OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: THOMAS SCHIRO, Petitioner v. ROBERT FARLEY, SUPERINTENDENT, INDIANA STATE PRISON, ET AL.

CASE NO: 92-7549

PLACE: Washington, D.C.

DATE: Monday, November 1, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS SCHIRO, :

Petitioner :

v. : No. 92-7549

ROBERT FARLEY, SUPERINTENDENT, :

INDIANA STATE PRISON, ET AL. :

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Washington, D.C.

Monday, November 1, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

MONICA FOSTER, ESQ., Indianapolis, Indiana; on behalf of the Petitioner.

AREND J. ABEL, ESQ., Deputy Attorney General of Indiana, Indianapolis, Indiana; on behalf of the Respondents.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 92-7549, Thomas Schiro v. Robert Farley.

Ms. Foster, you may proceed.

ORAL ARGUMENT OF MONICA FOSTER, ESQ.

ON BEHALF OF THE PETITIONER

MS. FOSTER: Thank you. Mr. Chief Justice, and may it please the Court:

Thomas Schiro was acquitted of mens rea murder at the guilt trial. The case then proceeded to the penalty trial where the jury unanimously recommended against the death penalty in 61 minutes.

QUESTION: You refer to it as the guilt trial and the penalty. It's more generally spoken of as the guilt phase and the penalty phase. Is there any difference, for our purposes, between those two terms?

MS. FOSTER: No, Your Honor, I don't think it makes any difference.

QUESTION: Now, you began by saying that he was acquitted. Isn't that one of the issues here?

MS. FOSTER: Yes, Justice Kennedy, and I'm getting to that.

QUESTION: All right.

MS. FOSTER: The judge overrode the penalty

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recommendation, but more importantly in our case, the guilt trial verdict and imposed the death penalty, finding that Schiro had committed mens rea murder during the course of a rape.

We know that Schiro was acquitted of mens rea murder for four reasons. Those reasons depend largely upon the three separate charges filed in this case and the verdict forms that the jury had received. The State separately charged three counts of murder for the death of a single person, as is common in Indiana. Count I, mens rea murder, charged that Schiro knowingly killed the victim. Charges 2 and 3 each charged separate counts of felony murder. Those counts did not require that the State demonstrate any mens rea as to the killing, but did require that the State demonstrate an underlying felony rape and criminal deviate conduct, respectively.

QUESTION: And presumably mens rea in connection with that felony, didn't it?

MS. FOSTER: Yes, Mr. Chief Justice, that's correct. The --

QUESTION: Now, Ms. Foster, I thought the jury was instructed in instruction 8 that regardless of the form of verdict, in any case the jury had to find that the defendant engaged in the conduct which caused the death, and that when the defendant did so he knew the conduct

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would or intended it to cause the death. I thought that was the instruction given, among others.

MS. FOSTER: Justice -- Justice O'Connor, that instruction goes to count I only. It does not apply --

QUESTION: Then it is not so limited. Was instruction 8 given to the jury or not?

MS. FOSTER: Yes, absolutely, it was.

QUESTION: And it appeared to be understood by counsel for both the State and the defendant that intent was required to be found in any of the forms of verdict, and wasn't that so found?

MS. FOSTER: That --

QUESTION: That was the arguments -- the arguments made to the jury by -- both counsel indicated that understanding, and it would certainly be consistent with instruction 8, as I read it.

MS. FOSTER: No, Your Honor, I would respectfully disagree with that. Final instruction number 4 told the jury what the separate elements for mens rea murder were and what the elements for felony murder were. Final instruction 8 clearly cannot -- it cannot apply to the felony murder count because the jury was instructed in final 4 that in order to sustain a conviction for felony murder, the jury had to find an underlying felony. And yet final instruction 8, we see nothing in there that

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requires the jury to find the underlying felony.

Additionally, final instruction 8 does on to say if you find from your consideration of all of the evidence that each of these propositions was proven and that the defendant was not legally insane at the time, then you should find him guilty. That instruction simply applies to the count I mens rea murder only, and does not --

QUESTION: Well, at a -- at a bare minimum, you would have to be concede that the courts below haven't found to the contrary of what I said to you. There's been no finding in the courts below that the jury was instructed as you argue, only from instruction 4 rather than instruction 8.

MS. FOSTER: I'm sorry, I don't understand what your question is.

QUESTION: Well, I had asked you whether the jury was given instruction 8 telling them they had to find intent regardless, and I don't believe that any court below has said that eight was inapplicable to the finding under the form of verdict that was returned here. I don't think any of the lower courts have said that, have they?

MS. FOSTER: No, no court has said that 8 was inapplicable. But the law in Indiana clearly is that the -- to sustain a verdict for mens rea murder, as was charged here, you have to show an intent to kill. To

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sustain a guilty verdict for felony murder, there is no necessity of showing an intent to kill. Additionally --

QUESTION: It just appeared that -- I mean, you may be right under terms of State law. It just appeared that the judge instructed the jury that they had to do that, for whatever reason.

MS. FOSTER: Well, the judge did give final instruction number 8. But if we look at the verdict forms too, the verdict forms talk in terms of "as charged in count I of the information." Clearly, count I did not charge the felonies and can't -- you know, in the verdict forms when the court refers to "as charged in count II of the information," count II did not charge an intent element as to the killing.

QUESTION: Is it true that counsel for the State, as well as the defendant, thought that only one form of verdict could be returned?

MS. FOSTER: No, absolutely not.

QUESTION: That was certainly mentioned in their arguments to the jury, though, wasn't it?

