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Supreme Court of the United States

OCTOBER TERM, 1968

In the Matter of:

JOHN DALMER BENTON, Petitioner, v. STATE OF MARYLAND Respondent.	Docket No. 201

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

John Dalmer Benton, Petitioner,	:	
v.	:	No. 201
State of Maryland, Respondent.	:	

Washington, D. C.
Monday, March 24, 1969.

The above-entitled matter came on for argument at 10:30 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 201, John Dalmer Benton, Petitioner, versus Maryland.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Cramer.

ORAL ARGUMENT OF M. MICHAEL CRAMER, ESQ.

ON BEHALF OF PETITIONER

MR. CRAMER: Thank you, your Honor.

Mr. Chief Justice and may it please the Court.

This case was argued to the Court previously on December 12, 1968, on the issue of whether the double jeopardy provision of the Fifth Amendment of the Federal Constitution was applicable to the State of Maryland through the Fourteenth Amendment.

A few days after argument this Court ordered re-hearing and rebriefing on another issue that issue being does the concurrent sentence doctrine enunciated in Hirabayashi versus the United States have continuing validity in light of such other decisions and more recent decisions, the last case being Sibron versus New York.

It is petitioner's contention that the Hirabayashi Doctrine is invalid today. It is petitioner's further contention that the Court need not reach the Hirabayashi rule in this case since both convictions were, we submit, invalid.

Briefly the facts of the case are as follows:

The State of Maryland with jurisdiction to do so indicted the Petitioner in Prince Georges County for burglary, common law house breaking and larceny. Common law house breaking charge was dismissed by the prosecution. The jury acquitted the Petitioner of larceny and convicted him of burglary.

Petitioner was sentenced to serve a term of ten years in the Maryland Penitentiary. He appealed his burglary conviction and the Maryland Court of Appeals remanded the conviction on the bais of its decision in Sibereau versus the State of Maryland in which case essentially held that Maryland's Constitutional provision which excluded jurors unless they expressed a belief in God was violative of the First Amendment.

Petitioner chose to take advantage of the remand and on the remand he elected to be retired on the burglary charge. Because he chose to take advantage of his First Amendment rights the petitioner was again indicted for burglary but for larceny, too, of which offense he was previously acquitted.

Q That had been an explicit acquittal by the jury had it in the first trial?

A Yes, your Honor, it was.

Q Not just an implicit acquittal by finding of guilty only of the burglary?

A That is correct, your Honor, the finding of not guilty.

Q Not guilty, yes.

A In the second trial the Petitioner was convicted of both burglary and larceny. The trial court sentenced petitioner to a term of 15 years for burglary and 5 years for larceny and the terms were ordered to be served concurrently.

As the court instructed, I am here to argue the question of the validity of the Hirabayashi concurrent sentence doctrine.

Q He ha been sentenced to 10 years of imprionment the first trial?

A Yes, your Honor.

Q The second time?

A Fifteen years.

Q Fifteen years, on the burglary and five on the largeny to be served concurrently.

A That is correct, your Honor.

Q So setting aside the larceny charge he was sentenced to a longer term on retrial on the burglary charge?

A Yes, he was, your Honor.

Q You didn't raise that as a possible error did you?

A No, your Honor. The question of increased penalty after an appeal is not before the Court. It was not raised, your Honor.

Q Was he given credit for any time served on the

first term?

A I don't believe he was, your Honor.

With the court's indulgence I would like to spend a brief moment stating my position as to why I feel that the Court need not reach the Hirabayashi rule in the instant case.

Of course the Hirabayashi rule presumes that one conviction is valid and the other is invalid. In this case we believe that the invalid larceny conviction infected the burglary charge and therefore the burglary was invalid also.

In United States versus Trenton Potteries this Court held that it would affirm an invalid conviction in which concurrent sentences were rendered only if the jury's consideration of the valid count was not prejudiced by their consideration of the invalid count.

Presuming that Petitioner's second prosecution for larceny was constitutionally impermissible the unfairness of charging and trying him a second time we submit infected the entire proceeding and invalidated the burglary as well as the larceny conviction.

And, therefore, we ultimately ask the Court to reverse the larceny conviction and order a new trial in the burglary case.

Addressing myself now to the question certified by the Court ---

Q I want to be sure I understand this position of

yours. To reverse the larceny conviction on the double jeopardy ground and to set aside the burglary conviction and order a new trial on what ground that it was infected by the larceny?

A That the institution of the larceny charge in the second case infected and prejudiced the defendant, the petitioner before the Court, Your Honor, in his burglary defense.

Q Why?

A I am sorry, your Honor.

Q Why and how did it do so?

A For several reasons. One, under the law of the State of Maryland burglary consists of breaking and entering a dwelling house with intent to steal.

Q Only with intent to steal? Can't it be with intent to commit any other felony?

A No, your Honor. With intent to steal.

Q With intent to steal.

Q I don't understand this for another reason. I thought that this reargument was limited to the Hirabayashi question and nothing else. That is the question that is before the court for purposes of this reargument. Isn't that right?

A That is correct, your Honor.

Therefore, may I -- I hope appropriately state that I have other reasons but if the Court would like other reasons why the valid charge was infected but ---

Q I would be interested in your theory, because as I understand your point, your preliminary point is that while you have been asked on this reargument only to address yourself to the concurrent sentence question your point is that even if we decide that the concurrent sentence rule has continuing validity you should still win.

A That is correct, sir.

In this case the State of Maryland to conduct a prosecution successfully had to prove that Benton intended to steal when he entered the premises.

In the first trial it was adjudicated that he did not intend to steal. We contend thatthis was race adjudicata under the Sealfon case that this principle applies in criminal cases and that, therefore, he was entitled to have excluded any mention and any evidence of the larceny, thus the State obtained an advantage that they ordinarily would not have had in proving intent.

Secondly, your Honor, the necessity of defending two rather than one charge tactically disadvantaged the Petitioner. Another reason why we feel that the burglary charge is invalid is that the State in this case used the device of cumulating as many charges as it could so as to promote a compromise atmosphere in the jury room and cause the jury to convict him of at least one. Although, of course, in this case he was convicted of two.

We also submit that another reason why he was prejudiced, why the burglary conviction should be reversed is that the jury was permitted to consider prejudicially irrelevant testimony because again Benton had a right to have the jury not consider any evidence of larceny in view of his first acquittal and the doctrine of race adjudicata.

Q Well, burglary in the State of Maryland, consists of whatever it is, breaking and entering a dwelling house in the night time for the intent to steal and if you are right in this submission, how could he even be tried for burglary again if the State isn't allowed to show that he had an intent to steel on the retrial of the burglary charge?

A Well, I submit, your Honor, that they could endeavor to prove intent to steal by other means, perhaps a conversaion, perhaps burglary tools, none of which were present in this case, but this is one of our points, your Honor.

Q And what cannot they do in your submission on a retrial of the burglary charge?

A We feel that they could not show that anything was missing from the premises after Benton had left the premises. Because that is the issue in the larceny case. And the larceny case was adjudicated in his favor.

Q Well, it is an issue in the burglary case. You tell me -- explain the definition of burglary in Maryland,

there has to be an intent to steal.

A Yes.

Q And that is embraced in the charge of burglary as I understand your definition of it.

A The question then, your Honor, comes before the Court of if they did not charge larceny could they have shown that items of personal property were missing from the premises just on the burglary charge alone and we respectfully submit that the answer to that is no whereas they might have been able to, under ordinary circumstances to show that an aspiration had taken place. They couldn't once this matter was adjudicated in his favor.

We also submit that there are certain cases decided by this Court that hold that eventhough there is no isolatable prejudice if prejudice does permeate the trial, then the entire proceeding is vitiated and we respectfully submit as our last ground that that is another reason why the burglary conviction should be set aside.

Thank you, your Honor.

And turning now to the issue before the Court it is Petitioner's contention if the Court please, that the Hirabayashi concurrent sentence doctrine no longer has validity in view of Sibron versus New York which case involved the Petitioner whose criminal record and background was similar to the petitioners in the instant case.

As a result of the Sibron decision it is incumbent upon the Government to show that no possibility of collateral legal consequences will be imposed on the basis of the challenged conviction.

I believe that Sibron makes it clear that the fact that a petitioner has a substantial criminal record does not in itself mean that there are no significant collateral legal consequences.

It is submitted that the rationale of the Sibron case is equally persuasive in the Petitioner's case. An additional factor in favor of abolishment of the Hirabayashi rule in the case of concurrent sentences is the consequences that may occur where a valid conviction is set aside at a remote time for such reason as newly discovered evidence.

In that case the defendant's evidence may be stale. He may be unable to locate and muster his witnesses and thus unable to vindicate himself. Therefore, we submit that the concurrent sentence case it is even, the Sibron rule is even more applicable.

Q Do you happen to know if any of the States that have recidivist statutes would consider these two convictions in this case as separate convictions for the purpose of establishing recidivism?

A I am sorry, your Honor, but I do not. However, I do note that the recidivist statutes use the word conviction

and most of them do not refer to multiple convictions but just leave it at that.

