TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF NORTH CAROLINA,

Petitioner,

vs. No. 70-77

WAYNE CLAUDE RICE,

Respondent.

Washington, D.C.
October 12, 1971

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STATE OF NORTH CAROLINA, Petitioner,	
vs.	No. 70-77
WAYNE CLAUDE RICE, Respondent.	

Washington, D. C.,

Tuesday, October 12, 1971

The above entitled matter came on for argument at 1:00 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

JACOB L. SAFRON, Assistant Attorney General, Post Office Box 629, Raleigh, North Carolina, For Petitioner.

WILLIAM W. VAN ALSTYNE, ESQ., Counsel Assigned By the Court of Appeals, Duke University Law School, Durham, North Carolina 27706 for the Respondent

CHIEF JUSTICE BERGER: We will hear arguments next in No. 77, North Carolina against Rice. Mr. Safron, you may proceed whenever you are ready.

MR. SAFRON: Mr. Chief Justice, and may it please the court: This case is before this court upon a petition for writ of certiori to the U. S. Court of Appeals for the Fourth Circuit which held in Rice versus North Carolina that upon the strength of Pearce the imposition of a greater sentence is impermissible in a situation in which a defendant receives a trial de novo in the Superior Court from a lower criminal court and that was the legal conclusion without the courts giving any legal reasoning. The court then went on to state in reference to all the cases to the contra that they simply disagree and ordered the State of North Carolina to expunge any record of Mr. Rice's conviction in the Bunkin County Superior Court. Wayne Claude Rice was originally arrested on July 2, 1968 for driving under the influence of alcohol. On July 19, 1968, he was tried in the Bunkin County Court which was then in existence and received a sentence of a nine month sentence suspended upon payment of a fine of $100 and costs. As was his absolute right, he applied for a trial de novo in the Bunkin County Superior Court. On August 2, his right to trial de novo was assured and on that day, he first pled

guilty to 12 offenses of uttering worthless checks and then was tried upon his plea of not guilty on the charge of driving under the influence.

QUESTION: I noticed, Mr. Safron, in the brief, the reference to the worthless check charge. That has nothing to do with the issues before us at all.

MR. SAFRON: Only in this regard, your Honor: There were these 12 worthless check charges. He pled guilty to those, was then tried upon a plea of not guilty as to driving under the influence. The sentences that were then imposed he received a two year active sentence for driving under the influence, the maximum then permitted under the law, but at the same time when the judge sentenced him as to the worthless check charges, he was sentenced to 12 consecutive one month sentences to run concurrently with the sentence imposed for driving under the influence.

QUESTION: But it was only partially concurrent. In other words, one was a total of one year; the driving while intoxicating was two years?

MR. SAFRON: Yes, your Honor.

QUESTION: So, we do not have really the concurrent sentence doctrine?

MR. SAFRON: Not except for -- for the first year the sentences were concurrent; whereas the court could have imposed the sentence consecutively, it was imposed concurrently

and he received no greater sentence as a result of having pled guilty to the worthless check charges.

QUESTION: We have at least one additional year based on the driving while intoxicated?

MR. SAFRON: Yes, your Honor, that is true.

QUESTION: And in the original so-called sub-constitutional court to quote your adversaries, sentence was what?

MR. SAFRON: His original sentence was 9 months susperded upon payment of $100 fine and costs.

QUESTION: So, we have before us this issue squarely presented.

MR. SAFRON: Quite clearly.

QUESTION: It is not blunted at all really by the concurrent sentence doctrine.

MR. SAFRON: Not at all. In fact, concurrent sentence, your Honor, I believe is merely something that applies to the Federal judiciary and is not applicable to the States.

QUESTION: There was only one indictment, the forged check?

MR. SAFRON: That was something separate and apart, your Honor. He received 12 -- there were 12 warrants in the County Court. This dates from January of that year --

QUESTION: Was he indicted?

MR. SAFRON: No, your Honor. He applied for trial de novo in these cases.

QUESTION: For the worthless check cases?

MR. SAFRON: Yes, your Honor.

QUESTION: And was he convicted by the same judge below?

MR. SAFRON: Before whom he appeared in the driving under the influence, your Honor?

QUESTION: Yes.

MR. SAFRON: I have no idea.

QUESTION: I am very confused how the check thing got involved in this case.

MR. SAFRON: Only in this respect, your Honor: On the same day when his trial de novo for the worthless checks came up for hearing, he also was on for hearing for his drunk driving charge.

QUESTION: That was a de novo trial too?

MR. SAFRON: These are all de novo.

QUESTION: What is the maximum sentence for the bad check charge?

MR. SAFRON: It depends, your Honor, upon the amount. At the present time, if it does not exceed $50, the maximum is 30 days.

QUESTION: were these all under $50?

MR. SAFRON: Apparently so, your Honor.

QUESTION: How many offenses subject to this procedure of a trial de novo?

MR. SAFRON: Every petty offense, your Honor. The right to trial de novo is an absolute right granted in the North Carolina constitution.

QUESTION: But only for particular offenses?

MR. SAFRON: No, your Honor. For every offense which is originally tried in what are not say the District Courts. This could be an ordinance violation. An overtime parking ticket. Traffic violation.

QUESTION: What offenses are subject first to trial in the District Court?

MR. SAFRON: In the District Court, your Honor? Or perhaps let me express it the other way: The original jurisdiction of the Superior Court is only applicible to felonies. All other offenses the District Court has original jurisdiction. That is --

QUESTION: In the District Court, in any of the cases tried in the District Court, no right to trial by jury?

MR. SAFRON: There is no right to trial by jury in the District Court, your Honor, in criminal manners.

QUESTION: Every offense triable in the District Court is an offense as to which on conviction the

accused may have a trial de novo of right, is that it?

MR. SAFRON: That is exactly right, your Honor.

QUESTION: Are these worthless check charges, would they have been triable in the District Court?

MR. SAFRON: Oh yes, your Honor.

QUESTION: I see. Were they in fact in this case?

MR. SAFRON: Oh yes, your Honor. They were tried in what was then the County Court.

QUESTION: Did he plead guilty?

MR. SAFRON: And then he appeared and pled guilty.

QUESTION: He pled guilty to the worthless check charges?

MR. SAFRON: Yes, your Honor.

QUESTION: What punishment did he get in the District Court or the County Court on those charges?

MR. SAFRON: I am really not sure, your Honor.

QUESTION: In any event, whatever it was he appealed and got what, a new and larger sentence?

MR. SAFRON: No, your Honor, I believe it was the same but I am really not sure.

QUESTION: Mr. Safron, was this his first offense?

