SUPREME COURT OF THE UNITED STATES

No. 91–1306

UNITED STATES, PETITIONER *v.* GUY W. OLANO, JR. AND RAYMOND M. GRAY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 26, 1993]

JUSTICE KENNEDY, concurring.

I join the Court's opinion and add this brief statement to express my own understanding of the Court's holding.

When a court notices an error on its own initiative under Federal Rule of Criminal Procedure 52(b), see *Silber* v. *United States*, 370 U. S. 717, 718 (1962) *(per curiam),* it may be awkward to say that the case is decided by burden of proof concepts, for by definition none of the parties have addressed the issue. But the Court's opinion is phrased with care to indicate that burden of proof concepts are the normal or usual mode of analysis of error under Rule 52, see *ante*, at 9–10, and so other rules may apply where the aggrieved party has not raised the issue. In most cases, however, the party will have raised the alleged error on appeal. In that context, the analysis the Court adopts today is helpful, for it gives operative effect to the difference under Rule 52 between those cases where an objection has been preserved and those where it has not.

That leads me to a final point, which is the independent force of the Rule against permitting alternates in the jury room during deliberations. As the Court is careful to note, this case was submitted on the assumption that it is error to follow this practice, and the Court does not question that premise. Indeed, there are good reasons to suppose that Federal Rule of Criminal Procedure 24(c) is the product of a judgment that our jury system should be given a stable and constant structure, one that

cannot be varied by a court with or without the consent of the parties. See Reply Brief for United States 9, n. 4. In the course of a lengthy trial, defense counsel, who may have numerous requests for rulings pending before a district court, may acquiesce in a proposal from the bench concerning jury composition so that counsel can concentrate on matters they deem more pressing. In such a climate, the trial court ought not to put counsel in the position of having to object to a suggestion that compromises the Federal Rules.

If there were a case in which a specific objection had been made and overruled, the systemic costs resulting from the Rule 24(c) violation would likely be significant since it would seem to me most difficult for the Government to show the absence of prejudice, which would be required to avoid reversal of the conviction under Rule 52(a). Rule 24(c) is based on certain premises about group dynamics that make it difficult for us to know how the jury's deliberations may have been affected. Defendants seeking reversal under Rule 52(b) are also likely to experience these difficulties in proving prejudice. But, as the Court makes clear today, the operation of Rule 52(b) does not permit a party to withhold an objection to the presence of alternate jurors during jury deliberations and then to demand automatic reversal.