Although under the Sibron case it is not incumbent upon the Petitioner to establish the collateral legal consequences if it please the Court I might venture to mention one. Regrettably due to misinformation the Petitioner's brief states that he has only one felony conviction when actually it appears that he has three felony convictions.

However, the Petitioner's background does have some redeeming features. Following two of his felony convictions Petitioner served with distinction in the United States Army. He was a decorated soldier, a recipient of the Purple Heart and to this day receives a Veteran's Administration service connected disability.

Perhaps some future administrative body were judge will consider the Petitioner's meritorious military record but will find that the invalid larceny nconviction militates against favorable consideration. In this case the Petitioner does not seek a declaration in the air.

He has a substantial interest in the outcome of this litigation. There is nothing abstract, feigned or hypothetical about his appeal.

It is submitted that another reason exists for not applying the Hirabayashi doctrine in this case. The State of Maryland does not follow the Hirabayashi rule but instead allows

a court to correct and set aside an invalid conviction at any time regardless of its immediate impact upon the defendant.

Following this rule the Maryland Court of Appeals has on many occasions reversed invalid convictions when the sentences were ordered to be served concurrently with a valid conviction.

We submit that application of a State remedy to a case involving a violation of a Federal Constitutional provision is not novel.

In Brady versus Maryland this Court held that the State of Maryland violated a Petitioner's right to due process of law under the Fourteenth Amendment when it withheld from him exculpatory information.

At the same time, however, this Court held that the use to which this exculpatory information would be put was to be determined by the law of the State of Maryland rather than the Federal law.

The Solicitor General recognizes that the Government under the Doctrine of Sibron cannot possibly negate the existence of all collateral consequences and the Solicitor General meets the problem by stating that the rule in Sibron versus New York requiring the Government to show that no possible legal collateral consequences exist should not apply in the case of concurrent sentences.

However, it is respectfully submitted to the Court

that the Solicitor General offers no cogent reason for distinguishing the situation where sentences have been served from the situation where the sentences are to be served concurrently as in the instant case.

The Maryland Attorney General approaches the problem differently by stating that his brief raises and negates the existence of all possible collateral consequences that might confront the Petitioner.

Since collateral consequences are often unpredictable we submit that the State lacks such extraordinary perception in this case.

Q Well, sir, as I understand it, the Solicitor General argues that the burden should be on the Petitioner to show that unless his concurrent sentence is reviewed, prejudice will result to him.

Is that your understanding? And if you look at it from the point of view of burden who has the burden or demonstration, however you want to define it more precisely, what do you say about that?

A We submit to Your Honor that it is incumbent upon the State, that the State has the burden of negating the existence of all possible legal consequences.

Q Let me be sure that I understand this.

You are presenting a clear issue on that point, that is to say, the Solicitor General says that it is the Petitioner's

burden to show that unless his concurrent sentence will be reviewed he will be prejudiced. You say that if a prisoner asks a review of his concurrent sentence that the burden is on the State to demonstrate that there could be no possible prejudice to him if his concurrent sentence is not, is not reviewed.

Am I correct in stating the position?

A Yes, your Honor.

In conclusion ---

Q Mr. Cramer, what possibility is there that the State has overlooked?

You said they negated a whole lot of things but there is some things they didn't negate. What?

A Your Honor, I have attempted to answer one when I state, refer and alude to ---

Q That if there is a change in legislation, et cetera, et cetera, et cetera in the future somebody thinks up in the past and all that he will be harmed?

A That is one of them, your Honor.

Q A little far fetched?

A I am sorry, sir.

Q Little far fetched?

A Itmight be but ---

Q Well let us settle for might. Now is there anything else that they have failed to negate?

A I believe that the parole consequences are involved in this case.

Q What are they?

A Under the Maryland law the District Attorney of the county in which the case is tried must certify to the Parole Department an abstract of each case in which a conviction was rendered.

And I submit to the court that it is a factor which governs or guides or helps to guide the parole authorities in determining the eligibility for parole.

Q Which the District Attorney in this case would certify that this man was convicted of burglary and larceny and a single trial involved the same evidence?

A Yes, sir.

Q And you think that would prejudice it?

A I believe that it is possible.

Q Possible.

A Possibility.

Q Anything else?

A The factors that I mentioned about his past record. His convictions, his two felony convictions are very old. One is '39 and one '40. One was when he was 16 years of age, before there was a juvenile delinquency law. I believe that it is difficult to anticipate what a future administrative body or what a future judge will think of his record.

Certain, your Honor, conviction of two crimes cannot help it as compared to one.

May it please the Court, in conclusion for the reasons stated we respectfully request the Court to order reversal of the larceny conviction and order a new trial of the burglary charge.

Thank you very much.

MR. CHIEF JUSTICE WARREN: Mr. Strauss.

ORAL ARGUMENT OF PETER L. STRAUSS, ESQ.

FOR THE UNITED STATES AS AMICUS CURIAE

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

The Government is here at this Court's invitation to present its views whether the concurrent sentence doctrine has continuing validity in light of last term's cases.

In those four decisions as the Court knows it re-examined doctrines limiting review of criminal sentences which an accused is either finished serving or has not yet begun to serve and it did so recognizing that in addition to sentence itself criminal convictions usually have legal effects such as loss of liberties which do entitle an accused to review.

For example, the Court concluded in the Sibron case that a criminal appeal cannot be found moot simply because the principal sentence has been served. The reviewing court must be convinced by the Government that there are no residual legal

effects of conviction or collateral legal consequences. As we understand the question which the Court invited us to discuss is whether the same rule must not apply in concurrent sentence cases; that is, cases in which an accused is convicted on several different counts given sentences all of which are to be served at the same time and then seeks to appeal on a ground which could affect only some and not all of those convictions and sentences.

In the past courts have not reviewed all counts in such cases. Once they have determined that some of the counts are valid they have to climb to review others.

And the notion has been that since the full sentence must be served in any event on the good counts nothing could be gained by reviewing the others. That review of the limited allegations of error would be a waste of their time and energy.

We agree, of course, that any such assessment must be a realistic one. Review must be had as to any count which in fact does have legal affects upon the convicted person.

Q Mr. Strauss.

A Yes.

Q Excuse me. Would you make a distinction between review of a concurrent sentence on direct appeal and on collateral attack?

A I think on collateral attack the case is all the stronger for the concurrent sentence doctrine.

Q Was your argument addressed to both? That is what I am trying to find out.

A Our argument is addressed to both. We would say the second. This is a direct review case and the second we would say follows a fortiorari.

Q But there is some sort of a difference, isn't there, in terms of a judicial latitude. Let us suppose that -- I am talking theory now -- in terms of a direct appeal let us suppose that there is a clear error with respect to a concurrent sentence.

Is it the Government's view that that ought to be ignored unless the prisoner, the accused can show prejudice even though it is on direct appeal as distinguished from collateral attack?

A No, your Honor, you ask whether that ought to be ignored. I think I would prefer if I may rephrase your question to say to put it whether you are asking whether the Government's view is that it must be ignored and I think we may claim in our brief that there is no such necessity in our view.

Q No, no, when you rephrase the question that way I don't understand what the Government's position is.

A Well I think the answer is, no, we do not believe that the doctrine is jurisdictional. We believe that if there is any good reason and a plain error may be a good

reason in a Court's view, it may do so in the Courts of Appeals. I should stress that our principal concern is not in this Court, but in the Federal Courts of Appeal, which have a tremendous burden of criminal appeals before them and which they frequently will receive a question as did the Second Circuit in the United States versus Berger, and which we cite in our brief.

In that case the defendants were convicted on two counts, one of a substantive offense of theft from Interstate Commerce and the other of a conspiracy to commit that offense. The defendants appealed on two grounds. One that it was not Interstate Commerce. That was a definite ground. And second that there was insufficient evidence in the record to support the conspiracy conviction.

Now the Court of Appeals characterized that record as being an extremely lengthy one and having found that there was Interstate Commerce they on that ground declined to pass on the conspiracy question.

On the other hand one frequently finds Court of Appeal in cases where error is plain or clear passing upon it and we say that they have every right to do so.

Q You kind of left me at thepost.

A I am sorry.

Q I want to get you right back to the question. Is there any difference in the Government's position

depending upon whether the question of error on a concurrent sentence is presented by way of direct appeal on the one hand, and on the other hand by collateral attack, let us say, habeas corpus or 2255? That is my precise question to you.

A And to answer that question I would say that I believe that in the collateral attack circumstance the Court would be much less justified in reaching error that was shielded; that is, our argument follows a fortiorari in that circumstance.

Q Mr. Strauss, could in any of the States where they have recidivist laws these two convictions be used to prove recidivism?

A We have found no case where they could but if they could ---

Q Well, all right, if they could.

A If they could then we believe the concurrent sentence doctrine could not be applied because we do concede that if there is a substantial reason for review then review must be had, although there could be an alternative in that circumstance.

One could also say as we have indicated in a position which we recently filed in another case before the Court, No. 1022, Croner versus United States, that was a tax case in which the Petitioner raised certain questions which the Court of Appeals again determined only pertained to limited numbers

of counts and specifically determined there was no crossover effect and the Petitioner in that case alleges that there will be a collateral estoppel, there will be in civil actions to collect the taxes which are allegedly due from them that there will be some collateral estoppel by these judgments in the particular counts that he challenged and what we say there is that since there was no review there could be no collateral estoppel.

