In the

Supreme Court of the United States

[illegible]LIP J. PICARD,
Petitioner,
v. No. 70-96
[illegible]ES J. CONNOR,
Respondent.

Washington, D. C.
November 17, 1971

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PHILIP J. PICARD,

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JAMES J. CONNOR,

Respondent.

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Wednesday, November 17, 1971.

The above-entitled matter came on for argument at 10:05 o'clock, a.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:

JOHN J. IRWIN, JR., ESQ., Assistant Attorney General, Chief, Criminal Division, State of Massachusetts, Boston, Mass., for the Petitioner.

JAMES J. TWOHIG, ESQ., 396 West Broadway, South Boston, Mass., for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first in No. 96, Picard against Connor.

Mr. Irwin, you may proceed whenever you're ready.

ORAL ARGUMENT OF JOHN J. IRWIN, JR., ESQ.,

ON BEHALF OF THE PETITIONER

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

I would respectfully ask that five minutes of the time allotted to me for argument be reserved for rebuttal.

This case is here on the Commonwealth's petition for certiorari. The court below found that a Massachusetts charging procedure that permitted a grand jury to indict with a fictitious name and permitted a court thereafter to substitute a true name was in fact violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Q Is that the only issue in the case?

MR. IRWIN: That, to me, is the overriding issue. The Commonwealth takes the position that in addition to the equal protection argument there is also an exhaustion argument, and there is also a question of whether or not a purely State procedural statute should be the subject matter of the review by way of a petition for writ of habeas corpus.

But, in answer to your question, Mr. Chief Justice,

I would say that the overriding argument that we want to make and stress upon the Court is the equal protection argument.

The Suffolk County Grand Jury in the Commonwealth of Massachusetts, on August the 4th, 1965, returned a first-degree murder indictment charging two people. They charged one Donald Landry, which in fact was a true name, and it also charged that a John Doe was also accused -- guilty of the murder of one Robert Davis.

The defendant, or the respondent here, James J. Connor, was later, on August the 9th, 1965, on a motion under General Laws Chapter 277, Section 19, filed by the prosecutor, was named on the court docket as the true named defendant and the John Doe indictment was changed to read James J. Connor.

The defendant seasonably objected to that, on the ground that he had an absolute constitutional right to be indicted in his own name. That, as far as the record indicates, was his sole basis for objection at that particular time.

That motion was directed to Chief Justice Tauro of the Massachusetts Superior Court, who is presently the Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts.

The Chief Justice was asked, under the provisions of General Laws Chapter 277, Section 19, which reads as follows, to make the substitution:

"If the name of an accused person is unknown to the

grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings with a reference to the fact that he was indicted by the name or description mentioned in the indictment."

Q What are you reading from?

MR. IRWIN: From the Commonwealth's brief, Mr. Justice Brennan, page 3, which quotes the --

Q In other words, what I meant by that, is that a statute or what?

MR. IRWIN: Yes, General Laws Chapter 277, Section 19.

Q May I -- since I've interrupted you, may I ask: It was that the Court of Appeals turned this on cases of -- I gather, your Supreme Judicial Court -- that indictments were amendable only with respect to matters of form and not as to matters of substance, as to minor details or other essential formalities. Is that the law?

MR. IRWIN: Yes, it is, if Your Honor please.

Q And does this then turn on whether this amendment was an amendment in minor detail or other essential

formalities?

MR. IRWIN: Well, we would suggest that this case does not necessarily turn on that issue in view of this particular statute. I would suggest that that -- those particular decisions direct themselves to matters other than the change of name, if Your Honor please.

Q I see. In other words, your position is that whatever it may be, by statute, indictments are also amendable in the particulars we have involved?

MR. IRWIN: Right. In the fictitious name situation or in erroneous name situation.

Q So that that then presents the issue whether that statute is constitutional?

MR. IRWIN: Yes, it does, I would respectfully suggest to the Court.

Q Thank you.

Q And the court in holding -- in reversing the conviction relies entirely, as I read the opinion, on the equal protection clause?

MR. IRWIN: Yes, they did.

Q Not on due process?

MR. IRWIN: No, they did not, Mr. Justice Stewart.

