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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: WILLIAM V. GRADY, DISTRICT ATTORNEY OF DUCHESS COUNTY, Petitioner v. THOMAS J. CORBIN

CASE NO: 89-474

PLACE: Washington, D.C.

DATE: March 21, 1990

PAGES: 1 thru 47

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM V. GRADY, DISTRICT ATTORNEY OF DUTCHESS COUNTY, Petitioner : v. : No. 89-474

THOMAS J. CORBIN :

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Washington, D.C.

Wednesday, March 21, 1990

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

APPEARANCES:

BRIDGET R. STELLER, ESQ., Assistant District Attorney of Dutchess County, Poughkeepsie, New York; on behalf of the Petitioner.

RICHARD T. FARRELL, ESQ., Brooklyn, New York; on behalf of the Respondent.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 89-474, William V. Grady v. Thomas J. Corbin.

Mrs. Steller, you may proceed.

ORAL ARGUMENT OF BRIDGET R. STELLER

ON BEHALF OF THE PETITIONER

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

This matter is here on a writ of certiorari issued to the New York State Court of Appeals. And the issue raised is whether, within the constraints of the double jeopardy clause of the Fifth Amendment, a motorist, who causes the death of another person as a result of an automobile collision, may be subject to a prosecution for homicide and/or assault, even though, at the scene of the collision and prior to the death of the motorist he or she -- prior to the death of the other person that motorist is charged with driving while intoxicated and failure to keep right, and then subsequent to the death, enters pleas of guilty to those vehicle and traffic violations, and is sentenced.

In this case, on October 3rd, 1987 there was an automobile -- there were -- collision -- an automobile driven by the Respondent, Thomas Corbin, was being operated in a westbound direction on Route 55 in the town

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of LaGrange.

It first collided with an eastbound vehicle and struck the rearview mirror -- or struck the sideview mirror of that car. It proceeded into the eastbound lane and struck a second vehicle in which Brenda Dirago was the operator and her husband, Daniel Dirago, was the passenger.

Respondent Corbin and both Mr. and Mrs. Dirago were taken to the hospital, where at approximately 8:00, Respondent Corbin was arrested for driving while intoxicated and failure to keep right. He was issued traffic tickets for those offenses. He then consented to having blood withdrawn, and blood was withdrawn for the purpose of chemical analysis at approximately 8:25 p.m.

The defendant was not arraigned that night. He was hospitalized. The tickets which were issued to him, directed to -- him to appear in the Town of LaGrange Court, a justice court, on October 29th, a Thursday night.

However, the Court did not sit on Thursday nights, it sits on Tuesday night. So the Court sent a letter to the Respondent Corbin directing him to appear on an advanced return date, that date being October 27th. No notice was given to the district attorney of the advanced return date.

On the night that the defendant appeared, it was not

a night scheduled for the district attorney to be in that courtroom. The defendant appeared with counsel, and entered pleas of guilty to both -- both the misdemeanor of driving while intoxicated and the violation of failure to keep right.

QUESTION: What is the jurisdiction of the justice court to which you refer, Mrs. Steller, so far as what kind of crimes can it hear pleas to?

MS. STELLER: Chief Justice Rehnquist, it would generally hear misdemeanors and violations. It would have preliminary jurisdiction over felonies, but its jurisdiction would be limited to holding a preliminary hearing, and setting bail on a non-Class A case, which would be a --

QUESTION: Binding over, in effect?

MS. STELLER: Yes, Your Honor.

I might also add that an assistant district attorney was called to the scene of the accident on the night of October 3rd. He was not there to assess what charges should be brought. There was one purpose for him being called, and that was to prepare a search warrant if one was necessary to obtain blood.

When he arrived at the scene, the defendant had already been arrested and charged. He learned that the defendant had consented to having blood withdrawn, and he

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left. He had no further participation in the investigation that evening. And he did not help draw any charges.

QUESTION: Does all -- do these facts make any difference to your legal argument? I mean, supposing the state's attorney had been fully advised all the way along the line, you'd still have the same legal argument, wouldn't you?

MS. STELLER: Yes, Your Honor, because we rely on New York State Vehicle and Traffic Law Section 1800(d), and we have relied on it in the state courts.

QUESTION: Your position is, even if he pleaded guilty or was convicted of this offense, you could go ahead and prosecute him for the greater offense.

MS. STELLER: That's right, Your Honor.

QUESTION: So I don't know, why -- what relevance, all these facts have.

MS. STELLER: Okay. I'm sorry, Your Honor, I'll --

QUESTION: I'm just suggesting that I'm not sure I understand.

MS. STELLER: It seems to me in this Court in Blockburger and in Vitale has set forth certain rules to be followed, that being that --

QUESTION: This Court.

(Laughter.)

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MS. STELLER: Thank you, Your Honor. That being that a defendant may be charged with the greater -- with a greater offense, or maybe charged with two offenses -- where -- and there can be subsequent prosecutions -- where there are different elements involved in each.

And in this case, we're here on an indictment which charged the defendant with manslaughter -- or counts of the indictment pertaining to manslaughter, criminally negligent homicide and assault.

QUESTION: But I -- I take it from the opinion of the state court that the prosecution is bound by its pleadings in its bill of particulars. And so, we can take this case as one in which the only way the prosecution can prove its case is to prove the same matters that were shown in the earlier proceeding on which there has now been a judgment.

MS. STELLER: Well, Your Honor --

QUESTION: Is -- is that correct?

MS. STELLER: That, plus additional factors are listed in the bill of particulars, Your Honor. He was charged with driving while intoxicated and failure to keep right.

QUESTION: Well, there are some additional factors but, really, the essential part of the prosecution's case is going to rely on the matters that were concluded by the traffic offense in the traffic court. Is that not

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correct?

