

OFFICIAL TRANSCRIPT

ORIGINAL

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: EDWARD HAROLD SCHAD, JR., Petitioner

v. ARIZONA

CASE NO: 90-5551

PLACE: Washington, D.C.

DATE: February 27, 1991

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X
3 EDWARD HAROLD SCHAD, JR. :
4 Petitioner :
5 v. : No. 90-5551
6 ARIZONA :

7 - - - - -X
8 Washington, D.C.
9 Wednesday, February 27, 1991

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:01 a.m.

13 APPEARANCES:

14 DENISE I. YOUNG, ESQ., Tempe, Arizona; on behalf
15 of the Petitioner.

16 R. WAYNE FORD, ESQ., Assistant Attorney General of
17 Arizona, Phoenix, Arizona; on behalf of the
18 Respondent.

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1 P R O C E E D I N G S

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 90-5551, Edward Harold Schad,
5 Jr. v. Arizona.

6 Ms. Young.

7 ORAL ARGUMENT OF DENISE I. YOUNG

8 ON BEHALF OF THE PETITIONER

9 MS. YOUNG: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 Edward Schad was convicted of first degree
12 murder and sentenced to death after a trial at which the
13 evidence presented was that the victim was strangled, and
14 that sometime later Mr. Schad had possession of some of
15 the victim's property. Two rules Arizona mechanically
16 applied in Mr. Schad's case allowed the prosecution to
17 obtain this verdict based on this then evidence.

18 The question -- both issues presented in this
19 case presents is whether that verdict obtained by the
20 rigid application of these two rules is constitutionally
21 reliable.

22 QUESTION: This was a verdict in the guilt
23 phase, Ms. Young?

24 MS. YOUNG: Yes, Mr. Chief Justice.

25 Although I'm going to discuss each rule

1 separately, that is not how they worked at Mr. Schad's
2 capital trial. These two rules, Arizona's one form of
3 verdict rule and Arizona's no lesser included offenses for
4 felony murder rule worked together, mutually reinforcing
5 one another and increasing the risk that the verdict
6 returned against Mr. Schad was erroneous.

7 I will first address the second issue we present
8 in our brief, Arizona's rule that there are no lesser
9 included offenses of felony murder, because it presents a
10 more narrow constitutional issue and it is controlled by
11 Beck v. Alabama.

12 The prosecutor's case for felony murder was
13 built circumstantially. No direct evidence tied Mr. Schad
14 to the homicide of the victim. The only evidence
15 connecting him to that crime was his possession of the
16 victim's property. The prosecutor argued that because he
17 had possession of the property, the jury could find that
18 he robbed the victim and that he killed the victim during
19 the course of that robbery, and was therefore guilty of
20 felony murder.

21 The defense used that same evidence to argue
22 their defense that, because he had possession of the
23 property but because there was no evidence directly tying
24 him to the homicide, that perhaps the jury could find him
25 a thief, perhaps a robber, but not a murderer. Because of

1 Arizona's mandatory rule precluding lesser included
2 offenses for felony murder, the judge refused to instruct
3 the jury on the offense of robbery or on the offense of
4 theft, which under Arizona law is a lesser included
5 offense of robbery.

6 QUESTION: Ms. Young, did the judge give any
7 lesser included offense instruction at all in this case?

8 MS. YOUNG: The judge did give an instruction
9 for second degree murder which was a lesser included
10 offense instruction for premeditated murder.

11 QUESTION: And do you think that requires, as a
12 matter of Federal constitutional law, any number of lesser
13 included offense instructions if -- if the evidence makes
14 them out.

15 MS. YOUNG: Yes. Beck requires that the jury be
16 given all rational lesser included offenses where
17 supported by the evidence.

18 Now that is not as broad as it may seem. Beck
19 of course is limited to capital cases. And a state can
20 define its offenses in such a manner that they are not a
21 lesser included offense of the greater offense. But
22 that's not what Arizona did here.

23 Mr. Schad was tried for felony murder based a
24 killing which occurred during the course of the -- of a
25 robbery. The jury was instructed that it could find Mr.

1 Schad guilty of felony murder if it found that he robbed
2 the victim and that a killing occurred during the course
3 of that robbery. As instructed, felony murder
4 incorporated all of the elements of robbery. The State
5 could not prove its case of felony murder here without
6 inescapably proving robbery.

7 But the jury was not given the option to return
8 that verdict because of Arizona's mandatory rule -- here
9 not different than the rule in Beck v. Alabama.

10 QUESTION: Well, is it -- is it all that clear
11 that Beck should be read as requiring the giving of every
12 potential lesser included offense rather than just a less
13 drastic alternative than the death penalty which was given
14 here? I would think one could read Beck to require no
15 more than that.

16 MS. YOUNG: Your Honor, I just --

17 QUESTION: And if not, why shouldn't we read it
18 that way?

19 MS. YOUNG: Because, Your Honor, of the
20 principle that Beck was based on which was eliminating the
21 distortion in the fact-finding process and ensuring the
22 integrity and reliability of the verdict.

23 In the Beck situation, the fact-finding process
24 was distorted, because the jury was not able to consider a
25 lesser included noncapital, homicide offense.

1 QUESTION: Wasn't that -- wasn't the -- Beck was
2 confined to capital cases, wasn't it?

3 MS. YOUNG: That's exactly right, Your Honor.

4 QUESTION: And so it was to give the jury an
5 option to imposing the death penalty.

6 MS. YOUNG: Yes, Your Honor, but also giving
7 them an option to return a rational verdict. Beck is
8 based on rationalizing the fact-finding process, not
9 derationalizing the fact-finding process.

10 QUESTION: So you're saying if the jury in the
11 jury room agrees at the outset that first degree
12 premeditated murder has not been proven, at that point, if
13 they -- they cannot consistently go to second degree
14 murder?

15 MS. YOUNG: That's right, Your Honor. Felony
16 murder as defined by Arizona law has two elements, a
17 killing occurring during the course of some statutorily
18 enumerated felony -- here, robbery. Those jurors here who
19 had a doubt as to whether Mr. Schad had anything to do
20 with the killing -- and that was the very factual issue in
21 dispute here, and there was considerable doubt here
22 whether he did -- were unable to return a verdict
23 consistent with that doubt, which is exactly what this
24 Court was concerned about in Beck, concerned about letting
25 the jury have a rational option if they are not convinced

1 that all of the elements of the greater offense have --
2 have been committed.

3 Because of the substantial risk where the jury
4 believes that one of the elements has not been established
5 beyond a reasonable doubt, but that they do believe the
6 defendant is clearly guilty of some wrong doing as
7 occurred here, there really was very little question that
8 Mr. Schad done something. He did have possess of the
9 victim's property.

10 The Beck court -- this Court recognized in Beck
11 that there was a substantial risk that such a jury would
12 convict -- would resolve its doubts in favor of conviction
13 rather than -- not -- excuse me -- not because it was
14 convinced of the defendant's guilt, but simply it did not
15 want to let the defendant go free.

16 This case presents a preclusion rule no
17 different than Beck. And we ask this Court to reverse the
18 conviction of Mr. Schad on that basis because this jury
19 was not able to return that verdict.