MR. SAFRON: Oh no, your Honor. This gentleman has a record dating back to 1948. I have here the so-called FBI wrap sheet. It starts in 1948 and he has spent more time in custody --

QUESTION: Was this his first conviction for driving while intoxicated?

MR. SAFRON: No, your Honor. In 1962, he was convicted of escape, temporary larceny of an automobile, larceny of an automobile and drunk driving. This was --

QUESTION: It was not his first. This explains the nine month sentence originally below.

MR. SAFRON: Your Honor, I would say this: Unfortunately, the District Courts are the courts of original jurisdiction. This is where the great mass of cases are tried. The felony cases are only a minuscule part of the total case load in the criminal judicial system. Unfortunately, in the District Courts, the District Court judge does not have made available to him all the resources which are available in the Superior Court.

QUESTION: Well, I am confused about two things. In counsel's brief, it is stated this was Mr. Rice's first conviction for driving while intoxicated. This is a misstatement.

MR. SAFRON: This is a misstatement, your Honor.

QUESTION: Then, secondly, I am confused about the nine month sentence imposed in the County Court when the statute says for the first conviction only 30 days.

MR. SAFRON: Oh, we are talking now, your Honor,

of nine months for driving under the influence. Thirty days was the bad check charge.

QUESTION: I am not talking about the sentence. I am talking about the statute. Doesn't the statute make the first offense punishable in no more than 30 days?

MR. SAFRON: No, your Honor. Now, there is a problem involved here due to the fact that the sentence for driving under the influence was administered subsequewt to Mr. Rice's trial. Whether or not that amendment in the statute and the downgrading of the maximum should fog the issue here, I am really not sure. The maximum now, I believe, is six months for first offenses, driving under the influence.

QUESTION: In any event, he got nine months.

MR. SAFRON: He received nine months at a time when two years was a permissible maximum, your Honor.

QUESTION: Only for a third offense?

MR. SAFRON: No, your Honor. At that time, the statute permitted up to two years for first offenses driving under the influence. He did receive the maximum but this is fogging the issue because of a subsequent legislative downgrading of the maximum sentence.

QUESTIONL: Well, it is evident I am be-fogged by your statutes. Maybe Mr. Van Alstyne can straighten it out.

MR. SAFRON: But, since I have this here, I just want to point out that, since 1948, Mr. Rice has spent more time in custody than he has out of custody.

QUESTION: One last question. Even if he were to plead guilty in the lower court, does he have a right to a trial de novo in the Superior Court?

MR. SAFRON: There is an absolute right to trial de novo in the State of North Carolina, your Honor. It does not matter whether or not the defendant pled guilty or not guilty. If he pled guilty and is not satisfied with the sentence that is imposed, he can apply for trial de novo that wipes the entire proceeding clean. It is completely off the record and he will then have an opportunity for a jury trial in the Superior Court as if nothing had ever happened before. I have just been advised that according to Mr. Rice's prison jacket, he received the same sentence in the Superior Court as he had received in the County Court upon the worthless check charges. Now, subsequent to this --

QUESTION: Let me clear this up before we go along. Is it possible that the information about his prior record came to the attention of the court, the second court involved in the de novo trial?

MR. QSAFRON: Your Honor, I am confident that upon his trial in Superior Court, which was then the

responsibility of the solicitor, a full jury trial, that this information was obtained. Now, I am familiar with procedures in the District Courts, previously the County Courts. The only record available to the judge at the time is a list of the man's convictions in that particular court. The court does not have available to it, due to the tremendous number of cases which are processed, the availability of, say, an FBI record, or in our State, a S. B. I. record in addition to determine the man's total background. I know when I have tried cases in the District Courts, you merely have a box which contains a card with the man's name and h s previous convictions in that court. Nothing else.

QUESTION: Mr. Safron, suppose a man appeals -- suppose this man after he was convicted, a month later after he sentence -- two months later after the sentence was pronounced, the judge had come across that wrap sheet. Would he have done anything about it?

MR. SAFRON: Nothing at all, your Honor.

QUESTION: What is the difference between that case and this case?

MR. SAFRON: Well, the point is this, your Honor: We are talking, now, about the District Court judge or the Superior Court judge?

QUESTION: I am talking about the courts of North Carolina.

MR. SAFRON: I think there is a clear distinction to be made, your Honor. The District Court judge, once that, say, one week term is over, cannot impose a greater sentence. In fact, I would say this: If the District Court judge had imposed a sentence and then subsequently determined he wished to increase it, he could not increase it. Not that particular judge. But here is the situation where a man exercises absolute and unlimited right to appeal his conviction to a Superior Court and in the eyes of our case law and our statutes, this wipes the slate clean as if it never happened and he is given a new opportunity --

QUESTION: Does he have any other way of appealing?

MR. SAFRON: From the District Court?

QUESTION: Yes, sir.

MR. SAFRON: No, your Honor.

QUESTION: So, that is an appeal.

MR. SAFRON: Well, I would not call it an appeal as such.

QUESTION: What is it called in North Carolina?

MR. SAFRON: You might have marked on the record appeal noted but it is an application for brand new trial. He can still appeal it.

QUESTION: But it is an appeal?

MR. SAFRON: No, I would not call it an appeal,

your Honor. He has wiped the slate clean. He is given the opportunity --

QUESTION: Do you think the State of North Carolina is bound to give him a right of appeal?

MR. SAFRON: There are two instances here, your Honor, in which we --

QUESTION: Do you think the State of North Carolina,under the constitution,is bound to give him an appeal?

MR. SAFRON: If you would permit me to draw a distinction.

QUESTION: Sure.

MR. SAFRON: One, the cases within the jurisdiction of the District Court are two-fold. Those which are petty misdemeanors, disorderly persons violations, traffic violations. Two, those which can be noted as serious misdemeanors. As to those which are serious misdemeanors,constitutional law, Federal constitutional law requires that he be given an opportunity to a jury trial. As to those which are petty misdemeanors, he would have no Federal constitutional right to a jury trial. In any event, our State constitution as part of the organic law of the State of North Carolina, Massachusetts, and several other states provides that there shall be a right to trial de novo.

QUESTION: But under the constitution, is a man convicted in a District Court of North Carolina entitled to an appeal to test the legality of his conviction?

MR. SAFRON: An appeal? If we frame it in that context, your Honor, there is no --

QUESTION: He goes to the Supreme Court of North Carolina?

MR. SAFRON: The procedure would be this, of course, your Honor: If the defendant is tried in the District Court, he can apply for trial de novo in the Superior Court. If he is unsatisfied with the conviction and, well, I should not say sentence, but unsatisfied with the conviction in the Superior Court, he may apply -- he may appeal as a matter of right to the North Carolina Court of Appeals. From the North Carolina Court of Appeals, he could then, if it is a constitutional issue presented which had not previously been determined, apply either by certiori or direct appeal to the Supreme Court of North Carolina.

