ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

CAPTION: REUBEN DOWLING, Petitioner v. UNITED STATES

CASE NO: 88-6025

PLACE: WASHINGTON, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

REUBEN DOWLING,

Petitioner

v. : No. 88-6025

UNITED STATES

Washington, D.C.

Tuesday, October 3, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 P.m.

APPEARANCES:

ROBERT L. TUCKER, ESQ., St. Croix, United States Virgin Islands; on behalf of the Petitioner.

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

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 88-6025, Reuben Dowling against the United States.

Mr. Tucker.

ORAL ARGUMENT OF ROBERT L. TUCKER

ON BEHALF OF THE PETITIONER

MR. TUCKER: Good afternoon, Mr. Chief Justice, and may it please the Court.

The issue that we bring before the Court today involves the issues concerning what role the Constitution plays, and more specifically, the Fifth Amendment, when the government, in a criminal case, attempts to introduce evidence of so-called other crimes evidence under rule 404(b), when, in fact, the defendant has previously been tried for that very conduct and found not guilty.

We suggest to the Court that the introduction of this evidence violates -- excuse me -- the defendant's rights under both the double jeopardy and due process clauses of the Fifth Amendment.

QUESTION: You're not making any rule, then, that 404(b) doesn't authorize it or should be construed not to authorize it?

MR. TUCKER: In this particular case, no. Although the Third Circuit did, alternatively, hold, on that basis,

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that issue is really not before the Court, in our view of the case --

QUESTION: Well, of course, the Court ordinarily doesn't want to reach constitutional questions if there's a different -- if it's a statutory ground in which to decide it.

MR. TUCKER: Well, in this case, if, in fact, the evidence violates the defendant's rights under the Constitution, the court would have to apply a different harmless error standard.

I suppose that the court could decide that the issue, as the Third Circuit --

QUESTION: Yeah, but what if the rules forbid this kind of evidence?

MR. TUCKER: If rule 404(b), a straight 404(b) analysis for -- forbids the evidence?

QUESTION: Do you argue that or not?

MR. TUCKER: We didn't argue it in our -- our cert petition, and the reason we didn't is this. If rule 40 -- if the evidence is inadmissible, as the Third Circuit alternatively held under a straight 404(b) analysis, then when the court goes to the harmless error standard, it would apply the statutory harmless error standard, as did the Third Circuit.

Now, not -- we're not conceding that the Third Circuit correctly applied that standard, but we do concede

that that would be the proper standard to apply if it's a rule 404(b) violation.

The cert petition basically raises the issue that the Third Circuit applied the wrong harmless error standard; that, in fact, they were -- should have applied the standard mandated by Chapman v. California, because, indeed, the evidence was not only admiss -- inadmissible pursuant to rule 404(b), but it was a violation of the Constitution.

QUESTION: I see.

QUESTION: But you say you're -- you're not presenting here and you're not arguing the rule 404(b) point.

MR. TUCKER: We didn't present it in the cert petition.

Let -- let me -- let me put it this way, Mr. Chief Justice. I think that now that the court has the entire case, it would certainly have the power to review that and decide on that basis. As far as the cert petition itself, were -- were we merely to have raised that issue before the court, what we simply would have been asking the court to do was -- would be just factually review a harmless error determination.

I -- I would say this, it is our position that the evidence is inadmissible to a straightforward application of rule 404(b); and that, in fact, the Third Circuit, while applying the right standard, nonetheless, we disagree with their factual conclusion as to whether or not it was still

harmless error.

But if this court were to hold that yes, indeed, the evidence is inadmissible under rule 404(b), and yes, indeed, it's harmless error under the statutory standard, then the court would still have to go to the constitutional issue, because it would have to then look to see if it's a violation of the Constitution, and was it indeed harmless error under that standard.

So, I guess in answer to your question, if the court decides to avoid the constitutional issue or not reach the constitutional issue by merely applying rule 404(b) analysis, then we would agree you don't have to reach it if, in fact, you also conclude that the Third Circuit wrongfully applied the harmless error standard.

QUESTION: Well, this wasn't test -- testimony that was designed to prove character --

MR. TUCKER: No.

QUESTION: -- in order to show that he behaved in a certain way, was it?

MR. TUCKER: No, it was certainly not offered for that purpose; it was offered for the purpose of -- QUESTION: And I -- I don't think -- and I don't think we could construe it as offered for that purpose, do you?

MR. TUCKER: No, I don't believe it was -- it had that effect --

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QUESTION: Well, then 404(b) doesn't apply, because the only thing it prohibits is character evidence.

MR. TUCKER: Well, rule 404(b) could -- it was -- it was offered for the purpose of proving identity. But rule 404(b) could still apply if indeed the evidence was not relevant to that purpose.

QUESTION: There -- there are two sentences in 404(b); the first prohibits character evidence. And as we agreed, that isn't this.

MR. TUCKER: Well, it -- it -- it -- it is, in one sense, but if, in fact -- it wasn't offered strictly to that purpose. It -- clearly we admit that if evidence is admissable for the purpose of identity under rule 404(b), that -- that evidence can come in, assuming that other standards are met.

But the Third Circuit held that -- of course there's numerous cases that hold in order to be admissible for identity, there are certain prerequisites that have to be found. For instance, either that it's a signature crime -- in other words, it has to have some relevance, in fact, to identity to enable the jury to infer, based on crime A, the other crimes evidence, that crime B, the one being tried --

QUESTION: Well, the -- the purpose for my making the comment is -- and it bears on the constitutional argument that I know you're trying to reach -- is that you began by

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saying, oh, this is other crimes. It doesn't seem to me this is an other crime. It was simply the fact that the woman had seen the person in company of -- with Christian, and that therefore he knew Christian. And secondly, that she'd seen him with a particular mask. It's not an other crime. It's not a crime to have a mask -- not a crime to be in the company of Christian. It's just a fact that is highly relevant in this case.