20 And we must remember here that the prosecution
21 based its theory of felony murder on robbery, told the
22 jury this is the premise of the felony murder, and then
23 wiped out their option by -- of returning a verdict
24 consistent with that premise because of Arizona's
25 mandatory rule.

1 The second issue that we bring here today --

2 QUESTION: Well, if we agree with you, we
3 needn't reach your second issue?

4 MS. YOUNG: That's right, Your Honor, you do
5 not.

6 QUESTION: The respondent here contends that
7 robbery is not indeed a lesser included offense of first
8 degree murder if you look just to the statutory
9 definitions.

10 MS. YOUNG: Yes, Your Honor, that is what the
11 State contends here.

12 QUESTION: Do -- do you agree with that?

13 MS. YOUNG: No, I do not agree with that. Here,
14 Mr. Schad was tried for felony murder based on a robbery.
15 Felony murder could not have been found by that jury
16 without it finding the elements of robbery. This jury was
17 instructed on the elements of robbery so that they were
18 able to return a felony murder instruction. So they had
19 the elements of robbery. They were instructed on that.
20 They had the felony murder instruction allowing them to
21 return that verdict. As instructed, robbery was a lesser
22 included offense.

23 QUESTION: Well, but no, you could have -- they
24 had a first degree murder instruction. That's your other
25 point.

1 MS. YOUNG: Yes, Your Honor.

2 QUESTION: They could have found him guilty of
3 the defined offense, first degree murder, without having
4 found him guilty of robbery, isn't that correct?

5 MS. YOUNG: Yes, Your Honor, they could have.

6 QUESTION: And pursuant to our prior law and
7 what constitutes a lesser included offense, that wouldn't
8 suffice. So this argument of yours, in a way, hinges upon
9 your first argument that you can't define first degree
10 murder that generally to include both felony murder and
11 murder with intent.

12 MS. YOUNG: I don't believe it does, Your Honor.
13 Under Arizona law, a lesser included offense is an offense
14 where the greater offense cannot be committed without
15 committing the lesser offense and where the evidence
16 supports a lesser offense. Here, that's exactly what
17 happened. And --

18 QUESTION: I thought we just -- I thought we
19 just went through that. The greater offense is first
20 degree murder and your client could have been convicted of
21 first degree murder without being convicted of robbery.
22 Isn't that right?

23 MS. YOUNG: That's true, Your Honor.

24 QUESTION: So it's not necessarily included.

25 MS. YOUNG: In the overall scheme of first

1 degree murder that's --

2 QUESTION: But that's the offense.

3 MS. YOUNG: That's true, Your Honor, which --
4 which brings us to our second issue, of course.

5 QUESTION: As I said.

6 MS. YOUNG: But -- but this jury was not just
7 -- they weren't given an instruction of this is just first
8 degree murder. They were given instruction of first
9 degree murder is either premeditated murder or felony
10 murder and let me tell you what murder is. They were then
11 instructed on that.

12 QUESTION: But -- but in felony murder, the
13 defendant must cause the death in Arizona?

14 MS. YOUNG: No, Your Honor, felony murder is
15 basically a strict liability offense in Arizona. The
16 defendant does not have to play any part in the killing
17 whatsoever. It's just a killing occurs during the course
18 of a felony.

19 QUESTION: And there was no instruction to that
20 effect in this case?

21 MS. YOUNG: The --

22 QUESTION: In this case, there's no instruction
23 that the defendant must have caused the death for there to
24 be a capital conviction?

25 MS. YOUNG: No, Your Honor. Now, there was a

1 instruction for premeditated murder that he must have
2 caused it.

3 QUESTION: I understand that for premeditated --

4 MS. YOUNG: Not for felony murder.

5 QUESTION: And that's not -- that's not required
6 in a capital case?

7 MS. YOUNG: Not in Arizona.

8 QUESTION: Well, what about the penalty phase?

9 MS. YOUNG: At the penalty phase it is performed
10 by a judge. We have judge sentencing only.

11 QUESTION: Well, I know. But what's -- what
12 must he find? That the defendant killed or intended to
13 have a killing?

14 MS. YOUNG: Yes, Your Honor, he must, in order
15 to be eligible for the death sentence, make an Inman-
16 Tison finding. That's exactly right.

17 QUESTION: But that's after sentencing phase.

18 MS. YOUNG: That's at the sentencing phase.

19 QUESTION: But that's just -- the sentencing
20 phase.

21 QUESTION: But just to be clear about it, there
22 is no Arizona crime of felony murder?

23 MS. YOUNG: Yes, there is, Your Honor. There is
24 an Arizona crime of felony murder, and Arizona tries
25 defendants often on -- just based on felony murder -- just

1 as Arizona defines --

2 QUESTION: I thought the defined crime was first
3 degree murder, and there are various ways of proving first
4 degree murder. But there's no separate penalty
5 denominated for felony murder. It's just one way of
6 showing first degree.

7 MS. YOUNG: It's -- it's under the first degree
8 murder degree statute. That is right, Your Honor. But --

9 QUESTION: So I think your answer should have
10 been yes.

11 MS. YOUNG: A defendant can be tried in Arizona
12 only for felony murder, though. A defendant can be tried
13 in Arizona only for premeditated murder.

14 QUESTION: He can be tried for first degree
15 murder with the State arguing only one theory of first
16 degree murder -- to wit, the felony theory -- if the
17 State wishes to proceed that way.

18 MS. YOUNG: That's right, Your Honor. That's
19 right.

20 That question of course brings us to the second
21 issue -- our first issue actually in our brief. The --

22 QUESTION: Well, I'll ask it later I guess,
23 whether you must win on this in order to win on the first.

24 MS. YOUNG: No, Your Honor, I do not believe we
25 must win on this issue in order to win on the first at

1 all.

2 The second rule that Arizona applied in Mr.
3 Schad's case is the one form of verdict rule that we have
4 been discussing. That rule applies in a capital case
5 whenever a prosecutor seeks a first degree murder
6 instruction based on either premeditated murder or felony
7 murder. When a prosecutor invokes that rule, he
8 eliminates the defendant's right under the constitution in
9 Arizona to a unanimous jury verdict.

10 This is how that rule worked in Mr. Schad's
11 capital trial. The prosecutor had only two facts on which
12 to obtain a conviction here. The victim was strangled,
13 and Mr. Schad later had possession of some of the victim's
14 property. The prosecutor told the jury that it could find
15 Mr. Schad guilty of first degree murder if it found either
16 premeditated murder or felony murder and that there were
17 two different, factual routes that the jury could take in
18 order to reach a conviction on each of those crimes.

19 The prosecutor first argued the premeditation
20 route. He told the jury that he could find -- that they
21 could find the defendant guilty of premeditated murder if
22 it found one fact -- excuse me -- based on one fact, that
23 the victim was strangled. The prosecutor argued that that
24 fact alone showed he premeditated the crime.

25 The prosecutor then argued an entirely different

1 factual route for the jury to reach the other crime, the
2 crime of felony murder. The prosecutor told the jury that
3 they could find Mr. Schad guilty of felony murder based on
4 a completely separate fact, that Mr. Schad had possession
5 of the victim's property. He must have robbed him then.
6 And he must have killed him during that robbery.