MS. FOSTER: The prosecutor's arguments and his one verdict comments come at a point in the proceedings where the prosecutor gets to get up a second time and deliver his closing argument. He did not argue that the jury should return but one verdict in his initial closing

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argument.

QUESTION: Did you try this case, Ms. Foster?

MS. FOSTER: No, Justice -- Mr. Justice Rehnquist, I did not.

QUESTION: So you're -- you're judging from the transcript, I take it. You weren't there.

MS. FOSTER: Correct. Getting back to your question, Justice O'Connor, the prosecutor -- the trial prosecutor makes his one verdict comments only after defense counsel interjects his postmortem defense to count III, that the jury should not find Schiro guilty of count III because the criminal deviate conduct occurred after death.

The comments made by the prosecutor would be interpreted by a reasonable jury as saying you don't have to find Schiro guilty on count III. The trial prosecutor concedes that the criminal deviate conduct occurred after death, and then says that Mr. Keating, defense counsel, makes an interesting argument. The prosecutor's comments would be understood by the jury as indicating that it was okay with the State if the jury did not return a verdict on count III, and that the State did not necessarily lose their case so long as the jury returned a verdict on counts I and II.

QUESTION: Ms. Foster, you're giving a very

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complicated analysis, but isn't it true that the defense counsel, as well as the prosecutor, told the jury -- and this is appendix page 17 of Brief for Respondent. Mr. Keating said to the jury: "You'll have to go back there and try to figure out which one of 8 or 10 verdicts." Which one. So the prosecuting attorney and the defense attorney both told the jury pick one.

MS. FOSTER: The defense counsel was arguing that one verdict was the only proper number of verdicts that should be returned in this case because he was arguing for not guilty by reason of insanity.

Additionally, as this Court said in Donnelley v. DeChristofero, when we're looking at closing arguments, closing arguments that are generally relatively spontaneous, that we will not attribute the most damaging interpretation to an ambiguous remark. Defense counsel was asking for one verdict, not guilty by reason of insanity.

Additionally, as we demonstrated in -- I believe it's footnote 18 of our reply brief, it's conceivable that -- that part of what's happening with defense counsel's comments is a difference in punctuation by the stenographer. Defense counsel could have said, you'll have to go back there and try and figure out which one of 8 or 10 verdicts. I believe there are 10 that you will

return back into this court.

As this Court stated in Donnelley, we just can't attribute the most damaging interpretation to ambiguous remarks, and I think that what -- clearly what the prosecutor is saying is you don't have to return a guilty verdict on each count. The prosecutor conceded count III.

We know that Schiro was acquitted of mens rea murder for four reasons. First of all, this jury had an unimpeded opportunity to convict Schiro. This jury was given separate verdict forms -- separate guilty verdict forms on each of the separately charged counts of murder. The jury signed and returned only that count which applied -- which found Schiro guilty of count II, and did not sign the mens rea murder form or the felony murder during a criminal deviate conduct.

QUESTION: Well, why does that mean that he was acquitted on those charges? Granted, the jury returned no verdict on them.

MS. FOSTER: Because, as this Court's precedents in Price and Green establish, a silent verdict is the constitutional equivalent of an acquittal if either the jury had the opportunity to convict and did not or because the jury intended to acquit and --

QUESTION: Ms. Foster, are you confusing --

QUESTION: In cases of lesser included offenses.

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Both Price and Green involved lesser included offenses, did they not?

MS. FOSTER: I think it's fair to say that it's questionable whether the offenses at issue in Green concerned lesser included offenses. In footnote 14, the Court says that an -- an argument is made that these are not lesser and greater offenses, although admitted the lower courts had found that they were.

But this Court stated that it doesn't matter whether they're lesser or greater offenses, because the fact of the matter is when we look at double jeopardy principles, a defendant has an interest in having his case resolved by the first jury impaneled to hear it. And if the jury is given an opportunity to convict and does not, it does not matter whether they're lesser or greater offenses.

QUESTION: That's what the Court said in Green?

MS. FOSTER: The Court said in footnote 14 specifically that the argument -- that the offenses at issue were not -- lesser or greater did not assist the Government's position at all. In fact, if they're different offenses, that Green's position would, in fact, be stronger.

QUESTION: Is there a difference between subjecting a person to jeopardy and acquitting a person?

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You can't be put in jeopardy twice. The State can't have you run the gauntlet and then say oh, wait a minute, we think we can make an even stronger case, so we're going to call this trial off and start over again without submitting the case to the jury. That person would have been in jeopardy and could not be tried again, and yet there would have been no acquittal.

MS. FOSTER: That's exactly correct.

QUESTION: So that putting a person in jeopardy is not the same -- I mean, you can put a person in jeopardy and there'd be no acquittal. Why isn't that what happened here? He was put in jeopardy, so he can't be tried again for that offense, but that doesn't mean that the jury acquitted him of it.

MS. FOSTER: Well, I think Green says that if the jury has the opportunity to convict and does not, that that is treated the same as an acquittal. But if --

QUESTION: It's treated the same in the sense that you can't try the person for that crime again, but it's not the equivalent of an acquittal, which is the determination of an issue.

MS. FOSTER: I'm -- I think I would disagree with that. I think that it is treated the same as an acquittal. I think the Court said that when a verdict -- when a jury is silent after they have had either the

opportunity to convict and have not, or that they have intended to acquit, that that is the constitutional equivalent of an acquittal.

