OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, Petitioner V.

FRANK DENNIS FELIX

CASE NO: 90-1599

PLACE: Washington, D.C.

DATE: January 14, 1992

PAGES: 1 thru 46

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, :

Petitioner :

v. : No. 90-1599

FRANK DENNIS FELIX :

Washington, D.C.

Tuesday, January 14, 1992

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

APPEARANCES:

WILLIAM C. BRYSON, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

SCOTT M. ANDERSON, ESQ., Dallas, Texas; on behalf of the Respondent.

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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in 90-1599, United States v. Frank Dennis Felix. Mr. Bryson.

ORAL ARGUMENT OF WILLIAM C. BRYSON

ON BEHALF OF THE PETITIONER

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

This case comes to the Court on writ of certiorari to the United States Court of Appeals for the Tenth Circuit. The facts of the case are fairly simple and not that unusual. I'll review them briefly.

The case involves a methamphetamine manufacturing operation that extended over a 4-month period over the summer of 1987. The operation had essentially two stages. The first stage was the portion of the operation in which the respondent and his co-conspirators sought to and ultimately succeeded in building a laboratory to manufacture methamphetamine in Beggs, Oklahoma, a small town south of Tulsa.

They manufactured a large amount of methamphetamine at that lab, using chemicals which they had procured from a chemist in Tulsa. Unfortunately for them, the chemist in Tulsa was working as an informant for

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the DEA, and his tipping off the DEA resulted in a raid on the lab and the arrest of several of the co-conspirators and nearly resulted in the arrest of respondent Felix. That raid occurred July 13, 1987, and it terminated that enterprise for manufacturing methamphetamine at that time.

Now, undeterred by this turn of events, respondent went back to the same chemist, not realizing that he was working with the DEA and attempted to procure some more chemicals to start a new lab, and in fact ordered in late August of 1987 a whole set of the chemicals that would be necessary and asked that they be delivered in Missouri. They were, and at the time of the delivery, the chemist having once again tipped off the DEA, Mr. Felix was arrested in Missouri.

Now, he was prosecuted very quickly in Missouri for the crime of attempt to manufacture methamphetamine. In the course of that trial, the Missouri trial, the prosecution introduced evidence of the prior operation in Beggs, Oklahoma, in which respondent had in fact manufactured methamphetamine and had set up the lab along with his co-conspirators and introduced that evidence for the purpose of showing that the defendant had the intent to in fact manufacture methamphetamine with these chemicals that he had assembled and ordered and in fact had the capacity to do so.

But what's important for our purposes is it was that evidence of the Beggs, Oklahoma, operation was introduced only for purposes of showing his intent. It wasn't introduced as part of a separate prosecution for the Beggs conduct. In other words, he was being prosecuted in the Missouri case for and only for his activities in late August of 1987, the activities that involved the attempt to manufacture methamphetamine.

QUESTION: But intent was an essential element of that offense for which he was being prosecuted --

MR. BRYSON: That's correct. That's correct.

QUESTION: And this was shown to prove the intent.

MR. BRYSON: This was one of the pieces of evidence that was introduced to prove the intent. That's exactly right.

Now, subsequently he was prosecuted -- the respondent was prosecuted with several of his co-conspirators in Oklahoma for activities surrounding the Beggs, Oklahoma, operation. First, he was prosecuted -- and this was one prosecution which involved a number of counts, but some of the counts, the substantive counts, involved the actual Beggs lab, and those counts ran up to and included July 13th, 1987, but extended no farther.

He was also charged with a conspiracy which

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extended from May 1, 1987, through the Beggs period and into the period of his activities in Missouri through August 31st. The district court held that -- over his objection that this constituted double jeopardy because he had previously been prosecuted for attempt in Missouri, the district court said no, you're being prosecuted for different crimes, separate offenses, and therefore there's no double jeopardy problem.

The Court of Appeals for the Tenth Circuit reversed, holding, in reliance on this Court's decision in Grady against Corbin, that in fact the prior prosecution for attempt, based on the late August activities in Missouri, barred a prosecution for both substantive offenses relating to the Beggs operation and also for the conspiracy throughout the entire summer.

The court's rationale was that this was successive prosecution for the same conduct. This was a phrase that the court used again and again. The court focused on the fact that in the Missouri case the evidence of the Beggs operation had been introduced to prove intent, and in the Oklahoma case evidence of the Missouri transaction had been introduced as part of the proof of the conspiracy, but because the evidence overlapped, the court regarded that as sufficient to constitute successive prosecution for the same conduct.

QUESTION: Under a strict application of Grady would the case have been -- would the prosecution have been invalid if in the indictment, in the charging papers for the Missouri attempt, they had alleged the Beggs operation?

MR. BRYSON: No. No, Your Honor. An allegation of simply factual assertions in the indictment that could have been thrown in would have been surplusage, as long as he was not in jeopardy for the Beggs operation. In other words, if they had said in the Missouri indictment, if they had had a charge which related to the Beggs operation, yes, he would have been in jeopardy. He could have been separately convicted for that. Or, if they had treated the Beggs operation as part, let's say, of an overall conspiracy.

QUESTION: Well, suppose in the attempted prosecution they had treated the Beggs operation as the exclusive evidence of the intent -- it's a little bit hard to work with the hypothetical for a point.

MR. BRYSON: I understand.

QUESTION: Would that have made a difference? Because intent is an element of the attempt crime.