7 The jury was told that they only had to return a
8 verdict of first degree murder, and that either
9 premeditated murder or felony murder constituted first
10 degree murder.

11 QUESTION: Is that any different from saying you
12 can convict a burglary if he broke through the door or
13 broke through the window, and six jurors think he went
14 through the door and six jurors think he went through the
15 window?

16 MS. YOUNG: Yes, Your Honor, I think that is
17 different.

18 QUESTION: What's the difference?

19 MS. YOUNG: Here the difference are the
20 completely separate factual routes that the jury must take
21 in order to establish the essential elements of the crime
22 --

23 QUESTION: Well, you can't go -- you can't go
24 through both the door or the window. You go through one
25 or the other.

1 MS. YOUNG: But -- but the crime of burglary
2 requires entering into a struction without a legal --

3 QUESTION: Well, but first degree murder in
4 Arizona requires that you -- one of two possible ways of
5 doing it.

6 MS. YOUNG: But let's look at how Arizona
7 defines these crimes.

8 Arizona defines premeditated murder to have
9 three elements -- that the defendant killed, that he did
10 so with malice intent, and that he did so with
11 premeditation. Those are the elements Arizona has chosen
12 to make essential to the crime of premeditated murder.

13 QUESTION: Well, is it unconstitutional for
14 Arizona to draft its statute in this way?

15 MS. YOUNG: No, Your Honor, it is not. Of
16 course, Arizona can -- can draft its statute this way.
17 But once it has set up those elements, Winship requires
18 that the jury find each of those elements beyond a
19 reasonable doubt, and the facts supporting each of those
20 elements beyond a reasonable doubt.

21 QUESTION: But they are not required elements.
22 You don't have to find any of those elements, because
23 there is no crime of premeditated murder. There is only a
24 crime of first degree murder. The judge's instructions to
25 the jury said, you may come to one of three verdicts. And

1 two of them were not felony murder and premeditated
2 murder.

3 First, you may return a verdict of guilty of
4 murder in the first degree, guilty of murder in the second
5 degree, or guilty -- or not guilty. Those were the only
6 three choices.

7 MS. YOUNG: That's right, Your Honor. But how
8 are they able to find that conviction? We have to go back
9 to look at what the elements were that the prosecution had
10 to establish and the jury had to find.

11 Now, here --

12 QUESTION: Which is this -- which brings you to
13 Justice Kennedy's question. The person had to break into
14 the house -- could have come in through the window or
15 through the door. Either one would satisfy it.

16 MS. YOUNG: That's not an essential element
17 required. Here the essential elements required --

18 QUESTION: Yeah, a break-in is an essential
19 element.

20 MS. YOUNG: Yes, but not breaking and entering
21 by one certain means.

22 QUESTION: But by one or the other.

23 MS. YOUNG: By break --

24 QUESTION: You've got to have some finding as to
25 the burglary to make it felony murder.

1 MS. YOUNG: Yes.

2 QUESTION: Then don't you think under your
3 theory you would also have to find all the elements of
4 burglary?

5 MS. YOUNG: Unanimously?

6 QUESTION: Yes.

7 MS. YOUNG: Well, Your Honor, it would depend on
8 the case.

9 QUESTION: Well, why would it depend on the
10 case?

11 MS. YOUNG: It would depend on the facts.

12 QUESTION: Why would it depend on the facts?

13 MS. YOUNG: -- of the case. If in fact the
14 facts of the case were such that they -- there weren't the
15 two possibilities but that he just entered, then, no, the
16 jury -- the prosecution would have presented the case in
17 such a manner that the jury could have only found one way.
18 But once you must -- once the law -- the State law has
19 defined the crime in such a way that there are different
20 elements that the prosecutor can rely on, different facts
21 to establish those elements, the jury must choose which
22 way.

23 QUESTION: Well, is -- is the key to your theory
24 the fact that you -- you must prove burglary as one -- as
25 one element if you're going the felony murder route to

1 first degree, but you don't have to get into the details
2 of burglary, so to speak?

3 MS. YOUNG: Your Honor, if the -- if the
4 burglary required that the jury have to choose one of --
5 if the elements of burglary were such that, like the
6 elements of premeditated murder and felony murder, the
7 jury must choose one of the two, then yes, I would agree
8 that they would have to unanimously find that.

9 QUESTION: So why -- why aren't you insisting on
10 that here or rather why don't you say that the -- if -- if
11 the jury splits as to whether it was a door or window,
12 that is unconstitutional?

13 QUESTION: She just -- she just did. If -- if
14 it was -- if the jury was required to choose.

15 MS. YOUNG: If -- if the elements defined by
16 State law and -- I don't have the elements of burglary --
17 but if the elements defined by State law required them to
18 do so, then yes, that they had to choose, then yes.

19 QUESTION: But do you think Arizona requires the
20 jury to choose between premeditation?

21 MS. YOUNG: No, I -- Arizona does not and that's
22 why we're here.

23 QUESTION: I know.

24 MS. YOUNG: But that's the problem. Arizona
25 should. Once it has defined these two crimes in the way

1 it has with the essential elements of premeditation on
2 this side -- and the prosecutor argued the case this way
3 to the jury. He outlined the elements on the blackboard
4 to the jury. Here they are, three elements of
5 premeditated murder. Here's how you find it.

6 QUESTION: Well, I assume --

7 MS. YOUNG: He strangled the victim.

8 QUESTION: I assume you would say the same thing
9 if we granted your -- your claim in this case. The next
10 step would be, what if the jury disagrees as to what the
11 felony was in felony murder? Six jurors think that the
12 felony was attempted rape. Six jurors think that it was
13 robbery. The individual can't be convicted. Is that
14 right? I mean --

15 MS. YOUNG: Yes, Your Honor.

16 QUESTION: All right, where -- where do you
17 stop. I mean the next level down, there are various ways
18 of -- of robbery, as Justice Kennedy said. And where does
19 it all end?

20 MS. YOUNG: It can end with the capital case.
21 It can end at the first degree murder statute. It does
22 not need to go any further than that. But the way --

23 QUESTION: Well, I don't understand that. If
24 your theory is right. You -- I understood your theory to
25 be it ends with different elements of the offense.

1 MS. YOUNG: That's right, Your Honor.

2 QUESTION: With the -- with Justice Kennedy's
3 example, it's the same element, namely entry, that you
4 don't care how he got in if they all thought he broke in.
5 But here you've got two different elements that are
6 mutually exclusive, really. Not necessarily mutually
7 exclusive, but he either robbed or he intended to kill.
8 Those are different elements. I thought that was your
9 theory --

10 MS. YOUNG: That is --

11 QUESTION: -- not just capital cases.

12 QUESTION: Well, unless -- unless it was defined
13 as an -- just an element is a felony. You might
14 semantically say that in Justice Scalia's example that the
15 elements are the same whether it's robbery or rape.

16 MS. YOUNG: You might, but that's -- I think a
17 unanimous jury verdict would have to --

18 QUESTION: There are not many indictments --

19 QUESTION: But you don't need -- in other words,
20 you can say that and still prevail in your case, because
21 you can say the elements of premeditated murder and felony
22 murder are different.