QUESTION: Suppose he does not want a trial de novo but he does want to challenge the validity of his conviction in the District Court. May he go directly to the Court of Appeals?

MR. SAFRON: No, your Honor, he may not. He has to go to the Superior Court.

QUESTION: The stage is a part of the appellant process?

MR. SAFRON: Yes, your Honor, it is.

QUESTION: Mr. Safron, if he finds that there is a possibility that if he goes for trial de novo, his sentence will be enhanced, is there any other way he can test that judgment?

MR. SAFRON: No, your Honor. The only method of --

QUESTION: So,under constitutional standards, that is an appeal, isn't it?

MR. SAFRON: In that -- I would not call it an appeal, your Honor.

QUESTION: I am only interested in what happens if the aggrieved appealed;the sentence could not have been enhanced?

MR. SAFRON: Your Honor, we have to make --

QUESTION: Is that not an appeal?

MR. SAFRON: We have to make a distinction here, I believe, between the case of North Carolina versus Pearce which is the basis of this and the facts presented here. In the Pearce case, a defendant was convicted in a Superior Court of rape. Ultimately,because of the inadmissibility of his confession, the Supreme Court of North Carolina reversed and he received a greater sentence upon retrial in the same court which convicted him the first time.

Here it is an entirely different proposition. It is not the same court. It is not a judge on the same level of jurisdiction. The trial now is before a judge of the Superior Court.

QUESTION: Suppose after this judgment, he had appealed to the Supreme Court of North Carolina and they had doubled his sentence?

MR. SAFRON: Which court, your Honor?

QUESTION: What is your highest court?

MR. SAFRON: The highest court is the Supreme. They have no sentencing power at all, your Honor.

QUESTION: Suppose they had sent it back to the Superior Court for retrial and the judge enhanced it?

MR. SAFRON: Under the doctrine of North Carolina versus --

QUESTION: Under the Doctrine of Pearce that would be invalid.

MR. SAFRON: Well, of course, Pearce, your Honor, does not state that enhanced sentences are invalid unless, of course, this court has stated that, if the judge places on the record supervening information or conduct of the defendant, then, enhanced sentences are constitutionally permissible.

QUESTION: Assuming he did not?

MR. SAFRON: Assuming he did not, upon a reversal,

upon a point of law, the Superior Court could not impose a greater sentence than that Superior Court had imposed in the first instance.

QUESTION: Isn't here the Superior Court sitting as Appellate Court over the District Court?

MR. SAFRON: No, your Honor, it is not an appellate court.

QUESTION: What is the case there? Isn't the case there on appeal?

MR. SAFRON: We have a problem with semantics here, your Honor. The case is in the contemplation of the law as if it had originated there in the first instance. I believe we are using the word "appeal" when I think proper phraseology would be application for trial de novo. It is a question of right. There is no need to point out error, to prove error. A man could take this application even from a guilty plea because he was merely dissatisfied with the sentence.

QUESTION: Are you going to save some time to tell us why there isn't any case here at all? The mootness point that you raised. Haven't you questioned the jurisdiction?

MR. SAFRON: The jurisdiction?

QUESTION: Yes.

MR. SAFRON: No, your Honor.

QUESTION: Hadn't he been released at the time the Fourth Circuit --

MR. SAFRON: Your Honor, I certainly would not argue an issue of mootness in this case because we have this Fourth Circuit pin which is hanging as a Damocles sword over the head of the State of North Carolina and the other states which have joined with us amigus.

QUESTION: Where is Mr. Rice now?

MR. SAFRON: I have no idea.

QUESTION: He is not in custody?

MR. SAFRON: But we have a Fourth Circuit opinion order, which tells us that we must expunge the record and, if Mr. Rice comes back as his record appears he probably will, then according to that expunction order, this conviction would never have existed and there would be no possibility for, No. 1, to impose a sentence which is required upon the second conviction, driving under the influence or license revocation for that period of time.

QUESTION: What if we held the case was moot when the Fourth Circuit acted? Would that solve your problem?

MR. SAFRON: No, your Honor, because it is obvious that the Fourth Circuit would merely reinstate in yet another case this doctrine and we would be faced with

what we are facing now.

QUESTION: Then you want us to give an advisory opinion.

MR. SAFRON: I don't believe it is advisory, Your Honor, because we have the order of the Fourth Circuit requiring expunction staring us in the face. This is a valid order and I would say to this Court that this order gives validity to the status of our case before this Court.

QUESTION: You agree, in other words, that the case is not moot.

MR. SAFRON: It is not moot, Your Honor. There is an order that we have which has been stayed, but that order is effective.

The American Bar Association has had the opportunity to review this very contention. In the American Bar Association standard relating to jury trial, I point this Court's attention to 1.1(b) in the American Bar's standard. The approved draft, issued in 1968, states:

"Defendants in all criminal cases should have the right to be tried by a jury of twelve, whose verdict must be unanimous. Except where not barred by applicable Constitutional provisions, the right to jury trial may be limited in one or more of the following ways:"

"(b) By requiring trial without jury for lesser offenses provided there is a right to appeal without

unreasonable restrictions to a Court in which a trial de novo by jury has been had."

That is exactly the situation which our District Court system provides.

In the commentary in the ABA approved draft, it also discusses the various states in which this is a part of the State Constitution and that includes Delaware, New Hampshire, North Carolina, Virginia and Massachusetts.

In fact, I would like to point this Court's attention to the fact that the Supreme Judicial Council of the State of Massachusetts has just had the opportunity to review this very issue. In Massachusetts, as in North Carolina, this is an organic part of the State Constitution.

In the case of Mann v. Commonwealth, which was first decided June 15 of this year and is reported in 271 Northeast Second at 331, a very recent case, came out just the end of last month, the Chief Justice of Massachusetts, before a unanimous court, found, as has the State Supreme Courts of North Carolina, Virginia, Nebraska, Michigan, Maine and the First Circuit Court of Appeals in Lemieux v. Robbins, that the imposition of a greater sentence upon trial de novo is not violative of due process and does not contradict this Court's opinion in North Carolina v. Pearce.

QUESTION: Do you know how recurring it is that the sentences in the Superior Court are considerably higher than

the District Courts or County Courts in the same case?

MR. SAFRON: Well, Your Honor, this, of course, is almost an impossible figure to produce.

QUESTION: If it were only one a year, you really wouldn't care, would you?

