ORIGINAL

In the

Supreme Court of the United States

DAVID SANDSTROM, Petitioner,	)	
v.	)	No. 78-5384
STATE OF MONTANA, Respondent.	)	

Washington, D. C.
April 18, 1979

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Washington, D.C.
Wednesday, April 18, 1979

The above-entitled matter came on for argument at 1:01 o'clock, p.m.,

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES

BYRON W. BOGGS., ESQ., 212 East Park Avenue, Anaconda, Montana 59711; on behalf of the petitioner.

MICHAEL T. GREELY, Attorney General, State of Montana, State Capitol, Helena, Montana 59601; on behalf of the respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 5384, Sandstrom against Montana.

Mr. Boggs, you may proceed whenever you're ready.

ORAL ARGUMENT OF BYRON W. BOGGS, ESQ.,

ON BEHALF OF THE PETITIONER

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

The law of this nation has always been that the criminal defendant is entitled to the presumption of innocence.

This Court has ruled that the Fourteenth Amendment due process clause protects the criminal defendant against conviction except on proof of guilt beyond a reasonable doubt as to each fact necessary to constitute the charge.

The Court has further held that the State carrying this burden may not shift the burden to the defendant such as by presumption.

QUESTION: That has not prevented the courts generally from holding that the possession--evidence of the possession of recently stolen property, for example, permits a jury to draw the inference that the possessor was also the thief, has it?

MR. BOGGS: No, Mr. Chief Justice. But there is a difference between permitting a jury to infer, and telling them that they are to presume, or telling them that the law

presumes.

And the difference is critical to the right of a trial by jury upon proof beyond a reasonable doubt.

QUESTION: Mr. Boggs, I'm sure that all of us trained as lawyers would probably agree with you that there is a difference between the statement that you may presume and you may infer.

Do you think the average juror really gets much of a difference between those two sentences?

MR. BOGGS: I think that any juror or literate lay person knows the difference between the word "may" and the word "shall," or the difference between the words "may infer," and the phrase "the law presumes."

I think they know there is a difference. They might differ as to exactly how they would describe that difference. But in general, the difference in those terms would be a difference significant, and at the heart, of the reasoning process of the jury.

The "may infer," allowing them to read, as if you were inviting them to read; the "shall" or the "law presumes" phrase, prohibiting them from reasoning.

Petitioner was charged with the crime of deliberate homicide. The crime of deliberate homicide under Montana law has the elements that the defendant shall have caused a death; and that he shall have caused that death purposefully or

knowingly.

And the Montana Supreme Court has said that those terms, "purposely" or "knowingly" embody the concept mens re.

It stood admitted in the case, both by written confession and by myself in open court, as petitioner's attorney, that there had been a death that had resulted as a consequence of the acts of petitioner.

QUESTION: You don't find any fault with that kind of an instruction in a civil case, I take it, although that question is not before us?

MR. BOGGS: I would see no fault in the instruction in a civil case, Mr. Chief Justice. However, I would note that the instruction as given in this case would not conform with the Federal rules of evidence pertaining to civil trials.

As I read Rule 301.2 pertaining to civil trials, the most that could be instructed under the circumstances of this case was that the jury may infer the presumed fact.

But the fact is strictly aside from the argument that I present to you, which is based on this Court's rulings as to criminal trials and proof beyond a reasonable doubt. The only question in the case, if I may say, the reason for the jury's being invited to the courtroom to listen to the evidence was to determine the factual question as to the mental state of petitioner at the time he engaged in the fatal acts.

The question of whether he had acted purposely or

knowingly was fairly raised by the evidence, in the written confession, which constituted the State's case, together with collaborating evidence.

While admitting that the death had been caused by the petitioner, in no instance states that he intended to kill her; that he wanted to kill her; that he knew she was dying. Not once is the word death mentioned.

The facts of the confession stood at the basis for the opinion of a psychiatrist and a psychologist, both of whom had examined petitioner and had formed opinions concerning his personality and intelligence, and had formed opinions as to his mental state at the time of the fatal act.

And their opinions offered for the jury's benefit were that he had not intended to cause this death; that he did not have the death in his view at that time.

