IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 01-687

LEONARD COTTON, MARQUETTE :

HALL, LAMONT THOMAS, MATILDA :

HALL, JOVAN POWELL, JESUS :

HALL, AND STANLEY HALL, JR. :

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Washington, D.C.

Monday, April 15, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

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

TIMOTHY J. SULLIVAN, ESQ., College Park, Maryland; on behalf of the Respondents.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 01-687, the United States v. Leonard Cotton, et al.

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE PETITIONER

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

This case is typical of many Federal drug prosecutions that were tried before this Court's decision in Apprendi v. New Jersey. Respondents were indicted on a superseding indictment that alleged a conspiracy to distribute cocaine and cocaine base without alleging a specific threshold quantity of drugs that were involved in the offense.

Respondents were convicted of that offense at trial, and the evidence established at trial that the offense involved well in excess of 50 grams of cocaine base, the threshold quantity of drugs to authorize a minimum sentence of 10 years and a maximum sentence of life imprisonment.

At sentencing, as all parties expected, the judge made findings of drug quantity and determined that

the quantities of drugs involved in the offense justified a sentencing range up to life imprisonment and imposed sentences on several respondents of life imprisonment and others of 30 years imprisonment.

Respondents made no objection to the judge's procedure in determining drug quantity himself without a jury trial determination on that issue or without an --

QUESTION: Well, at -- at sentencing, is it -- it -- it's really not that much of a burden to just send it back to the judge and tell him to do it right. Suppose he had sentenced under the wrong section or something like that. We'd just send it back.

MR. DREEBEN: The problem in this case, Justice Kennedy, is that the court of appeals has held that the omission of a drug quantity allegation from the indictment is a jurisdictional error that always requires automatic correction on plain error review regardless of the strength of the evidence against respondents on the question or on whether respondents had notice that they would face an increased sentence as a result of enhanced quantities of drug --

QUESTION: Well, but -- but in order to test that, I'm just asking -- it's not as if we have to have a new trial. In fact, I -- I doubt that you could have a new trial unless everybody stipulated to it.

MR. DREEBEN: It's --

QUESTION: All that happens is there's a new sentencing hearing. That -- that's not that big of a -- of -- a great a burden on the courts and on their resources. We don't have to have some huge trial. It's just a resentencing hearing.

MR. DREEBEN: What will happen if the -- this Court affirms the judgment of the court of appeals is that respondents will not be subject to the sentences that Congress authorized and that the evidence unequivocally showed in this case were justified.

QUESTION: You're not objecting to --

QUESTION: Aren't we really just arguing about -- are we really just arguing about retroactivity then?

MR. DREEBEN: In this case we're not arguing about retroactivity. What we're arguing about is plain error. Respondents never made a constitutional objection in the district court to the procedure by which they were sentenced. They never even objected as a factual matter to the proposition that their offenses involved 50 grams of cocaine base or more, which is all that is required in order to support a statutory increase in the sentence. And notwithstanding their failure to object, the court of appeals concluded that plain error analysis always requires vacation of the enhanced sentence, and the

Government does not get a chance to seek the enhanced sentence on --

QUESTION: Here, the -- the verdict of the jury corresponded to the indictment, I take it. It -- it wasn't a case where the indictment failed to allege an element of the offense which the jury found.

MR. DREEBEN: That's correct. The indictment in this case charged a complete offense under 21 U.S.C. 846, the drug conspiracy --

QUESTION: Except that under Apprendi, the -- the quantity may become an element, in effect. This was tried before Apprendi --

MR. DREEBEN: Correct.

QUESTION: -- came down.

MR. DREEBEN: This case was tried before Apprendi.

QUESTION: If it had been tried after Apprendi came down, there might, in fact, be a notice problem I assume.

MR. DREEBEN: Yes, absolutely, Justice O'Connor. Post Apprendi, the Government understands that it's its obligation to include an allegation of drug quantity in the indictment. This case, which was tried pre Apprendi, was done in a regime in which all parties understood that an allegation in the indictment of a conspiracy offense,

with no specification of drug quantity, did not limit the Government to proving increased quantities of cocaine base.

QUESTION: Well, for your position to prevail here, do we have to overrule Ex parte Bain or somehow set that aside, which seems to suggest that if it's not in the indictment, it's a jurisdictional problem?

MR. DREEBEN: Well, Justice O'Connor, this Court already has overruled Ex parte Bain on its square holding, which is that the narrowing of an indictment is impermissible and deprives the court of jurisdiction.

QUESTION: But the -- the Government can surely also argue that Ex parte Bain by its terms doesn't apply --

MR. DREEBEN: Ex parte --

QUESTION: -- to this case because the indictment and the verdict corresponded, and that was different from Ex parte Bain.

MR. DREEBEN: Well, that -- that is a difference from Ex parte Bain, Chief Justice Rehnquist, but we don't dispute that in this case, post Apprendi, there is an error in the sense that drug quantity is treated as a constitutional element.

QUESTION: Yes. There can be an error but not a matter of -- not going to a matter of jurisdiction.

MR. DREEBEN: Correct. And the fundamental flaw in Ex parte Bain was to treat a constitutional error arising under the Fifth Amendment's Indictment Clause as if it were a jurisdictional error. And it's our submission that the reason that the Court did that is because at the time, in the 19th century, on habeas corpus, relief was available only for jurisdictional errors, which led this Court to treat a variety of constitutional errors as though they were jurisdictional.

QUESTION: Well, and because there was no right of direct appeal.

MR. DREEBEN: Correct. So, the -- the result was that a -- the Court had broadly characterized a variety of constitutional errors as if they were jurisdictional errors, but later decisions of this Court make clear that the failure of an indictment to charge any offense is not a jurisdictional error.

QUESTION: Mr. Dreeben, you would like us to make that clear, wouldn't you, because it isn't in our cases so far, that that kind of error, whatever it is, doesn't qualify as, quote, jurisdictional?

MR. DREEBEN: Yes, Justice Ginsburg. We think that the time is -- is right in this case to make it clear that that's not a jurisdictional error.

QUESTION: There -- there are many instances

where the Court has said that an error is -- that -- that a requirement, certain requirement, is mandatory and jurisdictional. That word has been used in -- in many different contexts. And are you suggesting some approach to the -- what is jurisdictional so that there won't be this string of things that the label jurisdictional is appended to?

