. DREEBEN: Only a matter of degree, Mr. Chief
12 Justice, and for that reason, the Model Penal Code
13 rejected a legal rule that would carve out inherent
14 impossibility and said that it's really something that
15 should go to whether a judge should reduce the grade of a
16 crime or dismiss it.

17 Our position is that that sort of --

18 QUESTION: Okay -- or dismiss it. They -- they
19 just leave it up to the judge? It's a crime or not
20 depending upon -- is there any other instance where the
21 Model Penal Code does this sort of thing?

22 MR. DREEBEN: I don't know if there are any
23 other instances where the Model Penal Code does it, but
24 our position is that the sounder approach is to --

25 QUESTION: Extraordinary.

1 MR. DREEBEN: -- leave those cases in the hands
2 of prosecutorial discretion and the common sense of
3 juries. The fact is that there really are no
4 hypotheticals in real cases that resemble the killer by
5 incantation.

6 QUESTION: What did the Ninth Circuit rely on in
7 United States versus Cruz? If -- if the law is as uniform
8 as you say it is, what -- what did they rely on? They
9 must have relied on something.

10 MR. DREEBEN: The Ninth Circuit, I believe, made
11 a -- a linguistic mistake. There are an abundance of
12 cases that say that a conspiracy ends when its goal is
13 either accomplished or defeated, and those cases, read in
14 context, mean that if the conspirators actually abandon
15 their efforts to complete the crime, or all of them are
16 arrested and they're in custody and they're really not in
17 a position to go forward anymore, the conspiracy ends at
18 that point.

19 And frequently that sort of a determination is
20 made for purposes of the admission of co-conspirator
21 statements under 801(d)(2)(E). You want to know whether
22 the conspiracy is alive so you can determine whether to
23 admit post-arrest statements by one conspirator against
24 another conspirator. And in those cases, it makes perfect
25 sense to say that the conspiracy ended when all of the

1 co-conspirators are arrested and have given up.

2 The Ninth Circuit took that language -- the
3 language referring to the defeat of the object of the
4 conspiracy -- and took it literally, and the effect was to
5 create a defense of factual impossibility. And the court
6 actually used those words. It was factually impossible
7 for the conspirators to complete their crime. Therefore,
8 the conspiracy was over as a matter of law.

9 QUESTION: Is it the case -- four conspirators,
10 A, B, C, D. A is arrested, out on bail. A makes a few
11 statements which are overheard. Can you admit that
12 hearsay against B, C, D, who are later found?

13 MR. DREEBEN: It all depends, Justice Breyer, on
14 whether --

15 QUESTION: I thought they couldn't.

16 MR. DREEBEN: -- on whether he's still
17 attempting to achieve the goal of the conspiracy. There
18 are a -- a number --

19 QUESTION: You say, would -- in that --
20 normally -- normally a person who's arrested, that ends
21 the conspiracy as to that person, doesn't it, at least
22 normally?

23 MR. DREEBEN: Well, not -- not necessarily,
24 Justice Breyer. In this case, for example, one of the two
25 arrested couriers, Sotelo, reportedly told Arce, the other

1 arrested co-conspirator, that they should both tell a lie
2 to the authorities and then try to escape. I mean,
3 that --

4 QUESTION: No, I'm not thinking of that. I'm
5 thinking it is an -- there -- there is no reason to
6 think -- all we know about him is he's arrested and he
7 happens to mention something to a neighbor that has
8 nothing to do -- who has nothing to do with the
9 conspiracy. This statement is not made in furtherance of
10 any conspiracy.

11 MR. DREEBEN: Correct.

12 QUESTION: It's simply made after A is arrested.
13 As far as we know, A has nothing further to do with it.

14 MR. DREEBEN: That's correct. So long as the
15 statement isn't made in furtherance --

16 QUESTION: But -- that shows -- in other words,
17 that shows what? That shows that although the conspiracy
18 in your view continues -- B, C, D -- but A has withdrawn?
19 Is that what it shows?

20 MR. DREEBEN: No. What it may show is that the
21 statement wasn't made in furtherance of the conspiracy.
22 If he's simply talking to his neighbor, it may not be
23 doing anything to carry out the aims of the conspiracy.
24 If, on the other hand --

25 QUESTION: Inadmissible, in other words, even if

1 A has never been arrested?

2 MR. DREEBEN: Right. The statement to be
3 admitted as a statement of a co-conspirator must be both
4 during the course of and in furtherance of the conspiracy.
5 So to continue your hypothetical, if you suppose that
6 A comes out, and then tries to communicate through
7 intermediaries that he knows where the drugs are and that
8 people should take efforts to secrete them before the
9 authorities seize them, then that statement could be
10 admitted as a co-conspirator's declaration.

11 QUESTION: Mr. Dreeben, could we just clarify
12 this particular case? Why the -- the date of the 18th
13 when the two people involved -- the proof as to them goes
14 only from the next day on? And why the -- their
15 conspiracy starts the day that the drugs are seized.
16 Right?

17 MR. DREEBEN: Correct.

18 QUESTION: Although the larger conspiracy that
19 they're part of began presumably much before that.

20 MR. DREEBEN: Actually, I -- I think the -- the
21 way the case comes to this Court, the involvement of the
22 two couriers begins on November 19th, the day after the
23 drugs are seized, when they're recruited.

