

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MONTANA, Petitioner v. JAMES ALLEN EGELHOFF

CASE NO: 95-566

PLACE: Washington, D.C.

DATE: Wednesday, March 20, 1996

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MONTANA, :

4 Petitioner :

5 v. : No. 95-566

6 JAMES ALLEN EGELHOFF :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, March 20, 1996

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:05 a.m.

13 APPEARANCES:

14 JOSEPH P. MAZUREK, ESQ. Attorney General of Montana,
15 Helena, Montana; on behalf of the Petitioner.

16 MIGUEL A. ESTRADA, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D.C.; on
18 behalf of the United States, as amicus curage,
19 supporting the Petitioner.

20 ANN CELESTINE GERMAN, ESQ., Libby, Montana; on behalf of
21 the Respondent.

C O N T E N T S

| | | |
|----|---|------|
| 1 | | |
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | JOSEPH P. MAZUREK, ESQ. | |
| 4 | On behalf of the Petitioner | 3 |
| 5 | ORAL ARGUMENT OF | |
| 6 | MIGUEL A. ESTRADA, ESQ. | |
| 7 | On behalf of the United States, as amicus curiae, | |
| 8 | supporting the Petitioner | 18 |
| 9 | ORAL ARGUMENT OF | |
| 10 | ANN CELESTINE GERMAN, ESQ. | |
| 11 | On behalf of the Respondent | 27 |
| 12 | REBUTTAL ARGUMENT OF | |
| 13 | JOSEPH P. MAZUREK, ESQ. | |
| 14 | On behalf of the Petitioner | 55 |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

1 PROCEEDINGS

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 95-566, Montana v. James Allen Egelhoff.

5 General, is it Mazurek?

6 GENERAL MAZUREK: Mazurek, Mr. Chief Justice.

7 CHIEF JUSTICE REHNQUIST: Mazurek. General
8 Mazurek, you may proceed whenever you wish.

9 ORAL ARGUMENT OF JOSEPH P. MAZUREK

10 ON BEHALF OF THE PETITIONER

11 GENERAL MAZUREK: Mr. Chief Justice, and may it
12 please the Court:

13 Few matters are so troubling to modern society
14 as the vexing correlation between intoxication and
15 criminal behavior. At common law, a person who committed
16 a violent act could not rely on his voluntarily
17 intoxicated condition to exculpate his conduct. In 1987,
18 the Montana legislature, exercising the power
19 traditionally left to the States to prevent and deal with
20 crime, returned to that common law tradition.

21 It changed its substantive criminal law by
22 enacting a statute which precludes a defendant in a
23 criminal case from relying upon evidence of his own
24 voluntary intoxication from escaping personal
25 responsibility for his actions which ensued.

1 QUESTION: Did the supreme court of Montana
2 agree with you that the substantive law had been changed?

3 GENERAL MAZUREK: Mr. Chief Justice, the supreme
4 court of Montana did not address that issue. The
5 supreme -- that issue was raised by the State in its
6 supplemental brief to the supreme court. The supreme
7 court's analysis skipped over the fact that the
8 legislature had passed the statute, or changed the statute
9 from its former provision, did not analyze the -- or
10 interpret the statute, rather, proceeded directly to the
11 due process analysis.

12 QUESTION: Well, I thought the supreme court of
13 Montana found that under the statute the defendant had to
14 be proven to have acted knowingly and purposely.

15 GENERAL MAZUREK: Justice O'Connor, that's true,
16 the statute requires the defendant -- requires the State
17 to prove beyond a reasonable doubt that the defendant
18 acted purposely and knowingly --

19 QUESTION: And the supreme court so indicated,
20 did it not --

21 GENERAL MAZUREK: Yes, and the State --

22 QUESTION: -- in its opinion?

23 GENERAL MAZUREK: Excuse me, Your Honor?

24 QUESTION: In its opinion.

25 GENERAL MAZUREK: The State supreme court

1 indicated in its opinion that it went beyond -- went --
2 skipped over the analysis of the statute and held that the
3 defendant was -- essentially the State's burden was
4 lessened, which -- with which we disagree, or that the
5 defendant was deprived of the right to introduce all
6 relevant evidence. Both of those determinations were
7 based on Federal constitutional principles.

8 QUESTION: Well, do you agree that under the
9 statute the State must prove beyond a reasonable doubt
10 that the defendant acted knowingly and purposely?

11 GENERAL MAZUREK: Yes, Your Honor, we do agree,
12 and we agree --

13 QUESTION: And if there were evidence that the
14 defendant at the time of the alleged crime had passed out
15 from voluntary intoxication, under the statute that
16 evidence could not be brought in by the defense.

17 GENERAL MAZUREK: The evidence of -- that the
18 defendant was passed out, was asleep, would be admissible
19 for that purpose. It would not be admissible for
20 determining his mental state, whether he acted purposely
21 or knowingly as the example in the respondent's amicus
22 brief suggests.

23 QUESTION: It wouldn't go to that, you think?

24 GENERAL MAZUREK: It -- to the mental state
25 element, Your Honor?

1 QUESTION: Sure.

2 GENERAL MAZUREK: No, it would not. It would go
3 more likely to -- it would -- the fact that the defendant
4 was unconscious would tend to show that he would -- may
5 have been physically unable to commit the act. In fact,
6 that's what this defendant raised the issue of voluntary
7 intoxication for, to say --

8 QUESTION: Well, what about insanity in Montana?
9 Can a defendant bring in evidence to show that his mental
10 condition was such that he couldn't have acted purposely?

11 GENERAL MAZUREK: Yes, Your Honor. Under
12 Montana law a defendant can -- we do not call it insanity.
13 We call it mental disease or defect. A defendant may
14 negate the purposely or knowingly element by proof of
15 mental disease or defect, but that is a much different
16 situation than what we have here. There was strong --

17 QUESTION: How about involuntary intoxication?

18 GENERAL MAZUREK: -- support for that
19 tradition --

20 QUESTION: How about involuntary intoxication,
21 someone put a Mickey in his drink?

22 GENERAL MAZUREK: No, Your -- Justice Stevens,
23 we believe that's clearly excluded under the statute,
24 because it would not involve knowing consumption of the
25 alcohol.

1 QUESTION: In other words, he could rely on such
2 evidence?

3 GENERAL MAZUREK: He could rely on such evidence
4 to show that he did not knowingly introduce the alcohol,
5 and that would excuse his conduct, yes.

6 But if I may --

7 QUESTION: So intoxication can be relevant to
8 whether an act is done knowingly and purposefully?

9 GENERAL MAZUREK: Your Honor, Justice Kennedy,
10 where the intoxication is voluntary, no, it cannot. We do
11 not believe it is relevant --

12 QUESTION: Well --

13 GENERAL MAZUREK: -- to the issue of mental
14 state, and that is based --

15 QUESTION: Well, let's just focus on mental
16 state for a moment. Intoxication can be relevant to the
17 determination of mental state if we're interested in what
18 that mental state was.

19 GENERAL MAZUREK: Your Honor --

20 QUESTION: Montana itself says that, because
21 involuntary intoxication is deemed sufficiently important
22 so that the jury can consider it.

23 GENERAL MAZUREK: But Your Honor, what we're --
24 the distinction we're drawing here is where the
25 intoxication is involuntary the legislature in the

1 exercise of its prerogative and in -- consistent with
2 common law principles has determined that a person ought
3 not to be able to exculpate himself from his conduct
4 undertaken after he has voluntarily ingested the
5 intoxicating substance.

6 QUESTION: But if it's involuntary the
7 legislature has recognized that that can bear on the
8 formation of the requisite criminal intent.