The court, pursuant to a hearing that, apparently, at least on the record, appears to have been untranscribed, Justice Tauro, on presentment of this particular motion under

General Laws Chapter 277, Section 19, by the prosecutor, on August the 10th of 1965, ordered the following entry made on the record, and I mean reading this entry from the Commonwealth's brief, or the Petitioner's brief, which is on page 14, and I quote:

"Court (Tauro, C.J.) having determined that the trus name of John Doe" --

Q Now, where did Tauro say this?

MR. IRWIN: On the docket entry, if Your Honor please, Mr. Chief Justice.

Q Oh, the docket entry?

MR. IRWIN: Yes.

Q In response to a motion?

MR. IRWIN: Yes. He made this --

Q By the District Attorney?

MR. IRWIN: By the District Attorney. He made this entry on the docket, and it reads as follows:

"The Court" --

Q Do we have that in the Appendix?

MR. IRWIN: Yes, it is in the Appendix, although I don't have the -- I think it's page 59, Mr. Justice Brennan.

It says that the "Court having determined the true name of John Doe has been discovered to be James J. Connor orders the name James J. Connor to be entered on the record."

Q Yes, it is on page 59.

MR. IRWIN: Thereafter, the defendant, along with others, was tried in the Superior Court of the Commonwealth of Massachusetts, and convicted.

They appealed, of course, their conviction to the Supreme Judicial Court of the Commonwealth.

MR. CHIEF JUSTICE BURGER: Would you raise your voice a little bit, Mr. Irwin?

MR. IRWIN: Yes, I will, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: The acoustics are not very good in this room.

MR. IRWIN: They appealed their conviction to the Supreme Judicial Court of the Commonwealth. And the Supreme Judicial Court of the Commonwealth was again asked to confront itself, or decide the issue raised by this particular statute, 277, Section 19.

The court there reaffirmed its prior decision in Commonwealth v. Gedzium. There the court suggested that this alternative charging procedure was in fact a valid State interest, a valid State procedure, and was in fact in conformity with all of the constitutional requirements placed upon procedural statutes, and that the particular statute itself in no way violated equal protections of the law, because it required the court to stand between the accused and the prosecutor before this particular change under indictment could be made.

And it seems to me that the court below makes a significant argument and puts significant stress on the fact that this type of statute would allow a prosecutor to arbitrarily offer some other unworthy reason to substitute the name of a person not otherwise meant to be inserted.

The court in the Gedzium case said, and I think this is significant with reference to the equal protection argument, the court said that the trial justice, before he allows a motion under this statute, must make "the requisite findings" and also must make an independent determination that no defendant is injured by such substitution.

We have to assume, then, that the Massachusetts Court itself, through its construction of General Laws Chapter 277, Section 19, has imposed upon the court a burden of finding cause or probable cause that the person whose name is sought to be substituted for that of John Doe must be, in fact, the one that the grand jury intended. And that no injustice is done to him by such substitution.

We respectfully suggest that the construction placed on that statute by the Massachusetts Court corrects any possible infirmity with reference to the equal protection clause of the Constitution of the United States.

Q On what does the trial judge act in making that determination? Does he have a hearing?

MR. IRWIN: What he has done in this instance, and

here again we have to -- the Commonwealth has to make an analogy between the grand jury function and the function of the court. The grand jury function in Massachusetts is conducted, of course, in secret. It is ex parte, the prosecutor does not, of right, have the ability to be present at their deliberations; they can conduct their deliberations without him. And traditionally, the Massachusetts Grand Jury has the power to call upon the court to assist it in the performance of its duty and to serve as its agent for advice to the grand jury and, if need be, for protection of the grand jury.

So our argument is that this particular statute, as it has been construed, empowers the court or the trial justice to whom this motion is presented to place himself in the capacity as an agent for the grand jury. And then to conduct his hearing ex parte, to hear whatever evidence he feels is required under the Gadzium case, to make the requisite findings.

Q Well, what facts did Chief Justice Tauro use?

MR. IRWIN: That we do not know, Mr. Justice Brennan, because the proceeding was untranscribed, and how the Chief Justice reached the decision with reference to this particular amendment has never been litigated. And there again, getting back to our argument of exhaustion, as we make reference to it in our brief, and I intend to in my argument, it seems to me that that particular issue could have been litigated on the question of exhaustion in sending the case back to the State

court.

Q Well, then, I misunderstood you, Mr. Irwin. I thought you said the ruling in Gedzium is that there must be this determination, that in fact the person whose name is now to be substituted is the person that the grand jury intended to indict.

MR. IRWIN: Right.