24 QUESTION: Yes, but they're charged with a
25 conspiracy dating from the 18th. Is that right?

1 MR. DREEBEN: That's right. That's right.

2 QUESTION: Although they don't enter the picture
3 until the 19th.

4 MR. DREEBEN: As the case comes to this Court,
5 that's right. When -- when the case was charged, the
6 parties weren't focusing on Cruz and the case was just
7 charged in the way conspiracies normally are; namely, the
8 grand jury alleges that the conspiracy came into existence
9 by a particular date when it could be certain that it did
10 come into existence. It may have come into existence
11 earlier, and the grand jury's charge says from a date
12 uncertain, but at least by November 18, there was a
13 conspiracy in place and the following four individuals
14 were -- are to be charged as co-conspirators, plus others
15 unknown to the grand jury.

16 Now, in light of the way the facts actually
17 panned out at -- at the trial, and given the holdings of
18 the Ninth Circuit that the Government failed to prove
19 pre-seizure involvement on the part of the respondent
20 couriers, the indictment might have more accurately been
21 written to say that on November 18th, at least, a
22 conspiracy was formed, and by November 19th the
23 respondents joined it. The --

24 QUESTION: Could the Government have charged a
25 separate, second conspiracy if it had chosen to do so?

1 MR. DREEBEN: I don't think so, Justice Kennedy,
2 because the crucial aspect of a conspiracy and a defining,
3 limiting principle is the scope of the nature of the
4 agreement. Courts have worked out a multi-factor test to
5 determine whether you have one agreement or two
6 agreements. And it focuses not on literal identity of
7 membership or complete chronological co-existence of the
8 participation of each conspirator, but whether there's a
9 common agreement which each is seeking to advance forward
10 in his own way and whether the excess of one is dependent
11 on the efforts of the others.

12 Now, in this case, construed most narrowly, the
13 indictment alleges a conspiracy to move drugs, starting in
14 Phoenix, Arizona, through Las Vegas, and all the way up to
15 Idaho and then perhaps beyond that. That is the
16 conspiracy in which respondents were involved as
17 substitute couriers brought in to move the truck from the
18 Karcher Mall in Idaho to its ultimate destination. That's
19 the same conspiracy that existed at the outset. The
20 original couriers, had they not been arrested, would have
21 completed the trip. So what you have is one common
22 agreement in which all participants are working to achieve
23 the same goal, and there is only a switch of two members,
24 the two couriers, midstream --

25 QUESTION: But you were going back to -- I think

1 you hadn't completed your answer to why it's okay that
2 even though the proof as to these two defendants starts on
3 the 19th, not on the 18th, it's okay to have the
4 indictment say they were participants from the 18th.

5 MR. DREEBEN: Justice Ginsburg, if you read the
6 indictment as alleging that they were involved on the 18th
7 and we didn't show that they were involved until the
8 19th -- and as the case comes to this Court, that's what
9 we showed -- you have a variance between the allegations
10 of the indictment and the proof at trial. And the settled
11 law on variances is that it is no defense for a defendant
12 if the proof varies from the conspiracy charged in the
13 indictment so long as the conspiracy that's proved up is
14 within the scope of the indictment, a lesser included
15 conspiracy, so to speak, and the defendants suffer no
16 prejudice from the variation.

17 Now, in this case, everyone knew from the outset
18 that the centerpiece of the Government's proof against
19 respondents was going to be the observation of them
20 driving up after the call was placed to the Arizona
21 supplier of the drugs and getting into the truck and
22 driving the truck away down the highway in Idaho,
23 following which they were stopped and gave completely
24 unbelievable stories about what they were doing driving
25 around with a truck filled with drugs. There was no

1 prejudice to the defendants in defending against a
2 conspiracy that was proved up based on the events of
3 the 18th because those events were always going to be at
4 the heart of the Government's proof that they were liable.
5 So absent a showing of prejudice, the variance between the
6 allegations of the indictment and the proof at trial does
7 not warrant any relief.

8 QUESTION: But your -- your principal argument
9 is not in response to variance. It's simply that on
10 the 19th they became -- excuse me -- they became part of a
11 conspiracy that had begun at least by the 18th.

12 MR. DREEBEN: That's correct.

13 QUESTION: That's -- that's the essence of your
14 position.

15 MR. DREEBEN: That's -- the essence of our
16 argument is that -- and the Ninth Circuit in ruling that
17 the evidence was insufficient did not rely on principles
18 of variance or principles of multiple conspiracies or any
19 other fact-based, record-based analysis that would show
20 that the Government didn't prove the conspiracy alleged in
21 the indictment.

22 What the Ninth Circuit relied on was its holding
23 in Cruz which is that a conspiracy ends when the
24 Government intervenes and renders its completion
25 impossible. And the Ninth Circuit, therefore, reasoned

1 that respondents could not have joined the conspiracy
2 alleged in the indictment because that conspiracy was, as
3 a factual matter, over. Accordingly, the only way on the
4 Ninth Circuit's view that the Government could win this
5 case is if the Government showed that respondents joined
6 the conspiracy before the seizure of the drugs, or if they
7 were involved in a broader conspiracy that involved other
8 drugs. Only under those two assumptions did the Ninth
9 Circuit think that the Government could prevail.

