Supreme Court of the United States

October Term, 1968

In the Matter of:

HN DALMER BENTON,

Petitioner,

vs.

ATE OF MARYLAND,

Respondent.

Docket No. 201

Pt. 1

Place Washington, D. C.

Date December 12, 1968

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

JOHN DALMER BENTON,

Petitioner,

vs. No. 201

STATE OF MARYLAND,

Respondent.

Washington, D. C.
Thursday, December 12, 1968

The above-entitled matter came on for argument at 12:55 p.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:

M. MICHAEL CRAMER, Esq.
Counsel for the Petitioner

EDWARD F. BORGERDING, Esq.
Counsel for the Respondent

P R O C E E D I N G S

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

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Cramer.

ORAL ARGUMENT OF H. MICHAEL CRAMER

ON BEHALF OF THE PETITIONER

MR. CRAMER: Thank you, sir.

Mr. Chief Justice, may it please the Court:

This case is before the Court today on petition for writ of certiorari to the Maryland Court of Appeals. There are two issues in the case: Is the double jeopardy clause of the Fifth Amendment applicable to the states through the Fourteenth Amendment and, if so, was the petitioner twice put in jeopardy in this case? The facts of the case, Your Honor, are these.

The State of Maryland with jurisdiction to do so indicted the petitioner for three alleged violations of the Maryland Criminal Code: Burglary, common law housebreaking and larceny. The jury returned an acquittal on the larceny charge. The State dropped the housebreaking charge.

The jury also convicted the petitioner on the burglary case. Petitioner then appealed the burglary case to the Maryland Court of Appeals. The Maryland Court of Appeals remanded petitioner's conviction, the only thing before it, to the trial court so that the petitioner could elect to have the conviction set

aside.

The remand was made on the basis of Schowgurow v. State, which held that Maryland's constitutional provision requiring all jurors to profess a belief in God or swear a belief in God was in violation of the First Amendment to the Federal Constitution. Petitioner went to the trial court again.

He was indicted again for burglary and common law housebreaking, and because he sought to exercise his First Amendment rights, he was also indicted for larceny in the second case.

In the first case he was sentenced to ten years in prison. In the second case he was convicted, this time of both burglary and larceny. Again the State dismissed the housebreaking charge.

As a result of the second trial, the trial court imposed a sentence of 15 years for burglary, five years for larceny, these terms to be served concurrently.

Prior to the second trial the petitioner duly entered his objection on a plea of autrefoits acquit. But the Prosecutor argued to the trial court that the petitioner had to make an election. Either he could allow the burglary conviction to stand or else if he voided the burglary conviction, he could recreate the indictment against him and he could be tried on all charges that were prosecuted against him in the original indictment.

Q You say he was reindicted?

A He was.

Q He was not tried under the original indictment. That was voided under the Schowgurow Case?

A The original indictment had a fault.

Q So he was tried under the new original indictment?

A That's right.

Q Are you raising the double jeopardy question only as to the larceny conviction?

A We feel that the larceny conviction was such an unfair retrial, retrial was such an unfair procedure that this vitiated both convictions, Your Honor.

Q I gather you are not arguing that the second burglary conviction has to be set aside on double jeopardy grounds?

A We think it should, too.

Q You say because it was affected by the trial on the larceny count?

A And also because of the increased penalty in the second trial, Your Honor.

Q Is that a double jeopardy question?

A I believe so, Your Honor. We rely on the decision of the Fourth Circuit on that point.

Q Did you raise that here in your petition for certiorari?

A Yes.

Q Did you raise it in the State Court?

A No, Your Honor.

Q There has not been a decision in the State Court?

A No, the State of Maryland has decided that Patton v. North Carolina is inapplicable to the increased punishment.

Q I understood you did not raise this question of increased punishment explicitly in the certiorari petition?

A I am sorry, Your Honor, I believe it was.

Q On page 3 the question was, "If so, the petitioner was twice put in jeopardy in this case?" Is that what you referred to?

A What I referred to specifically was Patton v. North Carolina, that the second punishment is excessive. It is interesting to note that the Prosecutor set forth to the trial court the gambling theory, that is, that the petitionerhad to gamble against himself.

The convictions were then appealed to the Maryland Special Court of Appeals, a court enacted to have jurisdiction solely of criminal cases in the State of Maryland. The Court of Appeals affirmed both convictions, essentially on the grounds that no jeopardy attached on a prosecution based on a faulty indictment.