23 MS. YOUNG: That's right. That's right.

24 QUESTION: But doesn't -- doesn't that then just
25 raise the further question, why -- why isn't it

1 appropriate to analyze the Arizona statute as simply
2 requiring a guilty mental state which may be proven either
3 as premeditation or may be proven as a element in the
4 intent to commit robbery in the course of which there is a
5 killing? Your argument depends on the assumption that
6 there are two different mental states involved, and hence
7 two different elements. If we don't accept that
8 assumption, then your argument falls.

9 MS. YOUNG: But -- but there are, Your Honor.
10 Under -- as Arizona has defined felony murder, there
11 certainly are two different mental states. The mental
12 state for felony murder has nothing to do -- no connection
13 whatsoever to the homicide. It is a mental state for the
14 underlying felony that cannot be substituted over here for
15 the premeditation when the jury may have found that Mr.
16 Schad had no involvement in the killing.

17 QUESTION: Well, there are many more than two
18 mental states required. I mean there are as many mental
19 states required as there are all the felonies in Arizona
20 plus one more for -- for the intentional killing, right?

21 MS. YOUNG: For the premeditated murder --

22 QUESTION: I mean every felony if it's -- if it
23 requires mens rea, I assume, has a different intent,
24 right? So there are as many intents required under this
25 statute as there are felonies in Arizona you say?

1 MS. YOUNG: Intents -- intents that the statute
2 has required for that particular felony, that's right.

3 QUESTION: Well, and for -- and for this first
4 degree murder.

5 MS. YOUNG: That's right. We know what the --
6 we know what the mental state is for that, of course --
7 the intent and the premeditation for the -- the
8 premeditated murder.

9 QUESTION: That's -- that's one intent.

10 MS. YOUNG: Yes.

11 QUESTION: And then there's not just a second,
12 which is an intent to commit a felony. You -- there's a
13 different intent for each one of the felonies, right? So
14 there are 30 different intents here. Who knows?

15 MS. YOUNG: There could be. But -- but this is
16 not a great burden we're asking the State to take on. All
17 we're asking is that they give the jury separate forms of
18 verdict.

19 QUESTION: Well, I think it is unless you want
20 to have some special rules for capital cases. And I
21 certainly don't think your logic takes you there. What
22 about that Federal statute that punishes as an accomplice
23 anybody who aids, counsels, procures, abets, commands?
24 Does the jury have to be instructed -- do they have to be
25 -- it was either commanding or counseling or procuring?

1 They have to all agree on which of the three?

2 MS. YOUNG: They -- they --

3 QUESTION: Because those are really a different
4 act.

5 MS. YOUNG: If in fact the evidence is such that
6 it is, they do have to unanimously agree on the facts
7 essential to that crime. And if those facts are so
8 disparate as they are here and can establish such two
9 entirely different crimes as they do here --

10 QUESTION: You say that's -- that's the present
11 state of Federal law? Is that what you're saying? Is --
12 are you saying that the answer to Justice -- that the
13 present state of Federal law is that if a particular
14 statute says aids, abets, counsels, et cetera, that a jury
15 must have a separate form of verdict and unanimously find
16 either one or the other of those?

17 MS. YOUNG: No, I --

18 QUESTION: No.

19 MS. YOUNG: I do not know that to be so, Your
20 Honor. I know that there's been at least no decision out
21 of this Court along those lines. The circuit courts have
22 come out various ways when in fact they were faced with
23 the statute that the jury could have understood required
24 -- the -- the -- them to go off on -- the jury to go off
25 on two separate factual routes as it did here.

1 But the prosecution here can certainly argue 11
2 different ways if that's how you want to look at this
3 case. We believe -- it's our position that these are two
4 separate crimes regardless of what Arizona calls it. But
5 the prosecution can throw out 11 different ways for the
6 jury to find first degree murder. All we are asking is
7 that that jury unanimously agree on which one it is.

8 Here we've got a case where six jurors may have
9 believed that felony murder was committed. And you can't
10 look at this case in isolation. Remember they were given
11 the opportunity to return anything else if they had a
12 doubt. But six jurors may have believe felony murder was
13 committed, and six jurors may have disbelieved that. You
14 had as many believing that -- that crime as disbelieving.

15 QUESTION: But you had 12 who believe that
16 killed the person and 12 who believed that he had the kind
17 of intent that the State made unlawful.

18 MS. YOUNG: No, Your Honor, I don't believe you
19 did.

20 QUESTION: Are you sure?

21 MS. YOUNG: First of all, if -- if six --

22 QUESTION: One or the other of the various kinds
23 of intent that the State made unlawful.

24 MS. YOUNG: No, Your Honor, if the six people
25 who believe felony murder -- and setting aside the Beck

1 issue for a while -- those six people may not have had --
2 believed he had anything to do with the killing but simply
3 was present during a robbery. That is far different from
4 the other six jurors who believed there was premeditation.

5 QUESTION: Do you -- do you say that it must be
6 clear that the jury was unanimous on each -- on whatever
7 theory that -- on one theory or the other?

8 MS. YOUNG: On either premeditated murder or
9 felony murder? Yes, I do, Your Honor.

10 QUESTION: What is -- what is your case that
11 says that, in a State case, there must unanimous verdicts?

12 MS. YOUNG: Under Arizona law, the constitution
13 requires that their verdict be unanimous.

14 QUESTION: I know, but do you have any case here
15 that says it must be unanimous?

16 MS. YOUNG: A United States Supreme Court case?
17 No, no, there's no case by this Court that it must be.
18 There are certainly circuit court cases -- the Gipson case
19 --

20 QUESTION: Well, what makes it -- let's assume
21 that there's -- that there's a clear rule here that --
22 that -- that there may not be unanimous verdicts in the
23 state criminal cases, including capital cases. Let's just
24 assume that.

25 MS. YOUNG: Okay.

1 QUESTION: But Arizona requires it. On what
2 ground would you then say we should reverse this case?
3 It's just because Arizona has this rule, but is it
4 unconstitutional to have a -- in a -- for Arizona to do it
5 this way?

6 MS. YOUNG: Well, the possibility that the jury
7 here split evenly --

8 QUESTION: Yes.

9 MS. YOUNG: -- even violates this Court's
10 minimum requirements.

11 QUESTION: So that's -- you really get down to a
12 6 to 6 thing then?

13 MS. YOUNG: Yes, Your Honor, or --

14 QUESTION: It would have to be a majority.

15 MS. YOUNG: At least a majority. Here we have
16 them splitting evenly.

17 QUESTION: You say you have them. That's your
18 hypothesis, isn't it?

19 MS. YOUNG: That's -- yes, Your Honor.

20 QUESTION: We don't know how the jury --

21 MS. YOUNG: We have no idea here what the jury
22 did.

23 Thank you. I'm going to reserve the rest of my
24 time.

25 QUESTION: Very well, Ms. Young.

1 Mr. Ford, we'll hear now from you.

2 ORAL ARGUMENT OF R. WAYNE FORD

3 ON BEHALF OF THE RESPONDENT

4 MR. FORD: Thank you, Mr. Chief Justice, and may
5 it please the Court:

6 What this case presents is the classical death
7 by strangulation/drowning situation that you often see
8 raised in the law schools by the law professors where a
9 victim is found at the bottom of the swimming pool. And
10 when he's pulled out and goes to the morgue and the
11 medical examiner examines him, finds also that the death
12 could have been -- there's conclusive evidence that could
13 have been also strangled as well as drowned.