Q Is that right?

MR. IRWIN: Well, --

Q And you said, under Gedzium, the -- that determination must be made by the trial justice asked to make the amendment, is that correct?

MR. IRWIN: That's correct.

Q But nothing -- Gedzium didn't prescribe any procedure?

MR. IRWIN: No, it did not, if Your Honor please. The language is that they assume that the court, before allowing this motion, as any other motion, will find that there is the requisite findings, and find, quote, unquote, that there is no injustice done to any defendant.

Q Now, who assumes this? Your cases say that?

MR. IRWIN: The Gedzium case does.

Q Oh, it has that assumption?

MR. IRWIN: Yes, it does.

Q And it's a presumption of regularity in that

respect?

MR. IRWIN: Right. And that the court will act with the fact in mind that a defendant, before his name can be substituted, is entitled to a finding of cause. It does not in any way, Mr. Justice --

Q By the cause, you mean that the grand jury intended to indict that very person?

MR. IRWIN: Yes.

Q That's cause?

MR. IRWIN: Yes.

Q Is that it?

MR. IRWIN: Yes, it is, Mr. Justice Brennan.

We recognize, of course, that if a State confers a benefit, such as Massachusetts does, with reference to indictment procedure, to the extent that, generally speaking, everybody is indicted in their true name, we recognize that once we do confer that benefit, that we must do it with an even hand and we must do it equally.

However, we do insist that equal protection does not prevent differences in treatment, provided that the differences are not applied arbitrarily, and provided that they do infact serve a valid State purpose.

In this particular situation, we respectfully suggest to the Court that the Massachusetts system of criminal justice has a very decided valid interest in empowering grand

juries to return indictments even in those situations where they do not know the true name of the person whom they are accusing. It seems to me that it is a valid State interest that a grand jury serve that function, that it bring to the attention of the public that, in fact, there was a person, maybe among others or maybe alone, who they know committed a crime. And that even though they do not have that evidence, they want the public to be aware that this person in fact did commit this crime, even though he's only identified as John Doe.

So that those people who are responsible for the investigation and the prosecution of crime will not be in a position to discontinue their effort to locate and eventually prosecute the particular individual.

Q Well, Mr. Irwin, I have no trouble with the locating of him, the police can do that without the indictment. Am I right?

MR. IRWIN: I'm sorry, Mr. Justice Marshall, I didn't understand you.

Q You say "to locate the man", well the police can do that without an indictment.

MR. IRWIN: Yes, they can.

Q Well now, what does the trial judge know was the basis for the grand jury saying that John Doe committed that crime?

MR. IRWIN: We do not know. We do not know. Because,

of course, the -- in this particular situation we assume that --

Q Well, suppose it was John Doe and Mary doe turned up, would that still be good?

MR. IRWIN: Would the indictment still be good?

Q Well, suppose the indictment charges John Doe with committing the crime of burglary, and they pick up Mary Brown. Could they substitute her?

MR. IRWIN: No, I would say they could not.

Q Why not?

MR. IRWIN: Because -- I would say that the appropriate way of describing the individual would be -- if it happened to be a female, would be Mary Doe or Jane Doe.

Q So that --

MR. IRWIN: Obviously making it clear that the person was a female.

Q So Massachusetts does have some sense of identification?

MR. IRWIN: To a certain extent, yes, it does, if Your Honor please.

Q But not to the identification of "this person"?

MR. IRWIN: Right.

Q Would it be possible that the information that was presented to the grand jury, that resulted in John Doe, was erroneous?

MR. IRWIN: I would concede that it is possible that

it might be erroneous.

Q Would it be possible that the evidence that the prosecutor gives to the trial judge would be erroneous?

MR. IRWIN: Yes, it would be possible. But --

Q You don't have any equal protection problem.

MR. IRWIN: Well, I would respectfully suggest to the Court that traditionally the type of evidence that is presented to the grand jury is not a matter for our inquiry, and I would cite Costello v. The United States. I think the Court is well aware that the grand jury is able to receive hearsay evidence, is able to receive virtually any type of evidence. And we do not look behind the sufficiency of an indictment by way of examining what evidence was necessarily presented to a grand jury for the purpose of producing the indictment.

Q I hope you don't assume my silence means that I agree with you.

MR. IRWIN: No, I do not, Mr. Justice Marshall.

Q Thank you.