MR. TUCKER: Had the government merely limited the evidence to the fact that Vena Henry, had she testified, yes, I've seen Reuben Dowling in the company of Delroy Christian, I would think they would have a stronger point. But, in fact, Vena Henry testified that, I saw him in the company of Delroy Christian; he was in my house; that he had a mask and he had a gun.

Also, that was Vena Henry's testimony, but in opening statement, the government had also informed the jury that, in fact, he had been tried for robbery in connection with that. And the trial judge twice instructed the jury that he had been found -- or that he had been tried for robbery, in connection with the Vena Henry incident.

So the jury was clearly made aware that this wasn't just a situation where Mr. Dowling had been seen in the company of Miss -- of Delroy Christian by Vena Henry and he happened to have a mask and a gun; they were clearly aware of

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what the circumstances were through the state -- through the proffers made -- or the statements made by the government in opening statement and through the trial judge's own instructions.

QUESTION: Well, if the evidence of the -- the gun, the mask and accompanying Christian just happens to be in the occurrence of what might have been a crime, that doesn't seem to me to exclude it, unless the 403 balancing rule comes into play, of prejudice exceeding the probative value of the testimony. But, that's not the argument here.

MR. TUCKER: You're raising just the 404(b) analysis as to whether the evidence should come in just by mere application of that rule. The Third Circuit held that, basically -- and -- and, as I say, as an alternative ruling, that it didn't comply with rule 404(b)'s relevance provisions, and they also factored in the acquittal in that process themselves.

We -- we feel like the basic problem was not so much -- although we agree with the Third Circuit's alternative ruling, but the basic problem was the fact of the constitutional problems presented by the fact that a prior jury heard Vena Henry's evidence and said no, not guilty. And that raises --

QUESTION: But -- but -- but that's the whole point, not guilty of a crime, but not that he wasn't not with

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Christian, not that he didn't have a mask, not that he didn't have a gun.

QUESTION: This point, in other words, goes not just to 404(b), but it also goes to the constitutional point, doesn't it?

MR. TUCKER: It goes to the collateral estoppel issue --

QUESTION: Yeah.

MR. TUCKER: -- as to whether or not the -- the issue of identity had previously been determined by the --

QUESTION: Right.

MR. TUCKER: -- by the jury.

Now, we suggest -- now, admittedly the record is not clear in that regard, because we don't have a transcript of the first trial. So, we -- and we have a statement of the trial judge that -- where he says I -- I don't think the issue of identity was seriously contested. And we -- we have some other indications that at least cast some doubt as to what the basis of that verdict was.

And I'd like to make a couple of points in regard to that. First, as to who really bears the burden on this. And I would suggest that the government should bear the burden of convincing this court that the issue of identity had, in fact, not been decided in the first trial.

Now --

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QUESTION: Don't you have to show us that the burden of proof at that trial was the same as the government is required to show -- get something admit -- admitted under the rules of evidence?

MR. TUCKER: Well, I -- I -- you know, very candidly, Mr. Chief Justice, I would admit, I think that's the government's strongest argument, that there was a different burden of proof. I think that argument suffers from several flaws, though. Clearly the acquittal, when viewed in a very technical sense, merely signifies that there was a reasonable doubt, while the standard which the government had to bear to admit the other crime's evidence pursuant to the Huddleston decision would be a preponderance.

And clearly this court in -- in the civil forfeiture and penalty cases, which it has decided following acquittals, where it has basically said that the mere fact of an acquittal does not bar a subsequent civil forfeiture proceeding, has alluded to the burden of proof being different in the two proceedings.

But I suggest that there -- the burden of proof argument has several problems. For -- as far as the forfeiture cases, we would submit that we're really talking about a very different interest involved here. Of course, we're talking about a subsequent criminal prosecution here where the court, on numerous occasions, in its course, has

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recognized that a defendant's interest in a criminal case is much stronger than the defendant's interest in a civil case.

The -- also the language of Ashe v. Swenson, itself, the court, in more or less rejecting a burden of proof argument, quoted from United States v. Kramer as a rule of federal law, it's much too late to suggest that this principle, referring to collateral estoppel, is not fully applicable to a former judgement in a criminal case, either because of the lack of mutuality or because the judgement may reflect only a belief that the government is not meant to higher -- standard approve a higher burden of proof exacted in such a case for the government --

QUESTION: But -- but in -- in Ashe, the court was dealing with -- with two successive criminal prosecutions, where the burden was the same.

MR. TUCKER: That is true. That is true. And the court -- but the -- the court utilized this language, of course, the burden of proof. There's no question that it was the same burden of proof, but I suggest that the -- this language indicates that Ashe did not turn on the mere fact that the burden of proof was the -- was the same.

Because Ashe also clearly utilizes other language that we see in many of these cases, that the defendant should not be required to run the gauntlet, so to speak, again, and he clearly has to run the gauntlet again.

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QUESTION: Well, but, you know that's language that was used by the court in explaining an amendment. It's not the amendment itself. And what -- what you're dealing with, a provision of the double jeopardy clause, and you're --you're invoking a collateral estoppel doctrine. And I -- I thought that traditionally collateral estoppel was not applicable where the burden of proof in the second proceeding is less than the burden of proof was in the first proceeding.

MR. TUCKER: I don't -- I think, as far as when applying it in the civil context, that's true. The restatement of judgement alludes to that. But I suggest that the entrants -- interests are very different in -- when applied in the criminal context, especially when collateral estoppel is considered a part of double jeopardy.

In this court's cases, I would submit to the court, in interpreting the double jeopardy clause, have never really been very -- taken a real technical approach. I -- Mr. Chief Justice, I recall, in your opinion for the court in Illinois v. Somerville, referring to the fact that -- that the double jeopardy clause is not interpreted, I think, in a "mechanical, rigid manner." That follows as far back as this court -- court's similar decision in double jeopardy of the Perez case, a very -- Justice Storey's manifest necessity test was adopted, but a very technical approach would -- would reach a different result. You couldn't even be retried, even though

you had obtained a reversal of your conviction.

