ORIGINAL

In the

# Supreme Court of the United States

THOMAS W. WHALEN,

PETITIONER

V.

UNITED STATES

No. 78-5471

Washington, D. C.
November 27, 1979
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Tuesday, November 27, 1979

The above-entitled matter came on for argument at 2:25 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

SILAS W. WASSERSTROM, ESQ., Public Defender Service for the District of Columbia, 451 Indiana Avenue, N.W. Washington, D.C. 20001; on behalf of the Petitioner.

ANDREW J. FREY, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Wasserstrom, you may proceed whenever you are ready.

ORAL ARGUMENT OF SILAS J. WASSERSTROM, ESQ.,

ON BEHALF OF THE PETITIONER

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

My name is Silas Wasserstrom and I represent the Petitioner Thomas Whalen.

Petitioner was tried in the District of Columbia Superior Court on a seven-count indictment charging rape, robbery, burglary and three counts of felony murder predicated on these felonies. He was also charged with one count of second degree murder, that is murder with malice.

All of these charges grew out of a single incident and involved one victim.

Two of these counts -- robbery and felony murder premised on it -- were dismissed by the trial court.

QUESTION: You put a great deal of emphasis on the fact that there is only one victim?

MR. WASSERSTROM: Well, I just want to make clear, Your Honor, that the issue here is one that involves consecutive sentences where where there is a single victim. Certainly if there had been more than one victim, our position would be very

I am not trying to argue the fact that it was one victim is dispositive. It is clear to the Court that it is a case involving a single victim.

Two more of these counts, those charging burglarly and felony murder burglary, were dismissed by the Court of Appeals for reasons not --

QUESTION: You say one victim, and therefore for only one crime.

MR. WASSERSTROM: That is not our position, Your Honor. Our position is that if the murder in this case is proven by the Government in a way that does not depend on proof of the underlying felony, then we would not claim that there was any double jeopardy violation in punishing consecutively for the felony and for the murder. And we said in our brief that we are not challenging on double jeopardy grounds consecutive sentences for rape and the second degree murder count here. Our position is not that simply because there is one victim there can only be one sentence. Our position turns on the fact that here to prove the felony murder the Government relied on the underlying felony.

QUESTION: Is that strange?

MR. WASSERSTROM: No, it is not strange at all.

QUESTION: It doesn't seem so to me.

MR. WASSERSTROM: No, it isn't strange at all. What would be strange, in our position, would be to punish the

person consecutively, however, for the felony murder as well as for the underlying felony.

QUESTION: What is strange about that?

MR. WASSERSTROM: Well, it is strange for a number of reasons.

First, the felony murder statute in the District of Columbia,and most felony murder statutes do, is to impose a rule of strict liability with respect to murder occurring in the course of a felony. The District of Columbia statute, for example, makes the penalty for such a murder -- first degree murder -- it makes the murder first degree murder and it makes the penalty for that murder 20 years to life, mandatory sentence 20 years to life. And that can be for killing which is otherwise blameless, the killing was just unforeseen, unforeseeable, unintended.

QUESTION: Because of the legislative judgment that -- necessary only if a felony were so dangerous to society, that if life is taken in the course of commission of a felony, you should be treated just as if you had the intent to murder.

MR. WASSERSTROM: Well, Congress might have wanted to do that, but it is obvious that Congress didn't want to do that here. That is a separate argument. This is an argument we made, that Congress didn't intend consecutive sentences in this case; and we made that argument based on the legislative history and the structure in felony murder

statutes.

The double jeopardy argument is a different one. It is that to prove felony murder, a murder which carries 20 years to life, whereas the underlying felony without a killing would carry no mandatory sentence and would be punishable by provision if the judge chose to impose it. Our argument of double jeopardy is that when a felony murder can only be proved by proof of the underlying offense, that is the felony, then the felony is a lesser included offense of the felony murder.

QUESTION: But that that just stands Blockburger on its head, doesn't it?

MR. WASSERSTROM: Well, that's --

QUESTION: Because Blockburger wasn't originally a constitutional test, it was a test for determining legislative intent.

MR. WASSERSTROM: Well, that is the Government's argument, Your Honor. But there is really no question but that this Court has since Blockburger adopted it as the constitutional test for --

QUESTION: In what case?