10 And the Ninth Circuit held that the evidence was
11 not sufficient to prove either of those other
12 conspiratorial activities. It never questioned that the
13 evidence was overwhelming to prove a conspiracy to
14 participate in the distribution of drugs on November 19th,
15 when respondents showed up and got in the truck.

16 And because the Ninth Circuit was wrong in its
17 holding that a conspiracy terminates when it becomes
18 factually impossible of accomplishment, the rest of its
19 analysis also crumbles.

20 I'd like to save the remainder of my time for
21 rebuttal.

22 QUESTION: Very well, Mr. Dreeben.

23 Mr. Shurtliff, we'll hear from you.

24 ORAL ARGUMENT OF M KARL SHURTLIFF

25 ON BEHALF OF THE RESPONDENTS

1 MR. SHURTLIFF: Mr. Chief Justice, may it please
2 the Court, counsel:

3 Mr. Sullivan and I expect that we were not
4 invited here to argue our view that the case below was
5 decided on the sufficiency of the evidence question.
6 However, having said that, we would not wish to have it
7 taken that we abandon that argument.

8 Mr. Chief Justice, a number of the questions
9 posed seemed to go to the heart of what this case is
10 about. Justice Stevens asked, what was the conspiracy
11 that survived?

12 The Government argues at length in the brief and
13 here today that -- notwithstanding the charge in the
14 indictment and the trial of this case below -- that by
15 November 18th, 1997, Mr. Recio and Mr. Lopez-Mesa could be
16 charged with the crime. The fact of the matter is, is
17 that the indictment framed what this case was about by
18 November 18th.

19 QUESTION: Well, Mr. Shurtliff, the only
20 question presented in the petition for certiorari is
21 whether a conspiracy ends as a matter of law when the
22 Government frustrates its objective. Now is -- is -- are
23 what you're about to say going to deal with that question?

24 MR. SHURTLIFF: It is, Mr. Chief Justice,
25 because that's the argument that the Government makes that

1 we should not sustain the Ninth Circuit decision in this
2 case as framed by Judge Browning who formulated the
3 decision.

4 QUESTION: Well, but the Government formulated
5 the question here.

6 MR. SHURTLIFF: I -- I understand that,
7 Mr. Chief Justice, and -- and we do speak to that.

8 The -- the question was posed, What conspiracy
9 survives, and I'm suggesting that no conspiracy survived,
10 and that the answer is, is that the Government framed the
11 case as they would have it and that the issues that the
12 Government talks about here today and in their brief at
13 length as to when the -- these two late-comers to the
14 conspiracy enter -- came into it -- obscures that notion.

15 Your Honor -- or Mr. Chief Justice, the -- the
16 question posited in the -- in the petition for certiorari,
17 with all due respect, I don't think has been really argued
18 here much today by the Government. The -- the question is
19 correctly whether a conspiracy ends as a matter of law
20 when the Government frustrates its objective.

21 That is taken from the formulation of former
22 Chief Judge Browning in this case below that he -- all
23 they said was -- in describing the case here and referring
24 back to Cruz -- in Cruz we ruled that a defendant could
25 not be charged with conspiracy to distribute illegal drugs

1 when the defendant was brought into the drug scheme only
2 after the law enforcement authorities had already
3 intervened and defendant's involvement was prompted by
4 that intervention.

5 The Ninth Circuit didn't say that this was an
6 impossibility case, that it was impossible for the
7 conspiracy to continue as to other people. What the Ninth
8 Circuit said in that case was in these circumstances -- in
9 these limited circumstances, in Cruz and in Recio -- that
10 given the Government intervention in the objective of the
11 conspiracy, given the Government intervention and the
12 invitation after that to join the conspiracy by Recio and
13 Lopez, that they couldn't join the conspiracy. It was a
14 new --

15 QUESTION: Why would impossibility caused by the
16 Government be any different from impossibility caused by
17 somebody else? You -- you want to reframe -- you -- you
18 think that we could answer this question no, but still
19 find for your clients because this is not just
20 impossibility simpliciter, this is impossibility produced
21 by the Government.

22 MR. SHURTLIFF: I think, Mr. Justice Scalia,
23 that you could answer the question no and still find for
24 our clients because this is not the case. This is not why
25 they were -- the Ninth Circuit reversed their convictions.

1 The --

2 QUESTION: There wasn't impossibility at all?

3 MR. SHURTLIFF: There wasn't impossibility.

4 QUESTION: What was it?

5 MR. SHURTLIFF: It was termination. They

6 added -- typically and historically --

7 QUESTION: Well, why was it terminated? It was
8 terminated -- people didn't write notes to each other
9 saying, you know, Let's call off the conspiracy. It was
10 terminated, the Ninth Circuit found, because its object
11 was no longer possible. I thought that's why they found
12 it had terminated.