MS. STELLER: In large part. However, the accident reconstructionist's report -- which was not available until January of 1988 -- also indicated the speeds -- the respective speeds of the vehicles and the positions of the vehicles at the time of impact. This was not --

QUESTION: Oh, well, of course --

MS. STELLER: -- known on the night of the 23rd.

QUESTION: -- there will be differences, but the state says the major part of the case is the same. That's what the state --

MS. STELLAR: A large part --

QUESTION: -- that's what your state court says.

MS. STELLER: -- yes. A large part. The court of appeals' majority opinion indicates that we are bound by the bill of particulars until amended, and it has not been amended, Your Honor.

QUESTION: So -- so don't we take the case as one in which in the second trial the proof is going to be of the same facts that were proven in the first trial?

MS. STELLER: Yes, Your Honor. Plus additional facts. But you must remember, there was no first trial here. The was a plea of guilty at arraignment. And the defendant pled guilty to common law driving while intoxicated. The blood test results weren't even back at

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the time. The blood test results were not received by the district attorney until October 30th.

QUESTION: Well, are you -- are you suggesting the case would have different if there had been a trial and the prosecution had introduced all this evidence?

MS. STELLER: It might present it in a different light, Your Honor. I recognize that --

QUESTION: Well, what's the legal -- what's the legal difference?

MS. STELLER: In the sense that you would know exactly what evidence was -- had been presented --

QUESTION: But we do know because your state court has told us.

MS. STELLER: The state court has told us that we are bound by our bill of particulars, which does include elements which were involved in the crimes to which the defendant pled guilty.

QUESTION: So I think you have to tell us why that does not constitute a bar.

MS. STELLER: Because, Your Honor, this Court has never held that we must try all offenses that arise from one series of acts or one acts in one trial.

QUESTION: Well, what about Harris against Oklahoma? Does that have a bearing on this, do you think?

MS. STELLER: I don't think so, Justice O'Connor,

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because in Harris there is a footnote that in the state's brief, the state conceded that both felony murder and the underlying robbery were the same.

And also, in this Court's opinion in Vitale, this Court recognized -- or this Court commented about the -- it's cited or it's quoted at page 18 of the petitioner's main brief, "For the purposes of the double jeopardy clause, we do not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treat a killing in the course of a robbery as itself a separate statutory offense and the robbery as a species of lesser included offense."

Here, I don't think you can ever say that driving while intoxicated is a lesser included offense of manslaughter, criminally negligent homicide or assault because the homicide charges involve a death, the assault charge involves physical injury.

Driving while intoxicated involves operation of a motor vehicle that is not is not necessarily involved in a manslaughter or an assault prosecution.

QUESTION: (Inaudible).

MS. STELLER: Not in every manslaughter case, Your Honor. And this is not a vehicular manslaughter charge. This is a more traditional manslaughter charge.

QUESTION: But you didn't have any trouble with Ashe

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against Swenson, did you?

MS. STELLER: No, Your Honor, I didn't.

QUESTION: You didn't even mention it in your brief. Would you mind mentioning it now?

MS. STELLER: Certainly, Your Honor. I think that in -- in the reply brief I did mention it, Your Honor.

QUESTION: In your reply brief, you gave it one sentence.

MS. STELLER: Yes, Your Honor, I did.

QUESTION: But you didn't mention --

MS. STELLER: But I don't -- I'm sorry, Your Honor.

QUESTION: You didn't mention it in your main brief.

MS. STELLER: No, Your Honor, because I don't believe that we are -- this Court has held that we would be collaterally estopped, or that res judicata would apply in this particular case. And I think that in this type of case we are governed by this Court's rulings in Blockburger and Vitale.

Also, I think that this Court has recognized that there is a strong public interest in law enforcement and that the people should be given a full and fair opportunity to present their case. And I think that's something that arises with collateral estoppel and res judicata. That doesn't happen here.

And I think the legislature of the State of New York

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has a right when they are enacting a statutory scheme to consider this Court's rulings, such as Blockburger, such as Gavieres, and decide that it is permissible to have vehicle and traffic offenses prosecuted separately because they are not generally lesser included offenses of assault and homicide.

QUESTION: And that's because each has an element that the other doesn't have?

MS. STELLER: On the traditional homicide and assault charges, yes, Chief Justice Rehnquist. And --

QUESTION: Ms. Steller, if -- if I may put in my candidate for things that aren't mentioned in the brief that maybe should have been, the earliest case I see cited by any side is, I think, 1871. These words were written about a hundred years before that. Is -- is nobody have any interest at all at -- at what -- at the time the Constitution was adopted -- being tried twice for the same offense was thought to apply to?

MS. STELLER: I think --

QUESTION: Have you done any historical research in it at all -- what -- what -- you know what --

QUESTION: I think, Your Honor, this Court's decisions which are cited in our briefs, refer to Blackstone's Commentaries. And I think that traditionally in England you would not be prosecuted for two offenses in

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the same indictment.

And I think you'd seen that in this Court in Thigpen v. Roberts because in Mississippi there was a DWI prosecution and a homicide prosecution. And I believe, during the argument -- oral argument it was discussed that traditionally in Mississippi you were not allowed to join offenses.

QUESTION: Uh-huh.

MS. STELLER: And that results from the common law traditions.

QUESTION: And what does that prove?

MS. STELLER: Well, Your Honor, you asked me about a historical analysis --

QUESTION: Right, right.

MS. STELLER: -- and I believe --

QUESTION: -- well, now how does --

MS. STELLER: -- that historically you would not have joined a minor offense with a more serious offense.

QUESTION: Uh-huh.

MS. STELLER: Obviously at common law we wouldn't have vehicle and traffic violations, but I think that anything of that nature would not have been joined.