QUESTION: Mr. Boggs, let me take you back once more to the instruction which you complain of, which I guess is on the bottom of page 5 of your brief: the law presumes that a person intends the ordinary consequences of his voluntary acts.

What if instead of that the court had instructed, "you may infer that a person intends the ordinary consequences of his voluntary acts?" Do you think there would be any constitutional question raised?

MR. BOGGS: I don't think so.

Let me say in that regard that the instruction was given in addition to the instruction of which I complain which said--and it's instruction number nine on page 36 of the Appendix--purpose and knowledge are manifested by the circumstances connected with the offense. Purpose and knowledge need not be proved by direct evidence, but may be inferred from acts, conduct and circumstances appearing in evidence.

And I would say that that would be substantially the same as the instruction you just phrased.

QUESTION: You would have no objection to instruction number nine?

MR. BOGGS: I have only one objection to it; it's not of constitutional dimensions.

The objection I have is the word "are" in the first line rather than the word "may be."

QUESTION: Counsel, I take it that this crime could have been proved if this jury found beyond a reasonable doubt that he not only--that just knowingly, as distinguished from purposely, caused this death?

MR. BOGGS: Yes, knowingly in the sense that he was aware at that time--

QUESTION: But this instruction--instruction number five hasn't really any connection with that. Let's assume that the instruction had been that--to find the defendant guilty you must find that he knowingly caused this death.

Instruction number five wouldn't bother you on that, would it?

MR. BOGGS: Well--

QUESTION: Isn't it just in connection with purpose?

MR. BOGGS: It's most clearly identified with purpose, Mr. Justice White. But it would bother me as to knowingly also.

QUESTION: Why would it--

MR. BOGGS: And for this reason--

QUESTION: Well, I guess you can say that there was a general verdict here, wasn't there?

MR. BOGGS: Yes.

QUESTION: So you don't know whether the jury found purposely or knowingly.

MR. BOGGS: That's true.

QUESTION: And if they found purposely, you say this instruction is fatal to the case.

MR. BOGGS: That's true. But Mr. Justice White, if I can pursue that for a moment, the crime is deliberate homicide. The verdict was guilty of deliberate homicide.

QUESTION: That may be but the instructions told them what it was.

MR. BOGGS: But the official Code comment to the section states that this section deals only with acts done deliberately, that is, purposely or knowingly.

QUESTION: Thatmay be, but that isn't what the jury

was told. And you don't say that they told them wrong.

MR. BOGGS: No, I don't say that. But what I'm trying to say is this: The concept of knowingly in the context of deliberate homicide must surely be that the individual has an awareness that he is causing a death at the time he is causing it in such circumstances as he might turn away from the consequences.

QUESTION: Well, you don't say--you say knowingly and purposely, then, are the same?

MR. BOGGS: They are certainly related.

QUESTION: Well, they may be, but they certainly--the instructions define them separately.

MR. BOGGS: Yes, but--

QUESTION: The statutes define them separately.

MR. BOGGS: I think they are two attempts at getting at the same concept, albeit different avenues.

QUESTION: Doesn't purposely have some connotations of motivation to a greater extent that knowingly?

MR. BOGGS: Yes, I would agree with that, Mr. Chief Justice.

QUESTION: So that it is appropriate to define them separately and not--

MR. BOGGS: I don't disagree with that. But I only say that the instructions--the argument of course is not necessary for my position. Because if the jury followed the

instruction and presumed purpose, then they didn't have to ask themselves the question, did he act knowingly; for they had found sufficiently on the basis of that presumption to convict him.

But supposing, as Mr. Justice White has said, that the crime did not even contain the term purposely; and the only question was, did this instruction prejudice the issue on "knowingly;" I think it tends to prejudice that issue, because the concepts of intent and knowledge are interrelated.

That was the only point I wanted to make in that regard.

The--as I had stated, the question was fairly presented, and the question of fact for jury determination. The instructions complained of spoke directly to that question.

The meaning of the instruction is that the jury should not reason from the evidence to a conclusion of guilt beyond reasonable doubt, but rather should accept the acts presumed without proof.

I believe that that would be close, if not--I think that's a very fair statement of the common understanding of the term, presumed.

The--of course the law of presumptions is not simple, and jurisdictions differ as to it. But the law of the State of Montana as to presumptions is clear, and direct, and it is set

out in the rules of evidence that were applicable to this trial.

