Supreme Court of the United States

October Term, 1968

In the Matter of:

FRED BANKS

Petitioner,

vs.

CALIFORNIA,

Respondent.

Docket No. 670

Place Washington, D. C.

Date April 23, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

Fred Banks Petitioner, v. California, Respondent.	:	No. 670

Washington, D. C.
Wednesday, April 23, 1969.

The above-entitled matter came on for argument at 10:43 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:

THOMAS J. KLITGAARD, Esq.
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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 670, Fred Banks versus California.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Klitgaard.

ORAL ARGUMENT OF THOMAS J. KLITGAARD, ESQ.

ON BEHALF OF PETITIONER

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

This is a criminal case fromCalifornia. It involves the application of the harmless error rule to comment and instruction on petitioner's failure to testify at trial.

The crimes involved were robbery and attempted robbery. The only issue was one of identification.

Mixed in a totality of the circumstances was a show-up, a line-up and a showing of photographs by the prosecution to witnesses before trial.

Also involved was the use of petitioner's silence against him in another way. That is, through the use of adopted admissions, through the use of petitioner's silence in the face of accusations.

At trial, procedurally petitioner was without counsel and defendant himself in pro pur.

On appeal there was a partial denial of counsel as we will see.

The case began in 1962. Petitioner was convicted in the Alameda County Superior Court of two counts of robbery and one count of attempted robbery.

He appealed, counsel was appointed, and counsel briefed and argued the case. The District Court of Appeals affirmed the conviction. Counsel the next day after the affirmance wrote petitioner a letter saying he was withdrawing from the case.

There was no evidence anywhere that counsel sent a copy of that letter to the Court of Appeals. Petitioner then went ahead and filed a pro per petition for hearing in the California Supreme Court. The court denied the hearing and petitioner then came here.

He filed a pro pur petition for cert and in 1966 the court granted the petition and in a per curiam opinion remanded the case to the District Court of Appeals for further consideration in light of Griffin against California.

All right. The case gets back down to the Court of Appeals. Petitioner writes to the court and asks for counsel, someone to brief and argue his case. The court denies petitioner counsel. It says he is still represented by his original attorney and if he wants to file a brief he better get one in promptly.

Petitioner eventually filed a brief in pro per. The State Attorney General sent a paragraph in a page and a half

letter to the court saying that the evidence was overwhelming against petitioner and besides petitioner in his pro per petition had not made any factual showing to show a miscarriage of justice.

The court without oral argument about two weeks after receiving the State's letter entered and filed an opinion that incorporated its first opinion by reference and referred briefly to the evidence and then said that "In view of the overwhelming evidence of petitioner's guilt it was not reasonably probable a different result would have been obtained absent the comment on his failure to testify."

Petitioner again in pro per filed a petition for certiorari in this court. The court again granted the writ. This time it remanded the case to the Court of Appeals with instructions to reconsider the case in light of Chapman in the harmless error rule.

Again Petitioner requested the court appoint counsel for him. He did this twice. And again the court refused. Petitioner eventually filed the brief in pro per in the Court of Appeals. The State didn't file a brief, it just sent in a two paragraph letter saying it incorporated by reference everything it had said before and it didn't have anything further to add.

Without hearing argument, without hearing anything from counsel for petitioner who never filed anything on any of

the remands the Court of Appeals, the second time around, entered a two-page opinion and said it considered the case a couple of times before and incorporated its first opinion by reference and then it went on to say in the sentence, "After further consideration we declare a belief based upon the conclusive evidence of guilt that the comment and error and the comment on the failure to testify was harmless beyond a reasonable doubt."

After that petitioner again came here, and he filed a petition in pro per, again asking the court for a hearing. The Court granted the petition last October, appointed counsel and set the case down for argument.

In January this Court denied a motion by the State to dispense with printing the record.

Now, the State contends that at this point on the btality of the record, the comment and destruction on petitioner's failure to testify were harmless beyond a reasonable doubt. It also raises two issues never raised before.

In the Court of Appeals or before on this court even though it answered petition for certiorari first is asays that petitioner waived its Fifth Amendment rights by the manner in which he defended himself in pro per during the trial.

During trial petitioner in cross-examining asked a couple of questions that were less than articulate and it looked like he might have been testifying.

The court corrected him. He got back on the track and continued on.

At the end of trial, during oral argument and after the prosecutor had already commented on his failure to testify and wrapped him up on that as his final clinching point, Petitioner came back and made a few statements that a lawyer would make.

He said he was innocent. The court corrected him and said you can't say that. He said all right, judge, and then he followed the court's instructions and went on and made his argument to the jury as best he could.

Now the State claims that is a waiver. He waived his Fifth Amendment rights. I think the evidence will show as we go along that there was no such waiver.

Neither the trial court nor the prosecutor or any of the lower courts that reviewed this case ever once suggested there was a waiver and not once during argument to the jury or any time during the trail did the judge ever tell petitioner that he was in danger of waiving his Fifth Amendment rights.

The other issue is a jurisdictional point that is raised for the first time.

The State now says the Clerk can't hear the case. It made a mistake. The State says that the court should not have remanded the second time for further consideration in light of Chapman and it shouldn't have granted cert this last

time. The reason is according to the State is that because after each remand the petitioner didn't come back and file a petition for discretionary review in the California Supreme Court.

As to that point, suffice to say that at the very outset of this whole proceeding, Petitioner in pro per went to the California Supreme Court, he was denied a hearing. Under California law that judgment then became final.

After that, this case was bouncing back and forth between this court and the Court of Appeals. What Petitioner was seeking when he came back here each time was enforcement of this court's mandate, enforcement of the directions of this court to give him a hearing in the court below and for that it was proper that he come back here to the court that issued the mandate rather than to a stranger court.

Q Well our mandate didn't say he should be given a hearing did it?

A It said for further proceedings in light of Griffin against California.

Q And so the question that you are presenting to us really is on your theory of the case, is what should those proceedings be or more specifically was the petitioner entitled to counsel and then for purposes of those further proceedings that this court ordered for remand. That is No. 1.

And No. 2 you are raising the question of the standard

to be applied with respect to the determination of harmless error. Am I right?

A Yes, Mr. Justice.

What I am saying is that Petitioner has never had a hearing on this Griffin comment and when I went to the record the thing turned up to be a veritable can of worms. There was the use of adopted admissions against petitioner and this consisted, at trial now, the prosecution adduced evidence that at the time petitioner's arrest the police officer said there had been some robberies and "Buddy, you fit the description."

And petitioner remained silent. He didn't do anything.

Q I notice in your brief you have got a very elaborate brief and you argue a lot of points but aren't those two points that I stated the points that are before us; that is to say, one, whether on the further proceedings ordered by us for the purposes of considering Griffin against California's application to this case, counsel should have been appointed.

And, two, whether the Court below properly applied the harmless error standard.

A Correct, your Honor. And in properly applying the harmless error standard we look at the totality of the evidence introduced against petitioner at his trial and for that reason we get into how the comment fitted into the overall picture.

Q Well, do you conceive then that the proper

standard for determining whether the error was harmless was whether it is not as the court below says -- it is or is not reasonably probable that a result more favorable to Banks, the Petitioner, would have been reached in the absence of the error.

Do you believe that is a correct statement?

A No, I don't.

Q Why don't you tell us as succinctly as you can if you don't mind what you think the standard is. I was reading from page 33 of the appendix. You don't think the reasonable probability of a more favorable result standard is correct, what do you think is the correct standard?

A I think the correct standard is the one this court announced in Chapman, that the court must be able to declare beyond a reasonable doubt that the error was harmless.

Q What does that mean?

A That means that the Court has to look at the evidence, it has to look at the record, it has to look at the overall context of the trial. It has to be able to say that this comment did not contribute to the conviction beyond a reasonable doubt and as to that the burden is upon the State.