9 GENERAL MAZUREK: it could be a factor, Your
10 Honor.

11 QUESTION: Well, your point really is that the
12 legislature has said that in -- purposeful and so forth,
13 you have to prove that, except that the defendant may not
14 show that whatever lack of purposefulness he had resulted
15 from voluntary consumption of liquor.

16 GENERAL MAZUREK: That's correct, Your Honor,
17 and it goes to case --

18 QUESTION: But you don't deny that it's
19 logically relevant.

20 GENERAL MAZUREK: It --

21 QUESTION: Or do you?

22 GENERAL MAZUREK: No.

23 QUESTION: I mean, you seem to be trying to deny
24 it's logically relevant.

25 GENERAL MAZUREK: No. No, we're --

1 QUESTION: The man is so drunk he thinks he's
2 shooting an pink elephant, and he's shooting a human
3 being. Now --

4 GENERAL MAZUREK: It --

5 QUESTION: -- surely that's logically
6 relevant --

7 GENERAL MAZUREK: We concede that --

8 QUESTION: -- to whether he's -- okay.

9 GENERAL MAZUREK: Excuse me, Justice Scalia.

10 Yes, we do agree that it could be logically
11 relevant, and that's the very point of our argument. It's
12 the distinction that the State of Montana in the exercise
13 of the authority traditionally left to the States to
14 define and deal with crime to make the decision under --
15 which we think is allowed under the Due Process Clause,
16 and that's why the Montana supreme court's decision is
17 wrong.

18 We have made the evidence legally irrelevant,
19 and have done so by express enactment of the legislature,
20 and that is consistent with the common law tradition.
21 It's based on sound reasons of public policy.

22 QUESTION: Well, the legislature perhaps could
23 have written a law to say that a person who acts while
24 voluntarily intoxicated has the mental state required for
25 a conviction of a certain offense. They could have

1 written it that way --

2 GENERAL MAZUREK: We agree --

3 QUESTION: -- but didn't.

4 GENERAL MAZUREK: They did not, Justice
5 O'Connor.

6 QUESTION: Instead, they left a statute in place
7 that said the State has to prove knowing and purposeful.

8 GENERAL MAZUREK: That's -- yes, Your Honor,
9 that's correct. We -- but it's important that -- the
10 State does not shy from its burden in this instance of
11 proving beyond a reasonable doubt, as we believe the
12 evidence showed in this case, that this defendant acted
13 with purpose or knowledge. As in any other criminal case,
14 that determination will be made by the totality of the
15 circumstances surrounding the commission of the crime, and
16 even though a person --

17 QUESTION: And the condition of his mental state
18 by virtue of alcoholism is -- or the alcohol he had
19 consumed is, you admit, logically relevant?

20 GENERAL MAZUREK: Yes. It may be logically
21 relevant --

22 QUESTION: Is there any --

23 GENERAL MAZUREK: -- but it is not legally
24 relevant.

25 QUESTION: Is there any due process requirement,

1 do you think, in any criminal case that a defendant has a
2 right to produce evidence that is relevant in his defense?

3 GENERAL MAZUREK: We would -- we don't believe
4 that there is as broad a right to introduce all relevant
5 evidence as the Montana supreme court suggests.

6 I think this Court has looked at -- the cases on
7 which the State court relied and on which respondent
8 relies, such as Chambers and Crane, in those instances,
9 the evidence being offered by the defendant was, in fact,
10 exculpatory under State law.

11 The circumstances surrounding a confession, or
12 procedural rules, were deemed arbitrary in the Chambers
13 case to -- and prevented the defendant from bringing in
14 evidence that another individual had confessed to those
15 crimes.

16 In those instances, the evidence which was
17 sought to be introduced was legally relevant under State
18 law by the State's -- legislature's determination it is
19 not legally relevant in Montana, and that is consistent
20 with the common law traditions, and based on valid public
21 policy reasons the correlation between --

22 QUESTION: Well, I mean, you couldn't say,
23 you're guilty of robbery and the prosecution can present
24 its case but it's legally irrelevant to hear from the
25 defendant. You couldn't say that.

1 GENERAL MAZUREK: We could not.

2 QUESTION: All right. So here what you've said
3 is, it's legally necessary to prove the person did have
4 purpose or intent, and here is some evidence that will
5 prove to the contrary but it's legally irrelevant, i.e.,
6 you won't let him present the evidence that is highly
7 likely to prove to the contrary, so what's the
8 justification for that?

9 GENERAL MAZUREK: The justification, Your Honor,
10 for that position is first and foremost the tradition of
11 the common law, which denied any exculpatory value and, in
12 fact, there is some evidence that intoxication was
13 considered an aggravating factor.

14 And the example I guess I would give in this
15 case is the facts that -- on which purpose and knowledge
16 could have been inferred by the jury; the fact that Mr.
17 Egelhoff, with his own pistol, which had previously been
18 in the glove compartment, placed two well-placed shots
19 from a pistol into the heads of the two victims, he
20 attempted to evade detection after -- twice.

21 Once, a physician who was attempting to provide
22 assistance, he spoke with the -- the physician was so
23 scared he left the scene. At the hospital he kicked a
24 camera from a -- very deliberately kicked a camera out of
25 the defendant's -- or, excuse me, a detective's hands.

1 All of that would -- or, those are logical to
2 show that this defendant acted with purpose or knowledge,
3 again directing the Court to the State's definition of
4 those -- of purposely and knowingly.

5 He must be aware of his conduct or aware that
6 there exists a high probability. All of the facts in this
7 would tend to indicate that this was a deliberate shooting
8 of these two people, a person who, even though he may have
9 been intoxicated, and we don't know --

10 QUESTION: But the supreme court of Montana
11 based its decision not on lack of evidence, as I
12 understand it, but on the instruction it was given.

13 GENERAL MAZUREK: Mr. Chief Justice, there is a
14 comment in the decision that the instruction may -- might
15 have -- a jury may have been misled into believing that
16 the State's burden had been reduced. We don't think the
17 State -- the State's burden was not reduced. It still had
18 the burden to prove beyond a reasonable doubt that this
19 defendant acted purposefully and knowingly.

20 QUESTION: But the jury was told it couldn't
21 consider evidence of respondent's voluntary intoxication.

22 GENERAL MAZUREK: That's right, Your Honor, and
23 again for the very valid and historical reasons we have
24 offered in support of that conclusion by the State
25 legislature.

1 QUESTION: Is it --

2 QUESTION: General Mazurek, the argument, or
3 suggestion at least is made by the people on the other
4 side that you could accomplish what you want to accomplish
5 without skirting, if not confronting some of these
6 constitutional problems if the State had simply passed a
7 statute saying, anybody who is intoxicated and who kills
8 another human being is guilty of first degree murder.

9 Or they could have said, anyone who does it
10 except while driving a car, to preserve the negligent
11 homicide case, but it could have made intoxication plus
12 causing death a crime. The suggestion is, no problem.

13 Why shouldn't the State do that and, if you
14 know, why didn't the State do that?

15 GENERAL MAZUREK: The State -- the State made
16 this choice I think consciously in this respect: the
17 statute --

18 QUESTION: Well, why did it -- in other words --
19 you know, if you were saying -- you are saying to us that
20 the statute uses knowingly and purposely in its usual
21 legal sense. You're not saying, well, there's a special
22 meaning to it because it's -- it is modified by the fact
23 that you cannot negate it by intoxication. You're not
24 saying that. You're saying, it means -- those two terms
25 mean what they normally mean, the Model Penal Code and the

1 definition of the statute, and so on.

2 And so that creates a difficulty for you,
3 because it certainly is, in fact, relevant to those two
4 states of mind whether someone is intoxicated or not,
5 whereas if you were to have a statute that says, look,
6 voluntary intoxication, plus causation, is a crime. Then
7 you wouldn't have that problem. Why don't you do it that
8 way?

