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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

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

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

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

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

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

1 MR. DREEBEN: It's --

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

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

12 QUESTION: You're not objecting to --

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

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

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

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

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

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

13 MR. DREEBEN: Correct.

14 QUESTION: -- came down.

15 MR. DREEBEN: This case was tried before  
16 Apprendi.

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

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

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

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

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

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

15 MR. DREEBEN: Ex parte --

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

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

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

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

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

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

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

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

25           QUESTION: There -- there are many instances



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

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

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

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

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

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

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

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

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

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

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

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

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

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

11          QUESTION: Yes, but it withdrew the quantity  
12 allegation.

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

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

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

21          QUESTION: Whereas the earlier indictment did.

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

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

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

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

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

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

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

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

16           And furthermore, the respondents -- or the --  
17 the defendants in Stirone had a plausible claim that they  
18 were deprived of notice of the kinds of charges that they  
19 would actually face at trial; whereas in this case, there  
20 is not a claim, a plausible claim, that the defendants did  
21 not know that they would face an increased sentence if the  
22 Government established that the crime involved more than  
23 50 grams of cocaine base.

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

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

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

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

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

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

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

4 QUESTION: Lesser included offense.

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

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

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

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

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

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

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

10 MR. DREEBEN: Well, that's --

11 QUESTION: So, there would be no reason to.

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



1 the defendant to relief on plain error review.

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

14 QUESTION: The prejudice to you is that you  
15 cannot reindict, but the objection would be irrelevant to  
16 that.

17 MR. DREEBEN: The objection --

18 QUESTION: So, I mean --

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

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

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

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

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

22 QUESTION: The difference is --

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

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

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

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

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

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

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

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

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

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

20 MR. DREEBEN: Right, even though --

21 QUESTION: Because Neder wouldn't apply to that.

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

1 that were tried --

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

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

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

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

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

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

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

19           QUESTION: I don't think so.

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

1 error.

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

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

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

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

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

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

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

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

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

24 QUESTION: Oh, I see. Okay.

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



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

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

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

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

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

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

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

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

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

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

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

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

6 QUESTION: Very well, Mr. Dreeben.

7 Mr. Sullivan, we'll hear from you.

8 ORAL ARGUMENT OF TIMOTHY J. SULLIVAN

9 ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 drug quantity.

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

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

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

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

19 (Laughter.)

20 QUESTION: Nobody could imagine Apprendi?

21 QUESTION: The dissenters couldn't imagine it.

22 (Laughter.)

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

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

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

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

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

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

11 MR. SULLIVAN: Perhaps I overstated --

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

13 MR. SULLIVAN: Right.

14 (Laughter.)

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

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



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

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

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

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

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

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

1 unless it's very unusual circumstances.

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

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

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

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

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

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

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

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

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

25 We don't have that given the secrecy of the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17          MR. SULLIVAN: That's correct.

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

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

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

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

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

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

13 (Laughter.)

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

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

25 MR. SULLIVAN: Judge Blake instructed the jury,



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

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

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

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

1 the judge's instructions at that point.

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

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

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

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

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

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

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

9 MR. SULLIVAN: No. It's --

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

14 MR. SULLIVAN: That's correct.

15 QUESTION: Okay.

16 QUESTION: What was the defense?

17 MR. SULLIVAN: I'm sorry.

18 QUESTION: What was the defense at trial?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 QUESTION: May I go back to your argument that

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

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

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

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



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

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

8 QUESTION: Go ahead.

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

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

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

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

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

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

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

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

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

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

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

6 MR. SULLIVAN: But --

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

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

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

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

21 (Laughter.)

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

25 (Laughter.)

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

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

5                   CHIEF JUSTICE REHNQUIST: Very well.

6                   The case is submitted.

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

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