QUESTION: But how does -- how does that establish that the only application of this provision of the Constitution is to offenses that have different elements

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as opposed to later prosecution on the basis of the same facts?

I mean, I have no doubt that there is -- is substantial historical support for the position that you take that you can't try a person for an offense that includes the same element of an offense already committed and nothing additional. But the issue before us is whether it includes something beyond that, whether it includes using the same evidence as a necessary part of the later prosecution.

QUESTION: I think that this Court has held previously that it is not -- that it is perfectly permissible to use some of the same evidence. I think that that issue was addressed by the court in Vitale, where the Court indicated that it was permissible.

In fact, part of Vitale's problem may have been the way it arose in this Court. Vitale came before the Court on a petition for certiorari. This Court granted the writ and remanded to the Supreme Court of Illinois for further proceedings to determine whether it was based on a Federal question -- whether their decision was based on a Federal question. The Supreme Court of Illinois then indicated that it was -- their decision was based on a federal issue. However --

QUESTION: But we said in Vitale, although the mere

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possibility that the state will seek to rely on all of the ingredients necessarily included blah, blah, blah, would not be sufficient to bar. It -- it did suggest that if in fact it turned out that the evidence was the same, there might have been a problem.

MS. STELLER: Your Honor, I believe the majority opinion in dicta says a substantial double jeopardy claim. But substantial should not be equated with dispositive. Because if it was dispositive, then there would have been no need for a majority opinion. And in the briefs in Vitale which were filed with this Court, the state indicated what its evidence was going to be.

Also, although the Supreme Court of Illinois had indicated in its opinion that the failing to slow -- which was the motor vehicle violation -- was a lesser included offense of manslaughter -- which is the charge that Respondent Vitale was charged with following his vehicle and traffic trial, during oral argument, Respondent -- in this Court -- Respondent Vitale's counsel conceded that it was not the lesser included offense.

But I think the issue there -- and I think we addressed it in our -- our brief, if I may refer to it -- at page 17, the term "the" in your opinion, immediately preceding the reckless act, implies that you might have been concerned based on the Supreme Court of Illinois's

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opinion that the prior conviction for failing to slow would always be an element of involuntary manslaughter.

Here that's not the case. We are -- we clearly have separate offenses with separate elements.

QUESTION: Ms. Steller, may I ask you two questions? One, do you know what happened in Vitale after we sent it back for the last time?

MS. STELLER: It was my understanding, Your Honor, that the court's -- the Supreme Court of Illinois did not permit the prosecution.

QUESTION: I -- I just didn't know --

MS. STELLER: I think that was the decision, but their decision also was -- in the case that was before you, the supreme court's decision was that the failure to slow was a lesser included offense of the homicide.

QUESTION: Right.

MS. STELLER: That is not the way this case reaches this Court.

QUESTION: No, I understand. In this case, as I understand it, we have four different offenses. DWI -- I can't remember them -- reckless manslaughter, criminally negligent homicide, and third-degree reckless assault -- each of which has an element that none of the others do. So under Blockburger -- if I understand -- let me be sure I have your position.

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If the state elected to, it could take them one at a time, prove him guilty of DWI, then try the second case for reckless assault, prove him guilty of that, and prove him guilty of the third one for reckless manslaughter and then go ahead with the fourth trial. So, under your position, if I understand you correctly, you're entitled to four separate trials. Is that right?

MS. STELLER: No, Your Honor, that's not quite my position. Because under state law I recognize that there is a joinder provision. I would concede that all of the homicide counts would have to be tried together.

QUESTION: No, I'm not talking about state law. I mean as a -- there would be no Federal constitutional objection as long as you get four separate offenses each of which has an element different from the others, even though they have certain common elements. Under your view of Blockburger, I think, just as you could try one or two, you could also try all four. You could have four trials here.

MS. STELLER: We would have to have -- if I understand your question -- there would be a potential for a failure to keep right trial, a driving while intoxicated trial, an assault trial and a homicide trial.

QUESTION: Correct. Because each has an element that -- a statutory element that the other -- that none of the

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others has.

MS. STELLER: That's correct, Your Honor.

QUESTION: Yeah.

MS. STELLER: However, I realize that New York has a compulsory joinder section which would have --

QUESTION: Oh, I understand, and they've thrown out two of your seven counts for that reason -- or three -- or two or three, I can't remember.

MS. STELLER: Yes, Your Honor, the driving while intoxicated counts which were included, and I believe either one or two of the vehicular manslaughter counts. We're not arguing about the vehicular manslaughter counts here.

QUESTION: But -- but your answer is there would be no Federal constitutional impediment to the four trials?

MS. STELLER: No, Your Honor. Under Blockburger and under Vitale I do not think there would be a Federal constitutional bar.

QUESTION: Even though the same evidence is introduced and -- and the core of all of them is whether -- really, whether, he was driving under intoxication. And he's acquitted in the first three -- the first three juries find that there's -- they just can't find beyond a reasonable doubt that he was, but you finally get a fourth jury who finds otherwise. That doesn't trouble you at

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all?

MS. STELLER: Well, Justice Scalia, I think there is an issue here, and that is what was the issue before the jury. And I think you've already decided that.

In a case where a person was charged with committing six robberies and there was trial on four of them, and the defense being that only -- that the defendant had not participated. I think this Court said that the people could not proceed with that -- with that additional robbery prosecution because the jury had necessarily found that the defendant was not the robber.

However, that's not the issue here. The issue here, in a -- in a potential for four trials, would be, did the defendant -- number one, was he intoxicated, number two, did he fail to keep right.

QUESTION: Right.

MS. STELLER: But assuming -- even if you assume that he was not intoxicated, I think that the prosecution could still go forward on the homicide theories because there are other elements here.