Q Mr. Irwin, I suppose that the issue is whether this particular individual is the one whom the grand jury intended to indict. Wouldn't the grand jury have to have some kind of evidence that the perpetrator of the murder was a man, five-feet-seven, black-haired, or something of that effect, so that you could say, yes, obviously, you didn't have his name but this is the individual who satisfies that description?

MR. IRWIN: Yes. Mr. Justice Brennan, I think that your point is well taken. I think that -- obviously it troubles me, but it seems that the evidence that has been presented to the grand jury is something that we just can't necessarily look behind all these times.

I think that the court below put great stress on the fact that had there been a more adequate description of the defendant, such as you just suggested, that it would have been easier for the court to find that this was not violative of the equal protection clause, and that he would -- the court below would not necessarily have had the misgivings that they did have about this particular case.

Q What I had in mind was, how could Chief Justice Tauro conclude that this is the man that the grand jury intended to indict? Unless he, at least, had some idea of what the person looked like that the grand jury had in mind. How could he?

MR. IRWIN: Well, again, and this is probably not a very satisfactory answer, but I would suggest that the record is bound, with reference to what evidence was before Chief Justice Tauro, for him to --

Q What went before the grand jury.

MR. IRWIN: Yes, it is. And again, as I suggest, this is probably not a very satisfactory answer, but I would represent that the law has been explicit, that where the grand

jury speaks, we assume that what the grand jury has done is sufficient. We do not look to the sufficiency of it. And therefore --

Q But even though we do, I thought the issue here was whether Chief Justice Tauro complied with what you tell us is the requirement of the Supreme Judicial Court decisions, that he must be satisfied that the person whose name is now to be put on the indictment is the person whom the grand jury intended to indict. Is that not the law?

MR. IRWIN: Yes -- yes, it is, Mr. Justice Brennan.

Q I don't see on this record how we can -- how we can know one way or the other when he did.

MR. IRWIN: Well, this is again the reason why we suggest that the exhaustion remedy would have been more appropriate. It seems to me that the very point that you make required the court below, on the comity, the theory, and on the exhaustion of remedies doctrine, to remand this case to the State court for the appropriate procedures to determine exactly what you said.

It seems to me that we have to take the position in advancing an argument before this Court that the judge, in making this determination, is in fact an agent of the grand jury, and once he sets down on paper that he is satisfied that the true name is that of James J. Connor, the respondent, we're in an analogous situation where we would be trying to

examine why a grand jury indicted somebody, and it would seem to me that the suggestion that you made points up the argument that we make in our brief with reference to the exhaustion situation.

Q The court quoted inconsiderate exhaustion, and they checked it, didn't they, on --

MR. IRWIN: Yes, very, very summarily in --

Q I've forgotten on what ground.

MR. IRWIN: I think it was a suggestion that the controlling legal principles were before the court and therefore that the court sua sponte could have raised the federal issue, and therefore there is no exhaustion situation before the court below.

Q As I read the opinion of the First Circuit, it was an attitude that it didn't make any difference what the proceedings and procedures were in the Massachusetts courts, it was constitutionally --

MR. IRWIN: Infringed.

Q -- impermissible.

MR. IRWIN: Exactly.

Q That's why, at least I read it, that's why he didn't send it back to the Massachusetts State courts to let them say what they had done.

MR. IRWIN: Exactly. And, Mr. Chief Justice, I would suggest to the Court that we of course do not agree at

all with that particular conclusion by that court. As a matter of fact, it's interesting to note in the decision below that the court does not in any way discuss the fact that the court, the Massachusetts trial court stands between the prosecutor and the accused with reference to making the substitution. And I think if the court had recognized that, it would in fact recognize that at least part of its equal protection objection would be dissipated, and that if there was a further problem with reference to it, the situation that Justice Brennan suggests would be appropriate to exhaust the matter in the State court.

Q Do you think there might be some due process problems if it developed, and this is a hypothetical, if it developed, that the judge made this amendment to the indictment solely because the District Attorney of Massachusetts came in and said, "This is our man"? Nothing more.

MR. IRWIN: Yes, Mr. Chief Justice, I would suggest that there could be a due process problem at that particular point.

Q Mr. Irwin, --

Q That petition for certiorari -- I mean for habeas corpus, as I read on page 19; it says that all the prosecutor said was to give the direct quote. Is that correct or not?

MR. IRWIN: Yes. But that was only when the

respondent and his counsel were present. This particular matter was initially heard by the Chief Justice on the motion ex parte.