MR. DREEBEN: Well, jurisdictional has been appended as a label to a variety of kinds of errors, but the relevant sense in which it's being invoked in this case and in which the lower court understood it was a kind of defect that may be raised at any time regardless of an objection and that is tantamount to subject matter jurisdiction, the sort of error that is so fundamental to the proceedings that harmless error review and plain error review simply don't apply.

Now, the court of appeals in this case did, as a formal matter, apply rule 52(b) of the Federal Rules of Criminal Procedure, the harmless error rule. But it also repeatedly stated that errors relating to the indictment process are jurisdictional, and the failure of an indictment to charge an offense violates a mandatory rule and creates a jurisdictional error. And that led to the conclusion that this Court's precedents in Neder v. United States and Johnson v. United States simply don't apply and

that the weight of the evidence against respondents in this case and their possession of notice that they would face increased sentences under the drug statute --

QUESTION: May I ask what you rely on for the notice proposition?

MR. DREEBEN: In -- in the factual record --

QUESTION: Are you relying on the general run of cases or the fact there was a preceding indictment?

MR. DREEBEN: In this case, Justice Stevens, we rely most fundamentally on the fact that the state of the law at the time of respondents' indictment was that all defendants understood that notwithstanding the absence of a --

QUESTION: But you're not really relying on the fact there had been a prior indictment that was withdrawn and superseded.

MR. DREEBEN: We don't have to rely on that. I think the prior indictment makes clear that the Government believed that this conspiracy --

QUESTION: It believed at the time they filed the prior indictment, but when they withdraw it and file a second indictment, you normally would think they've withdrawn the charges that have been withdrawn.

MR. DREEBEN: Well, not in view of the fact that at the prevailing legal regime at the time --

QUESTION: That's a separate point, and I understand that point. But it seems to me you'd make that point even if there had been no original indictment.

MR. DREEBEN: I would. And I think it's important to underscore that the superseding indictment didn't give the defendants the impression that the Government was retreating in the scope of its proof. To the contrary, the superseding indictment expanded the conspirators from 9 to 14. It expanded the length of the conspiracy --

QUESTION: Yes, but it withdrew the quantity allegation.

MR. DREEBEN: It didn't withdraw all references to quantity, Justice Stevens. If you look at the superseding indictment, it alleges that there were multi-kilogram cocaine shipments and multi-kilogram --

QUESTION: Well, I thought we were taking the case on the assumption that the indictment did not charge enough to get the sentences that they received.

MR. DREEBEN: And that's correct. But what --

QUESTION: Whereas the earlier indictment did.

MR. DREEBEN: The earlier indictment in terms said this offense involves more than 50 grams of cocaine base. The later indictment didn't say that. But if you do read the allegations in the later indictment, it's

impossible that anyone could come away thinking that the Government had narrowed the scope of the conspiracy it intended to prove.

And respondents didn't take it that way. There is information in the detention hearings of at least four other respondents that indicates that they understood that this was the kind of cocaine conspiracy -- cocaine base conspiracy that, if proved, would expose them to a life sentence. They had a full opportunity to try to contest that evidence if they wished to do so.

What the respondents did instead was attempt to say we weren't part of this --

QUESTION: Let me just interrupt you by saying I think it would be most unfortunate if we decided this case on the particular fact that there was an original indictment and a superseding indictment. This was case would mean nothing if that's all we have.

MR. DREEBEN: Well, I don't think it would mean nothing, Justice Stevens, but we are asking the Court to rule on the broader ground that when an indictment fails to allege what we now understand to be an element of the offense, but the evidence is sufficiently powerful so that any rational grand jury, if asked, would have found that.

QUESTION: What does the -- what does the Government's position do to the Stirone case?

MR. DREEBEN: Nothing, Chief Justice Rehnquist, because Stirone was a case in which two features are present that are not present here. First of all, the defendant in Stirone repeatedly objected to the broadening of the indictment in that case. There the indictment had alleged that there was an effect on interstate commerce from an extortion as a result of obstruction of commerce in sand. And the Government got to trial and attempted to prove that the sand would have been used to build a steel mill, the steel mill would have exported steel to other States, and that was the effect on commerce that had been obstructed. The defendants vociferously objected, but the judge allowed that to go to the jury. So, that case is not like this case, a plain error case. It is a harmless error case.

And furthermore, the respondents -- or the -- the defendants in Stirone had a plausible claim that they were deprived of notice of the kinds of charges that they would actually face at trial; whereas in this case, there is not a claim, a plausible claim, that the defendants did not know that they would face an increased sentence if the Government established that the crime involved more than 50 grams of cocaine base.

QUESTION: Can you tell me, post Apprendi in the trial courts, can the defendant agree with the Government

to plead guilty but leave it to the judge to determine the amounts of the drug involved?

MR. DREEBEN: It's a little unclear, Justice Kennedy, whether the defendant can do that because typically the Government has not acquiesced and the courts have not been hospitable to partial pleas of guilty. And in effect, the defendant would be tendering a partial plea to an aggravated drug offense and then asking the judge to decide one element of the offense. Under pre-Apprendi law, that procedure would not be followed in any circuit.

Now, there have been some defendants who really would be willing to plead to the underlying offense and contest drug quantity, and I haven't had a chance to see whether that has played out in the district courts with any courts allowing that to happen.

QUESTION: And what does the Government do when it indicts? There's -- there's no stipulation of any kind. Does it have three or four counts and -- and it alleges the -- the maximum amount and then -- and then a smaller amount and then another amount? Three different counts?

MR. DREEBEN: No, Justice Kennedy. We allege the amount of threshold quantity of drugs that we believe we can prove at trial. If the trial evidence then establishes that a rational jury could find guilt on the

underlying offense but still have a doubt about drug quantity, then the Government would be entitled to a lesser included offense.

QUESTION: Lesser included offense.

MR. DREEBEN: Correct. And -- and the lower courts have understood that that's the appropriate analysis in a case like that.

QUESTION: I guess part of the problem in this case is that if we say that defendants are entitled to the benefit of a change in the law before their conviction becomes final, there's not much you can do because you'd have to issue a superseding indictment and you can't do that.