QUESTION: Ms. Foster, could -- can I ask this question? Suppose you have a defendant who is tried and convicted and sentenced for rape. He is then subsequently prosecuted and convicted for murder in connection with the same episode. Would, in your view, a showing at the sentencing phase of that murder proceeding that the murder occurred in the course of a rape, would that be invalid, to use the rape as an aggravating circumstance?

MS. FOSTER: Let me make sure that I understand your --

QUESTION: He's convicted of rape. He's later convicted of murder in the course of the rape. Would showing that the rape was an aggravating circumstance of the murder be precluded? Would he be placed in double jeopardy if the prosecution tries to come in and say this murder should be punished by death because there is the aggravating circumstance of rape, he having been convicted of rape already in the first trial? It's your position, is it not, that that's double jeopardy?

MS. FOSTER: If the murder charge that he is -- if the State convicts him of rape, then comes in and convicts him of murder during the course of a rape, what

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we would call in Indiana felony murder, is that what you're saying?

QUESTION: Right.

MS. FOSTER: Okay. Yes, that would be double jeopardy, because the rape is a lesser included of the felony murder rape. I'm assuming by your hypothetical that we're talking about different proceedings here.

QUESTION: Suppose it isn't a felony murder. Suppose it's -

MS. FOSTER: Intentional.

QUESTION: Suppose it's intentional murder, but what is shown at the sentencing phase is that rape was part of the -- of the event.

MS. FOSTER: Well, if he's subsequently charged with intentional murder then, no, I don't think there would be a double jeopardy problem there.

QUESTION: Why not?

MS. FOSTER: Because the elements are not the same.

QUESTION: But he's been treated -- he's been tried for the rape.

MS. FOSTER: Right. But the elements of -- you're saying tried for the rape in one proceeding.

QUESTION: That's right.

MS. FOSTER: Then separately tried for

intentional murder, what we would all mens rea murder.

QUESTION: That's right.

MS. FOSTER: No, there's no double --

QUESTION: But rape as an aggravator. You would have no problem, although rape has already been -- he's been exposed to jeopardy for that, that could still be brought in at the sentencing phase.

MS. FOSTER: Yes.

QUESTION: With no double jeopardy problem.

MS. FOSTER: He's convicted of rape. That's very different than being acquitted.

QUESTION: Not for double jeopardy purposes, is it?

MS. FOSTER: Yes, it is. Yes, Justice Scalia, it is.

QUESTION: Is that right. It's okay to be convicted twice but not to be acquitted and then convicted?

MS. FOSTER: In the hypothetical that you've given me, he is convicted of two different things. Rape and intentional murder are not the same offense. So, yes, it would be okay for him to be convicted of both of those things.

QUESTION: Well, then you're talking about collateral estoppel, not double jeopardy. That's your

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argument. I think if you're going to say double jeopardy, you have to -- to answer Justice Scalia's question. He's been put to the pain, the agony, the ordeal of having to defend against the rape charge a second time. It's double jeopardy, you can't do it. But you don't take that position apparently.

MS. FOSTER: Well, if the -- if the elements of the intentional murder are different than the elements of the rape, then no.

QUESTION: It's a question of a second trial for this -- for the same facts.

QUESTION: We're talking about the sentencing phase. Your case separates out the sentencing phase, and the elements no longer make a difference when you're just talking about the sentencing phase. In the sentencing phase, they're trying to introduce the proof of a rape. It -- the elements of that proof at the sentencing phase are the same as the elements of the rape that he's been convicted of. I don't -- I don't see why you wouldn't -- if you believe in double jeopardy, you would have to say, no, that rape could not be introduced in the sentencing phase.

MS. FOSTER: I think that the element -- the elements do make a difference. For our argument, what has happened is that Schiro was acquitted of the mens rea

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murder and then the elements of that were used at the sentencing phase. And our argument is that that violates double jeopardy.

QUESTION: Well, what if he'd been convicted. The jury had come in with a verdict of guilty on count I and then at the sentencing phase the State wanted to prove that it was done in the course of a rape, as a -- as an aggravator.

MS. FOSTER: And there had been no --

QUESTION: And you say double jeopardy here because they didn't return a verdict of guilty of felony murder. Is that your argument?

MS. FOSTER: If he was convicted on count I and the jury was silent as to count II, yes, that would be -- my argument is that that would be a double jeopardy violation also.

QUESTION: So the States' call it either way here, on double jeopardy.

MS. FOSTER: No, absolutely not. This jury had an opportunity to return a guilty verdict on each charge. This -- the State charging three counts of murder in Indiana is very common, as demonstrated by our footnote 12, I believe it is, in our reply brief. When the jury is convinced that the State has proven the elements of each of those offenses beyond a reasonable doubt, juries in

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Indiana return guilty verdicts on each one of those offenses.

There's 37 cases in footnote 12 where defendants were charged, similarly to Mr. Schiro, with multiple counts of murder for the death of one person, and the jury returned verdicts on -- on both counts.

QUESTION: Ms. Foster, did you check in those cases whether there was the kind of instruction that was involved in instruction 8, where the jury was told for murder -- seemed to think that murder, without defining felony murder, premeditated, that all of them required an intent, or where the prosecutor and defense counsel says pick one?

In those cases that you cite in that footnote, did we have that kind of presentation to the jury where counsel says pick one and the judge gives the same charge for -- without differentiating? Or in those cases did the judge discreetly say this is what's required for felony murder, this is what's required for premeditated murder, and did the attorneys in their summation make clear that the jury could find more than one?

MS. FOSTER: Justice Ginsburg, the opinions in those cases obviously do not answer the question that you have just asked, but I have looked at 33 of the records in 30 -- in those 37 cases. In 11 of the cases -- in 11

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of the 33 cases, the jury was instructed to return a verdict on each count, guilty or not guilty on each count. In 22 of those cases, the --

QUESTION: That instruction was not given here.