I think it would be equally possible in the case you put, Mr. Chief Justice, to say that since review was declined on the basis of the concurrent sentence doctrine that conviction could not be counted toward recidivism so there are the alternatives in the case that you mentioned.

Q Let me ask you this: Suppose this had been a larceny independent of this particular offense of burglary. And he was convicted and sentenced as he was here. Could that be used as a recidivist offense?

A I think again the answer is that in most States it could not. As we state in our brief in most States recidivist statutes are designed to vindicate the State's interest in having prisoners learn from going to jail.

Q Are you sure that they all do that?

A I am not sure that they will all do that. I do think that those cases where they don't do that can be dealt with separately and certainly in the Federal system,

which is our concern they don't do that.

Q How would a court know 25 years after the fact whether this larceny and this burglary were part of the same transaction, if they were in a State charging prior convictions. Would they have to go back and review all of these cases and determine whether they were connected in fact or not?

A Well, I think if one were able to determine that the concurrent sentence doctrine had been applied applied 25 years ago, one would do so through the medium of an appellate court decision and that decision would probably sufficiently indicate the fact to enable the judge to make the determination as readily as he could the determination that the concurrent sentence doctrine had been applied.

Q As you know many of these old records are destroyed and are otherwise lost.

A But then the record of the application of the concurrent sentence doctrine would also have been lost or destroyed.

Q Well, that might be but you would have a conviction of the two offenses and some district attorney in some state would charge as one offense that he had been convicted of burglary and a second offense that he had been convicted of larceny and how would you go about and prove that they were all part of one offense?

A As I say, your Honor, my principal defense is that in all States that we know of I can't say to you that this isn't the case. But so far as we know as soon as it appears that a conviction was had on the same date of the same indictment or the same trial, however many counts there were the Court would consider it one count for purpose of the recidivist statute.

Q Are you prepared to say that that is true even though they were entirely separate and distinct crimes, are you?

A I believe that is the case although they were entirely separate and distinct.

Q Is there any constitutional reason why the State could not do what I have just suggested, charge them with being recidivist because he was convicted on a number of cases in one particular trial. Suppose there was autograph crimes that continued over a period of a year or two and they tried him for a dozen of them and convicted him of each of them. They are entirely separate.

A I think that would offend the legislative policy of the recidivist statutes.

Q I know, but would it affect the Constitution for them to do that, and if it doesn't then we say that it will not be done to the prejudice of the defendant when this happens.

A Well, I think what we are speaking of the case

where the opinion through destruction or some other circumstance is destroyed so that it does not reflect whether the concurrent sentence doctrine was applied so that it does not reflect whether they were separate cases so that State court goes against the grain of its recidivist statute and applies it to count more than once in single conviction although on multiple counts. I think all of those things put together really are an extraordinarily remote circumstance.

Q Remote from everybody except the man who is involved?

A If they occurred, I would think that man would have a sound plane to not having the statute apply to him as a matter of due process.

Q He would have to go back 25 years maybe to establish that that was the situation.

A The State would have had to go back 25 years to establish the other was the situation.

Q I know but there is a little difference between the power of the State and the power of an individual, particularly an indigent one, to prove such a thing, is there?

A If the State were able to come up with one part of the records it seems to me probably they could have come up with the remainder of the record. If there is a record of the conviction I would think there would also be a record of the appellate proceedings.

We are not talking about transcript.

Q I know, but is it your position that the burden is on the State or on the prisoner to prove such a thing?

A To prove which, your Honor?

Q Well is it the burden of the State to prove that he was not injured by this double punishment or is it the burden of the defendant to prove that he was?

A I would say that once the double punishment was shown it was the burden of theState to prove that he was not injured.

Q In this case then the burden would be on the Government to prove that there is no ---

A This is not the case of application of recidivist statute.

Q No, it isn't, it isn't, but we are dealing with what it might lead to, are we not?

A Well, I don't wish to speak for the Maryland law because I am sure the ---

Q I am not interested in the Maryland law, we are interested in what can happen all over the country because in other parts of the country they can charge him with recidivism under the Spencer case and all they have got to do is prove that he has been convicted twice or so and then he goes to the penitentiary for his natural life.

A I think this Court could in this case if it

wished to indicate perfectly plainly that where double convictions occur on a single trial occasion, that if review is not had as to all counts and if the record doesn't show review is had as to all counts if there have been no other circumstances those double convictions cannot be counted twice and since the situation is so remote and I genuinely do believe it is I think that that would be an adequate response, particularly in view of the genuine importance of this doctrine in the Courts of Appeals.

The Court of Appeals in the Berger case would otherwise have to have read what it considered to be an extremely lengthy record, that time would have been taken away from other pending appeals meritorious appeals, appeals where the Court could have done something.

Q Mr. Strauss, do you have any figures that indicate how many criminal appeals are disposed of on concurrent sentence type?

A Well, we made a survey as you know in our brief indicating that in something like 40 percent of the appellate cases that had come before the Court this term, 45 percent, concurrent counsel were present.

A sampling of those and we were able to do only a sample of those indicate that in about 20 percent of those cases the concurrent sentence doctrine was used.

Now, if I may go back to the question Justice Fortas asked before, I think that the doctrine was under-used

in a sense that there were some cases in which the doctrine wasn't used because the claim of error on the concurrent count was so clear one way or another that it was as efficient or efficient simply to deal with it and that frequently happens.

But I think the answer is about 20 percent or in about roughly 10 percent of the appeals that have come up, 20 percent of 45 percent.

Q Is that an absolute number? As an absolute figure, what does that run?

A Well there were 3851 criminal appeals in 1968 and that would be about 385, 400, 350.

Q 3850-odd. All criminal appeals not just those involving concurrent cases.

A All criminal appeals.

Q Yes. About how many?

A About 10 percent of that.

Q How many of the total number of criminal appeals involved concurrent sentences?

A Forty-five percent.

Q Forty-five. So that gets us down to about 1800 is that it? That involved concurrent sentences?

A Yes.

Q About 1800 and of that number some 380-odd were disposed of on the concurrent sentence?

A Yes, as a projection from our figures which are

subject to error, of course.

Q This is in the Federal system?

A This is in the Federal system. And these are very rarely cases as this Court appreciates, these are very rarely cases on which this Court grants certiorari, the question which concerns us is the problem of the Court that has no discretion to say this question is not important, we won't hear it. Except as the harmless error doctrine, or the concurrent sentence doctrine may enable it to identify.

Q Let us take that sort of a case. Let us take an appeal from a District Court to the Court of Appeals, a direct appeal, and the defendant has received concurrent sentences.

Now is it your position that because there are concurrent sentences a Court of Appeals can decline to consider alleged error with respect to one of those concurrent sentences.

I am talking now about power.

A Right. It must first determine that some other count is good.

Q There is no question about the other counts.

A All right.

Q And the Court is presented with a direct appeal from a concurrent sentence on a count that is supposed to be infected by constitutional error and some other kind of error.

A Our position is that if no crossover prejudice

occurs, if no legal incidents are present, this is harmless error like any other kind of harmless error and the Court need not review.

And, as in harmless error generally, if error which is claimed is one which on its face appears to be substantial, appears likely to have infected the whole proceeding, that is sufficient to just to require review.

If on the other hand it is not, if the Court can determine that it did not affect the other proceeding that there will be no collateral consequences then it need not review.

Q So your theory really is a harmless error theory?

A I think that is right.

Q With respect to direct appeal. Now with respect -- suppose it is 2255 in a Federal case or habeas corpus and Federal review -- no let us simplify it, let us take 2255, direct appeal in the Federal case, direct appeal to the Court of Appeals a Federal case from theDistrict Court's denial of 2255, an attack on a concurrent judgment, concurrent count, for which you receive concurrent sentence, and do you still rely on the harmless error theory?

A Well, it is in a fashion. That is, if the Petitioner in that circumstance could show as part of his petition that the other counts under which he is being concurrently held were infected by that error, then he would be

entitled to review. Now there will be the situation on habeas corpus which there is not in direct appeal, someone may have had two separate trials. Of course, the concurrent sentence doctrine should never foreclose review from separate trials but there would be then no possibility of alleging that trial error at one trial had prejudiced the result at the other.

Q All right.

Mr. Strauss, the problem is that I have difficulty in squaring this theory with the Government's argument that the burden should be on the prisoner. If you say that this is harmless error, that your theoretical basis for the Court's decline to review judgment in a concurrent sentence situation, is harmless error, how can you say that the burden should be on the prisoner to show that it was not harmless error, isn't that just the opposite of what usually happens in a harmless error situation?

A No, your Honor. If I may take what one may call a statutory or nonconstitutional error, before the passage of the harmless error statute -- I am not talking about the constitutional area for the moment -- before the passage of the constitutional error statute, plainly the situation you are referring to is in existence equally plainly that that statute was passed to change that situation.

In the legislative history we find that without saying that what is a very short report, one that was adopted

by this Court in Kodiocos that unless the error appears on its face to be a substantial one which would prejudice substantial rights in which event review should be had, but unless that is the case it is the burden of the appellant to show that there was error.