MR. DREEBEN: We can't do it in this case, Justice Kennedy, which is why, in effect, the result that the court of appeals achieved is a tremendous windfall for the defendants. They never raised a constitutional objection at trial. They never contested the amount of drugs involved in the offense. The statute clearly authorizes a life term for the conduct that was proved, and the evidence supports that --

QUESTION: Well, I -- I don't know they'd object. Does he stand up during the prosecution's case and say, well, we just want you to know that you're not doing a very good job of proving the amounts? I mean,

what's -- what's he supposed to do? That -- that -- I don't understand when the objection would take place.

MR. DREEBEN: Well, the objection could take place at trial when a defendant could have said the Government has to prove this quantity up to the jury or it could --

QUESTION: No, but it -- it doesn't. I mean, the -- the point at which the -- the failure to indict and allege on quantity becomes objectionable is at sentencing.

MR. DREEBEN: Well, that's --

QUESTION: So, there would be no reason to.

MR. DREEBEN: That was just what I was about to say, Justice Souter. The -- the most pertinent time for the defendant to object would be at sentencing, and there are defendants who raise the kind of constitutional objection that this Court alluded to in the Jones decision in 1999 and later accepted in the Apprendi decision in the year 2000. There were defendants who raised that constitutional objection, and they are entitled to the benefit of harmless error review. Those defendants who do not raise that constitutional claim are subject to plain error review. And this Court has repeatedly recognized that even the type of error that might entitle a defendant to reversal on harmless error review, regardless of the strength of the evidence, does not automatically entitle

the defendant to relief on plain error review.

In Johnson v. United States, this Court considered a very analogous type of error. There the trial court convicted the defendant of a perjury offense without sending materiality to the petty jury. So, there was no petty jury determination of materiality. The defendant made no objection to that, and on appeal, this Court held that the appropriate standard is plain error review because the defendant had never objected. And when the evidence is overwhelming and uncontestable -- and uncontested at trial, the Court concluded that it is affirmance that supports the integrity of the judicial system rather than reversal.

QUESTION: The prejudice to you is that you cannot reindict, but the objection would be irrèlevant to that.

MR. DREEBEN: The objection --

QUESTION: So, I mean --

MR. DREEBEN: The objection would not be irrelevant because -- for two different reasons. First of all, the -- the defendant, had he objected at the pertinent time and had the Government concluded that this was an objection that we should worry about, could have sought indictments on other counts relating to substantive drug violations if it believed that the sentence that it

was about to obtain was not sufficient. We're not in that position today because it's the year 2002, and the statute of limitations will have run on many other drug offenses that we might have brought.

QUESTION: Oh, you mean you could have just hit him with another -- hit the defendants with another indictment in another case without a double jeopardy problem.

MR. DREEBEN: Well, any -- a substantive drug count is a separate offense from a conspiracy offense. This Court has held that in Felix v. United States and reaffirmed it more broadly in United States v. Dixon. So, there would have been no double jeopardy objection.

But the Government is no longer in the position where we can extricate ourselves from the -- the dilemma that the court of appeals has placed us in. These defendants will not receive the sentence that the sentencing guidelines called for and that the statute authorizes. And the fact that they did not make a timely objection puts them in a very different position than a defendant would be who had timely objected.

QUESTION: The difference is --

QUESTION: The actual difference, as a practical matter, is between life -- a life sentence and 20 years. Right?

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

QUESTION: And that, Mr. Dreeben, seems to me a substantial difference. So, I follow your argument at the -- the very last step in a plain error analysis, but you seem to stop short of that and you said there wasn't any substantial difference. And I think that that's troublesome because the disparity in sentencing is large.

MR. DREEBEN: The disparity in sentencing is large both from the Government's point of view and from the defendant's point of view. The way that the Government looks at this question is would the defendant have gotten the same sentence if he had been accorded the procedures that he now claims that he should have been given. If the Government had understood that it had to obtain an indictment that mentioned drug quantity and it had understood that the Constitution required the jury, not the judge, to make that finding, would the defendant be better off or the same off?

That is exactly the kind of analysis that the Court used in Johnson v. United States and Neder v. United States. It looked at whether the -- the availability of the procedure that the defendant has been deprived of would have made a difference to him. Of course, it would make a difference to him if he could have compelled the sentencing judge to drop down to 20 years as a result of

the Government's failure to put drug quantity in the indictment, and that's what would happen today if this case were unfolding in a post-Apprendi world.

But in a pre-Apprendi world, particularly where the defendant didn't object, it makes more sense to look at the problem as one of a deprivation of procedure and to ask whether the possession of the procedure would have --

QUESTION: Mr. Dreeben, can I ask you this question? I understand it's not this case, but would the Government -- what -- what would the Government's position be if the evidence of quantity came out after the trial was concluded just as a result of a pre-sentence investigation and then a finding by the judge? What would -- what should happen in that kind of case?

MR. DREEBEN: In that kind of case, our position would be the same, that particularly on plain error review, the Court should look to the entire --

QUESTION: Even though the evidence was not before the jury.

MR. DREEBEN: Right, even though --

QUESTION: Because Neder wouldn't apply to that.

MR. DREEBEN: Well, it's not clear that -- that Neder wouldn't apply to it. It's true that in Neder itself, the Government proved up all of the evidence relevant to materiality at the trial. But in many cases,

that were tried --

QUESTION: But you would take the same position even if all the evidence developed post-trial during the pre-sentence investigation.

MR. DREEBEN: That's right. We would. But, as Your Honor has indicated, the Court wouldn't have to agree with that in order to sustain in this case.

And this case is the far more typical one in which the grand jury investigation itself developed substantial evidence of drug quantity. Everybody knew that before the trial, and the trial evidence itself is where the evidence of drug quantity was adduced.

QUESTION: Mr. Dreeben, I -- I'm not sure I -- you say we should determine whether substantial rights have been affected by -- by asking whether if the procedure that has been omitted had not been omitted, he would have been -- he would have been convicted anyway. I -- I just -- that -- that seems to me extravagant. I mean, that -- that would mean that if there were no indictment at all, you just go to the jury without an indictment and the jury convicts him of murder, you could come in and say, well, his substantial rights weren't affected because had there been a murder indictment, there was plenty of evidence to -- to convict him of murder. Is -- is that the position the Government's taking?