MR. BRYSON: It is an element, but even if the Beggs evidence had been the only evidence that had been available to the prosecution to prove the intent in the

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Missouri case -- it's a little hard to imagine that, because the intent could be inferred from the activities themselves, almost certainly. But in any event, supposing that that were the only evidence, still what you're talking about is the use of evidence of conduct to prove another offense. You're not talking about an offense that -- for which you are being prosecuted. That is the key, we think, to the double jeopardy --

QUESTION: Well, but you're proving intent.

MR. BRYSON: You are.

QUESTION: And the way Grady reads, as I understand it, it takes elements of the crime in a not a very academic or formalistic way, and intent is really more of an element than -- I really think than what we are dealing with in Grady.

MR. BRYSON: Well, you are definitely proving intent, but what's important is you are not -- you're not in effect reprosecuting him for something for which he has been prosecuted before. In other words, when the Missouri -- when the Oklahoma case came up you weren't reprosecuting him for an offense for which he was in jeopardy in Missouri.

QUESTION: Mr. Bryson --

QUESTION: Here we have an attempt and a substantive offense.

MR. BRYSON: That's right.

QUESTION: The two crimes involved in Grady against Corbin were not of that nature, were they?

MR. BRYSON: No.

QUESTION: So that Grady against Corbin's holding does not apply to this situation.

MR. BRYSON: No, we think the holding does not apply. The problem, of course, is in the language that Grady used, and the question --

QUESTION: I take it that's dicta, then, if it's not the holding.

MR. BRYSON: It's not the holding. That's correct.

QUESTION: Well, the Court thought it was the holding, Mr. Bryson, didn't it?

QUESTION: You had a dissent in the Tenth Circuit, did you not?

MR. BRYSON: There was a dissent by Judge Anderson, and we believe that Judge Anderson's analysis of Grady against Corbin is very insightful and we think that his analysis is the correct approach to the application of Grady in this case.

QUESTION: Mr. Bryson, here's what Grady thought it was holding, anyway. There are very few cases that have such a clear, concise expression of its holding: We

hold -- we hold -- that the double jeopardy clause bars a subsequent prosecution if to establish an essential element of an offense charged in that prosecution -- the subsequent prosecution -- the Government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

That squarely fits this case. It couldn't possibly be more clear.

MR. BRYSON: I don't think, Your Honor, that it does squarely fit this case. It could be -- you could read that language broadly enough -- I think it would be an extremely broad reading of the language. You could read it broadly enough to cover this case, but I think if you do so then you would construe Grady against Corbin as having overruled a hundred years of double jeopardy law, and I don't think that Grady against Corbin --

QUESTION: That's what the dissent in the case said, and the majority did not deny that it was doing it.

MR. BRYSON: Well, I think that the majority did --

QUESTION: They had no response to that.

MR. BRYSON: The majority did deny it to this extent, Your Honor. I think what the majority said is we are not doing anything radical in this case, we are simply applying the principles of Illinois against Vitale and

Harris against Oklahoma, which are essentially talking about a kind of lesser included offense law.

What Grady does -- and I think this language is consistent with it. What Grady does, in our view, and what we urge upon this Court as the proper construction of Grady, if the Court approaches Grady with the intent to not have Grady overrule all of the prior cases involving conspiracy and substantive offenses with respect to successive prosecutions -- what we urge this Court to construe Grady to mean is that this language, conduct constituting an offense that is used to establish an element of a later offense, is simply a way of talking about a lesser included offense.

In other words, the lesser offense, the first offense prosecuted in the case of Grady, has to be proved -- reproved entirely, and it will have to establish -- it will have to constitute the entire element of a later offense. Now --

QUESTION: Mr. Bryson, do you think a Court can convert dicta into a holding by simply saying in front of the dicta, we hold?

MR. BRYSON: Well, I think not, Your Honor. I think that we hold may not be an accurate description of what the actual holding is, although obviously the more clearly the Court states what its rule is I think the more

it imposes on the lower court certainly the obligation to attempt to accommodate that rule to their decisions. And that has been, I think, one source of confusion among the lower courts, and I have to concede that there's been a lot of confusion about exactly what that formulation means. And this case is an example of it.

I think, to finish my point in response to Justice Scalia, the -- what's important, I think, about the way the Court -- the majority viewed Grady is that while in the dissenting opinion the point was made that Grady could be read much more broadly, I think even the dissenting opinion said that that wasn't a necessary reading, although the dissent anticipated that an argument would be made, and here we are, that the argument would be made that Grady should apply virtually to constitute a same transaction test.

But the majority did not say that. The majority said, in effect, we are simply applying the principles of Illinois against Vitale and Oklahoma -- Harris against Oklahoma, which again in our view is a way of signaling that what the majority was trying to do is to say this is really lesser included offense law.

In any event, we would --

QUESTION: Mr. Bryson, maybe we can limit it that way, but I don't believe that's what the majority was

saying. I don't know how you can read that description --

QUESTION: Well, as a member of the majority I'd just like to suggest that we often do not take the dissent's interpretation of a majority opinion. The dissent will often overstate majority rule to make the dissent more persuasive. It happens all the time.

May I just ask you, do you agree with Judge Newman's interpretation of Grady in the Second Circuit?

MR. BRYSON: No, Your Honor. Judge Newman explicitly construes the second element, if you will, of the Grady test in a way that's different from the language of Grady. He says he feels that it's necessary to do so, but he construes conduct constituting an offense not to mean conduct constituting the whole offense, this concept of lesser-included offense for which we're contending.