Q Without the defendant being present?

MR. IRWIN: That's right.

Q Then when the party challenged, with his lawyer, --

MR. IRWIN: When he raised his objection on his arraignment, --

Q So nothing was done except this statement that "We now know who it is"?

MR. IRWIN: That's right.

Q No problem.

MR. IRWIN: That's right. And I think it's significant to point out, though, that there was -- again this is in connection with our argument that the justice under 277-19 serves as an agent for the grand jury. I think it's significant to point out that there was a prior hearing, even though it was ex parte --

Q I have great trouble with this judge being an agent of the grand jury; I have great problem with that.

MR. IRWIN: Well, --

Q In Massachusetts, isn't it true that the judge empanels the grand jury?

MR. IRWIN: He instructs them, he empanels the grand jury.

Q So he's an agent of what he has empaneled?

MR. IRWIN: Well, he is to this extent, that the Massachusetts grand jury has available to it the Justices of the Superior Court not only for their advice with reference to the proceedings they are conducting, but also for their assistance, for the court's assistance in the event that the grand jury needs them. So I would suggest that at least on that analogy that they are serving in this capacity as an agent for the grand jury.

Q Where is there, in the record in this case, that there was a hearing held, ex parte or other than ex parte?

MR. IRWIN: The Appendix shows that there was a hearing held on August the 9th, 1963, where the prosecutor presented this motion. And that apparently --

Q Well, you said there was a hearing before then. You said there was an ex parte hearing before the motion was made; I thought that's what you said.

MR. IRWIN: Before the arraignment, Mr. Justice Marshall. The arraignment was subject -- subsequent to the time of the substitution of the name.

Q Well, is there anything in the record to show that the judge ever heard anything prior to that hearing ex parte?

MR. IRWIN: No, there is not, because the record is bound with reference to that. But the docket, the court docket indicates that a motion was presented by the prosecutor

to the Chief Justice on August the 9th.

Q That's what's on page 19? Is that a correct statement on page 19 of the petitioner's habeas corpus? Is that an accurate statement?

MR. IRWIN: That's accurate to this extent, that the arraignment, at the arraignment the defendant, through his counsel, raised an objection to the substitution of his name. And at that particular time the Court made that appropriate remark.

Q And that's all that the prosecutor said?

MR. IRWIN: That's all.

Q Was that "I find out that John Doe is James J. Connor"?

MR. IRWIN: That's all that was said at the arraignment. And I think the Chief Justice's comment was that this was not an uncommon procedure.

Q Mr. Irwin, does -- well, has a formal indictment ever been returned against Mr. Connor?

MR. IRWIN: No, it has not, Mr. Justice Blackmun.

Q You don't have this practice in Massachusetts, that when identity is determined, of perhaps a subsequent indictment?

MR. IRWIN: No. But I wouldn't want the Court to conclude from that that that is not feasible or practicable. I would assume that it can be and has been done in the past.

Q Is there any limitations problem lurking in the background here? This is a murder charge, isn't it?

MR. IRWIN: Yes, it is.

Q Do you have a statute of limitations on murder?

MR. IRWIN: No, we do not, Mr. Justice Blackmun.

Q Do I understand, Mr. Irwin, that your position is that in any event this petitioner never submitted this equal protection claim to any Massachusetts court?

MR. IRWIN: That is exactly correct.

Q And for the first time it was raised in the federal habeas proceeding?

MR. IRWIN: Exactly.

Q He raised some federal constitutional ground but never specifically anything to be called an equal protection claim?

MR. IRWIN: Never, Mr. Justice Blackmun.

Q Mr. Irwin, do you know how many other States have this procedure? If any.

MR. IRWIN: I would assume that there are very few. I do not know exactly, Mr. Justice Stewart. I do know that a great many States -- on page 20 of our brief we make some reference to it, but I would assume that probably 35 States use the information procedure, so I would assume that maybe somewhere between 14 and 15 have a variation of this --

Q And do John Doe indictments?

MR. IRWIN: Yes.

Q Do I understand you do not use the information procedure in Massachusetts?

MR. IRWIN: We do not, Mr. Justice Blackmun.

Q I suppose there could be John Doe information, couldn't there?

MR. IRWIN: I would suggest that there could be, yes.

Q But you haven't -- you just don't know how many States have this John Doe --

MR. IRWIN: No, I do not, Mr. Justice Stewart.