MR. SAFRON: I can point this out, Your Honor: Last year, finally -- in December of last year -- our District Court system was fully implemented through the hundred counties in North Carolina and statistics we have reflect those eighty-three counties which are under the administrative office of the courts. Last year, in those eighty-three out of the hundred counties for which figures are available, there were sixteen thousand seven hundred fifty-one of such hearings which constituted fifty-seven point four percent of all cases tried in our Superior Court.

I would submit in this regard that when fifty-seven point four percent of all trials in Superior Court, with all the formalities of the Superior Court, are de novo trials, that this --

QUESTION: You mean fifty-seven percent of them are cases that came from the District Court.

MR. SAFRON: That's right, Your Honor. Of all criminal cases tried in our Superior Court, fifty-seven percent are de novo hearings.

QUESTION: I am wondering how you would describe

North Carolina's interest in not being restricted sentence-wise when the case is tried in the Superior Court.

MR. SAFRON: Your Honor, I would say this: Obviously the state has an interest in trying to save a system of criminal justice. Without the District Courts, the Superior Courts will not be able to function.

QUESTION: But that isn't the issue here.

MR. SAFRON: This is part of it, Your Honor. If I can just be blunt, we are frightened silly that if it is a one-way street, if the state and the defendant are not on a parity, if every defendant knows that the sentence imposed below is the absolute maximum, if he has everything to gain and possibly nothing to lose, then I doubt if the Superior Courts can long survive.

We are presently trying to keep up with the Constitutional requirement of speedy trial. The leverage factor here is frightening.

QUESTION: Well, you are saying, then, that you would like to handle the great bulk of your criminal litigation without a jury.

MR. SAFRON: I am saying this, Your Honor: If a defendant wishes to apply for trial de novo from a District Court Judge --

QUESTION: If sentences were less in the District Courts than they are in the Superior Courts, perhaps they would

be satisfied to have a trial without a jury.

MR. SAFRON: A trial in the Superior Court, Your Honor, brings forth a great deal of additional evidence. It is tried before a jury. It is tried by the Solicitor. It is tried before a Superior Court Judge. More evidence is brought out. The cross examination is more intense. More records are made available to the Court.

I say that the authority, the descretion of the Judge of the Superior Court is at question. If judges of the Superior Court, who are there because we respect their expertise and who develop an expertise in that particular case before them, cannot exercise their judgment and their descretion, then how long can the court system continue?

QUESTION: How about the states that have the system that you have but who have a formal rule that on retrial de novo the sentence may not be larger than what was imposed below?

MR. SAFRON: Your Honor, there are many different states. In the Petitioner's brief, he cites the Debonas case in New Jersey, which was determined by the Supreme Court of New Jersey as a policy issue. As a matter of policy, the Supreme Court of New Jersey took the opportunity to criticize the structuring of their Municipal Courts, which were locally appointed part-time judges.

In North Carolina, we have a District Court system

with full-time judges. It is a unified system which has taken fifteen years to implement. The professor cites comments from a report in the mid-fifties and that report we took to heart and the State of North Carolina revamped its entire judicial system. We have a completely unified system now with full-time judges who are paid a very respectable salary.

QUESTION: Mr. Safron, do I gather what you are saying is that in order to limit the number of appeals de novo, it is necessary to enhance the sentence every once in a while?

MR. SAFRON: Your Honor, no. There are very few cases in which that occurs.

QUESTION: What are you saying, then? You are saying you want to leave this intact. Why?

MR. SAFRON: Well, there areseveral reasons.

QUESTION: You said because you don't want to increase the number of cases in the Superior Court.

MR. SAFRON: Let me say this: Number one, the professor states in his brief there is no provision for representation in the District Court. That is wrong. He cites as precedent for one point the case of State v. Morris, which he cites for the proposition that the Supreme Court of North Carolina has refused to adopt the holding in the patent case which was the basis for Pearce, but in that very case -- State v. Morris -- associate Justice Suzy Sharp held that a man has a Constitutional right to representation by counsel if he is

indigent in the District Court in a serious misdemeanor. We have counsel in the District Court. If that man wishes to appeal, it goes on to the Superior Court, with that same counsel paid for by the State. If he wishes to appeal to the Court of Appeals, we pay for counsel.

This year, we funded one million eight hundred thousand dollars for appointment of counsel. We have public defenders in two of our counties. We have counsel in those courts. The public defenders' offices, in their reports to the court which -- excuse me, Your Honor, I see that --

QUESTION: Finish what you are saying.

MR. SAFRON: In the public defenders' offices and under our statutory scheme which provides for the appointment of counsel, in any felony case and any misdemeanor case for which the authorized punishment exceeds six months in prison or five hundred dollars, we have counsel.

To illustrate this very point, the public defenders' offices in the two test counties where we presently have public defenders, in one county they were appointed to represent nine hundred forty-nine persons during the year. That was eight hundred seventy-seven felonies and they also were involved in three hundred ninety-six serious misdemeanors.

They state: "In the course of its representation, the office made six hundred twelve appearances in the District Court and four hundred four in the Superior

Court."

The other office made six hundred one appearances in the District Court and two hundred thirty-nine in the Superior Court.

We do have counsel in the District Court system.

If there are any questions --

CHIEF JUSTICE BURGER: Thank you.

Mr. Van Alstyne.

MR. VAN ALSTYNE: Mr. Chief Justice, may it please this Court:

If I might, rather than launching into an original argument, I would like to attempt to respond to some of the questions which are directed to Mr. Safron simply by way of helpful clarification.

So far as the technicality of what it is called when one seeks a new trial against the correction of what he may believe to be an injustice committed in the course of his original trial in the General County Court or now in the District Court, it is perfectly clear that even in the view of the state, itself, it is an appeal.

Indeed, by turning to page seventeen of petitioner's appendix one will note that the statute so defines it, itself. It is called an appeal to Superior Court. Subsequently, appeal from District Court. Subsequently, appeal from justice; trial de novo.

QUESTION: The only point, I suppose, Professor Van Alstyne, is that unlike a conventional appeal, one need not even alledge any error.

MR. VAN ALSTYNE: Indeed.

QUESTION: One has an absolute right to this new trial without even claiming any error in the original trial.

MR. VAN ALSTYNE: Unquestionably correct.

What needs to be observed side by side that

observation, however, is that it is also the exclusive recourse one has from any grievance which he may honestly feel to purvey that original trial.

In this respect, it seems to me, therefore, most important that one take the accurate measure of the character of the Court in which he is first tried.

QUESTION: In that connection, does this mean if he feels there is error below in the District Court that he may not even move for a new trial in that court? His only avenue of relief is to take the so-called appeal.

MR. VAN ALSTYNE: To the best of my knowledge, that is the case. That is correct. There is no other recourse. The court in which he is first tried is not a court that merely tries petty offenses. I quite take exception to that description.