Mr. Justice, after going through this record and it seems to me that how can you ever say comment on the failure to testify is harmless. That goes to the basic issue in the whole case, guilt or innocence and no appellate court can see

the impact on the jury when that comment is made. I can't see the widening of the jurors' eyes. Now I know you have ruled already against this point that you can the harmless error rule in the comment cases, but what I am saying right now is that when you get into the harmless error and harmless failure to testify, you have to start in and re-weigh the whole case.

You have to look at the facts, look at how this fits in.

Q Well, certainly the Court of Appeals of the First Appellate District of your State, when the case was before it for the third time, not the second time which is what Mr. Justice Fortas read, the third time after it had been remanded in the light of Chapman, first it was granted as I understand it in the light of Griffin and then it was remanded in the light of Chapman.

This brief opinion appears on 341 and 342 of the appendix indicates that the court at least purported to be applying the rule enunciated in Chapman, didn't it? And that such error was harmless beyond a reasonable doubt, which is exactly what you said the standard ought to be and was said to be in the Chapman case.

A Mr. Justice, what the Court of Appeals did was repeat the language in the Chapman test but how could the Court of Appeal decide this case without hearing a lawyer argue the facts?

Q Well, that is a different question but what I am talking about is the standard that they verbalized.

A Sure, the standard verbalized.

Q Do you think the standard they verbalized is acceptable to you under Chapman? What it means to me based on the conclusive evidence what the court is saying that if you look at the record and see the evidence, look at the evidence of guilt --

A Yes, sir.

Q -- other than the comment, if it is conclusive enough, it is harmless error.

A I don't believe that.

Q Well, isn't that what they said?

A That is right. That is their phrasing, based there upon conclusive evidence of guilt.

Q If you look at the other evidence, and it is conclusive enough, it doesn't make any difference about the error. Now, do you think that is what Chapman means?

A I would hope not. I would hope not. I would think that Chapman means that you have to look -- you don't just look at, you are not just weighing the number of balls in a cannon on one side and the number of balls in the cannon on the other side. Chapman means that you look at all the evidence, not just the evidence that points toward this one result.

In other words, the fact that a jury convicted a man is ---

Q How do you ever -- how can there ever be harmless error then? How can there ever be a harmless error rule then, if you don't look at all the evidence and decide that it is so conclusive that this erroneous piece of evi-ence didn't make any difference.

If you don't do it that way, how can you possible do it?

A I think you are agreeing with me, Mr. Justice. You have to look at all the evidence.

Q I know, but I think that is probably what this court purported to do.

A That is what it appeared to do.

Q Well, how would you state it? Would you say, for example, that if there is any basis on which a jury might rationally conclude that the defendant was innocent?

A No, sir.

Q The defendant is not harmless beyond a reason-able doubt?

A No, the way I think I verbalize the test is the test has to be applied upon the basis of all the evidence in the record, and if there is the slightest doubt that this comment might have convinced one juror, one juror to believe the evidence against the defendant -- and you can't show that

that error was harmless.

Q I see. So what you would say that if there is a basis in the record for thinking that a single juror might have refused to vote for the defendant's guilt, then you can't find harmless error?

A That is right.

Q And you further say that whenever you have comment on his failure to testify there is such a basis?

A Well, why is the prosecutor making the comment? He is not just up there beating his gums.

Q Exactly. That is right. But that I thought was my point of view in the Chapman case and I was all by myself, you know.

A Well, you have somebody with you, standing over here.

Q But we have to overrule the Chapman Case?

A I don't think you have to overrule Chapman to get a reversal in this case because in this case there is all kinds of doubt that petitioner was the robber. Heck, you had three robberies at night. You had two Chinese men come in testifying, they were all excited. One of them said he went to the lineup and he couldn't identify petitioner. He said two weeks before trial the prosecutor brought around a photograph or the police brought around a photograph, a mug shot, and says, "Is this man the man that held up your store?"

The witness looked at the photograph and on the back of it was a description of the defendant, age, height, size, weight, name and on front was the numbers across the chest. The photograph showed the man likely to appear in court without his hat.

Two weeks before trial the District Attorney gets ahold of the two guys that are at least certain of identification at the lineup and calls them into his office and says, "I want you to take a look at a picture here."

"Picture of whom?"

"Picture of the defendant, we are going to try."

"Fine."

"And while we are at it, let us take a look at his clothes." The clothes he was wearing that he took from him the night of the crime.

Then the witnesses come into court and they say,"Sure we identified the defendant."

And all this came out at the trial. I mean any right-thinking juror would have a little bit of doubt about the validity of this eye-witness evidence where the police bring in photographs and show them to the witnesses just before trial.

I mean, for crying out loud, why were they doing it, it wasn't just for the fun of it.

Again, to show you what kind of evidence the State

was using against petitioner which would cast a doubt upon the fact that he was a robber, to have this man who says he could have recognized the robber again if he saw him in the next hundred years. Never forget his face. He really saw him cold.

This man comes in and tells the jury that he didn't remember whether the robber had any grease on his face, for example. Then he tells the jury he didn't remember whether the robber had any whiskers. Petitioner had a decorative lip whiskers under his lip.

The man who says he would recognize him in a hundred years also tells the jury that he was hot when he went to the linup, he was mad, he didn't want to go, that he had work to do. The police told him to come on down and pick out the suspect. You have got him down here.

You have got all of these witnesses who are all over the place in their testimony and if you will look in the brief you will see that they describe a man of all different colors and sizes.

The most important thing, Mr. Justice Stewart, this will show you where the real bite of this harmless error rule comes in.

Here the District Attorney when the case was on remand took the clothing out of the files of the Superior Court and destroyed the clothing used in evidence against petitioner, so there is no way that an appellate court could ever look at

that clothing and see if it were being properly described during trial.

He also took the diagram that was used against petitioner at trial. What happened? Was that the District Attorney had someone come in from his office and make a rough sketch and not one to scale and says "Well, this is the location of the various robberies and so forth."

Then when this court remands the first time, not the second time, but when it remands the first time for consideration under Griffin, the D.A. goes into the files and takes that evidence out, takes that diagram out and destroys it.

He also destroyed most of the other exhibits and it was only by good fortune that petitioner had copies and we were able to get some of it to show what was in the record. They denied they had the exhibits. I had to go over there and fight to get the exhibits.

Q You are not suggesting, are you, any deliberate wrong-doing?

A No, I am suggesting the case dragged on, the judgment became final in the Court of Appeals.

Q Certainly, and the conviction was affirmed and it was remanded by us only for reconsideration in the light of Griffin which involved comment on his failure to testify and didn't involve anything else.

A No, they are nice guys. They are trying to do

their job and I am sure if they had ever thought that they were violating this court's mandate they wouldn't have done it, but the fact remains is the evidence isn't there.

Q Well it was remanded in the light of Griffin, it was simply remanded in the light of a case that it said you can't comment on the defendant's failure to testify. It was a limited remand, wasn't it?

However, I just wanted to make clear in my mind that you were weren't charging ---

A Oh, no, no, no.

Q Let me see if I can understand this. The standard adopted by the court was that the court arrived at the conclusion that there was conclusive evidence of guilt and therefore the error was harmless beyond a reasonable doubt.

And are you suggesting to us, that that is different from the court examining this to see, examining the record to see whether there was a possibility that a juror might not be persuaded beyond a reasonable doubt that this man was guilty?

A Yes, I am.

Q You are saying that that is the vice in this standard?

A That is the exact vice in the standard.

I think when you try a case you can just see at some time when the jury's eyes widen at certain evidence. Where was the missing witness? You can always see the jury's eyes

widen at that. And that is the frustrating part about the harmless error rule. You just can't measure the impact on the jury when you come up on appeal. You can kill by a single bullet.