It is stated in Rule 301 of the Montana Rules of Evidence that a presumption is an assumption of fact that the law requires to be made.

This presumption is stated to be a disputable presumption. And as to disputable presumptions, the rule in Montana in rule 301(b) is that a disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.

QUESTION: Was this instruction given to the jury which you're now reading?

MR. BOGGS: No.

QUESTION: Well, how is that material?

MR. BOGGS: If there is any question as to how the public mind might interpret presumptions, if it is thought that the purposes--the interpretations of the law might have influenced the jury's consideration of the meaning of the instructions, then I believe the rule states what that meaning would be.

QUESTION: But how does that apply to the jury? The jury uses its own--each one of the jurors uses his individual interpretation of purpose, doesn't he?

MR. BOGGS: We cannot assume that the jury knew what this rule was.

QUESTION: Yeah, that's what I mean.

MR. BOGGS: On the other hand, we cannot be sure that at least one of them didn't know what it was.

QUESTION: Well, is the subject of rebuttable presumptions, in the legal context, something we would ever expect to be generally known to the public, members of juries, unless the judge has instruced them on it, as Mr. Justice, my colleague, has just suggested to you?

MR. BOGGS: I feel confident in saying, Mr. Chief Justice, that a jury is not going to know the convolutions and details of the law of rebuttable presumption.

QUESTION: It's difficult enough for them to grasp the ones they are instructed about, isn't it?

MR. BOGGS: I wouldn't think that this particular instruction would have been difficult for them to grasp; some perhaps would be, but this one would not.

But I certainly would say that they would not know the law of presumptions. Thatdoes not mean, however, that they would not be somehow influenced by the clear statement of what a presumption means in the State of Montana as it's contained in Rule 301, which was a codification of the prior existing statute, and stated the case law rule as well.

QUESTION: And you don't think the instructions 13 and 14, and the others that you must be convinced beyond a reasonable doubt, offsets and takes care of this presumption?

MR. BOGGS: No, I don't, Mr. Chief Justice. And I believe that the Montana Supreme Court itself, in its second opinion in State of Montana v. McKenzie stated better than I could why that instruction would not cure the error contained in instruction number 5; and that is, when it said that yes, the State carries the burden of proof beyond a reasonable doubt, but the presumption is a means by which that proof can shouldered; I'm paraphrasing, not quoting.

QUESTION: Mr. Boggs, you have going for you another presumption instruction, don't you?

MR. BOGGS: Yes.

QUESTION: You are instructed that the law presumes a person innocent until he's proven guilty.

MR. BOGGS: Yes.

QUESTION: You don't think that operates to balance the one of which you complain?

MR. BOGGS: Again, I think it is likely that a jury would believe that the instruction number 4 followed directly by instruction number 5 was compatible in the law; that they would believe, as I believed, that the court was capable of stating a blatant contradiction, one right after the other, would shake their belief in the consistency and fairness of the law.

And I believe that they would think that instruction number 5 was to be read as compatible; it was to be read as a

means by which instruction number 4 could be satisfied.

QUESTION: Is there a harmless error in Montana? Does the harmless-does the Montana Supreme Court ever hold that the failure to give--giving an improper instruction was harmless error?

MR. BOGGS: Yes, Mr. Justice Rehnquist.

QUESTION: Your client confessed, and his confession was introduced against him?

MR. BOGGS: Yes.

QUESTION: What was the theory of your defense?

MR. BOGGS: The theory of the defense was that the statements as contained in the confession were not prcof beyond a reasonable doubt that he acted purposely or knowingly.

QUESTION: Well, I'm looking at page 11 of the Appendix, which is part of the confession: "She started to wheel her wheel chair and I got scared and didn't know what to do. There was a knife laying on the counter, so I grabbed that and stabbed her. I stabbed her in the back five times."

Now with a confession like that, does it really make too much difference how finely tuned the instruction of the judge is?

MR. BOGGS: Your Honor--Mr. Justice Rehnquist, based on that same language, two court-appointed mental health experts acting independently of one another, came to the conclusion that he did not act purposely or knowingly.

QUESTION: And all that was submitted to the jury for their decision?

MR. BOGGS: Yes.