Indeed, the original and exclusive jurisdiction, original and exclusive jurisdiction of the District Court runs to misdemeanors which, In North Carolina, are defined as offenses punishible by as much as two years in prison.

Indeed, that is exactly this case and that is how it originated. I think it quite, then, begs the question.

QUESTION: Which offense?

MR. VAN ALSTYNE: On the drunk driving offense, itself, to be sure the Legislature has since revised the maximum penalty downward but at the time in question it was

punishible by two years. There is no doubt or quarrel, then, between us that sole jurisdiction in the first instance was in the General County Court. There is no possible relief from the sanction and result of that decision in the County Court other than through an appeal for trial de novo.

QUESTION: What about the paragraph at Section twenty point one seventy-nine? As I read it, it says for a first conviction it is punishible by a fine of not less than one hundred dollars.

MR. VAN ALSTYNE: That's correct, Mr. Justice Blackmun. In that respect, I think the clarification we were seeking earlier may be in front of us.

QUESTION: All right.

QUESTION: What about the point that was raised on whether in the Superior Court information about the man's prior record was available, which was not in the record of the first court?

MR. VAN ALSTYNE: That, of course, is a possibility. Respectfully, Mr. Chief Justice, it was the burden of the state so to demonstrate in the court below that there was that kind of evidence in front of the Superior Court Judge not present before the County Court Judge. That evidence was not produced.

It now is a matter of retrospective idle speculation based upon the subsequent securing of a wrap sheet and other

data. That is a possible explanation.

QUESTION: Is there a date on that sheet?

MR. VAN ALSTYNE: There is. It has not been made available to me. I can only report to you a direct quotation from the Federal Court of Appeals that says in this respect the record reveals nothing which warrants the increased punishment.

QUESTION: Mr. Van Alstyne, could -- do you mean you have never seen this document?

MR. VAN ALSTYNE: I have not.

QUESTION: And it wasn't before the court below?

MR. VAN ALSTYNE: It was not.

QUESTION: But if you are right in your basic contention, this is wholly irrelevant.

MR. VAN ALSTYNE: It is.

QUESTION: Even if the reason for the enhanced sentence had been information in the wrap sheet that was not available in the lower court --

MR. VAN ALSTYNE: Indeed, it is.

QUESTION: If you are right, you still prevail. This is an irrelevant consideration, isn't it?

MR. VAN ALSTYNE: Indeed. I don't rest upon this outside observation as critical to affirmance of the decision below. Indeed, a reasonable reading of the decision before this court in an opinion of your authorship confines the permissibility of harsher sentencing pursuant to a subsequent trial to

evidence respecting the conduct of the accused, which conduct must, itself, occur subsequent to the first trial.

It seems to me, in retrospect, that the manner in which that line was drawn may well have anticipated this kind of case whereby when the retrial occurs in a more formal court following a trial in a court which does not even make a record, necessarily, therefore, there is no record of the earlier trial for the Superior Court Judge to compare and, thus, to determine whether there has been new evidence introduced respecting aggravating circumstances of the crime or, indeed, additional data respecting the background of the accused.

QUESTION: By the same token, I think, then, that upon trial de novo in the Superior Court the defendant isn't burdened by what has happened in the District Court, either. I mean, there is, as you said, no finding of an error. There is no question of reviewing the summary of evidence or things like that. It is a brand new proceeding.

MR. VAN ALSTYNE: It is new. In no respect different --

QUESTION: Though I think what happened to him in the Superior Court is no different than what could have happened to him if he had been tried there in the first place.

MR. VAN ALSTYNE: Indeed, that possibility is there.

QUESTION: So isn't the question here really whether the state may interpose between him and a Constitutional trial,

a trial in the District Court without a jury and without a record?

MR. VAN ALSTYNE: I think that is certainly among the questions.

QUESTION: Isn't that a little different than your Pearce argument, which is really a constructed argument? It is just following the route of Pearce. A real problem could be raised that he couldn't get in the Superior Court in the first place.

MR. VAN ALSTYNE: That is true. Respectfully, I do wish to suggest that the case is a clearer instance than Pearce, itself, for this is an instance where a man is placed in jeapordy or difficulty of a substantial penalty without even the rudimentary safeguards of the Fourteenth Amendment, due process.

QUESTION: Yes, but he can wipe it out immediately without any problem.

MR. VAN ALSTYNE: Indeed, but Mr. Justice White, is it not, in fact, an instance where the state first submits a man to trial with no election for trial elsewhere in denial of his Constituional right --

QUESTION: The real point is: Can he be run through the mill twice? Is his price for being run through the mill in a correct manner being run through the mill in an incorrect manner in the first place?

MR. VAN ALSTYNE: I think it is a crucial point to the case andmakes the outcome in the court below quite right on that basis, alone. I do not understand how any reasonable concept of due process can contemplate the power of a state to subject a man to trial and punishment without any due process.

Indeed, the judge need not be law-trained. I take exception to the description of these judges. There is no record to determine the voluntariness of pleas nor the admissibility of evidence. These are very stripped down, economically operated courts. They are operated now as the state concedes without access to trial by jury with offenses punishible by two years.

QUESTION: The harm there is to the defendant when he is first subjected to a trial in the District Court before he can get to the Superior Court.

MR. VAN ALSTYNE: I think the harm is palpable and addresses itself to every man's common sense. To the extent the state says that ifyou are willing to succomb to the punishment that has been imposed upon you by trading off that which the Fourteenth Amendment guarantees, then we will, to that extent, insulate from the risk of more severe treatment. It is a kind of bargain that is made in the background without any of the overt circumstances, however, which might ordinarily participate in honest guilty plea bargaining. There is no election here.

QUESTION: Would you make the same argument if the defendant had a choice in the first place?

MR. VAN ALSTYNE: It seems to me the case is somewhat different and it is harder andcloser. My frank position would be that the result should be the same because I do think there are other poisonous elements to this kind of procedure.

It is true that if he had an election in the first instance respecting the court in which he might first be tried, there would be less reason for this court to be apprehensive that the Superior Court judges would harbor the motive to discourage seeking access to theDistrict Court in the first instance through the menace of harsher sentencing.

It is also true that with that election in front of him honestly to be made in the initial preference for the District Court, it may consciously be entertained by the accused that he may be more leniently treated. That, at least, comes closer to an honest kind of negotiated election but that is not this case.

QUESTION: In your argument, I still don't see how the Pearce rationale really solves your basic objection.

MR. VAN ALSTYNE: Oh, no, my objection would exist quite apart from Pearce.

QUESTION: I see. Even if the Court of Appeals is correct, even if we affirmed this case, it seems to me that this basic objection to the two tier proposal -- proceedure -- still

remains.