That comment at the trial, at the end of trial as in this case, at the very end of the prosecutor's argument he was winding up, the point he used against petitioner as he hadn't got up on the stand and testified.

Then petitioner got up and his argument he said, and he tried to go through the facts and went through about showing the photographs and so forth, that he hadn't testified because he didn't think the Government had proved its case and so on.

The prosecutor got right back up to that and he said to the jury, "Look here," he said, "you can't expect all the witnesses to agree on what they saw and besides his lineup showed that he was guilty, picked him out right there, and besides that there is a lot of circumstantial evidence in this case. Lots of it. Let us look at the circumstantial evidence," the prosecutor said. And this was the whole last part of his argument to the jury, the closing argument.

He says petitioner here was cool, cool, you saw him here in court, how cool he was defending himself. Well the robber was described as cool.

You heard the evidence that there was some money in petitioner's pockets. That is circumstantial evidence. Other

circumstantial evidence is when the petitioner was accused of being the robber by the policeman at the time of the arrest. And one of the witnesses said to him in the lineup corridor, "That is the man."

Petitioner remained silent. That is evidence. That is circumstantial evidence and you can take into consideration the fact that petitioner didn't testify and the court is going to tell you and I am telling you now that if he could have denied it, you will be instructed that you can infer that he wasn't able to deny it. And you can take his failure to testify into consideration.

Now petitioner's defense basically was that he was a plumber, he had earned his money, he had been working up in Pittsburg, a little town outside of Concord, outside of Oakland, and the prosecutor got up and says, "Well, we know" as his last punch at petitioner after this other failure to testify business, he got up and said, "Well, you know petitioner says he has earned his money and so forth, but we all know lots of people who have bills and things like that, and we don't know that the money petitioner had in his pocket was the same money he earned. Because he hasn't got on the stand and told you."

And then he says petitioner asked why people rob. He says you can ask lots of people why people rob. Lots of persons you could ask that question.

And then he says to the jury at the very end, winding up, "You can take into consideration not just the direct evidence but look at all this circumstantial evidence that we have just been talking about. You can reach your verdict on that."

Then the court went on to instruct on these accusations, that that was something the jury could consider as an admission of guilt, instructed on the failure to testify. The State makes a big deal out of petitioner copying somewhere from the California Standard Instruction Book in long-hand the instruction on the failure to testify and giving it to the judge.

The judge had already told petitioner he was going to give the instruction. The judge didn't give the instruction that petitioner tried to write out but gave a far more damning one and told the jury the petitioner was in a position to understand all of this and know the facts and then denying them and then the jury could take that into consideration.

There is one other point I want to testify to -- to bring up, not testify to -- and that is the denial of counsel at trial.

Now, petitioner had been represented by the Public Defender at the preliminary hearing and at arraignment and as you can see from reading the briefs there are three crimes. It is important that if he could as a tactical matter the

petitioner be tried separately on each of those crimes because then you avoid that overlap and modus operandi argument that the prosecutor made.

So petitioner goes to the arraignment and the public defender tells the judge he wants to make a motion for separate trials.

All right, but then instead of arguing the motion he tells the judge we will take it under submission.

The next week or so they come back to court for a hearing and the judge turns to the public defender, to the prosecutor and says, "What do you have to say about this motion for separate trials?"

The prosecutor, the D.A. makes his pitch. Then the petitioner's lawyer gets up and says, "Well, the pleadings are defective." And that is about it and the court overrules the motion for separate trials.

Petitioner then the next time they go to court, petitioner asked the public defender if he can ask the court a question and he says to the judge, "Say, your Honor, I don't think it is constitutional if you try me all at the same time for these crimes."

And instead of defending, standing up for his client, the public defender says to the judge, "Well, your Honor," he said, "this is the same thing I raised before a couple of weeks ago and you have already ruled against petitioner and

he is just raising the same point now but on a different constitutional ground."

The defendant says, "I think it is reasonable," and so forth.

And the judge without hearing from the D.A. simply goes ahead and denies the motion.

Two weeks later petitioner comes back before the judge for a hearing to set a trial date. He says to the judge, he butts in, and he says, "Your Honor, can you take care of this constitutional thing for me" on a similar offense.

And the public defender says, "I don't know what he is talking about now, Judge." You have already ruled on the motion for a separate trial.

Then the judge denied and the judge says, "Well, he is talking about separate trials on each of the three counts and the motion is denied.

Then petitioner says, "Well, I don't want to be represented any more by the public defender."

The court looks at the charges and says, "Pretty serious crimes, you can't waive them."

But the petitioner says, "I don't want to be represented by this man any more. It doesn't look like the public defender's office is any match for the D.A. around here, not qualified."

Well then the judge says, "All right, you can go to

trial by yourself but we will have someone from the public defender's office sit inside the courtroom with you to help you out.

And just then the public defender pipes up and says, "Wait a minute, your Honor, may I be heard? Look, this guy looks like a wise guy. He is trying to pull something off here. He is trying to look like the poor little man in front of the public D.A. being picked upon and if one of these legal points bounces on him it is going to be real tough. I don't want any part of this mixed-marriage, either he goes alone or he goes with us."

Then the Court then said to the public defender, "Listen you have someone there in court."

So about two weeks later petitioner comes up for trial before a different judge and this judge gives proper petitioner warning, inquires into petitioner's background, he finds out he has got a record. A young man in Illinois who has been convicted for murder, been out on parole in California, working as a plumber up in Pittsburg, sixth grade education, mentally defective, been in a hospital, mental treatment, emotionally upset about the charges and the judge says, "You can't defend yourself. No man should defend himself on a felony charge."

And petitioner says, "I am not going to stick with this public defender. I want somebody who is qualified and

someone who I have confidence in."

The judge says, "Well, take the public defender or nobody."

Meanwhile, while all of this is going on, of course, there is an assistant public defender listening to what happens at trial, what is being said.

The case comes back, the judge says, "Well, all right, you will have to go by yourself. I can't give you any help."

And then petitioner in a real flash of brilliance says to the judge, "Well, it will look better on appeal if I go up without counsel."

And the judge jumped up and he says, "What do you mean by that?

Petitioner says, "What I mean is, I think I still have a right go counsel, to appoint someone other than the public defender."

So he goes before the next judge. He disqualifies the judge and he asks for a change of venue to go back before the first guy. He gets back before the first judge, the one who heard the public defender call him a wise guy and this judge says, "Well, you can still have the public defender."

He says, "I don't want the public defender. Just appoint anybody from the Oakland Bar, anybody other than the public defender, somebody I can believe in."

The judge says, "Go to trial with the public defender

or without anybody."

And then he says, "Well," and then petitioner says, "Well, how about this guy who has been sitting here, the Assistant Public Defender."

The Assistant Public Defender was present during the second proceeding when all of this came out about petitioner's background and so forth. He didn't say a word to the judge about that. He kept his mouth shut.

So the third judge, I mean the first judge who heard petitioner called a wise guy and finally the judge who tried the case but the public defender was inbetween them both didn't report back to the trial judge what he had heard at the prior proceeding that petitioner had a sixth grade education, was a plumber and so forth and so petitioner goes to trial.

Q He doesn't sound so retarded though.

A Well, if you see what the judge said to him during voir dire, Mr. Justice, petitioner conducting voir dire to the jury you see and here he is alone and he says to the jury, he is trying to explain what separate offenses are and if the jury can keep them straight.

And one of the jurors says, "I don't understand the question."

The judge says to the juror, "Well, you can come over here and join me."

And then another time during the voir dire petitioner

was asking the juror about juvenile delinquency -- and I will shut up right after this -- but he asked the judge about -- he was asking about juvenile delinquency and the judge says to the petitioner, "You look a little bit old to be talking about juvenile delinquency, ha ha ha."