There is an element of driving his vehicle into the opposite lane of traffic, and there's a substantial overlap of vehicles. And I think it would be up to the jury to consider the other elements of whether the defendant acted recklessly or did he act with criminal

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negligence, and then, was the death the result of his reckless conduct or his criminal negligence.

Similarly with the assault count. It would be did he cause physical injury and was his conduct reckless? This is not a case where --

QUESTION: Well, what -- what you are now saying gives me cause to wonder whether your response to Justice Kennedy was correct earlier. I thought we had established that it -- under the -- under the indictment here it was clear that the state was going to use as a principal part of its case the -- the intoxication.

MS. STELLER: Your Honor, that would be some of the evidence introduced at this trial. However, the jury would be free to accept or reject it.

QUESTION: You're saying it's not an essential part of its case?

MS. STELLER: No, I don't believe that it is.

QUESTION: That it can win its case even -- even if he's -- even if the jury doesn't believe he was intoxicated?

MS. STELLER: The jury --

QUESTION: But that's not what the court of appeals said. "Thus, unlike Illinois Vitale, there's no need in this case to await the trial to ascertain whether the prosecution will rely on the prior traffic offenses as the

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acts necessary to prove the homicide and assault charges."

MS. STELLER: Your Honor, the evidence --

QUESTION: It seems to me that's --

MS. STELLER: -- that goes to the --

QUESTION: -- somewhat inconsistent.

MS. STELLER: -- evidence which would we -- which the prosecution would intend to adduce at the trial.

QUESTION: Well, they said as the --

MS. STELLER: However --

QUESTION: -- acts necessary to prove these charges. That's what the court of appeals has construed it.

MS. STELLER: We would have to introduce evidence. The jury -- it would be up to jury to credit the evidence. And that's part of the problem with analyzing double jeopardy after a second trial. Because you don't know what evidence the jury credited at the first trial in many cases, and you don't know what evidence they credited at the second trial.

QUESTION: Well, I think you may well be right that if there was an acquittal that would bar farther -- future prosecutions.

But my hypothetical was four successive victories by the state. They take the easiest -- lowest one first, get a -- a victory, and then I think under your theory there would be no bar of res judicata or collateral estoppel.

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You'd just -- you'd just add another element and get another -- another conviction.

MS. STELLER: Well, that's just another --

QUESTION: So I think you could get four separate convictions under your theory.

MS. STELLER: Well, it's not just another element, Justice Stevens, because we would be deleting other elements.

QUESTION: Well, not as I read the court of appeals' opinion. I mean, maybe I misread it, but I --

MS. STELLER: I'm sorry, Your Honor, but it seems to me that under the counts of this indictment, if you read the statutory language, as this Court has indicated should be done in its opinions in Blockburger --

QUESTION: Yes, but you have to read the bill of particulars too and the --

MS. STELLER: Then you're --

QUESTION: -- construction that your state court puts on the bill of particulars. That's all part of the case.

MS. STELLER: Then you are looking at the evidence adduced, and that's the problem, we believe, with the state court's opinion. We are asking you to reverse that opinion because we believe they have misconstrued your opinions concerning double jeopardy, that being that you do not look at the evidence which will be adduced, you

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look at the statutory elements and conduct a statutory analysis.

QUESTION: But -- but you're saying that when you do that, you can do it even if it's precisely the same evidence in each case. That's your legal position. I -- I mean, it certainly -- it's -- it's a permissible argument.

MS. STELLER: That's true. And this Court has said, even if there is a substantial overlap in proof it doesn't --

QUESTION: Even if it's an entire overlap. That's the point. You can be completely overlapped, and you still -- you still win under your legal theory.

MS. STELLER: As a general rule, yes, Judge. But here, this case that comes before you is not limited to the identical evidence. There are other elements here.

Obviously, the speed at which the defendant was traveling would not be relevant on his failure to keep right charge. So there are different elements as you analyze the statutory elements, and some evidence, which is indicated in the bill of particulars, would not be included, just as the defendant's blood alcohol level would not be relevant at a failure to keep right trial.

QUESTION: But -- but we have to evaluate your legal theory on the basis of what results it could produce, not

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just the results it might happen to produce in this case. And you acknowledge that -- that your legal theory can produce the result that Justice Stevens described.

MS. STELLER: That's correct, Your Honor.

I would suggest to you that in the -- you have indicated that society has an interest in law enforcement, and in enacting 1800(d) of the Vehicle and Traffic Law, the New York State legislature had a right to consider how the vehicle and traffic laws were to be enforced and how they would affect society.

Now, vehicle and traffic laws can give rise to a variety of minor offenses. Not all of them require intervention of a prosecutor. In fact, the vast majority of New York cases would not require the intervention of a prosecutor.

In most cases, the district attorney would not even receive notice of a vehicle and traffic offense. But if the prosecution for a homicide was barred by a prosecution for a vehicle and traffic offense, society would be at a loss because of that, and the defendant would basically be getting a windfall. And I don't believe that that was ever the intention of the double jeopardy clause.

Mr. Chief Justice, I'd like to reserve my remaining time for rebuttal.

QUESTION: Very well, Mrs. Steller.

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MS. STELLER: Thank you.

QUESTION: Mr. Farrell, we'll hear now from you.

ORAL ARGUMENT OF RICHARD T. FARRELL

ON BEHALF OF THE RESPONDENT

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

This is a case of bad draftsmanship. The Fifth Amendment was poorly drafted. It doesn't tell us what the term offense means. As a matter of fact, it even spells it differently than the modern spelling.

We find ourselves in this case, once again, after lessons of Blockburger and Vitale; the nonlesson, if you will, of Thigpen v. Roberts; the recessed lesson of Fugate v. New Mexico, addressing before this Court, the question of what the term "same offense" means.