9 GENERAL MAZUREK: Your Honor, the -- I -- the
10 legislature, perhaps as a matter of convenience, took a
11 statute which provided just the opposite, a statute which
12 is codified in the General Criminal Code section under
13 other provisions relating to personal --

14 QUESTION: Well, I know that's what they --

15 GENERAL MAZUREK: -- or individual
16 responsibility.

17 QUESTION: That's what they did. Let me --

18 GENERAL MAZUREK: But --

19 QUESTION: Why?

20 GENERAL MAZUREK: Because they wanted to reverse
21 the -- what had been the treatment under the Model Penal
22 Code but --

23 QUESTION: Let me ask you --

24 GENERAL MAZUREK: -- but then the defendant was
25 allowed to --

1 QUESTION: General --

2 QUESTION: I understand that, but --

3 QUESTION: Do you agree that the statute
4 described would produce the same result as the statute
5 here, the statute that said anyone who, when intoxicated,
6 knowingly kills a human being is guilty of murder?

7 GENERAL MAZUREK: Justice Scalia --

8 QUESTION: I don't think it will produce the
9 same --

10 GENERAL MAZUREK: I believe that he left out the
11 term knowingly. It would produce a strict liability --

12 QUESTION: Sure I left out knowingly, because
13 your problem is in having knowingly and not allowing
14 relevant evidence to determine whether it was knowing or
15 not.

16 But let me ask you the same question Justice
17 Scalia has. Do you agree that the State could have done
18 what your opponent suggests you could have done? Do you
19 agree that you had that alternative?

20 GENERAL MAZUREK: Yes, we do, Your Honor. We
21 believe that, believe the respondent concedes that, that
22 the State could have done that. I don't think it's
23 required to do that.

24 QUESTION: I want to know whether you concede
25 it, too. The State could have done that?

1 GENERAL MAZUREK: Yes, could have.

2 QUESTION: I wish you would describe to me how,
3 because I don't concede it. I don't understand how the
4 State could have gotten precisely this result in any other
5 way.

6 GENERAL MAZUREK: Well, we --

7 QUESTION: To still require knowingly -- to
8 still require knowing, and yet not allow evidence of
9 intoxication to be used with respect to the knowing.
10 That's a quite different disposition from anything else
11 that could have been crafted.

12 GENERAL MAZUREK: Your Honor, it is, and the
13 legislature made that conscious choice and, in fact, it
14 still makes the evidence available to show that the
15 defendant did not commit the act or, as this defendant
16 did, that --

17 QUESTION: Mr. Mazurek, do I understand the
18 legislation right, that the only change from the way it
19 was was the insertion of the word not? Basically, that
20 was the change.

21 GENERAL MAZUREK: In effect, Your Honor, it was
22 to -- Justice Ginsburg, it was to switch what had been a
23 provision which allowed complete exculpation if
24 intoxication was used to negate the mental state to a
25 situation where the person could not escape culpability --

1 QUESTION: Well, I --

2 GENERAL MAZUREK: -- but could still use the
3 evidence for other purposes.

4 And again, I come back to the notion that the
5 fact that the State made it the way it did in this omnibus
6 manner, by making it apply across the board to all crimes,
7 that that is a valid exercise of the State's power.

8 I'd like to reserve the remainder of my time.

9 QUESTION: Thank you, General Mazurek.

10 Mr. Estrada.

11 ORAL ARGUMENT OF MIGUEL A. ESTRADA

12 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

13 SUPPORTING THE PETITIONER

14 QUESTION: Mr. Estrada, I don't want to spoil
15 your order, but sometime in the course of your argument
16 would you address the question that Justice Scalia and I
17 were posing to General Mazurek?

18 MR. ESTRADA: Yes.

19 QUESTION: It doesn't have to be now, but --

20 MR. ESTRADA: Justice Souter, the answer is on
21 page 2 of the reply brief of the State, filed by the
22 State. I don't think that the General had an opportunity
23 to get back to your question, but the answer is that it is
24 a changed purpose concept. It is not the ordinary purpose
25 as one would think --

1 QUESTION: Well, that's what I thought the
2 argument was, and then I thought the State was in fact --
3 I thought the State had clearly jettisoned that argument.

4 MR. ESTRADA: No. As I read their reply
5 brief --

6 QUESTION: Well, I just mean in the argument
7 here. I didn't think that was the position the State was
8 taking.

9 MR. ESTRADA: As I understood the argument here,
10 I didn't think that the General got to get back to that
11 question because he was answering the other part of your
12 question, but I don't understand them --

13 QUESTION: Well, is --

14 MR. ESTRADA: -- to have changed their view.

15 QUESTION: Is -- do you think that position that
16 in fact there is a change in the meaning of purpose and
17 knowing, and so on? Is that consistent with what the
18 State court found or construed?

19 MR. ESTRADA: Yes, Justice Souter, and the
20 reason is this. The thing that the State court did wrong
21 in the first place was to use Winship and that line of
22 cases as the first step in the analysis, rather than the
23 last step of the analysis.

24 In the usual case we give to the States the
25 power to determine what are the elements of criminal

1 responsibility, and based on the elements as they fashion
2 them, then hold them to the reasonable doubt standard.

3 Here, the State court never really got to the
4 question of whether there has been a change in the State
5 law, because it simply jumped to the conclusion that, to
6 the extent that there had been one, it was barred by
7 Winship.

8 In our view that was, in a sense, putting the
9 cart before the horse, because it was using a test from
10 these case -- from this Court's cases that is directed at
11 the last step of the analysis as the first step, and what
12 it should have done to start with the analysis rightly was
13 to recognize that the proper test was whether this change
14 in the substantive conception of criminal liability was
15 consistent with the history and tradition of our people,
16 which is --

17 QUESTION: Well, do you say that the State no
18 longer in Montana has to prove knowing and purposely
19 killing?

20 MR. ESTRADA: Yes, they do, but what they do is
21 that they have a conception of knowledge and purpose from
22 which the effects of voluntary intoxication have been
23 extracted, which is not all that different from how the
24 common law dealt with the concept of malice aforethought.

25 One could equally well have said that at common

1 law being completely intoxicated was as relevant in a
2 logical sense to whether one could form malice
3 aforethought.

4 QUESTION: Can you tell me, Mr. Estrada, has --
5 what -- has the State here said in effect that this
6 knowledge and purpose is usually present in the
7 intoxicated person, and the jury can usually find it
8 despite the fact of the intoxication, or has it said that
9 we don't care about conscious purpose if the person is
10 intoxicated? It's not clear to me the logical and the
11 common sense basis for the common law rule that you're
12 proposing.

13 MR. ESTRADA: Well, let me indicate two possible
14 points. The first point is that evidence of intoxication
15 really goes not so much to intent but to capacity to form
16 intent and, in that sense, it is a sort of evidence that
17 is not about the defendant himself but about hypothetical
18 third party.

19 It says, in effect, given certain medical data
20 most people would do X. It doesn't really say anything
21 about the specific person, other than by inference that he
22 may be in the norm.

23 The second point is that a legislature could
24 reasonably conclude that the effects of voluntary
25 intoxication are not relevant to the law's conception of

1 intent, in the sense that in the ordinary case the effect
2 is to remove inhibitions.

3 It doesn't keep people from being able to think
4 and choose, and to say that you're going to explain, in a
5 way, how intoxication made it difficult to invoke
6 behavioral controls or to grasp how grave the conduct was
7 is one way of saying why the intent was there but not
8 really saying that it wasn't. In a way --

9 QUESTION: Is that a fair answer to Justice --
10 isn't the question whether you can determine whether the
11 intent was there or not, not why, or -- and is it not true
12 that if a person -- if the defendant got on the stand and
13 said I thought I was shooting at a pink elephant, or, to
14 take Justice Scalia's example, if he's not able to say he
15 was totally intoxicated at the time, no one would ever
16 believe him.