Now I realize that there is the ---

Q To show that it was error?

A To show that it prejudiced a substantial right. Excuse me.

There is the Chapman case. But the Court did repeatedly stress in that case that it was dealing with constitutional error and as I understand it it really involved the determination that constitutional error would be error affecting substantial rights.

Q I see. So you are making the same argument with respect to constitutional error?

A In respect of constitutional error, what one has to remember is that here unlike Chapman, the constitutional error by hypothesis does not go to the whole conviction. It goes to only one of several counts and while Chapman provides authority for the ---

Q How can you say that that is not a whole conviction if it is a conviction, a judgment, a sentence on each count it is a whole conviction with respect to that particular count.

A It doesn't have independently all of the incidents which a conviction will have. It doesn't independently of the other convictions enter at the same time beside recidivist statute, it doesn't independently authorize confinement, it doesn't independently serve as the mode of impeachment.

Q Well, I think I understand you now. I want to make sure. You make no distinction between direct appeal and collateral attack, that is No. 1.

No. 2., you make no distinction as to whether it is a constitutional error or a statutory or some other non-constitutional type of error.

In any of those situations the Government's position is that where the appeal is sought from judgment imposing concurrent sentence, the burden should be on the appellant or the petitioner, to establish that there are practical adverse consequences that flow from the concurrent sentence which he seeks to have set aside.

Have I correctly stated your position?

A I think not.

I think first that we do say that there is -- we would acknowledge that there is more room for discretion so ----

Q Are you saying this whole thing is a discretionary matter?

A We believe it is. We don't believe it is a

jurisdictional case.

Q I understand that, but you are saying that we can have a different rule it would be perfectly appropriate for the courts to adopt a different rule, a different set of standards in one of these situations as compared with the other?

A We think it would be highly regrettable to adopt the Sibron rule for the reasons we put out with the act.

Q Do you make these distinctions in your brief?

A Which distinctions?

Q Between direct appeal, collateral attack between constitutional claim based on the Constitution and claim based on non-Constitutional ground?

A No.

Q I didn't see it in your brief.

A No, that is not in the brief but I think it does follow from our particular approach to the question that they are there. I would also say with respect to the constitutional versus the statutory question we do not believe there should be any distinction but certainly we couldn't say that might not be an appropriate basis of distinction.

Q Mr. Strauss.

A Yes.

Q Suppose you had a two-count conviction with two witnesses, one for each count, and concurrent sentences, and

in one of the counts the witness is an admitted perjuror, and it is found out five years from now.

What under the sun can that man do to clear his record up?

A I think if these are two separate trials ---

Q No, sir.

A Excuse me, two separate matters, not a larceny that took place in the middle of the burglary as it is in this case, we do in our brief acknowledge that that is a case in which the Court should be that much more ready not to apply the concurrent sentence doctrine in which the question of prejudice appears much more readily than it does in a case.

Q Then in this 2255, what would he get?

He is serving a concurrent sentence of 15 years. And one of them is admittedly bad.

A One of them is admittedly bad? Were these separate trials or a single trial, your Honor?

Q Two count indictment tried in the same court-room at the same time.

A I would think that question should be raised on appeal.

Q All right. We are past the appeal stage. We are now in 2255.

A I would think had he not raised the question on appeal that it would be competent at that point to decline to

pass on the allegation on the basis of the good count unless he could show and quite possibly he could show that the bad count prejudiced the good count.

Q No, it is no possibility. He is stuck with a bad conviction, an unlawful conviction.

A Which has no effect upon him, which has no legal incident, no legal effect upon him.

Q Well, that is the point that I would like a little answer to. If this doesn't affect him at all, why do you insist on defending it? You say the fact that he has got concurrent sentence doesn't affect him at all.

A Yes.

Q Well, why are you here arguing?

A I think we are arguing principally on the ground of judicial efficiency which we set out in our brief that to require appellate courts which are very hard pressed -- I am talking about the Courts of Appeals -- to spend what may frequently be a very long period of time considering questions as to which they can do absolutely nothing of practical benefit to the petitioner involved, the appellant involved, is to enage them in a waste of work.

Q Is this a very efficient procedure that we have in this case where they took advantage of this multiple sentence and not only went through all of the Maryland courts but it has been to this court and then had it reargued and

so forth. If the State only took advantage of those thing which would not hurt the defendant and would not help themselves wouldn't we be relieved of all of these things, and why is it necessary for the State to keep a man under a conviction of two offenses where there is no difference in his sentence as you say, and what benefit could there be to the State to keep him under the cloud of those two convictions when one would do just as well from the standpoint of the State of rehabilitating him and if you choose, punishing him or whatever theory you have of sentencing defendants, why do you want to fight as you do for all of these things when there is no good to anybody and some harm possibly to others?

A Well, your Honor, I think I agree with you to this extent that the same end could be served from the State's interest by imposing a single general sentence and as you will recall this is the situation in which the question is most frequently arisen in this case, in this court. At least which it arose most early.

But the concurrent sentence serves one function. It enables the trial judge to give a review in court some indication how he views each of the crimes charged on the indictment. Now this might very well have been an appeal with a 15-year burglary sentencewas under appeal and the five year larceny count was not and if there were a general sentence in those circumstances, assuming 15 years is possible under the Maryland

larceny statute I don't know, and the Court found that the burglary count was bad under a general sentence of 15 years and said well, since the larceny count supports it anyway we won't do anything.

Quite likely there would have been substantial prejudice to the accused so I think the concurrent sentence does serve value of the purpose in that respect.

Q Let me ask you just one other question.

Suppose a man in the position of this petitioner should take the stand as a witness either in his own behalf or in behalf of someone else in another jurisdiction, and he was asked the question, "Have you ever been convicted of a felony?"

And he says, "Yes."

"You were convicted of burglary, weren't you?"

"Yes."

"You were also convicted of larceny, weren't you?"

"Yes."

Do you not think that would be worse than to have a man merely admit that he was convicted of burglary?

A Well, again, it seems from what I know of criminal practice the more general practice is to ask are you the man who was convicted on such and such a date of breaking and entering into somebody's home, and not to specify each of the independent counts. If you have a 35-count mail fraud ---

Q You haven't had much experience. Because they

don't do it that way. I know from some experience.

Ask them have you ever been convicted of a felony?

"Yes."

"Were you convicted of burglary in such and such a court?"

"Yes, I was."

"Were you ever convicted of larceny in that same court?"

"Yes, I was."

Do you mean to tell me that that wouldn't have some effect on a jury on the credibility of this man?

A It could certainly, the jury could certainly be told about that that was the same offense.

Q Well, now who is going to tell them?

A Counsel for the defendant, or the defendant himself.

Q Can they go in and try those things on such a collateral matter?

A Can they say that it was the same count, that it was the same offense? I should certainly think if the State were entitled to try and get the jury to believe that they were separate matters that the defendant would be entitled to show that they were one and the same and that the State was out trying to squeeze more juice from the orange than it had in it.

Q All they have to prove is the commitment, and they have the commitment. They can't go behind that and try on such issues as that collateral matter as far as I know.

A I should think they would be able to to that extent. I should also think that as we, again, as we make out in our Croner brief that it would be competent to rule that where there were such incidental possibilities as that simply that they, that it could not be given collateral effect of that source.

That if review was declined for reasons of the concurrent sentence doctrine on a particular count, that should a prosecutor be so minded as to do what you have suggested in the future he simply could not do so and his doing so would be error and that to us at least be considerably the more efficient means of dealing with the situation.

Rather than as in this Berger case forcing the Court of Appeals to read a four or five volume record to determine a question which couldn't really affect the practical outcome of the case before it and which would delay and quite possibly prejudice the decision of appeals in other pending cases.

Thank you, your Honor.

MR. CHIEF JUSTICE WARREN: Mr. Attorney General.

ORAL ARGUMENT OF FRANCIS B. BURCH, ESQ.

ON BEHALF OF RESPONDENT

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

If I may I would like to address myself to some of the opening remarks made by Mr. Cramer.

I think he probably unintentionally overlooked pointing out to the Court that with respect to the increased penalty on the second trial for burglary, 10 years to 15 years, this is a matter of a separate proceeding before the United States District Court in Maryland. The matter has been decided. The Federal Court has directed that the sentence be reduced to 10 years.

It is on appeal to the Circuit Court for the Fourth Circuit and it is being held by the Circuit Court for the Fourth Circuit pending the outcome of this proceeding, and I thought it important that the Court be apprised of the fact that as far as that 10 year and 15 year aspect of the matter is concerned, it has been adjudicated and that of itself is on appeal.

Q Did the Court write an opinion in that case?

A I don't know whether there was an opinion -- has it gone down to the Fourth Circuit?

VOICE: Your Honor, the District Court did write an opinion in that case.

A Yes.

Q May I ask what the reason for the reduction of the sentence was?

A Increasing the penalty that it was in the nature

of double jeopardy, and, therefore, it should not have been permitted to increase thepenalty.

It is under the Peyton case.

Mr. Cramer has pointed out that it was prejudicial to try the larceny case in the second trial with the burglary case because the larceny case under his interpretation or theory of the case was in fact double jeopardy proceeding.