MS. FOSTER: That instruction was not given here, that is correct.

In 22 of those cases, the jury was given no guidance on how many verdicts to return. And what we found in the records were instructions similar to instruction 8, where the court said here are the elements of the offense and if you find those elements proven beyond a reasonable doubt, then you should return a guilty verdict on that count.

QUESTION: So I take it your answer is no, they didn't have the kind of, perhaps misleading under State law, picture that was presented in this case, or at least you --

MS. FOSTER: I'm not sure what you mean by misleading picture. In 22 of the cases, the jury did not receive any guidance from the court on how many verdicts to return. They got instructions similar to instruction 8 that said here are the elements; if you find these elements beyond a reasonable doubt, return a guilty verdict.

QUESTION: May I ask a -- are you through? I

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don't want to interrupt you.

May I ask a question about instruction number -- final instruction 21, which says -- ends saying the foreman will preside over deliberations and must sign and date the verdict, parenthesis s, close parenthesis, to which you all agree.

So, in a written statement, that seems to contemplate plural verdicts. I'm curious to know if the transcript of the -- in the -- of the proceedings themselves indicate what the judge said when he read that instruction?

MS. FOSTER: The transcript of those -- of the actual words that the judge spoke is not available. It's not in the record. This is the extent --

QUESTION: So we don't know how he conveyed the parenthesis, s, close parenthesis to the jury.

MS. FOSTER: That's correct.

QUESTION: Did the written instructions go the jury?

MS. FOSTER: We don't know the answer to that either, although I know that -- that the practice is Indiana is, in general, they do. But we do not know whether these guilt trial instructions -- we know that the penalty trial instructions went.

QUESTION: Because if the written instructions

went, then the judge, in effect, said you can return more than one verdict. But if he read verdict, that would be a different reading.

MS. FOSTER: I mean, at some -- at some points, I think, in the instructions he refers to verdicts and offenses, and at other points he refers to offense. I mean, I think that there's a real hodge-podge going on here of what he refers to. However, if I was defense counsel and the judge was referring to numerous verdicts in the plural, I think I would have an objection to that, and that's that --

QUESTION: But we're all hypothetical. You don't know. You don't know what he said.

MS. FOSTER: That's correct, Justice Ginsburg.

QUESTION: Let me just ask you one thing that I find so troublesome about your double jeopardy, that you propose to your issue-preclusion argument. Am I right that if you are correct, then the Federal Sentencing Guidelines have got to be unconstitutional when they allow a judge at the sentencing stage to take into account a crime of which the defendant was, in fact, acquitted.

Not where the jury was simply jury but the jury acquits, and then at sentencing the judge says but I think that was shown by a preponderance of the evidence, so I am going to put you into a higher penalty category, because I

find that you committed that crime. Is your double jeopardy -- doesn't your double jeopardy argument say that that would be unconstitutional?

MS. FOSTER: No, Justice Ginsburg. And I don't do any Federal trial work, so correct if I'm wrong, but what I heard you say is --

QUESTION: But there the jury acquitted the person of the conduct.

MS. FOSTER: But what I heard you --

QUESTION: And if the sentencing stage -- if that acquittal carries over to a sentencing and a sentencing is treated just like another trial, then why doesn't that follow?

MS. FOSTER: Am I not correct that at the sentencing stage, that the -- the factor only needs to be established by a preponderance?

QUESTION: Right.

MS. FOSTER: And the court could have found -- I mean, it's a relative burdens case that the State didn't prove --

QUESTION: But this claim is precluded -- the claim is precluded. We're not talking about precluding on a particular issue. That's the second argument that you make. I'm talking about your larger double jeopardy argument that says you can't -- convicted, acquitted, you

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can't bring this matter up again.

MS. FOSTER: I still -- my answer would nevertheless be that it's a relative burdens, that the distinction is relative burdens.

QUESTION: But isn't the answer that in Indiana to prove the aggravating circumstance to make death-eligible, that must be proved beyond a reasonable doubt, so that there's a difference and Justice Ginsburg's problem would not arise in this case?

MS. FOSTER: That's absolutely correct, Justice Stevens. By statute, they've got to prove the aggravator beyond a reasonable doubt.

QUESTION: You have a different standard in the Sentencing Guidelines. You have the same standard in Indiana.

QUESTION: Let me ask a question about the collateral estoppel aspect of your argument. Would it make sense for us to adopt a kind of bright line rule to the effect that in a situation exemplified by this one, we will -- we will not, for Federal constitutional purposes, infer any fact finding and hence raise any estoppel unless the defense counsel has, in fact, asked for specific verdicts on each of the specific counts, or at least on the specific count or indictment which is supposed to be the basis for the estoppel, so as to avoid all of this

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tea-leaf reading after the fact?

Why wouldn't it make sense to ask for a bright line rule like that?

MS. FOSTER: The bright line rule that you're suggesting is that defense counsel would be required on a collateral estoppel claim to request specific findings from the jury?

QUESTION: Not findings. A specific verdict. In this case, the defense counsel should have said, Your Honor, please give the jury forms that will -- will give them an opportunity to make specific findings of not guilty in relation to each of the three specific homicide charges here. Because if the -- if the jury had come back with a specific finding of not guilty and returned a form to the -- to the intentional killing, you'd have a very different argument.

MS. FOSTER: I don't think we'd be here today if --

QUESTION: Why wouldn't it make sense for us to require that, simply to avoid this attempt at reconstruction afterwards, which is never very satisfactory?