Beyond that, might I say that this Court has ruled in a different case, where a man was stabbed thirty times, that no matter how strongly the Court may believe that the elements of the crime are made out, that cannot deprive the defendant of the right of a properly instructed jury.

But that's not the same case as we have. Because as I told you, those same facts were the basis of two independent assessments that said that the elements of the crime were not made out.

QUESTION: What stage in the proceeding was the insanity defense abandoned?

MR. BOGGS: The insanity defense was of course first raised at the time of arraignment. We had appearing before the court on the issue of insanity, at which time the experts stated their view that the man was sane. And for all intents and purposes, at that time the defense was abandoned.

And I informed the jury and the court that it was formally--I formally informed them that it was abandoned at the time of my opening remarks.

QUESTION: Well, if you rely to any extent now on the psychiatric testimony or on his condition, are you then indirectly suggesting a diminished responsibility idea?

MR. BOGGS: No. And I in admitting that the petitioner had the capacity to form the mental elements required--the defense is that he did not form those elements. That is, that he was sane.

Now, he was--had certain personality makeup that lent itself perhaps to this situation. But I am not saying that it was such that it prevented him from having the capacity to form the mental elements required for this crime.

QUESTION: And the court specifically so instructed? Number 12?

MR. BOGGS: I believe that's correct, Your Honor. They were instructed that they could not consider the defense of insanity.

QUESTION: Yes. You have no objection to that instruction?

MR. BOGGS: I was bound by it. I had invited it by my own remarks.

The jury was assembled to determine the factual question, the presumption told them that the law presumed what their conclusion was to be; and by so instructing them it deprived petitioner of due process of law in depriving him of a jury determination of guilt based on all of the evidence, upon proof beyond a reasonable doubt.

And that is my case.

MR. CHIEF JUSTICE BURGER: Mr. Greely, Mr. Attorney

General?

ORAL ARGUMENT OF MICHAEL T. GREELY, ESQ.,

ON BEHALF OF THE RESPONDENT

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

Certainly the State of Montana is not enamored with this instruction. And since the beginnings of this case we have informed the prosecutors in the State of Montana not to use it.

That's not to say that we do not believe the instruction as used in this particular case--that we do believe that the instruction as used in this particular case is unconstitutional.

We have told the prosecutors not to use it essentially for the problems that have arisen. And I call your attention to the Mann instruction in the, I believe it's the Chiantes case of the Fifth Circuit, which had a lot of problems with instructions similar to this. And rather than trying to draft some kind of instruction that would meet all of the different opinions that we've received from all of the different circuits, we decided to inform prosecutors that this instruction probably wasn't needed.

And indeed, in this particular case, our position is essentially that the instruction was superfluous.

Now, in Montana, there are essentially three elements o

the crime of deliberate homicide. One of the elements is that it has to be a voluntary act; and another element is that the defendant had to cause the death of his victim; and thirdly, the act had to be committed either purposely or knowingly.

Now that isn't the alternative.

QUESTION: You don't think they're the same?

MR. GREELY: Absolutely not. Purpose--if you were going to try and prove "purposefully," you would have to prove specific intent to kill. If you're going to prove "knowingly," you can prove that the defendant had a high probability that the acts he was committing would create in this case, death; the actual stabbing.

QUESTION: Well, would you always then--if you ever found purpose, you would always find "knowingly," too?

MR. GREELY: Probably. I suspect that rather than always--if you ever find purpose, always find knowingly, I think probably the likelihood of ever finding purpose isn't too great, unless you really have a--if you have a premeditated--the old premeditated malice aforethought situation, you probably can find a purpose.

QUESTION: Well, why would you ever put purpose or knowingly, then? why wouldn't it always just be knowingly if you always--

MR. GREELY: I'm not certain of the justification for it other than that our criminal code was adopted largely

from the--

QUESTION: And they do define them separately?

MR. GREELY: They are defined separately. And they--

QUESTION: And you don't know which the jury found in this case, do you?

MR. GREELY: No. But I think it's pretty clear in this case as far--

QUESTION: Well, you don't know. You don't know.

Let's assume that there was something wrong with the instruction on purpose, unconstitutional. Say the instruction on purpose, defining it, or somehow, was unconstitutional. Then you'd have a problem, wouldn't you? Because you wouldn't know which ground the jury rested on, whether it's purpose or knowingly. Because it's a general verdict?