MR. DREEBEN: No, it's not the position that we're taking, Justice Scalia. And the logic of -- of the Government's position in this case doesn't have to go to a total omission of any grand jury indictment at all. Just as in Neder, the Court made perfectly clear that although harmless error analysis would apply to the omission of an element, it would not apply to a directed verdict --

QUESTION: No, but my -- my point is it seems to me the way you decide whether substantial rights have been affected is not to ask the question would he -- would he have been convicted anyway. Even though he would have been convicted anyway, in some cases you simply say there was no indictment. His substantial rights were affected. Period.

MR. DREEBEN: Well, there -- there is a class of cases in which the Court will find an effect on substantial rights without regard to the strength of the evidence.

QUESTION: I don't think so.

MR. DREEBEN: And those cases are called structural error cases. And as the Court is well aware, that's a very narrow category. It was hotly debated in the Neder case whether structural error did apply to the petty jury's failure to decide an element to the offense, and the Court held that it was not a case of structural

error.

Even the dissenting view in Neder, however, recognized that when there wasn't an objection at trial and the case comes up on plain error review and the Court might find an effect on substantial rights, it's still not required to reverse. It applies the -- the test that was articulated in United States v. Olano and in Johnson v. United States, was there an effect on the fairness, integrity, and public reputation of judicial proceedings.

QUESTION: It seems to me that's the step that you -- that you should put your -- your emphasis on in this case, not the -- not the substantial right.

MR. DREEBEN: Well, that's all the Court needs to hold in order to conclude that the court of appeals erred in this case because the court of appeals in this case got to the fourth step of plain error review, after finding an effect on substantial rights, and then it held that we really can't say what the grand jury would have done. We're not permitted to speculate about that because the grand jury is a body that operates without any legal restrictions at all on whether it can charge or not.

That proposition that the grand jury is essentially free to charge or not, regardless of the evidence, is inconsistent with the historical record of the way grand juries operated. The charges that were

given by members of this Court sitting on circuit in the early years of this Nation made clear that grand juries had a duty to indict when there was probable cause to believe that an offense had been committed. And the grand jurors' oath similarly reflected that grand jurors should indict when the evidence justifies that.

QUESTION: Yes, but can I just give you sort of an intermediate hypothetical? Supposing all the evidence of quantity developed after the grand jury had returned its indictment that it developed, but in the plea bargaining they found out how much drug there really was involved, you'd treat that as the same case even though the grand jury could not have indicted.

MR. DREEBEN: Well, if that case took place, as this one did, in a legal regime in which the Government didn't believe it had to get a grand jury indictment on the point, then I suppose my answer to that is if we had known, we could have gone back to the grand jury and gotten a superseding --

QUESTION: No. But you didn't know the evidence at the time is what I'm saying.

MR. DREEBEN: Oh, we could have gotten a superseding indictment.

QUESTION: Oh, I see. Okay.

MR. DREEBEN: And -- and that's what's odd about

this case. All parties in this case proceeded on the theory that it wasn't necessary to go to the grand jury, and that's the explanation on this record for why there's nothing --

QUESTION: Well, except that the defendant doesn't have to proceed on any theory. It's your prosecution.

MR. DREEBEN: That's true, but the defendant on this case proceeded on the same theory as we did. The defendant never objected. The defendant never believed that there was a contest as to the amount of drug quantity in question that increased the sentence. And the result is that the entire sentencing proceeding unfolded with all parties fully well understanding that the legal regime in place at the time meant that drug quantity did not have to be charged in the indictment.

And the proposition that a grand jury is free to reject the evidence of drug quantity and determine itself that it just doesn't want to charge the greater offense would be fundamentally at odds with the democratic system in this country. Congress has voted a regime in which drug quantity can increase the penalties. The evidence in this case established to the satisfaction of the Government that those increased quantities were there, and therefore the increased penalties should be applied.

QUESTION: Of course, if we see it your way, it would be open to prosecutors all the time simply to make the grand jury proceeding a short-cut and not bother to get into quantity and, hence, not, in -- in effect, advise the -- the grand jury that it's -- that it's going for something that might have the -- the potential for life. And even in a post-Apprendi regime, I suppose you could say, well, it was harmless error because the -- the quantity -- the -- the evidence of quantity was there and therefore we -- we shouldn't regard it as structural and we should overlook it.

MR. DREEBEN: You could make that argument, Justice Souter, but in a post-Apprendi environment, Apprendi is a sufficiently well-known decision of this Court that no prosecutor would responsibly go to sentencing and say I would like to have an increased sentence regardless of the fact that we didn't charge drug quantity. And it's hard for me to imagine that there are defendants or judges that wouldn't catch the error if the prosecutor didn't itself bring it to the attention of a court.

QUESTION: How about in this case? If -- if the standard were harmless error rather than plain error, would you maintain that the Government should still prevail?

MR. DREEBEN: Yes, Justice Ginsburg, we would because of reasoning analogous to -- the Court used in Neder v. United States. The underlying values of the right in question are not impaired. The evidence was so strong that no rational grand jury could have failed to find the increased drug quantity and the defendants were not deprived of notice and an opportunity to contest it. So, even though there was error, the error has to be weighed against the important values of essentially depriving society and the Government of the sentence that Congress prescribed for the kind of offense in question. And weighing those against each other, the conclusion should be that the court of appeals should affirm rather than reverse.

QUESTION: But the Court could well conclude otherwise were the test harmless error and you could still prevail.

MR. DREEBEN: That's correct. And most of the cases that we are dealing with in this transitional era of drug prosecutions that were tried before Apprendi but are now on appeal after Apprendi, do not involve objections by the defendant in the trial court. They are almost all plain error cases, and a ruling on the fourth prong of plain error analysis that concludes that in this scenario it doesn't offend the integrity and public reputation of

judicial proceedings or their fairness to affirm rather than reverse would be a outcome that would resolve almost all of the litigation that has occurred in this area.

If the Court has no further questions, I'll reserve the remainder of my time.

QUESTION: Very well, Mr. Dreeben.

Mr. Sullivan, we'll hear from you.