I might point out that this would be true with respect to any count that was held to be invalid if there were five counts and one was good and four were held to be invalid you could say that trying the one good count with four invalid counts would affect the one good and consequently that the one good count should be thrown out.

I don't believe that any of the cases hold to that effect.

Q Mr. Attorney General, he was found not guilty of larceny in the first case?

A In the first case.

Q And am I correc that there is no way under the sun you could have retried him on that count if he hadn't used his right to get a new trial?

A I am not sure I understood your question.

Q The original acquittal you could never have retried him after he was acquitted of larceny?

A That is correct.

Q Except if a new trial is granted?

A That is correct. But in this particular case because of the Sibereau case and his having in the Sibereau case the Court of Appeals held that all indictments by Grand Juries who were required to profess their belief in God were invalid.

Q Is that for the benefit of the defendants?

A He was given the opportunity.

Q And the opportunity was given, was to get five more years.

A The opportunity was given him --

Q To get five more years.

A -- the advice of counsel to decide whether he wanted the first indictment to stand and to pursue his appeal that was then pending in the Court of Appeals in Maryland, or whether he wanted to stand under a new indictment which would have included the same counsel as the original one.

Q So he really had a temporary acquittal?

A He had an acquittal ---

Q A conditional acquittal.

A But the court held that he had waived -- and I know that this was all argued at the previous hearing -- that he had waived any of the rights he had under the first series of indictments in the counsel because that was stricken out the first indictment everything fell and therefore he was to stand

trial as though this were a new trial to begin with in the first instance.

Q That is your position here. You say that is a sound position for us to take.

A We take the position that under the waiver which was signed and if your Honors are interested I am in a position to read to you the actual proceedings at the time of the second indictment when he was apprised with counsel present as to exactly what the situation was as to the fact that he might receive an increased sentence ---

Q Where can we find that in the record?

A Well the issue was never raised up until the point was reached here at the time of argument and we, therefore, do not have it in the record because it was never raised by the petitioner below, but if I may I would like the ---

The court, have you thoroughly explained to him this is the court now at the time of the second indictment, addressing the remark now to counsel for the defendant, have you thoroughly explained to him and do you understand all of the provisions of the Sibereau case?

Mr. O'Malley. Yes, sir.

The Court. You have thoroughly explained to him all aspects of it?

Mr. O'Malley. Yes, sir.

The Court. That he is not required in any manner to

waive his original trial or appeal, he may allow his appeal to stand. You have explained that to him?

Mr. O'Malley. He can allow his appeal to stand and waive a new trial. Yes, sir.

The Court. In the Court of Appeals?

Mr. O'Malley. He can. I have explained to him that he can elect to proceed on his present appeal or in the alternative he can ask to be tried anew with a new indictment.

The Court. And what is his choice?

Mr. O'Malley. His choice is to have a new trial.

The Court. New trial?

Now does he fully understand and I direct my remarks directly to you, Benton, do you fully understand that you will be tried again and if found guilty you could get a greater sentence?

The Defendant. Yes, sir.

TheCourt. There will be no inference in any manner at any time that you had put in thus far be credited towards that sentence.

The Defendant. Yes, sir.

The Court. Do you understand that?

The Defendant. Yes, sir.

The Court. Very well, under the facts developed at this particular hearing the Court awards you a new trial. Now do I understand he has been arraigned under the order of the

Clerk?

Yes, your Honor.

Then they proceeded to the arraignment and the Clerk, "You have been indicted by the Grand Jury of Prince Georges County, on the charge of burglary, common-law housebreaking and larceny, and Mr. O'Malley is your attorney in this case. Do you please in this case guilty or not guilty?"

The Defendant. Not guilty.

How do you elect to have this case tried by the court or by a jury?

The Defendant. By jury.

Q Mr. Attorney General, ---

A "Are you in jail at the moment?"

"No, sir, I am on bond."

He was on bond so it wasn't a question, if your Honor please, of there being any credit given for the time he spent in jail because he was on bond. He did not spend any time in jail.

Q Mr. Attorney General, let us see if I can get this straight in my own mind.

This defendant was first tried for larceny and burglary. He was found guilty of burglary, not guilty on the larceny charge. He was sentenced to 10 years in prison on the burglary charge.

He then appealed and the conviction was set aside on

the basis of Sibereau, the oath case?

A Actually it was never set aside because his appeal was in process and the Court of Appeals in Maryland gave the opportunity to all those ---

Q Something must have happened. The sentence was vacated. Something happened.

Then he was tried again and he was convicted on both counts.

A That is correct.

Q And he was sentenced to five years this time for larceny for which he had been previously acquitted, and 15 years for burglary. Is that right?

A Right.

Q And now you have told us a few moments ago that the United States DistrictCourt, is that right?

A Of Maryland.

Q Of Maryland, has entered some kind of an order reducing ---

A Directing that the sentence be reduced from 15 years to 10 years on the burglary count.

Q On the burglary count so now he has a 10 year sentence on the burglary count and a 5 year sentence on the larceny count to run concurrently and you tell us that that decision of theorder of the District Court, the Federal District Court is on appeal to the Fourth Circuit, is that correct?

A Yes.

Q So that as we sit here we don't know whether this case will involve a 5-year sentence on larceny and a 15-year sentence on burglary or whether it will involve a 5- and 10-year sentence.

The original sentence being 10 years I suppose that the ultimate outcome of this Fourth Circuit proceeding has some bearing on the question of harmless error, that should be the theory.

Is that correct? With respect to the concurrent sentence problem.

A I don't know that it would have any connection with the harmless error on the concurrent sentence because it makes no difference whether the sentence on the burglary is 15 years or 10 years insofar as the 5 year sentence concurrent on larceny is concerned.

Q I see.

A They are still served together.

Q You still have 5 and 10 year sentence?

A And he would be eligible for parole after serving 25 percent less time on the 10-year sentence, assuming that is what the ultimate disposition is at the Federal level.

Mr. Chief Justice, in Sibron, I believe that you made the observation that you thought that the pollard had in effect created a presumption of collateral consequence and that

the burden was therefore on the State to prove that there was no collateral consequence and I have read the pollard and quite frankly I see nothing in the opinion itself which directs itself to the question of presumptions on the one hand or burden on the other.

There is just a very short paragraph in there in which the Court says that there appears to be substantial likelihood of collateral consequences insofar as the defendant in that case was concerned and it may well be that the record of the case would disclose that in fact there were some significant collateral consequences on the face that the defendant himselfmight have suffered if the conviction were allowed to stand unreviewed and I merely suggest that because I am not ready to accept that Sibron itself or that the decisions of this court have clearly enunciated the rule that in the mootness cases the presumption exists that there is collateral consequence on the one hand and that the burden is on the State on the other.

But I do share the view of the Solicitor General that even though that may be the rule with respect to the mootness doctrine it should not be and is not we believe the rule with respect to concurrent sentencing and the Hirabayashi rule.

We believe that if you go to Sibron itself one thing is very clear as it is in pollard and that is that in both

instances the Court has pointed out that it is not just simply a case of a possibility, it is not just simply a case of the parade of marbles being dragged along and saying that anything can happen because anybody who has imagination can create a possibility simply because they have an imagination.

But what the Court, you said, Mr. Chief Justice, in the Sibron case was that -- if I have the right quotation -- the conclusion you said St. Pierre versus United States must be read in light of later cases to mean that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed upon the basis of the challenged conviction.

That certainly is not the case here. Sibron has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him and I would point out that in the Sibron case the State acknowledged and admitted that there would be collateral consequences insofar as this particular defendant was concerned.

So I do not argue with Sibron, I do not argue with the doctrine that where there are substantial collateral consequences the right of review should in fact exist.

The same thing is true in Pollard. If we go to the language of the Court in Pollard, the Court said, the possibility of consequences collateral to the imposition of the sentence is sufficiently substantial to justify our dealing

with the merits. Again it is not just simply a claim of collateral consequence but there has to be some showing and I believe that that showing should be the burden, the burden of that showing should be on the ---

Q Mr. Attorney General, may I ask does this sort of thing happen in Maryland? Suppose there were involved here two burglaries.

A Two what?

Q Two burglaries. Separate burglaries, and this petitioner had been tried and convicted by a jury in one week of one of them and the following week he was tried and convicted by another jury of the other. Sentence was imposed on both convictions on the same day, and they were both ten year sentences and they were to run concurrently.

In that circumstance does your State Court, do they apply the---

A I may be wrong but I don't believe they apply the concurrent sentence doctrine.

Q They do not in that case?

A I don't believe so, your Honor, and I hesitate to say categorically they do not because I could be wrong but I do not believe that they do.

Q Do you think that would be a circumstance where you would support that ever applying the concurrent sentences?

A Yes.

Q You think you would support it?

A No, no, I think this would be a circumstance which would warrant the inapplicability of the concurrent sentencing doctrine.

Q But Maryland doesn't use the rule at all in a State Court?

A Doesn't use the what?

Q The concurrent sentence doctrine.

A Oh, yes, yes, yes, we do.

Q Your Courts do.