And I think the -- looking at the court's double jeopardy cases, we see -- see this language -- or these results all through the line of cases, where the court basically reached -- interprets the double jeopardy clause in terms of what its purposes really are, and reach a -- reaches a result based on fairness.

The -- the mistrial at the defendant's request in Arizona v. Washington, the court recognized that really that -- that there was no manifest necessity for that, but nonetheless, fairness dictated a result against the defendant in that case because he -- he had initiated -- or the mistrial had been as a result of his own conduct, his own improper opening statement. And so fairness, in interpreting that clause, leads to a different result.

QUESTION: From what you say, it sounds as thought double jeopardy is almost subsumed under due process; kind of a general fairness requirement.

MR. TUCKER: Well, I think, clearly, there are distinctions, but I also think we have raised the due process issue in this case, too. And, at times, they -- they tend to become closely allied, I guess. But I think the arguments -- and looking at the cases -- and I want to emphasize this, because the burden of proof argument, I think, as far as the collateral estoppel, is, of course, our most difficult hurdle.

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QUESTION: May -- may I ask you a question, Mr. Tucker --

MR. TUCKER: Sure.

QUESTION: -- about the collateral estoppel? When -- when you were asked before about whether the identity issue was foreclosed by collateral estoppel, you said there were two problems with that, and one of them was that the burden should be on the government to show that the issue was not raised; and you had a second point you were going to make and you never made it. Do you know what it was?

MR. TUCKER: The -- yeah, I -- I -- yes, Justice Stevens. I suggest that there are several indications in the record that, in fact, the issue of identity may well have been raised in the prior trial. We -- we had the indic -- and I assume you just want me to answer based on what's in the record. I am in possession of some other information in the court's files as to the resume of the first trial and the witnesses that were called, and that sort of thing, that also casts doubt on -- on the government's assertion of the issue that I --

QUESTION: But there's not enough in the record is there? If we disagreed with you on burden of proof and thought you had the burden of proving that the earlier judgement did actually decide the specific matter that the government seeks to use this evidence for, would you not agree

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that the -- the record does not -- isn't sufficient to say you carry your burden on that?

Do I make myself clear?

MR. TUCKER: Yes.

QUESTION: Yeah. Maybe there's a lot of stuff out there that if you had a retrial you could do that, but I don't think in the present state of the record we can really tell whether -- whether the jury verdict in that case determined that your client was not the person who went to that woman's house.

MR. TUCKER: I think -- I think a fair answer to that question is, indeed, the record is not clear either way.

QUESTION: Yeah.

MR. TUCKER: That's why we would like you to put that burden on the government.

QUESTION: So, the issue really is who -- if -- if -- if -- if you don't lose on the difference in the burden of proof, the issue on collateral estoppel would be who had -- who had the burden?

MR. TUCKER: The issue on collateral estoppel would be who had the burden.

QUESTION: The government says you should because you're relying on it, and you say they should because it's unfair to do it otherwise.

MR. TUCKER: Your Honor, I -- I would, in further

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response to your question, I agree -- I think I agree basically that since there's no transcript and it's not clear enough either way, I would suggest that if -- if the court extends and -- and agrees with us that the principles of Ashe v. Swenson apply, and collateral estoppel applies, that perhaps a remand would be appropriate for that determination.

But there are some other indications that identity was the issue. For instance, the defendant testified in this trial, Mr. Dowling testified, and he testified he did not rob Vena Henry.

Now, had he made any sort of admission of the fact that he had been in Vena Henry's house in the first trial, I suggest that the government would have impeached him with that. And, indeed, had his counsel made any sort of admission to that effect, he could have been impeached by that also. And we see nothing -- that he was not challenged on that basis.

QUESTION: Well, I'm not sure you would have impeached him on that. If he just testified he didn't rob her, that wouldn't necessarily be inconsistent with the fact that he was there wearing a mask and carrying a gun.

MR. TUCKER: I think I said that wrong. He said he was not in Vena --

QUESTION: Oh, I'm sorry. Okay.

MR. TUCKER: -- his testimony was that he was not in Vena Henry's house.

Also I would suggest that the government -- the theory that the government is putting forth and put forth at the trial here when this issue arose, that -- in fact, the defense was that perhaps they had just come to the house seeking to get some money that was owed them, is not -- would not -- that theory violates Ashe's language that this court should look at -- in attempting to -- or to -- or any court, in attempting to reconstruct the basis of an acquittal, should in fact not apply a hypertechnical rule and look -- and look at it with reason and rationality.

The assistant United States attorney, when addressing the issue, told the court the two of them merely came to retrieve, from an individual in the house, money. I suggest --

QUESTION: Well, it would be kind of odd to come in a mask and a gun, wouldn't it?

MR. TUCKER: I suggest that -- that the government's theory that the jury acquitted on the basis that two individuals came with a mask and a gun and a shot was fired in the ceiling, and that was proffered and -- by the government lawyer and argued in the admissability of the evidence, clearly defies ration and reason.

And I would also point out to the court that the --

the defendant was not only acquitted of robbery, he was acquitted in the Vena Henry case of burglary; he was acquitted of assault; and perhaps most importantly of all, he was acquitted of weapons violations, where he was charged with possession of a weapon during a commission of a felony, and he was acquitted of the lesser-included offense of possession of a firearm.

Now, had the jury even decided on this basis that the government conjures up for us, they still would have had to have found he possessed the -- the firearm. And they acquitted him on that basis, too.