MS. FOSTER: Well, I guess my initial answer would be -- you know, the State supreme court didn't find any sort of a procedural default, and that sounds to me

like --

QUESTION: Well, we've got -- we've got a Federal issue here. I mean, it's up to us to decide what is a sufficient predicate for collateral estoppel under Ashe and Swenson. Why should -- why isn't it appropriate for us to impose that requirement?

MS. FOSTER: Well, Schiro's counsel would have had no notice of that requirement. To my knowledge, you've never imposed that requirement in the past, and it would seem to me unfair to impose it at this point and oppose it -- impose it upon him when he had no notice that that was a part and parcel of a collateral estoppel claim.

QUESTION: If we -- if we, in fact, find that we cannot draw a sufficiently sound inference to raise an estoppel, would you -- would you concede that the suggestion -- that the imposition of such a bright line rule would, in fact, be appropriate? Your client would not suffer and we wouldn't be in quite a confusing situation in the future.

MS. FOSTER: Well, I think in our case that there is a bright line that you can draw. In our -- assuming that there is an acquittal at the guilt trial, which we believe that you should find, with respect -- with respect to why the jury acquitted, I think it's pretty clear in this case why the jury acquitted when you

line up the elements of felony murder as against the --

QUESTION: But that isn't the question. The question is would your client suffer in any respect if you as, or your person who's defense counsel says judge, I want you to tell the jury on each of these counts and give them a verdict form that says guilty -- check either guilty or not guilty in each case, or would you -- wouldn't you prefer, as defense counsel, to leave the possibility of the jury not saying anything?

MS. FOSTER: Well, standing here today --

QUESTION: There wouldn't be this question of guessing if the judge had said in each -- for each one of these counts, check off either guilty or not guilty.

MS. FOSTER: I think you're -- I think that that is the proper thing that the court should have done.

QUESTION: And as defense counsel, you would have asked for that?

MS. FOSTER: I'm not sure.

QUESTION: It would produce a lot of hung juries. You're saying every jury has to be -- if the defense counsel requests it, has to be required to bring in a verdict of all of the counts. They can't say, hey, one is good enough; you know, they'll go up for 30 years on this one. They don't have to consider the rest. They're going to have to consider each one and come in

with a verdict of guilty or innocent on each one. Wow.

MS. FOSTER: Well, the fact is --

QUESTION: It's normally that instruction, isn't it? You're normally instructed to return a verdict on every count. You don't say just do one count and go home for the evening.

(Laughter.)

QUESTION: This last trial in Los Angeles, they spent about a week extra getting the extra counts decided.

MS. FOSTER: The State filed three charges and I think the jury would feel duty bound to return -- you know, to give the State an answer on each of their three charges.

QUESTION: Well, why -- why would it, if the jury was not instructed to do it? Why shouldn't juries act the way most of us would act? And that is if they, in fact, found the felony murder, which is -- which does not involve any subtle weighing of evidence about state of mind, and they have no doubt about the -- the predicate for that conviction. Why, unless they are otherwise instructed, is it reasonable to suppose that they went on and, in fact, took up the rather more difficult issue? Isn't the inference just the opposite?

MS. FOSTER: Because, as demonstrated in footnote 12, juries in Indiana routinely do come back with

verdicts on each count. Because it makes sense that the jury would have -- the jury was not told to just return one verdict by the court. It makes sense that the jury would have approached their obligations in the order in which the charges were submitted to them, one, two, three. We know that the jury was considering count III because they had a question during deliberations that went only to count III.

QUESTION: Thank you, Ms. Foster. I think you did very well on the 4 minutes that the Court allowed you.

MS. FOSTER: Thank you.

(Laughter.)

QUESTION: Mr. Abel.

ORAL ARGUMENT OF AREND J. ABEL

ON BEHALF OF THE RESPONDENTS

MR. ABEL: Thank you, Mr. Chief Justice, and may it please the Court:

The petitioner's claims in this case fail for each of the four following reasons. First, whatever else is clear about the record in this case, it is clear that it does not show an actual determination on the issue of intent in petitioner's favor, which is a necessary requirement because this is really a collateral estoppel, rather than a double jeopardy claim.

QUESTION: It isn't -- it isn't a requirement

for double jeopardy. It is a requirement for issue preclusion.

MR. ABEL: It is most certainly a requirement for issue preclusion. There are other issues that come up in the double jeopardy context, you're correct.

QUESTION: Yes. But you don't -- don't have to -- if you decided the case in double jeopardy, you don't have to have specific findings.

MR. ABEL: In many double jeopardy cases you would not. And for -- because the implied acquittal doctrine would not apply where you've got multiple charges of the same offense, we believe that if this were viewed as a double jeopardy case, he still would have to, at a minimum, show that the jury intended to acquit him.

QUESTION: May I ask, before you go on to your other three, if the first one, there had been an explicit finding by the jury of not guilty on the intentional murder count, would you still prevail?

MR. ABEL: Under the double jeopardy clause, that's correct. And that is, indeed, the third point, which is that double jeopardy deals with successive prosecutions; it does not deal with the relationship between different stages of a single capital trial. There might be other things in the Constitution that would prevent that result, but certainly it would not be either

double jeopardy or collateral estoppel growing out of the double jeopardy clause.

And the fourth point is --

QUESTION: What was your second? You skipped to the third.

MR. ABEL: I'm sorry. The second point was that the implied acquittal doctrine simply does not apply where the multiple counts are alternative theories of proving what is the same offense, as they were in this case.