If it please the Court, it is the petitioner's position that the double jeopardy clause of the Fifth Amendment is a fundamental principle of liberty and justice and is, therefore, applicable to the states either by incorporation in the Fourteenth Amendment or through the due process clause in the sense that

the procedure employed by the state was violatative of basic fairness.

Q Was your contention overruled in Palko?

A No, sir, because I don't believe that Palko sanctioned this type of procedure, sir.

Your Honor, I respectfully submit that the Court also carefully set out that in the Palko Case they were deciding only one issue: Does the State have the right to appeal?

On page 328 of the Court's decision in Palko, I believe that the Court leaves open the question that has come before the Court today in this case.

Q In what language did it leave it open? Do you have it there before you?

A Yes, sir. What the answer would have to be if the state were permitted to try the accused over again, would bring another case against him, we have no occasion to consider. We deal with the statute before us and with no other.

Q What was the thing there that they claimed was double jeopardy?

A Appeal by the state. The state appealed alleged error in trial. The case was reversed and new trial was brought. Of course, it is the respondent's position that the double jeopardy clause did not apply and they pitched that solely on this Court's decision in Palko v. Connecticut.

As I stated, we are convinced that Palko never

sanctioned the type of grossly unfair procedure which was employed by the state in this case.

Q Suppose we only have the burglary count. Suppose that is all we had was just burglary. On your double jeopardy argument would you be entitled to a new trial or just to a sentence of not more than ten years?

A You mean had he been prosecuted for larceny and burglary?

Q Had he been prosecuted only for burglary in the second time and got 15 instead of ten years as he got the first time?

A Yes, sir.

Q Does your double jeopardy argument founded on Patton prevail?

A In that case it would be limited to Patton.

Q Then what would you be entitled to, a new trial or new sentence?

A New sentence, Your Honor. It is submitted that the State of Maryland in this case did not adhere to the Federal principle for the application of the double jeopardy clause. I refer the Court to its decision in U. S. v. Ball, which is the most basic type of decision that can be considered on the issue of double jeopardy.

There it was held that double jeopardy attached regardless of the validity of the indictment. And that indictment in the U. S. v. Ball was no more invalid than the indictment in

the petitioner's case.

We submit, Your Honors, that a faulty indictment constitutes no more than an ordinary trial error. Since the Government is unable to undo an acquital because of an ordinary trial error, we contend that they should not be able to set aside petitioner's acquital on this case.

For that reason we ask the Court to reverse this entire case and remand it for a new trial on the burglary charge alone.

Thank you very much, Your Honor.

MR. CHIEF JUSTICE WARREN: Mr. Borgerding?

ORAL ARGUMENT OF EDWARD F. BORGERDING

ON BEHALF OF RESPONDENT

MR. BORGERDING: Mr. Chief Justice Warren, may it please the Court:

The basic question in this case is the petitioner's election to be reindicted by declaring that his original indictment was null and void under Schowgurow and his subsequent conviction constitutes double jeopardy.

It is the State's position that it does not constitute double jeopardy in this case. Now as my brother has indicated, Mr. Benton was indicted in Maryland in 1965 on the three counts, as he had indicated: common law burglary, housebreaking and the third count was larceny. He was convicted of the burglary count by a jury in neighboring Prince Georges County and the State abandoned the second count and he was found not guilty as to the

Maryland Court of Appeals in September of 1965.

The following month the Court of Appeals of Maryland handed down the decision in Schowgurow. So this question of double jeopardy is involved in the procedural setup and what did Schowgurow provide as far as the Maryland judictional system was concerned?

Schowgurow held that the provisions of Article 56 of the Maryland Declarations of Right requiring a belief in God as a qualification for grand jury service or petit jury service was in violation of the Fourteenth Amendment of the United States Constitution.

And that was predicated on this Court's decision in Torcaso a year or two before in which this Court held that the Maryland requirement that a public official express a belief in God under Article 37 was in violatinn.

Now when the Court of Appeals of Maryland reached this decision, it was confmnted with possibly in the neighborhood, it has been estimated, of around 3500 indictments throughout the entire judicial decision of Maryland that had been indicted by an invalid grand jury, if you please. Therefore, they limited the retroactivity decision in Schowgurow to the cases that had not become final as of the Schowgurow decision.

Now in order to implement and carry out this, and it was a gigantic proposition that was confronting the judicial system of Maryland at this time, there were several other cases

that were decided within three or four days. One was State v. Madison. The question in State v. Madison was that any accused that was indicted or convicted by a properly constituted grand jury had the right to have the original indictment declared null and void or his case retried without showing actual prejudice.