17 MR. ESTRADA: Well, he can use the intoxication
18 to explain his current inability to have a complete
19 memory. What he is not allowed to do is to tell the jury
20 that because most people who have had a similar number of
21 drinks would have been intoxicated and impaired, that his
22 own intent was lacking.

23 Now, let me hasten to say that that doesn't mean
24 that the State gets to prove that he is guilty of the
25 crime merely because he was drunk. There may be cases, as

1 one was given from the bench, where the person has
2 completely passed out and he is incapable of committing
3 the act.

4 At the same time, in a case like this the State
5 can point to evidence in the record to show that this one
6 person, notwithstanding anything that might have flown
7 under another rule of law from his intoxication, was
8 capable of knowing, of knowledge and purpose, and the
9 examples that --

10 QUESTION: And he can also show that he didn't
11 have the intent by means other than invoking the
12 drunkenness. He can show from witnesses that this person
13 didn't seem to know what he was talking about.

14 MR. ESTRADA: Oh, but of course.

15 QUESTION: All right.

16 MR. ESTRADA: He could have --

17 QUESTION: He could do that.

18 MR. ESTRADA: Absolutely.

19 QUESTION: Even though that was the effect of
20 the drunkenness.

21 MR. ESTRADA: Absolutely. let me give you two
22 examples. You could have someone who is shown in a
23 videotape walking out of a bar, and he is completely
24 drunk, and he is shooting wildly in the air. He has no
25 conception of exercising choice about what he is doing,

1 and in that sort of a case the State would have a very
2 tough time showing that he was capable of knowledge and
3 purpose.

4 You have the same person who you happen to know
5 has ingested the same amount of alcohol in another
6 videotape, and he is taking aim at you, and he is shooting
7 and cocking his eye and saying something like, I got you
8 now, and he hits you in the middle of the forehead. You
9 could infer from that, apart from knowing anything about
10 intoxication, that he was capable of exercising aim,
11 judgment, and that he had some knowledge of good and evil.

12 QUESTION: But in your first case you would not
13 allow a doctor to testify as to the blood level, blood
14 alcohol content.

15 MR. ESTRADA: No, I would not allow it under
16 this law as to either of those two cases. I would say
17 that the evidence of the mental state should be inferred
18 from the circumstances of the conduct, and that the --

19 QUESTION: But you say you only get those
20 circumstances if you happen to have a videotape.

21 MR. ESTRADA: Well, no. Let me paint another
22 picture for you here --

23 QUESTION: In most cases that doesn't happen.

24 MR. ESTRADA: -- Justice Stevens. Based on the
25 evidence in this case, let me highlight to you four facts

1 that I think are fairly significant.

2 The first one is that earlier in the day he had
3 put the gun and the holster in the glove compartment, and
4 that therefore he had to take it out of there, which
5 indicates some exercise of design.

6 QUESTION: Are you making a harmless error
7 argument?

8 MR. ESTRADA: No, I am -- I am explaining to you
9 how, in an ordinary case, you can have a very compelling
10 case of intent and judgment.

11 QUESTION: I've one question which I say, in
12 many cases this will work out fine, but some it might not.
13 I take it if you wilfully, intentionally get blind drunk,
14 and you run into a pedestrian in a sidewalk going 5 miles
15 an hour and kill him at 4:00 in the morning, you'll
16 probably be found guilty of first degree murder.

17 If you get similarly, absolutely blind drunk,
18 and you drive at 95 miles an hour, in the middle -- you
19 drive 95 miles an hour and run into somebody because
20 you're going too fast, you won't get convicted, right,
21 because there's no purpose, there's no knowledge. In the
22 one case -- and I don't understand how any State could
23 make such a distinction. It seems irrational.

24 You see, what you're doing is, you're saying
25 that they can't use it to rebut knowledge of intent, so it

1 only comes in in a case where there's likely to be purpose
2 and knowledge in the first place.

3 MR. ESTRADA: I'm not saying that, Justice
4 Breyer.

5 QUESTION: Do you see --

6 MR. ESTRADA: What I'm saying --

7 QUESTION: Do you see -- I know we're out of
8 time, or we're late, so if you can't follow it I'll --

9 MR. ESTRADA: What I'm saying is that it is
10 within their domain to define who is morally culpable,
11 and --

12 QUESTION: What rational basis could there be
13 for convicting a blind drunk person of first degree murder
14 under circumstances where knowledge and failure to say,
15 I'm drunk, leads the jury to conclude you knew what you
16 were doing, and that exact same thing happening in
17 circumstances where it doesn't?

18 MR. ESTRADA: I understand --

19 QUESTION: Yes.

20 MR. ESTRADA: -- the question, and the answer is
21 the same rational basis as allows a guilty person to go
22 free whenever the State cannot muster the evidence, even
23 though he's equally guilty as the person who goes to jail,
24 and the fact is that many days the State cannot muster the
25 evidence to show that somebody is guilty when, in fact, he

1 is and he goes free, and that is not rational at some
2 level, but that's not a general impeachment of our
3 criminal laws.

4 QUESTION: Thank you, Mr. Estrada.

5 Ms. German, we'll hear from you. Is it German?

6 MS. GERMAN: German.

7 ORAL ARGUMENT OF ANN CELESTINE GERMAN

8 ON BEHALF OF THE RESPONDENT

9 MS. GERMAN: Mr. Chief Justice, and may it
10 please the Court:

11 The Montana supreme court has authoritatively
12 construed the Montana law in this case. This instruction
13 prevented the consideration by the jury, as it decided
14 whether or not there was reasonable doubt as to James
15 Egelhoff's acting purposely or knowingly, of evidence
16 that, as a matter of State law, negated those elements.

17 The jury's task is to ascertain the truth. It
18 cannot do that if relevant evidence going to the proof of
19 an element of the charged offense is excluded from the
20 deliberations of the jury, the considerations by the jury
21 during its deliberations.

22 QUESTION: Ms. German --

23 QUESTION: Ms. German, don't we always -- I
24 mean, there are lots of -- there's lots of relevant
25 evidence that is excluded traditionally at common law.

1 There are all sorts of privileges, husband-wife privilege,
2 a priest-penitent privilege, evidence will be excluded
3 that is totally relevant but too inflammatory, evidence
4 may be excluded because it's unlawfully obtained -- I
5 don't know how we can say, as a general matter, that it's
6 unconstitutional to exclude relevant evidence.

7 MS. GERMAN: Yes, I agree with you. The Montana
8 supreme court in its decision in Egelhoff did not find
9 Montana Rule 403, the rule of evidence that allows the
10 court to exclude otherwise relevant evidence, did not find
11 that rule unconstitutional. That rule continues in
12 effect. Otherwise relevant evidence can be excluded
13 because it's not probative, it's confusing, it's
14 misleading, et cetera. In this --

15 QUESTION: Or there's a policy against admitting
16 it --

17 MS. GERMAN: A policy --

18 QUESTION: Such as --

19 MS. GERMAN: Yes.

20 QUESTION: Such as the priest-penitent privilege
21 or the husband-wife privilege.

22 MS. GERMAN: Yes. The Montana supreme court in
23 construing that this evidence was relevant to this
24 particular charge of deliberate homicide made an initial
25 determination that the elements of this crime are purpose

1 and knowledge subject mental state elements. That was
2 their first step.

3 The second step was that given that those are
4 the elements, intoxication is relevant, legally relevant
5 because it tends to prove a fact, the probability of the
6 existence of a fact that would go to the ultimate
7 determination.