QUESTION: What do you say about footnote 14 that she relies so heavily on?

MR. ABEL: Well, I think it's important to look at. The court said what's not important is lesser or greater, but the court went on to say it is vital that it is a distinct and different offense. And you simply don't have that here, because on -- under State law, under the common law, and under the law of most American jurisdictions, felony murder and murder are not separate offenses; they are part of a unified offense, and this Court recognized that in the Schad case.

And the fourth point is that to apply double jeopardy or collateral estoppel in the manner that petitioner suggests would be to create a new rule and to apply it retroactively in a habeas corpus case, which this Court has held time and again is not appropriate.

Before I amplify on those points, however, I do want to correct what I believe may have been a misimpression about Indiana practice with respect to jury instructions, because the practice has changed over time. At the time of this trial it was inappropriate under Indiana law -- and there were several Indiana Supreme Court cases indicating that instructions were not to go to the jury room.

Over time that practice evolved. The Indiana Supreme Court began saying, well, it's okay to send them to the jury room, or at least it's not error. And the current state of the law is that it's the better practice to send them to the jury room.

QUESTION: When was this case tried, Mr. Abel?

MR. ABEL: 1981.

QUESTION: Were the verdict forms separate? They weren't all on one sheet, as printed in the appendix here? Was there a separate sheet of paper for each possible verdict?

MR. ABEL: There were three sheets of paper. As we've noted in our brief -- and there were -- three of the forms were on one sheet, three were on another, and four were on another sheet.

QUESTION: I'll check the record for that.

MR. ABEL: And -- but they were not all on one

form, and they were not on separate sheets for each one. There were 3 sheets of paper that contained the total of the 10 forms.

QUESTION: How do you distinguish Price and Green on the implied acquittal theory?

MR. ABEL: Well, because, as the Court recognized in Green, the vital thing is that you have a distinct and different offense involved, and felony murder and murder simply are not. In addition, on this record it is a requisite for the application of Price and Green that the jury has a full opportunity to convict, and in this context opportunity to convict has to mean that the jury had an opportunity to convict on all of the counts.

Because, as I believe in one of the answers to one of the questions earlier, had they convicted on the -- on count I but been silent on counts II and III, then we would be here arguing over whether they had acquitted him of the felony.

And the only case that we've been able to locate that addresses this specific issue is a case from the New York Court of Appeals, People v. Jackson, where the jury in that case was told -- the charges were premeditated murder and felony murder. The jury was told you only are supposed to return one verdict. And in analyzing -- and, of course, they followed that. They returned one verdict.

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They were silent on the other count. The conviction was reversed for other grounds, and the State went back and tried the case again on both counts.

The New York Court of Appeals said that simply Green and Price aren't implicated under those circumstances -- well, that Green wasn't implicated, Price had not been decided yet. And this Court implicitly approved that analysis, in fact, in Price when it specifically cited People v. Jackson in the context of discussing opportunity to convict.

QUESTION: In Price and Green, too, Mr. Abel, it was two successive proceedings in each case, wasn't it? One case had gone to judgment and then there was a second separate proceeding brought.

MR. ABEL: That's correct. And that is another reason that the cases are distinguishable. I believe they're distinguishable for at least three different reasons. One, simply the nature of the offenses. The Court has said it's important you have a distinct and different offense.

And, if you look at some hypotheticals, you can see why it's that factor, rather than greater and lesser offenses, that is -- that is important. Because if a defendant were, say, charged with robbery and rape, which -- neither of which are lesser or included, the jury

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returned a verdict on one of them. Assuming that the court discharged the jury without declaring a mistrial because they had hung, rather than telling them to continue to deliberate, then there would be a problem with trying that second charge in a subsequent prosecution, but that simply is not this case.

QUESTION: Mr. Abel, I'm not sure I understand you. Why do you say that these three offenses are not separate? It seems to me they were separate in point in time, among other things. One -- the deviate one is different from the rape, isn't it?

MR. ABEL: No. Each of the -- each of the offenses -- the offense alleged in each of the counts was murder under Indiana law, and the murder occurred only once. She died at one time. And as this Court recognized in Schad v. Arizona, murder and felony murder simply -- they were not separate offenses at common law. They are not separate offenses under the laws of most American jurisdictions and, indeed, the Indiana Supreme Court's precedents make clear that they are not separate offenses under Indiana law.

QUESTION: No, but you would agree, would you not, that the jury, consistently with Indiana law, could have returned a guilty verdict on one, two, or three of the counts? It would have been consistent with Indiana

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law to do that?

MR. ABEL: Well, had they -- had the jury returned a verdict on more than one of the counts, the trial court would have been required to not enter conviction -- to enter conviction on only one. It is inappropriate --

QUESTION: No, but I'm just asking about the jury. Consistently with Indiana law, the jury could have returned all three verdicts, two verdicts, or one verdict?

MR. ABEL: Well, I -- I'm not sure what you mean by consistent with Indiana law, in the sense that if they did so, the court was required to take corrective action. So in that sense, I'm not sure it is consistent with Indiana law.

QUESTION: But if it would have happened, he would have been able to choose among three different guilty verdicts?

MR. ABEL: The court -- yes, the court would have been able to do that. I think one --

QUESTION: And what guides the court? The jury comes in guilty on counts I, II, and III. What does the court enter?

MR. ABEL: Um --

QUESTION: Whatever it wants?

MR. ABEL: There are no specific standards for

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guidance. Probably the most serious of the -- of the verdicts, which in this case --

QUESTION: Which in this case would be count III because -- I guess count III, because that was the capital charge.