Now, Your Honors, the question there was, should a member of the so-called excluded class be entitled to raise this point or was it limited only to the included class, to wit, the persons who did not believe in God?

In Madison the Court, I think, went beyond this Court and held that it applied to both the excluded class and the included class. So that anyone could file a proper proceeding and set aside his indictment, because it was brought back by an invalid constituted grand jury, to wit, a grand jury that was in violation of the Fourteenth Amendment.

And also you will note in that decision they held that the individual did not have to show prejudice -- this was another attempt to protect the rights of the individual -- that he was prejudiced by this unconstitutional grand jury.

Then to cover another point, they had the case of Smith v. State. These all happened within a period of three or four days as they implemented this decision. It was held that "There could be an intelligent and knowing waiver of the defects in an indictment or conviction by such an improperly constituted grand jury." This meant that someone, if he saw fit, could waive

that constitutionally invalid grand jury.

Then the fourth case that came up at this time was Hays and Wainwright v. State. The question here was, did someone have to raise this point in the lower court to have it considered by the Court of Appeals of Maryland and the Court of Appeals held that it wasn't necessary that they raise the invalidi of the grand jury in the lower court.

They all could have benefit of it. Now in that framework the Court of Appeals of Maryland went forth and set up guidelines. They remanded approximately 221 cases, which is an exact figure from their records, that were pending in the system before the Appellate Court. As far as the cases that were indicted, there were some in the classification that they had been indicted, but they had not been tried, some had been indicted had been tried but had not taken an appeal, and other ones who had fallen in the category that they had been tried and they were acquitted and so they were out as far as this illegally constituted grand jury.

Now these are the guidelines that the Court of Appeals of Maryland set down in their notice to the lower court. They said that "The accused was to be brought into the trial court with his counsel present to ascertain whether he desires to avail himself of the relief afforded by the rulings or whether he elects to waive any objections now available to him under these decisions," the four that I mentioned.

"Second, the accused is to be informed of his right to take his conviction and of the fact that the Court would vacate the indictment or conviction if he moved them to do so.

"Third, the accused is to be advised that he is subject to reindictment and retrial if he elects not to abide by his present status.

"Fourth, the accused should likewise be advised that if he be reconvicted, any new sentence to be imposed might be greater or less than the one, or ones, presently against him, within maximum limits.

"Five, the accused is to be told that he can waive any defect in the grand or petit jury which indicted or convicted him notwithstanding the unlawful composition of that jury.

"Six, if the accused elects to accept the indictment or trial jury as valid, the appeal will proceed in the Court of Appeals in the usual way, on the other grounds of error claimed."

Mr. Benton was brought into the Court in Prince Georges County. He was advised of these rights in the presence of his counsel and he exercised his option to declare his original indictment null and void.

Q Where do you find this position stated in the record?

A Your Honor, I would go to the appendix. It would be in the docket entries.

Q On what page?

A It would be on page 2, Your Honor, where it says, "The

defendant challenges the array of the grand jury on June 30, 1966."

Q I read over on page 4, though, where he says, "It is the position of the defendant that the housebreaking and larceny counts, the second and third respectively of this endictment, should be dismissed, should be a bar in jeopardy as in regards to the present prosecution on those counts and that is our motion."

A That is the original motion, Your Honor, that Mr. Benton made in the lower court against the larceny count. Then he has changed it as he proceeded along the appellate road. He has changed it now and raises the point that he is prejudiced on the larceny count by the fact that he was indicted for larceny after being acquitted of the same.

Q Do you concede this portion of his motion that "The housebreaking and larceny counts, the second and third respectively of this indictment, should be dismissed, should be a bar in jeopardy as in regards to the present prosecution on those counts and that is our motion." Do you agree?

A No, sir. The State's position is that when Mr. Benton exercised his right to declare his indictment null and void, the indictment ab initio, it was returned by an illegally and unconstitutionally organized grandy jury and as such, since he exercised that right, an unconstitutional grand jury cannot bring back a valid indictment. The Court had no jurisdiction and, therefore, he was not placed in jeopardy on his first trial.

Q When is the verdict of not guilty final?

A Well, a verdict of not guilty could be final upon its being given, assuming that no one has any rights to appeal and in Maryland the state does not have the right to appeal.

Q A man does not ordinarily appeal a verdict of not guilty, does he?

A You are correct, he does not.

Q When was the verdict of not guilty on the larceny count final in this case?

A I would say it was final on the day it was rendered, Your Honor.