8 QUESTION: Right.

9 MS. GERMAN: So you can -- you could affirm the
10 Montana supreme court without saying that --

11 QUESTION: Well, that doesn't get you home. You
12 could say the same two things in all the other instances
13 I've just told you.

14 MS. GERMAN: I --

15 QUESTION: It is -- you know, it is relevant,
16 logically relevant to the point that must be proved.
17 Nonetheless, we say in many instances, nonetheless we will
18 not allow it in. So you can't say that automatically that
19 establishes a constitutional violation.

20 There has to be something else to your case
21 like, for example, we've never, you know, traditionally
22 excluded evidence of this sort, that only -- States can
23 only exclude relevant evidence in situations where States
24 have traditionally done it in our common law system, but
25 on that point it seems to me the history is against you,

1 that in fact, drunkenness did not used to be allowed as
2 mitigating the offense.

3 MS. GERMAN: I don't disagree with what you're
4 saying. What -- our point is that part of what the
5 Montana supreme court did here was it not only construed
6 the statute of deliberate homicide with respect to what
7 the elements were, it also construed what is legally
8 relevant to those elements in this particular case. It
9 held that under Montana law intoxication evidence is
10 legally relevant to the proof of knowledge or purpose.

11 The confusion arises where you get into the
12 history of the use of intoxication over the last 200
13 years, which would be a different case. The Montana
14 supreme court didn't look at that in determining that
15 Montana State law relevance is that this evidence is
16 relevant.

17 QUESTION: Well, leaving history aside, didn't
18 the Montana supreme court say on the hypotheses -- the
19 hypothesis that you have just put before us that for
20 reasons of Federal constitutional law, there is something
21 illegitimate about a State policy that says, we are going
22 to exclude what would otherwise be legally relevant
23 evidence, and what is, in fact, factually relevant
24 evidence because we have a policy of discouraging
25 drunkenness, and of -- we have a policy that refuses to

1 allow individuals to exculpate their conduct because of
2 intoxication?

3 Didn't Montana say, for reasons of Federal
4 constitutional law, that is an illegitimate and
5 unconstitutional policy?

6 MS. GERMAN: Yes, and it --

7 QUESTION: All right. Why is --

8 MS. GERMAN: What I --

9 QUESTION: Why is, then -- address the question
10 why they were right. Why is it, in fact, unconstitutional
11 to say exculpation because of intoxication is
12 illegitimate, but the preservation, let's say, of the --
13 of marital privacy on the husband and wife privilege is
14 perfectly legitimate?

15 MS. GERMAN: The Montana supreme court's
16 interpretation of this Court's precedent on due process
17 gave rise to their conclusion that when you have an
18 essential element of a crime, in this case purpose or
19 knowledge, the jury -- the defendant is entitled to have a
20 jury find that beyond a reasonable doubt. When you
21 exclude that evidence that is legally relevant, you have
22 undermined that due process right that this Court has
23 enunciated.

24 With respect to the marital privilege --

25 QUESTION: All right, you've done it on the

1 marital privilege case, you've done it on the Fourth
2 Amendment case, I suppose, although in that instance it's
3 working against the Government so that you say there's no
4 constitutional problem --

5 MS. GERMAN: I'm not sure that I know how to
6 answer the question with respect to marital privilege on
7 this particular set of facts, because what the Montana
8 supreme court did here was very, very narrow.

9 They said, in this case, where a man who is .36
10 blood alcohol is charged with a crime that requires proof
11 by the State of subjective mental state, intoxication is
12 relevant, and to exclude it --

13 QUESTION: The opinion of the supreme court of
14 Montana was considerably broader than you're saying. I
15 mean, it didn't depend on the fact that the man had .36
16 blood alcohol.

17 MS. GERMAN: Well, no, and in fact the opinion,
18 if it's affirmed, would have the effect of overturning
19 that statute, the part of the statute that was amended in
20 1987, but how they arrive at their conclusion was based on
21 the specific facts of this case, and the court -- I
22 could -- well, I don't want to take the time to find it,
23 but the court in their opinion specifically said, here we
24 have a man who is .36, the jury wasn't entitled to
25 consider it.

1 And I want to point something out. This
2 evidence was not excluded from the jury. This evidence
3 was brought in by the State. It was introduced by the
4 State at the beginning of the trial in their opening
5 statement, the evidence was collected, they produced the
6 evidence of it, they proved to the jury that he was .33
7 blood alcohol, they proved that he was a violent drunk,
8 and then at the end of the trial they said to the jury,
9 now, with respect to that intoxication evidence, put a
10 sack on your head, go in the jury room, and don't consider
11 it, but yet you've got to determine whether or not he
12 acted purposely, which requires subjective mental state --

13 QUESTION: But didn't defendant -- didn't
14 defendant himself ask to have that considered, because
15 wasn't his defense, I didn't do it, some fourth person did
16 it --

17 MS. GERMAN: Yes.

18 QUESTION: -- so I want everybody to know I was
19 dead drunk, I was in a drunken stupor? So it was not just
20 the State that was saying, this is a bad guy, he got
21 intoxicated. Defendant himself wanted the jury to believe
22 that he was so drunk he didn't do it, so the evidence was
23 there to help the defendant make that --

24 MS. GERMAN: Yes.

25 QUESTION: -- part of his case --

1 MS. GERMAN: Yes, but had the State not
2 introduced it in their own case-in-chief, I think the
3 situation might have been a little different.

4 One of the things that happened --

5 QUESTION: But nothing would have impeded the
6 defendant from making that defense and saying, I didn't do
7 it because I was stone drunk, I was out, and introducing
8 that evidence. Nothing in the statute, nothing in Montana
9 law would preclude that.

10 MS. GERMAN: No, and the statute that existed
11 prior to 1985, or to '87, was not a mandatory statute. It
12 didn't say the jury must consider intoxication. It said
13 that the jury may consider intoxication.

14 What happened in '87 is the jury was precluded
15 from considering it for any purpose, so when we get into
16 Egelhoff, certainly we could have presented and we did
17 present the evidence to prove that he was physically
18 incapable of acting, but the State introduced it to prove
19 that he was a violent drunk who killed with no motive.

20 QUESTION: Well, the answer, I thought in my own
21 mind, to the question that Justice Scalia and others were
22 asking, we always exclude a lot of evidence. Why is this
23 any different? It would have to be, what's the reason
24 that you want to exclude this evidence, and I take it the
25 reason they want to exclude this evidence is because they

1 want to convict people who voluntarily get blind drunk of
2 first degree murder. So what's wrong with that as a
3 reason? That's their reason for excluding the evidence.
4 they want to convict the person who voluntarily gets blind
5 drunk.

6 Now, to my suggestion that that's irrational to
7 convict the person where the circumstances, absent the
8 drunkenness, lead to an inference of purpose, compared
9 with the situation where the circumstances absent the
10 drunkenness lead to an inference of negligence, the reply
11 was, well, that's the way they want to do it, and what's
12 wrong with that?

13 So that's the question I'm asking. What's wrong
14 with that? Missouri wants to convict people who --
15 Montana, sorry. Excuse me. Anyway --

16 MS. GERMAN: Well, what's wrong with it is not
17 that they can't do that. They can't do it this way. If
18 they want to do it they can -- the Montana legislature has
19 the capacity to pass a statute that specifically says,
20 there is a crime known as intoxicated homicide, and for
21 that crime we are not going to require a subjective
22 mental --

23 QUESTION: But that is not what the effect of
24 this statute is, because this statute does convict people
25 of first degree murder if, blind drunk, they run into a

1 pedestrian at noon, because the jury will infer purpose,
2 but does not convict them of first degree murder if, blind
3 drunk, they run into somebody at 3:00 in the morning going
4 100 miles an hour, because absent drunkenness the jury
5 will infer negligence, so those cases are treated
6 differently.