MR. GREELY: Well, obviously, you'd always have that problem in determining what the jury actually--what they relied upon.

But I think the Court can look at the facts in this case, and the attempts by the defendant in his proof would indicate the jury in this case could probably--more likely than not have found knowingly as opposed to purpose.

I think the--I think defendant produced evidence to indicate to the jury that the defendant didn't do it on purpose, as far as their understanding of the instructions were concerned. I think that's fairly clear when you read the

confession and the transcript and so forth.

QUESTION: But the judge thought there was a jury case on purpose, didn't he?

MR. GREELY: Well, he instructed on purpose. And of course, the alternative--the way the law is defined, the statute itself would always require that both the instructions be given, and that both knowingly and purpose would be used. With respect to a given situation, the judge, within his discreti could say that purpose is not applicable. And I think that--

QUESTION: Suppose he--

MR. GREELY: --said that in this case.

QUESTION: Suppose he hadn't instructed on knowingly at all in this case; he just said purpose--just the purpose instruction.

MR. GREELY: Then I think there'd be some--there'd be more of a difficult--more difficulty in upholding our position than there would be otherwise.

QUESTION: Oh, really? You mean just on the evidence, or would you think that your problem would be rooted in instruction five?

MR. GREELY: I think that the fact that the jury possibly could have found that--used the presumption. Now, of course we're suggesting to the Court--

QUESTION: So your answer is, yes, instruction five would give you real problems if all the judge had instructed

on was purpose?

MR. GREELY: I think that's correct, your Honor.

QUESTION: Which is the more aggravated of the two crimes, purposely, or knowingly?

MR. GREELY: I don't know that they can be--I don't know that they can be separated?

QUESTION: Which requires the more specific degree of intent?

MR. GREELY: Certainly, purposely would require the element of specific intent; and obviously, knowingly does not.

QUESTION: What does an indictment charge? Just deliberate homicide?

MR. GREELY: Deliberate homicide committed purposely or knowingly. The charge in this case, of course, walways describes the fact that the defendant had killed a victim in whatever manner he did it.

QUESTION: Well, so what difference does it make whether the jury finds it was--in this case the jury didn't make any finding as to purposely or knowingly.

MR. GREELY: Correct.

QUESTION: Does the judge sometimes require them to find that it was done either purposely or knowingly?

MR. GREELY: I don't believe that's ever happened, Your Honor. I obviously don't know. I've never--in my

experience, in any cases that are brought before our Supreme Court that I'm directly familiar with, I'm not aware of any instruction being given on just one or the other; it's almost--it's always, it always has been given in the alternative, just as the wording of the statute.

QUESTION: --position, Mr. Attorney General, is in the disjunctive: purposely or knowingly? Isn't it?

MR. GREELY: That's correct, Your Honor.

QUESTION: And is a finding of either one to support--and the sentence is simply the minimum-maximum sentence as provided for the defense of deliberate homicide?

MR. GREELY: That's correct. And also, purposely and knowingly also is required as a part of mitigated homicide, even though the instruction in this case was--that was given to the jury was wrong.

QUESTION: Well, assume--let's just assume that if there had been an instruction on purpose alone, that this conviction would have to be reversed because of instruction number five. Let's assume that.

Now, there wasn't an instruction on purpose alone. It was an instruction on purpose or knowledge. Now you think the "or knowledge" would save the case?

MR. GREELY: Yes.

QUESTION: Because, you think the evidence is--it's so likely the jury went on that ground?

MR. GREELY: Correct.

QUESTION: Is that what the case turns on or not?

MR. GREELY: Well, no, I think the case turns on if there is--the alternative to that, of course, in this case is that the question is whether or not the jury had taken a short-cut, and had accepted the purpose instruction and used the presumption in the meaning--or the way it's described in Montana law that there would--it would raise a serious constitutional question.

And that's the primary reason we have suggested to the prosecutors not to use it any more, because it could happen that a case would come that would cause that problem.

But as far as the State is concerned, the presumption as it was given in this case had a similar effect to the inference of ours, that the fact that it wasn't fully described in any of the other instructions.