ORAL ARGUMENT OF TIMOTHY J. SULLIVAN

ON BEHALF OF THE RESPONDENTS

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

I'd like to direct my first comment to the question that the Chief -- Mr. Chief Justice asked about didn't the indictment and the verdict correspond. Mr. Chief Justice, you're exactly correct. The problem is that the sentence didn't correspond. And these defendants were on notice for what later turned out to be a (b)(1)(C) drug case that had a 20-year statutory maximum and they ended up receiving a life sentence.

QUESTION: I think my point was that Bain involved a situation where the verdict and the indictment didn't correspond, and that a rule that says that's jurisdictional might not extend to this situation.

MR. SULLIVAN: The issue with jurisdictional is twofold in this case. One deals with the Court's

sentencing jurisprudence, which goes back all the way to In re Bonner, which is essentially unchallenged by the Government, which sets the proposition that any excess sentence beyond the statutory maximum is void.

And that was at the heart of Apprendi. And Apprendi says and recognizes that a district court judge, like Judge Blake in Baltimore, was limited necessarily at her outer limits with what's charged in the indictment and what's found by the petit jury. A district court does not have a sense of roving jurisdiction under 3231. If a defendant comes into that courtroom charged by the grand jury with a specific offense, that sentence must be rendered for that specific offense.

QUESTION: In re Bonner was one of those old habeas cases.

MR. SULLIVAN: Mr. Chief Justice, I don't believe that a -- a case that's old somehow loses its force after Apprendi.

QUESTION: Well, but I -- I think you have to recognize that the Court at that time, because there was no direct appeal, kind of expanded the concept of jurisdiction to reach constitutional error.

MR. SULLIVAN: And I think that is exactly what the Apprendi Court and the majority is restricting now is -- is that -- that exact caution of the Court. Until -- I

-- I don't think that when a defendant goes into court and has notice that he's charged -- let me just back up to say this.

The rule of law in this case is much more important than what happens to these defendants. As Justice Kennedy pointed out, all we were challenging is the illegal sentence in this case. We're not challenging the conviction. We were convicted of a 21(b)(1)(C) offense. We recognize that. We recognize the court had jurisdiction over the offense. We recognize that the court had jurisdiction over our defendants or our clients. What we challenge is the illegality of the sentence.

QUESTION: Well, that's all, but I mean, that's -- that's pretty big. Your -- your clients were -- were convicted, if you accept the Government's case, of being drug kingpins, of running and managing a massive drug operation, and -- and you say all we're asking is that they be given the same sentence as a mule who was just somebody, you know, carrying a -- a small amount of drugs. I don't consider that an insignificant difference.

MR. SULLIVAN: Justice Scalia, the burden is upon the Government in their prosecution to indict the appropriate offense. I disagree with my friend, Mr. Dreeben, that somehow the error solely belongs to us. The genesis of the error is the Government's failure to indict

drug quantity.

QUESTION: Well, I think he might concede that your -- you're both equally at fault, but that -- but that doesn't get you all the way.

You began by saying that this later became a (b) case, and that's the problem. It was tried on -- on a pre-Apprendi assumptions.

MR. SULLIVAN: Much like Neder, Justice Kennedy, this case is the product of a laboratory test tube. I acknowledge that, and the propositions and the fundamental beliefs that all of us went into the trial with are far different because none of us could ever imagine that the Apprendi case was forthcoming. Both Jones and Apprendi were decided while this case was on direct appeal. So, I don't see how we could forfeit an error that we could never even imagine would -- would result in --

QUESTION: Now, wait, wait, wait. It wasn't that much of a bolt from the blue.

(Laughter.)

QUESTION: Nobody could imagine Apprendi?

QUESTION: The dissenters couldn't imagine it.

(Laughter.)

MR. SULLIVAN: Justice Scalia, let me -- as a trial attorney, let me just --

QUESTION: I mean, Apprendi was -- was based on,

I assume, the long common law tradition. There had been Almandarez-Torres before. Was -- was that decided before this case was tried?

MR. SULLIVAN: I don't know the answer to that.

QUESTION: I think it was. And -- and that case made abundantly clear that there was a big problem even -- even with respect to the proof of -- of prior offenses for recidivism, in -- incremental sentences.

So, you know, both out of the blue? No, no, no, no, no.

MR. SULLIVAN: Perhaps I overstated --

QUESTION: No, I don't think you did.

MR. SULLIVAN: Right.

(Laughter.)

MR. SULLIVAN: In -- in -- my point is simple, Justice Scalia, is that in pre-Apprendi practice, the -- the Fourth Circuit made it abundantly clear to defense attorneys and to Government attorneys that we were not to concern ourselves with sentencing factors of drug quantity at the time of sentencing.

QUESTION: Did some defense attorneys make the objection for the record in any case? I'm thinking back in the old days when there was jury discrimination and the courts routinely said no, but many defense attorneys, knowing they were going to lose on it, made it for the

record anyway, hoping that their case on appeal would be the one that changed the law?

MR. SULLIVAN: Justice Ginsburg, I'm sure there are attorneys who did that. That was not done in -- in our case. We challenged drug quantity in the typical pre-Apprendi way under the sentencing guidelines.

I'm reminded that in Johnson, this Court indicated that sometimes defense attorneys aren't expected to make laundry lists of objections, and I would dare suggest that many of the judges that I appear in front of would not be too welcoming of my trying to speculate what this body would do two or three terms from now.

So, I don't think that -- I'm sure that there are attorneys throughout the country who were making these types of objections, sensing the change from McMillan and Almandarez-Torres, sensing the direction of this Court, but we -- we did not.

QUESTION: That's -- I -- I'll take that as a given. I'll say, yes, it is a surprise. I couldn't expect you to -- to object to all these things.

But in terms of recognizing plain error, where I'm having a problem is I don't see how you could treat the grand jury any differently from the trial. That is to say, if you have a trial and there is a failure to object, what we've said in our cases is it's not plain error

unless it's very unusual circumstances.

Now, whatever those unusual circumstances are, if they're present here, it should be both, and if they're not present here, how could you possibly say that a person who goes through a full trial and it has the defect can't object, but a person who's had that defect at the grand jury stage, but it's cured at the trial stage, could object? I just don't see how a system could function that way.

MR. SULLIVAN: Justice Breyer, my -- my answer is that it all goes back to the Indictment Clause of the Fifth Amendment and to the jurisdictional end-run that Justice Souter was alluding to. The -- you can't guess or speculate -- no court, most respectfully this Court or any other reviewing court, can't guess what the grand jury would have, could have, or should have done.