7 Maybe it's irrational, maybe it isn't, but I
8 want to be clear about what I think they're saying the
9 justification is, and now that's what I want you to reply
10 to. What's wrong with their justification?

11 MS. GERMAN: Well, I'm not -- again, I can't get
12 away from this. The Montana supreme court has interpreted
13 the statute that is -- that Mr. Egelhoff was charged with
14 here as requiring proof of the specific mental states, and
15 you can't do that if you don't allow the evidence of
16 intoxication to come in for the jury to consider it.

17 The jury does not have all of the relevant
18 evidence that they need, and in the Montana supreme
19 court's interpretation of its own statutes, this Court, as
20 I understand it, is bound by that interpretation.

21 QUESTION: Ms. German, do I understand that the
22 argument you're making is, the State could make this
23 conduct as the same degree of culpability as now, so this
24 case is about form, that it didn't do it in the right
25 form, but they could accomplish exactly the same result

1 through another statute, or are you saying if somebody was
2 drunk the jury has got to be told that because it always
3 goes to culpability?

4 Are we dealing with pure form, or is there some
5 substance at stake?

6 MS. GERMAN: Well, it's not pure form, and I
7 guess in response to your first -- the first proposition,
8 there is nothing in the Montana supreme court's opinion
9 here that prohibit's the jury, or the legislature from
10 doing what you suggest.

11 Now, they could write a statute that results in
12 a serious penalty being imposed on a person who commits a
13 crime when drunk without proof of any other mental state.

14 QUESTION: Then why isn't it pure form?

15 MS. GERMAN: Because in -- as has been recited
16 by this Court in fairly recent decisions, even when a case
17 exists where a person is absolutely guilty -- I mean, the
18 proof beyond them is overwhelming, we do not allow the
19 judge to direct a verdict. I mean, what we're doing is
20 we're saying the jury is the one who's going to make
21 the --

22 QUESTION: No, I think you've answered my --

23 QUESTION: They couldn't get --

24 QUESTION: Yes.

25 QUESTION: -- this result, this precise result

1 in any other way, really, could they?

2 MS. GERMAN: No, and you know, I want to point
3 something out here that I think happens, and this is of
4 interest to me because I'm a trial lawyer. You have two
5 jurors in this jury room. They've both taken an oath to
6 follow the instructions.

7 One of them says, I believe that this man did
8 not know what he was doing. The lowest form of mental
9 state -- and I wanted to correct Justice O'Connor on that.
10 We don't have to prove purpose and knowledge in Montana,
11 only purpose or knowledge, and knowledge is a very low
12 standard. It just means awareness.

13 So there's someone in the jury room saying, I
14 don't think this man was aware, and -- because he was
15 drunk. Another juror said, I've taken an oath to follow
16 these instructions, and this instruction said, I can't
17 take intoxication into account.

18 They're both right, and they are mutually
19 contradictory to one another.

20 QUESTION: Well, why are they both right? One
21 is following instructions, and the other isn't.

22 MS. GERMAN: Yes. One is following the
23 instruction that says I cannot take intoxication into
24 account when determining the mental state, the other one's
25 saying, I don't think he was aware.

1 QUESTION: Well, don't we read the instructions
2 as a whole, and isn't it clear from the instruction that
3 it may not be taken into account for that purpose?

4 MS. GERMAN: That's right.

5 QUESTION: One juror is following the
6 instructions and the other juror isn't.

7 MS. GERMAN: Well, the other juror, the one
8 who's saying I'm following the instruction that says we
9 can't take it into account, may very well not believe he
10 was aware, so what you're doing is undermining the truth
11 of the verdict. He may not believe -- I don't believe he
12 was aware, but I can't take that --

13 QUESTION: Well, I think you've made an argument
14 for -- perhaps for jury difficulty in following the
15 instruction.

16 MS. GERMAN: Mm-hmm.

17 QUESTION: But I don't think you've made an
18 argument to the effect that the two jurors can each follow
19 the instruction and come out differently as in your
20 example.

21 QUESTION: Actually, the juror could say, I
22 don't believe he was aware because he was drunk. That --
23 the juror could say that and be following the instructions
24 so long as the reason -- the reason he thinks he wasn't
25 aware is something more than simply knowing he had drunk

1 three bottles of bourbon immediately before the event.

2 There has to be some external evidence that he
3 was not aware, and the jury -- the juror could see that
4 external evidence, let's say a videotape, and say, he
5 wasn't aware.

6 MS. GERMAN: Right.

7 QUESTION: Now, the reason I think he wasn't
8 aware is I think he was drunk, but it's some evidence
9 other than the mere evidence of the drunkenness that
10 convinces the juror of that unawareness. That doesn't
11 seem to me terribly irrational.

12 MS. GERMAN: Well, what I'm suggesting, I'm
13 suggesting the scenario where that isn't there. There
14 isn't that other evidence. We don't have a videotape.
15 We've got Mr. Egelhoff out there in the middle of the
16 night, in the middle of nowhere, in the dark, and no one
17 sees a thing.

18 QUESTION: Okay.

19 MS. GERMAN: So the only evidence they have of
20 mental state is entirely circumstantial based on what
21 happened after the fact.

22 So they're sitting there and they're going,
23 well, boy, we just don't think he was aware, given the
24 fact that he was found to be unconscious -- the first
25 people on the scene found him to be unconscious, et

1 cetera. That evidence is in the record.

2 QUESTION: But the burden's on the State to
3 prove awareness.

4 MS. GERMAN: That's right.

5 QUESTION: So there has to be some evidence of
6 awareness, I assume.

7 MS. GERMAN: Well, the evidence of awareness I'm
8 sure in this case was the State's contention that he
9 pulled the trigger. You wouldn't do that when you're
10 unaware, I guess, asleep, but --

11 QUESTION: But there wasn't a whole series of
12 things that were recited in the brief, taking the gun out
13 of the glove compartment --

14 MS. GERMAN: Exactly, and --

15 QUESTION: -- aiming squarely --

16 MS. GERMAN: Yes.

17 QUESTION: -- not using any -- doing it very
18 efficiently.

19 MS. GERMAN: Everything that the State has
20 recited in their brief, and the Montana supreme court in
21 fact recited in its opinion, go to show that the State had
22 ample evidence. They didn't need this instruction. They
23 could still go to the jury and say, hey, we -- you know,
24 you can take intoxication into account here, or we don't
25 give an instruction at all with respect to it. We've got

1 evidence that he committed this crime.

2 Based -- you know, go ahead and take into
3 account all of the evidence. Don't exclude any, you
4 know --

5 QUESTION: Certainly if you're a Montana trial
6 judge and this is on the books, and you're asked to
7 give -- you give that instruction, don't you? You don't
8 say, well, you -- to the State, well, you've got plenty
9 of evidence, so much evidence you don't have to worry
10 about the jury considering evidence that the statute says
11 you couldn't consider.

12 MS. GERMAN: I don't know that that's true,
13 Mr. Chief Justice. I think that in this case not giving
14 that instruction -- we objected to the giving of the
15 instruction on a couple of grounds, one of -- the one that
16 we're here today, that it wasn't the State's burden to
17 prove the mental state beyond a reasonable doubt.

18 Not giving the instruction doesn't direct the
19 jury one way or the other and, for instance, in the Fisher
20 case that was cited by the Solicitor General in their
21 brief, that's what happened. It was the failure to give
22 an instruction, rather than the giving of instruction that
23 was the complaint.

24 If you get to the end of your case as the State
25 and you feel that you've proved purpose or knowledge, and

1 again, it's a very low standard in Montana, awareness,
2 awareness of your conduct, awareness that your conduct has
3 a result, you don't need this further instruction to the
4 jury saying you can't take voluntary intoxication into
5 account.