MR. WASSERSTROM: Well, Brown v. Ohio, for example, the Court said: "The established test for determining whether two offenses are sufficiently distinguishable to permit the

imposition of cumulative punishment was stated in Blockburger."

QUESTION: Well, that doesn't say anything about double jeopardy, does it, --

MR. WASSERSTROM: Well --

QUESTION: -- the quote you just made?

MR. WASSERSTROM: Well, what else would preclude it?

QUESTION: Brown v. Ohio was a double jeopardy case, was it not?

MR. WASSERSTROM: It was a double jeopardy case; yes.

QUESTION: But the quote you just made said nothing about double jeopardy.

MR. WASSERSTROM: Well, double jeopardy was the only constitutional provision that could conceivably forbid consecutive --

QUESTION: Further consecutive sentences.

MR. WASSERSTROM: Moreover, in Brown this Court was clear in stating that: "When the greater offense" -- when two offenses are related to a greater and lesser included offense they are "the same for purposes of double jeopardy." Here we submit the rape underlying the Petitioner's conviction for first degree felony murder is a lesser included offense of the murder for the simple and compelling reason that to prove its case of first degree felony murder, the Government necessarily had to prove the underlying rape. This being so,

Brown, Blockburger teach that the rape and the felony predicated on it are the same for double jeopardy purposes. And thus, the consecutive sentences imposed here were unconstitutional.

QUESTION: You say Brown, Blockburger. I take it what you mean is Brown, since Blockburger wasn't a constitutional case.

MR. WASSERSTROM: No, Block -- our position, Your Honor, is this: that Blockburger establishes a test.

QUESTION: For legislative intent.

MR. WASSERSTROM: Well, it establishes a test which was originally formulated as a test for determining legislative intent. It has since been adopted by this Court as the constitutional test for defining same offense.

QUESTION: In Brown. Although --

MR. WASSERSTROM: Brown has been treated -- it has been treated as a constitutional test in several other cases.

QUESTION: Yes, but Brown was a State case where presumably the State courts of Ohio were perfectly competent to determine what the intent of the Ohio legislature was.

MR. WASSERSTROM: Well, that is all the more reason it would seem then, the fact that this Court never struck down the decision of that court.

QUESTION: So it didn't turn on legislative intent.

MR. WASSERSTROM: Well, it turned on the fact that

the Ohio court interpreted its two statutes -- the two statutes it issued there -- joyriding and grand grand larceny as bearing a greater and lesser included offense relationship. That was determinative to this Court in Brown, the fact that -- one was a lesser included offense than the other, and this Court held that they were the same for purposes of double jeopardy.

QUESTION: Suppose a man and his wife were taking a walk, or a young man and his girl friend, and the attacker rapes the woman and then murders the man in the process of his trying to come to her defense and her aid. Double jeopardy?

MR. WASSERSTROM: If they had consecutive punishments for the -- if the Government can prove any kind of intent with respect to the murder and prove the murder based on that theory --

QUESTION: A felony murder and he committed a homicide in the course of carrying out a felony -- committing a felony.

MR. WASSERSTROM: Well, I would concede that that would be more difficult problem. There is I would concede a --

QUESTION: Well, why would you? I would think your --

MR. WASSERSTROM: Well --

QUESTION: -- position would be clear as a bell on that, that's double jeopardy.

MR. WASSERSTROM: Well, I think it would be double jeopardy --

QUESTION: Under what case would be?

MR. WASSERSTROM: It would be under the same principle, Your Honor, Brown v. Ohio and Blockburger as now incorporated as the constitutional test.

The murder in that hypothetical you postulate, apart from the felony --

QUESTION: Suppose he went on to murder the woman too, then, chose to eliminate the only surviving witness?

MR. WASSERSTROM: Well, I think that in most --

QUESTION: Is it still double jeopardy?

MR. WASSERSTROM: Well again Your Honor, in most situations, such as the case here, the murder can be proved on a theory other than that of felony murder.

QUESTION: I am just assuming --

MR. WASSERSTROM: And where it can be proven on that theory.

QUESTION: The hypothesis is that both are felony homicides and therefore under the statute, felony murders?