MR. ABEL: II and III were both capital charges.

QUESTION: II and III.

MR. ABEL: And, in fact, under the instructions in this case, count II, I believe, would have been the most serious, the one, in fact, that the jury did return a verdict of conviction on.

It's important to look at the nature of the claim here, and I think when that is done it becomes clear that it is not a pure double jeopardy claim, but rather it is a collateral estoppel claim in the mode of Ashe v. Swenson and that line of cases. Because this Court's cases consistently teach that what double jeopardy precludes is a subsequent prosecution for an entire offense. It simply doesn't speak to preclusion of particular elements, particular factual elements.

If it did, there would have been no necessity for the Court to decide Ashe v. Swenson, if double jeopardy, pure double jeopardy dealt with issue preclusion. In this sense, a pure double jeopardy claim in criminal law is analogous to a claim preclusion claim

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in the civil law, just as -- and collateral estoppel in criminal law, of course, is analogous to collateral estoppel in civil law. In one instance, the whole claim is precluded, whether that is a civil or criminal claim, cause of action as it were, and in the other instance particular elements are precluded.

That is important for this case for a number of reasons, because if the record in this case shows anything, it shows that the petitioner has failed to establish a jury determination on the issue of intent in his favor. The Court's cases are very that this burdener -- burden rests on one claiming criminal collateral estoppel.

All the way from Ashe v. Swenson, which adopted collateral estoppel, to Dowling v. United States, one of the Court's more recent cases on the issue, the Court has made plain that the defendant must show that there is no other possible explanation for the verdict. I believe -- that is a paraphrase, if you will, of Dowling.

Here, of course, there are a number of possible other explanations. But in analyzing whether there was an actual determination in his favor, I think it's important to look at two things. First, what did the State courts find on the issue? And second, are those findings fairly supported by the record?

The Indiana Supreme Court's finding is clear, that the jury simply chose not to consider count I. That appears in the Joint Appendix at page 140. And that's a finding that's entitled to a presumption of correctness under 28 U.S.C. section 2254(d), as long as it's fairly supported by the record. In this case, I don't think there's any question that the record fairly supports the Indiana Supreme Court's conclusion.

Petitioner's argument is that the jury acquitted him on the issue of intent. They found intent was lacking. Well, what does the record show with respect to that? First, we have the facts of the crime. By his own admission, petitioner repeated raped the victim and then killed her for the express purpose of preventing her from reporting the rapes.

QUESTION: Mr. Abel, this whole problem would have been obviated, would it not, if the verdict form that was submitted to the jury had asked the jury yes/no on each of the counts? Then we would know whether they -- if they had an option say yes or no. But they didn't get that, and the prosecutor told them you're only allowed to return one verdict. The appropriate charge for you to return is on murder in the conduct of a rape. So the jury gave the prosecutor what the prosecutor asked for.

MR. ABEL: That's -- exactly. And that is

another reason that I think it's clear on this record that the jury didn't determine any issues in the defendant's favor.

QUESTION: But wouldn't it -- wouldn't it have been -- for the purposes of clarity and to avoid an appeal, wouldn't it have been appropriate for the -- for the prosecutor to say to the judge, give the jury a form which will make it clear to them that they can -- that they should -- not that they must, but that they should find yes or no on each count?

MR. ABEL: Certainly, it would have obviated a great deal of the confusion. It is in no sense constitutionally required. I think that's clear from this Court's --

QUESTION: Well, if the -- if that had been done and the finding had come back not guilty on the first count, the intentional murder, then would there be a collateral estoppel problem at sentencing if you tried to prove intentional murder as an aggravator for sentencing?

MR. ABEL: Not collateral estoppel under the double jeopardy clause. Because, as this Court noted in Ohio v. Johnson, unless you have successive prosecutions, which is what the double jeopardy clause is really aimed at, neither pure double jeopardy nor collateral estoppel growing out of double jeopardy applies, and in that case

the court held that you simply cannot create a bar between the separate --

QUESTION: Well, Ashe v. Swenson, though, has language that is troublesome, I suppose?

MR. ABEL: Well, you need to bear in mind in Ashe v. Swenson the fact situation. The defendant there had been accused of robbing, I believe, four people. The State first had one prosecution with respect to one of the victims, and then on a second indictment had a whole other prosecution on another of the victims.

And so Ashe v. Swenson simply doesn't govern this case where you've got separate stages of a single trial. And, indeed, nothing in the Court's collateral estoppel jurisprudence under the double jeopardy clause suggests that you can create an estoppel in the middle of a proceeding, and Ohio v. Johnson says that you cannot.

QUESTION: Well, then we'll have to make up something else, won't me. I mean, you -- you acknowledged earlier that -- very subtly that there might be some other constitutional doctrine that prevents it, but it's not collateral estoppel or double jeopardy. Surely we can't have proceedings in which a jury first finds that fact X doesn't exist and then in the same proceeding, in order to determine the penalty, it is found that fact X does exist. And, you know, you're not troubled with it?

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MR. ABEL: I --

QUESTION: I mean, if we don't call it collateral estoppel, let's call it something else, but surely things like that should not happen, should they?

MR. ABEL: Assuming your proceedings are governed by the same burden of proof, I believe there certainly would be -- might be something in the Constitution that would prevent that. I think the most --

QUESTION: And they are here. And this -- in civil proceedings if you have an equitable relief -- damages and equitable relief, same proceeding, and the jury finds damages, that finding binds the judge with respect to equitable relief. So I don't understand your argument that issue preclusion doesn't apply. I thought your whole point about issue preclusion was there was no finding, but now you've gave -- given the answer that double jeopardy is out of this picture altogether, issue preclusion is out of it altogether.