If Blockburger is the sole test, I'll sit down. Because I'm through. I lose. Corbin goes to trial. Because the Court of Appeals of the State of New York acknowledged that if the Blockburger test, analytical approach -- call it what you will -- is the way that one determines what the Fifth Amendment proscribes, then as to the -- I keep on losing track of the numbers of these things -- three of the counts of the indictment survive a Blockburger-based analysis.

In this case if Blockburger is the law, if

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Blockburger is all that the Fifth Amendment requires, then this case goes back to New York State Court of Appeals on remand and the court of appeals will do that voodoo that they do so well on remand from this court and decide the question on state constitutional law grounds, and they may come to the same result, they may not. The good Lord only knows. I sure don't.

But insofar as the historical exegesis that one of Your Honors asked for, there are two things. Deeply rooted in the double jeopardy clause is the ancient -- it must be an ancient maxim because it's in Latin "Nemo debet bis vexari pro eadem causa." And if it's in Latin, then it's got to be old.

QUESTION: Well, it may be Latin and old, but how do we know it's deeply rooted in the double jeopardy clause?

MR. FARRELL: Well, Your Honor, I'm going to have to take the word of the historical exegesis done on several occasions by this Court and by some of the law review writers that track the idea of a proscription against double jeopardy, as we call it now, back to at least Demosthenes' times, about the three centuries before the common era.

And flowing from that and taking the well-known classical rootings of many of our Founding Fathers that they -- we can assume that they were familiar with these

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deep historic roots, one could probably, even if you wanted to push it further, run the whole idea back into Scripture. When Daniel was released from the lions' den, the lions were not given a second chance at Daniel.

Thomas Corbin went into the lions' den, and now the lions say we want to get another chance at him. These lions of the District Attorney's office in Dutchess County, taking an -- a fatal accident that occurred on October 3rd of 1987 -- one of these lions, on October 14th, 1987 sent off to the defendant, Thomas Corbin, the document that appears on page 5 of the joint appendix, a document that was issued out the Office of the District Attorney in Dutchess County, signed on behalf of Mr. Grady, the Dutchess County District Attorney, by one of his assistant DAs, a Mark Glick, "please take notice that pursuant to Section 3030 of the Criminal Procedure Law that people indicate their readiness for trial in the above-captioned case."

The above-captioned case, on October 14, 1987 was the People against Thomas Corbin for driving while intoxicated as a so-called common law count under the VTL, and the People against Thomas Corbin for failing to keep right under another provision of the VTL. These are the two tickets he was issued.

Having delivered themselves of this statement of

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readiness --

QUESTION: Mr. Corbin had killed somebody, hadn't he?

MR. FARRELL: Yes, sir, he had killed somebody and a member of the DA's--

QUESTION: Just -- just -- just a minute Mr. Steller. When a Justice answers -- Mr. Farrell, when a Justice asks you a question, you -- you don't say, yes, sir.

MR. FARRELL: I beg your pardon.

QUESTION: And I -- I suggest you adjust your entire demeanor to that of a court.

MR. FARRELL: Yes, Your Honor. Thank you for your correction.

Your Honor, the district attorney's office was aware, through the agent that was on the scene of the accident, that this accident had caused a death. It knew through its agent on the scene at the time -- at the time -- that there had been a fatality.

Their office proceeded in one direction, and that was to prepare the case for presentation to a grand jury. But incident to that -- incident to that -- they indicated quite early on, within two weeks after the fatality, that they were prepared to prosecute on the tickets.

Defense counsel appeared before the LaGrange Town Court on a date set by the court, set by the court, and entered a plea of guilty to driving while intoxicated.

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The town justice, not wanting to enter or make any sentence on that date, adjourned the case to a night when the district attorney's office was scheduled to have one of its representatives present.

One of its representatives, Assistant District Attorney Sauter, showed up on the night set by the court for sentencing, unarmed with any information about case except what she could find in the court file, and in the court file all that was there were these two tickets.

Justice Caplicki imposed sentence, a $350 fine, suspension of license, driving school. And six weeks later -- six weeks later -- the district attorney's office, or more precisely, the grand jury in Dutchess County, returned the indictment that gave rise to the initiation of the proceedings in this case, where the counts in the indictment were challenged both on state law grounds and under the double jeopardy clause of the state and Federal constitutions.

The county court judge rejected the motion on the ground that somehow the defendant was guilty of procuring his own conviction, repelled division the second departments, Appellate Supreme Court of the State of New York, and proceeding in the nature of prohibition, dismissed, without any comment, and the case went to the New York State Court of Appeals.

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And then the New York State Court of Appeals, writing for a four-judge majority, Mr. Justice Titone held that although certain -- the first -- the manslaughter vehicular homicide or the vehicular assault charges in the indictment survived, a Blockburger-based analysis taking hold of the language in this Court's opinion in the Vitale case, the majority's observation that if the same evidence were to be used to support the prosecution on the homicide charges, there would be a substantial constitutional question.

And seizing upon also, the language in the -- excuse me -- dissenting opinion, that to quibble with the characterization of the substantiality of the constitutional question, would rather simply be dispositive of the constitutional question held that Blockburger notwithstanding the prosecution in this case is barred under the double jeopardy clause as read by the court of appeals through its perception of the view of this Court as barring further prosecution. And it is on that holding that we come to this Court.

It seems that of the protections of the Fifth Amendment this particular aspect -- as I have mentioned -- perhaps over-enthusiastically, and I apologize for that -- this problem -- this specific problem emerges in Vitale and has progressed through Thigpen where the Fifth Circuit

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in the Thigpen case in the decision below mounted the sort of analysis that we suggest ought be followed, that was followed by the New York State Court of Appeals, that was followed even more recently in a case we cite somewhat frequently in the brief, Connecticut decision of State v. Lonergan, to first parse the statutes themselves as written, the two statutes that are said to create the double jeopardy problem.