13 MR. SHURTLIFF: The object, Mr. Justice Scalia,
14 was -- was frustrated by the Government intervention.

15 The --

16 QUESTION: But the Government's position is
17 there's only two ways a conspiracy can end. One we know
18 is not this case. They didn't succeed. The other, the
19 Government says, is that the conspirators have to abandon
20 it, not that it becomes -- there's an impediment to its
21 completion, but abandonment by one person, if she
22 withdraws from the conspiracy and tells the police, for
23 example, or tells the co-conspirators. But an
24 impediment -- another impediment -- doesn't stop the
25 conspiracy from persisting.

1 And the Ninth Circuit I thought pretty clearly
2 said, Yes, it does, and that -- wasn't there rather sharp
3 disagreement among the Ninth Circuit judges over this?
4 They didn't treat it as a question of sufficiency of the
5 evidence.

6 MR. SHUTLIFF: Indeed, Justice Ginsburg, there
7 was sharp disagreement. Justice -- Judge O'Scannlain and
8 eight other members of the court dissented from the -- not
9 granting the rehearing en banc.

10 However, what -- the point I seek to make, not
11 very well, apparently -- is -- is that what the court
12 below did not say was that it was impossible to have a
13 conspiracy, but that they added to abandonment and
14 accomplishment a new ability to frustrate or end the
15 conspiracy. That is Government -- and -- and narrowly.
16 Government intervention that frustrates its objective and
17 that Government intervention invited the new participants
18 into it.

19 And Justice Ginsburg, you -- you inquired as to
20 what -- or, Justice O'Connor, as to the -- as to the --
21 what the Model Penal Code might say about that. And I
22 would suggest that in that regard, Wharton, in describing
23 that, said -- suggests that the Model Penal court -- Code
24 suggests the position that if the conduct is, quote, "so
25 inherently unlikely to result or culminate in the

1 commission of a crime that no public danger is presented
2 warranting defendant's punishment as a conspirator. "

3 And I think that's what the Ninth Circuit was
4 saying in this case, that if we look at this historical
5 purposes of conspiracy -- and the Government has well
6 traversed that in its briefs and its reply brief -- that
7 the gist, the gravamen of a conspiracy is the
8 combination that -- to agree to do something.

9 Mr. Justice Kennedy, you inquired whether to do
10 something that's not illegal is -- can be a conspiracy,
11 and I suggest that that -- that's part of what brings us
12 here is the confusion as to when you can and cannot and
13 ought not have a conspiracy.

14 QUESTION: Well --

15 QUESTION: But there -- there is a public danger
16 presented by people who band together to rob a bank even
17 when there is no money in the bank. It's utterly
18 impossible. Right? That -- that's quite different from
19 the -- the unquestionable fact that there's no public
20 danger presented by people who band together to curse
21 somebody with -- with a voodoo doll. You can say, well,
22 you know, That's a harmless conspiracy, but a conspiracy
23 to rob a bank is not harmless. These are bad people, and
24 if they don't do this bank, they may do another bank.

25 Now, you acknowledge that that is a conspiracy

1 even though there -- a criminal conspiracy even though
2 there's no money in the bank. Right?

3 MR. SHURTLIFF: Indeed, Justice Scalia.

4 QUESTION: But you say it does -- it is not a
5 criminal conspiracy if the reason there is no money in --
6 in the bank is that the Government has removed the money
7 from the bank knowing that there's going to be a -- a
8 break-in?

9 MR. SHURTLIFF: There would be no conspiracy if
10 the Government had intervened in that conspiracy early on
11 and the involvement of the participants charged was only
12 as a result of that involvement.

13 QUESTION: So if the Government took the money
14 out of the bank, that would be different than if there was
15 just no money there from the outset.

16 MR. SHURTLIFF: I'd think not, Mr. Justice
17 Scalia. I think the -- the question would be what the --
18 what the participants who were engaged to participate
19 in -- in the robbing of the bank thought.

20 QUESTION: They -- well, in both cases they
21 thought there was money in the bank. In one case, they
22 were wrong because there was never money in the bank. It
23 was a blood bank. Okay?

24 (Laughter.)

25 MR. SHURTLIFF: And --

1 QUESTION: In the second case, there was no
2 money in the bank because the Government, anticipating
3 a -- a robbery, had removed it. And you say that there's
4 something different about the second case.

5 MR. SHURTLIFF: I -- I don't think there's
6 anything different, Justice Scalia --

7 QUESTION: Okay. I don't think so either.

8 QUESTION: Then what is your reason? I'm just
9 trying to get -- A, B, C, and D form a conspiracy to
10 deprive a person of civil rights, to rob a bank, to commit
11 an act of terrorism, whatever. They do it on January 1.
12 On March -- in March, a Government agent infiltrates. Now
13 it'll fail. In April three more people join. All right?

14 Now, why should the law not be those three
15 people are just as guilty as anybody else?

16 MR. SHURTLIFF: Mr. Justice Breyer, they can be,
17 and they ought to be depending on the facts of the case,
18 and that's why the --

19 QUESTION: The facts of the case are just what I
20 said. Now what?

21 MR. SHURTLIFF: I think -- I think they're
22 guilt -- they -- I think they -- they're in on the
23 conspiracy.

24 QUESTION: You think they're guilty. Okay.

25 MR. SHURTLIFF: They're guilty of the

1 conspiracy.