14 And the question that this case presents is
15 whether the jury is constitutionally required which of the
16 two had happened. In this case, of course, there's not a
17 drowning.

18 My position in this situation is that it is a
19 question of --

20 QUESTION: May I ask you right there? Supposing
21 Arizona had -- in your very hypothetical -- one statute
22 prohibiting death by -- killing by drowning which had a --
23 which was not a capital case, where as death by
24 strangulation was a capital case. Would they then be
25 required to find out which way it was done?

1 MR. FORD: I -- my assumption was that the death
2 by drowning by a forcible -- it was a killing -- and that
3 the jury ultimately decides that way. If it was an
4 accidental drowning --

5 QUESTION: No, no, no. I just said that your
6 two examples as I understood you were death by
7 strangulation and death by drowning, wasn't it?

8 MR. FORD: My -- my presumption should have been
9 that it was death by drowning -- by forcible drowning.
10 And the jury unanimously decided there was a killing.
11 Must they then -- are they then constitutionally required
12 to decide whether the killing was by forcible drowning or
13 whether --

14 QUESTION: And my question to you is -- I think
15 to put your question, you have to assume the statute only
16 applied -- there's a special crime of killing by drowning.
17 And then would they not have to find that there was
18 killing by drowning?

19 MR. FORD: Under the -- if the statute said
20 killing by drowning?

21 QUESTION: Right.

22 MR. FORD: Then the jury would have to be
23 unanimous in making that finding. However, under the
24 Arizona statute, it does not specify killing by drowning.
25 The Arizona legislature, in its prerogative of defining a

1 crime, said that first degree murder is the killing with
2 malice of forethought. That is the crime. That is the
3 level that -- to be attained. That is the offense under
4 our statute.

5 Then they realized that there were different
6 methods of committing first degree murder, and --

7 QUESTION: Well, but that -- counsel for the
8 petitioner I think will say that that's not her argument.
9 She's saying that there are different -- in the example
10 you've put, killing by strangulation and drowning, the --
11 the mental state is the same. The elements of the crime
12 are the same. But here you do not need to be participate
13 -- to have caused the death of the victim for -- of felony
14 murder.

15 MR. FORD: If that's the position that the
16 petitioner is taking, I'd say --

17 QUESTION: Then you'd need only -- and you need
18 only have been intended to engage in the robbery.

19 MR. FORD: Pardon me?

20 QUESTION: When you need only to have intended
21 to engaged in the robbery.

22 MR. FORD: That -- that is an issue that is
23 determined in Arizona at the sentencing stage. What the
24 -- if you're asking about the mental intent that was
25 involved in it.

1 QUESTION: So the -- you're saying -- are you
2 saying that the elements are the same for felony murder
3 and for premeditated murder in Arizona?

4 MR. FORD: The elements of the crime were -- are
5 the same for first degree murder in Arizona. There are
6 two doctrines under which the -- there are multiple
7 doctrines under which an individual may be -- the -- the
8 charge may be presented to the jury, but as far as the
9 conviction -- as far as the verdict that's returned -- as
10 far as the statute that's used to charge it, it is first
11 degree murder.

12 QUESTION: How about the petitioner's argument
13 that the prosecutor told the jury, now there's two
14 different routes you can go, two different prongs to this
15 statute. And the argument is that those are different
16 elements in each case.

17 MR. FORD: No, I disagree that the prosecutor
18 presented that to the jury in the first place. And if --
19 even if he did, the court's instructions to the jury were
20 not to that effect. The court's instructions to the jury
21 were the defendant is charged with the crime of first
22 degree murder. You may find that he committed first
23 degree murder. If you find that he premeditatedly
24 committed the crime, then we also find first degree murder
25 if you find that he committed -- was -- committed the

1 killing during the commission of a robbery.

2 So that --

3 QUESTION: It's not -- not immediately clear to
4 me that those aren't different elements.

5 MR. FORD: Those not elements of the crime per
6 the statute. The elements of the crime of murder in the
7 first degree is a killing with malice of forethought.
8 Then the legislature decided to, for sentencing purposes
9 at least, for punishment purposes, to categorize whether
10 it would be first degree murder or second degree murder
11 and put that burden on the jury and make that
12 determination. Whether they should find this happened
13 with -- with these different events that they found more
14 reprehensible, they would put it under a first degree
15 murder category.

16 The second degree category -- or the first
17 degree category they punish by either death or life
18 imprisonment. But the second degree category is a lesser
19 punishment. And those are the less reprehensible. So as
20 far as the elements are concerned, it is a fact finding
21 that the jury must find that the defendant was guilty of
22 first degree murder and it is one of the findings. But it
23 is not an element of the crime as defined by the statute.

24 QUESTION: Well, how far does that go toward
25 Arizona -- just abolish all of its specific felonies and

1 adopt a new crime called a generic felony. And there are
2 various ways you can prove a generic felony. You can
3 prove fellow committed homicide. You can prove he
4 committed robbery. You can prove he committed burglary.
5 And those would not be elements of the crime. The crime
6 is felony. And it just goes to the jury. And you say,
7 you know, you figure out whether he did any one of these
8 things. If we get nine of you to think he did nine
9 different things, we got him. Do you believe that?

10 MR. FORD: I believe that the legislators -- the
11 legislature's prerogative would be able to do -- if you're
12 talking about the traditional type crime, which would be
13 like the homicide crime, if you place that -- if you say
14 not as a felony. But if you say the crime in this case is
15 homicide and you may find that the defendant committed
16 homicide by these different fashions and include second
17 degree murder and manslaughter and perhaps even negligent
18 homicide.

19 QUESTION: You can do it for homicide, but you
20 can't go above homicide. Why can't you just do it for a
21 felony? The crime is defined as felony. And you tell the
22 jury you can find that he committed a felony in various --
23 in various ways, just as the prosecutor here directed
24 them. You can find that he committed homicide. You can
25 find that he committed robbery. You can find that he's a

1 tax cheat -- whatever. If I -- you know, if I can pick up
2 nine votes for one or the other, I have a conviction. Can
3 you do that?

4 MR. FORD: It would depend on how the statute
5 would be written. I was --

6 QUESTION: I told you how it's written.

7 MR. FORD: Okay.

8 QUESTION: It's a felony.

9 MR. FORD: If -- if you mean that there a
10 robbery independent and we're going to punish him for a
11 -- a homicide, I don't believe that they could do that.
12 If you're saying that he commit a homicide by robbery,
13 then I think the legislature --

14 QUESTION: Well, take homicide -- I think you're
15 getting confused by homicide. Take homicide out of it.

16 MR. FORD: Okay.

17 QUESTION: It's a -- it's a new crime called a
18 nonhomicide felony, and it includes every felony in the
19 world except homicide.

20 MR. FORD: Okay.

21 QUESTION: All right? But they are not elements
22 of it. They are just like the two elements of intent in
23 this statute. Could Arizona do that?

24 MR. FORD: I believe that Arizona -- that the
25 legislature would not be allowed to do that. I believe

1 you'd be running into a due process, a reasonable doubt
2 standard, which --

3 QUESTION: Uh-huh. Now, why is this different?
4 How do you -- how do you draw the line between that
5 statute and the one you're defending here?

