OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: TERRY LEE SHANNON, Petitioner v. UNITED STATES

CASE NO: No. 92-8346

PLACE: Washington, D.C.

DATE: Tuesday, March 22, 1994

PAGES: 1-44

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IN THE SUPREME COURT OF THE UNITED STATES

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TERRY LEE SHANNON, :

Petitioner :

v. : No. 92-8346

UNITED STATES :

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Washington, D.C.

Tuesday, March 22, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

THOMAS R. TROUT, ESQ., New Albany, Mississippi; on behalf of the Petitioner.

AMY L. WAX, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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PROCEEDINGS

(10:08 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first in No. 92-8346, Terry Lee Shannon v. the United States.

Mr. Trout.

ORAL ARGUMENT OF THOMAS R. TROUT

ON BEHALF OF THE PETITIONER

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

This case requires the Court to determine whether and under what circumstances it is appropriate for a trial court to instruct the jury that in the event of a not guilty solely by reason of insanity verdict, that the accused will be committed to a mental hospital. Hereafter I will simply refer to the form of verdict as an NGI verdict.

The case comes about because of the passage by Congress in 1984 of the IDRA, the Insanity Defense Reform Act of 1984. That Act was passed in part in reaction to the unfortunate events surrounding the assassination attempt of President Reagan. The Congress had been considering insanity defense reform for some time before that, however, and this simply was the event that pushed the Congress to agreement.

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Prior to the passage of that Act, the -- there was no provision outside the District of Columbia for the mandatory commitment of a defendant acquitted in a Federal prosecution because of insanity. In fact, there was no not guilty by insanity verdict, as such; there was simply the general verdicts guilty or not guilty.

The IDRA changed that, and prescribed a form of verdict which is not guilty solely by reason of insanity. The Congress, in adopting this law, modeled it closely on the District of Columbia Act which, of course, also was a congressional enactment.

QUESTION: Mr. Trout, when you say Congress modeled it closely on the District of Columbia Act, what do you mean, that they looked to the District of Columbia Act only?

MR. TROUT: There's no evidence from the legislative history that I can find, Your Honor, that they looked anywhere else.

QUESTION: Is there evidence is the legislative history that they did look at the District of Columbia Act?

MR. TROUT: Yes, there's quite a bit of evidence that they did. In the Senate Report, which is the most comprehensive report in the legislative history about the adoption of this Act, the -- reference to the D.C. Code

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provisions are quite numerous and throughout the report.

The Congress in particular paid close attention to the disposition that was to be made of the accused in the event he was found not guilty solely by reason of insanity, and most closely modeled the IDRA on the D.C. enactment with regard to that disposition. I think that is why it is so relevant to the issue that we have before the Court today, because we are dealing with what happens to the accused in the event he's found not guilty solely by reason of insanity.

The D.C. Circuit has already held that the IDRA was modeled on D.C. section 24-301 in the Crutchfield case. The Government, in its brief, did not deal with the Crutchfield case whatsoever. It did not mention it, it did not try to point out any error in it, and I think it incumbent on the Government today to at least respond to the Crutchfield case and either admit that the holding in that case is correct or else explain to the court where the error in that case.

QUESTION: What holding in the Crutchfield case, Mr. Trout?

MR. TROUT: The holding that the IDRA was closely modeled on 24-301.

QUESTION: Not the question involved in this case, but the question of the derivation of the IDRA.

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MR. TROUT: Yes, Mr. Chief Justice.

If there is any question about whether the IDRA was modeled on 24-301, I think it important to point out the similarities, and especially with regard to the disposition that's to be made of the accused in the event of the not guilty by reason of insanity verdict.

It's true that the Congress made certain changes in the -- between 24-301 and IDRA. They increased the burden of proof from preponderance of the evidence to clear and convincing evidence. In the D.C. statute the burden had been placed on the defendant to prove the defense. They kept that burden on him; they simply increased it to clear and convincing.

There were other minor changes that dealt with the trial phase of a criminal case in which the insanity defense is at issue, and all of those changes generally are to increase the difficulty on the accused of successfully asserting the defense. But once the defense is successfully asserted, then the IDRA and 24-301 are very very similar.

QUESTION: Was it the case that the D.C. courts that imposed this requirement under the IDRA purported to be imposing it because the statute required it, or was it simply a part of their own supervision of the D.C. courts?

MR. TROUT: Well, the Lyles case in 1955 was

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decided under 24-301. It refers to the statute in the decision.

QUESTION: Does it say that this requirement of informing a jury is a statutory requirement?

MR. TROUT: No, it does not, Your Honor.

QUESTION: Ordinarily, you wouldn't expect the legislative body that is enacting a provision governing a criminal -- something to do with a criminal to say, you know, what sort of instructions would be given, would you? Don't they usually leave that up to the courts?

MR. TROUT: That is correct, Your Honor. I think that it's difficult to think of congressional enactments which prescribe for the court what instructions they ought to give. In fact, I -- none come to my mind. There may be, I'm not saying there are none, but it is rare, if it ever happens, that Congress tells the courts what instructions you ought to give --

QUESTION: But that's what you're urging here, are you not, Mr. Trout, that you get this requirement that the trial judge instruct the jury from the statute? You're not making any constitutional argument, as I understand it.