6 QUESTION: Well, it's -- if it's a very
7 debatable instruction you might not ask for it, but it
8 seems to me when you have a statute on the books that
9 says, this is -- the jury may not consider this, the State
10 would normally certainly ask for it.

11 MS. GERMAN: Well, it happened in this case.

12 QUESTION: Yes.

13 MS. GERMAN: I don't know of very many others,
14 and I would like to point out that the instances in
15 Montana, for 100 years, Montana allowed the evidence of
16 intoxication on the issue of mental state, and there is
17 not -- there are no reported cases, or there were no
18 evidence of any case of a person who was acquitted because
19 of it.

20 QUESTION: Suppose the State prohibits the
21 commission of an act that is reckless, where the actor is
22 aware of the risk, and then it has a further statute that
23 says drunkenness does not negate recklessness, would that
24 be constitutional?

25 MS. GERMAN: Well, that's the Model Penal Code

1 formulation.

2 QUESTION: That's one reason I asked.

3 MS. GERMAN: Yes, and we don't have that in
4 Montana.

5 QUESTION: I'm asking, suppose you did?

6 MS. GERMAN: Yes. The Model Penal Code
7 formulation was concededly arbitrary. However, I would
8 point out that I think that at some point evidence of
9 intoxication when you're charging an objective mental
10 state -- and I think your question posited a subjective
11 mental state.

12 QUESTION: You must be -- the actor must be
13 aware of the risk.

14 MS. GERMAN: Okay. I think again when you've
15 got an awareness question that the jury has to find that
16 evidence of intoxication might very well be required to be
17 allowed in that case, but it would be unconstitutional --

18 QUESTION: I think you have to answer that, and
19 I -- that way, and that means that under your formulation
20 I think the Model Penal Code is also unconstitutional, and
21 I'm quite troubled by that.

22 It seems to me that what the State is saying
23 here is that in most cases the jury can find awareness,
24 knowledge, conscious purpose, quite without regard to
25 drunkenness, and that we don't want drunkenness to

1 intervene as an excuse, and it seems to me that that's a
2 plausible and a permissible and a rational theory.

3 MS. GERMAN: Sure, and I would point out here
4 that the Montana supreme court's interpretation of --

5 QUESTION: But if you say sure, then if you
6 agree with that, then you lose, don't you?

7 MS. GERMAN: Well, what I was going to want to
8 say is that what the Montana supreme court said here was
9 that it's not an excuse. They said the word excuse, i.e.,
10 defense, is not what we're doing. We're not allowing the
11 word, exculpate, excuse, defend -- we're not allowing an
12 intoxicated defendant to come in and say, I am not
13 criminally responsible, that we might say, for instance,
14 to somebody who has some other infirmity.

15 All we're saying is that, as this Court has held
16 in other cases, with respect to the proof of this mental
17 state, I want to be able to say to the jury, you've got to
18 consider whether or not I in fact was aware, given my
19 level of intoxication, and if -- and if this Court's rules
20 or precedent on proof beyond a reasonable doubt of all
21 essential elements is to be applied to this case, it seems
22 to me the Montana supreme court's interpretation of their
23 statute in the application of these rules, these
24 precedents has to be affirmed.

25 If you want to go further --

1 QUESTION: I don't understand, really, the
2 distinction between the affirmative defense --

3 MS. GERMAN: Okay.

4 QUESTION: -- and, I can disprove intent by
5 showing I was dead drunk. Are you -- you say that those
6 two are discrete, and maybe in the abstract I can think of
7 them that way, but in concrete I can't, if you're using
8 the drunkenness to show he could not have formed the
9 mental intent necessary to be deliberate.

10 MS. GERMAN: Okay, Justice Ginsburg, I'll give
11 you an example of the practical effect.

12 When you're trying a case, in a criminal case to
13 the jury, the state has the burden of proof to uphold with
14 the evidence, and in Martin v. Ohio I think in fact this
15 language was used, that the State survives the motion to
16 acquit at the end of the State's case.

17 All that time what you're doing, the State has
18 the burden to prove the elements beyond a reasonable
19 doubt. The defense is constantly raising doubts,
20 constantly trying to raise reasonable doubt, constantly,
21 with respect to every piece of evidence that comes in.

22 At the end of the State's case, the defendant
23 sits down and said, I have no evidence to present. The
24 burden's on the State, it's got to find beyond a
25 reasonable doubt. I don't have any burden. I'm sitting

1 here waiting for a verdict.

2 In that case, all you've done, really, is negate
3 the mental state. That's all you've really done, is tried
4 to negate the mental state.

5 If, however, they prove the awareness, then the
6 burden very permissibly, according to this Court's cases,
7 can shift to the defendant to come forward and try to
8 prove an affirmative defense why the State's proof of the
9 case up to that point, beyond a reasonable doubt, ought
10 not to result in a guilty verdict, and that's how the
11 affirmative defense comes in.

12 QUESTION: Isn't in this case -- I would have
13 thought that a State might have a law which says, if you
14 do this with purpose or knowledge, you're guilty of first
15 degree murder, but if you do it with purpose and knowledge
16 and are voluntarily intoxicated at the time to a serious
17 degree, you're guilty of second degree murder.

18 MS. GERMAN: Yes.

19 QUESTION: It would then be an excuse, a
20 defense.

21 You're saying that's not what's at issue here.
22 Montana could do that, probably, but that's not what's at
23 issue here. What's at issue here is how you prove an
24 element. All right, so how do you -- have you run across
25 any authority anywhere which -- this is where I'm having

1 trouble again.

2 Suppose Congress passed a law which said,
3 robbery of a federally insured bank is a crime. They
4 might also pass a law which said, robbery of any bank in
5 commerce is a crime.

6 Suppose they pass the first and say, but you're
7 not allowed to deny that it's a federally insured bank.
8 Are those two statutes the equivalent? Is there any
9 authority -- I'm not asking you to think of the answer to
10 that right now. I just want to know if it triggers any
11 bell in what you've looked up and that makes any
12 difference at all whether they do it the one way rather
13 than the other.

14 It's somewhat misleading the first way. People
15 might not know what they've done. It could create
16 irrational distinctions the first way. Does it ring any
17 bell? No.

18 MS. GERMAN: Well, it creates irrational
19 distinctions, and I hate to keep coming back to this, but
20 what it seems to me this Court's inquiry has to be is
21 not -- this Court is not for the first time approaching
22 the question of the constitutionality of this statute.

23 The Montana supreme court has interpreted the
24 statute, and its interpretation ends, these are the
25 elements, this evidence is relevant, therefore under

1 Winship and Sandstrom and Martin and Chambers and the
2 other precedents we've cited the defendant's entitled to
3 have that evidence considered by the jury.

4 So it gets down to a question of the Montana
5 supreme court's interpretation of its own State law.

6 QUESTION: Ms. German, do I take it that this is
7 not -- your argument is not special to homicide. It would
8 be any intentional --

9 MS. GERMAN: Yes. I wanted to point something --

10 QUESTION: May I just ask you a particular
11 question that occurred to me, and I may be totally off-
12 track.

13 Suppose there's an aggravated assault, assault
14 with intent to commit grave bodily harm, and the
15 defendant, who happens to be the spouse of the victim, has
16 beaten her to a bloody pulp, but he says, I was -- I do
17 this when I'm drunk.

18 And so you have two cases, one with someone who
19 does it when he's drunk, the other who's cold sober. Can
20 the State say, we're not going to treat those two
21 differently, or must the batterer who does it when he's
22 drunk be able to say to the jury, I was drunk, so that
23 should be mitigating?