So I suggest -- and also in the record there is -- in the volume of September 23rd and September 24th, at page 60 and 61, there is evidence to the effect, when the United States -- the assistant U.S. attorney was arguing concerning the admissability of the piece of evidence, that the defendant had denied his involvement in the Vena Henry case when he had first been arrested in connection with that, and that denial had been introduced in the first trial.

So, when you couple that with his denial in this trial, the lack of impeachment, and when you factor in the Ashe's injunction that a reviewing court, in attempting to reconstruct the basis of the verdict, should not leave its common sense at home, that I suggest to you that perhaps maybe we even have carried the burden.

And if we haven't, if the court puts that burden on us, then we would suggest a remand.

If I could just address one other matter in regard to the burden. The lower court -- Ashe doesn't really tell us who -- who bears the burden, but the lower courts, as the government cites in their brief, pretty much assume that burden should be on the party opposing the admissability of the evidence.

I suggest that that doctrine perhaps conflicts with prior decisions of this court, too, especially the line of cases, and I believe it begins with the Fung Foo case, that basically say, if a jury finds an acquittal, even if it's on a total -- or I think Fung Foo involved a judge entering a judgement of acquittal -- on a totally erroneous basis, and the reviewing court can see that the judge should not have entered a judgement of acquittal, nonetheless, that's the end of the matter.

Now, what that says is that the risk of -- of an acquittal on a improper basis, the Constitution puts that risk on the government. And I suggest that a continuation of that principle would have put the burden the government here, because the risk of a reviewing court wrongfully deciding what the basis of that acquittal was, should rest on the government.

The -- the problems that we -- that we have to

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address here is that part -- the protections that double jeopardy is designed for, and even due process, and that this court has always showed great solicitude for, is protecting the rights of innocent people. And --

QUESTION: We've upheld the position of the government about the last dozen double jeopardy cases we've written. So I don't think you can say our double jeopardy decisions show great solicitude for the criminal defendant.

MR. TUCKER: No, I mean for the -- for the rights of innocent defendants.

[Laughter.]

MR. TUCKER: The problem that I -- that I'm trying to -- trying to -- perhaps the odds are on our side on this one.

[Laughter.]

MR. TUCKER: But the --

QUESTION: -- could say about a roulette wheel; it has no memory and no conscience.

[Laughter.]

MR. TUCKER: The people --

QUESTION: This court has a memory.

[Laughter.]

MR. TUCKER: The problem that we get into here is that, indeed, a not guilty verdict on this technical burden of proof argument, you know, the government can say that all that

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means is a reasonable doubt, but somewhere out there, you know, we suggest that there is a lot of people out there, who when the jury finds not guilty, they mean innocent. They might not say that, but because the law -- that's not the way they're instructed.

And those defendants who are -- who, indeed, were innocent, and -- and this court has always, I suggest -- suggest, basically, whether it's technically correct or not, has treated -- not -- I shouldn't say always -- that may not be correct, but certainly the court has, at times, indicated that a not guilty verdict, at least functionally, the system really requires that that be treated as innocence.

QUESTION: That -- that -- that's just inconsistent with our cases that say that it's not -- you know, you're not precluded from bringing a civil penalty action on the basis of a -- of a -- of a criminal acquittal. We are just not willing to assume that an acquittal means you didn't do it.

MR. TUCKER: In the civil -- I clearly have to draw the line because of civil versus criminal. I think there's certainly a distinction. But the language that I'm recalling to mind is the Civil War case of Ex parte Garland, which was cited, I think, last term by this court in the Arkansas case of Lockhart v. Nielson.

And the issue there was what the effect of a pardon was where the attorney had -- I think there had been a oath of

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allegiance to the Union, and he was from Arkansas, and when Arkansas seceded, he had gone with Arkansas, and then he wanted to come back before this court and practice, and Congress had passed an act saying he couldn't practice, I believe, unless you took this oath that you had never, essentially, been against the Union.

And he argued that he had indeed, as I think President Lincoln had given him a pardon. And that issue came before the court, and the court said a pardon reaches the punishment prescribed for the offense and the guilt of the offender, and when the pardon is full, it releases the punishment and blocks out the existence of guilt, so that in the eye of the law, the offender is as innocent as if he had never committed the offense.

Now I would suggest that if a pardon is treated in that manner, where a jury or -- and that wasn't the factual situation there, but if a -- if a pardon is treated as innocence, where a jury has returned a guilty verdict, clearly, functionally speaking, where a jury has come back and said not guilty, that we're not asking the court to go too far, at least functionally, to treat that as innocent, at least in the context of not having to be retried again in a subsequent criminal case, where the jury asks -- is asked to draw an inference of guilt based on that conduct of which you were acquitted, and ask, based on that inference of guilt, to

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infer that you are guilty of the instant offense.

If I could, Mr. Chief Justice, if I could reserve my remaining time for rebuttal.

CHIEF JUSTICE REHNQUIST: Surely, Mr. Tucker.

ORAL ARGUMENT OF STEPHEN L. NIGHTINGALE

ON BEHALF OF THE RESPONDENT

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

Our essential position is that the reasoning of two of this court's decisions require the conclusion that Mrs. Henry's testimony was admissible, notwithstanding the prior acquittal.

First, in Huddleston v. United States, the court confirmed what the rules provide. The admissability of evidence in federal cases is governed by a standard of proof that is effectively the same one that a trial judge employs when it determines whether to send a case to a jury in a civil case.

Evidence is admissable if the facts on which its relevance depends are supported by proof sufficient to support their being found by a preponderance of the evidence.

And that is the standard that applied to the admissability of Mrs. Henry's testimony in this case.

Second, in United States v. Eighty-Nine Firearms, the court held that for purposes of collateral estoppel, a

judgement of acquittal in a criminal case establishes only the existence of reasonable doubt on whatever issues are decisive.

Such a judgement does not, therefore, foreclose relitigation of those issues in a proceeding in which they are subject to a lower standard of proof. It follows, we believe, that Mr. Dowling's acquittal did not foreclose the trial judge in this case from making the finding necessary to admit her testimony.