He says you have to read that to mean conduct constituting an element of an offense. That, it seems to us, is where Judge Newman has expanded Grady and in a way that is inconsistent with the language, and we would say with what Grady is really trying to get at.

Again, if I can --

QUESTION: I take it you say that the language Justice Scalia read to you as the holding is beyond what Vitale suggested.

MR. BRYSON: We think so, Your Honor. We think

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that the language can be squared with Vitale, because -- but it isn't obvious that from reading the language that it incorporates only what Vitale says.

The problem is, the language is not as clear, I think, as the language that appears in cases like Harris and Vitale, on which Grady relied and which we think Grady was attempting, in a sense, to codify, but the language can be read more broadly.

QUESTION: In this case, the evidence that was used in the second prosecution was used in the first prosecution but that evidence was about conduct for which he was not convicted.

MR. BRYSON: Exactly, and that states in one sentence our submission in this case.

QUESTION: Well, that was -- that's Vitale.

MR. BRYSON: Well --

QUESTION: I mean, it's -- Vitale says that if the evidence in the second prosecution related to conduct for which he had been convicted in the first prosecution --

MR. BRYSON: That's right. Well -- that's right.

Now, in this case, this case, we submit, before Grady would be an easy case, because the principles governing this case, the substantive and conspiracy

prosecutions in this case were very well established and they were simply this: that conspiracy and related substantive offenses are always different. They are separate offenses; they are not the same offense for purposes of the double jeopardy clause.

And two, that substantive offenses that occur at separate times and places are separate offenses; they are not the same offense. And this case is a perfect example of a case in which the substantive offenses occur at separate times.

The substantive offenses related to Beggs occurred in Oklahoma on July 13th and previously; the substantive offense related to Missouri occurred in Missouri in late August.

QUESTION: Well, I think that's a pretty easy argument in regard to the substantive offenses, and the more difficult one relates to the conspiracy charge, of course, as affected by the proof in the attempt trial in Missouri.

MR. BRYSON: I think it is more difficult, but still, I think the point that I'd like to emphasize is that there is a hundred years of law from this Court and from the lower courts in which the Court has emphasized that conspiracy and the related object substantive offenses are separate offenses for double jeopardy

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purposes, and we don't think that Grady against Corbin intended to change that. So that although the analysis in dealing with the language of Grady is more complicated with respect to the conspiracy offense, we don't think that the legal point is more -- is closer.

It's more difficult, because it is harder to deal with the language we think, but the legal point is still quite clear that a conspiracy and its related substantive offense are separate offenses for double jeopardy purposes.

QUESTION: Mr. Bryson, do you agree in every detail with the dissent below?

MR. BRYSON: I think there are a couple of minor respects in which we would disagree, but I think they fall into the category of quibbles. The dissent, just to give you an example -- and this is -- I don't want to go into the quibbles in great detail, but the dissent at one point states that there is no evidence with respect to the Missouri transaction that suggests any continuing conspiratorial activity.

In fact, there is a little bit of evidence -- not a lot, but a little bit of evidence that does suggest that the conspiracy was ongoing. One of the conspirators, McNeil, had a telephone conversation with the DEA informant which suggested that McNeil was still in cahoots

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with Felix. So there are a few minor respects in which we would part company, but basically --

QUESTION: If we adopted the rationale as you propose it here I take it that would not disturb the holding of Calderone.

MR. BRYSON: Well, I think that it would certainly require the Court to reanalyze in Calderone, and I would submit that it would change the result. And the reason I think it would change the result is because in Calderone we submit that the defendants were never in jeopardy for the subsequent conspiracy at the time they were prosecuted for the first, and that's the gist of what the district court said in that case.

It's a little bit of an unusual case because of the way the district court disposed of the first case in not letting the case go to the jury because it didn't involve the same conspiracy. We then reprosecuted for what we had been told was not at issue in the first case and the court of appeals said even so the second prosecution is barred by the first. We would submit that Calderone would be decided differently if you accept the analysis that we're suggesting. Certainly the analysis would be different.

Now, I think it's important in talking about what exactly it is that Grady has done to compare it with

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Harris and the Felix case as well, and to see what is really going on in this area, what I think the Court was really trying to do in Grady was to simply extend the concept of lesser-included offenses to cases where your greater offense isn't just -- is not just -- where it's not just possible that hypothetically the prosecution could prove the greater offense without proving the lesser, but to include as lesser-included offenses cases where the greater offense would necessarily result in the proof of the lesser. And let me give concrete examples.

Harris. That was a case in which the felony murder that was proved first was felony murder based on a robbery. Now, of course, the argument could be made that the felony murder -- that robbery is not a lesser-included offense of felony murder, because of course the felony murder could have been premised on a rape or an arson, but in that particular case the felony murder was clearly premised on a robbery, and for all practical purposes -- not theoretically, but for all practical purposes, then -- the felony murder was a greater offense and the robbery was a lesser-included offense. That is the rationale, I think, of the Court's judgment in Harris.

The same thing --

QUESTION: In effect, he was being tried again for a robbery.

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MR. BRYSON: That is what the court concluded, that's right, because --

QUESTION: And you agree with that.

MR. BRYSON: Well, I think --

QUESTION: Do you think so, or not?