6 MR. FORD: Because you're talking about a
7 traditional category of crime here. You're talking about
8 the legislature has decided to define the offense of
9 homicide or murder in this specific instance. That is a
10 category I believe that the legislature should be allowed
11 to designate as an offense -- call it homicide or call it
12 murder which ever you call it -- and should be allowed to
13 say if you commit a homicide by any of these means, then
14 you have committed the crime of homicide.

15 QUESTION: Well, what's -- what's the standard
16 that you using in order to answer Justice Scalia's
17 question in which you said that the hypothetical statute
18 he put of a generic felony statute has a due process
19 problem? What is this standard you have to meet in order
20 to be consistent with due process?

21 MR. FORD: You would have to look at the way
22 this statute is written and determine whether or not the
23 jury is making the determination of the crime that is
24 charged in that case, as opposed to --

25 QUESTION: Well, but the crime is the one

1 Justice Scalia put. It's -- it is the crime of being a
2 dangerous person. And you can do it by robbing a bank,
3 committing arson, or reckless driving.

4 MR. FORD: If you define it that way, then
5 you're beyond -- I foresee the problem there as -- what
6 you're doing is you're giving up the jury's -- the
7 defendant's right to a jury trial and giving it over to
8 the judge merely because the jury is deciding, okay, he
9 did something wrong. Three can find it this way, and six
10 can find it that way, and three the other way.

11 QUESTION: Well, that's -- that's the argument
12 in this case.

13 MR. FORD: I disagree, because in this case --

14 QUESTION: What's the difference in the two
15 cases, and what's the standard you use to determine that
16 -- that one is valid and the other is invalid?

17 MR. FORD: The line that I would draw would be
18 if it falls within one of the traditional type of crimes,
19 then it would be all right for the legislature to say, you
20 have committed a homicide. But they can't throw in and
21 say that you will be guilty of -- we will find you under
22 the law guilty of a homicide if you commit speeding in an
23 automobile. That's without --

24 QUESTION: Well, would you say there has to be a
25 close conceptual mens rea between the acts that are

1 grouped in this same statute?

2 MR. FORD: That has been one of the factors that
3 has been considered in classifying crimes throughout
4 history. Yes, the --

5 QUESTION: But you don't think that has anything
6 to do with due process analysis?

7 MR. FORD: Oh, it -- due process is certainly
8 involved in that, yes. Due process under the reasonable
9 doubt statute would be -- or under the reasonable doubt
10 standard of proof would be involved in that.

11 However, it brings us back to this crime when
12 you classify it under a murder. We're very, very narrow
13 in the traditional category of crimes now. We're saying
14 that you can commit murder. The legislature has said you
15 can commit murder by poison, or torture, or lying in wait,
16 premeditation, or during the commission of any of these
17 felonies. That has -- is something the legislature can
18 say. That is something -- there is no constitutional bar
19 to the legislature making a single statute and putting --

20 QUESTION: Well, Mr. Ford, suppose that Arizona
21 did have a third valid and they want -- they want the jury
22 to say what the verdict is. And it turns out that six
23 jurors thought -- voted on premeditated murder and six on
24 felony murder. Would -- would the judge then enter a
25 verdict of guilty?

1 MR. FORD: If -- if they had -- if they came
2 back with separate verdicts itself, yes, under the Arizona
3 statute.

4 QUESTION: Six and six?

5 MR. FORD: We're talking about the way -- the
6 manner in which the murder was committed as opposed to
7 whether a murder was committed.

8 QUESTION: So, so -- so you're -- you're quite
9 content with the assumption that six on one and six on the
10 other would still produce a guilty verdict
11 constitutionally?

12 MR. FORD: If six jurors found, yes, that there
13 was -- that he killed by premeditation and six found that
14 he commit -- that he killed during the commission of a
15 felony, there's no problem under that. There's no
16 constitutional bar to the legislature defining such a
17 crime. Those are merely different ways.

18 QUESTION: Because -- and you would say the
19 State law rule of unanimity is satisfied, because there's
20 12 people who voted for first degree murder?

21 MR. FORD: Because 12 people voted for the
22 offense. The focus on a murder crime is on the killing
23 and not on how it was committed. As --

24 QUESTION: In effect, you're -- you're saying
25 then that if there's a 6-6 split on how it's committed, we

1 don't have a due process problem keyed to reasonable
2 doubt? We do not have to say, as a matter of law, you
3 can't have reasonable -- you can't have a finding beyond a
4 reasonable doubt even though there's a -- there's a split
5 6 to 6.

6 But if we got a greater number of fractioned
7 possibilities -- if we maybe got three-three-three, it
8 would be an implication for reasonable doubt. Is that
9 what you're saying?

10 MR. FORD: No, no. If I said that or implied
11 that, I misspoke.

12 QUESTION: Well, I guess then -- let me if I may
13 just ask you one other question, and that is when -- when
14 you were -- when were answering Justice Kennedy's
15 question, he said, well, what is the due process
16 implication that bothers you in Justice Scalia's
17 hypothesis in which there might be, you know, 30 ways to
18 commit the generic felony. And I thought you said that
19 the due process concern that you had was somehow keyed to
20 the concept of reasonable doubt. Maybe I misunderstood
21 you there.

22 MR. FORD: Due process would be, under Winship,
23 keyed to reasonable doubt. But I was -- trying to answer
24 Justice Kennedy's question was as to a generic crime of a
25 felony -- I believe it was originally --

1 QUESTION: And -- and weren't you saying -- I
2 guess I misunderstood you -- weren't you in effect saying
3 that in -- in a system in which there might be 12
4 different theories, one for each juror about how the
5 generic felony had been committed, the requirement of
6 proof beyond a reasonable doubt would not be satisfied.
7 Wasn't that what you were in effect saying?

8 MR. FORD: I was saying that there would not be
9 a reasonable doubt question if you're talking about a
10 category of crimes such as, in this case, the way it's
11 defined in Arizona, of murder. You're talking --

12 QUESTION: Okay, why is that so when there would
13 be a question about it on Justice Scalia's hypothesis in
14 which we might have 12 different theories within the jury
15 about how the crime was committed?

16 MR. FORD: As I understood Justice Scalia's
17 question, it spoke to the fact that we have several -- we
18 just designate one crime as being a felony, and that could
19 include from homicide all the way down to traffic --

20 QUESTION: Right, and that means that among 12
21 jurors -- in theory 12 jurors might come to 12 different
22 views about how -- one juror might say, well, you know,
23 this fellow robbed. Another one might say, no, he simply
24 received stolen property. And a third might say he was
25 reckless driving and so on. I thought -- I thought that

1 possibility was what implicated the reasonable doubt
2 concern that you had raised.

3 MR. FORD: I -- I do foresee the problem there,
4 when you start crossing the lines between categories of
5 crimes.

6 QUESTION: Okay, and you're now saying that when
7 there are only two possibilities, so that the worst that
8 we might have would be six jurors feeling one method, six
9 another. That does not have the same implications for the
10 reasonable doubt standard.