MR. TROUT: No, I'm not making any constitutional argument.

QUESTION: So you -- you're pinning your

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position about what the judge must charge to this IDRA statute, is that right?

MR. TROUT: Or to the supervisory power of this Court to impose a -- the best rule. In the event that the Court does not find that the settled judicial construction of 24-301 was, in fact, incorporated into the IDRA, then the Court still has the power to require the instruction.

QUESTION: Well, if you do -- if you're talking about just some general supervisory power notion, then wouldn't your reasoning apply as well to telling the jury about a mandatory minimum sentence in a case.

MR. TROUT: No.

QUESTION: So they'll know the defendant's exposure.

MR. TROUT: No, Your Honor.

QUESTION: Distinguish --

MR. TROUT: The diff -- I don't mean to interrupt you, but --

QUESTION: Yes, distinguish the two, if it's a question of the jury making an informed decision.

MR. TROUT: Well, the difference is this. The jury has no role in sentencing and I'm not here to create some -- urge some doctrine that would give the jury a role in sentencing unless the legislature does it by some congressional enactment. The only point that I'm

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advocating for is that the jury have the same knowledge about the insanity defense, the same common knowledge that it has about guilty and not guilty verdicts.

Jurors come into the courtroom knowing that not guilty verdicts mean the accused will be free if such a verdict is rendered. They also know that if they render a guilty verdict, he is at least subject to punishment, but -- they don't know necessarily what that punishment will be but they do know he can be punished.

With regard to the not guilty solely by reason of insanity verdict, there is no certainty about what will happened to an uninformed layman. He or she simply knows that the verdict says not guilty by reason of insanity, and what happens to the defendant thereafter the jury has no idea about.

And quite frequently we are dealing with accused who are violent and at least -- at the very least are disturbed mentally, and the public is concerned both about violent individuals and mentally disturbed individuals. And jurors may well feel compelled to convict under circumstances where they would otherwise feel that the not guilty by reason of insanity verdict was proper simply in order to prevent the release of someone that they see as potentially dangerous to the public.

QUESTION: If the judge -- if the judge told the

jury, now, there is a requirement, if you return a verdict of not guilty by reason of insanity, that this person go to mental institutions -- a mental institution, but it is possible that he could be released within 40 days, that would be -- you would have no objection to such an instruction.

MR. TROUT: Well, I think that instruction is -- I do object to that instruction, Your Honor, because I don't think it solves the problem that I am urging the Court to correct. I think the instruction ought to be brief and it ought to be concise, but it should simply say something like what the Sixth Circuit Pattern Instruction says, which is:

"If you find the defendant not guilty because of insanity, then it will be my duty to send him to a suitable institution. He will only be released from custody if he proves by clear and convincing evidence that his release would not create a substantial risk that he might injure someone or seriously damage someone's property."

QUESTION: Well, that's the good side from the point of view of your client, but if we're interested in giving the truth a totally -- the jury a totally truthful, accurate picture, why wouldn't one add what Justice Ginsburg said, that there cold be a hearing in 40 days and

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he might first -- that that would be his first opportunity to be released.

MR. TROUT: Mr. Chief Justice, we're not trying to get the jury -- I'm not trying to get the jury involved in what's going to happen to this man down the road -- or woman -- other than to say, other than to assuage whatever fears they have that they're going to release this man.

QUESTION: Well, buy they're -- if he could be released in 40 days, maybe some of those fears are justified.

MR. TROUT: Mr. Chief Justice, the Act is so severe that --

QUESTION: Well what do you mean, severe?

MR. TROUT: I mean severe with regard to the ability of an accused found not guilty solely by reason of insanity to be released. It is very restrictive, and it's very difficult, if not impossible, in many cases for anyone who successfully asserts this defense to subsequently obtain release. So --

QUESTION: But you don't deny it's possible.

MR. TROUT: It's possible.

QUESTION: Well, it seems to me that you're just picking and choosing the parts of the effect of this verdict that would make a jury favor your client.

MR. TROUT: Your Honor, I -- what I'm trying to

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do is honor the time honored principle that the jury has no role in the disposition of the accused, at the same time that the jury is put on an equal footing that they're already on with regard to the guilty and not guilty verdicts. I don't think that it is wise to have the jury speculate about whether the man will be released or not be released. They may do it anyway, but this instruction will -- it will solve some of the problems that the present situation creates.

And there -- I don't suggest that there's any ideal solution to it, but I do believe it would be unwise to get into the detail about what happens, because -- when I say what happens, what happens in the event of his acquittal on this ground and the subsequent commitment procedures and release procedures.

QUESTION: Mr. Trout, is there a -- the D.C. Circuit decision you refer to is back about 30 or 40 years ago, I think, in the Lyles case. Have they adopted a pattern instruction that they use, do you know?

MR. TROUT: Yes, sir.