MR. BRYSON: I think that -- we don't challenge Harris. I think frankly if you went back to first principles, Your Honor -- it's not necessary to challenge Harris in this case. But if you went back to first principles I think a strong argument could be made, as we argued in the Whalen case unsuccessfully, that felony murder is really not just an enhanced version of robbery, or whatever the underlying felony is, but it is a form of murder.

It is a way of -- the felony is a way of establishing the state of mind for the murder, so that you could view them as separate offenses. I don't think it's necessary for this Court to address that question -- the validity --

QUESTION: The first principles you refer to are basically the rule as stated in Blockburger, I guess.

MR. BRYSON: Yes, I think so, and at least as applied to a single transaction case.

QUESTION: What was he being tried again for in Grady itself?

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MR. BRYSON: Well, the theory was that he was being tried again for the two traffic infractions that he had previously pleaded guilty to -- drunk while -- driving while drunk and crossing the median line, because those had to be proved, at least by hypothesis.

QUESTION: Why did they have to be proved? I mean, for felony murder you had to prove a felony. You had to prove some act, and you say, well, the only one really at issue was the burglary, but I don't see why you, in order to be held to -- what was it, a manslaughter charge?

MR. BRYSON: Right, manslaughter and assault.

QUESTION: Why would you have to have shown a traffic violation?

MR. BRYSON: Well, the court -- the State announced that that was -- those were two of the three ways it was going to attempt to establish the --

QUESTION: So it's not a matter of that just at law you would have to --

MR. BRYSON: Well, that's the extension of Grady over Harris, and that was the distinction that, Your Honor, you drew in your dissent, where you characterized Harris as being a case in which the law itself incorporated essentially the elements of the lesser offense without doing so explicitly.

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Grady extended that one step by saying it's enough if, in fact, the prosecution will prove this lesser offense in order to establish an element of the greater, and that's what went on in -- that was what was going on in Grady.

QUESTION: And why isn't that the situation here?

MR. BRYSON: Because here all we're talking about is evidence. In other words, the attempt is neither sufficient nor necessary to establish any element of the conspiracy.

QUESTION: Well, it wasn't sufficient -- or it wasn't -- I just said, it wasn't sufficient or necessary in Grady, either.

MR. BRYSON: It was sufficient, because the act that the State regarded as being sufficient to establish the basis for the negligent conduct of the assault was driving while intoxicated. That's the theory that the court pursued, was that act, that conduct which constituted an offense, was an essential element of the crime of assault or manslaughter and it established that essential element.

QUESTION: And he had already been tried for that.

MR. BRYSON: And he had been tried for that.

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QUESTION: I mean, the evidence that they were going to introduce was criminal conduct for which he had already been tried.

MR. BRYSON: He'd already pleaded guilty to that traffic infraction.

QUESTION: It could well have been necessary, if there was no other way of proving that element of the offense. Not only sufficient, but necessary, because that's the only --

MR. BRYSON: In that case. That was -- by hypothesis, that's the way the court analyzed the case.

QUESTION: So it was sufficient in that sense, you're saying.

QUESTION: Are you saying it has to be necessary, as well as used? It has to be the only way that you can do it?

MR. BRYSON: Well, it has to be the way that the prosecution will do it. It is not necessary in the sense that the prosecution could hypothetically prove the greater offense by some other way.

QUESTION: But they did it that way here. They did it that way here in order to show one of the elements of the later offense, the intent, they chose to do it by showing the prior crime.

MR. BRYSON: Well, they didn't show the prior

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crime, Your Honor; that's the distinction. They showed evidence which was also introduced in the prior case, but they did not come in and say, okay, we are going to prove the crime of attempt, and that crime is an element of the crime of conspiracy, because attempt is not an element of the crime of conspiracy. It is neither enough, nor is it confined to the elements of conspiracy.

In other words, attempt would not establish any element of conspiracy. It doesn't establish an agreement, it doesn't establish that any overt act was in furtherance of an agreement, so it won't do it. It doesn't establish an element, and by the same token, attempt goes farther in one important respect than conspiracy in that it requires proof of a substantial step to achieve the goal.

That isn't required by conspiracy, so you have -- you aren't essentially using the underlying offense to establish an element of the greater. You're simply introducing proof which you happen to have previously introduced to prove a previous prosecution.

QUESTION: Mr. Bryson, can I ask you one question about the conspiracy part of it, because I think we haven't given you enough time on that.

If the -- in the conspiracy case, two of the overt acts, 17 and 18 I think they were, were two of the factual matters that were proved in the first trial.

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MR. BRYSON: Yes.

QUESTION: If they had been the only overt acts alleged, would your position be the same?

MR. BRYSON: Yes, it would.

QUESTION: Okay.

QUESTION: Mr. Bryson, let me, if I may just go back -- can you hear me, by the way?

MR. BRYSON: Sure.

QUESTION: I'm not sure this is working.

Going back to Grady, the proof of the DWI was sufficient to prove an element in the later prosecution in Grady. Is that correct?

MR. BRYSON: That's right.

QUESTION: The reason it was sufficient was that the commission of DWI constituted negligent behavior and therefore that satisfied the negligent element of the homicide.

MR. BRYSON: Well, it -- the Court never talked about that aspect of it. In fact, under New York law DWI does constitute negligent behavior. But I think the way the court --

QUESTION: That's the only basis on which we could say that it was being used to prove an element as opposed to -- or constituting element and as opposed to merely being another evidentiary fact.

