

# 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 STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, dissenting.

Under Rule 24(c) of the Federal Rules of Criminal Procedure, the trial judge in this case had a clear and unqualified duty to dismiss the alternate jurors at the end of the trial. Indeed, she could no more admit the alternate jurors into the jury room than she could afford any stranger access to that room while the defendants' guilt or innocence was being decided. There can be no question but that the trial judge's failure to abide by the strictures of Rule 24(c) resulted in a violation of the "cardinal principle that the deliberations of the jury shall remain private and secret in every case." Advisory Committee Notes on Fed. Rule Crim. Proc. 23(b), 18 U. S. C. App., p. 785 (quoting *United States v. Virginia Erection Corp.*, 335 F. 2d 868, 872 (CA4 1964)).

In my view, it is equally evident that this violation implicated "substantial rights" within the meaning of Rule 52. I cannot agree with the Court's suggestion in Part III of its opinion that Rule 24(c) errors may be deemed to "affect substantial rights" only when they have a prejudicial impact on a particular defendant. At least some defects bearing on the jury's deliberative function are subject to reversal regardless of whether prejudice can be shown, not only because it is so difficult to measure their effects on a jury's decision, but also because such defects "undermin[e] the structural integrity of the criminal tribunal itself." *Vasquez v. Hillery*, 474 U. S. 254, 263-264 (1986) (racial discrimination in selection of

grand jury); see also *Gray v. Mississippi*, 481 U. S. 648, 668 (1987); *id.*, at 669 (Powell, J., concurring) (improper exclusion of juror opposed to death penalty). Whether or not they harm the defendant, errors that call into question the integrity of the jury's deliberations may harm the system as a whole. In that sense, they may be said to "seriously affect the fairness, integrity or public reputation of judicial proceedings," *United States v. Atkinson*, 297 U. S. 157, 160 (1936), making them candidates for reversal under Rule 52. See *United States v. Young*, 470 U. S. 1, 15 (1985) (citing *Atkinson*, *supra*).

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The phrase “substantial rights” appears twice in Rule 52: once in Rule 52(a), which describes the harmless-error rule, and again in Rule 52(b), in connection with the plain-error rule. See *ante*, at 6. Presumably, the words have the same meaning each time they are used. If the majority's understanding of “substantial rights” is correct, then even an objection by respondents to the alternates' presence during jury deliberations would not have mandated reversal here; instead, the Rule 24(c) violation would have been subject to harmless-error review, as it did not “affect substantial rights” within the meaning of Rule 52(a). I cannot concur in reasoning that would lead to this result. Had respondents objected, and had the trial court nonetheless refused to follow the plain dictates of Rule 24(c), deliberately rejecting the considered judgment of the Rule's drafters, I think it clear that reversal would have been the proper response, with or without a showing of prejudice.

Reading “substantial rights” the same way in Rule 52(b) as in Rule 52(a) does not, of course, eliminate the difference between cases in which no objection is made and those in which one is. A nonforfeited error affecting substantial rights must be corrected under Rule 52(a). A forfeited error, however, even if it is plain and affects substantial rights, “may” be corrected at the discretion of the reviewing court under Rule 52(b). See Fed. Rule Crim. Proc. 52(b); *ante*, at 10-11. It is this distinction between automatic and discretionary reversal that gives practical effect to the difference between harmless-error and plain-error review, and also every incentive to the defendant to raise objections at the trial level.

In this case, for instance, to say that the Rule 24(c) violation affected substantial rights for purposes of Rule 52 does not answer the ultimate, and, in my view, more difficult question presented: whether the Court of Appeals properly exercised its discretion to remedy the error. After considering the nature of the

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error, the degree to which the respondents can be said to have consented to the procedure in question, see *ante*, at 1-3, and the likelihood that the procedure actually affected the outcome of the jury deliberations, a reasonable judge could well have concluded that the Rule 24(c) error in this case did not call for reversal under Rule 52(b). Rather, an opinion emphasizing the significance of the error, designed to provide guidance to the trial courts for future cases, might have been viewed as an appropriate response.

The Courts of Appeals are, however, allowed a wide measure of discretion in the supervision of litigation in their respective Circuits. See *Ortega-Rodriguez v. United States*, 507 U. S. \_\_\_, \_\_\_, n. 24 (1993) (slip op. at 17); *Thomas v. Arn*, 474 U. S. 140, 146-148 (1985). Certainly, the Courts of Appeals are better positioned than we are to evaluate the need for firm enforcement of a procedural rule designed to protect the integrity of jury deliberations, and to weigh the interest in such enforcement against other relevant considerations. Because I am not persuaded that the Court of Appeals here abused its broad discretion, I would affirm its judgment.