If the two statutes do not survive a Blockburger-based analysis there, the double jeopardy inquiry ends, and the double jeopardy clause precludes prosecution -- a second prosecution.

The prosecutor, and I suspect, any prosecutor -- certainly if I were a prosecutor -- would look to have the inquiry end right there. And if that's where the inquiry ends, then that's where the inquiry ends. But it seems, from Vitale, and maybe perhaps by precursor language in the Brown case a few years before Vitale, that Blockburger is not the answer. Blockburger is an answer, an answer.

The answer as to what the simple language, the simple, but as events since the adoption of the amendment indicates, complex problems presented by the double jeopardy clause lies in looking beyond the definitions, looking to the underlying idea, as this Court has said back in 1957 in the oft-quoted language of Green v. the

United States, looking to the deeply ingrained idea that the state with all its power should not be allowed to make repeated attempts to convict an individual.

Even earlier -- I take that back -- at approximately the same time that that statement was made by this Court in its opinion in Green v. the United States and a case decided a few years earlier, Brock v. North Carolina, writing at a time before the incorporation through the Fourteenth Amendment of the Fifth Amendment into the jurisprudence of the states, Mr. Justice Frankfurter in his concurring opinion said that in a due process analysis -- in a due process analysis -- fairness indicates that a prosecutor who has been incompetent or casual or even ineffective shouldn't be given an opportunity to see if he or she cannot do better a second time.

It is the second time aspect that raises the question of whether there isn't even a third level beyond which the prosecution must pass before the prosecution is allowed the proceed to try the defendant again on a second charge where the factual matrix that gives rise to the second charge is sensibly indistinguishable from the first prosecution.

QUESTION: Of course, to agree with Frankfurter and Brock we don't have to adopt the rule that you're proposing. It's enough to -- to support that, that you --

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if -- if you're acquitted the first time, you can't then bring the same evidence that the jury has rejected the first time around back. Frankfurter says to see if the prosecutor cannot do better a second time.

MR. FARRELL: Well --

QUESTION: The prosecutor is not trying to do better here. He won the first time; he's trying to win again the second time.

MR. FARRELL: Mr. Justice Scalia, doing better does not necessarily mean trying to win again. But doing better can also, and as it does mean very often the civil context of res judicata cases, trying to get a better result, to enhance the outcome of the first case.

Trying to do better in the kind of callous calculus of the criminal law, a -- oh, good heavens -- a conviction for a, let's say, second-degree crime could be considered not doing as well from the prosecutor's point of view as getting a conviction for the higher, the first degree, of that.

And I think the language bears the fair construction that an attempt to do better is not only to try to convict the defendant who has once been acquitted, but to perhaps try to do better by convicting a defendant who's been once acquitted on a charge that arises out of the same operable set of facts, by convicting him over yet a higher degree

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of crime.

QUESTION: Mr. Farrell, what if the death here had occurred several months after the -- after the accident so that at the time your client was prosecuted for the misdemeanor charges in the justice court there had been no death?

MR. FARRELL: It's -- it's quite clear, Your Honor, in the cases both of the state and in this Court, that if the prosecutor does not have available all of the information needed to mount the particular prosecution under attack, then the double jeopardy clause allows a prosecution as -- as I understand your hypothetical, the so-called later-death cases.

QUESTION: Now, how -- how -- how does that fit in under your version of the -- the same-evidence test?

MR. FARRELL: The same-evidence test, as we would envision it being applied in this case, would be to take a look at the situation as the prosecutor knows it at the time that first guilt-imposing proceeding is ready to go to adjudication.

And if we were to take that in this case, and look at what the prosecution knew -- knew -- when the defendant went before the court, the prosecution knew that it had evidence of intoxication. It knew that it had evidence of death. It knew that it had at least a pretty good reason

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to consider presenting this case to the grand jury.

Because we are told by the prosecutor, Your -- Mr. Chief Justice -- that while these matters were percolating through the justice's court, the district attorney's office wasn't completely asleep in this case. They had retained an accident reconstructionist. They were having analyses done on the blood. They had impounded the cars that were involved in the accident.

QUESTION: Under your theory, I take it, if the state were to have come several months later on evidence of intoxication which it didn't have at first, then there would be an exception for that too just like there would be for a later death?

MR. FARRELL: It would be difficult to imagine how that could happen, but I think that --

QUESTION: Well, just take it as a hypothetical. I mean, there seemed to have been enough slip-ups in this case so we can envision one more.

(Laughter.)

MR. FARRELL: Okay. Including mine, Your Honor, which I apologize again.

QUESTION: They lost the blood sample and they find it.

MR. FARRELL: That one, Your Honor, I think I would have to say they had the information at the time. They

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had it. They had it. They had it, or they had it or they had it readily available.

In the after-occurring death cases, the prosecution may have -- and certainly no prosecutor's going to be sitting around saying, gee, I hope this victim dies so I can prosecute this guy for manslaughter. That's -- that's horrible.

But if this is what eventuates, if the prosecution moves ahead and moves ahead speedily and moves ahead intelligently and gets the conviction for what is -- move it up from driving while intoxicated, let's move it up to a high-level felony assault -- and then the victim dies, it's quite clear under the law of practically every state that I can confess to even some nodding acquaintance with -- it's quite clear within the context of the cases decided by this Court that in the situation where the death of the victim whose injuries were the subject of an original criminal prosecution, the death occurs after -- after conviction of the assault-level charges, there's no problem.