11 MR. FORD: I'm saying that where it falls under
12 a certain type category of crime that you wouldn't have
13 the reasonable doubt problem. If you only have two
14 theories, such as murder and reckless driving, then I
15 think that you would have a problem, because what you're
16 doing is your taking away from the jury that decision to
17 make reasonable doubt and you're giving it to the judge.
18 And you're talking about a preponderance of the evidence
19 standard.

20 QUESTION: (Inaudible) --

21 QUESTION: I didn't understand -- I understood
22 you to ask -- (inaudible) I misunderstood your answer. I
23 thought you -- you overtly appealed to tradition which is
24 okay with me. I mean, I'm big on tradition. But I
25 thought you basically said that my generic statute is no

1 good, because we've just never done things that way. And
2 you say we've always done it this way for first degree
3 murder. And I must say I have to take your word for it.
4 I don't recall any lengthy discussion in your brief about
5 how common this practice is in other States. Is it -- has
6 it been done this way for a long time? Is it generally
7 done this way in other States?

8 MR. FORD: You mean as a generic felony or as a
9 --

10 QUESTION: No, no, no, no, no. Not the generic
11 felony. First degree murder, which can include either
12 felony murder or -- or -- or intent.

13 MR. FORD: That's -- in almost all States,
14 including the Federal Government, murder is defined.
15 Federal statute, in fact, is almost identical to the
16 Arizona statute.

17 QUESTION: And this could happen, you assert, in
18 any State? The same conviction could possibly come in
19 with a 6-6 split on the jury? Six thinking that a felony
20 murder had been committed and six thinking there was --
21 there was intent to kill -- premeditated intent.

22 MR. FORD: Absolutely.

23 QUESTION: Yeah, but the statutes may be that
24 way, but how about the practice of submitting separate
25 verdict forms? Do you think that's done everywhere?

1 MR. FORD: With the court -- the trial court
2 actually submits the different forms? They are a -- they
3 have done that in some cases in Arizona, and the practical
4 effect --

5 QUESTION: No, and your supreme court even says
6 it's a good idea to do it, doesn't it?

7 MR. FORD: For a different reason than what
8 we're talking about here.

9 QUESTION: Well, nevertheless it says go ahead
10 and do it.

11 MR. FORD: It has suggested --

12 QUESTION: What about other jurisdictions? What
13 about in the Federal practice?

14 MR. FORD: I'm unaware of it being done in the
15 Federal system or any other system. To carry on with that
16 thought, the reason that the Arizona Supreme Court is
17 doing that is so that what it's talking about is the
18 punishment. It has a better view of what is going to
19 happen, and it specifically states that in Smith and the
20 other -- and the other case that we're -- that happened
21 here. So that the judge -- the sentencing judge and at
22 the reviewing court has a better idea of how the jury
23 concluded this, so that the trial judge can make the
24 decision whether or not this individual was the one that
25 either killed or intended to kill or --

1 QUESTION: And deserves the death penalty.

2 MR. FORD: That's the death penalty exclusively.
3 Yes, it is.

4 QUESTION: May I just be sure we don't have a
5 dispute about one rather fundamental thing? As I
6 understand it in the premeditated murder, there's the
7 element of the killing, the element of malice which can
8 proved by the use of the weapon, and thirdly, there's
9 premeditation. And that in the other theory, all that's
10 necessary is to prove that there was robbery and a
11 killing. And there's no requirement of premeditation. Is
12 that correct?

13 MR. FORD: That is correct to a point. First,
14 it presumes that there's two different offenses, which
15 there aren't. But --

16 QUESTION: Well, no, that are two different ways
17 of proving the same offense, and --

18 MR. FORD: Right, and if you prove first degree
19 murder and --

20 QUESTION: What I'm really asking is can you
21 prove the offense at issue in this case by proving robbery
22 and that a death occurred in the course of the robbery
23 without proving that the defendant had any intent to kill?

24 MR. FORD: Yes.

25 QUESTION: Well, I just wanted to be sure.

1 MR. FORD: The statute so reads that because
2 we're -- what we're doing in all felony murder situations
3 -- you're transferring the specific intent from the felony
4 to satisfy the premeditation issue which all comes down --
5 that's why they're satisfied in that way.

6 QUESTION: But you may not be able to impose the
7 death penalty without proof of that element -- without
8 proof of intent.

9 MR. FORD: Without -- yes, that's correct.

10 QUESTION: Let me -- let me just get the
11 terminology right. The common element is what?
12 Premeditation? No.

13 MR. FORD: For first degree -- for murder?

14 QUESTION: What is the common element for first
15 degree murder?

16 MR. FORD: There's killing with malice of
17 forethought.

18 QUESTION: It's the -- it's the killing with
19 malice?

20 MR. FORD: That's the way the statute was
21 defined at the time --

22 QUESTION: The malice may be supplied by
23 premeditation or it may be supplied by the intent to
24 commit the felony?

25 MR. FORD: Either way. It can be express or

1 implied, as it's stated in the statute.

2 So it is my position in this case that the
3 Arizona legislature can constitutionally create a statute
4 that is -- shows one offense that can be committed in
5 several different ways and the jury is not
6 constitutionally required to make a distinction between
7 the ways it happened.

8 QUESTION: May I just -- because I don't think
9 this makes a difference in the end result, but I just want
10 to get my thinking straightened out. In this particular
11 case and the judge imposed the death penalty, it is
12 possible, is it not, that the basis for his decision that
13 Inman and Tison were satisfied was his own finding of
14 fact, because he couldn't be sure whether the jury had
15 found the kind of intent that Tison required?

16 MR. FORD: In Arizona the trial court is
17 required to make the finding during the sentencing phase,
18 yes.

19 QUESTION: Right.

20 MR. FORD: Independent of what the jury may have
21 found.

22 QUESTION: Would he have been permitted to do
23 that if the jury had only been instructed on felony murder
24 and in effect -- or had two separate counts and rejected
25 the premeditated and found felony, would he still be

1 permitted under Arizona law to impose the death penalty?

2 MR. FORD: Yes, he would have been. Under the
3 facts, the judge has to make that decision, regardless of
4 how the jury returns the verdict.

5 With respect to the second issue of lesser
6 included offense, the petitioner is asking this Court to
7 adopt a theory that it has already rejected, which is
8 called the inherent relationship theory. She has asked
9 the Court to say that where some fact during the trial
10 establishes the existence of a crime other than that crime
11 charged that the jury must have that option to return that
12 verdict as opposed to the verdict that's charged merely
13 because the jury may decide it wants to see another -- it
14 doesn't want to impose the capital crime.

15 That is not the case in Arizona. Under Arizona
16 law robbery is not a lesser included offense of first
17 degree murder. It's not a lesser included offense of
18 felony murder. It is a separate, independent crime that
19 can be charged separately, prosecuted separately,
20 convicted and punished independently. That makes it an
21 independent, not a lesser included offense.

22 This Court and Arizona have both adopted the
23 statutory elements test, which is to analyze the statute
24 of both offenses and determine whether or not the elements
25 are the same with the exception of one element. In this

1 case, can murder be committed without necessarily
2 committing robbery. And of course you --

3 QUESTION: In what case do you say this Court
4 established that rule?

5 MR. FORD: It's a matter of procedure and
6 established that in Schmuck v. United States, Your Honor,
7 1989 case out of this Court. It was for that express --
8 it didn't limit it to, but it said that it would be for
9 purposes of Rule 31, the rules of procedure, that the
10 inherent relationship test is not the test to apply to
11 determine whether or not it's a lesser included offense.