Q If he takes an appeal from the rest of the judgment, how does he vitiate that?

A Well, to go back to our basic premise that the mere fact that that first indictment was brought by an unconstitutional grand jury, that it did not bring back a valid indictment.

Q He did not raise that before he was found no guilty on the larceny count, did he?

A You are referring, I assume, to the second trial. We had two trials, Your Honor.

Q I am assuming when he was first found not guilty. That was final, was it not?

A It was final if the indictment was valid. It was final if the Court had jurisdiction over that indictment. Yes, I would agree it would be final.

Q You mean in any case if a man is acquitted by a jury and his indictment was not lawfully drawn, that there is no jeopardy?

A It depends on -- when you use the term "unlawfully drawn" and there are some cases that say "defective" and so forth, but I say in the circumstances of this case where the Court held that the grand jury that brought back this indictment was unconstitutionally organized under the Fourteenth Amendment of the Constitution, that grand jury cannot bring a valid indictment if that is so.

Mr. Benton made it so by exercising his option. He was told that the indictment would be null and void. He had the right to exercise the right either to make it null and void or not. That is true. Once he did, the Court had no power to try him on an invalid indictment.

Q Aren't you here arguing because of all this void indictment that jeopardy never attached under that amendment?

A Yes, sir.

Q Even though you went through trial and appeal and everything else, for the purpose of the double jeopardy clause that whole proceeding is one to which double jeopardy never attached?

A That's right.

Q Do I understand correctly that there are no rules of different things that a defendant could do?

A Yes, sir.

Q He could waive the invalidity of that indictment?

A That is correct.

Q How can you waive something that is null and void?

A Your Honor, this is null and void at the discretion of the defendant. It was up to him to declare whether he wanted to exercise the right to make it null and void. That is those four decisions.

Q You mean it is up to the man?

A It is voidable.

Q It is now null and void?

A If the man exercises the voidable right, it becomes null and void, does it not.

Q Then his acquittal is also subject to being voidable, is that your position?

A Your Honor, we have to go back to the basis of the acquittal is the indictment.

Q The basis of acquittal?

A Well, he was acquitted on an indictment that was invalid.

Q But he was acquitted?

A Yes, sir, he was.

Q By a jury?

A Yes, sir.

Q So now he is reindicted by a jury?

A That is correct.

Q For the same thing of which he was acquitted?

A That is correct.

Q You don't see double jeopardy at all?

A The distinction, Your Honor, is in the validity of the grand jury, can an unconstitutionally organized grand jury bring back a valid indictment?

Q Have you any cases in Maryland where juries have been found to be wrongly constituted on other grounds?

A In Maryland? Not to my knowledge.

Q The ULEE Case, on the exclusion of Negroes?

A I thought that was in another state.

Q Would that be another null and void?

A In arriving at their position, our Court of Appeals in the Smith Case quoted the exclusion of Negroes from grand juries.

Q Is that null and void?

A I believe that that would be voidable at the option of the included party, to wit, the Negro in that case.

Q If we have a hypothetical case where a man is convicted of burglary and acquitted of larceny and it is found that one of the jurors was a felon and, therefore, it was reversed, you would retry him on burglary and larceny?

A No, sir.

Q What is the difference between that case and this case?

A I don't think that that case is the jurisdiction of the Court. That goes to the illegal sentence, but the Court still had jurisdiction to try the man in the first instance.

Q Did it also have jurisdiction to acquit?

A Yes, sir.

Q Did this Court in this case have jurisdiction to acquit?

A This Court, it is our theory and not the Court of Appeals case, once this man voided his indictment, he exercised his option, the Court did not have the jurisdiction in order to convict or acquit.

Q He was never in jeopardy?

A He was never in jeopardy.

Q He was just in jail?

A Sir?

Q He was just in jail?

A Yes.

Q But never in jeopardy?

A That is correct, Your Honor.

Q Counsel, may I ask you a question here?

A Yes, sir.

Q As I understand the argument, perhaps I am wrong about it, what you are really saying is that the petitioner here waived whatever defect there was in the composition of the grand jury. You refer to that as petitioner having agreed that the original indictment was null and void.

The Chief Justice asked you where that appears. You pointed to page 2 of the appendix, the item June 30, 1966, that reads only the defendant challenges the array of the grand jury. Is there someplace that shows exactly what the defendant did to which you refer as agreeing that the original indictment was null and void?

Do the words "null and void" appear?

A They appear in the Madison Case, which was implementing the Schowgurow Case.