MR. VAN ALSTYNE: Yes.

QUESTION: He still has to --

MR. VAN ALSTYNE: I did not attempt in my brief --

QUESTION: Indeed, it would remain even were North Carolina to provide, as some states -- I gather New Jersey has done it -- that the sentence may not exceed in the Superior Court.

MR. VAN ALSTYNE: You would still have the same argument. I think there is an independent Constituional --

QUESTION: Is this automatic?

MR. VAL ALSTYNE: Respectfully, no, because it is not necessary for the court to affirm, to anticiate a next case. That is to say, the appropriate case in which this issue would be raised, it seems to me --

QUESTION: Without this basic objection, it seems to me the Pearce point is only gaining strength from this.

MR. VAN ALSTYNE: Well, respectfully, I think it has separate strength. Indeed, the reasoning of Pearce, if I may quote the Court'sopinion, was this: Due process of law requires that vindictiveness against the defendant for having successfully attacked his first conviction must play no part in the sentencing he receives after a new trial. Since the fear of vindictiveness may Constitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first

conviction, due process also requires that a defendant be freed of apprehension of such a related retaliary motivation on the part of the sentencing judge.

Respectfully, I submit that that, at least, is the rationale on due process.

QUESTION: In the absence of conduct subsequent to the initial sentence --

MR. VAN ALSTYNE: Indeed.

QUESTION: -- which would justify an increased sentence after the --

MR. VAN ALSTYNE: Yes.

QUESTION: This would come down, I gather, in your submission. All we would decide in this case -- or would need to decide in this case -- to affirm is that that approach applies as much in this frame of reference as it did in what we had before us in Pearce.

MR. VAN ALSTYNE: Yes.

QUESTION: That would still leave what?

MR. VAN ALSTYNE: It still leaves a Constitutional flaw remaining in the system which this Court will doubtless have to consider in the course of time.

QUESTION: In New Jersey you would have to argue the other, wouldn't you --

MR. VAN ALSTYNE: Indeed.

QUESTION: -- since there I think it is by court

decision, isn't it? They might not impose a harsher sentence.

MR. VAN ALSTYNE: That is correct. I have no doubt that consistent with the U.S. v. Jackson there is now a fundamental law. There is an additional relevance to that observation. Mr. Safron essentially says that the judicial system of the state is at stake. To the extent that it is separate because of this observation respecting juries, it seems to me, therefore, we cannot argue against deferments in this instance on the basis of preserving a system which already has a fatal flaw in it and will require some immediate revision.

QUESTION: Is it possible that one response to the Fourth Circuit holding, if it stands, would be for all of the sentences in the First Court -- now the District Court -- to be the maximum?

MR. VAN ALSTYNE: It is possible, Mr. Chief Justice. Respectfully, that argument was presented by counsel for the State of North Carolina in Pearce, itself. The same speculation was made that if this court were to accept theargument at that time, a pernicious reaction might set in among Superior Court judges always in the first instance to place the maximum sentence upon the accused.

It is my opinion, therefore, that that argument, having been made previously and the court not entertaining quite so negative an attitude toward the Superior Court judges and observing also that if they were to do so, if anything, it

would then merely accelerate and prompt further appeals in every instance under such a regime.

QUESTION: What is the remedy that Pearce prescribes for the enhanced sentence on the second time around?

MR. VAN ALSTYNE: The remedy is to permit the enhancement of sentence only by a mode which makes practical then subsequent judicial reviews.

QUESTION: When they find the sentence which is not merited under Pearce, what is the remedy?

MR. VAN ALSTYNE: I beg your pardon. I misunderstood. The appropriate remedy, I take it, would be to enter a contingent order of habius, if that's the way the case comes up. Specifically, that the state must correct the record and reduce the sentence. It does not require the obliteration of the finding of conviction.

I agree with that, and to that extent I think that there was a clerical error by the Fourth Circuit. The correction to be made is to correct the record respecting the intensity of sentence.

QUESTION: It didn't read like a clerical error to me, Mr. Van Alstyne. Do you think it is just an oversight?

MR. VAN ALSTYNE: Respectfully, Mr. Chief Justice, I earnestly do. Nothing in the argument presented below, nothing in the fabric of Pearce, suggests that the conviction subsequently secured pursuant to a fair trial is obliterated or that

all go free.

It is, rather, that the excess of service attributable to the Constitutionally improper harsher sentence must be relieved. To the extent, therefore, that the order was to expunge the whole conviction rather than to let the public record show that the sentence is merely that originally imposed in the General County Court --

QUESTION: Let me read you the language that led me down the other road. I am reading from the opinion. "Rice is not to be held to his conviction," which means the conviction is set aside. Is that the remedy prescribed by Pearce?

MR. VAN ALSTYNE: It is not.

QUESTION: Then this is not a clerical error but a judicial error, isn't it?

MR. VAN ALSTYNE: Yes, Mr. Chief Justice, and for this Court appropriately in the disposition of the case to note that and call for its correction seems to me eminently appropriate. There is nothing in the argument of Pearce or this case that means to overthrow the conviction, itself.

QUESTION: Then doesn't the point of the Chief Justice take us even further down the road? If you agree that -- as I think you are quite right in conceding that there is nothing invalid about this conviction, and since he has now served his sentence the only validity went to the length of the sentence which he now served, why isn't this case moot?

MR. VAN ALSTYNE: In my judgment, that issue was an honest issue which was litigated in the Fourth Circuit. The Fourth Circuit position was that consistent with this Court's opinions in Karafas and Sibron and one of its own decisions, a case called Hewett v. North Cariolina, the citation of which I can provide, there were collateral legal consequences --

QUESTION: From the conviction.

MR. VAN ALSTYNE: I beg your pardon. In the argument that I presented respecting mootness to the Fourth Circuit, collateral legal consequences assigned to the record of sentence that the degree or intensity of sentence might itself have a tracible collateral legal consequence. One of these, of course, bears upon the possibility of subsequent conviction for another offense. That sentence imposed pursuant to the subsequent conviction might foreseeably of course even be harsher than it would otherwise in light of previous sentences. That is to say not merely the record of conviction but surely the degree of sentence, the severity of punishment.

QUESTION: The Fourth Circuit apparently didn't understand it or didn't accept your argument, because they say injurious consequences because of the convictions might still obtain and you are now conceding that the convictions were improperly set aside.

MR. VAN ALSTYNE: Yes. Respectfully, I don't mean it as a concession. It has never been my position that Pearce

meant anything other than a correction of the sentence. The mootness issue was not only not raised by the state in its petition, but it is not briefed and it seemed to me unseemly to try to respond.

Indeed, the state did not contest the viability of the case below.