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MR. BRYSON: Well, I think that the way the Court viewed it, and one could quarrel with this way of viewing the application of New York law, but I think the way the Court viewed it was, look at what is the actus reis on which the prosecution is premised, and that actus reis is drunk while driving, and that either that act is per se negligence or that we will prove -- in addition to proving that act we will prove that it was done in a negligent fashion.

So it was one element as the Court construed it, and this was consistent, I think, with the way the -- State court had viewed it.

QUESTION: Well, aren't you saying, then, that if the State selects one evidentiary fact as the means to prove an element, that is the equivalent of making that fact the element for purposes of double jeopardy?

MR. BRYSON: I don't think so, Your Honor. I think the State has to actually say that those are elements of the offense and the fact that the evidence -- if I understand your question, that the evidence may be established in a particular way doesn't make something an element of the offense.

Thank you.

QUESTION: Thank you, Mr. Bryson.

Mr. Anderson, we'll hear now from you.

ORAL ARGUMENT OF SCOTT M. ANDERSON

ON BEHALF OF THE RESPONDENT

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

This Court is reluctant to change the constitutional limitations on the conduct of the Federal Government, with good reason.

QUESTION: Why -- what --

MR. ANDERSON: What I meant to say by that, Your Honor, or Mr. Chief Justice, is that the law of double jeopardy has changed slowly, and in recognition to some --

QUESTION: It changed rather dramatically in Grady against Corbin, didn't it?

MR. ANDERSON: It did.

QUESTION: You think that that's an example of the Court being reluctant to change the constitutional law relating to the protection of defendants?

MR. ANDERSON: Yes, sir. I think that Grady v. Corbin represents a direct -- is a direct descendent of the issues raised in Brown v. Ohio, in Harris v. Oklahoma, in Illinois v. Vitale -- and we're talking about cases that occurred 15 years ago today, in 1977, Brown v. Ohio and some of the others. I would say that's a relatively slow change.

Those cases I believe recognize that in the

context of the double jeopardy protection of the Fifth Amendment as applied to successive trials, that a mere statutory interpretation such as Blockburger is insufficient and there must be some conduct or some fact base analysis to go along in order to fully implement that protection.

QUESTION: Would you agree with the Solicitor General when he says that for a hundred years, being considerably longer than 15 years, the -- we have distinguished between substantive offenses and conspiracies -- we regard them as separate?

MR. ANDERSON: I would, Your Honor, except that not -- that is not so in the case of successive prosecutions. I think I have fully briefed that, but I would like to point out that in 1868 Thomas Cooley, Mr. Justice Cooley from the Michigan Supreme Court, wrote a landmark book that was published in 1868 called Constitutional Limitations.

His interpretation of that time, in which he analyzed all of the law back to the beginning from the time of 1791 when the Bill of Rights was enacted, consisted of this, and I quote from the first edition, page 328: Where the legal bar has once attached -- that is, the jeopardy bar -- the Government cannot avoid it by varying the form of the charge in a new accusation. If

the first indictment or information were such that the accused might have been convicted under it on proof of the facts by which the second is sought to be sustained, then the jeopardy which attached on the first must constitute a protection against the trial on the second.

In other words --

QUESTION: You feel that responds to the question about what the cases of this Court held for a hundred years?

MR. ANDERSON: Yes, sir, I do.

QUESTION: You -- well, why -- I mean, I would not --

MR. ANDERSON: I have no quarrel with the Attorney General and the Solicitor's opinion that the cases in this Court authorize in the case of a single trial the conviction for both an attempt and a conspiracy. There's no problem with that. I submit that that is in fact the law.

Where we disagree is what the law says in the context of successive prosecutions, and I believe Grady v. Corbin speaks to that better than any case in the history of this Court.

The Court has expanded constitutional guarantees against successive prosecution by introducing a conduct-based element of analysis into the double jeopardy on

successive prosecutions. Let's see what really happened in this record in the Felix case and what the Government did and why they did it.

The record in the Missouri trial, of which this case is not an appeal, is on file and is of record in this case, now. From the beginning of the prosecution in Missouri the United States Attorney in his opening statement relies heavily on all of the conducts of the Beggs Lab in Oklahoma, and this is at page 14 -- 13 through 19 of the record in the Missouri case.

The first statement out of the box by the United States Attorney at the bottom of page 13 is, and I quote: The story in this case goes back to May -- I think May, early June of 1987. You will learn that the defendant in this case met up with a gentleman named Mr. Roach.

From there he goes on to describe the proof that will be offered by the Government in the Missouri trial, which consists of all of the conduct of all of the co-conspirators which was later tried in the Oklahoma trial.

We would not be before this Court, in my opinion, if the Oklahoma trial had occurred first. There would be no question that, having alleged in the overt elements -- the overt acts in the count 1 of the conspiracy, that those acts were relied on and tried in Oklahoma and would be a bar to the trial in Missouri.

It is an extension of the direct language of Brown v. Ohio that what difference does it make if you try the lesser first or if you try the greater. What significance does it have for double jeopardy law that this case was tried, prosecuted promptly, as the Solicitor has argued in this case?

I want to give you some dates that I consider to be significant in the history of this case. The first date is August 31st, which is alleged in both of the indictments, both the Missouri and the Oklahoma indictment.

The next date is September 15th, 1987. That is the date of the indictment in the Missouri case. The Missouri trial occurred beginning November 30th, 1987. An appeal was filed with the Eighth Circuit.

The next significant date is February 3rd, 1989. On that date, the Eighth Circuit returned its opinion affirming Mr. Felix's conviction in the Eastern District -- or Western District of Missouri.