24 MS. GERMAN: The batterer can say that. The
25 jury isn't going to accept it, and that's the nub of this

1 case. This hasn't to do with directed --

2 QUESTION: But it says that the intent, I have
3 to show intent to -- and says, I didn't want to hurt her
4 at all. It's just that I go crazy when I get drunk.

5 MS. GERMAN: And if I were a prosecutor I would
6 argue that to the jury. I would say, this man knew that
7 when he got drunk he commits violent acts, so in fact he
8 is culpable of the -- you can't say that he didn't intend
9 to do what he was doing.

10 Because what you're really doing in a -- when
11 you're asking a jury to find a mental state, you're asking
12 them to go in the jury room and consider all of the
13 evidence and determine whether or not they think the
14 person know what --

15 QUESTION: Can a State say in Justice Ginsburg's
16 second hypothesis, you may not introduce evidence of
17 drunkenness?

18 MS. GERMAN: If -- if the element of the
19 offense -- the Montana supreme court's opinion in this
20 case is that if the elements of the offense make that
21 evidence relevant, then you have to allow it. I think
22 that has to be determined on a case-by-case basis.

23 It may well be --

24 QUESTION: Well --

25 MS. GERMAN: -- that the mental state for

1 aggravated assault would not make it relevant. In
2 homicide, deliberate homicide, the Montana supreme
3 court --

4 QUESTION: Suppose you have to intentionally and
5 purposefully assault -- act with an intent and a conscious
6 purpose to injure the victim?

7 MS. GERMAN: There's a -- the mental state
8 requirement is purposefully or knowingly. Knowingly is,
9 as I say, a very low standard. All you have to show is
10 awareness, the fact that the person was aware of what he
11 was doing.

12 QUESTION: Isn't the drunkenness, showing
13 drunkenness just showing a prior -- just showing prior
14 behavior? If you can show that the person didn't know
15 what he was doing, whatever the reason, drunkenness or
16 not, you get off.

17 Drunkenness is simply, you prove that the person
18 drank three bottles sometime ago, and excluding that
19 evidence of prior conduct, I don't see why that's any
20 different from rape shield laws which exist in many
21 States, where, you know, in a rape case the defendant is
22 not -- not able to introduce evidence that the alleged
23 victim was sexually promiscuous.

24 MS. GERMAN: The evidence --

25 QUESTION: They just say, we're not going to

1 allow that in.

2 MS. GERMAN: The evidence that --

3 QUESTION: The question before us is whether
4 there was a rape or not, and you can prove it a lot of
5 ways, but we're not going to let this prior history come
6 in, and it's the same thing with this drunkenness statute,
7 it seems to me. The question before is whether it was
8 knowing, and we're not going to let the prior history of
9 drinking the booze come into the question.

10 MS. GERMAN: Let me draw an example. If one of
11 the elements of the crime of rape were the past sexual
12 conduct of the rape victim, then I don't know that the
13 rape shield law could stand constitutional challenge. The
14 rape shield law withstands constitutional challenge
15 because there's no -- it's not caused -- there's no causal
16 nexus between the rape victim's prior conduct --

17 QUESTION: Right.

18 MS. GERMAN: And this man's intent.

19 QUESTION: But drunkenness isn't an element of
20 the crime here, any more than --

21 MS. GERMAN: Right, and what was excluded here
22 from consideration by the jury was not that the man drank
23 8 hours before, it was at the time that the offenses were
24 committed his blood alcohol level was .36.

25 And I wanted to respond to something that

1 Justice Souter said, because I think this is important.
2 Justice Souter hypothesized in the petitioner's case a
3 statute that said that you could punish someone for being
4 drunk other than driving a -- for committing a homicide
5 other than when driving a car to preserve the negligent
6 homicide case.

7 In fact, what this statute has done in Montana
8 is eliminate the negligent homicide, because if you go in
9 and you try to prove drunken vehicular homicide in
10 Montana, and this statute is allowed -- this instruction
11 is given to the jury, the jury can't consider it. They
12 have to bring back a deliberate homicide verdict.

13 They can't consider intoxication to determine
14 whether or not the person in fact was negligent, which is
15 an objective mental state, as compared to purposeful or
16 knowing, which is the subjective mental state.

17 QUESTION: Which suggests that in fact the State
18 really cannot get the results that it's trying to get here
19 except by doing what it's doing.

20 MS. GERMAN: No, which suggests that the State
21 has to be very careful about the way it defines the
22 element of offenses.

23 QUESTION: Let me ask you this. We have been
24 assuming -- I think most of our questions and most of the
25 answers have been assuming that if there is something

1 irrational about what's going on it's because the fact of
2 the intoxication goes to the existence or nonexistence of
3 the purpose or the awareness, and we've sort of left our
4 analysis there.

5 Isn't the policy of the statute based on
6 something different, and that difference is, two people,
7 one drunk, one sober can be aware, but one is not
8 inhibited in his action, the drunk one, the sober one is,
9 and the State is saying that the lack of inhibition as a
10 result of voluntary intoxication should not be an excuse.

11 That is not irrational in the sense of going to
12 the proof of awareness or purpose, and it is rational in
13 saying there are certain acts which remove the capacity to
14 inhibit behavior, and they should not be taken as an
15 excuse.

16 Isn't that the justification?

17 MS. GERMAN: Well, it's a justification, but I
18 want to go back to how you framed your hypothesis, or your
19 analysis.

20 You started out by saying you have two people
21 who are aware, one who's drunk and one who's sober. In
22 fact, if --

23 QUESTION: Well, the State has to prove that.

24 MS. GERMAN: -- the person is not aware.

25 QUESTION: The State has to prove that.

1 MS. GERMAN: Mm-hmm.

2 QUESTION: So I think I may assume that
3 hypothesis. If the person is, in one example, blind drunk
4 on the floor, the State isn't going to be able to prove
5 it, but if the State has proven it --

6 MS. GERMAN: Why not?

7 QUESTION: Pardon me?

8 MS. GERMAN: I mean -- excuse me.

9 QUESTION: I -- your time has expired, Ms. --
10 General Mazurek, you have 4 minutes remaining.

11 REBUTTAL ARGUMENT OF JOSEPH P. MAZUREK

12 ON BEHALF OF THE PETITIONER

13 GENERAL MAZUREK: Thank you, Mr. Chief Justice.

14 I would like to make two points, if I might.

15 First, I want to clarify and ensure that the Court
16 understands that Montana -- and I may have given this
17 impression in response to Justice Souter, that we may
18 have -- we have not backed away from our position that the
19 statute which is in question here, we believe, and espouse
20 in our brief that it has conditioned the elements of
21 purpose and knowledge. It has taken voluntary
22 intoxication out of that consideration for valid public
23 policy reasons.

24 What I -- Justice Souter, in my response to your
25 question, I was attempting to say that a State could enact

1 such a statute. We do not believe that is what we have
2 done here. It's not the effect of what we have done here.
3 Rather, we have conditioned purpose, the definitions of
4 purpose and knowledge, and we believe that, having done
5 that, we have offended no principle enunciated in the
6 Constitution. It is rational. It does not shift the
7 burden of proof.

8 QUESTION: Mr. Mazurek, I was curious about one
9 thing in Montana. How do they treat being high on drugs
10 as distinguished from alcohol?

11 GENERAL MAZUREK: Justice Ginsburg, being high
12 on drugs would have the same effect. This statute applies
13 to the knowing ingestion of any intoxicating substance.

14 QUESTION: So it includes --

15 GENERAL MAZUREK: If there are no further
16 questions, Mr Chief Justice, I'll conclude my remarks.

17 CHIEF JUSTICE REHNQUIST: Thank you, General
18 Mazurek. The case is submitted.

19 (Whereupon, at 12:06 p.m., the case in the
20 above-entitled matter was submitted.)