In view of the questions that came up about the applicability of the rules of evidence to this situation, it may be helpful to review that aspect of the case briefly. First, there is a general rule, perhaps the most important of the federal rules of evidence, which is that all relevant evidence is presumptively admissable.

That rule appears to reflect the assumption, which experience suggests is well-founded, that the best guarantee of reliable outcomes in any trial is to permit both parties to marshal whatever evidence they can that tends to make the facts in issue more or less likely, and to offer that evidence to the jury.

Second, under the rules, judgements are, with a very few specified exceptions, hearsay, completely inadmissible in evidence. Those exceptions are -- are inapplicable here. Again, the assumption appears to be that when a matter that has been the subject of a prior judgement is an issue in a

second trial, those exceptions are inapplicable. The issue is to be resolved by allowing the trier in the second case the same opportunity to see all of the evidence that's available, as was available to the trier in the first case.

Each jury is then free to draw its own conclusions about the weight and probative value of that evidence, depending on the issues in dispute and the other evidence that is available.

QUESTION: Well, Mr. Nightingale, the Third Circuit thought the evidence was not admissable under the rule.

MR. NIGHTINGALE: Yes, Your Honor. And our position is that when one reviews their rationale, it appears that they accorded the judgement the same effect, in terms of the rules of evidence that they had concluded, with respect to collateral estoppel.

I forget their precise language, but, in effect, it was, that if a jury has determined a fact in a prior proceeding, a second jury should not be allowed to find that fact in a second proceeding. And that, in effect, is collateral estoppel reframed, in terms of the rules of evidence.

We believe that there was a mistake made in all of the court of appeals holdings, which was to assign too much effect to the judgement.

QUESTION: Well -- well, in your view, is this just

the misapplication of the rule of Ashe v. Swenson, or is there some new proposition presented here?

MR. NIGHTINGALE: The Third Circuit has not relied on Ashe v. Swenson. The Third Circuit has limited Ashe v. Swenson to the situation in which the fact is essential to both prosecutions. It has concluded that, as a matter of federal common law, I suppose, the collateral estoppel extends in addition to this case.

So that we believe that the Third Circuit misapplied the doctrine of collateral estoppel, and that it would be unwarranted a fortiori to extend to Ashe v. Swenson to this situation.

If the doctrine of collateral estoppel does not reach it as a matter of common law, Ashe v. Swenson, which held that collateral estoppel was embodied in the double jeopardy clause on those facts, cannot possibly be extended to this case.

QUESTION: Mr. Nightingale, you said that the Third Circuit gave too much effect to the judgement in the prior case.

MR. NIGHTINGALE: Yes.

QUESTION: Well, your view, I think, is that there should be no effect given to it; it's not a matter of some effect?

MR. NIGHTINGALE: The way collateral estoppel and

the rules of evidence work is an all-or-nothing proposition. If the conditions for an estoppel are present, it's conclusive. The government is estopped from trying to introduce --

QUESTION: Right.

MR. NIGHTINGALE: -- any evidence inconsistent with a prior judgement.

QUESTION: So their -- their error was not it gave you too much effect, it wasn't giving any effect?

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

QUESTION: You would agree, I take it, that they couldn't retry the defendant for the Vena -- Vena whatever it was case again?

MR. NIGHTINGALE: Yes, Your Honor.

QUESTION: Since that would be the same burden of proof?

MR. NIGHTINGALE: Assuming the matter of what was resolved by the prior verdict were -- were -- would foreclose a -- a prior prosecution, that's correct. We do differ with the petitioner in this case as to what it was that was shown in the trial court to be resolved by the prior verdict of acquittal.

It's our view that the only evidence of record is the trial court's recollection of the prior proceeding and his recollection was that the issue of Mr. Dowling's presence in

the house was not seriously contested.

QUESTION: You didn't -- you won the case below it, so I guess you -- I suppose you could have filed a cross petition or something?

MR. NIGHTINGALE: Your Honor, we felt that was unnecessary when the case -- we believe that we're entitled to defend the judgement of the court below on any ground that we've preserved to this point. So it was our judgement that a cross petition was not necessary to bring before the court the question whether the evidence was properly admitted --

QUESTION: But you want us to disagree with the court of appeals on its constitutional ruling?

MR. NIGHTINGALE: We believe that the --

QUESTION: Don't you? I mean --

MR. NIGHTINGALE: Yes.

QUESTION: -- as I read your brief, you do?

MR. NIGHTINGALE: Yes, we disagree with the Third Circuit's disposition of the evidentiary question, both as a matter of collateral estoppel and under the rules of evidence.

QUESTION: Let me ask you a question, Mr. -- Mr. Nightingale, a kind of a hypothetical. Supposing that there's an indictment that charges on or about January 1st, 1985, at 8:00 a.m., at 1600 Pennsylvania Avenue, John Doe committed burglary. And he is tried on that and acquitted. Now, he could not again be tried on that indictment, could he, no

matter what identity evidence came up at the trial?

MR. NIGHTINGALE: That's correct. That is the effect of an acquittal in a criminal case; one cannot be retried for the same offense in double jeopardy terms. And Ashe v. Swenson, which is, in effect, a subspecies of double jeopardy claims, provides that it is deemed the same offense when the same fact is essential to the -- to convictions and subsequent prosecutions.

It's that reason that we -- it's that understanding of Ashe that leads us to the conclusion that the case cannot fairly be extended to this situation. Ashe v. Swenson, after all, is a decision that applies the double jeopardy clause. That constitutional provision prohibits putting a defendant twice in jeopardy for the same offense.

In Ashe, because the same fact was essential to both convictions, to the -- to both offenses -- the court found that there was, in effect, the same effect -- the same offense involved in both cases. And that's the way the case is explained by Justice Powell in his footnote 6 in Brown v. Ohio.