QUESTION: You -- why did you read us the one from the Sixth Circuit rather than that one, because the Federal Government, I guess, is always a party in the D.C. Circuit cases. Well, I guess they're in the Sixth Circuit too, of course.

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MR. TROUT: Your Honor, I did include the D.C. Circuit Pattern Instruction in the appendix to my brief, and --

QUESTION: How long has that pattern instruction been given, do you know?

MR. TROUT: It's -- I've got two of them, both of them in here. It's been amended slightly, but it's been in effect since -- roughly since the Brawner case in 1972. And so the instruction is of long standing in the D.C. Circuit, and it was in effect --

QUESTION: Is it a discretionary instruction that the district judge gives, or is it always given if the defendant asks for it, in the D.C. Circuit?

MR. TROUT: In the D.C. Circuit it is always given if the defendant asks for it, but if the defendant does not want the instruction given, it is not given.

QUESTION: Suppose the trial judge instructs the jury, ladies and gentlemen of the jury, you are not to speculate upon the disposition of the -- or custody of the defendant in the event you find him not guilty by reason of insanity; the law has addressed that subject and it is not your concern.

MR. TROUT: Well, similar instructions are given, Justice Kennedy, I -- in every case, I believe. But I don't think that's -- I realize the presumption is

that juries follow their instructions, and that is necessarily a presumption that we have to engage in in order for the criminal justice system to work. But, to simply give them that instruction with all the fear and concern that jurors may feel about the accused in these cases is expecting too much.

QUESTION: Well, the trial judge tells the jury the law has addressed this subject. Suppose he added it makes adequate provision for the safety of the public?

MR. TROUT: Well, I think that surveys indicate -- many surveys do indicate that the public at large is very suspicious of the insanity verdict. They feel like it's used all the time and it's very successful and it's a loophole that criminals use to get through the criminal justice system.

QUESTION: And you think that's wrong and that a particular position should be taken in telling the jury about it.

MR. TROUT: Well, I think it has to be wrong, Your Honor, under the IDRA, but --

QUESTION: Well, I mean, the public may think that people at the 40-day hearing are simply judged too leniently and that therefore they get out after 40 days when they shouldn't get out after 40 days. Must the court take a position on whether the system is, indeed,

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operating well enough? If the public wants to think, if the jury wants to think that, in fact, they're letting them out too soon, must the court disabuse them of that notion by withholding from them the information that this person could be out within 40 days?

MR. TROUT: Justice Scalia, the reason to give the instruction, as I see it, is to have the jury concentrate on the law and the evidence in the case, and to -- and to bring in the 40-day requirement is a -- there is some danger.

QUESTION: Mr. Trout.

MR. TROUT: Yes.

QUESTION: I'm really puzzled by your argument because on the one hand you ask us to follow the example of the D.C. Circuit.

MR. TROUT: Yes.

QUESTION: And the D.C. Circuit Pattern Instruction has the 40-day provision in it.

MR. TROUT: Yes, sir.

QUESTION: It seems to me you've got to -- ought to take one position or the other on whether we should look to the D.C. Circuit for guidance.

MR. TROUT: Well, I think I have it in my brief, Your Honor, that if the -- the doctrine that I am asking the Court to follow is the incorporation of the settled

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judicial construction which was placed on the D.C. statute.

QUESTION: Well, you said it wasn't. You said it wasn't a settled construction of the statute, I thought you acknowledged that.

MR. TROUT: No, sir, I did not acknowledge that. It was very settled --

QUESTION: Well, it's not a construction of any text in the statute, is it?

MR. TROUT: No, sir, but it is a -- it's a settled construction of the statute.

QUESTION: Well, it's a settled practice in D.C. when administering the statute, but as I understood your answer, the D.C. Circuit did not purport to be construing any language in the statute when it laid down the instructional rule that you're asking for.

MR. TROUT: That is correct, Your Honor. But every decision is tied to the statute. Now, they're not construing a word or a phrase in the statute, I confess that, but it is tied to the statute and Congress knew that. When it adopted the IDRA it knew the practice, and it -- in fact, in the Senate Report it advocates the practice of the instruction.

And I will -- I must confess that a strict application of the doctrine of incorporation that I'm

asking the Court to adopt would require the model instruction that Justice Stevens has referred to. I don't -- I personally don't think it is the best instruction, but it is the instruction which the D.C. Circuit has used now for -- well, in its form, I believe, for over 20 years, and it would certainly be a substantial improvement over the present situation.

QUESTION: Mr. Trout.

MR. TROUT: Yes, sir.

QUESTION: In your Appendix E, starting on 37a of your brief, there's an Alternative A.

MR. TROUT: Yes, sir.

QUESTION: And then an Alternative B.

MR. TROUT: Yes, sir.

QUESTION: And then on 41a we have Alternative A, Superior Court, which I take it is the D.C. Superior Court.

MR. TROUT: Yes, sir.

QUESTION: And then Alternative B, District Court.

MR. TROUT: Yes, sir.

QUESTION: Are all -- is Alternative A on page 37a and Alternative B on 39a and Alternative B on 41a, are all of those given in the District Court of the District of Columbia?