The next significant date is February 16th, 1989, because that is the date of the Oklahoma indictment. That is 3 weeks -- or 2 -- less than 3 weeks after the court of appeals in St. Louis had placed its stamp of approval on the conviction of Mr. Felix.

The evidence used to prove the conduct in the

two trials varied very little. Through the evidence, through the testimony of four witnesses in both trials against Mr. Felix -- Paul Dean Roach; Carolyn Ruybals, the chemist; George Dwinnells, the cooperating individual; and John Coonce, the head of the DEA in Tulsa -- in the Oklahoma trial every element of every allegation brought against Mr. Felix was proved beyond a reasonable doubt to the jury in the Missouri trial.

If you read the testimony of those four who testified in both trials, there can be no doubt --

QUESTION: Well, Mr. Anderson, in the Missouri indictment I guess the defendant was charged with attempting to manufacture the drug during some dates in August --

MR. ANDERSON: That's correct.

QUESTION: And the prosecutor used similar acts evidence to help prove intent based on what occurred earlier in Missouri at a different period in time. Isn't that right?

MR. ANDERSON: No, ma'am. That is what the Government would have you believe.

QUESTION: As to the substance of it.

MR. ANDERSON: That is the Government's and the Solicitor General's argument in this case. It turns out that on February 16th, 1989, instead of being merely a

cooperating witness, George -- excuse me -- Paul Dean Roach becomes an unindicted co-conspirator in the conspiracy of the case. In the Missouri case he was presented as someone who was going to give you mirror evidence --

QUESTION: I thought we had two separate inquiries here. One relates to the substantive offenses, the attempt offense that was charged in Missouri, and then a second question as to the conspiracy charge in Missouri. Isn't that right? Don't we have two questions to address here?

MR. ANDERSON: The conduct -- the complete conduct which is alleged in the indictment of February 16th, 1989 and the Oklahoma trial, trial number 2, was proven through the witnesses that I pointed out and trial number 1, the Oklahoma trial. I believe it's a red herring to say that the substantive counts are different in some way from the conspiracy count. If we had tried -- if it had been tried all together -- and it was in fact tried all together in Oklahoma.

QUESTION: Well, how -- I mean, Grady doesn't even purport to say that you can't use the same evidence if you're charging an offense in -- that occurred in August in Missouri and you use evidence, same -- similar act evidence from a July offense in Oklahoma. Grady

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doesn't say that's prohibited, does it?

MR. ANDERSON: No, it doesn't --

QUESTION: No.

MR. ANDERSON: -- but this is not merely similar act evidence. This is proof by evidence of conduct, which Grady forbids to be used in two trials to prove a material element. Reliance on the term evidence is too elusive for this Court to grasp, I think, as any kind of standard, because evidence in my experience can -- or facts or the conduct can be proved by different forms of evidence. It's too slippery a doctrine.

QUESTION: Well, if you've charged a second attempt that occurred in August in Missouri, how can you ever say double jeopardy prevents proof of something that -- evidence of something that had occurred at an earlier date in a different State?

MR. ANDERSON: If such an opinion is adopted by this Court it would constitute the authority for the United States Government to decide to try the small offenses first.

What does this do? What does this deprive the defendant of? In the first trial, this was alleged to be 404(b) evidence. Okay? In the second trial, this was undoubtedly 801(d)(2)(e) evidence from Roach, from Paul Dean Roach, the unindicted co-conspirator.

Certain protections attach to that evidence when it is an acknowledged, as a matter of law, co-conspirator, and that is an inquiry into the existence of the conspiracy and a finding by the Court before the evidence is allowed that the conspiracy in fact exists, a prima facie showing by the Government. No such requirement exists on 404(b) evidence now.

Have I answered your question?

QUESTION: Not to my satisfaction --

MR. ANDERSON: I'm sorry.

QUESTION: -- but you've certainly responded.

MR. ANDERSON: I am trying to respond, if I may continue.

QUESTION: But what do rules of evidence have to do with the double jeopardy inquiry? I mean, you -- in responding to Justice O'Connor's question you cite two rules of evidence under Federal rules.

MR. ANDERSON: Yes, sir.

QUESTION: How does that bear on the double jeopardy inquiry?

MR. ANDERSON: What they have to do with is what effect it has to try this man twice. The Government gets to rehearse the practice and practice their proof. They get to see what defenses will be raised and structure their proof to meet those defenses.

QUESTION: But you say to try him twice, but by Justice O'Connor's hypothesis it's not for the same offense, it's for one offense that occurred in July and another offense that occurred in August.

MR. ANDERSON: I understand that, Mr. Chief Justice --

QUESTION: Well, so what is your answer to it?

MR. ANDERSON: But the Government chose --

QUESTION: What is your answer to it?

MR. ANDERSON: My answer is, the Government chose to prosecute him for the conduct twice. They may not choose to do that in the future because of Grady v. Corbin, but they did here in this trial.

QUESTION: What's the matter with it?

MR. ANDERSON: What's the matter with it is that if --

QUESTION: What's the objection to it under the Constitution? I realize there are tactical objections on the part of his defense lawyer.

MR. ANDERSON: Well, you have -- you're being deprived of your right to have determined in one -- at one trial all the facts and all of the statutory violations that you may have --

QUESTION: And where does that right come from?

MR. ANDERSON: It comes from the Fifth Amendment

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double jeopardy clause of the United States Constitution.

QUESTION: What case is authority for that?