Q I am not talking about that. You said that this petitioner said that the original indictment was null and void. Isn't that what you are saying?

A Yes, sir.

Q Is that in the record and, if so, where? It is not in this appendix?

A No, sir.

Q Is it in the printed transcript of record on file here? You say this defendant, this petitioner, agreed that the indictment was null and void. Isn't that what you said?

A Yes, sir, he exercised his option.

Q I am interested in exactly what were the words used, where do they appear?

A As far as this particular record is concerned, Your Honor, and this has never been challenged, that he exercised his rights in conformity with these cases ---

Q I understand that, but I want to know exactly what happened. What did he say or what did his counsel say for him? Chief Justice Warren asked you that question.

Is your answer to it confined to the entry that appears on page 2 of the appendix?

A Yes, as far as the record here before the Court, it would be limited to that.

Q There is nothing else in the transcript on file?

A Well, the transcript on file was only the transcript of the second trial.

Q When you say the defendant agreed that the first indictment was null and void, that is your inference of law, is it?

A I don't understand when you say "inference of law."

Q I am trying to find out what happened. What did the defendant do? What did he say that leads you to characterize it as a statement by the defendant that the indictment was null and void?

A This question has never been raised by the petitioner.

Q They are raised right now by me.

A Yes, I understand. But I do not have any record of what he actually said and it was never challenged. This is the docket entry as a result of ---

Q The steps you set out in your brief, one, two, three, four, five, six, on the bottom of page 21 and top of 22 of your brief, are the steps thatyou represent were taken in this case

and you tell us that there is no argument about the fact that that is what happened in this case?

A There has never been a challenge.

Q Those six steps?

A Yes, sir.

Q It is on those six steps you are relying, I suppose, for your submission that the defendant exercised a right to void at his option the original indictment?

A Yes, sir.

Q My question to you is that there may be a difference -- I am not saying that there is -- there may be a difference between the defendant electing to appeal and trying to get the judgment set aside, on the one hand, and, on the other hand, the defendant saying that or agreeing directly or through counsel, or both, that the original indictment was null and void.

As I listen to your argument, you seem to put a good deal of weight on that specific characterization, to wit, you say the defendant agreed. But it is now my understanding that that is an inference or a conclusion that you urge upon this Court as a result of the events listed in the first six items appearing on pages 1 and 2 of the appendix.

Now do we have it straightened out?

A Yes, sir, I would say this was the procedure set up by the Court of Appeals and was the procedure, and there has been no objection to it, that was applicable to the defendant Benton.

The only reflection in the record is the notation of the docket entry.

Q I was talking about pages 21 and 22 of your brief?

A Yes, sir. I understand Justice Fortas was referring to the appendix, I believe.

Q The first step is the accused would be brought to trial court. Then it says, "Ascertain whether he desires to avail himself of the relief afforded by the rulings or whether he elects to waive any objections now available to him."

Now was there any transcript made of that proceeding?

A I honestly do not know.

Q So we have no way of knowing, then, what actually happened when he was brought into the trial court with counsel present?

A The reason I do not know ---

Q We have no way of actually knowing what happened?

A This point has never been raised that he exercised his rights ---

Q Is this by statute?

A This was to take care of this particular situation. It was by order of the Court of Appeals of Maryland and lower court that this procedure was set up.

Now Maryland has a case, which is the Barger Case, which follows this Court in the Green Case where Barger was convicted of murder in the second degree. He appealed. His second degree

conviction was set aside on instructions to the jury. It was referred back to the lower court for a new trial.

The state sought to indict him on first degree murder. He objected. The lower court sustained his objection. It went to our Court of Appeals and our Court of Appeals sustained it, too, on the basis that there was a valid indictment.

Q Do you think he would have gone in under step 1 and said, "You set aside that indictment for larceny under Schowgurow so that I can be retried for larceny, though I was acquitted?"

Does that make sense?

A He has to make a choice, Mr. Justice.

Q You call that an intelligent free choice?

A Under all the circumstances it could be.

Q I wonder if this colloquy that begins on page 3 should not settle the matter in view of the fact that there is no transcript on what happened at the earlier date: "Mr. O'Malley: Your Honor, may we approach the Bench?

"The Court: Yes.

"(Whereupon counsel approached the Bench and the following proceedings were had out of the hearing of the prospective jury."

"Mr. O'Malley: Your Honor, I would suggest to the Court that the defendant is now charged with the crimes of burglary, housebreaking and larceny, that at a previous time he was found not guilty of housebreaking and larceny, he was found

guilty of common law burglary. The common law burglary was appealed to the Court of Appeals and while pending by virtue of the Schowgurow decision, it was remanded to this Court at which time the defendant elected to have a retrial.