He explains Ashe v. Swenson as a situation in which there is a particular test applicable to determine whether two offenses are the same for purposes of double jeopardy.

Now that's a characterization that can't possibly apply to this case.

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QUESTION: Suppose in Ashe, the first prosecution is for robbery in the house. And it's very clear that the only defense is identity and the defendant prevails.

MR. NIGHTINGALE: Yes.

QUESTION: Identity testimony establishes that it was a -- that it was -- the government did not bear the burden of proof that this person was in the house. They then charge him with murder. Does Ashe v. Swenson bar the -- that indictment and that subsequent prosecution?

MR. NIGHTINGALE: The theory of the prosecution is that the murder --

QUESTION: That he was in the house and committed a murder.

MR. NIGHTINGALE: In the course of the robbery?

QUESTION: Yes.

MR. NIGHTINGALE: At the same time? Yes, then Ashe v. Swenson would foreclose the murder trial.

QUESTION: So then it isn't just related to whether or not the same offense is being the subject of a subsequent prosecution.

MR. NIGHTINGALE: Your Honor, to reconcile --

QUESTION: Which was what your formulation was.

MR. NIGHTINGALE: To reconcile Ashe v. Swenson with the language of the double jeopardy clause, one has to conclude that collateral estoppel establishes a subspecies of

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situations in which, because the same fact is essential to convictions, it can't be relitigated.

Ashe v. Swenson can't be reconciled with the language of the double jeopardy clause in one -- unless one believes that in some sense the same offense is involved.

QUESTION: Well, I'm just asking, is it your position that the subsequent prosecution in the case that I put would be barred by Ashe v. Swenson?

MR. NIGHTINGALE: Yes.

Now, perhaps it would be helpful to walk through briefly the way this issue -- the evidence was presented in the district court, because I believe it illustrates the very close parallel between the situation that faced the trial court in this case, and the situation that faced the court in the second proceeding in Eighty-Nine Firearms.

The theory on which this evidence was offered in this case was that it tended to tie together a line of circumstantial proof. The inference that the prosecutor asked the jury to accept was that Mr. Dowling had borrowed a white Volkswagen the day before the robbery and had planned to make his escape in the same Volkswagen after robbing the bank.

There was evidence that the -- there was a white Volkswagen in the vicinity of the bank at near the time of the bank robbery. And one of the individuals in the car was identified. He was Mr. Christian.

Now, plainly, if the prosecution could tie Mr. Christian and Mr. Dowling together, it would tend to tie together that line of circumstantial proof. And that was the purpose of offering Mrs. Henry's testimony to show that some two weeks after the bank robbery, Mr. Christian and Mr. Dowling were together, under circumstances that would make it more likely that, in fact, Mr. Christian was waiting for Mr. Dowling and was to assist him in making his getaway.

QUESTION: Well, it's more than just Christian and Dowling and the white vehicle. It's also the gun and the mask.

MR. NIGHTINGALE: That's true.

QUESTION: And all of those facts, if it was the same person, it's -- it's quite probative of the fact that the -- it was the same person in both situations. And if you had a previous trial that said those facts existed, but was a different person, don't you think there's a little -- something a little unfair about this man having gone to trial on that issue and having won in that case, and saying, well, we're going to use that same evidence all over again to try and prove precisely what we failed to prove before?

And I understand your burden of proof argument. But isn't there some element of unfairness in that?

MR. NIGHTINGALE: Your Honor, I don't believe so, because the -- the notion of fairness that you've raised

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relates to what it is that a judgement of acquittal establishes. There's a circularity here, in other words.

QUESTION: I understand.

MR. NIGHTINGALE: It's unfair only if one assumes that a judgement of acquittal represents a finding that someone else did it. And it's our position that that's not what a judgement of acquittal establishes. It establishes for purposes of collateral estoppel that the jury was unable to find proof beyond a reasonable doubt of the crime.

The defendant gets some very significant benefits; he can't be tried again for the same offense, but it's not as though the history of the events was wiped away, that the -- there is not a seal placed on the evidence that's effective in all future cases in which the evidence is equally --

QUESTION: But Ashe -- Ashe suggests that maybe the acquittal establishes something else -- it can establish something else.

MR. NIGHTINGALE: I believe that what Ashe establishes is that when a jury -- when a jury acquits on the basis of an issue, the absence of proof beyond a reasonable doubt on an issue, the government cannot seek to establish the same issue beyond a reasonable doubt.

QUESTION: So the acquittal does do more than -- than just say the jury failed to find guilt by -- beyond a reasonable doubt; it also may, in certain circumstances, show

why the jury decided that way? It shows that the --

MR. NIGHTINGALE: Under Ashe v. Swenson --

QUESTION: -- that -- that the jury resolved a certain fact.

MR. NIGHTINGALE: Under Ashe v. Swenson, the court is required to put itself in the shoes of a rational jury --

QUESTION: Yes.

MR. NIGHTINGALE: -- to study the record, the instructions, and attempt to discover what a rational jury must have determined.

But in Eighty-Nine Firearms, the court made clear that when one goes through that exercise and concludes, for instance, that the defendant in that case must have been found either not to have been engaged in a firearms business or to have been entrapped --

QUESTION: Did the government go through this record and show that -- that what you wanted to offer this evidence for hadn't been determined in the prior trial?

MR. NIGHTINGALE: Your Honor, the government rested on the explanation of the assistant, who was a second-hand hearsay explanation of what he understood had been the case in the prior trial, but there's no --

QUESTION: But I take it your position is he didn't need to explain at all; that the other side had the burden?

MR. NIGHTINGALE: That's correct. And it would be

our position that even if, in the prior proceeding, it could be shown that the jury had entertained a reasonable doubt as to Mr. Dowling's presence in Mrs. Henry's house, that that wouldn't foreclose the evidence in this case.