Now, usually in Montana you will find that this presumption is given--that other instructions are given that would qualify it. In this particular case, that didn't happen, for whatever. So there was no qualified instruction saying that it--saying that the defendant had to be--that if it were an inference that the jury could or could not find that presumption.

But, obviously, in any situation when you're proving intent, you've got the problem of an inference or presumption.

Because you can't really prove intent by direct evidence.

Basically, the State's aware of the constitutional questions that arise here. And essentially as we understand the history of this Court in the various cases that have been cited in the brief, namely, the series of cases Gainey, Todd, and other cases which relate to specific intent crimes, the--the problem here is whether or not the burden of proof has shifted to the defendant, and that the defendant is in a position of having to prove a specific element, or disprove a specific element, of the crime.

And I think this case relates in that respect to Mullaney. But in the Mullaney case, the aspect of malice, which was an element of that crime, that aspect of malice was presumed, and the defendant was in the position of having to disprove that.

Now, in the State of Montana, mitigated deliberate homicide has the same elements as deliberate homicide, except that it can be mitigated by an affirmative defense of extreme emotional or mental distress.

The presumption in this case--and I use the term loosely, because you are all aware that presumptions and inferences have become tremendously confused. I do not agree with the defense counsel that the legal description of a presumption in the State of Montana applies to this case, because those instructions were not given to the jury.

So the effect of the presumption--of the term, a person is presumed to intend the ordinary consequences of his acts, has some other meaning in this case. And we're suggesting that the meaning in this case is that the presumption had the effect of an inference, an inference very similar to that in Barnes.

QUESTION: Mr. Attorney General, the--number fifteen, the cleanup, the final catch-all instruction, you are to draw no conclusions or inferences from the fact that the defendant does not testify.

Now, if they went through the process of analysis that we perhaps mistakenly assume that they do, wouldn't they get some ideas out of instruction number 15 that they could not draw any conclusions or inferences or presumptions from the fact that the defendant didn't take the witness stand?

MR. GREELY: I think that's probably true, Your Honor. I don't know what effect that would have had as far as the jury's looking at instruction number 5. The thrust of the--the thrust of the defendant's case, apparently, was in essence to prove that he could not have created the intent to kill, and mistakenly, the instruction was offered to suggest that if the jury did not find knowing or purpose, that he would be--he could be convicted of mitigated deliberate homicide.

Now, that's an incorrect instruction. However, it is clear, I believe, that the jury had an opportunity to look at

the knowing and purpose instructions, and I suspect that the way this case came about that the jury believed the testimony of the defendant's witnesses that the defendant indeed ;did not have the intent to kill; and therefore, they were forced into--if they were going to find deliberate homicide, they were forced to look at the knowingly provisions, and the definitions, that he should have understood the high probability of the consequences of stabbing the deceased.

And I think that that's indeed what happened in this case.

QUESTION: Mr. Greely, let me--I want to be sure I understand the thrust of your position. Your opponent has conceded in response to Mr. Justice Rehnquist, if the instruction had said you may infer instead of the law presumes, it would have been all right.

Are you arguing in effect the jury may have so understood the instruction?

MR. GREELY: Yes. We're arguing that they could have, that the instruction itself, since the facts of the case indicated that the jury could have found him guilty of deliberate homicide, based on the knowingly aspect of the element of proof, that the jury could have disregarded the instruction. Or if they had looked at the instruction, that they could have taken the position that it was an inference like that in Barnes; in other words, that it--

QUESTION: That they could not--

MR. GREELY: --that because he stabbed this person that he intended to kill her.

And I believe the facts in the case indicate that the jury came to the conclusion that he did not intend to kill this person. I think that's probably what they came to--obviously--it appears almost more likely than not that that's what happened.

QUESTION: Well, except that--the jury is the judge of the facts, which should--determines on all the admissible evidence in the case. But it--as to the law, it gets its instructions from the trial judge.

And this instruction wasn't that the law allows you to presume, or permits you to infer; it says the law presumes, and that was the law, as that jury was instructed. The law presumes that a person intends the ordinary consequences of his voluntary acts.

And that would require them, if they were--did their duty as jurors, to take the law as it was given to them by the trial judge to find this person guilty of intention purposeful homicide; if the law presumes that.