MR. TROUT: Yes, sir. And the reason for that -- and I apologize to the Court for just putting it there without explanation. The reason for that is that in the District of Columbia some of the cases are going to be prosecuted under 24-301, some of them are going to be prosecuted under IDRA, and so that's part of the reason for the alternatives, because the terms of the statutes are slightly different so the --

QUESTION: Is there -- do more than one of the various instructions I've mentioned apply when the prosecution is under -- is governed by the IDRA?

MR. TROUT: I'm sorry, Your Honor, I didn't understand the question.

QUESTION: Well, there are -- we have an instruction on page 37a and an instruction on page 39a and an instruction on page 41a; which of those are used when the IDRA governs?

MR. TROUT: I have to stop a minute, Your Honor, and remember.

QUESTION: Well, don't take a lot of time from your argument. I was just curious.

MR. TROUT: All right. The instruction that is most important is the Instruction 5.11: "Effect of a finding of not guilty by reason of insanity."

QUESTION: And where is that in your brief?

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MR. TROUT: That's on page 36a.

QUESTION: And then what are -- what are the alternatives? They are given sometimes, perhaps?

MR. TROUT: Well, no, they define the -- they define insanity and give the substantive nature of the defense. The 5.11 on 36a simply gives a short instruction that informs the jury about the disposition that will be made of the accused in the event that he's found not guilty solely by reason of insanity.

QUESTION: Mr. Trout, if I didn't agree with you as to whether this requirement is brought along by the statute, if I don't think it's a matter of statutory construction, but I do think that there's a question as to what the Federal courts should provide under their supervisory power and if I think that they should provide this instruction, why shouldn't I think that they would also have to provide the instruction, for example, in a case where there have been multiple crimes committed by a particular individual and he's been convicted of one of them already?

Must the jury know that this person is already under life sentence, so that if you find him not guilty of this subsequent crime, it really doesn't matter? Why is that any different from what you're asking us to do here?

MR. TROUT: It's different because in that case

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that you pose, the defendant is on trial for a crime, and the jury knows that if they convict him he is subject to punishment, and that's all they -- that's all they need to know. And --

QUESTION: But you say they should also know that if they release him, he's not going to be turned loose on the public. You say that's very important for them to know; why shouldn't they know that in this other case too?

MR. TROUT: It's important in the insanity context simply because they -- there's a void there and they don't have any knowledge, or they may not have any knowledge, or they may have erroneous knowledge. But in the case that you pose, they have some knowledge, they have all the knowledge they need to render a true verdict, which is that the defendant is subject to punishment. And that's all they need to know, and that's all the law has traditionally permitted them to know, and I don't argue with that. And I don't think that the rule that I'm asking the Court to adopt will interfere or weaken that principle in any way.

QUESTION: Was there anything in particular in this case that might have led the jury to believe that the defendant would be release immediately?

MR. TROUT: Your Honor, there was nothing in the

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case that --

QUESTION: Or not treated at all?

MR. TROUT: There was nothing in the case that would have caused them to believe that. It was not mentioned in any way. Nevertheless, the insanity verdict was something that the jury was concerned about. They sent a note back to the court during their deliberations, which is on page A-9 of the Joint Appendix, and saying: "We want you to explain the reason of insanity."

Now, that note does not mean, necessarily, anything. I mean, I don't know what it meant, and the court didn't either. But it could mean we want you to explain what caused this man's insanity, we want you to explain what the reason of this defense is. Really, the note is quite ambiguous and subject to a number of interpretations.

QUESTION: Thank you, Mr. Trout.

Ms. Wax, we'll hear from you.

ORAL ARGUMENT OF AMY L. WAX

ON BEHALF OF THE RESPONDENT

MS. WAX: Mr. Chief Justice, and may it please the Court:

Petitioner's principal contention in this case is that it was error for the judge not to instruct the jury on the consequences of an insanity verdict because

that instruction is required by the text of the Insanity Defense Reform Act of 1984.

As a simple matter of statutory construction, that contention must be incorrect. The Insanity Defense Reform Act does expressly deal with instruction to the jury. It requires the jury to be instructed that it can find the defendant guilty, not guilty, or not guilty by reason of insanity in a case in which the insanity defense has been raised, but it is absolutely silent concerning instructions on the consequences of an insanity verdict.

Now, petitioner seeks to rely on the familiar canon of statutory construction that where Congress has adopted a statute enacted in another jurisdiction and that statute has received a settled judicial interpretation, Congress must be deemed to have adopted that settled interpretation along with the text.

Now, there are several reasons why that canon of construction does not help petitioner in this case. First of all, the canon does not even apply here for the simple reason, as Justice Scalia and Justice Souter have pointed out, that the D.C. Circuit, in laying down the mandatory rule of instruction in Lyles, was not engaging in interpretation of the D.C. statute.

QUESTION: Ms. Wax, can I ask you just kind of a basic question? Let's assume the statute doesn't require

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it, because there certainly is nothing in the statute that says a text should be given, but there -- the practice has been in the District of Columbia to give this instruction, as I understand it, for some years.

MS. WAX: Right.