QUESTION: I see. Because of the difference in the burden?

MR. NIGHTINGALE: The difference in the burdens of proof and the fact that under the rules of evidence, a judgement is an all-or-nothing proposition; it either forecloses the evidence when the conditions for collateral estoppel are present, or it has no place at all in the trial if it doesn't reach that level.

Your Honor, if the court -- please -- we are also -- in terms of whether it makes any sense to extend Ashe, I -- we believe that the reasoning of Ashe itself limits the reach of the case. Justice Stewart indicated that he saw no distinction for constitutional terms between the case in Ashe v. Swenson in a case in which Mr. Ashe had been tried a second time for robbing the same person. And therefore, we believe that under the -- that the case establishes its own reach.

But if it were an open question whether to extend Ashe, there also have been some developments in this court's cases, which we believe would -- would urge heavily against that extension.

In Standefer v. United States, the court addressed

those considerations that make it particularly -- that call for particular caution in extending collateral estoppel, the effect of a judgement in the criminal context. Those grounds include the fact that in a criminal case, the government does not have access to many of the means that other litigants have to protect themselves against irrational verdicts or verdicts involving lenity.

The record in this case suggests that this might be that kind of case, a situation in which a man carrying a gun and -- and wearing a mask was acquitted, and the trial judge thought that his presence in the house had not been seriously contested. But the government had no opportunity in that earlier trial to make a motion for a directed verdict, to file a post-trial motion for a new trial or a judgement notwithstanding the verdict, to take an appeal.

And under the black letter laws of -- black letter rules of collateral estoppel that apply in the civil context, the absence of those procedures would be a sufficient reason for denying collateral estoppel.

In Standefer, the court relied on those concerns in refusing to extend the doctrine to permit offensive collateral estoppel against the government. And we think those concerns are just as forceful a reason not to extend Ashe v. Swenson.

In addition, it should be noted that in the civil context, at least, collateral estoppel serves primarily the

function of judicial economy. The notion is that one full and fair opportunity at an issue is enough. The courts have enough to do without rehearing the same issue over and over again.

In the criminal contest -- context, we submit -- and this is what the court found in Standefer, the interests are a little bit different. The primary interest is in seeing that each charge is litigated fully and fairly, and particularly in view of the absence of remedies to protect the government against irrational verdicts; verdicts based on lenity.

We think that the court should be quite cautious in extending the doctrine. Ashe doesn't require it. We believe it has its own limits. But even if it were an open question it would not be a good idea, given the Standefer decision and the considerations that have been addressed there.

I'd like to address briefly the due process argument, which is -- seems a bit of a variation on the collateral estoppel theme. I got briefly into it in addressing Justice Stevens' question. The basic question there is what is fair.

And the -- and the notion of fairness is circular. It is unfair to rely on a judgement of acquittal only if one believes that a judgement of acquittal is a -- a judgement that has more effect than any other judgement in any other type of case.

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A judgement of acquittal finally resolves the charges on -- on which the defendant has been tried. It precludes a second trial on any offenses that are considered the same under the court's double jeopardy precedence. But it is not -- emphatically not -- an order expunging evidence, declaring that what witnesses saw did not occur.

QUESTION: No, but Mr. Nightingale, isn't it a little more significant than -- with the double jeopardy clause and all the rest -- than a normal collateral estoppel situation, because the defendant does have certain benefits out of an acquittal. He can get an immediate appeal if he later claims to be put in jeopardy.

Because there is an interest in protecting the defendant from having to go through all of the difficulty of defending himself again against the same charge. And that is somewhat implicated here if you assume that the other evidence really opened up a whole new --new inquiry; did he really go into this lady's house or not? And, yes -- he might have to put on all the same defendants he did at the prior trial, and all the rest of it.

So isn't there -- isn't there an additional burden in the criminal context that you don't always find in the normal civil collateral estoppel situation?

MR. NIGHTINGALE: The -- the burden of relitigating, I submit, if collateral estoppel permits relitigation in a

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civil or criminal proceeding, the burden is essentially the same, in terms of trial time and so forth. The fact that the defendant is at risk of conviction for a different offense means that he may have a greater interest in it.

But in Eighty-Nine Firearms, for example, the defendant in that case was effectively required to relitigate the entire state of affairs that led to his acquittal, and then the forfeiture of the firearms.

The fact that the -- and in terms of assessing the importance of the fact that the defendant is -- is subject to possible conviction, it's important to remember that he is subject to possible conviction for a different offense than that for which he was first tried.

What is -- he is exposed to, with respect to the first offense, is nothing that -- that resembles jeopardy in the classic sense. The defendant is not subject to being convicted. Mr. Dowling was in no way subject to being convicted of having allegedly robbed Mrs. Henry. The jury was not asked to make that finding. He could not be punished for that offense.

QUESTION: Well, implicitly they were asked to make that finding, because they were asked to determine that the same person did both -- both robberies or both crimes, and that this is the guy. They really were being asked to say this is the man who robbed Mrs. Henry.

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MR. NIGHTINGALE: Well, they were being asked to determine how credible Mrs. Henry's testimony and what probative value it had with respect to the identity of the bank robber.

QUESTION: Right.

MR. NIGHTINGALE: But, as Justice Kennedy pointed out, there wasn't even proof of a crime as such. The trial court took care to limit this testimony. He cautioned the prosecutor not to ask open-ended questions, and the testimony came in in a very condensed form, limited to those features of the event --

QUESTION: Limited to the fact that he was in her house with a mask and carrying a gun and wanted to get some money that he thought he was entitled to. It's fairly limited.

MR. NIGHTINGALE: Your Honor, compared to the proffer --

QUESTION: Yeah.

MR. NIGHTINGALE: -- compared to the proffer that the government made in arguing the admissability of the evidence, which involved proof that there was a shot expended, I believe that there was a conscientious effort made here to limit the testimony. And what was put in was not evidence of a crime, as such --

QUESTION: I understand.