There's no double jeopardy consequences, if for no other reason, there is no possibility of ever being put in jeopardy for that particular crime at the time of the original proceedings. That crime had one regrettable element that could not have been -- could not have been

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asserted in the original proceeding.

In this unhappy case, all the information that was needed was there or readily obtainable and sitting there ticking away in the criminal procedure law of the State of New York is CPL 170.20. CPL 170.20 gives the district attorney's office, so positioned as the District Attorney's Office in Dutchess County found itself with this case, the absolute right to go into a court like the LaGrange Town Court, move for an adjournment on the ground that there is an intention to submit the case for indictment.

And the statute quite clearly says that the judge, Justice Caplicki, in this case, must grant -- must grant --

QUESTION: Well, let me ask you another question. Supposing you're in a jurisdiction where the state was not obligated to or didn't in fact submit a bill of particulars. How would you handle your same evidence test on a double jeopardy argument if -- if the state indicts on the -- on the greater offense?

MR. FARRELL: If we were to replicate this case in Illinois -- in Illinois, where apparently this is not necessary because that is how Illinois v. Vitale got here -- if we were to replicate this case, like your hypothetical case, Mr. Chief Justice, who are in Illinois,

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I would suggest that the approach taken in Vitale might have to be re-examined and to look at -- and look for -- look for -- for this Court to look for in the proceedings in the lower courts the motion to dismiss, let us say, the second indictment, any hearings that are held on that second indictment -- to look for the defense -- the defense -- to establish beyond at least any reasonable question -- not beyond a reasonable doubt -- but to establish clearly that the prosecution can move ahead only on the same evidence.

QUESTION: Now, how would the defense go about establishing that? Would they call the prosecutor to the witness stand?

MR. FARRELL: I suggest, Your Honor, if we take it in this case I think we could probably call the investigating officers, we could call forth the blood --

QUESTION: Well, they -- they could certainly give you testimony as to what happened, but I would think there would be no guarantee that the state would necessarily use all the testimony of the investigating officers.

MR. FARRELL: No, Your Honor. But in a very simple, straightforward -- on terms of the factual context -- situation like the one presenting us in this case -- I think the simple -- I think that the defendant could probably meet my rather favorable standard in the course

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of the defense by demonstrating the reasonableness -- the reasonableness -- of the assertion that there is no rational conclusion to be reached except that the same evidence that the same evidence that has already convicted me will be part, parcel, if not all of the essential meat and potatoes of the prosecution's case against me on this second go-round.

I'm quite mystified that the Illinois Criminal Procedure Law is equivalent -- doesn't permit the kind of liberal disclosure in advance of trial that is permitted under, as I understand, in the Federal rules of criminal procedure. It certainly is required or permitted under Article 240 of the Criminal Procedure Law in New York.

There might be a little preliminary digging that might have to be done by the defendant to make out the same evidence argument, but I don't think it is that terribly difficult a problem for -- it would not be a terribly difficult burden to impose upon defendants to bear the -- if not the onus probandi, at least the burden of persuasion that the same evidence will be used in the second prosecution.

And then -- and then -- and then we have set the stage for the preliminary attack on the second trial which this Court has since Abne has indicated that it is the only successful or satisfactory way of resolving the

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problem confronting a defendant under the double jeopardy clause.

And that is it's all very well and good to say that it was a double jeopardy clause, but if you want to establish the double jeopardy argument the defendant has to undergo the travail, run the gauntlet, if you will, to borrow off the language of this Court, of the second trial to make out his or her double jeopardy argument, the double jeopardy clause becomes a rather unhelpful piece of the Bill of Rights as to --

QUESTION: Well, it seems to me that's the consequence of your test. That we're not -- unless you adopt the transaction test -- but if -- if you adopt something short of that, as you propose, you're not going to know about double jeopardy unless, one, you wait for the second trial to actually proceed, or, two, you have some sort of mandatory bill of particulars.

MR. FARRELL: Well, Mr. -- Mr. Justice --

QUESTION: And I'm -- I'm not talking necessarily about this case because we seem to know in this case what's going to happen.

MR. FARRELL: Yes, Mr. Justice Kennedy, if we were to be willing to rest on a Blockburger first, same- evidence test second, then the problem of the same transaction would not be solvable.

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But the thrust of our brief is that there are at least three identifiable in the jurisprudence of this Court -- three identifiable tests -- screens, if you will -- filters, through which the prosecution must pass.

QUESTION: What is the third? What is the third -- was the third one the same-transaction test?

MR. FARRELL: The third one is the same transaction test, Mr. Chief Justice.

QUESTION: That's never been adopted by the Court, has it? It's been rejected several times.

MR. FARRELL: No, sir, and it has been pointed out that the Court's declination to adopt that test has been characterized in one of this Court's writings as a steadfast refusal to adopt it.

But I would like to take the time that's available to me in the argument to suggest that perhaps the steadfastness of that refusal might warrant some reexamination in this case adding a couple of -- a couple of additional observations to what has probably been said better, and said, perhaps, more often, and perhaps more articulately than I can say it.

But there is, underlying this whole double jeopardy problem a consideration of the fairness to the defendant, who is facing the somewhat awesome power of the court. And it would seem if one were to take general approach of

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a state statute like CPL Article 40 which says if you've got the material, put it all in one indictment and prosecute.

Like the suggestions made in the model penal code that are cited in our brief in opposition to the petition of certiorari, like the cites in the American Bar Association -- I think Project for Minimum Standards of Criminal Justice -- that where there is, as we also say in the brief in the civil case, the reasonable expectation -- the reasonable expectation that -- by the bench and by the bar that these claims would all be asserted in a single vehicle, then that reasonable expectation is part of the reasonableness that is inherent in the term fairness.