QUESTION: But we face many, many cases in which the normal tendency of the courts has been to say, forget about errors at the grand jury stage. If you're suddenly going to recognize this as an error at the grand jury stage, when it's cured at the trial stage, well, why wouldn't that throw open the doors for all kinds of challenges of grand jury proceedings?

MR. SULLIVAN: Justice Breyer, Mechanik and Nova Scotia were not -- were not constitutional rules. They

were procedural rules under rule 6, which had a trial that followed through and the court could -- had a record, and the court could look at the record to see if the grand jury problem affected the validity of the trial.

QUESTION: Mr. Sullivan, I have the same problem that Justice Breyer has. I didn't -- you know, I didn't agree with -- with Neder, but -- but given Neder, you say we cannot second guess what the grand jury would have, could have, should have done. But Neder says we can second guess what the petty jury would have, could have, should have done. And why -- why is second guessing the one any -- any worse than second guessing the other?

MR. SULLIVAN: I think it goes back to the historical function of the -- the grand jury, Justice Scalia, and the fact that what happens to the grand jury is absolutely --

QUESTION: Is it any greater than the historical function of the -- of the petty jury?

MR. SULLIVAN: The petty jury is an -- is the product of an adversarial process where a judge acts as a referee and the law is well defined and the evidence is well known. And the judge sits there and makes determinations. So, there's a certain sense of reliability to entire trial process.

We don't have that given the secrecy of the

grand jury, the fact that no matter how many times I knock on the door to be asked to enter the grand jury, the Government will not let me or my client --

QUESTION: But the defendant could certainly waive a grand jury.

MR. SULLIVAN: A defendant can certainly waive a grand jury and proceed by information. But just if a -- if a defendant chooses to waive the grand jury and go by information, that doesn't mean that they can be sentenced for a crime that they don't waive the indictment for. So, for example, if a defendant waives jurisdiction on an 841 case and allows to go by indictment and --

QUESTION: What -- what do you mean when you say waived jurisdiction?

MR. SULLIVAN: I don't mean waive jurìsdiction, Your Honor. I meant waive -- waive indictment and -- and go by an information.

You can only be sentenced for the crime that you've waived for, that you've knowingly and intelligently waived for. You can't be sentenced for another crime.

QUESTION: Well, but the idea that you can waive a grand jury suggests that perhaps it is no -- certainly no higher than the -- the petty jury right. And it was argued, you know, when the idea of harmless of error first began to be applied, how can we possibly second guess what

a jury would have done here. Well, the answer was that in many cases you can. If the evidence is overwhelming, you can.

MR. SULLIVAN: And following up on that, Mr. Chief Justice, I don't agree that the evidence in this case, despite Mr. Dreeben's articulation, was that overwhelming. One of the defendants in the trial court were acquitted, Roger Evans. And I would suggest that now in a post-Apprendi practice, we would do things a lot differently attacking drug quantity that we never did when it was a detectable amount because no one ever had to worry about it.

QUESTION: Mr. Sullivan, you -- the fact that one defendant was acquitted I'm not sure is -- is relevant. If the jury believed the testimony that was necessary to support the verdict, I understand the Government to be arguing they must have been describing transactions in amounts that would qualify them for the sentence they had. Do you disagree with that proposition?

I thought we were sort of assuming -- if I'm wrong, tell me -- that it was a case in which the -- if you believed the Government's evidence, as the jury did, you would necessarily have -- had also believed there was more than the quantity to change the -- the guidelines range.

MR. SULLIVAN: I -- well, I can't argue with that. I think that's a mathematical, you know, formulation, but I agree that -- what I would suggest is that what the Fourth Circuit said which is that the quantum of evidence is irrelevant when the problem stems from a defect in the indictment from the very beginning

But I would suggest, Justice Stevens, that now in the post-Apprendi environment, defense attorneys are taking a much different strategy and not giving up or -- or just resting on drug quantity or challenging drug quantity, challenging the laboratories, challenging the weights of the drugs, distancing ourselves like we would normally do in conspiracy cases farther away from clients who are holding heavy amounts of drugs because we now know that drug quantity is -- is very important.

QUESTION: It was an issue before the judge before, wasn't it?

QUESTION: You had every incentive to do that before, too. I find that peculiar. I mean, surely it made a difference before.

MR. SULLIVAN: A detectable amount -- when -- when you're charged with a detectable amount, it doesn't behoove you, as a -- as an attorney, to challenge a detectable amount. It's almost a impossible task. Any amount is detectable.

QUESTION: But you would before the judge. It's just a question now you do it before the jury, but you made the same kind of attacks. It was still the difference between 20 years and life.

MR. SULLIVAN: And -- and the problem is, Justice Ginsburg, that under Apprendi Judge Blake -- she was the wrong judge applying the wrong standard of proof. She was the wrong fact finder and the wrong standard of proof.

QUESTION: I guess that's your point. I guess that's a fair point that there's -- there is more of an incentive to raise it before the jury because the jury has to find it beyond a reasonable doubt. And therefore, your chances of -- of winning a -- a contest of the amount before the jury are much better than your chances of winning one before the judge.

MR. SULLIVAN: That's correct.

QUESTION: Which is what Apprendi was all about, I assume.

QUESTION: But -- but if we said we want to send this back so that you can have the advantage of Apprendi, there's nothing the Government can do because it can't reindict.

MR. SULLIVAN: The Government cannot -- I take the position, Justice Kennedy, that the -- that the

Government cannot reindict on double jeopardy grounds, but our clients would still receive 20-year sentences in the Bureau of Prisons.

QUESTION: I -- I understand that. But assume, as the courts of appeals uniformly seemed to have held, that Apprendi is not retroactive to convictions that are final, and assume that the Government can protect itself in a post-Apprendi world. What we're talking about is this narrow line of cases where you seem to have an -- an automatic escape hatch and the Government can't retry.

MR. SULLIVAN: And I find that fantastic because it's usually the other way around.

(Laughter.)