MR. ANDERSON: Well, I believe that Brown v. Ohio is a case -- is for it, all of the cases cited in our brief.

QUESTION: Do they say that you're entitled to have determined in one trial everything that the Government might charge you with?

MR. ANDERSON: No, Your Honor.

QUESTION: That's the same transaction test which the Court has never adopted.

MR. ANDERSON: If -- that would be the standard if -- let me back up just a moment. The events that occurred in this case over the period of time from June until August were all one -- part of one conspiracy, and that was understood by the Government and that is the way they charged it.

I don't want to hypothesize any further on what they could have done, because I'm only dealing with what they did to Mr. Felix here. They chose to prosecute him under the overt acts which the court -- as pointed out in the brief of the amicus in this case, which the court instructed the jury that they must consider in a finding of guilt on the conspiracy charge.

In regards to the evidence and --

QUESTION: Tell me what it was that -- what was the prior crime that you rely on to prove double jeopardy? Is it the -- I mean the Missouri conviction?

MR. ANDERSON: It is.

QUESTION: Which was what?

MR. ANDERSON: Which was attempt to manufacture methamphetamines, and in order to prove the material element --

QUESTION: What was the specific conduct that you think the jury found to have constituted an attempt?

MR. ANDERSON: Well, attempt has two parts that need to be proved.

QUESTION: The specific conduct.

MR. ANDERSON: One is intent. The specific conduct which was used to prove the intent was the entire Beggs Lab and Oklahoma conspiracy. That's the evidence of knowledge --

QUESTION: Well, that was the intent, yes, but isn't there another element of the crime?

MR. ANDERSON: There is -- substantial step.

QUESTION: What is it?

MR. ANDERSON: It's a substantial step toward the accomplishment of the manufacturing. I believe that the Court in the Eighth Circuit stated that this evidence was also used to prove the substantial step, but I do

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agree with the Solicitor on this point, and that is that the acquisition of the chemicals in August 26th and the receipt of them in August 31st should be considered the conduct which constitutes the substantial step portion of the attempt conviction.

QUESTION: But you don't -- was there other evidence of the attempt?

MR. ANDERSON: Other than the Beggs Laboratory and the evidence of the conspiracy, no.

QUESTION: Well, is that quite right? Wasn't the evidence concerning the purchases in August itself some evidence of intent to carry -- to manufacture? I mean, isn't it true that the Government's evidence of intent consisted of two parts, one the prior manufacture in Oklahoma, and also as far as they got in Missouri? That's some evidence of intent, isn't it?

MR. ANDERSON: It is some evidence, but they also included all those dates within the prosecution for the conspiracy in the Oklahoma case and used it as --

QUESTION: Well, I understand, but that isn't -- that's a different argument. I mean, the argument here, as I understand you, is that in order to prove intent they relied entirely on the conduct for which they were later prosecuted -- it was later prosecuted. It was a different order.

MR. ANDERSON: I will not make that argument.

QUESTION: You don't make it.

MR. ANDERSON: If you perceive that to be my argument --

QUESTION: So your argument is that Grady applies even if the evidence of the prior crime or the subsequently prosecuted crime is only some of the evidence that's used in the second prosecution.

MR. ANDERSON: That's correct. I believe that you're -- the line of reasoning that you're referring to is Judge Newman's dissent in the -- Calderone case. I don't think that the Court should adopt that.

QUESTION: Well, you don't -- I take it you -- you don't really know whether the sole ground for convicting him in Missouri was the fact that on August 26th, 1987, while in Tulsa, Oklahoma, the defendant provided money for the purchase of chemicals and equipment necessary in the manufacture of methamphetamine.

MR. ANDERSON: That could not possibly constitute the entire proof or even proof of his intent. That --

QUESTION: Well, he certainly wasn't -- he certainly wasn't -- you can't say that in Missouri he was separately convicted for that conduct.

MR. ANDERSON: That conduct in Oklahoma --

QUESTION: It may have been a crime, but he wasn't convicted for it.

MR. ANDERSON: That conduct in Oklahoma was used to prove the intent in the Missouri --

QUESTION: That's right, but you can't say that the jury convicted him of that conduct that occurred in Oklahoma.

MR. ANDERSON: My point to the Court which I tried to make at the beginning was that if you have different results when you try them in reverse order then it is not a standard which can be applied in implementing the protections of the double jeopardy clause.

If this were tried in reverse, I don't believe that we'd be standing before this Court. Everything tried in Oklahoma was tried in Missouri, and having been alleged as an overt act and ordered by the judge in his charge that the jury must -- that they must prove those overt acts, I don't believe that we'd be standing here before you. There'd be no question that a Missouri prosecution following the Oklahoma prosecution was double jeopardy.

QUESTION: But let me just challenge that a second. You're suggesting that -- and I think early in your argument you said that everything that was proved in the Missouri trial had already been proved beyond a reasonable doubt, or would later be proved beyond a

reasonable doubt in the other trial, but the evidence of the Oklahoma transactions would not have been needed to be proved beyond a reasonable doubt to sustain the Missouri conviction.

There is evidence of intent -- inferences of intent were drawn from the Oklahoma conduct, but I don't think the jury had to be instructed that you must believe beyond a reasonable doubt that the transactions in Oklahoma occurred as the Government indicated. I think what the judge must have told the jury was that that evidence, together with the contemporaneous evidence, must convince you beyond a reasonable doubt that in August the requisite intent was present.