And there is petitioner taking it on the chin.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. O'Brien.

ORAL ARGUMENT OF EDWARD P. O'BRIEN, ESQ.

ON BEHALF OF RESPONDENT

MR. O'BRIEN: Mr. Chief Justice, may it please the Court.

The initial point that I wish to bring to this Court's attention is that of this Court's jurisdiction to review the present case.

This Court's jurisdiction in reviewing State court's decisions is, of course, limited to those judgments rendered by the highest court of a State in which decision could be had.

After this Court remanded the Banks case to be reviewed in light of Chapman, the Court of Appeals of California rendered its decision on October 2, 1967. Petitioner did not thereafter petition for a hearing in the California Supreme Court.

It is well settled that the judgment of an intermediate appellate court is not that of the highest State court where

discretionary review is available and not sought. That is precisely the situation here under the California Constitution and laws, the California Supreme Court has discretionary power to review the Court of Appeals.

And, therefore, the judgment in this case is not that of the highest court of the State.

Q Now, had he asked the Court of Appeals for counsel?

A Yes, your Honor.

On the remand, he sent a letter in to the Court of Appeals stating that he wishedæ second counsel or a different counsel, and gave as his reason that his appointed counsel on the original appeal, decided in 1964, did not raise the Griffin constitutional issue.

The Court of Appeals answered petitioner's letter and pointed out to him that he was not, in effect, that he could not expect counsel to anticipate that to be clairvoyant to spot the Griffin issue in 1964.

Indeed, this court has said as much in the O'Connor versus Ohio case and he gave no other reason to the Court of Appeals as to why he should be entitled to a second or different counsel.

In the reply brief in an effort to avoid the ---

Q Is there anything in the record from the lawyer?

A I beg your pardon?

Q Is there anything in the record from the lawyer?

A The appointed counsel, your Honor, at the time of the remand did not file a brief.

Q Did he do anything?

A He filed nothing with the court, your Honor.

Q Did he argue?

A No, your Honor. There was no argument in the case.

Q Well, did he have counsel?

A Yes, your Honor, he did.

Q How?

A He had been appointed counsel, Mr. Chefsky, by the Court of Appeals and on each remand, the Court of Appeals informed both the petitioner and his counsel that if they wished, they could submit additional written argument on the Griffin and then the Chapman issue.

Q But did he have counsel in any effective way?

A Yes, your Honor, in this sense, that he had appointed counsel and then it was a choice by counsel as to whether or not to file a supplemental brief on the Chapman case.

Q Well, wasn't the case sent back for that purpose?

A For the Court of Appeals to review in light of Chapman, yes, your Honor.

Q And I would assume that counsel on both sides would be prepared to argue on that point?

A Yes, your Honor, they would be.

Q And in this case, petitioner had no counsel on that point?

A Oh, yes, well I disagree with your Honor.

Q Well, show me something that he said, wrote or did, the counsel.

A He did not write anything to the court.

Q Did he say anything to the court?

A No, your Honor, he did not.

Q And yet you say that he had counsel?

A Yes, your Honor, the question being in other words, we can take a case in which a case is before a court and while it is before that court, a decision by this court or perhaps by the California Supreme Court comes down and the question would be: Is there a duty on the part of counsel, whether retained or appointed. to file a supplemental brief on this case which has impact on that appeal.

Now, I think in that situation that due process does not require an automatic brief, or supplemental brief to be filed in that situation. That is what we have here. He had counsel on the initial appeal and he ---

Q What you really mean is, if he is so guilty he doesn't need it?

A Oh, no, your Honor. It has nothing to do with his guilt.

Q Well, you don't take the same position as the court, though, do you, that just because he is guilty nothing will save him?

A No, your Honor, and I don't believe the court took that position in this case.

Q What was that last sentence in the opinion?

A Your Honor, I believe the court applied the standard laid down by this Court in Chapman that the question was whether or not the error in viewing the error, whether or not the court could declare a belief that the error was harmless beyond a reasonable doubt.

Now, in applying that standard laid down by this court, certainly a court of review must take into consideration two factors, two factors or more.

One is the nature of the error and the extent of it and, secondly, the nature of the case. And that I believe is what the Court of Appeals did in the Banks case.

Q But here you have some sort of a proceeding when the case was before the court for the third time, did Mr. Chefsky file a paper or enter an appearance -- I assume his appearance had been entered before, had it?

A Yes, earlier. Yes, your Honor.

Q And if you consider this as part of the same record as I suppose we might, you would assume nevertheless that counsel would file some sort of a paper and say, "Well, I

am still counsel to petitioner. I have nothing further to say."

A Well, your Honor, there had been a series of cases before the California Appellate Courts involving remands from this court and all possible variations occurred, namely, that counsel do not file a brief, that they do file a brief and that some are argued, and the results also vary where in some cases there is no argument or brief and nevertheless the case may be reversed, depending on the nature of the case.

Q Well, I have seen a lot of those cases and I guess that is one of the reasons for a good deal of interest in this case on my part.

A Well, yes, your Honor.

Q You see what I mean.

A Yes, your Honor, but I would point out that the courts have, depending on the nature of the comment, and various facts and circumstances, they have both reversed and affirmed in the individual cases.

Q Do you have a procedure in California of an order which says "upon the briefs and arguments"? I know it is in the order here, because you couldn't have such an order here. You couldn't file an order that said "The court upon the consideration of the case and briefs and arguments orders". They couldn't say that here?

A No, your Honor. And the more common order I would say is merely that the cause is submitted.

Q Well, was this submitted? Was this submitted? Did the petitioner ever submit this case to the court?

A Yes, your Honor.

Q How?

The only letter I saw was a letter asking for a lawyer.

A No, your Honor. There was also a brief filed by petitioner.

Q Did he say he submitted and didn't want to argue? Did he waive argument?

A No, your Honor, he didn't.

Q Well, why wasn't he permitted to argue?

A Your Honor, he was -- for the simple reason that he had counsel and that in such a situation the defendant does not npresent the argument.

Q And so the counsel can waive his rights?

A Clearly, yes, your Honor.

In other words, I would say that the practice in courts on whether or not you argue a case on appeal after is the choice made by counsel.

Q It is?

A There are many cases, your Honor, in which the ---

Q Well, assuming that the paying client says, "I want you to argue," what happens?

A Well, your Honor, that would ---

Q Well, if the paying client says, "I have given you $25,000 more dollars and I want you to argue my case," you mean counsel submits without argument?

A Well, that would be up to the individual counsel.

Q It sure would.

But in this case, this man had an almost nonexistent counsel?

A Well, your Honor, in the situation of retained counsel that you speak of, retained counsel on occasion both in criminal and civil cases, make a determination not to orally argue the case.

Q Well, he didn't argue this any way, either orally or written.

A No, your Honor. It was originally argued by the counsel, your Honor.

Q But in this one that is before us now, counsel didn't argue any way, any how, any time, any place.

A He did not argue the Chapman issue, your Honor. He did argue the entire case before the Court of Appeals when it was before them.

Q This time?

A No, your Honor.

Q Well, I am talking about this time. This is the one that is before us now. He did nothing.

A Yes, your Honor. However, when the case is

reamdned it is back before the court as a current appeal.

Q And his counsel did nothing?

A He filed no documents with the court, your Honor.

Q Did he do anything else in the court?

A No, your Honor.

Q I wonder if you would tell us whether there is a rule of the District Court of Appeal with respect to oral argument, and if so, what is it?

A Your Honor, as well as I know, the question of oral argument is that it is not required in every case and as a matter of practice, oral argument in the Court of Appeals in California in many cases is not conducted.

Q I understand that. I wondered whether there was a rule of court that would indicate who has the option of making that decision?