A I wanted to address myself to that. The Meade case makes it very clear.

Q So you say that the suggestion you had from your opposition that Maryland does not apply the rule at all is wrong?

A I don't know that we said that the rule is not applied at all.

Q The other side. The other side said that.

A The other side, they cited in their reply brief and Mr. Cramer, they cited the case of Brady versus Maryland. Well actually what Brady versus Maryland did if I may, the concluding paragraph of the Court in Brady versus Maryland was although the judgment under the first count and indictment No. 4073 was null and void we see no reason to remand for a new trial since the lower court sentenced the appellant to

ten years in No. 4074 to run concurrently with No. 4073 and the same under the same facts and circumstances.

And what the Court did it reviewed 4073 which ended up by being the bad count but the reason they reviewed it was because it was the first count and they found that invalid. It reversed on that.

It did what the Solicitor General has said, Mr. Strauss has said, and that is sometimes they will review but where it serves no good purpose they don't review because of the efficiency of the judicial system in the appellate system.

In this case the first count was found to be bad. They reversed as to that count but they did not remand because they employed the language of the concurrent sentence doctrine which said in effect it would be harmless in any event and in the case of Meade versus State this was where there was concurrent, a sentence on a number of counts on general sentencing on a number of counts and the Court in effect applies the basic philosophy of the concurrent sentence doctrine in Meade

And would not review all of the other counts once it found one of the counts valid.

Q These are all convictions as I understand it -- I would like to be clear about this -- under your practice this happens only in the case of convictions by the same jury of a number of counts at a single trial?

A This is my understanding but I wouldn't want to

make a representation to the Court because I am not 100 percent sure but I believe I am right.

Mr. Borgodene, do you have any knowledge to the contrary?

If they have rive cases arising out of different sets of circumstances that may be tried the same day, I can see where ---

Q I am not talking about that.

A I understand that.

Q I am talking about separate trials and separate juries but concurrent sentences. That sort of thing happens.

A I don't know of instances where this has happened, your Honor, but if it did, if there was a trial today and next week another trial, two different crimes, two different sets of circumstances, two different indictments and there were two convictions then I think the concurrent sentence doctrine would not apply.

I think this would be the type of instance where the right of review should exist before anything.

Q Why?

A Because then you have two separate convictions by different courts, different juries removed each from the other in time and facts and circumstances are different.

Q What difference does that make?

A And then it could have the possibility of

collateral consequence.

Q Why?

A Because then it is possible that there may be the number of convictions under different sets of facts and circumstances that a subsequent Court imposing a sentence might take into consideration. It might have some effect on ---

Q You mean for purposes of a recidivist statute there clearly had to be two convictions?

A Well, I am not so sure because there is a Florida Law Review article -- I am sorry, I don't have the article here -- but the case comments discusses this question of recidivism and the penalty says many states have statutes similar in purpose to the one in Florida. These statutes generally are of two classes.

Those which specifically state the rule that the commission of each offense must be subsequent in time to conviction for the last previous offense and those that are less specific merely mention previous convictions and subsequent offenses without reference to the time element.

By a great numerical majority courts of States having statutes of the second type have construed that provision as operating in the manner expressly stated in the legislation of the first type.

Considering the philosophy underlying habitual criminal statutes in which classification of the act in question

falls, such interpretations are not surprising. The purpose of most habitual criminal statutes is to protect society from criminals who persist in the commission of felonies.

The statutes contemplate, however, that an opportunity for reformation be given after each conviction before concluding that the criminal habit is incurable.

And that is why I was going to address myself to the point that I think Mr. Chief Justice you raised and that is that the application of the recidivism statutes have generally been and I think all we have is almost uniform throughout the country that they look at what has happened after this given point of time to see whether six months, a year, or two years later there has been a falling back into the old ways and more crime has been committed.

Q Do you have a recidivism statute in Maryland?

A We have no recidivism statute in Maryland. So that it really becomes of no particular consequence as far as this particular case is concerned although I am sure the Court will address itself to the broad question.

One of the things that bothers me about this whole thing is just what is going to happen if the concurrent sentencing doctrine is abolished by this court.

I know what problems we had in the State of Maryland in dealing in the habeas corpus cases with the Federal Court level. We had reached the point that I had to go to the

Governor of the State of Maryland to get additional phones in order to hire additional assistant attorneys general to be able to keep up with the workload in the Federal Court and this is a very difficult situation and is becoming even worse in the State courts.

Now this means that we are having a backlog of cases at the appellate level. We are having a backlog of cases at the District Court level. And the net end result of it is that those who are not out on bail by necessity are going to have to spend more time in jail awaiting either the culmination of their cases on appeal or new trials or whatever the case might be.

And I would hate to think that unless there is a showing of a collateral consequence in the words of Sibron of a substantial nature or in the words of Pollard in a substantial nature that we would create an even greater backlog that would require those people who are now languishing in jail awaiting the culmination of all of their appeals to require them to stay there even longer.

And I think this is a practical question we must adjust ourselves to.

Q Mr. Attorney General, Maryland does have an appeal as of right from a criminal conviction?

A That is right. First to the Court of Appeals and then certiorari to the Court of Appeals.

Q Do you see a distinction of consequence between the consideration of the concurrent sentence doctrine on direct appeal as compared with its application in collateral attack?

A Mr. Justice, yes, I do. I see a distinction in that I think that the concurrent sentencing doctrine should be under all circumstances kept viable on the collateral basis, that is, so that they can't go in under the habeas corpus to the Federal Court after they have had the opportunity to do it on the direct appeal level.

I believe that it is a viable doctrine that should be applied on direct appeal as well as at the collateral level but certainly if it should ever come to pass where it is not kept at the direct appeal level it should never be abandoned so far as the collateral level is concerned.

Because at least that opportunity has been afforded through the method of a direct appeal.

Q General, let me ask you this question.

Assume that we could start afresh now without any consideration of your backlogs or what backlogs would eventuate in the event of taking into consideration all of the cases that have been handled in this manner, what is the great interest in the State and how would the State be hurt by not tacking on this penalty that you say doesn't injure the defendant in any way and I don't know how it is going to help the State to do it.

Why should we have all of this difficulty and all this argument about something unless it is a real vital interest of the State involved. If a man is going to do ten years, why shouldn't he do ten years on the case that he is clearly guilty of and not have this underlying current going on all the time?

A Mr. Chief Justice, I think it simply gets down to the question of the fact that defendants in many instances are tried on multiple counts.

Q Why are they though?

A In this case a jury trial, multiple counts.

You have in this case a jury question. The District Attorney or the States Attorney as we call him in Maryland prepares the indictments the Grand Jury indicts, and they may feel that the then state of investigation that they may be able to prove through these series of facts that there was burglary or they may not be able to prove all of the elements of burglary but they may be able to prove all of the elements of larceny.

Or they may not be able to prove the elements of either one of these and they may be able to prove the elements of housebreaking which were the three counts in these particular indictments. The housebreaking one was by the way abandoned in both instances before the trial took place.

So now you have the case go to the jury as this did.

In one case the jury came in guilty as to burglary, not guilty as to larceny. On the later trial they came in guilty as to burglary, guilty as to larceny.

The judge is now in the position of imposing the sentence. He imposes the sentence on the two counts. He had been found guilty of both. He imposes a sentence on the two counts.

Both of these cases now are subject to appeal. It may be as we did in the Brady case where they found the first count to be defective that they reversed as to that but then they found the second count to be valid and therefore the imposition of the sentence was upheld so that there could be a failure on the part of the State to prove this particular aspect of that particular crime as alleged in the indictment whereas it may be able to be sustained under a second count of burglary, and this is the problem they are using the opportunity to try to on the basis of the facts have a valid conviction and the court then sentences both.

Q Is it your submission that the sentencing judge if he is in doubt as to the legality of the verdict he makes out a concurrent sentence on one that he knows is good, is that your submission?

A I don't really believe, Mr. Justice, that this is the philosophy of the lower court judges in Maryland.

Q I thought you were getting very close to that.

A I would say that almost invariably the courts in Maryland when there are multiple counts and convictions on multiple counts arising out of the same facts and circumstances will impose concurrent sentences.

It is a rare thing, a very rare thing to read where the court below has imposed sentences on multiple counts and made them consecutive.

Q How about just a general sentence?

Does that happen very often?

A Well, we had it in the Meade case. I myself don't have that much contact with the lower courts to be able to evaluate what they do on those. Mr. Borgerding might be better able.

Q But in this very case I just wondered, might there have been just a single sentence of ten years' period?

A There could have been.

Q Yes.

A But I think like Mr. Strauss, the Solicitor General, believes, I think that the rights of the defendant are better protected by the concurrent sentences on the specific counts than on the general sentence.

Q Yes.

A And I would hate to have to go to the general sentence on multiple counts when I think the rights of the defendant are better protected on the specific sentence on the

specific counts.

Q Mr. Attorney General, can you tell me what the actual practice is in Maryland on appeals in criminal cases? Is it really the practice to refuse to review a concurrent sentence? What does your appellate court do? What is the practice?

Is it generally to go ahead and review an appeal from a concurrent sentence or does it generally decline to do it?

A Well, there isn't much legal literature on it.