MR. WASSERSTROM: Well, certainly if he eliminated -- if he killed the woman to eliminate her as the only witness it would surely be a premediated murder and if the State were able to prove it as such and, if it did, then double jeopardy might not --

QUESTION: Yes, but you can't try him for double jeopardy -- you can't try him over in some other lawsuit -- the Chief Justice suggests -- what if it is tried as felony murder and the only proof it is of intent is another felony, is it the underlying felony.

MR. WASSERSTROM: If the Government proceeds on the felony murder statute as to each of the two?

QUESTION: Yes.

MR. WASSERSTROM: Then each felony murder would be punishable consecutively, but not consecutively to the underlying felony.

QUESTION: So your theory does say that even if there are two victims it would be double jeopardy?

MR. WASSERSTROM: It would be double jeopardy to punish consecutively for the rape and the felony murder, not to punish consecutively for two felony murders.

QUESTION: Then certainly that doctrine if it were followed by this Court would put a premium on eliminating the witness.

MR. WASSERSTROM: Well, in D.C. for example, Your Honor, if you eliminated two witnesses your penalty for two counts of felony murder would be 40 years to life, which means that you would be eligible for parole after 40 years. I don't think that, facing that kind of penalty, that is going to induce criminals to want to murder wantonly without thinking

about it.

QUESTION: And could I ask you, was the issue below that double jeopardy -- I have a difficult time finding any discussion of the double jeopardy provision in the opinion.

MR. WASSERSTROM: Well, the opinion ignored this Court's opinion.

QUESTION: So there is not a mention of double jeopardy in the opinion, is there?

MR. WASSERSTROM: Except to the extent that in the murder doctrine --

QUESTION: Well, I know, but that is a separate doctrine. That is a sort of semi-judicial legislative doctrine. But there is not a mention of it.

Did you present it?

MR. WASSERSTROM: Your Honor, I am not absolutely sure exactly what our brief said in the Court of Appeals below concerning --

QUESTION: Well, I will give you a clue. I am; and you did prasent it.

MR. WASSERSTROM: I know we presented it. The argument had not been decided.

QUESTION: Well, it wasn't even discussed.

MR. WASSERSTROM: No.

QUESTION: And --

MR. WASSERSTROM: Your Honor, I do know we

filed a supplemental memorandum after Brown and Harris were decided, bringing those cases to the Court of Appeal's attention. We also petitioned for rehearing en banc in this case, making the argument from those cases, the double jeopardy argument; and that petition was denied.

So it was presented to the Court of Appeals and in their opinion they simply ignored the double jeopardy problem.

QUESTION: Well, perhaps we should remand it for reconsideration, in the light of some cases that we don't see mentioned.

MR. WASSERSTROM: Well, that is not generally done when a court simply makes a mistake of law.

QUESTION: You say where the case has been called to their attention.

MR. WASSERSTROM: These cases Your Honor -- I don't know -- they were not called to their attention in the initial brief, because it hadn't been decided. They were called to their attention in the supplemental filing we made and we called it to their attention in a petition for a rehearing en banc. So the court was aware of them when it issued this decision.

It seems to us, Your Honors, that both the Court of Appeals and the Government speak of the felony murder rule as one which permits the jury to infer the requisite intent

of first degree murder from the commission of the underlying felony and in this respect they fail to understand the fundamental nature of that doctrine.

In the District of Columbia that felony murder statute does not merely create a permissive presumption that the accused harbored a particular mental state with respect to the killing. The jury is not instructed that it may infer that the defendant had the mental state required for first degree premeditated murder from the fact that the killing occurred in the course of a felony.

QUESTION: We are talking now about the intent of Congress in passing this Act?

MR. WASSERSTROM: No, I am just talking right now Your Honor about the way the felony murder statute in fact operates. The Government and the Court of Appeals both treat it as though it simply creates a presumption and that the jury then makes its own determination of whether there was in fact premeditation and deliberation.

QUESTION: So you are not quarreling with the Court of Appeals construction of the statute. You are saying the Court of Appeals mis-describes the way --

MR. WASSERSTROM: I think the Court of Appeals mis-described in the course of its opinion; yes.