A Well, your Honor, the -- I think it merely states that it may be done and is not particularized, and in practice it is done quite often through even phone calls.

Q You mean just by the court, doing it without asking parties, the court just deciding a case without asking parties whether they want to argue it or not?

A Well, in this type of situation, namely when we are dealing with the equivalent of a supplemental brief on a particular point, as distinguished from the initial, original appeal.

Q In assuming that you were wrong, on your ideas about the lawyer, what do you say about the rest of the case? Assuming that you were wrong and the court might think well then I will have the lawyer come in and argue that point, which is a reasonable position I would say.

A Yes, your Honor.

Then the next question is that of the effect of the comment in this case. Now it is necessary to look both at the comment and the evidence in this case and particularly in this case, unlike most cases before this court and the California courts, we have the unusual situation that the petitioner in effect attempted to testify to the court on certain matters.

Throughout his cross-examination of various witnesses, the petitioner made testimonial statements concerning his actions on the night in question and also concerning statements of witnesses.

The prosecutor objected and the court admonished the jury to the effect that the petitioner had not taken the stand and that the statements could not be considered as testimony.

Now this court has held in the Caminetti cases and later cases that the privilege against self-incrimination can't be waived when a defendant elects to testify and indeed this court approved a comment by the court in Caminetti that the jury could consider the defendant's failure to explain acts of

incriminating nature that the evidence established againsthim in reaching their conclusion as to guilt or innocence.

Q But that is not the basis on which the decision below was rested by the court.

A No, your Honor, but it is before this court as to whether or not the comment in this case was erroneous.

Q Well, are you sure about that. I rather thought it was a question of whether they were right or wrong or we should hold them right or wrong and their conclusion that this was harmless error.

A Yes, your Honor.

Q Now that requires a consideration of the evidence doesn't it?

A It does, your Honor.

Now, referring to that evidence, the evidence shows that there were within the space of one hour, there was an attempted robbery, two completed robberies and an aborted robbery committed within one hour.

Q Where?

A In Oakland, California, in East Oakland, California, all within the same basic geographical area.

The first attempted robbery occurred at approximately 11 p.m. at Vince's Liquors, which involved Roger Wong and Harry Jow. The petitioner walked to the rear counter and standing three feet from the witnesses, lifted his right in

his coat pocket in this manner (indicating) and said, "Give me all your money."

He then said, "Do you want to die? Give me all your money."

When Wong heard this, he lookeddat petitioner and he saw the pocketed hand on the counter. Wong then picked up a .38 pistol from under the counter, reached over and he struck the petitioner on his pocketed right hand.

Wong then ordered the petitioner to hold his hands up and the petitioner said, "Go ahead and shoot me," but Mr. Wong testified that he could just shoot the man and the petitioner then left the store.

Fifteen minutes later at about 11:15, Petitioner entered the Three Point Liquor Store, approached the clerk, Perry, and again with his right hand in his pocket, simulating a gun, said "Hand over the money."

When Perry did not respond, Petitioner said, "If you don't want to jeopardize your life, hand over the money. And I'm not kidding."

Q You say petitioner said that. Who identified him?

A Mr. Perry, the witness to who he was demanding the money identified him and two other witnesses, Mr. Griffith and Mr. Jones who were in the store.

Now Mr. Griffith was standing right behind the

petitioner and as petitioner then left, Mr. Jones came in and in effect bumped into him.

Now, both Mr. Perry and Mr. Griffith identified the petitioner and there is no question about their identification at the trial level.

They also identified him at the lineup, and were, Mr. Perry was quite positive in his identification.

Q How many people identified him?

A Well, your Honor, there is again additional -- he then robs, petitioner then robs Linden Liquor Store at about 11:30, and at that point the store is owned by Mr. Pauletich, he again simulates a gun in his right hand contained in the pocket ---

Q The precise method that was used at the other ---

A Yes, your Honor.

And demands the money. And he obtains $165, including 30 to 40 $1 bills. As the petitioner was leaving ---

Q How many identified him there?

A The owner, your Honor, Mr. Pauletich.

Finally, 15 minutes later approximately ---

Q Is there any question about the identity there?

A No, your Honor, and I will bring that out in that the robbery occurred at 11:30. He then goes to Sobek's Liquor Store and goes into the store and asks the proprietor, Mr. Smith, whether he had a gun.

Smith says, "Why do you want to know?"

And petitioner says, "Well, I might want to hold you up."

Just then Officer Nielsen walks into the store. Smith tells Nielsen what petitioner had said. Nielsen informs him that there had been some robberies in the area and says to Banks, "Buddy, you fit the description."

The officer then arrested him and in searching for weapons they discovered various currencies in $1's, $5's and $10's in his pockets.

The officers then bring the petitioner to the closest store, Linden Liquors which Mr. Pauletich owned.

Q There were three robberies?

A Yes, your Honor. There was one attempted robbery, two completed robberies and one aborted robbery.

And there was a total of six witnesses at the first three stores. There are two in the first store, three in the second store and one in the last store.

Q Yes.

A Then they bring him back ---

Q Did anybody deny that or was there an alibi shown?

A No, your Honor, no alibi. The only defense and it was a very weak defense presented in this case is that he had earned money at a prior time and even that, when the

witnesses are examined they are confused about the dates and about the amounts of money.

Q Was there any testimony by the defendant, offered by the defendant for witnesses, not from himself as to indicate where he was at the time these robberties occurred?

A None, whatsoever, your Honor.

After, the petitioner was then taken to the last store and Mr. Pauletich identified him, stating "That is the man."

He was then taken to the Oakland Police Department. The officers found more money in various pockets and his wallet for a total of $176, including 31 $1 bills, similar to the amount described by Mr. Pauletich.

Q As having been taken from him?

A That is correct, your Honor.

Then when Nielsen asked petitioner where the money came from petitioner responded that he cashed a check that day. He never attempted to show that he had cashed a check that day at trial.

Officer Nielsen, still concerned about the gun, since each of the witnesses had mentioned the hand covered in the pocket, said, "What did you do with your gun, Fred?"

Petitioner responded, "I didn't havea gun. If I had one, I would probably have killed somebody tonight. Guns make me nervous."

Now we then look at the comment in this case.

Q And before you get to the comment, is that evidence which you have given all the evidence that appears with reference to his guilt or innocence and is that the evidence on which the court found that the error in the comments was harmless?

A Yes, your Honor. There were other corroborating circumstances which I should inform the court of. One was that as you recall, Wong at the time he was being robbed, reached over and hit Banks on his hand with a gun because he couldn't bring himself to shoot the man.

After he positively identified Banks at the lineup, he had requested the officer to look at his hand. He looked at his hand and there was a black spot right on his right hand.

Q That was the hand he had used?

A That was the right hand he was simulating a gun in the robberies.

The other point would be the 31 $1 bills, similar to the money that this Mr. Pauletich described. The other is the statement previously mentioned that he made to Mr. Nielsen, and, of course, quite important is the seventh witness, namely the witness to the aborted robbery.

Now there, there can possibly be no question about the identification there for the simple reason that while he is starting in on it, the police come in and he again had made

the statement to Mr. Smith, "I might want to hold you up" in relation to his question whether he had a gun.

That is the evidence ---

Q And in addition to that, does the State make any argument that the judgment of its judges that this error was harmless was entitled to any consideration here?

A Oh, yes, your Honor. Clearly, for the simple reason that in this case the appellate court has reviewed this question in light of Chapman and it has come to the conclusion that it was harmless beyond a reasonable doubt.

It has expressed its belief as required by this court so that this is not, of course, a question of initial review or the question of the application of the standard as was posed to this court in Chapman, where this court had to decide both the standard and then apply it.

This case, the standard has been applied by a Court of Review and it has come to the determination that in this case the comments were harmless beyond a reasonable doubt.