QUESTION: Are you asking us to decide the case in a way that will require the D.C. Circuit to change its practice?

MS. WAX: We are asking this Court to lay down a supervisory principle, just setting aside the whole issue of statutory construction. We are recommending that this Court, in its supervisory capacity, adopt the principle that in general the instruction should not be given except in the discretion of the trial court where there is affirmative indication that the jury has been misled or misunderstands the consequences of the verdict and may be influenced.

QUESTION: I understand that's your position --

MS. WAX: So, in a way I'm saying, yes, we are asking --

QUESTION: Yes, you do understand -- you, in effect, are saying that that practice has been erroneous for the last 20 years or so.

MS. WAX: As a rigid, inflexible, blanket rule, yes, but not as a matter of instruction.

QUESTION: Has it been the Government's practice regularly to object to the giving of the instruction in the District of Columbia? There's probably been a lot of these cases, I assume.

MS. WAX: Not that I'm aware of, that we haven't consistently objected, we've just gone along with the rule in D.C. And it's important to realize --

QUESTION: It wouldn't affect, though, the D.C. Superior Court --

MS. WAX: No.

QUESTION: -- Where there's the same prosecutor but a different code.

MS. WAX: Exactly. The reason why the D.C. Circuit has this rule as a rule applying to the D.C. Code is that until 1973 the D.C. Circuit was the appellate court for D.C. law as well as Federal law, and then there was a split. And, of course, this just goes to the point of whether this is a supervisory rule. It was a supervisory rule adopted by the D.C. Circuit to apply to any insanity defense within its jurisdiction, whatever law it may have arisen under. Of course --

QUESTION: Ms. Wax, would -- you are now urging us to instate a supervisory rule that would go together with the IDRA.

MS. WAX: With Federal --

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QUESTION: Suppose the jury sends a note to the judge that says if we return an NGI verdict, will the defendant walk. Should the judge respond to that, and if so, how, under your supervisory principle?

MS. WAX: Well, I think under those circumstances the judge could reasonably conclude that the jury was tempted to abandon its responsibility or its oath, that their -- that the system, so to speak, was not functioning properly; that the jury was focused on something that they weren't supposed to be focused on, even to the point where they may harbor a misconception about what would happen.

And that might be the type of circumstance in which the judge should at least instruct the jury, again quite sternly, that this was none of their concern, but could perhaps go beyond that and issue a curative instruction to perhaps clear up any possible misconception about the disposition.

QUESTION: Could the judge say, no, he won't, because I'm obliged to send him to an institution where he will be examined?

MS. WAX: Yes, he could. I mean, he could -- he could, in effect, issue a curative instruction that included the information about what would happen to the particular defendant. I think there are other --

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QUESTION: I'm not sure I understand, Ms. Wax, the basis for your answer to Justice Ginsburg. You said well, first, he could instruct the jury in very stern terms that this is none of their business.

MS. WAX: Right.

QUESTION: But then if he wanted, he could add the instruction. Now, which is right? It seems to me one -- it seems to me that if he has the discretion to give the instruction, that must mean that he has to give the instruction in some instances. What is to guide that discretion? I assume one factor would be if there was some misleading statement by counsel to the effect that had to be cured, but absent that it seems to me that your answer is inconsistent.

MS. WAX: Well, no, if the jury says will the defendant walk, will he be instantly released, that -- I think the judge can think that that's somehow equivalent to a prosecutor making the statement, and, by the way, this defendant's going to walk, because it means that there is this notion in their mind which is inaccurate. When there's an inaccurate notion in the mind of the jury, it is our belief that the judge need not just sternly admonish them to ignore the consequences, but can actually correct that misinformation.

I'll give another example --

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QUESTION: Well, let me --

QUESTION: But there is not an inaccurate notion. What gave you the impression there's an inaccurate notion? The jury just doesn't know, but that's the same presumed state of facts even before they asked the question. The jury doesn't know what the effect of a DWI instruction is; that's all the question indicates. It doesn't indicate that they're under a misimpression at all, but just indicates we don't know what happens if we come in with DWI.

And it seems to me if you say you can give the instruction when they come in with a question, you ought to say you can give the instruction even if they don't come in with a question. They ought to know what DWI means.

MS. WAX: Well, my understanding from Justice Ginsburg's question -- and maybe I misheard it -- is that they actually asked, will this individual be instantly freed, implying that they had a misimpression because, in fact, he's not going to be instantly freed necessarily.

Let me just give an analogous example --

QUESTION: The question is if we return an NGI verdict, will the defendant walk. That was --

MS. WAX: Right. Let me give an --

QUESTION: And you said that, yes, the judge

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could tell -- could respond no to that question.

MS. WAX: Well, no, he --

QUESTION: Justice Ginsburg did not say that the question was if we return a DWI verdict, the defendant will walk, won't he. That's a different question, and then I could understand your response, but if all they ask is what will happen, will he walk, I don't see that that's any impression.

MS. WAX: Well, now we're getting into subtleties. Let me try and give an analogous example. I think that my response is in part a function of the great deal of discretion that we give judges, district court judges in issuing curative instructions, instructions which try to correct misimpressions on the part of juries.