MR. SULLIVAN: That -- the rule of law -- I mean, sometimes you -- you roll the dice and sometimes the defense wins and oftentimes the Government wins, Justice Kennedy. And perhaps the results in this case are not palatable to some -- to some people. But in this case --

QUESTION: Well, Mr. -- Mr. Sullivan, in light of the Johnson case and the Neder case, I think the Government has a very strong argument here. I mean, you -- you could fail under Johnson to include an element in the jury instructions and, nonetheless, conclude that it was not plain error.

MR. SULLIVAN: Judge Blake instructed the jury,

the petit jury, that drug quantity was not a concern of the court -- I mean, concern of the jury. In Neder and Johnson, Justice O'Connor, again there -- there was a trial. There was an adversarial process. And we don't know to this very date, quite frankly, whether the grand jury was ever asked to make a determination on drug quantity in the superseding indictment, and that's the problem.

In Neder and Johnson, there was a record. There was a great record that this Court could apply the appropriate test. You can't do that in this case, in the Cotton case, because there is no complete record for this Court to go back and basically usurp the responsibilities of the indictment because we don't know whether on a certain date the Government brought in their witnesses to establish drug quantity. We simply don't know that in this case, and I think that is the fundamental difference that distinguishes the line of cases of Neder and Johnson that go to trial problems as opposed to indictment problems.

QUESTION: Under the first indictment, would the jury have been instructed that it had to find the amounts?

MR. SULLIVAN: I think in pre-Apprendi practice, no. I think there was -- the instruction from the judge that drug quantities are not your concern would have been

the judge's instructions at that point.

QUESTION: You said that some people might differ about this particular case and maybe this time it's roll of the dice. But the last part of the plain error test is just that. Is this something that's fundamentally unfair that will affect the reputation of the courts? And it seems to me that what you just told us goes against any such finding.

MR. SULLIVAN: Justice Ginsburg, I had -- the Olano test is quite clear that you don't -- well, that a decision on a basic right that is forfeited doesn't matter on -- if somebody is innocent or guilty. It's much stronger and much more important than that.

I do suggest, most respectfully, that the integrity of the court under the fourth Olano prong would be impaired if the -- the decision is that you can be indicted for one offense and convicted for another offense, that that's why the fairness and the integrity of the judicial proceedings comes into question. The very integrity of the court, the power of the court to do the most -- one of the most important things to a person who's charged with a crime -- oftentimes people don't care what they're charged with.

QUESTION: In -- in a transition case, in -- in a case where the -- the law was -- was in flux, this would

not be a determination -- a plain error determination wouldn't be that routinely this kind of omission could occur.

MR. SULLIVAN: I think this is the exception rather than the rule. That's correct.

QUESTION: I thought that the -- the lack of conformity between the indictment and the conviction is not in this case. You said --

MR. SULLIVAN: No. It's --

QUESTION: -- you can be indicted for one offense and convicted of another. That's -- that's not in this case, is it? It's just a question of whether the grand jury decided upon what was in the indictment.

MR. SULLIVAN: That's correct.

QUESTION: Okay.

QUESTION: What was the defense?

MR. SULLIVAN: I'm sorry.

QUESTION: What was the defense at trial?

MR. SULLIVAN: Justice Breyer, in this multi-defendant 846 conspiracy, the defense was one part that the Government cooperators lacked credibility, that they weren't reliable. It was one part attacking the Baltimore City Police Department. This is what we call a historical case. It was a series of arrests that the Government put together at the end and made it into a conspiracy.

QUESTION: I mean, was it basically they didn't do it?

MR. SULLIVAN: It was that and there was also multiple conspiracies. The judge instructed the jury on multiple --

QUESTION: I just wonder on the harmless part or whether it's harmful. If they were arguing, well, we didn't do it, is it likely that they would have presented to the jury evidence that even though we didn't do it, the amount involved was only 500 grams or less and not more?

MR. SULLIVAN: I -- I don't think that that -- that that would have been -- you never use drug quantities as a defense.

QUESTION: All right. So, that's -- that -- you see the reason -- the reason that I say that is because they're saying, look, this error is harmless, and part of the strength of your claim I think is that they never could have thought of it at the trial before Apprendi to raise it.

But if it is harmless and you're really arguing for us to make an exception from Neder, as well as the grand jury, I wonder if there's any response to the view I just stated. I mean, that it was harmless.

MR. SULLIVAN: I don't think it can be harmless, Justice Breyer, because the very thrust of Neder, the very

thrust of harmless error analysis is the Government must prove beyond a reasonable doubt that the error didn't affect substantial rights. And I don't know how the Government could make that burden of proof in this case --

QUESTION: Well, in Neder, didn't the Court assume that substantial rights were affected?

MR. SULLIVAN: I think -- I think --

QUESTION: I think in either Neder or Johnson, it did. I forget which one it is.

And then -- so they went to the fourth prong and said, you know, even assuming substantial rights are affected, you know, this -- this is not going to reflect on the integrity of the -- the court system or whatever the fourth prong reads.

MR. SULLIVAN: That -- I think you're obviously correct, Mr. Chief Justice, but I think the important thing too about Neder is that the Court was -- was convinced -- I think part of its position was that the correct standard of proof that the district judge on the materiality element found it by -- beyond a reasonable doubt. So, I think that we don't have a problem with a mishmash of different standards of proof like we do in this case here where -- where some elements of the indictment are found beyond a reasonable doubt and some elements are found by a preponderance of the evidence and

you have different fact finders performing -- performing different functions.

QUESTION: What I was trying to direct your attention to, which is -- and maybe this doesn't help you. But I thought that Neder -- and I'd have to reread it to be sure -- was saying the omission of an element doesn't always automatically mean no clear error, but it might sometimes. And so, I guess if it might sometimes, maybe this is one of those unusual cases or exceptional cases where it would. But if so, your clients must have been treated very fairly -- unfairly and the criminal justice system must have suffered in its reputation. Now, you might have something to say on that point, and I wanted to be sure you did if you do.

MR. SULLIVAN: And my point is, Justice Breyer, that I agree with the premise of your question and my answer would be that Neder and that harmless error rule enunciated there would be utterly meaningless in this case because there's no object and no gap that any reviewing court could fill because we don't know and we will never know what happened in front of the grand jury when that element was not returned.

And it's precisely that no object to scrutinize for harmless, which you'll never have in a trial for the most part because of the adversarial process, because of

the judge refereeing what goes on -- there's a reliability factor there. There's not that reliability factor before the grand jury.