Q Can a man be charged in Massachusetts on a capital charge, on a murder charge, without a grand jury?

MR. IRWIN: No, he cannot, Mr. Chief Justice.

Q All right.

Q You have indictments generally for all felonies, don't you?

MR. IRWIN: Yes, we do, Mr. Justice Stewart.

In summary, then, I would just like to conclude by stating that the Commonwealth, for the reasons that it has asserted in its brief and in its argument before the Court, feels that the court below, if it thought that there was indeed an equal protection problem, should have, under the comity doctrine and the exhaustion doctrine, referred the case back to the State court so that the State court, for the first time, would be able to view its statute with reference to

whether or not it was a valid State procedure in light of the constitutional claims made under the equal protection clause of the Fourteenth Amendment.

Thank you very much, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Irwin.

Mr. Twohig.

ORAL ARGUMENT OF JAMES J. TWOHIG, ESQ.,

ON BEHALF OF THE RESPONDENT

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

In this case, involving a homicide that occurred in the early morning hours of May 1st, 1965, the indictment was handed down by a grand jury that was in session during the entire summer of 1965, and I believe was even in session during May 1965, and throughout August 1965.

On August 4th, a Wednesday I believe, this particular indictment was handed down, and the indictment, besides naming a man named Donald Landry, also stated that another man was involved, John Doe, and that they had no description of this man, and no other name.

Now, that is the way the indictment read, and I believe it's stated in full on page 74 of the Appendix.

This information was attested under oath by the grand jury, and signed by the foreman. On August 6th, two days after this so-called indictment of John Doe, which is not

a fictitious name in my belief under the Massachusetts statute; in my belief that statute is intended to indicate a man who is known to the police only by a nickname, part of a name, or a fictitious or assumed name.

Q But aren't there a lot of people who commit criminal acts, whose identity is not known for quite some time?

MR. TWOHIG: Not even any name, Your Honor; I will agree to that. But in those cases the statute provides that there shall be a practicable description before indictment.

Q You mean by that a certain height, a certain color of hair, and so on?

MR. TWOHIG: Yes. And in this case, Connor was five-feet-seven, had black hair, and was of very slight build. But there was no description of any kind in this indictment. All the grand jury did was to indicate that it did not know any way of identifying the second man involved in the homicide.

Now, on August 6th, Landry's wife was moving from her apartment in Boston and some friends had gone there to help her. Connor and his girlfriend were at that apartment. Connor was arrested when the police visited the apartment, with another man, of about the same description. This other man had been in jail on May 1st, so Connor was held. And this was in fact stated to Connor by one of the policeman: I have made this statement in open court. There's never been any denial of it.

Connor was then taken to police headquarters in

Boston, and thereafter, on the 9th of August, the following Monday, I, in response to a telephone call on behalf of Connor, went to Sussex Superior Court for the purpose of representing Connor. It was not known at the time, when the case was called, that I was in the courtroom. But it was called, and I presented myself to the court. I had supplied the court with a copy of that session that morning.

Shortly after the court recognized me, the Assistant District Attorney in charge of the case, -- and Mr. Irwin was not there; the Attorney General's office has had nothing to do with this case until it was in the federal courts. But the Assistant District Attorney presented a motion for an amendment to the indictment.

The only information, evidence, or anything of any kind that the court ever had was a bald statement by the prosecutor: Since the indictment has been returned, we -- and he did not identify who he meant by "we" -- we have ascertained the name of the defendant. We did not know it at the time of the indictment.

No statement was made as to any other means of identification.

I objected to this, although I was taken by surprise, and they accepted the allowance of the amendment. And went into it in detail, stating that there was no indication that Connor was the man intended to be indicted by the grand jury,

or indeed that they ever intended to indict any specific person, and that consequently the indictment had no application to Connor whatsoever.

Q Mr. Twohig, is there any -- is that a transcript of that hearing in the Appendix?

MR. TWOHIG: I have supplied one for the Court, Your Honor.

Q Is it in the Appendix?

MR. TWOHIG: It's not in the Appendix, no, Your Honor. It is with the voluminous record of the --

Q In the original record?

MR. TWOHIG: -- pretrial proceedings, and the evidence in the case.

Q Thank you.