Q Mr. O'Brien, are these the same judges that heard the other one?

A Your Honor, I believe ---

Q I can find it.

A I believe they would be the same, your Honor. The change did not occur until after that time.

Q This court was the first appellate district?

A Second Division, yes, your Honor.

Q Second Division, and that is what area of the State?

A That is basically the San Francisco Bay area.

Q And this trial was in San Francisco, in the city.

A Alameda, your Honor, right across the Bay.

Q Yes. And the Judges were Judges Schumacher, Agee and Taylor?

A That is correct.

Q And that is Division 2?

A Of the first district.

Q And does that consist of only three judges?

A Yes, your Honor.

Q Unless there was a change of personnel ---

A There was no change at that time. There has been subsequently but not on these decisions.

Q I suppose that there is some doubt as to whether the court applied the correct standard contemplated by Chapman. The question is whether the harmless error is harmless error in terms of a judgment of the court, that there was conclusive evidence of guilt which is what was done here or whether the court's task is to determine whether beyond a reasonable doubt no rational nor reasonable jurur could have felt or could have arrived at a different conclusion absent the

improper comment?

A Well, your Honor, I believe the Court of Appeal in this case applied that standard.

Q Applied which standard?

A Pardon?

Q The Court of Appeals applied the first standard; that is to say, it looked at the whole record and said on the whole record we find there is conclusive evidence of guilt but I am suggesting the possibility that may not be the same thing, as if the Court of Appeals had looked at it to determine whether a single juror might have declined to find the defendant guilty in the absence of the ---

A Well then, your Honor, we get into a question of what this court stated in Chapman and in that situation this court stated it was merely a restatement of the original Fahy standard, namely whether there is a reasonable possibility the evidence complained of might have contributed to the conviction, and I think that is the standard that was applied here and that it is the -- that Chapman contemplated a review by the reviewing court on that question.

Q Mr. O'Brien, do you think that when this court sends the case back for reconsideration in the light of a certain case that the court can just say without more, to -- "We have considered it and we adhere to our former opinion," and that is exactly what happened in this case.

It says, "Now we are again directed after appellant's petition to the United States Supreme Court to reconsider our determination in view of its decision in the light of Chapman versus California."

And the Chapman case, the United States Supreme Court announced that before a Federal constitutional error could be held harmless the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

We have given further consideration to this cause in the light of Chapman. We approve and adopt this part of this opinion incorporated herein by reference our original decision September 16, 1964.

That is all they did.

A Well, your Honor has omitted the most significant part, namely the final sentence, namely as to the error in commenting and instructing on defendant's failure to testify, we declare a belief based upon the conclusive evidence of his guilt that such error was harmless beyond a reasonable doubt.

The court here complied with the remand by this court, namely, to consider the Chapman standard. This court did not say "Reverse this case."

Q No, not at all.

But my point is this: Do you think that when we send a case back to be reconsidered in the light of another case that all the court has to do is to say without more, "We have

reconsidered it and we adhere to our former opinion."

Do you not think it calls for some review of the situation through counsel or through petitioner or some way to satisfy the mandate of this court?

A Well, your Honor, I think that the reviewing court makes that determination and in some cases may determine to proceed in that manner but in other cases would proceed in the manner in which it did here, namely, sending a letter to counsel and petitioner asking whether or not they choose to submit additional written arguments.

As far as the manner in which they treat it in the opinion, I think they have applied this standard. Now, it would seem to me to be a matter of discretion with the State courts as to whether or not they go through an extended opinion pointing out the precise nature of the comment, the circumstances surround it and then referring to the evidence.

Q Could I ask you a question?

A Yes, sir.

Q Since Chapman, have there been cases in your court where there has been a remand from this court where your court has invited counsel to participate in the argument? In the reconsideration?

A Oh, yes, your Honor.

Q There have been? Are those listed in your brief?

A No, they are not.

Q You understand my question. It is prompted by your suggestion that it was discretionary of the state court to invite counsel to submit a brief or submit an argument for having looked over the record to say, "No, there is not enough there to warrant that procedure."

My question is whether they have ever done that in any case since Chapman.

A Well, your Honor, I would actually say that they have done it in every case that I am familiar with, namely ---

Q Invited counsel?

A Yes, your Honor, sending letters stating that the case has been remanded.

Now, quite often counsel on the case will not receive the documents from this court of remand. They go to the Court of Appeals and are not necessarily -- counsel on the case is not necessarily binding, depending on whether or not, of course, he was on the petition for certiorari.

Q Does the court act on its own initiative in that kind of a case or if counsel doesn't make a motion for an argument, is it simply dealt with by ---

A No, your Honor, it is basically as in this case by way of a letter advising him of the situation and then asking whether or not they wish to submit additional written arguments. That is the basic practice that I am acquainted with in

both the First District and for that matter other districts.

Q Was there such a letter in this case?

A Yes, your Honor.

Q It was a letter that went to the lawyer?

A Yes, your Honor. There is a letter to the lawyer which states precisely that.

Q Is that in the appendix?

A Yes, your Honor.

Q Could you lay your hands on it quickly?

A Yes, I can.

Page 326, your Honor, would be one example in which the letter to Mr. Banks with a CC to Mr. Chefsky, states the United States Supreme Court has vacated the judgment of this court in the above-entitled case and has remanded the case to us for further proceedings in light of Griffin versus California.

This court wishes to know whether it is your desire to submit anything further to the court by way of written argument before we proceed to decide the case pursuant to the directions of the United States Supreme Court ---

Q Wasn't that before the second, not the third ---

A Well, yes, your Honor, there is a similar letter on the current one in which it states, "Enclosed is a copy of an order vacating the submission granting you 30 days in which to file a supplemental brief."

Q What page is that?

A That is page 337, your Honor.

"Inasmuch as this case has been restored to our list of active cases by order of U. S. Supreme Court, Mr. Robert Chefsky continues to represent you and no other attorney will be appointed in his place.

"If Mr. Chefsky desires to file a further brief on your behalf he will be permitted to do so."

Q Well, in this, on 335, which is that that is the second one, isn't it, but he did ask to argue, Banks did ask to argue his own case?

A That is correct.

Q And he was denied that right?

A Yes, your HOnor. In other words, the letter I just read is in reply to that that Mr. Chefsky is his counsel.

Q And he cannot argue for himself?

He could not argue pro se?

A Not when he is represented by counsel, your Honor. In other words, the basic case is whole that you have a right to one of two things, a right to counsel or a right to defend pro se, one or the other but you are not entitled to a hybrid of those two.

Q Does he have a right to fire his counsel and argue himself?

A Yes, when there is a substantial reason given, your Honor. Yes.

Q May I ask you if you were here yesterday?

A I beg your pardon.

Q May I ask you if you were here yesterday? When a man was here, counsel that had been appointed for him by this court and he asked the court to let him talk and the court refused to do so?

A Well, your Honor, I was not here. If I had been here I would have called it to this court's attention. And certainly there are cases before this court, decided by this court without any briefing or argument on a given point.

Certainly the recent case of Roberts versus Russell is an outstanding example wherein this court had neither brief nor argument before deciding that particular issue.

Q Now wait a minute, you mean no brief?

A I beg your pardon, your Honor.

Q Oral argument.

A No, no brief discussing the issue of retroactivity or oral argument, to be more correct. The basic decision in Roberts was that Bruden would be retroactive.

Q What do you think Chapman meant by the reference to the burden, burden on the party which had one below?

A Well, your Honor, the burden is clearly on the prosecution, in effect, to show ---

Q Well, what did the prosecution do here?

A In this case, your Honor?

Q No, in the third go-round, it didn't do anything, did it?

A Yes, your Honor, it submitted a letter ---

Q Saying we don't care to brief it any more.

A That is correct, your Honor.