And the fairness that is inherent in the system is translated in this context into a -- an adoption of principles of res judicata, collateral estoppel, borrowed quite clearly and liberally from the civil side into this specific problem presented by cases like this.

QUESTION: Mr. Farrell, before you sit down, what case do you rely on?

MR. FARRELL: Ashe v. Swenson.

QUESTION: Thank you.

MR. FARRELL: Mr. Chief Justice, I apologize, again, for my enthusiasm, my excesses. Thank you very much.

QUESTION: Very well, Mr. Farrell.

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Mrs. Steller, you have five minutes remaining.

REBUTTAL ARGUMENT OF BRIDGET R. STELLER

ON BEHALF OF THE PETITIONER

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

Mr. Farrell has discussed the issue with fairness to the defendant. In this case the defendant was on noticed by virtue of Section 1800(d) that he could be prosecuted for the assault and homicide in spite of his guilty pleas to the vehicle and traffic offenses. And this is a scheme which must be viewed as also fair to society.

In fact, here, prior to sentencing, the defendant knew that the prosecution intended to present this case to a grand jury. This is the defense counsel, who may well have been the only person in the room who knew about it, but he knew about it. The judge and the prosecutor who was present did not.

Mr. Farrell has also indicated that this case should be governed by New York State Criminal Procedure Law Section 170.20 which provides that the district attorney may stop any justice court proceeding. That is a general provision of the criminal procedure law of New York.

The vehicle and traffic provision is a much more specific one. The criminal procedure law presumes that the district attorney will know about a case. The vehicle

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law recognizes that vehicle and traffic is slightly differently, and that because --

QUESTION: Well, this hasn't got a whole lot to do with our double jeopardy question, does it?

MS. STELLER: I think it does, Your Honor.

QUESTION: Does it really?

MS. STELLER: I think that this Court in deciding this case has to craft a rule which will be fairly simple and can be applied in all 50 states. And I think that there are many cases, not just in New York, but also in -- I -- I think Connecticut is specific to this -- that it's possible in a vehicle and traffic charge for the district attorney to have no notice and to have somebody plead guilty by mail. Similarly, I believe, New Jersey can do this.

But here, if you look at it, the district attorney had no notice that this case was on the calendar in LaGrange on October 27th. That is the day the plea was entered. And without notice of the date of the appearance that the defendant was supposed to be in court, there would have been no requirement that the district attorney present --

QUESTION: Well, isn't all of this, the people of New York?

MS. STELLER: If you are to presume --

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QUESTION: You only have one state.

MS. STELLER: That's right, Your Honor.

QUESTION: And -- you -- the state speaks with one voice.

MS. STELLER: That's right, Your Honor, but the district attorney is charged with --

QUESTION: (Inaudible) all prosecutions?

MS. STELLER: That's right, Your Honor, and the district attorney --

QUESTION: So what is your problem? If he -- if he makes a mistake?

MS. STELLER: It's not just a mistake, Your Honor. Even in the absence of a mistake --

QUESTION: If he doesn't know what's going on?

MS. STELLER: Even in the absence of a mistake, Your Honor --

QUESTION: If he doesn't know what's going on, who gets blamed? Do you -- you don't think that the defendant is obliged to tell the prosecutor, prosecute me?

MS. STELLER: No, I'm not saying that, Your Honor.

QUESTION: You don't put that on him, do you?

MS. STELLER: I'm not saying that, Your Honor. But what I am saying is that the district attorney is entitled to a fair opportunity. And if he has no notice of the date on which the appearance is scheduled, or on the date

that the plea is entered, he can't stop it.

QUESTION: He did get notice.

MS. STELLER: No, Your Honor, he didn't.

QUESTION: He didn't for six months?

MS. STELLER: Your Honor, he had no notice on the night the plea was entered that the case was even on the calendar.

QUESTION: Well, wasn't it in the newspapers?

MS. STELLER: Judge, I don't think you can presume --

QUESTION: Wasn't it in the newspapers?

MS. STELLER: Yes, Your Honor, but as a practical --

QUESTION: Well, did -- didn't that tell him what was going on?

MS. STELLER: I don't think that this Court -- I don't believe that this Court can presume on this record that anyone in Dutchess County read the newspaper on the morning of October 4th. And I believe, specifically --

QUESTION: Well, then did it -- do you have news --

MS. STELLER: There is a --

QUESTION: Just to speak for myself, do you have newspapers in Dutchess County?

MS. STELLER: We do, Your Honor, but I --

QUESTION: Well, if you have them, I assume somebody read them.

MS. STELLER: Your Honor, on the morning of October

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4th -- this is referred to in the district attorney's answer in the county court to the defendant's motion to dismiss the indictment. There was a blizzard. There's a state of emergency here. And I don't think you can presume that anybody in Dutchess County read the newspaper, just as I don't think that anyone on this Court can presume that somebody in Charleston read the newspaper the morning after Hugo struck.

QUESTION: There was a storm yesterday, and I read the newspaper.

MS. STELLER: Your Honor, I don't -- this is October 4th in the Mid-Hudson Valley. The leaves are on the trees. It's not just a snow storm. It was a blizzard. And if you think about the effect of a blizzard when you have leaves on the trees --

QUESTION: I am unwilling to write any constitutional law based on a blizzard.

(Laughter.)

MS. STELLER: That's correct, Your Honor. On the other hand, there's no constitutional law that you can presume that somebody read the newspaper.

QUESTION: Thank you, Mrs. Steller.

The case is submitted.

(Whereupon, at 12:01 p.m., the case in the above-entitled matter was submitted.)

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No. 89-474 - WILLIAM V. GRADY, DISTRICT ATTORNEY OF DUTCHESS COUNTY,

Petitioner V. THOMAS J. CORBIN

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan friedman

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