MR. ABEL: If I may explain, I believe that a doctrine that the Court could develop in an appropriate case, a case on direct review where it wouldn't be creating a new rule, would be in the nature of issue preclusion, and that it should be grounded just as the cases, the mixed law and equity cases are grounded on the appropriate right to a jury trial provision, rather than

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on the notion -- on the double jeopardy clause, which is simply not aimed at anything but successive prosecutions.

So I'm not suggesting that there wouldn't be something that would require some form of issue preclusion. It's not the double jeopardy clause.

QUESTION: But some issue preclusion is raised, litigated, and decided, so what's the -- I don't understand -- and I thought your whole point throughout is it wasn't decided.

MR. ABEL: That -- that is the point, Your Honor. But also to create --

QUESTION: So now you're saying even if it was decided, it would still -- could be decided again by the judge, in a way -- in conflict with the jury?

MR. ABEL: As I understood the hypothetical, I do think there would -- there would be problems with having that issue relitigated. I don't think that rule should be created in this case, and I don't think that rule should be grounded on the double jeopardy clause. It would be more appropriately grounded on the Sixth Amendment right to a jury trial --

QUESTION: Which was not raised in this case, right?

MR. ABEL: Which was not raised in this case.

QUESTION: So, your argument would be even if it

was decided and even if there was no Teague problem, that we still couldn't find in their favor in this case?

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

QUESTION: I thought your argument was it was academic in this case because there was no finding, and for issue preclusion that you must have a finding?

MR. ABEL: That's correct. And that -- that is our main argument in this case. But it also -- to apply a -- the form of collateral estoppel that I believe would need to apply in the hypothetical, would create new law and would address issues not raised in the petition in this case.

In terms of the implied acquittal rule of Price v. Georgia and Green v. United States, first I think it's clear an implied acquittal is not enough for collateral estoppel; you need an actual finding. But even if the law were to the contrary, that rule simply doesn't apply, as this Court recognized in Cichos v. Indiana where your separate counts are multiple theories of the same offense. And that's precisely what felony murder and murder are under Indiana law and under the common law, and in a manner that's entirely constitutional, as this Court recognized in Schad v. Arizona.

Also, in this case there would not be an opportunity to convict under Price and Green because the

jury was told by both defense counsel and by the prosecutor that its task was to pick from among the three verdicts. And I think the thrust of the prosecutor's remarks -- and I think this is clear from the transcript, which is included in the appendix to our brief so you can see the whole context.

And why this point came up in rebuttal was the defendant had, indeed, presented this defense to one of the felony murder counts, and the prosecutor said to the jury it doesn't matter because you can only return one verdict anyway. He said, give the defense counsel his argument, be that as it may, you're only allowed to return one verdict. And under those circumstances, there's simply not the full opportunity to convict required for the implied acquittal doctrine in Price and Green.

QUESTION: Can you clarify for me what you mean by -- you know, when there are just different theories of the same offense, what is the criterion for that, whether separate sentences could be imposed for each of the convictions? I assume you've -- if one type of murder had a 40-year sentence, another a 30-year, and another a 20-year, whether you could convict of all three and string the sentences together, is that the criterion?

MR. ABEL: I believe the criterion is how State law defines the offense, so long as it does so in a manner

consistent with due process under Schad. I think the States are free to define certainly murder and felony murder as a single offense.

QUESTION: Yeah. But, I mean, isn't the easier way to tell whether it's a single offense or multiple offense is whether you can get two punishments for this -- for the thing?

MR. ABEL: Um.

QUESTION: I assume here you could only be punished for murder.

MR. ABEL: That's correct.

QUESTION: One type or the other of murder. And you couldn't -- you couldn't get three separate punishments for three separate kinds of murder, because there was only one murder. Is that the point?

MR. ABEL: Certainly if that were the test to be applied, this case would meet it. I simply haven't thought through all the potential hypotheticals and statutes dealing with aggravated robberies and so forth, so I'm not sure of the test. I think -- but I believe it should be the test that the Court applied in Schad; that the State can do it, constrained by the limits in Schad.

And, if there are no further questions.

QUESTION: Let me just ask you one other question, if I may? At the heart of this case, of course,

is how we interpret the jury's silence on that one instruction. Is it -- what is your view on whether that's a question of State law or Federal law?

MR. ABEL: I believe it's not really a question of either law. I think it's a question of historical fact. It's subject to the presumption of correctness under Teague, because the question is, sort of, what did the jury do here. And, as the Indiana Supreme Court found, they simply didn't reach that count.

QUESTION: Well, supposing it were perfectly clear. Say the instructions were more the way your opponent would like them, where the judge said in so many words, return verdicts on all the counts that you can make up your mind on, or something like that, and clearly said you have a duty to decide the whole case, and then they failed and they left a silent verdict as to one of the three counts. Would the determination of whether that's equivalent to an acquittal or not, you think, be a matter of Federal law or State law, under those facts?

MR. ABEL: I still believe that it would be a factual question, depending on what else might be in the record that would determine a resolution of that factual question. But I think, fundamentally, it's a question what did the jury do? And there's always at least some possibility that the jury would not have followed such an

instruction, although ordinarily courts presume that they do. So that's probably the basis the State courts would start from in making that finding.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Abel.

The case is submitted.

(Whereupon, at 11:57 a.m., the case in the above-entitled matter was submitted.)

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CASE 92-7549

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BY Ann Marie Federico

(REPORTER)