QUESTION: Are you quarreling with --

MR. WASSERSTROM: And that misunderstanding may have

led the court to gloss over what would otherwise be, or should have been an apparent double jeopardy problem.

QUESTION: But you are not quarreling with the Court of Appeals construction of the statute.

MR. WASSERSTROM: Well, we are quarreling with their construction of the statute as intended to permit consecutive punishments here, or to authorize --

QUESTION: But since the Court Reorganization Act of 1970, the Court of Appeals for the District of Columbia is the last word as to what a statute such as this means, as if a State court says this is what it means.

MR. WASSERSTROM: Well, Your Honor, we would submit that although the District of Columbia may since Court Reorganization bear certain of the hallmarks of a State and State court decisions may not be reviewable in the way they were prior to Court Reorganization, where there is a constitutional guarantee at stake -- and we submit that even our legislative argument is grounded in the Constitution, the Government itself concedes that where multiple punishment is imposed and the legislature did not intend it be imposed there is a violation, a substantive violation of the accused's double jeopardy rights.

QUESTION: Do you suppose Congress had in mind the thought that it was bad enough to have the crime of rape occur but they didn't want to do anything to encourage homicide, the

killing of the victim, and that therefore two penalties were provided?

MR. WASSERSTROM: Well, Your Honor, there is a penalty for rape and there is a penalty for felony murder. It is our position that Congress did not in fact provide in any sense that these punishments be imposable consecutively. In fact our position is that the legislative history and the structure of these statutes indicates if anything that Congress did not intend to permit the courts to cumulate punishments for felony murder and the underlying felony.

I don't think there is any question that the felony murder statute, is one of the interests that is protected by that statute is the interest in saving human life. But it does so in a way and is structured in such a way, that it seems apparent another interest to be protected in that rule -- in that statute is the same interest that is protected by the underlying felony. Congress didn't after all make it first degree murder to kill under any circumstances in any way. It didn't impose a rule of strict liability for any killing, and impose a mandatory sentence of 20 years to life. It is only if the killing occurs in the course of the felony that such a penalty is authorized.

It is our position that that indicates very strongly that what Congress meant to do by the felony murder statute was to punish the person, hold him culpable both for

killing and for committing the underlying felony during which the killing occurred.

The Government to a great extent I think gets mileage out of the facts of this case. This case appears clearly to involve a rape and a murder -- or killing, rather, which was in fact done with a culpable mental state. And the jury so found, the jury found him guilty of second degree murder.

QUESTION: What would have been the penalty if there had been just a murder, just the homicide and nothing else?

MR. WASSERSTROM: Just the second degree? The penalty would be up to 15 years to life but, again, unlike first degree murder a judge can give any sentence he wants in the District of Columbia, including probation for second degree murder. That is the startling thing. Perhaps not just in the District of Columbia, although I think it may be more extreme here. And that is the startling thing about felony murder statutes. They make murder first degree murder. They make a killing, rather, first degree murder. In the District of Columbia at least, that killing carries a mandatory penalty of 20 years to life. No matter what the judge wants to do the defendant convicted of first degree murder is going to spend 20 years of his life in jail. Any other form of homicide, second degree, manslaughter, the judge can give a sentence of probation. That is true also with respect to any of the underlying felonies can be

the predicate for felony murder.

It seems also that the structure of the statute reveals that Congress intended to punish in part for the felony, because the statute imposes a rule of strict liability where the killing occurs in the course of six enumerated serious felonies and requires that for it to be first degree murder, a felony, as any other felony the murder has to be purposeful. This in our view also indicates that Congress when it enacted the penalty provisions -- when it enacted the felony murder statute and structured it the way it did -- clearly intended that the punishment for the felony murder would incorporate the notion of liability for the underlying felony as well. This is why in our position if a court punishes a defendant consecutively for a felony murder and for the felony on which it is premised, in a very real and palpable sense it is imposing double punishment for that felony.

QUESTION: Well, do you think that argument withstands analysis in the case of intentional rape that results in death where there is carnal violation of the woman plus the death? Aren't there two separate interests there?

MR. WASSERSTROM: Well, I think there are two separate interests but -- my position is that the interest protected by the felony murder statute is an interest in human life plus an interest protected by whatever the underlying felony charge is.