I mean, if a statement came out in the trial about prior convictions; if, for example, a prosecutor tried to insinuate than an individual had prior convictions in a particular case, and it turned out he had no prior convictions, I mean that was actually false, we -- I don't believe that the judge would be confined to just simply saying ignore that comment on the part of the prosecutor, but he could go on from there and actually give the proper information, correct the misinformation.

QUESTION: Ms. Wax, do you take the position that in our supervisory power we should insist that every

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jury be told that they should not concern themselves with what happens to the defendant following their verdict, whatever it is?

MS. WAX: Well, it probably isn't necessary to insist on it, since I believe that it is generally practice in most Federal jurisdictions, at least it was --

QUESTION: That instruction was given here.

MS. WAX: Yes, it was, on page A-8 of the Joint Appendix.

QUESTION: And you are satisfied that it is always given, so we don't have to concern ourselves with it.

MS. WAX: I'm not going to say with absolute certainty that it's always given, because I haven't reviewed the instructions of each circuit, but --

QUESTION: But in any event, this Court has never handed down some decision saying that it must be given.

MS. WAX: Not to my knowledge.

QUESTION: But presumably if that's given, what additional instruction or rule is required by us? Maybe -- what's the matter with just leaving it there and letting a judge decide in the judge's discretion what ought to be done? That's what we normally do with instructions.

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MS. WAX: Well, we do think that the judge should have a great deal of discretion, but we also believe that there can be such a think as abuse of discretion in this instance. And the reason that we think that the judge should not be allowed to give information to the jury generally about consequences of the NGI verdict unless there's some affirmative indication that the system is not functioning, is that --

QUESTION: Well --

MS. WAX: -- There are other instances in which the judge could equally be allowed discretion to give instructions about mandatory minimums --

QUESTION: Do you say that it would be an abuse of discretion for a trial judge to give a truthful instruction, such as that given in the D.C. courts, on what happens as a -- following a not guilty by reason of insanity verdict? Is that an abuse of discretion if there are no special circumstances and the trial judge gives that instruction?

MS. WAX: Well, I'm not sure that it would ever come to appeal, necessarily, but I think we would take the position that the judge should not be doing that, and --

QUESTION: The district court which felt otherwise could so instruct, I suppose. And as you say, the Government could never raise it --

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MS. WAX: Exactly.

QUESTION: -- If there's an acquittal, and they'd have no interest in raising it if there's a conviction.

MS. WAX: Exactly. So when I say that I don't think it would ever come to appeal, that's precisely what I'm saying. It's sort of a theoretical principle, and I don't --

QUESTION: But as a matter of principle, you take the view that's an abuse of discretion to give it.

MS. WAX: Well, I think it would be -- I think this Court should indicate that it would be improper because it would not be in keeping with the general principles that govern our system, which is that we don't ordinarily have trial judges instructing juries about consequences of verdicts, not just in the insanity context but in a million other contexts in which the jury could well be interested in what's going to happen, could well be interested in probation, issues of parole, mandatory minimum-maximum sentences, whether they can make a recommendation of leniency as the Rogers case exemplifies.

I mean, the fact is we're on a slippery slope once we sanction these sorts of freewheeling --

QUESTION: Has this slippery slope in the District of Columbia caused any people to slide downhill?

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I mean they've had the rule there for over 20 years and we haven't had all these other problems, have we, any of them? They don't ask for instructions on parole or mandatory minimums, do they? I mean, it's theoretically possible, but in practice it hasn't happened.

MS. WAX: Well, no. But, first of all, I think it would be a very different matter if this Court sanctioned those sorts of instructions and the reasoning behind them --

QUESTION: Not "those sorts." One particular instruction has been given for 20 or 30 years in the jurisdiction without any evidence of it creating any of the problems that you hypothecate.

MS. WAX: But, Your Honor, there's really no way to distinguish between that sort of instruction which opens the door to the jury speculating about the consequences of the verdict -- and it's not as if this doesn't come at a price. I mean, petitioner tries to imply that this instruction can only help the defendant, and that's just not true.

QUESTION: Well, of course, that's why he has a lawyer. If he doesn't want it, presumably he can ask the judge not to give it. But if -- when requested, the question is whether he's entitled to it, and in the D.C. Circuit, as I understand it, he automatically gets it,

and I gather it's a pattern instruction that the prosecutors and defense counsel, everybody cooperated in drafting the particular instruction they give.

MS. WAX: Well, it's just our view that this is not a necessary rule, and in that sense we shouldn't have the rule, which is just another opportunity for error on the part of the judge; that it's not a desireable rule --

QUESTION: Well, it wouldn't be error if you had a regular rule that you give the pattern instruction when it's asked for. There's not any danger of error there; you just either -- you just do it. That's one of the beauties of pattern instructions.

MS. WAX: Well, the problem is, of course -- well, let me just say that the instruction that petitioner wants, the instruction that he's requesting, is not really a terribly accurate or helpful instruction. He is focusing --

QUESTION: No, but would you not agree that the D.C. Circuit's instruction is accurate?