Q That is point one.

Point two, what do you think about the bearing of the statement in Chapman, which is quoted from Fahy in this case. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Do you think that is the same thing that was stated by your court? That is, your court said that we conclude that there is convincing evidence of guilt. Is that right?

A Well, your Honor, this Court ---

Q Do you think those are the same standards?

A Yes, your Honor, for the simple reason that this Court said that the standard laid down in Chapman was nothing in effect -- it was in effect a rephrasing of the very standard in Fahy, and I don't ---

Q Well, I read you what Chapman says, quotes from Fahy. Do you think that that is the same thing as saying that "Based upon the conclusive evidence of his guilt." Do you think that is the same thing as saying that to paraphrase the standard in Chapman taken from Fahy, that the same thing as saying that "There is no reasonable possibility that the

evidence complained of might have contributed to the conviction."

Do you think those are the same thing?

A Yes, your Honor. for the simple reason that in Chapman this court was merely in effect, rephrasing it, stating that it was "There is little if any difference between our statement in Fahy and the standard beyond a reasonable doubt," and I think it is not incumbent upon ---

Q Did they use that word as a standard beyond a reasonable doubt?

A Yes, they did, your Honor.

Q Is that a sufficient standard according to Chapman?

A I think it is, your Honor, for the simple reason that otherwise this court would then require every appellate court throughout the nation to state, not only beyond a reasonable doubt but further there is no reasonable possibility that the evidence complained of might have contributed to the conviction

Then this court would then be requiring, it would seem to me merely a semantic parody by the reviewing courts throughout this nation to comply with this court's decision in Chapman.

I for one think that this Court was rather clear in Chapman and that the courts in California have attempted to comply with this court's ruling. And I think that the Banks case is no exception to that.

Q Mr. O'Brien, I notice Mr. Klitgaard's reply brief suggests -- well what it says, it was doubtful that the State Supreme Court could have granted review, that is, on either remand, even had it wanted to citing two California decisions.

A Yes, your Honor, that statement is clearly incorrect. The law is settled that every deicison of the Court of Appeals of California you have a right to discretionary review.

The two cases cited by counsel merely state that the Supreme Court has no jurisdiction to review a Court of Appeals after the statutory 60-day period has expired.

Well, obviously, that is true of any basic review including certiorari in this court.

Q Well, what actually happened here when we sent back for the first time under Griffin, all that the record shows is an opinion which ends with "judgment affirmed."

Now, what does it mean by judgment affirmed? That is a judgment of conviction, isn't it?

A That is correct, your Honor.

Q The initial judgment of conviction. Was there any new judgment entered at all at that time?

A Not at the trial court, however, your Honor.

Q No, no, no. Was there a judgment entered even in the Court of Appeals?

A Oh, yes, your Honor.

Q There was? It is not in the record anywhere.

A Yes, your Honor, it is the decision rendered by the ---

Q That is a decision. I am asking a judgment.

A That is the judgment, your Honor, which became final as to the State Court, 60 days after its rendition.

Q In other words, the practice is not in the Court of Appeals when it affirms a judgment of conviction to enter an independent judgment of affirmance of the conviction?

A No, your Honor, the only thing is at the time it becomes final a remittitur is issued to the trial court which occurred on all three occasions in this situation. At the time of the initial affirmance ---

Q Are those remittiturs anywhere in this record?

A Yes, your Honor, I believe they are. But it is by law they are issued when the case becomes final which, unless the Supreme Court grants a hearing is 60 days is 60 days after ---

Q Well, when you petition for a hearing in your Supreme Court, what is it you petition from?

A You petition from, you actually petition from the judgment of the trial court in the sense that if the petition for hearing is granted, then the ---

Q Well, may I ask, a petition from the judgment of

the trial court on this second go-round, he did attempt to go to the Supreme Court from the initial ---

A Oh, he did go there, your Honor, and the hearing was denied.

Q And it was denied.

Now, the second time, would he go back again and petition from the same judgment of conviction?

A Well, your Honor, perhaps I misstated that.

He petitions for hearing based upon the decision of the Court of Appeal. In other words, the common thing in the petition for hearing is to point out why the decision of the Court of Appeals is incorrect.

Q Well, is the form, "I petition from the judgment for conviction for error in the decision of the Court of Appeals", is that ---

A That is correct. From the decision of the Court of Appeal. The only reason I perhaps misspoke it is that if the Supreme Court grants the hearing, it then in effect negates the decision of the Court of Appeal but the petition for hearing is from the decision of the intermediary.

Q But you are telling us that both the second time and the third time he might have done what he attempted unsuccessfully to do the first time; that is, to go to the Supreme Court for a hearing on the decision of the ---

A Oh, yes, your Honor, there is no question here

that he clearly had the right to seek review in the ---

Q There have been a lot of remands to the District Court of Appeals from this court in the last couple of years. Do you remember any, where after the remand an action by the Court of Appeals, there actually was a petition to the Supreme Court of California, which was granted?

A Yes, sir. Well, I know one case in which People versus Boyden, I believe it is, in which the conviction was affirmed in 1959, it was then -- he reinstituted it based on Douglas in 1964, came up here and was remanded in light of Chapman.

Q To whom?

A To the District Court of Appeal.

There the petitioner petitioned for a hearing, it was denied, he then petitioned for a certiorari in this court and this court denied the petition for certiorari.

Q Well, I know but you don't know whether the Supreme Court denied the hearing because it couldn't hear it or because it wouldn't hear it?

A Oh, yes, your Honor, it is clear ---

Q Oh, I know you say it is clear but it just might be very helpful if there was actually an instance in which the Supreme Court actually reviewed a case after remand.

A Well, your Honor, I think I can forward to this court a case in which the Supreme Court did review it. The only

thing I don't know about that particular case is whether or not it was done pursuant to a remand in this case, but it did involve a Chapman-type issue and a hearing was granted on it.

As to the question of the California Supreme Court's being able to review this judgment, I think there is no question about it based on the Constitution and laws as set forth in our brief.

MR. CHIEF JUSTICE WARREN: Mr. Klitgaard, your time has expired, but in view of the long time we have taken here, you may have five minutes after lunch if you wish to summarize your case.

MR. KLITGAARD. I wish to.

Thank you, Mr. Chief Justice.

(Whereupon, 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. Klitgaard, you may proceed.

REBUTTAL ORAL ARGUMENT OF THOMAS J. KLITGAARD, ESQ.

ON BEHALF OF PETITIONER

MR. KLITGAARD: Thank you, Mr. Chief Justice.

Mr. Justice Black, you asked about the evidence of the trial pointing to the petitioner.

There was lots of doubt that the petitioner was the robber. In petitioner's pockets, the police found $176. Within half an hour the robber had obtained $235 to $265 in cash.

Furthermore, the last robbery, the one involving Pauletich netted some 20's, $20 bills and when the police searched petitioner they didn't find any $20 bills on him. He did have any.

At the last liquor store where petitioner was arrested there was absolutely no attempt to rob that liquor store. The clerk on duty testified during trial there was no attempt at all made to rob the liquor store. The petitioner had not done anything except make that comment.

There was one witness who the robber come out of the last liquor store. And he saw the robber come out the store

and go down the street. He walked after the robber, followed him, saw him get into a car and drive away. That man was called to testify at the trial. He could not identify the robber, he did not identify petitioner as the robber, he couldn't identify anyone.

Significantly, that one witness was the only one of all the State's witnesses that wasn't shown a photograph of petitioner before trial and that didn't take part in the suggestive lineup outlined in our brief or in the show-up. He was the only one who hadn't been exposed to petitioner beforehand.

Q Mr. Klitgaard.

A Yes, sir.

Q Let us for just a moment get back to this threshold question we seem to have in this case.