2 QUESTION: They're guilty and they joined
3 after --

4 MR. SHURTLIFF: Whether they're guilty or not is
5 another question.

6 QUESTION: No, no. I'm -- all the facts are
7 just as I say.

8 So, they're guilty, and now what they did is,
9 after all, join it after the infiltration of the
10 Government agent made it absolutely certain there would be
11 no success.

12 All right. Now, how is that different than the
13 facts before us?

14 MR. SHURTLIFF: Because the facts before us are
15 that these two individuals joined at the behest of the
16 Government, and that they were charged and tried for
17 activity before the date of November 18th, 1997. They
18 were -- the -- the Government's focus on this case was
19 narrow. They weren't charged. And one of the
20 questions --

21 QUESTION: Now -- now I take -- you say, number
22 one, you take my hypothetical and say, but the Government
23 -- what did the Government do that was different from the
24 hypothetical? The Government --

25 MR. SHURTLIFF: Intervened.

1 QUESTION: Intervened. Yes, I got that.

2 MR. SHURTLIFF: Frustrated.

3 QUESTION: They joined it.

4 MR. SHURTLIFF: They frustrated the objective of
5 the conspiracy --

6 QUESTION: That's true in my hypothetical too.
7 Now what?

8 MR. SHURTLIFF: And then they encouraged the
9 participation by their intervention of the --

10 QUESTION: Oh, they led. I see. The Government
11 led my three extra people to join.

12 MR. SHURTLIFF: Indeed.

13 QUESTION: So you're saying it's like an
14 entrapment.

15 MR. SHURTLIFF: It's -- it's similar to, but
16 different --

17 QUESTION: No, no. It's not quite as strong as
18 an entrapment. So what you're argument is, is that where
19 the Government has joined, thereby frustrating the
20 objective, and in addition brings about the circumstances
21 through which the later membership, A, B -- of my three
22 extra people take place, that's close enough to
23 entrapment, plus the fact that the conspiracy can't
24 exceed -- can't succeed. Put those two things together
25 and you have grounds for not convicting.

1 MR. SHURTLIFF: And you have --

2 QUESTION: Is that the argument?

3 MR. SHURTLIFF: And you have this case,
4 Mr. Justice Breyer.

5 QUESTION: And all right, and you have this
6 case. But -- so it's like a -- a mix. It's like an
7 impossibility/entrapment mix. That's the argument.

8 MR. SHURTLIFF: Well, I -- I'm not --

9 QUESTION: I'm not ridiculing the argument. I'm
10 trying to understand it. It's a -- it's an interesting
11 argument.

12 QUESTION: Is that what the Ninth Circuit said?
13 That -- this argument you're making -- is that the basis
14 on which the Ninth Circuit held that this -- this
15 conviction couldn't stand?

16 I thought it was just simply, you know, whether
17 they were enticed in or not. The mere fact that -- the
18 mere fact that it was no longer possible to execute the --
19 the conspiracy was enough.

20 MR. SHURTLIFF: Mr. Justice -- or Justice
21 Scalia, I -- I don't think that they got to the notion of
22 entrapment or enticement, and -- and that's -- I think
23 that -- and so I can't say that -- that that's part of the
24 predicate for how they got where they got -- went in this
25 case. I think they focused on the Government intervention

1 and the Government involvement without calling it the
2 typical terms of entrapment --

3 QUESTION: It relied on Cruz, and in Cruz it
4 said it extends -- the court said it extends conspiracy
5 liability beyond reasonable limits to say that it
6 continues when the product can no longer be delivered and
7 all that remains is for a new recruit to be added.

8 But there is no reason given for that in -- in
9 Cruz. There must be some legal doctrine that it rests
10 upon. Impossibility or entrapment are the -- are the two
11 categories that we know.

12 MR. SHURTLIFF: I --

13 QUESTION: This is something else. I --

14 MR. SHURTLIFF: Mr. Justice Kennedy, I think --
15 I think the question was similarly asked to -- to the
16 Government, and I -- I would probably agree with their
17 answer. I think they relied on Castro, a predecessor case
18 from the Ninth Circuit, and then they relied on another
19 case.

20 I think what happened -- I don't know -- was is
21 that -- like many of us, the more you study the area of
22 conspiracy, I think the more confused you get. And I
23 think that's what Justice Jackson was talking about, and I
24 would urge that we consider what he said because I think
25 they -- they blended in and it's different -- it's hard to

1 dichotomize between impossibility and termination and
2 multiple --

3 QUESTION: Well, I don't -- I don't know what's
4 confusing about having people with a criminal intent
5 who -- who join a conspiracy with the intent to violate
6 the law being called conspirators. That's not -- it
7 doesn't sound like rocket science to me.

8 MR. SHURTLIFF: But, Mr. Justice Kennedy, the --
9 the -- in Cruz, he was invited to join the conspiracy
10 after -- only after -- the Government was sitting there
11 with the drugs and he was a late recruit to the process.
12 He wasn't an early conspirator. In this case, these
13 persons were invited to join only after the Government had
14 fully intervened. They could have stopped it then. The
15 only activity was to get new recruits.

16 And what the Ninth Circuit said in both cases --
17 they didn't say they couldn't be charged with a new
18 conspiracy. They could have been charged with it.
19 Indeed, they left that open in both Cruz and here. They
20 could have been charged in a new conspiracy for the
21 activities that they engaged in.