QUESTION: Well, say in the --

MR. WASSERSTROM: When you punish, you are protecting both those interests. When you punish for rape, you are punishing twice for the rape.

QUESTION: I simply don't follow you. Perhaps I am wrong and you are right on the analytical aspect of the thing but it seems to me that -- you know, you can conceive of a system of justice which regarded penetration of a woman in a rape case as being a more serious offense than the taking of life.

MR. WASSERSTROM: Well, this Court did hold however that, for example, the death penalty would be inappropriate for rape.

QUESTION: Right. But I am saying in an analytical sense you can have your scale of values however the legislature chooses to draw that.

MR. WASSERSTROM: Well, Your Honor, for example it certainly does -- it does punish rape more severely than it does manslaughter.

QUESTION: Yes.

But again, I think the Court should be on mind that the felony murder statute doesn't work only where there is a rape. It works with any one of six enumerated felonies to impose a rule of absolutely strict liability. That is a person who burns down a house he believes to be vacant but

in the course of the fire a derlict who happens to be sleeping in it is killed, is punishable by a mandatory sentence of 20 years to life. Now, that sentence obviously has to be based not only on the fact that a killing occurred, because that killing was unforeseen and unintended, but on the fact that it was during the course of an arson.

QUESTION: Is the double jeopardy analysis that you think the Court has adopted based on the actual facts necessary for a conviction in each particular crime, or in the abstract on what facts might be used to convict for each particular crime?

MR. WASSERSTROM: Well, I don't think that is an easy question. I think the position -- what test this Court has adopted --

QUESTION: Well, I don't either.

MR. WASSERSTROM: Well, the position that I think the Court has adopted and the position which we take in our brief is that at the very least when the indictment itself reveals that one offense is a lesser included offense than the other, it will have to be proved in order to prove the other, then it should be treated as a lesser included offense, and the same offense, for purposes of the double jeopardy clause.

QUESTION: So --

MR. WASSERSTROM: That it seems to me --

QUESTION: Is that an answer to the question of whether if for double jeopardy purposes you analyze the facts of each particular case to decide whether there is double jeopardy and if one fact has to be proved twice or one offense contains a fact that the other does, it is double jeopardy? Or is it an abstract thing that you might have to in a hypothetical situation prove one fact twice?

MR. WASSERSTROM: Again, Your Honor, if you look at the indictment in this case, for example, you can see by looking at the indictment that to prove the felony murder the Government is going to have to prove the felony -- I mean the rape, to prove that rape was premised on a felony murder, they are going to have to prove the rape.

Now, again, in many cases a murder that is part in some sense of a felony or that occurs during a felony, it may very well be provable as a murder, as a homicide on some theory other than felony murder. And where the Government does that it is not relying on the felony --

QUESTION: But that isn't this case.

MR. WASSERSTROM: No, the defendant here was convicted of second degree murder.

QUESTION: So as far as first degree murder is concerned, this case involves felony murder and felony murder only. Am I right?

MR. WASSERSTROM: That is correct, Your Honor.

QUESTION: And if he were to get a new trial he could not be tried for anything higher than felony murder.

MR. WASSERSTROM: Well, he was never charged with premeditated murder. This is not the case where there is any kind of implied --

QUESTION: He was being charged in a second degree case.

MR. WASSERSTROM: But here he wasn't charged with first degree murder. He was only charged with second degree murder and he was convicted of second degree murder.

Of course we are not challenging the conviction. All we are asking for is remand for re-sentencing with respect to the rape and the felony murder premised on it.

He stands convicted right now of second degree murder, incidentally. That conviction was never set aside.

QUESTION: He was convicted of second degree murder.

MR. WASSERSTROM: He was and he stands convicted. The Court of Appeals made a point of not setting that -- I don't know if it made a point, but it didn't set aside that conviction. It vacated the sentence on that count. Our double jeopardy argument would not preclude a court on remand from sentencing consecutively for rape and for second degree murder. So the defendant still would be, in our view, subject to a penalty of up to 30 years to life. This would

be because the second degree murder was proved without reference to the underlying felony.

QUESTION: But he can't just re-sentence for a felony murder and --

MR. WASSERSTROM: And the underlying felony.