MR. GREELY: It could, if they didn't have the alternative of accepting a knowingly prospect.

QUESTION: Why would they even turn to the alternative after being told this by the trial judge, that the law

presumes this?

MR. GREELY: I think that the reason they would turn to it is because the facts in the case would have suggested to them that possibly defendant did not intend to kill.

QUESTION: But the law--they were told that the law presumes that a person intends, and these were voluntary acts; there's no question of that.

MR. GREELY: Well, the only--certainly they--

QUESTION: And they were told that that was the require result under the law of Montana; it was given to them by the trial judge in his instructions.

MR. GREELY: That's true, but there was no followup instructions to explain to them what the effect of a presumption was, and whether or not--

QUESTION: Well, that makes it even--does that make it better?

MR. GREELY: I think that if they had treated it as an inference, that would certainly make it better--

QUESTION: Well, they were told--they said, the law tells you to do this. The law presumes it. No the law entitles you to presume it or authorizes you to infer it, but that the law itself presumes it.

MR. GREELY: True, that's true. That instruction, it's possible that it could have been interpreted that way.

QUESTION: There is the risk, I take it--

MR. GREELY: Exactly.

QUESTION: --there is the risk that once the jury has found that the act was voluntary, which they would find from finding that it was purposeful, then the next step is, as Mr. Justice Stewart suggested, almost automatic; at least that is the risk that they would think it out that way if juries indeed do go through that sort of process.

MR. GREELY: Certainly there is the--certainly we could not deny that there isn't a risk in this case. But essentially that is why the instruction has created some difficulties. And I think it's clear in this case that the prosecution could prove deliberate homicide beyond a reasonable doubt based on the knowing aspect of the elements of proof, and possibly even by an inference, such as a Barnes inference, could have proved inference beyond a reasonable doubt.

But obviously the better position to stand with, and the better approach to take as far as what the jury actually did, is that they found the defendant did this knowingly, and even that they may have found that they accepted the defendant's evidence and found that he did not intend to kill, so ppurposely did not become a part of their deliberation.

Basically, we're--the State is also arguing that the effect of the instruction number 5 acting as an inference, rather than a presumption, that if there was any shifting that

was taking place as far as the defendant was concerned, that it was a shifting of the burden of production and not the shifting of a burden of persuasion. Although admittedly Montana law suggests that a presumption does not suggest--states that a presumption requires a person to overcome that presumption by a preponderance of the evidence.

In this case if that instruction were treated as an inference, the effect of it, according to the ruling of our Montana Supreme Court in this case, would be that the defendant would be required to come forth with some evidence, just as in the Barnes case when the inference was used to state that the defendant knew that he recently received Treasury notes were stolen.

The inference in that case was that the mere possession of those recently-stolen notes would create the presumption or inference--and those terms are used interchangeably, although I think most scholars understand what the difference between those two are--that in that case, essentially, you're requiring the defendant possibly to testify in violation of his Fifth amendment rights, that's a very strong inference that you're requiring him to take upon himself, to come forward with some evidence to explain the possession of this recently-stolen property.

And I think probably that inference is even stronger than the effect this presumption may have had in the

instant case.

QUESTION: More subtle, though, isn't it?

MR. GREELY: More subtle because there were not any qualifying instructions.

If there are no further questions, thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

Do you have anything further, Mr. Boggs?

MR. BOGGS: If I may.

REBUTTAL ARGUMENT OF BYRON W. BOGGS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BOGGS: I wanted to pursue a point that Mr. Justice Rehnquist raised. And if I understood you correctly, you asked which was the worst crime, to purposely take a life or knowingly take a life.

And the commentators to the code--it was enacted in 1973--that originated this language, state that purposely is the worse crime.

It is the equivalent of the premeditated homicide in the common law.

QUESTION: What operative effect does that--does it have, when the jury comes out and simply finds a verdict of deliberate homicide, no separate verdicts are requested as to whether it was purposeful or deliberate, what operative effect does it have on your client.

MR. BOGGS: Well, this is the reason I wanted to pursue that point.

QUESTION: Go ahead.

MR. BOGGS: Because I think it has due process implications.