QUESTION: You suggest that upon conviction of some other offense, if he again committed an offense, and the fact that the record would show two years, if that's what it shows, rather than having the two years expunged, it might result on the subsequent conviction in a harsher sentence than otherwise.

MR. VAN ALSTYNE: It wouldn't be.

QUESTION: It wouldn't be expunging the two years. It would have been saying it should have been nine months.

MR. VAN ALSTYNE: Suspended on payment of one hundred dollars fine. That's right. It was my position in the Fourth Circuit that consistent with Sibron and Karafas that is a foreseeable collateral legal consequence.

QUESTION: Let's assume that we decided that his confinement beyond nine months was unconstitutional. Would he have any civil remedy against North Carolina?

MR. VAN ALSTYNE: Unfortunately, he would not. The state --

QUESTION: There is no provision.

MR. VAN ALSTYNE: Currently Congress authorizes

nothing even for compensation of people who have spent time in deprivation of Constitutional rights. There is no remedy.

QUESTION: Assuming that Mr. Rice gets religion and doesn't commit any more crimes, he doesn't have a worry, then.

MR. VAN ALSTYNE: I suppose he does not. He has been unconditionally released by the state. There is no doubt of that.

QUESTION: And now we have sort of a conflict between you and the Fourth Circuit. I am at a loss as to how you solve it. You say the conviction is all right. The Fourth Circuit said it is not. You say it is the sentence that is wrong. The Fourth Circuit says that is not. So where does that come out?

MR. VAN ALSTYNE: Respectfully, Mr. Justice --

QUESTION: I have to decide between you and the Fourth Circuit now.

MR. VAN ALSTYNE: I do not think so. I think if the Court will study the opinion of the Fourth Circuit, the opinion is exactly modeled on Pearce. Indeed, the Court's reasons parallel Pearce. We see again the more drastic sentence on the second trial as a denial of federal due process in that by discouragement it impinges upon the giving of an appeal.

QUESTION: Is there one word in Pearce that says we were really aiming at the conviction?

MR. VAN ALSTYNE: Nothing. I can assure you nothing in my submission or in the briefs submitted to the Fourth

Circuit invited that view of the case. I merely mean to suggest in the appropriate disposition of the case surely the order can fittingly be described so as to cure that part of the judgment.

QUESTION: So you are assuming here that the convictions are valid.

MR. VAN ALSTYNE: Indeed. May I observe also with regard to the alleged parade of horribles that is foreseen to flow from an affirmance of what I now regard as a perfectly ordinary decision that at least nine states that have examined this problem have already set their laws systematically against harsher sentencing, even in the context of these absolute rights for appeal of trial de novo. Five of these based it on Pearce, itself.

The reasoning is identical all the way through. Indeed, as the Indiana Supreme Court observed this year exactly with respect to this situation, we fail to see where the de novo aspect of the trial in criminal court has any bearing upon the logic of the Pearce case, which is simply that the threat or possibility of having a greater sentence imposed should not be a deterrant to the exercise of one's right of appeal. These states include Arizona, Indiana, Hawaii, Maryland, New Mexico by statute and not merely by judicial fiat, Louisianna since about 1950 has had a dual trial system but under a construction of the state's own Constitution has fore more than a decade forbidden any harsher sentencing. The alleged parade of

horribles has simply not materialized.

QUESTION: Are there any plea bargains in the District Courts?

MR. VAN ALSTYNE: Indeed, I have no personal doubt there are many.

QUESTION: Let's assume there is an outright bargain. You plead guilty and you will get nine months and they present it to the judge and the judge says all right, if that's satisfactory and everybody is perfectly -- then he exercises his right to appeal.

MR. VAN ALSTYNE: Yes, the answer --

QUESTION: And then you would make the same argument?

MR. VAN ALSTYNE: No, I would have to answer because of the failure of the District Court to make a record at all that under the decisions of this court, there being no record made to allow a subsequent court to ascertain the authentic --

QUESTION: Let's assume everybody agrees on a habius corpus after his conviction and higher sentence in the Superior Court, the record is perfectly clear; he admits there was a plea bargain. Everybody testifies. The acts are clear. He says, nevertheless, it is limited to nine months.

MR. VAN ALSTYNE: No, I think that consistant with the Court's decisions in Parker and Brady and McMann, it is perfectly possible to find that this is an honest bargain, that the accused has indeed received a benefit in exchange for

knowingly giving up that to which he is entitled.

QUESTION: You don't think this whole system can be interpreted as sort of an enormous plea bargain in the sense that they are saying to him we are going to run you through -- let's assume the state said we will have an administrative determination of your guilt and then a suggested sentence. If you are satisfied with it, you take it. If you are not satisfied with it, you will get a trial by jury.

MR. VAN ALSTYNE: Mr. Justice White, respectfully there is no possible basis for finding a bargain. Mr. Rice did not plead guilty and he had no election to be tried elsewhere. He pleaded not guilty.

QUESTION: In the choice after the District Court trial, isn't it more effective than a choice before?

MR. VAN ALSTYNE: Oh, it seems to be clearly not, sir.

QUESTION: Why not? You know the state's case.

MR. VAN ALSTYNE: And they know yours. Indeed, one had to incur the expense and delay and ordeal and the harrassment of the first trial. It's as though one threw up a picket fence and --

QUESTION: It's better afterward than before in terms of choice.

MR. VAN ALSTYNE: Oh, yes, indeed.

QUESTION: What percentage of all cases are in the form of appeals from the District Court?

MR. VAN ALSTYNE: I do not know whether figures are even available, Mr. Chief Justice. I would suppose it is a relatively substantial percentage.

QUESTION: Don't you think it might be substantial, like ninety percent?

MR. VAN ALSTYNE: I cannot know, honestly. It seems a sensible guess, respectfully, but I don't have the figures. Perhaps Mr. Safron does.

QUESTION: If after the guilty plea is arrived at in the hypothetical case Mr. Justice White suggested, the man then asserts his right to a trial de novo, is his guilty plea under North Carolina law admissible in evidence against him in the new trial?

MR. VAN ALSTYNE: I will appreciate assistance by counsel of the state because I am not certain. I am advised by some local attorneys that it is admissible but I do not know that and would willingly stand corrected on the matter.

QUESTION: Let me ask you this, then: On a retrial in Superior Court, if the state can produce evidence of what his testimony was in the District Court, is that admissible?

MR. VAN ALSTYNE: I don't know. I cannot answer truly. Part of the difficulty is again that there simply is no record or transcript of that first session.

May I, in the few remaining moments --

QUESTION: May I ask it this way: There was a record

in the Superior Court in this case?

MR. VAN ALSTYNE: Yes. As far as I know, that was never made a part of the record in the case now presented --

QUESTION: At least, on the bad check charges there was a guilty plea as to that, wasn't there?