It is our position that --

QUESTION: Didn't this Court hold almost precisely that in Harris v. Oklahoma?

MR. WASSERSTROM: Well, it is argued that Harris is dispositive, Your Honor. The Government takes the view that Harris is different because that involves successive prosecutions as opposed to consecutive sentences imposed after a single trial.

QUESTION: And the Government's argument is that the test should be quite different.

MR. WASSERSTROM: The Government argues that the meaning of same effect for purposes of double jeopardy clause varies from context to context.

QUESTION: Right.

QUESTION: But it just says you can punish as many times you want to the same act, if you just have one trial.

MR. WASSERSTROM: That is the Government's view, yes.

QUESTION: Yes.

MR. WASSERSTROM: Well, that is another way I think

of saying the same offense means nothing, really, in the context of the single trial other than what the legislature wants it to me. But the legislature --

QUESTION: It has also been argued there is no violation of the Blockburger rule. We have got a lot of arguments but one of them is that there is no violation of Blockburger.

MR. WASSERSTROM: Well, the Government argues that there is no violation of Blockburger on the theory that here anyone of several felonies --

QUESTION: That is right.

MR. WASSERSTROM: -- could have been charged. And you can argue that position carries to its logical extreme -- or you can just -- well, carries to its extreme, entails completely absurd results, as I think we showed in our brief. I think that even offenses that have always been traditionally considered almost paradigmatic cases of a greater offense and a lesser included offense would in their view be different, not be the same for double jeopardy purposes.

Also, as we argue in our brief, it seems to me that the decisions of this Court, or a plurality opinion of this Court in Jeffers as well as the dissenting opinion in Jeffers, both indicate that in deciding whether two offenses -- whether one offense is a lesser included offense than the other, you look to the indictment. You don't just look to the

statute in the abstract and see what could have been charged. You at least look to the indictment -- if you don't look to what happens in trial, you at least look to the indictment. And if you look at the indictment here you know from looking at it that the felony murder did -- the felony murder premised on the rape was just that, premised on the rape.

QUESTION: Do you think Iannelli fits that analysis?

MR. WASSERSTROM: Well, I think that Jeffers and Iannelli read together certainly do. The way Jeffers talked about Iannelli and the way Jeffers emphasized -- I think it was Footnotes 15 and 16 of Iannelli -- I think the court was making just about this point.

I have very little time left. I would just say that I think our brief adequately covers our argument that even if the double jeopardy clause doesn't apply here to absolutely bar consecutive punishments, that is even if the Government's position is accepted, any kind of reasonable interpretation of the relevant statutes would have led the Court of Appeals to conclude that Congress did not here intend consecutive punishments. The legislative history of the penalty provisions to the felony murder statute which were enacted in 1962 show quite clearly that those members of Congress who addressed themselves to this question felt that for a fatal felony murder the defendant's effective sentence should not be greater than the sentence for pre-

meditated first degree murder, that is 20 years to life. In the Government's view, every time a felony murder is proved the defendant would be subject to a penalty considerably longer than that 20 years to life sentence which the congressmen thought was sufficient.

QUESTION: And you spell that out of the legislative history, do you, of the --

MR. WASSERSTROM: All the congressmen that spoke to the issue indicated that they thought 20 years in prison for the single felony murder was enough time to be eligible for parole. It doesn't mean that he is going to be paroled, but it means he would be eligible after 20 years.

It is also, we argue, implicit in the structure of the statute. But more importantly, it is our argument that if double jeopardy doesn't operate to bar absolutely punishment for two offenses that are the same, under Blockburger, at the very least it creates a very strong constitutionally-based presumption that where two offenses are the same, under Blockburger, consecutive punishment should not be imposed unless the legislative intent that they be imposed is unmistakably clear.

QUESTION: What if the Supreme Court of Ohio in Brown had said: "We have heard your double jeopardy argument, we know we are bound by the United States Constitution amendment, we find them unconvincing, and we find the legislative

intent to be against you, do you think this Court would have had any power to reverse other than on a constitutional basis?

MR. WASSERSTROM: Well, it is our position this would be a constitutional basis, a constitutionally-based presumption. Because we are --

QUESTION: It is not we are to avoid a constitutional question.