"It is the position of the defendant that the housebreaking and larceny counts, the second and third respectively of this indictment, should be dismissed, should be a bar in jeopardy as in regards to the present prosecution on those counts, and that is our motion."

Now that is the only thing I see in this transcript and should that not be determinative of what the defendant sought in this case?

A Mr. Chief Justice, there is some question as to what he sought to raise at that time. This was the second trial we are referring to. He raised the point of double jeopardy. But he did not raise the point that he did not exercise his rights within the confines of the order of the Court of Appeals of Maryland.

Q He said all he is appealing is this question of his double jeopardy on the larceny and on the housebreaking?

A He challenged those two counts of the indictment, but this was addressed to the indictment, per se, that the indictment was invalid.

Q You say in your brief, "This, on the record, was an intelligent, knowing and formal choice."

Do you think it was on the housebreaking and burglary

question? You say in your brief, on page 22, that "This on the record was an intelligent, knowing and formal choice, made with the understanding and agreement that his original indictment would be fair and declared invalid, and that he could be reindicted and upon reconviction he might receive an increased sentence."

A On the record if you take it in that context, the record as we had it in the Court of Appeals, Court of Special Appeals, there never was any challenge ---

Q Are you really urging that he made an intelligent, knowing and formal choice to be retried on the housebreaking and larceny counts?

A Yes, sir. The only choice he had then was to set aside the indictment or not to set aside the indictment.

I see my time is limited, but I would like to make a point as to the larceny count itself, Your Honor, although I think my time is up.

MR. CHIEF JUSTICE WARREN: You may proceed.

MR. BORGERDING: As far as the retrial on the larceny count itself, I would like to point out to the Court the first count was common law burglary in Maryland, breaking and entering in the nighttime with an attempt to commit a felony there. In the state evidence was produced to prove the burglary charge, which also proved the larceny charge.

He got a concurrent sentence. In effect, he was not

damaged as such. As to the part on the fourth point, that increased punishment, Mr. Benton has filed habeus corpus in the District Court of Maryland. He has been granted release under that habeus corpus under increased punishment.

The Court ordered the state to either resentence him in sixty days or release him. We have taken an appeal to the Fourt Circuit. So I do not feel that that point is before the Court because he is already on relief on that.

The last point is that he never raised the increased punishment point in the Special Court of Appeals of Maryland.

I thank the Court.

MR. CHIEF JUSTICE WARREN: Mr. Cramer.

REBUTTAL ARGUMENT OF M. MICHAEL CRAMER

ON BEHALF OF THE PETITIONER

MR. CRAMER: I would like to clear up one area. The import of the state's argument is that the petitioner knew precisely what he was doing on the remand proceedings. However, the material cited to this Court by the respondent refutes his argument rather than supports it.

On page 21 and page 22 of the respondent State of Maryland brief, there is cited six questions that were to be asked of the petitioner on the remand proceedings. The Court will note that among the six questions there is no question, "Do you realize that if you elect to be retried, your previous indictment may be revived and you may be charged again on all matters, even

those of which you were previously acquitted?"

There is nothing in this record to support that, not specifically, not inferentially. In fact, the State of Maryland asks this Court to believe that on the remand proceedings the petitioner would anticipate that the state would violate the most basic principles of double jeopardy and I think it is wrong to believe that a defendant would anticipate that the state would do wrong.

Furthermore, and lastly, on pages 2 and 3 of the joint appendix, we note on page 2 that the defendant challenges the array of the grand jury on June 30, 1966. On page 3 we note that his trial was on August 11, 1966. It is reasonable to infer from this that the first time he knew that he would be charged again on the case on which he was previously acquitted was more than two months after he made his so-called election.

Q And on the first day of trial his counsel made the point that he should not be retried for these other offenses?

A Yes, Your Honor, made the point apparently when he first knew of it.

One final thing. The Maryland Court of Appeals in its remand decision never said anything about acquittals, never said anything about any charges other than the one of which he stood convicted. They said we are remanding the conviction. They did not say they were remanding anything more.

I thank you very much, Your Honors.

MR. CHIEF JUSTICE WARREN: The Court is adjourned until Monday at 10 o'clock.

(Whereupon, at 1:40 p.m. the oral argument was concluded and the Court adjourned, to reconvene at 10 a.m., Monday, December 16, 1968.)