MR. VAN ALSTYNE: Yes.

QUESTION: Was there a trial of the drunken driver?

MR. VAN ALSTYNE: Indeed, there was.

QUESTION: Evidence taken?

MR. VAN ALSTYNE: Indeed, there was.

QUESTION: And you don't know whether the record indicates any cross examination based on testimony given in the other --

MR. VAN ALSTYNE: No, I don't know. It is true Mr. Rice was represented in the course of that trial by court assigned counsel as well, but there is simply no record that was --

QUESTION: You have no transcript of the Superior Court.

MR. VAN ALSTYNE: We do not, Your Honor, no. A question was raised earlier as to the ascertained frequency of harsher sentencing in North Carolina in this configuration of cases. I have tried to determine that and there are no records kept of this matter. Indeed, I think one can understand readily why. Since the General County Court andnow the District

Court makes no record and the state nominally treats it as though it were indeed a new ball game, we have nothing to compare it to work back. This court, however, did rely upon a relatively informal survey in Pearce, itself, that was published in the Duke Law Journal finding by a sample of the judges and their records in the Pearce profile of cases that harsher sentencing was imposed upon new trial in around seventy percent of all retrials following successful appeal.

Now I am not a practitioner in the North Carolina District Court. I can merely assure the court that there is widespread interest in the bar because it is habitual for attorneys to advise their clients pursuant to the District Courtproceeding that unless they are confident of success they ought not appeal for trial de novo for the frequency of harsher sentencing is believed to be quite widespread.

But there are no figures available. As I say, I do not believe that the condition of records makes it possible to gather that information at all.

Respectfully, then, I want to return to what I regard as the central issue. The court has established a set of subconstitutional courts that systematically deny an accused his fundamental Fourteenth Amendment safeguards. It does not give him an opportunity to trade that off against the Superior Court. This is not a case of bargaining of any kind. He stood upon his plea of innosence and he sought recourse through the

only mechanism the state allows him.

The state essentially then sets up a kind of electric fence. If one is brazen enough to press forward with a demand for really rudimentary fair play, he is made to take the risk of judicially unreviewible and unexplained harsher sentencing. That, in essence, is this case.

As I say, the great majority of state supreme courts, not federal courts, which have re-examined this system subsequent to Pearce have pronounced it absolutely inadequate and I can anticipate no parade of horribles.

QUESTION: Let's assume that North Carolina had the system of trying people in the District Court and having a finding of guilty or innocence but postponed the sentencing and then run through an appeal. You could appeal from your own conviction.

MR. VAN ALSTYNE: Sentence, respectfully, to be then determined and imposed by whom at what date?

QUESTION: Well, they made it two different items. You could appeal from your conviction or you could appeal from your sentence.

Now if he did not appeal from his conviction within ten days, then he is sentenced in the District Court but the conviction is --

MR. VAN ALSTYNE: If he did not appeal from his conviction within ten days, sentence would then be imposed. Do

I understand it? And the question is --

QUESTION: And his conviction would no longer be open to attack.

MR. VAN ALSTYNE: Yes. I think that raises at least a very substantial procedural due process question.

QUESTION: At least, you get back to the question you were talking about earlier.

MR. VAN ALSTYNE: Yes, indeed. I think the hypothetical is very well taken. The question forthis court is the extent to which the state may suspend this Sword of Damocles while placing the accused in a dilemma for a certain critical period of time, and I would have serious doubts as to whether that procedure, in the absence of very compelling governmental interests to be served, which I can't discern in the hypothetical, itself, should be allowed consistent with due process.

QUESTION: Would you see a Constitutional question if it developed on a survey that every judge in every case in the District Court imposed a maximum sentence and that in a given percentage, ten or fifteen percent, they later entertained motions for modification of the sentence and did reduce the sentence?

MR. VAN ALSTYNE: Mr. Chief Justice --

QUESTION: Is there a due process question there, too?

MR. VAN ALSTYNE: I do think so, indeed. If firm figures of that kind would be forthcoming in a given piece of

litigation, then it seems to me at least to yield a prima facie inference of punitive original sentencing which would at least shift a burden of coming forward with some explanation so as to account for such an odd and peculiar pattern.

QUESTION: Now is your argument here -- does your argument go right across the board to the so-called petty and serious --

MR. VAN ALSTYNE: It need not, of course. The extent to which the Fourteenth Amendment may somehow be abdicated when the maximum punishment a man may endure may be as light as ninety days is, of course, an open question. I am not prepared quite frankly to take the position that no aspect of the Fourteenth Amendment whatever applies, though the penalty cannot exceed ninety days. Possibly counsel can, but at least impartiality of the requirement of fact, for instance, and the recquisite of a hearing, itself -- these are all hard core elements of due process and an absolute notion they can all universally be dispensed with because a man may be subjected to no more than ninety days loss of freedom strikes me as quite implausible.

QUESTION: It is not abdication of the Fourteenth Amendment. The question is: What does the Fourteenth Amendment require in those circumstances?

MR. VAN ALSTYNE: Yes, of course. That's aproper rephrasing of it. I announced the view, I suppose, in taking

that position.

QUESTION: We have given you a little bit of extra time so we will give you three minutes if you need it, Mr. Safron.

MR. SAFRON: Thank you. I have the annual report of the administrative office of courts for the year nineteen-seventy and in answer to the question concerning representation of indigents the report reads: Concern has been expressed as to the incidents of indigency among the defendants in criminal cases processed by our courts. As to the trial courts, this data is not available. In the appellate division, it is available and interesting.

Of the criminal appeals docketed in the Court of Appeals during calendar year 1968, seventy point three percent involved indigents. The figures for 1969 and nineteen-seventy were seventy-two point two percent and seventy-six point one percent, respectively.

In the Supreme Court, seventy-three point one percent of the criminal appeals docketed in 1968 were brought by indigents. During the two succeeding years the percentages were seventy-one point eight and eighty-one point one percent respectively.

This data would seem to support the inference already drawn by some on the basis of the records on appeal that many indigents have come to the appellate court for no other

apparent reason than that the court is there.

There are some other comments.

QUESTION: That leads to confusion.

MR. SAFRON: No, Your Honor, and I am not reading further because there are some other comments.

I would like to point out in this year we budgeted one million eight hundred twenty-two thousand seven hundred ninety-seven dollars for indigent counsel and I am advised in discussion yesterday with the administrative director of the courts that the courts will run out of money.

CHIEF JUSTICE BURGER: Thank you, Mr. Safron.

Thank you, Mr. Van Alstyne.

The case is submitted.

(Whereupon, at 2:00 P.M. the case was submitted.)