MS. WAX: It is accurate, Your Honor.

QUESTION: It has the 40 days in it, and it has --

MS. WAX: Well, it does, but our position is that any jury that is going to be -- is going to be swayed by its fear of what's going to happen to the defendant

instead of adhering to its oath and looking only to evidence is not going to be influenced by this instruction because this instruction provides no -- very little reassurance to any jury that an individual who might be dangerous is not going to be released.

A person will, at most, be held for 40 days, and, in fact, he could be sprung as little as a few days after the verdict because the hearing can be held at any time within 40 days, and the person needs to show that he isn't going to be dangerous to others and the property of others, but that is a very different matter from a showing that needs to be made to succeed in an insanity verdict, which is --

QUESTION: Well, I suppose that's the defendant's choice to make if he has the option to ask for the instruction.

MS. WAX: But it's this Court's responsibility to decide whether, in fact, it makes any sense to add yet another requirement, another instruction, when that instruction is out of keeping with the general -- our paradigm, which is that juries look to the evidence, and is just of marginal utility and in some cases may backfire.

I mean, we haven't talked at all about the ways in which this sort of information might lead to -- the

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jury to engage in compromise verdicts. There are all kinds of situations in which the jury's attention being brought to what's going to happen to the defendant might lead them to render a less rather than a more accurate verdict.

QUESTION: But as long as the defense -- it's the defendant's option, why should we be concerned about that aspect of it? We have in this case a judge who refused to give a charge, and I'm clear on what your position is there, that there is no requirement that the judge give the charge. I'm not clear yet on your answer to may the judge, if the judge -- in the judge's discretion, give the charge.

Say, for example, the judge has read a law review article that says 80 percent of jurors don't know what NGI means; they think it means that the defendant will walk. And the judge says, I'm impressed by that and I want to tell them that that's wrong.

MS. WAX: Well, I mean, that law review article has yet to be produced. Maybe at some point in the future it might be produced and the land -- the whole landscape that surrounds this particular issue will change. But one of the pieces of information on which we base our position in this case is that there simply is no good evidence; it's purely speculative that jurors systematically

misunderstand the law.

QUESTION: Well, Ms. Wax, all that we have to do in this case, I suppose, to satisfy your concern immediately, is to say the statute doesn't require the court to give the instruction.

MS. WAX: Right, that is one -- certainly one --

QUESTION: We don't have a case here where the judge has given an instruction and there's some objection made, and perhaps we never will, but to decide this case we only need to answer that one question, does the statute require it, isn't that so?

MS. WAX: That's certainly correct based on the argument that petitioner has made, but we have made the additional argument and we think that guidance might be useful, although certainly not mandatory. It might be useful for this Court to lay down certain guidance for the lower courts to follow, certain parameters.

QUESTION: Ms. Wax, the first question presented for review in the -- "Was the petitioner entitled to an instruction that if he was found not guilty solely by reason of insanity, he would be committed until he was no longer a threat to the safety of others or their property." Don't you think that embraces not just an argument based entirely on the statute, but an argument based on supervisory power too?

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MS. WAX: It certainly can, Your Honor, and that's why we have made a separate argument both in our brief and are attempting to make one here, which is that certainly even if the statute doesn't require this instruction -- and certainly it doesn't require it -- that there still is a further question of whether, as a supervisory matter, this Court ought to have a certain rule about what lower courts should do. And I think that the Lyles case exemplifies a court of appeals deciding, you know, what ought to be the practice in its jurisdiction. And as a --

QUESTION: Ms. Wax, if we reach that issue, would it be your position that the instruction should sometimes be given not only at a defendant's request, in the case that you gave in your hypothesis, but at the State's request as well?

MS. WAX: Yes, under appropriate circumstances.

QUESTION: What would the circumstances be in which the State would be entitled to it?

MS. WAX: Well, I'm having trouble thinking of one -- I'm having trouble thinking of circumstances.

QUESTION: Well, what if we had Justice Ginsburg's law review article on the bench again, wouldn't the prosecutor be free to make the argument, Judge, the -- most jurors don't know what NGI means and I want them to

know that anyone found NGI can walk in 40 days. Is the prosecutor -- would the prosecutor be entitled to that instruction?

MS. WAX: Under our -- under our theory, I don't think the prosecutor would be entitled to the instruction.

QUESTION: Why not?

MS. WAX: Because our view is that in the absence of a particular indication that this jury, in this case --

QUESTION: In other words the law review article wouldn't be enough.

MS. WAX: No. That would be our view.

QUESTION: If the judge is giving the instructions on not guilty by reason of insanity and the jurors are shaking their heads and rolling their eyes, at that point he can exercise discretion and tell them more?

MS. WAX: If there -- our view is that we presume that the system is functioning properly in the sense that the jury --

QUESTION: Well, do you presume that if they're shaking their heads and rolling their eyes.

MS. WAX: Well, no, that's a particularized set of circumstances.

QUESTION: Okay, now they shake their heads and they roll their eyes. The prosecutor says I want them to

know that in 40 days he can walk. Is the prosecutor, on your view, entitled to that instruction?