QUESTION: What I'm talking about is practical effect on your client

MR. BOGGS: Yes. With the general verdict, guilty of deliberate homicide, based on the information stated in the disjunctive , the sentencing judge then is prepared, or may, sentence either the minimum or the maximum, as I believe you observed.

And of course the maximum was 100 years in prison. Now, if I understood the Attorney General correctly, he has said that he thought the jury probably concluded that the petitioner did not intend to kill. And I would say, well, he did not act purposely then.

And that is the worst crime. But under the general verdict, the judge could sentence to the maximum. And I argued to the judge at sentencing that there was not the elements of premeditation, and that premeditated murder had been considered the worst crime in our tradition, and that he should consider a lesser penalty than the maximum penalty, based on that proposition. And he sentenced him to the maximum penalty, 100 years.

QUESTION: You don't have capital punishment in Montana?

MR. BOGGS: It is not applicable under the facts as stated.

The prosecution attempted to place the case within the context of the capital punishment statute.

QUESTION: So you do?

MR. BOGGS: But the judge took it away from the jury.

QUESTION: So--I see. In this case--

MR. BOGGS: In this case it was not within his--

QUESTION: --the death sentence could not have been imposed?

MR. BOGGS: That's right.

QUESTION: Does Montana practice permit the requesting of separate--submission of a verdict asking the jury to decide whether they found it bto be purposeful or knowingly?

MR. BOGGS: I know of no precedent for that? Although after arguing this case, I think I might pursue one.

Now, with respect to the suggestion by the Attorney General that the state--the instruction, the law presumes a person intends the ordinary consequences of his voluntary acts, shifted the burden of production. And this is in the opinion of the Montana Supreme Court.

The--unfortunately it doesn't make sense in this case. The burden of production would have required--and the

Montana Supreme Court said it would have required--that he produce some evidence contrary to the fact presumed. But in characterizing the defense evidence, it characterized it as being to the effect that the defendant may not have intended the death.

So by its own characterization, it certainly called for some evidence contrary to the fact presumed. So there was a contradiction inherent in that position.

Finally, of course, in that regard, the jury was not told that that was the requirement under that instruction. If I understand the law of those jurisdictions that interpret presumption as shifting the burden of production and requiring the production of some evidence, and we have some of those with regard to affirmative defenses, it is that once the--some evidence has been produced, then the jury is directed to weight the evidence, according to the applicable burden of persuasion which of course would have been proof beyond a reasonable doubt. And there would have been no instruction as to the presumption.

But in this case, of course, the jury was instructed.

QUESTION: The Attorney General has told us that this instruction is no longer given in criminal cases in Montana. Do you acknowledge the truth--the accuracy of that statement?

MR. BOGGS: It may have been that he's directed the county attorneys to discontinue the use. But as is always

the case in circumstances of this kind--

QUESTION: It doesn't help your client?

MR. BOGGS: It doesn't help mine, and it'll continue to be used until each one of them is alternately brought in line.

QUESTION: It isn't binding on the trial judges. I suppose the Attorney General can't enforce that request.

MR. BOGGS: No.

QUESTION: He can merely direct his county attorneys.

MR. BOGGS: Yes.

QUESTION: The cases you cite in your brieffrom the Federal courts of appeal, as I glance over them, all indicate disapproval of this sort of instruction and said to the district courts in their respective circuits, don't do this anymore, but didn't reverse the convictions; is that about right?

MR. BOGGS: Some reversed the convictions, Mr. Justice Stewart. There have been a mix of cases that either reversed or didn't reverse. The cases in general predate this Court's ruling in Mullaney, and in many cases predate this Court's ruling in re Winship.

QUESTION: I'm looking at page 21, what's that, the Second Circuit and the Third Circuit; the Ninth Circuit. They've all been just admonitions not to do it anymore, haven't they?

MR. BOGGS: I think both the Ninth Circuit cases were reversals.

QUESTION: On that ground?

MR. BOGGS: On that ground. And I think that may be also true of at least one, if not both, of the Second Circuit cases.

The two supervisory opinions, as it were, in the Fifth Circuit and the Third Circuit, do not reverse.

MR. CHIEF JUSTICE BURGER: Very well.

Thank you, gentlemen. The case is submitted.

[Whereupon at 1:49 o'clock p.m., the case in the above-entitled matter was submitted.]