22 QUESTION: Well, you think that this
23 defendant -- these defendants could have been charged in a
24 new conspiracy? It seems that -- that undercuts your
25 argument. I thought the whole purpose of this argument

1 was to have some reasonable confines on how long a
2 conspiracy can exist after everybody knows it's not going
3 to go forward. And now you say there was a second
4 conspiracy that could have been charged?

5 MR. SHURTLIFF: I think they could have been
6 charged with a second conspiracy starting on the 19th.
7 They weren't charged. I -- I --

8 QUESTION: Mr. Dreeben said that was a variance
9 whether it was the -- they joined on the 18th or the 19th.
10 The question is what did they join, and why should it make
11 a difference?

12 MR. SHURTLIFF: It should --

13 QUESTION: If these defendants didn't know there
14 had been any seizure, why should it -- why should their
15 guilt turn on that factor? As far as they're concerned,
16 this is a truck that has gotten by the Government's
17 surveillance.

18 MR. SHURTLIFF: Justice Ginsburg, the -- the
19 question of variance is another one of those little things
20 that pop up and confuse some of us.

21 But the issue in this case, there was no
22 variance because the Government said, we indict you for
23 activity by November 18th, 1997. The prosecutor stood
24 before the jury in his opening and his closing. The
25 instructions all went to the issue, We will show that

1 these persons were engaged in this activity for either a
2 single load -- the load at issue -- or that they were
3 members of a larger conspiracy before November 18th, 1997.

4 QUESTION: But that's not --

5 MR. SHURTLIFF: That's not variance.

6 QUESTION: -- that's -- that's not part of the
7 question before this Court. The question before this
8 Court is whether a conspiracy ends as a matter of law when
9 the Government frustrates its objective. And whether
10 there might be some other grounds that the Ninth Circuit
11 might have decided it on, that is not before us.

12 MR. SHURTLIFF: And as to that issue, Mr. Chief
13 Justice, as we said it in our briefs and I said it in my
14 brief specifically, I believe, that the policy that's come
15 down through the -- through the -- conspiracy is not that
16 old -- that there is no good reason why the answer to that
17 question ought not be yes, that a -- that a -- it is
18 terminated as absolutely as if the conspiracy were
19 abandoned or if it were accomplished because there is no
20 good -- there is no chance of it being successful.
21 There's no chance of the unified activity creating the
22 dangers that we speak of and -- when we're -- when we're
23 trying to combat conspiracy.

24 QUESTION: And that -- and that would follow --
25 that would also be true if the project was impossible from

1 the outset. Right? That -- I mean, that's what I don't
2 understand. You -- you say if -- if they enter in a --
3 into a conspiracy to rob a bank in which there is no
4 money, that can be prosecuted. Right?

5 MR. SHURTLIFF: It has been, Mr. --

6 QUESTION: Well, I know it has been, you say.
7 But it can -- but it can be.

8 MR. SHURTLIFF: Surely. Surely.

9 QUESTION: Well, why doesn't that violate your
10 principle? You say there's no harm done there either.
11 There is just as -- just as much no concrete harm that
12 could have been done there except the harm of wicked
13 people banding together, which is what -- what the crime
14 of conspiracy is directed against. Why should it make any
15 different -- difference whether the impossibility exists
16 from the outset, or whether -- whether it -- it occurs
17 later in the scheme. What -- why does that make any
18 difference?

19 MR. SHURTLIFF: I think it probably should not
20 make much difference --

21 QUESTION: No, I don't think so.

22 MR. SHURTLIFF: -- in a lot of cases, but I
23 think each case is fact-specific, Mr. Justice Scalia. And
24 I think in this case you have to look at what was charged,
25 what was tried, and what the conspiracy was about. And --

1 QUESTION: May I ask? Are the -- are the
2 instructions to the jury in the papers before us?

3 MR. SHURTLIFF: I'm not real -- I'm not -- I'm
4 not really sure, Mr. Justice Stevens.

5 QUESTION: Yes.

6 MR. SHURTLIFF: The -- the -- we didn't do an
7 excerpt for the record. I think it's in the petition for
8 certiorari.

9 QUESTION: The instructions are in the petition?

10 MR. SHURTLIFF: Some of them are referred to. I
11 don't know that we've listed -- I don't think all of the
12 instructions are in the record here.

13 The -- the instruction as to the conspiracy.
14 And that's how it was charged that it -- that they had to
15 belong before or after -- before and not after.

16 The --

17 QUESTION: It says that the conspiracy began on
18 or about that date, but then it says the defendants became
19 member. It doesn't say the date the defendants became
20 member.

21 QUESTION: Why don't you proceed with your
22 argument?

23 MR. SHURTLIFF: Thank -- thank you.

24 The issues here raise difficult questions. The
25 whole area of conspiracy raises difficult questions of

1 interpretation and -- and law. I suggest, and we suggest
2 that the decision below is not as far-reaching as it might
3 otherwise appear, that Justice Browning formulated a
4 result in this case that's much narrower than what we're
5 about.