Q I know that.

A I would say that generally the courts if once they find a good count and the sentence has been imposed is let us say ten years on a particular count and that is the maximum for all counts, that they won't go into the other counts because it is just simply a matter of great inconvenience.

The Court would have to write an opinion. It would have to go down as to each of the counts and it would end up being extremely difficult, burdensome time-consuming function of the court and again unless there can be shown some collateral consequence to the defendant I believe sincerely that it serves no purpose as far as the Defendant is concerned, it serves no purpose as far as the Courts are concerned and it serves a great disservice as far as the other defendants who may be languishing in jail awaiting the disposition of their

cases on appeal or on new trials.

Q Well, General, do you think the views of the District Attorney as you laid them out should be an important State interest where they say well, maybe we haven't much of a case on housebreaking maybe we haven't a very strong case on burglary, and probably we haven't got much on larceny but if we throw them altogether and put in testimony on all of them, why maybe the sum will be greater than the parts, and, therefore, they will convict him on all three and we will sustain all three convictions.

For any sentence the judge might want to give on all three of them if he can pick out of the whole situation enough to convict on one of the counts?

A Well, Mr. Chief Justice, anything is possible. But let me say this: That whatever that conviction is it is reviewable on appeal and if all of those four counts are infected with some error because they didn't mount up to the quantum of proof that the law requires then they would all be reversed on appeal. That is the first thing.

The second thing is and Imust defend the right of the District Attorney to have the indictments handed down on the multiple counts because let us face it, we have some very brilliant defense lawyers who are at the bar every day, and if they can use the technicality of the law, whether it be because of a defect in the indictment or a defect in the proof

or one little scintilla of evidence that might be necessary absolutely to prove this particular thing, they are in a position to find every single one of these doors to walk out of.

And I think then that the State has the right, in fact it has the duty it seems to me, to have the opportunity to make to have the indictments handed down in such a way that if in fact there has been a crime committed which is punishable by the State and it can offer the proof which will stand up on appeal, that society has the right to see that that conviction stands.

Q That is one thing.

But does society have the right to say that if there is sufficient evidence in there to convict under one theory, and the jury finds him guilty of both, and that one of them cannot be sustained, that still both of them should be sustained because one of them can be?

A I agree with you, Mr. Chief Justice, if there are collateral consequences that can be shown to have been imposed upon this defendant because of that state of affairs then there should be the right of review, but I must go with the harmless error theory of my brother, Mr. Strauss.

Q Let me just ask you one question I asked of Mr. Strauss.

Suppose this man ten years from now in another jurisdiction wants to take the stand as a witness either for

himself or for someone else, and he is asked, "Have you ever been convicted of a felony?

"Yes.

"Have you ever been convicted of burglary?

"I have.

"Have you ever been convicted of larceny?"

Do you not think that the conviction on both of those would discredit him more than if he only had to say I was convicted of one offense?

A Mr. Chief Justice, first of all I would say, sir, that there is no question about it, if he asks the question he has the opportunity to explain his answer and if I were the defense lawyer and the prosecuting attorney were to try to pull that kind of a trick before a jury I will tell you I would go before that jury with the greatest argument that any defendant ever had.

Q Maybe you had better make it here.

A It would be foolishness on the part of the District Attorney to try that type of tactic.

Q I think it is done every day.

MR. CHIEF JUSTICE WARREN: We will recess now.

(At 12 o'clock noon the Court recessed, to reconvene at 12:30 p.m. the same day.)

AFTERNOON SESSION

(The oral argument in the above-entitled matter was resumed at 12:30 p.m.)

MR. CHIEF JUSTICE WARREN: Mr. Attorney General, you may continue with your argument.

ORAL ARGUMENT OF FRANCIS B. BURCH, ESQ. (continued)

ON BEHALF OF RESPONDENT

MR. BURCH: Mr. Chief Justice, Mr. Justices, during the course of his argument the attorney for the petitioner raised the question as to whether any evidence of the taking of goods in this particular case should have been admitted into evidence because of his claim that the larceny conviction was illegal void because of double jeopardy.

I think it should be noted that under the law of Maryland the indictment dealing with burglary was the entering -- the breaking and entering with the intent to steal, and evidence was introduced to show that goods had in fact been taken in order to show that the intent to steal was present on which you would base the conviction for burglary.

As a matter of fact it is very interesting in this particular case because the place that the defendant entered was a Wednesday Club. It actually happened to be the property of the people whose goods were taken but it was called the Wednesday Club I believe it was and people came and went and when he was first accosted in the place he claimed that

he was there as a guest of the Wednesday Club so to speak so that it was important that they prove not only the breaking and the entering and the taking of goods or the intent but in case they weren't able to prove the breaking and entering, that is why they had the larceny count to show the taking of the goods.

Q Mr. Attorney General, under Maryland law may burglary be proved without proving an actual larceny?

A It may be -- intent to steal. That is all you have.

Q That is all you have to prove?

A And in this instance then it was the evidence of the larceny which bore on the intent to steal, is that it?

Or you might say the taking of the goods, the possession of the goods was the evidence of the intent, because the best evidence of intent is to tell what you have done and I will tell you what you intended to do.

So that it supports it. It would have had to have come in irrespective of whether it was a larceny count or not it still would have had to come in in order to properly prove the burglary count.

Now, let us go to the question of what were the collateral consequences, if any, that would be suffered by this defendant by the concurrent sentencing.

The first thing is parole. It makes no difference

whether he is in for 10 years or 15 years plus 5 on a concurrent basis because his parole rights are exactly the same.

If I may I would like to read as the Solicitor General has pointed out in his brief when the Parole Board makes a determination as to whether parole should be granted, they look to the background and the circumstances of the crimes committed, the conduct and so on and so forth in trying to determine on a current basis whether or not this particular inmate may make a good parolee.

Under the law of Maryland, which is in Article 41, Section 111 it says that the -- talking about the Board of Parole -- it shall be the duty of the Board in carrying out its powers authorized herein in determining whether a prisoner is suitable for release on parole; one, to consider the circumstances surrounding the crime and the physical and mental qualifications of persons who become eligible for parole; two to determine whether there is reasonable probability that the prisoner if released on parole will remain at liberty without violating the laws and whether the release of the prisoner on parole is compatible with the welfare of society and that is the test that is to be applied by the Parole Board.

Q Are you saying then that any consideration on release date by reason of the fact that he was also convicted of larceny, would be inappropriate and improper under those standards?

A Conviction of larceny would absolutely not come into the picture at all in determining parole because it would go to the facts and the circumstances they would find that the same act was the subject matter of the conviction of burglary and the conviction for larceny, so they take the facts and circumstances as directed and required by the statute and they apply that test and then say is this man eligible, is this man a good risk for parole? This is the sole thing that the Parole Board would be required to consider.

Q That would not be true if he were serving concurrent sentences for two different transactions so to speak?

A If there were a series of crimes and he was convicted of all say five and he was given concurrent sentences, there is a greater likelihood but I don't believe the Parole Board, in Maryland at least, would consider that other than the fact, yes, they would consider the nature of the person his disposition toward multiple crimes.

Q Yes.

A So then on the series of crimes I think probably but that would be a factor that would be involved but this was not the situation in this particular case.

Q I understand that.

A Yes.

Impeaching the petitioner's credibility. Well, as

Mr. Cramer pointed out in his argument he was regretful that in his brief he only indicated that there had been one felony conviction of this particular defendant.

I refer the Court to our supplementary brief on page 20 where we show not only three felonies but we show several misdemeanors plus contempt and this would certainly indicate that the additional conviction on larceny under the same facts and circumstances of the conviction of burglary would have absolutely no effect whatsoever on the impeachment of the witness and his credibility and I believe I gave your Honor, Mr. Chief Justice, an example that if I were the defendant's lawyer I would love to have the prosecuting attorney get up and try to make two crimes out of this thing attacking the credibility because I think it would come back and hit him right in his face if I may use the vernacular.

Affecting the sentencing of the Court I think is exactly the same posture. We are not talking about different crimes. We are talking about one set of facts and circumstances in this particular case and I don't believe that they would have one iota of effect on the Court insofar as the future sentencing is concerned.

Ineligibility for licenses -- here we have a man who has been convicted of three felonies, several misdemeanors and under the law of Maryland you cannot get certain licenses if you are not of good moral character.

The fact that he has had these other felony convictions, the fact that he was convicted of burglary and this other concurrent sentencing for larceny arising out of the same types of circumstances wouldn't affect one iota his eligibility for licenses because he wouldn't be eligible because he wouldn't be of good moral character in view of his record.

The right to vote -- he has been convicted of three felonies. He wouldn't have the right to vote irrespective of what happened in this particular case.

The same thi with respect to the right to serve as a juror.

So when we look at all of the factors in this particular case that go to determine and to give us some indication as to whether there is a reasonable possibility not even a substantial possibility but a reasonable possibility that this concurrent conviction, this concurrent sentencing might have an adverse effect on him or collateral consequences as far as he is concerned, the answer has to be a categorical no, it would not have any effect.