12 That's the same test that is used in Arizona.
13 And because of that it is not a lesser included offense.
14 And this Court in Spaziano v. Florida, for example, said
15 that if there is no lesser included offense, if it does
16 not exist, then it should not be instructed on it.

17 I would also, in passing, state that Beck is
18 limited, in my opinion, to capital cases. It was never
19 intended to extend beyond a capital case to give the jury
20 the option of finding a nonhomicide issue. It was for the
21 purpose -- what Beck said was that the state cannot pass a
22 law that would prohibit a jury from considering an
23 existing lesser included offense.

24 QUESTION: What is second degree murder that --
25 there was an instruction on second degree murder?

1 MR. FORD: There was in this case, Your Honor.

2 QUESTION: What is that?

3 MR. FORD: Second degree murder is any type of
4 murder that is not first degree. In other words, if
5 there's no premeditation, no willfulness, no deliberation,
6 no felony --

7 QUESTION: Well, what -- so to get to that, you
8 would have to say no felony murder -- no premeditated
9 murder, no felony murder -- but murder.

10 MR. FORD: To get a second degree murder? Under
11 the way the jury was instructed in this case that was not
12 matter -- it is a matter of law in Arizona. But under the
13 way that they were instructed -- I'd refer the Court to
14 page 26 and 27 of the joint appendix. They were
15 instructed merely if you have a doubt in this case as to
16 first degree murder, then you may find the defendant
17 guilty of second degree murder. The court did not
18 distinguish between if you find him guilty of premeditated
19 murder, you may. But you can't if you find him of felony
20 murder.

21 So practically speaking, this jury was not faced
22 with that problem.

23 QUESTION: Well, they -- but they would have to
24 find him not guilty of either premeditated or felony
25 murder in order to hold him guilty -- to let him off with

1 second degree murder?

2 MR. FORD: Right. They would find him as the
3 court --

4 QUESTION: As a matter of law under Arizona law
5 and under those instructions.

6 MR. FORD: Under the -- the instructions didn't
7 exactly follow the law. That's right.

8 QUESTION: Well, they -- yeah, but the
9 instructions said if you don't find him guilty of first
10 degree murder, you may find him guilty of second degree
11 murder.

12 MR. FORD: That's right.

13 QUESTION: Well, to find him not guilty of first
14 degree murder, you would have to say he wasn't -- they
15 weren't guilty of either premeditated or felony murder.

16 MR. FORD: Under the instructions, that's
17 exactly what happened -- would have happened. The jury
18 had the option in this case of finding the defendant
19 guilty of first degree murder, a capital offense, or
20 guilty of second degree murder, a noncapital offense.

21 QUESTION: What's the penalty for second degree
22 murder?

23 MR. FORD: At that time I believe the capital --
24 the top end was 15 years -- either 10 or 15 years in
25 Arizona. I believe the bottom end was 5.

1 QUESTION: 5 to 15?

2 MR. FORD: 5 to 15.

3 QUESTION: What was the penalty for robbery?
4 The felony of robbery?

5 MR. FORD: I'm not sure of that, Your Honor. It
6 would be in the same type of category. They're both -- if
7 it was an armed robbery, it would have occurred -- it
8 would have been in the -- in the same -- felony -- second
9 class felony. It would have been approximately the same.

10 QUESTION: May I ask this about second degree
11 murder? What if -- does he have to have done the killing
12 to be guilty of second degree murder? Now, supposing the
13 facts showed that he -- he did not kill and had no intent
14 to kill, but he was a participant in the robbery. And he
15 intended to rob and there was a death in the course of it,
16 but an accomplice did the killing. And he'd be guilty of
17 felony murder. Would he also be guilty of second degree
18 murder?

19 MR. FORD: No, he could not be. There is no
20 second degree felony murder in Arizona.

21 MR. FORD: So that if the jury's -- if the --
22 the critical evidence in this case was the -- evidence
23 that he had the property an the proceeds of the robbery
24 and all. If they believe that he was a robber, they could
25 not have found him guilty of second degree murder?

1 MR. FORD: If they found that he had --

2 QUESTION: I mean, you had to follow the law,
3 that they could not have done that consistently with the
4 law.

5 MR. FORD: Yes. If they -- if they had been
6 instructed that if you find that he is guilty of robbery,
7 then you cannot find him guilty of murder.

8 QUESTION: Well, no, I'm just saying -- forget
9 what these instructions -- as a matter of Arizona law --

10 MR. FORD: Okay.

11 QUESTION: -- if the jury was totally convinced
12 and properly instructed that he did -- had nothing to do
13 with the killing except his participation in the robbery,
14 but he was guilty of the robbery, could they -- and
15 consistently with Arizona law, find him guilty of a second
16 degree murder?

17 MR. FORD: No.

18 QUESTION: So your position is that if you have
19 an indictment in which you'd alleged just the felony
20 murder aspect of the Arizona statute, there is no
21 requirement for any lesser included offense under Beck?

22 MR. FORD: That's correct. Under Beck, under
23 Arizona law, there is no allowable -- there is no lesser
24 included offense.

25 QUESTION: Well, if they -- if there was proof

1 in the question of robbery -- of course in a lot of felony
2 murders I suppose you can prove who killed him?

3 MR. FORD: That's correct.

4 QUESTION: And if there's proof that -- of the
5 -- if the jury believes that there was not only a robbery,
6 but this defendant killed him, would they give him second
7 degree murder?

8 MR. FORD: Not under Arizona law, no.

9 QUESTION: Why not?

10 MR. FORD: That the Arizona --

11 QUESTION: That's the way it is?

12 MR. FORD: -- court has decided that there is no
13 lesser included offense of -- for felony murder that
14 includes second -- second degree or the lesser -- any
15 homicide. There is no second degree murder as a lesser of
16 actually murder.

17 QUESTION: So it's only a second degree to
18 premeditated?

19 MR. FORD: Under the Arizona law, that's
20 correct.

21 QUESTION: Thank you, Mr. Ford.

22 MR. FORD: Thank you.

23 QUESTION: Ms. Young, do you have rebuttal? You
24 have 1 minute remaining.

25 REBUTTAL ARGUMENT OF DENISE I. YOUNG

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ON BEHALF OF THE PETITIONER

MS. YOUNG: Thank you, Mr. Chief Justice.

That's exactly our point on the Beck issue, that this jury had no rational option if they did have a rational doubt about one of the elements of felony murder. And the supreme court, when it reviewed this issue, and it set forth in the joint appendix, found that the evidence would have supported a verdict for robbery. But that this jury was not given that option to return that verdict because of the preclusion rule.

I also want to very quickly state that, contrary to what Mr. Ford said, the prosecutor in this trial very clearly argued the different factual routes, and we have set out that portion of the argument in our joint appendix at page 6 and 7.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Young.
The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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EDWARD HAROLD SCHAD, JR., Petitioner v. ARIZONA NO. 90-5551

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BY *Robert H. Hester*
(REPORTER)

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