6 But on the other hand, having said that, and
7 being here, the question is whether the Government
8 intervention in these circumstances, in these extant
9 circumstances, ought end the opportunity and the ability
10 to join a conspiracy. We simply urge that frustration of
11 the purpose of the -- by the Government -- invitation to
12 join by the Government in these circumstances is no less
13 or is no more in keeping with the termination of the
14 conspiracy than would be had they -- some of the people
15 abandoned the conspiracy or had it been accomplished.

16 The Government argues that the answer to this
17 question, if we answered it in the affirmative, would
18 raise havoc with our ability to prosecute these kinds of
19 cases. We would suggest that that's not the instance
20 here. Here in -- here and in Cruz, as near as we can
21 tell, Cruz has been cited once; this case not at all.
22 It's not a set of circumstances that are likely to reoccur
23 often or with great --

24 QUESTION: Suppose in this -- suppose in this
25 case the truck had been apprehended in Arizona, and

1 neither of the participants at that point cooperated with
2 the police except to tell the police that their
3 instructions were to drive the truck to a certain place.
4 Then without any Government intervention in calling Recio
5 and his buddy -- Recio and -- and his co-defendant show up
6 without any Government intervention. So we have the
7 Government seizure, just as you do in this case, but the
8 scenario plays out just as it was arranged without any
9 Government intervention. In that case, would you say that
10 the -- that the conspiracy continued and these people are
11 properly prosecuted?

12 MR. SHURTLIFF: Yes.

13 QUESTION: May I ask --

14 MR. SHURTLIFF: But that's not what happened
15 here. The -- the -- they were intercepted --

16 QUESTION: You're making it turn on the
17 Government having a part in bringing in the latecomers.

18 MR. SHURTLIFF: And -- and I -- I retreat again
19 to the -- what they were charged with and what the
20 indictment was and what they -- that we will prove that
21 they were involved by November 18th, 1997. We will prove
22 that. That's what this case is about. That's what they
23 kept saying and they argued that throughout.

24 Now, here they want to suggest that -- that by
25 going to the 19th, it provokes no prejudice on the part of

1 the defendants. That's not the case they were charged
2 with. That's not the case that was tried below. And so,
3 in your hypothetical, Justice Ginsburg, I think yes, but
4 there was no involvement and -- and depending on how they
5 were charged. And I --

6 QUESTION: Counsel, it -- it looks like the
7 instruction to the jury said that a defendant may only be
8 found guilty of the conspiracy charged in the indictment
9 if he joined the conspiracy at a time when it was possible
10 to achieve the objective of that conspiracy. Was that the
11 instruction given them?

12 MR. SHURTLIFF: It was, Justice O'Connor.

13 QUESTION: So that means the jury must have
14 found that -- that there was evidence sufficient to say
15 they joined before the impossibility occurred.

16 MR. SHURTLIFF: Indeed.

17 QUESTION: Did the Government object to that
18 instruction, do you know?

19 MR. SHURTLIFF: No. The Government supported
20 that, Mr. Justice Stevens.

21 QUESTION: What should happen if the trial judge
22 faithfully followed Cruz? And under Cruz, the jury should
23 not have found him liable, but we say that Cruz is wrong.
24 Does it still have to go back for a new trial?

25 Because the -- on page 76a of the appendix, the

1 instructions seem to say that -- one of two things. You
2 can only find him guilty of the conspiracy if he joined it
3 prior to 1:18 a.m. on November 18th. On the other hand,
4 if you find there's a larger conspiracy, you can find him
5 guilty, but that larger conspiracy must be to distribute
6 other drugs than those that were seized. So I -- I
7 suppose the proof doesn't support either of those
8 conspiracies.

9 MR. SHURTLIFF: And -- and that, Mr. Justice
10 Kennedy, is what the Ninth Circuit said, that it doesn't
11 support either the single load --

12 QUESTION: What happens if we think this
13 instruction was wrong? Under the evidence, the defendants
14 should have been convicted, and that Cruz is wrong. Do we
15 still have to send it back?

16 MR. SHURTLIFF: I think, Mr. Justice Kennedy,
17 you send it back to the Ninth Circuit for a determination
18 whether, but for a decision that Cruz is incorrectly
19 applied in the facts in this case, would the decision
20 below remain the same.

21 And I suggest, with all due respect to the
22 Government's position in this case, that the -- that it
23 could be concluded that notwithstanding the application of
24 Cruz in the Ninth Circuit below, that the decision of the
25 Ninth Circuit could be -- almost by redacting it,

1 eliminating the references to Cruz -- come to the same
2 conclusion. The evidence was just simply insufficient to
3 sustain the conviction for either the single load or the
4 multi-load before November 18th.

5 QUESTION: Of course --

6 QUESTION: Assuming Cruz is right. Assuming
7 Cruz is right.

8 QUESTION: I'm assuming Cruz is wrong, and then
9 it would seem to me the evidence is fully sufficient to
10 convict if Cruz is wrong because it doesn't make any
11 difference if they joined it before or after 1:18 a.m. on
12 the 18th.

13 QUESTION: Can I ask another question? Is
14 there -- is it conceivable that the jury found that the
15 evidence after the impossibility was sufficient to sustain
16 the verdict? Because they weren't asked to find that.