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MR. NIGHTINGALE: -- it was evidence which bore on the identity of the bank robber.

QUESTION: It bore on the identity of the bank robber, if this is the fellow that was in her home at that time.

MR. NIGHTINGALE: That's true. And -- and that is exactly the judgement that the district court was asked to -- to make. The evidence was admissable if that judge could find that the jury would be reasonable in concluding by a preponderance of the evidence that that was -- that Mr. Dowling was the one who was there.

And in that context, Mrs. Henry's testimony was its own foundation. If believed, it established, by a preponderance, what was necessary.

I would add briefly that there is -- there are means available to protect defendants against overzealous use of prior offenses. They are the same ones this court referred to in the Huddleston case. As the trial court did in this case, the jury can be instructed that the evidence is to be considered only for a limited purpose.

In this case the judge, during his final instructions, instructed the jury to the effect that you may consider this for the purpose of -- if it assists you in determining who the bank robber was. And if it does not assist you, you can disregard it.

The judge can limit the testimony to that element of the testimony that's relevant to the offense for which the defendant is then being charged. Again, that is something the trial judge did in this case. He admonished the prosecutor to avoid open-ended questions and limited the testimony quite carefully.

The judge can exclude the evidence altogether if under rule 403 the balance of prejudice and probative value is against its admission.

Under all of these circumstances, we believe that there are ample means available of protecting defendants against unfair prejudice. And that the -- the principal rule of criminal trials should be the one that governs the case, which is that all relevant evidence is presumptively admissable.

The admission of the evidence in this case did not constitute a second round of jeopardy for a single offense; it did not violate traditional principles of collateral estoppel; it's entirely consistent, we believe, with the court's decisions in Huddleston and Eighty-Nine Firearms.

Accordingly, we ask the court to affirm the judgement of the court of appeals.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nightingale.

Mr. Tucker, you have four minutes remaining.

REBUTTAL ARGUMENT OF ROBERT L. TUCKER

ON BEHALF OF THE PETITIONER

MR. TUCKER: Thank you, Your Honor.

We would suggest to the court that the approach advocated by the government here in its argument, and indeed in its brief, really trivializes the double jeopardy clause. What the government is saying to the court is, treat the acquittal as meaningless; just treat this as whether or not it's relevant evidence.

And, in fact, the government even tells us, don't worry about the defendant because he'll have an opportunity to defend again.

Well, that's of little concern to a criminal defendant. If that rationale is adopted, then why can't a person who has been acquitted be retried for that offense again? He'll have an opportunity to defend again.

The -- and the relevant --

QUESTION: Because the answer to that is the double jeopardy clause prohibit it's -- prohibits it.

MR. TUCKER: And we suggest the same thing applies here. The same --

QUESTION: Yeah, but the language isn't quite the same.

MR. TUCKER: We would -- the courts that have

applied Ashe v. Swenson to this situation have basically said that there's really no principle of distinction between Ashe v. Swenson and the situation presented by the admissability of acquitted conduct evidence in a subsequent trial.

And if the court -- we'd ask the court to look at the purposes that this court has said are the values that are protected by double jeopardy protection, and those same concerns are very much present here.

The defendant here is still subject to the same strain he would be of a retrial, the expense, the ordeal of a retrial; in fact, his situation is even worse. He has been acquitted of crime A; he's now being tried of crime B; the government's machinery is lined up against him to convict him of crime B, and in the middle of crime B, he has to defend against crime A, when in fact he's already done that.

Clearly, those are the type of values that double jeopardy protects.

Last term the court, in rejecting the Missouri defendant's claim in, I think, Jones v. Thomas, about he should be -- be entitled merely to have his 15-year sentence because the two consecutive sentences of 15 and life weren't valid, rejected that claim and pointed out that one of the reasons we reject that is that the defendant there had really -- he didn't really have any legitimate expectation of finality that he would be entitled to that 15-year sentence if

the two consecutive sentences were thrown out.

Here, we suggest that, indeed, a defendant who has been tried and acquitted and the government has had their opportunity to present their case, and he has successfully defended against that, does indeed have a legitimate expectation of finality.

Now, also the concerns that the court -- that double jeopardy protects against repetitive and harassing lawsuits are indeed applicable here. For instance, suppose a defendant who has been acquitted and he -- and he is suspected -- or the government is thinking about charging him in what otherwise would be a very marginal second prosecution, as indeed was the case here, this was -- this evidence was first introduced in the third trial, and the prosecutor even proffered to the court, we need this evidence -- now, what this means is that a defendant is subject to repetitive lawsuits based on the fact that he had been acquitted because of -- is that acquitted conduct evidence that may indeed be the piece of evidence that not only convicts him in the new trial, but, in fact, motivates the government to press forward with the new trial.

Also, we have the concerns that are equally present here of double jeopardy prevents the government from utilizing the first trial as a dry run. Well, we have those same sorts of concerns here. The government probably learned something from its acquittal in the Vena Henry case. They pare --

obviously pared down their evidence.

All of these concerns are equally present.

Now, the government cites the Standefer case and the language in Standefer which the court says, well, perhaps we should take a cautious approach to extending collateral estoppel to criminal cases.

However, Standefer is entirely distinguishable based on these very same concerns. Because in Standefer, the defendant was claiming, don't prosecute me based on collateral estoppel on an aiding and abetting theory because defendant number two has been tried as the principal and acquitted.

Well, it follows that double jeopardy concerns are not quite as strong there because that defendant had indeed not suffered the expense, the ordeal of the first trial himself. He had nothing to do with that trial. His arguments were not near as strong.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Tucker.

The case is submitted.

(Whereupon, at 1:56 p.m., the case in the above-entitled matter was submitted.)

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BY Judy Freilicher

(REPORTER)