MS. WAX: I think -- I wouldn't say no to that. If would have to be, though --

QUESTION: Would you say yes?

(Laughter.)

MS. WAX: Well, I think that that is very different from this case, and I haven't really thought through what the State would be entitled to.

QUESTION: It is. It is.

MS. WAX: Yeah. Because I think one of the premises of this case is that the defendant is -- it is the defendant who is, in effect, making, without making it, a sort of quasi due process argument that it's essential to the protection of their interest.

QUESTION: Yeah, but we're now concerned with supervisory authority, and if our criterion for exercising supervisory authority is that the jury ought to have an accurate sense of the consequences that will follow upon the return of a given verdict, why doesn't the prosecutor have just as good an argument for saying "he can walk in 40 days and I want them so instructed" as the defendant has for an instruction "he can't walk tomorrow?"

MS. WAX: Right. Well, I think if there's been an affirmative breakdown and indication that the jury has

really gone astray, I think probably the prosecutor could get such an instruction.

QUESTION: What if a jury in a criminal case that has a number of counts, first degree murder, second degree murder, manslaughter; there's some indication that the jury thinks that manslaughter, the punishment for manslaughter is that you're going to lose your driving -- driver's license; must that be corrected? Does the jury have to know what the increment of punishment is for each of the verdicts that it's going to bring in?

MS. WAX: Well, you mean, if the jury says -- sends back a note and says we want to know what's going to happen to this person's driver's license.

QUESTION: Right.

MS. WAX: Yeah, we're very concerned about this person's driver's license.

QUESTION: We have no idea what the consequences of first degree versus second degree versus manslaughter, we have no idea what the consequences are, please tell us how long does this person spend in prison, if any time at all?

MS. WAX: Okay.

QUESTION: Must the court respond to that?

MS. WAX: Right. Well, once again, I would distinguish, Justice Scalia, between a case in which the

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jury has expressed a sort of vague concern with consequences and a case --

QUESTION: I don't think a court must, and I don't see any reason why that's different from this case. I don't think a court must.

MS. WAX: Well, I think a line has to be drawn somewhere.

QUESTION: But it seems to me very odd, Ms. Wax, that if you reserve this instruction for the jury that is transgressing its authority, then they have the advantage or the disadvantage of knowing the extra information. It seems to me your position should be that the more unfocused the jury is becoming, the more the judge should stick to the letter of the law and say, you must follow the instructions I have given you; these matters are not of your concern. If you have the jury ready to go off the path, it seems to me that this is the one time when you should insist on the instructions.

MS. WAX: Well.

QUESTION: It seems to me this is a very odd calculus you're asking us to accept, that the one time we give this instruction is when the jury's about ready to go off in the wrong direction.

MS. WAX: Well, once again, Your Honor, it really depends on the circumstances, as with all curative

instructions, as with all cases in which --

QUESTION: Well, but I'm -- we're trying to give some guidance to the district judges as to what those circumstances are.

MS. WAX: As in all cases where juries send back notes asking specific questions or saying we're concerned about this and they're not supposed to be concerned, or we harbor this misconception that just simply isn't true, the judge is going to have to make a judgment about how much they need to tell the jury to get them back on track. And I don't think it's possible to lay down a blanket rule except to say that the presumption of regularity has to apply in general. Despite, you know, law review articles or background information, the presumption that the jury will stick to the evidence will apply.

QUESTION: May I go back to raise one question with you again. And forgetting presumptions and hypotheticals, what has the practice been in the District of Columbia for the past 30 years? Does the prosecutor ask for this instruction? And if so, is it given?

MS. WAX: The practice has been that the instruction is given unless the defendant objects. That's my understand.

QUESTION: I see.

MS. WAX: That's it's given as a matter of

course unless the defendant actually objects to the instruction being given. And that's --

QUESTION: Ms. Wax, I suppose you have to be a pretty stupid jury to think that you're given three choices, guilty, not guilty, or not guilty by reason of insanity, and to think that the last two have exactly the same consequences. It's sort of, you know, this is my brother Daryl, this is my other brother Daryl.

(Laughter.)

QUESTION: It's ridiculous. Isn't it ridiculous?

QUESTION: Well, it may be ridiculous, but that was, in fact, the practice in the Federal system for a long long time, wasn't it?

MS. WAX: Well, as a formality --

QUESTION: Not guilty by reason of insanity was they'd walk, period.

MS. WAX: Not in reality. In reality -- it was only formally, but not in reality, and Justice Scalia --

QUESTION: But you'd have to go through a State commitment, civil commitment.

MS. WAX: That's right, you had to give the defendant over to the State. But, in fact, the Federal system tried very hard to ensure that those procedures took place and a fair number of people were committed.

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And there's no reason to believe that people didn't know, and especially after the Hinckley verdict in 1982, that people somehow think that individuals who are acquitted by reason of insanity are instantly released. There's no reason to believe that and, beyond that, that even if some of them do think that, that they're going to act on that belief.

If the Court has no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Wax.

The case is submitted.

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

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CASE NO.: 92-8346
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BY Ann Mari Federico

(REPORTER)