17 I mean, I don't -- as I understand Mr. Dreeben's
18 argument, there was plenty of evidence later on, that they
19 joined the -- they joined an ongoing conspiracy, but the
20 charge didn't ask them to find that, as I -- maybe
21 Mr. Dreeben will comment on it in his rebuttal. I --

22 MR. SHURTLIFF: I -- I think that's entirely
23 correct, Justice Stevens. The -- the jury wasn't asked to
24 find that, and the -- and the Government was very careful
25 in the way they tried this case. We will show you that

1 by, and the whole case was by. In the Ninth Circuit, the
2 issue was whether by that date the indictment and the --
3 and the trial.

4 The -- if -- if Cruz is -- if Cruz is wrong, the
5 question would still be whether these persons entered into
6 a conspiracy.

7 QUESTION: And had you raised that further
8 question in the Ninth Circuit? In other words, did you go
9 to the Ninth Circuit and say, Apply Cruz, period, or did
10 you go to the Ninth Circuit with other reasons?

11 MR. SHURTLIFF: Mr. Justice -- or Justice
12 Souter, we -- we went to the Ninth Circuit with -- with
13 other reasons because the court --

14 QUESTION: Okay.

15 MR. SHURTLIFF: -- in the instructions that
16 we've read did apply Cruz, and everybody was satisfied --

17 QUESTION: I just wanted to know whether -- I
18 just wanted to know whether you had raised anything beyond
19 a Cruz point, and the answer is yes, okay.

20 MR. SHURTLIFF: The sufficiency of the evidence,
21 ineffective -- there were several issues raised and -- and
22 decided.

23 The Government suggests that if we allow this
24 decision to stand, that it would cause irreparable injury
25 and damage to the ability of the Government to prosecute

1 crime, to catch people who are miscreants, and that it
2 would make inordinately difficult the choices of the
3 prosecutor in determining what and how to charge. We
4 would suggest simply that that's the obligation of the
5 prosecutors now. Cruz doesn't add any burdens to the
6 prosecutorial responsibility.

7 Thank you.

8 QUESTION: Thank you, Mr. Shurtliff.

9 Mr. Dreeben, you have 3 minutes remaining.

10 REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

11 ON BEHALF OF THE PETITIONER

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

14 To address the jury instruction issue first, the
15 jury in this case was instructed in accordance with the
16 requirements of Cruz, and therefore, the jury was asked to
17 find whether there was evidence of respondents'
18 involvement in the conspiracy before the seizure of the
19 drugs or, alternatively, whether they were involved in a
20 broader conspiracy, not limited to the drugs that were
21 seized.

22 At pages 6 through 8 of our reply brief at the
23 petition stage, we addressed the consequences of what
24 happens if this Court should conclude that the Cruz legal
25 rule is incorrect. And in essence, our position is that

1 any rational jury that found guilt under the Cruz
2 instructions also would have found that respondents were
3 involved in a conspiracy to distribute the very drugs that
4 they drove to the Karcher Mall to pick up. That was the
5 centerpiece of the Government's evidence, that respondents
6 were involved in a conspiracy, and the fact that the jury
7 may have found that respondents were involved in a longer
8 conspiracy, or in other conspiracies wouldn't detract from
9 the rationality of its necessarily concluding that the
10 respondents were also involved in this conspiracy.

11 Even if this Court didn't agree with that
12 rationale or chose not to reach it, it's important to note
13 that the effect of the Ninth Circuit's holding is to find
14 insufficient evidence to prove the crime charged in the
15 indictment. That doesn't leave the Government with the
16 option of pursuing a new trial on correct instructions
17 with the Cruz findings purged from them. It would mean
18 that respondents have permanent immunity from the crime
19 that's charged in the indictment. If this Court were to
20 conclude that Cruz is wrong, and either this Court or the
21 Ninth Circuit also concluded that the jury instructions
22 somehow prejudiced the defendants, the remedy would be a
23 new trial.

24 It is also important, I believe, to note that
25 the -- the principle that the Ninth Circuit has adopted

1 would go contrary to what this Court has noted about the
2 evolution of conspiracies. In a case called Blumenthal
3 versus United States, which we did not cite in our briefs,
4 but it appears at 332 U.S. 539, the Court noted that
5 conspiracies involving elaborate arrangements generally
6 are not born full-grown. Rather, they mature by
7 successive stages which are necessary to bring in the
8 essential parties.

9 And in this case, two essential parties were
10 brought in not at the inception of the conspiracy, but
11 after events that the conspirators were aware of required
12 that new couriers were brought in. They were not aware
13 that the Government had seized the drugs, but they knew
14 that they needed new couriers. They brought them in.
15 Under the principles of Blumenthal, that's all one
16 conspiracy.

17 Respondents' counsel has mentioned the Model
18 Penal Code provisions. The Model Penal Code at section
19 5.01 addresses the question of impossibility under attempt
20 law and concludes that the defense should not be
21 recognized and at section 5.03 does the same for
22 conspiracy.

23 Finally -- thank you.

24 CHIEF JUSTICE REHNQUIST: Thank you,
25 Mr. Dreeben.

1 The case is submitted.
2 (Whereupon, at 11:04 a.m., the case in the
3 above-entitled matter was submitted.)
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