QUESTION: Well, but if you're right in that, then Mechanik was wrongly decided.

MR. SULLIVAN: I -- I don't believe that Mechanik was wrongly decided, Mr. Chief Justice. Mechanik was not a constitutional issue. It was -- it was a -- more of a procedural issue --

QUESTION: But it said that, you know, you can't attack the indictment rendered by the grand jury even though you might have some -- some reason to do so.

MR. SULLIVAN: That's correct, but there was never a challenge to the validity of the indictment -- the indictment itself in Mechanik, which is the root of our contention here. The Mechanik indictment was concededly free of error. I think that's what the Court -- what the Court found to be a very important distinction. And that -- we don't have that in this case. The indictment is the cause of -- of our problems in this case. So, I think Mechanik is -- is distinguishable, and the Court did apply harmless error in Mechanik but found that it didn't rise to the level to -- to challenge the structural integrity of -- of the grand jury process itself.

QUESTION: May I go back to your argument that

you made a second ago that we never know what the grand jury would have done if it had been presented with the evidence? The difficulty that I have with that argument is, number one, I think we have a pretty clear body of law that tells the grand jury what its duty is, if it is presented with evidence which would justify an indictment with respect to quantity and hence the severity of the crime.

And if we're going to respect that law on duty, then in order to see it your way, we have to say, well, regardless of what the grand jury's duty is and regardless of what the probability is that it would indict and -- and would specify the quantity, we have to assume that there's a wild card element in the grand jury. And on the basis of that wild card element, you never absolutely know what they're going to do. We are -- we are going to hold that, in fact, you can never assess the harmfulness of the error.

How do we get to the point of dispensing with our law on grand jury duty and emphasizing the wild card element, in effect, of the grand jury when it refuses to follow that obligation? How -- how are we able to do that?

MR. SULLIVAN: Justice Souter, I think the answer is that we try to remain as true as we can to the

Framers' intent and the Framers' fear of a corrupt judiciary or an oppressive prosecutor. And that bulk -- that bulk word or whatever -- whatever that barrier that exists between the process, that very threshold that brings someone into the criminal justice system that that cannot be -- that is indispensable to our system.

QUESTION: Well, wasn't that a fear --

QUESTION: Go ahead.

QUESTION: Wasn't -- wasn't that a fear, in effect, that grand juries are simply going to be puppets that are going to be indicting without regard to evidence? Whereas, here the assumption is the evidence is overwhelming, and so that policy of wanting the grand jury to stand between the state and the individual is not really a policy that's implicated here.

MR. SULLIVAN: I -- you're right in that regard, Justice Souter, but we don't know if the Government did its duty and presented to this grand jury drug quantities in the superseding indictment. So, we don't even know, based on any record that we can discern, whether or not that major element, that critical element that -- that drives the sentences in this case was ever presented to them. So, sure, I guess that, you know, grand juries can charge greater offenses of it. And that's one of the beauties of it. They can charge greater offenses, lesser

sentence, no -- no -- I mean, not -- offenses, or none at all, and they can even nullify, although it's not -- we -- we shouldn't encourage it.

QUESTION: But they tend not to nullify, I think, except when there are political considerations that the grand jury sort of smells in the circumstances. And one thing it seems to me clear is that the grand juries are not likely to smell political considerations when the Government decides to go after kingpins as opposed to when the Government decides to go after mules. And so, I -- I don't see that concern as coming to the fore in this case.

MR. SULLIVAN: And I -- and I guess it goes back, Justice Souter, to where I began this morning. It's the Government's responsibility to indict each defendant based on their roles and their culpability. You can't go in and just do a blanket 846 indictment. You must delineate each and every element of each and every offense for each and every defendant. And that's the Government's failure in this case.

Look, I -- I understand the fact that it's not terribly difficult for the Government to obtain a Federal grand jury indictment. I mean, I -- it's very rare that they -- a Federal grand jury will no-bill what the U.S. Attorney wants him or her to do or them to do. There is a tension there.

But I think the rule of law and the purpose of the grand jury and why we need the grand jury is far greater than whether or not Mr. Hall, the leader of this drug conspiracy, is going to do life or 20 years or by whether other people who may have had different roles in the conspiracy which no drug quantity has ever been attributed to them -- there's evidence that they have been involved in multiple conspiracies. Whether they're mules or couriers or street vendors or kingpins, sometimes the rule of law requires that -- that fairness be done. And -- and fairness in this case is a sentence based on what you were charged with, not a sentence based on something that you weren't charged with.

QUESTION: I think you -- I think you've got a good argument there except for the fact that we've got to find a distinction between the role of the grand juries and the petty grand juries given the fact that Neder is -- is on the record. And that's -- that's why I was fishing for something and kind of shooting down everything that I could come up with. And that's the dilemma I have.

MR. SULLIVAN: The dilemma is, Justice Souter -- is that what -- this would crack open the gate to allow, I would suggest, the Government to trample into the -- the grand jury function. They already go into the grand jury room each and every day, but now they can indict for one

thing, prove another thing, if their position is adopted here, charge one thing --

QUESTION: But that didn't happen here. They didn't indict for one thing and prove another thing. You agreed --

MR. SULLIVAN: But --

QUESTION: -- the -- the verdict corresponded to the indictment.

MR. SULLIVAN: No. I'm talking in a different case, a more broader case, not this actual case.

QUESTION: Well, wait. You don't -- you don't agree that the verdict corresponded to the indictment, do you? I -- I thought the only reason that that issue was not in this case is because of Neder. It doesn't matter, under Neder, whether the verdict corresponded to the indictment. That can be harmless error. Right? Which is why you're driven back to the -- to the grand jury argument.

MR. SULLIVAN: That's correct, but it's also correct that I told the Chief Justice earlier that --

(Laughter.)

MR. SULLIVAN: -- that the -- that the problem is a sentencing problem in this case and not a difference between -- well, it is a -- my time is up.

(Laughter.)

QUESTION: Mr. Dreeben, you have 1 minute remaining.

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

CHIEF JUSTICE REHNQUIST: Very well.

The case is submitted.

(Whereupon, at 11:00 a.m., the case in the above-entitled matter was submitted.)