MR. WASSERSTROM: No, because if the Court is wrong when it imposes are sanctions consecutive punishment, then there is in fact a substantive violation of the defendant's double jeopardy rights.

So where do you have a mistake in this area? You have a violation of a specific constitutional guarantee.

Interestingly enough, I think this position is is the position taken in the Yale Law Journal note which the Government relies on so heavily in its brief, to try to argue that, the question of whether two offenses are the same should be entirely for the legislature.

I see my time is up. Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: You are very welcome.

Mr. Frey, if you do not want to provide your argument between now and tomorrow, we will rise.

MR. FREY: If it is all right with the Court, I would be happy to begin now.

MR. CHIEF JUSTICE BURGER: Very well. You may open tomorrow.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE RESPONDENT

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

From one standpoint this appears to be a case that deals with an arcane and esoteric corner of the law. It lends itself to subtle linguistic disputes regarding the meaning of such terms as "same offense" and "lesser included offense" as well as to elaborate efforts to plumb the depths of the mysterious Blockburger test. It has produced from Petitioner and intricate analysis of snippets of dictum in Brown v. Ohio, in Jeffers, and in Simpson.

And I can't deny that we too have engaged in our brief in a serious effort to analyze comprehensively this complex and interesting talk.

There is however a danger in all of this the Court will lose sight of the forest for the trees.

So let me draw back for a minute to make one point. It seems to me both futile and absolutely devastating to Petitioner's contention that the double jeopardy clause bars Congress from imposing cumulative punishments for rape and felony murder because the two offenses are the same. Suppose Congress had enacted a statute that stated as follows: "Anyone

who kills another person in the course of committing a rapse shall be sentenced to a maximum term of life imprisonment and to a minimum term in the discretion of the sentencing court of not less than 20 nor more than 35 years."

Now, it seems to me beyond argument, given the power of the legislature to define offenses and to set punishments for them, that the double jeopardy clause would have no bearing whatsoever on the validity of such a statute. And that is exactly what the Court of Appeals construed the statute in this case to mean.

Now, it is true Congress expressed its will by means of two separate statutes, which must be read together to give the result of my hypothetical statute, but surely the double jeopardy clause cannot be construed to require that the legislature employ a particular form of words or that it do something in one section rather than two. Such a reading would trivialize this important constitutional provision. This is precisely the conclusion that this Court reached in Gore where it said about, after analyzing the hypothetical statute such as I have given, is it conceivable that such a statute would not be within the power of Congress. And is it rational to find such a statute constitutional but to strike that on the Blockburger doctrine as violative of the double jeopardy clause or here to strike down the two separate statutes as violative of the double jeopardy clause?

Now, let me turn back from the forest to the trees. Petitioner's argument rests upon the notion that because proof of felony murder requires the proof of the underlying felony, the latter is a lesser included offense of the felony murder and therefore is the same offense and therefore may not be made the subject of multiple punishments. He says the Blockburger test is a constitutional test under the double jeopardy clause for the permissibility of multiple punishments. There are several difficulties with his argument.

The first difficulty is that rape and felony murder are not in fact the same offense under the Blockburger test, which depends upon the elements of the two offenses. Obviously, one need not kill in order to rape or rape in order to kill.

QUESTION: Under the Blockburger test there didn't have to be successive prosecutions for these two offenses.

MR. FREY: I don't think that the Blockburger test is the exclusive criterion for successive prosecutions, although I think that if they fail the Blockburger test there could not be successive prosecutions.

QUESTION: Well, do you think there could be successive prosecutions here?

MR. FREY: Well, not under Harris v. Oklahoma; but I have no problem squaring that result with the position that we are contending for here, because it is a very different

matter as to what punishments the legislature may prescribe and as to when the courts and the prosecutor may --

QUESTION: Would that be whichever prosecution came first?

MR. PREY: I think that would be true under Brown, whichever prosecution came first.

MR. CHIEF JUSTICE BURGER: We will resume there at 10:00 o'clock tomorrow morning.

(Whereupon, at 3:00 o'clock, p.m., the arguments in the above matter were recessed, to reconvene at 10:00 o'clock, a.m., on Wednesday, November 28, 1979.)

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