MR. ANDERSON: I believe the charge of the court in that matter is cited in the Government's brief on the merits in this case, and I can't find the citation at this time, but I think the exact charge from the Missouri court is cited, and it's in the opinion of Felix from the Missouri case and addressed by the Eighth Circuit, which said it was virtually the only evidence in that case of intent, and that no other evidence existed for intent.

Now, the Government argued that at the Eighth Circuit, and now the Government wants to argue something different before this Court in a different case. I can't blame them.

To show you how much they relied on it, in the Missouri trial in the final arguments, page 465, at line 16, the Government's final argument is: We have to show you that what he did he did knowingly and intentionally. We showed that through the Beggs Oklahoma Lab, and by his conduct in Joplin, by his statements to George -- that's George Dwinnells, the confidential informant -- and by George's evidence dovetailing with Roach's, the later unindicted co-conspirator, and by Lamar Evans out of Rowlett, Texas.

They relied heavily on that. They relied on that as their only proof of intent.

QUESTION: You say not merely relied heavily on that, but they relied solely on it.

MR. ANDERSON: I believe that's a fair reading of the opinion of the Eighth Circuit in St. Louis in the first case --

QUESTION: What if we disagreed?

MR. ANDERSON: That's why I'm here.

QUESTION: I know, but what if we did disagree, would you lose, that that was --

MR. ANDERSON: No, sir. I don't believe that it has --

QUESTION: What if we disagreed that that was the sole evidence?

MR. ANDERSON: I don't believe that Grady says it has to constitute the entire proof, the only proof that --

QUESTION: So your answer is no, you would not lose.

MR. ANDERSON: Yes, sir, that is my answer.

All of the exhibits introduced in the Missouri trial included exhibits 4 through 11 and 17, which were photographs of Beggs Lab; 18 through 23 were the drugs from the Beggs Lab, and number 46 through 48 exhibits introduced in the Missouri trial were -- to refute an alibi defense of Defendant Felix to being at the lab on November 13th.

There were only 44 exhibits introduced at the trial in Missouri and by and large the majority of them were from the Beggs Lab operation. They were introduced again with duplicate plaintiff's evidence stickers placed on them in the Missouri -- in the Oklahoma trial, as noted in the majority opinion from the Tenth Circuit.

QUESTION: What would you do -- what would you do if -- what should the Court do if it believes that introducing evidence of the Missouri transaction or the Missouri conviction to prove overt acts was wrong, was unconstitutional? They were just two of the overt acts alleged and proved, weren't they?

MR. ANDERSON: They were 2 of 17 -- or 18, excuse me.

QUESTION: What should -- just order a new trial?

MR. ANDERSON: The --

QUESTION: Just that you just can't rely on those two overt acts?

MR. ANDERSON: Mr. Felix was convicted -- or, excuse me -- was charged in 9 of the 18 overt acts.

QUESTION: Yes.

MR. ANDERSON: Each one of those overt acts, as each one of the substantive crimes which they were accused of violating under 846, were all included in the proof that was given at the Missouri trial. What you have here in this record from the Missouri trial -- pardon me -- is a textbook --

QUESTION: You mean evidence of all nine of the overt acts that the defendant was --

MR. ANDERSON: That is correct, Your Honor, were offered in proof through the four witnesses that I mentioned at the Missouri trial -- every one of them.

QUESTION: Yes, but in its brief the Government argues that the proof of the overt act is not an essential element of the conspiracy, this particular conspiracy offense. It is under some conspiracies.

MR. ANDERSON: The Government would argue that nothing has to be proven in a conspiracy, and they're pretty nearly right. No overt acts has to -- have to be alleged or proven in an 846 conspiracy, but when they are alleged they have to be proven. They were alleged here.

QUESTION: Well, do they? Supposing the jury was not convinced about these two overt acts. They could still convict, couldn't they?

MR. ANDERSON: They could convict on the other overt acts. That is correct.

QUESTION: Say they didn't prove any of the overt acts, but they were convinced that the defendant had entered into the agreement described in the charging part of the indictment.

MR. ANDERSON: And they could still convict, but we have no way of knowing that.

QUESTION: No, but then I think you are agreeing with the Government that the proof of the overt act was not an essential element of the crime.

MR. ANDERSON: It's not an essential element of the crime. I agree with that.

QUESTION: Well, what about the instructions?

MR. ANDERSON: The instructions are set forth in the amicus brief.

QUESTION: Well, what do they say about -- did

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they say the jury, to convict, had to find an overt act?

MR. ANDERSON: It did, and I'll give you the cite to the amicus brief.

QUESTION: Well, they also had to find --

MR. ANDERSON: Page 33.

QUESTION: They did have to -- was the -- the overt acts were used to prove the agreement, to approve the conspiracy?

MR. ANDERSON: Yes, sir, I believe they were.

If there are no more questions I'll just make a closing statement that no one needs to advise this Court, on the 200th anniversary of the Bill of Rights, how important it is that this Court stands firm, as it had -- has for over 200 years, and served its purpose as the third branch of Government, keeping an eye on the prosecution for us.

Thank you very much.

QUESTION: Thank you, Mr. Anderson.

Mr. Bryson, you have 2 minutes remaining.

MR. BRYSON: I have nothing further, Your Honor.

CHIEF JUSTICE REHNQUIST: Very well. The case is submitted.

(Whereupon, at 11:05 a.m., the case in the above-entitled matter was submitted.)

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BY Michelle - Sanders

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