Justice Brennan asked your brother counsel about the statement in your reply brief saying it was doubtful the State Supreme Court could have granted a review even had it wanted to in citing those two cases. Do those cases really stand for?

A Yes, sir, I am glad you asked the question.

Here is what they stand for. These are cases in the California District Court of Appeal where after its judgment became final, the 90 days passed, the Court of Appeal modified its opinion like the court did here, didn't modify the judgment -- the judgment still stayed the same but it modified the opinion.

And from the modification of the opinion there was a petition to the California Supreme Court for a hearing and here is what the California Supreme Court said, "It said a different situation would be presented if the modification by the District Court of Appeal had been solely with regard to its opinion. Such a modification would not have affected the judgment which would in that event have become final in that court on the date specified and the Supreme Court wouldn't have had power to grant review.

Q Of course, in this case we have set aside a judgment twice but we are talking now about the last time.

A Right.

Q And we have set aside a judgment and remanded it to the Court and so that started everything going again. The judgment was vacated.

A Yes, your Honor, but the judgment was still basically the same as it had been in the case the whole time.

Q Yes, but it had to be re-entered, didn't it?

A Something had to be done to it. It had to be re-entered.

Under the California rules of appeal, Mr. Justice, even had petitioner filed a petition, Rule 29 of the California rules prohibits the California Supreme Court from reviewing just on factual questions and under that rule the California Supreme Court will not look behind the statement of facts or

the dealing of factual matters in the Court of Appeals in its opinion.

Now that is not cited in any of the briefs but it is upstairs in one of these West Books. It is Rule 29.

Q Well, now is this another ground you suggest that the petitioner ---

A I thought these cases ended the matter when the California Supreme Court says as long as judgment remains the same, if the opinion is modified, that doesn't start the time running again. But as an additional ground, there are these additional grounds, the court's own rules prohibit review.

Q Yes, but if one of your arguments is whether or not the standard used in terms of harmless error was used by the District Court of Appeals, was correct or not, that sounds like a pretty clear question of law which you could have taken to the California Supreme Court.

A Well, you must remember, Mr. Justice, that this time petitioner didn't have any lawyer. And if you are going to say to petitioner, "All right, you have to go back up and down," then it becomes important to decide whether the petitioner had a right to help him on that discretionary review.

Q You mean when you haven't got a lawyer, you don't need to get the judgment of the highest court of the State?

A I am not saying that. I am saying if petitioner

went to the highest court of the State, the court denied him review, at that point the judgment under California law became final, by anybody's standards.

When the case came back down again there was no tampering with that judgment. The judgment remained the same.

Q You just set it aside is all.

A It was vacated.

Q Yes, it was no longer in effect until it was re-entered.

A It was reaffirmed.

Q And what did we set aside. What judgment did we vacate?

A You vacated, your order says you vacated a judgment of the Court of Appeals.

Q That is right. We didn't vacate the judgment of conviction.

A No, you didn't vacate that. That remained in effect.

Q You could not have gone, the first time. to the Supreme Court of California, I gather, until that judgment, which we vacated was entered by the Court of Appeals. Is that right?

A I didn't follow your question, Mr. Justice.

Q What went to the Supreme Court at the time the petitioner attempted to ---

A Oh, the first time out?

Q Yes, that was the judgment of the Court of Appeal, wasn't it?

A I believe it was the judgment. Let me answer it this way, because there is an esoteric question here in California law.

Once the California Supreme Court takes its discretionary review, and it can do it on its own motion or petition, once it does that the whole Court of Appeals proceeding becomes an utter nullity, as though it never existed. The opinion can't be cited for anything has no authorities pressing or anything else, and in that case when it goes up to the California Supreme Court, it is then reviewing the judgment in the trial court.

Q I see. But now when it denies hearing ---

A That ends it.

Q And that means that the judgment, the final judgment, appellate judgment in the case is the judgment of the Court of Appeals?

A Correct. That is right.

Q And isn't that the judgment of the Court of Appeals that we vacated?

A That is right.

Q And then when the new opinion was filed, what happened? a new judgment of the Court of Appeals or a

reinstatement of the original one?

A A reinstatement of the original judgment. I mean there wasn't any change in the judgment.

Q Well, on page 342 it says "judgment affirmed."

A Well, Mr. Justice, the judgment was affirmed. That is right. The judgment of the trial court, but where was petitioner during this time when the case was back down again? He was still in jail. The judgment of the trial court was still in effect.

Q But you say this judgment could not go to the Supreme Court?

A I beg your pardon?

Q You say that this judgment could not go to the Supreme Court.

A If I were a lawyer in California advising petitioner at this time, I would say you did not have to go to the California Supreme Court, because of the two cases I cited and because of my knowledge of California rules, Rule 29, which says that the California Supreme Court can't look into these factual matters.

Q Do you consider this fa tual matter? I don't see any facts in here at all.

A The whole harmless error rule, Mr.Justice, is one of fact. You look at the overall ---

Q It is applying a rule to the fact, right?

A Yes, every case involves that.

MR. CHIEF JUSTICE WARREN: Mr. Klitgaard, you may take a few moments on the evidence, if you wish to continue.

MR. KLITGAARD: Let me just come back to Mr. Justice Marshall's point.

Those two cases I cite in my brief, I think, on why the California Supreme Court couldn't do it if it wanted to pointed up the whole heart of the matter.

Now, as to the argument on appeal, as to whether there should have been oral argument, the California statute says that a California appellate court in a criminal case cannot reverse a judgment unless it hears argument.

That is Section 1253 of the Penal Code.

Now counsel has informed me that in Douglas against California, which is the, remember right to counsel case on appeal, there was a remand to the DCA for further consideration in that case, that after the DCA appointed counsel there was another issue brought up by counsel at trial and then the Supreme Court granted a hearing, California Supreme Court granted a petition on the different issue on right of counsel at trial.

But here you weren't having in this case different issues coming up, you were still having the same issue each time.

MR. O'BRIEN: In reply to Mr. Justice White's

question, there is the -- the Douglas case is an example where after this court remanded it to view in light of this decision, the District Court of Appeal affirmed the case. Appellant at that point, petitioned the California Supreme Court for a hearing in a number of issues and they granted it. It went off on the question as to whether or not he was entitled to separate counsel at trial, but they granted a hearing and reversed the case.

MR. CHIEF JUSTICE WARREN: What is that rule that says that the Court of Appeals cannot reverse a case unless the case was argued?

MR. KLITGAARD: Penal Code Section 1253, Mr. Chief Justice.

It says, "The judgment may be affirmed if the appellant failed to appear but can be reversed only after argument though the respondent failed to appear."

Q That is a pure question of State law we are not concerned with.

A Well the question you were concerned about was the oral argument and there was some inquiries about the rules and I just bring it up to be helpful.

MR. O'BRIEN: Mr. Chief Justice, just in connection with 1253, I would call that to the Court's attention for the simple reason that it says may be affirmed if the appellant fails to appear but can be reversed only after argument though

the respondent fails to appear.

In other words, that is situation wherein the respondent state in the criminal case may argue the case there isn't the equivalent situation with regard to the appellant. And 1253 therefore does not govern this situation.

MR. CHIEF JUSTICE WARREN: Had you finished, Mr. Klitgaard?

MR. KLITGAARD: Yes, unless the Court has some additional questions.

MR. CHIEF JUSTICE WARREN: Very well.

Mr. Klitgaard, we want you to know that the Court appreciates your acceptance of our assignment to represent this indigent defendant. That is a real public service and we are grateful to you for it.

MR. KLITGAARD: Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE WARREN: Mr. O'Brien, we appreciate, too, the diligent manner in which you represent the people of the State of California.

MR. O'BRIEN: Thank you.

(Whereupon, at 12:44 p.m. the oral argument in the above-entitled matter was concluded.)