Q Mr. Attorney General, I take it then it is implicit in your argument that if the State did at some time attempt to use and successfully use some prior conviction which had not been reviewed and affirmed because the concurrent sentence rule that at that time the defendant should be able

to object to it.

A I don't think there would be any question about it.

Q Let us assume the State did. Assume the State did, some State, not Maryland, based the recedivism charge on the fact that a defendant had been convicted on the same day of two felonies arising out of the same transaction and counted that as two felonies for purposes of their statute, recidivist statute.

One of them had never been reviewed and was refused review because of the concurrent sentence rule.

Would you think the defendant had a constitutional right at that point to object to the use of that against him?

A If that in fact were the case, your Honor, yes.

In our position as we have set forth in our brief and as I say here today ---

Q Similarly if somebody attempted to impeach him with this evidence?

A He would have the right to put on the record all of the evidence and what not.

Q Well, yes, but why couldn't he say you may not even mention that other conviction because it was never reviewed and was never affirmed. I was deprived of my review of that conviction because of the concurrent sentence rule. Therefore, if the State wouldn't review it for its own

convenience, that is all, wholly convenience, therefore it should never be able to use it.

A If your Honor please, it may well be that this Court might feel that constitutional rights have been denied and if so then that would be a proper case, a proper case but we don't kill the patient in order to cure the ill.

If a proper case has been shown there has been an abuse then there is a remedy to this Court, the Courts of the States, or even the Federal Courts.

Q You are saying if that were the rule it ought to be applied at that time rather than at this stage.

A That is exactly right, your Honor, and this is the position that we have taken both in our brief and I take here before your Honors today that we recognize that there are certain circumstances where there will be collateral consequences if you have a concurrent sentencing doctrine which is applied without any consideration being given to the particular facts and circumstances, but in this case there isn't one single scintilla of evidence nor is there one single argument that I can conceive of, that I have perceived that suggests that there would be any collateral consequences to this Defendant.

Q Are you saying with that argument, if I understand it, do you mean by that that you are saying this judgment should not be reversed on that account but that if a time should come some court somewhere else or even here by some

adverse disadvantages were to be imposed on him on account of both convictions he should be allowed to show it then?

Is that your argument?

A Yes, your Honor.

I have said we were here today to review the viability of the concurrent sentencing doctrine. We take the position that it is viable, it is still viable, it is important insofar as the administration of justice and the expeditious administration of justice is concerned but there are circumstances such as in Sibron which was not the concurrent sentencing doctrine but the mootness doctrine but there are circumstances where there has been a concession that there will be collateral consequences or where there could be proof shown that there were in fact collateral consequences, then in those cases there should be a remedy.

Thank you, your Honor.

MR. CHIEF JUSTICE WARREN: Mr. Cramer.

REBUTTAL ORAL ARGUMENT OF M. MICHAEL CRAMER, ESQ.

ON BEHALF OF PETITIONER

MR. CRAMER: Thank you, your Honor.

Mr. Chief Justice and may it please the Court.

Just a few matters, please, for rebuttal.

Both the Solicitor General of the United States and Maryland's Attorney General have argued that if the abandonment of the concurrent sentence doctrine would

unnecessarily burden the administration of justice.

However, it is interesting to note that the experience of the Maryland Court of Appeal which often review all convictions whether sentences were concurrently served or not, does not indicate that the Court's workload has become unbearable because of its review of invalid as well as valid convictions.

There is no doubt, your Honors, that the Maryland High Courts of Appeals and highest courts review convictions in which the terms are ordered to be served concurrently. I have the volume here. I can quote from them and cite the cases.

Many of them, all of the ones that I have reviewed in fact deal with situations where two sentences were imposed as a result of one criminal transaction.

In other words, situations eminently analogous to the situation which petitioner is presently in.

Q Suppose the Court did not agree with you on this point and should hold that the conviction so far as it is cncerned and the sentence is valid. Would that, would you still have pending before us your double jeopardy argument?

A I believe the double jeopardy argument would still be before the Court, your Honor.

Q There would be no difference. That would have to be disposed of.

A I believe the double jeopardy argument as a matter of justice, sir, must be disposed of in this case, yes.

Q Well, it would have to be disposed of whatever the ruling. If we took on this one why at least if we held it valid, wouldn't it?

Suppose we held it invalid but not invalid as to this case as a valid sentence. Then would your former jeopardy argument have to be reached?

A If the Court, your Honor, held that the larceny conviction was invalid we respectfully submit that they can reach it regardless of the fact that it was a concurrent sentence because we feel that the doctrine enunciated in the case of Sibron versus New York should be applicable to this case.

Moreover, we contend and respectfully request that this Court void both convictions because of the prejudice that was inherent in the trial.

Q Are you arguing a former jeopardy position?

A Yes, sir.

Q How does a proceeding now pending in the Fourth Circuit cut across the propriety of our considering the former jeopardy point or maybe it doesn't. But what do you have to say about that?

A I believe it has no effect, your Honor.

Q Why?

A Were the Court to reject the petitioner's appeal in this case according to the order of the United States District Court for the District of Maryland, Benton would serve no more than ten years in prison.

Q Is that because of the former jeopardy point?

A Yes, sir. It is because of the former jeopardy pdnt that reached the question of whether double jeopardy attached where after in a successive prosecution the defendant received an increased penalty.

Q Now whether that is right or wrong or what its implications are there is a question that is now before the Fourth Circuit, as I understand it.

A That is correct.

Q And it is possible I suppose anyway, possible that its necessarily something that is involved in your submission to this court on the former jeopardy point.

A We did not raise the point, your Honor.

Q But that is a different double jeopardy point, as I understand it. You tel me if I am wrong. That point is on the burglary conviction alone forgetting all about the larceny conviction. On the burglary conviction alone he was given a greater sentence on the new trial, after a new trial. He was given ten years on the first trial and 15 years on the second trial. That is what is involved in the case now pending before the Fourth Circuit. And by contrast this

case involves whether or not he can be tried for a second time at all for larceny having been acquitted the first time.

Am I mistaken about that?

A Not at all. That is correct.

Q Well, I understand that that is the case but I haven't seen the District Court opinion. I didn't know until this morning that the District Court hadn't filed an opinion. But that was what the District Court's reduction of sentencing was here or sentence should be reduced was in response to a full-fledged former jeopardy argument, wasn't it?

A No, your Honor.

Q No, it was not.

A The limited double jeopardy argument increased penalty on a second trial.

Q Is that the only argument that was made to the District Court?

A Yes, sir, and that was based on the case of Patton versus North Carolina, the Fourth Circuit case which held that that was another form of double jeopardy.

Q I see. So the argument that has been presented to us namely the conviction after the dismissal of the larceny count I guess it was, was not presented at the District Court? Is that what you are telling us?

A That is correct, your Honor. The District Court was apprised of the fact that I had this case pending

before this Court.

Mr. Burch, speaking for the State of Maryland, states that in the Sibron case the Attorney General of the State of New York stated to this court at least in his brief stated to the court that collateral consequences did in fact exist in Mr. Sibron's case.

I have before me, your Honor, Volume 25 of the transcript of records and trial copies of briefs on file in this court and I note that from the State of New York's supplementary, respondent's supplemental brief, the Attorney General attempts to negate probable collateral legal consequences rather than admit that they exist.

And, of course, this court did not accept the New York Attorney General's argument in the Sibron case.

Q Does the State of Maryland have any appeal where a jury acquits a man of a crime?

A No, but they do have appeal where the judge acquits him.

Q But they do not where the jury acquits?

A That is correct.

Q And who acquitted this man?

A The jury, your Honor.

I would like to respectfully point out to the Court the petitioner's criminal record is substantially similar to the criminal record which Mr. Nelson Sibron had in the case

of Sibron versus New York, and that there are no cogent reasons for distinguishing this petitioner's situation from the situation that Sibron was in.

On behalf of the petitioner, I respectfully thank the Court for the great consideration they have given to this case.

MR. CHIEF JUSTICE WARREN: Thank you.

Mr. Attorney General, would you mind sending us copies of the opinion of the District Court? That is all we need. We don't need any further argument on it. Just send us a copy.

MR. BURCH: Could I refer the Court to our original brief that says all six questions were considered by the ---

MR. CHIEF JUSTICE WARREN: I know, but we would like to see the opinion.

VOICE: Excuse me, Mr. Chief Justice, but may I address the Court for one more moment?

MR. CHIEF JUSTICE WARREN: Yes, you may.

VOICE: I thank you very much.

I would like to make clear your Honors the question of what happened on the remand.

On page 2 and 3 of the appendix filed with this Court the third paragraph shows that on June 30, 1966, the Defendant challenged the array of the grand jurors.

In other words, the exercised his right to have his

burglary conviction set aside. It was not until two months later as revealed on page 3 of the appendix that he was indicted on the larceny as well as the burglary convictions. So it cannot be said on the basis of this record that at the time he made his election which was June 30, 1966, that he knew of the dire consequences that would face him if he took advantage of the First Amendment rights.

Therefore, your Honor, the second trial for the larceny as well as the burglary was unfair from the very beginning.

Thank you.

MR. CHIEF JUSTICE WARREN: Very well.

(Whereupon, at 12:55 p.m. the oral argument in the above-entitled matter was concluded.)