The amendment was allowed. Now, the amendment was not sanctioned by the Gedzium case. The procedure in the Gedzium case was in accordance with what the Gedzium case said the statute intended. The procedure in the Gedzium case was that the amendment was not to apply. There was not to be any amendment; that the indictment was, in effect, sacred, and could not be touched. And this is in accordance with the decision in Commonwealth vs. Mahar in Massachusetts, which I believe has never been overruled, and which states that no amendment can be made to an indictment in a capital case.

The Gedzium case said that when the true name of

the man accused in the indictment under the name of John Doe is discovered, it can be entered in the record and thereafter the defendant will be referred to by that name. And that's what the statute says, which Mr. Irwin has just read.

But that presupposes that John Doe is actually a fictitious name and that no other practicable description is necessary, and I submit that the statute does not mean that. But even if it did, it would be unconstitutional, because it would deprive the defendant not only of equal protection but also of due process.

Q What would you do, Mr. Twohig, about an accused who is indicted under this statute by the John Doe identification and thereafter, when he's apprehended, he refuses to give any name of any kind and they are unable to find his true name? Can he frustrate the process, or what would be the next step under this Massachusetts statute?

MR. TWOHIG: He could be tried under the practicable description, Your Honor, and the name John Doe. But there must be, under the statute, a practicable description. He must have been indicted by some identification by the grand jury.

Q By "practicable description" do you mean, again, "approximately five-feet-seven, approximately 140 pounds, and approximately 40 years of age", something of that kind?

MR. TWOHIG: Something of that kind, or by photographs or by fingerprints, or by some birthmark. Some description of

any kind --

Q Well, at the time of the grand jury there may be no way of getting either a photograph or a fingerprint.

MR. TWOHIG: I grant that, Your Honor.

Q That may not be available until --

MR. TWOHIG: And in such a case the culprit would never be discovered, I suppose. But, in this particular, --

Q No. No, I'm assuming, Mr. Twohig, just to get this illustration, I'm assuming that after the indictment by this process he is apprehended and identified, and the witnesses who testified before the grand jury identify him as the person that they were speaking about to the grand jury, but the name is not disclosed, and he refuses, he stands on Fifth Amendment grounds to refuse to give his name. Now --

MR. TWOHIG: They do not need it. Witnesses can go before the grand jury again, Your Honor, and they can identify the man as the man whom they failed to identify before.

Q Well, I've not made myself clear. In my hypothetical they have identified him. They said he was five-foot-seven, approximately 40 years of age, black hair, swarthy complexion; and that they saw him shoot someone with a pistol, and run. And that's all. He hasn't been apprehended at the time they're before the grand jury.

They describe these events. There is a dead person. And the grand jury returns a John Doe indictment.

Now, when he is thereafter apprehended, he is identified in custody by the same witnesses who had testified to the grand jury, who again say, "This is the man we were talking about." So you have a clear identification of -- for indictment purposes, I suppose you would agree?

MR. TWOHIG: Yes.

Q Now, you say they must go back to the grand jury again and do what?

MR. TWOHIG: No, they don't have to go back this time, because they had previously identified him by a practicable description.

Q How do you go ahead under this statute with the trial, then?

MR. TWOHIG: You go ahead with the indictment as it stands, because it cannot be amended under Massachusetts law, in my opinion.

Q He is tried as John Doe?

MR. TWOHIG: John Doe, and the description. Yes, Your Honor.

Q But the statute doesn't say John Doe and the description; it says "or" --

MR. TWOHIG: Or.

Q -- he may be described by a fictitious name or by any other practicable description.

MR. TWOHIG: Yes, Your Honor.

Q But we're not --

MR. TWOHIG: That is it.

Q We're dealing here with the constitutional question and not with the statute.

MR. TWOHIG: No.

Q Mr. Twohig, may I ask: Did you have any method of reviewing the amendment after it was allowed over your objection? Under State law.

MR. TWOHIG: On many occasions I've brought up the question of the illegality -- I claimed it was illegal and unconstitutional.

Q But I take it you couldn't appeal the allowance of the amendment over your objection without first going to trial, is that it?

MR. TWOHIG: That's it, Your Honor, because I tried that and --

Q Do we have the trial proceedings, are they before us?

MR. TWOHIG: They are. I have furnished a copy of them to the Clerk of the Court.

Q They're in the complete record?

MR. TWOHIG: The complete record is here.

Q Well, were there any witnesses who testified at the trial who identified Connor as one of the --

MR. TWOHIG: Yes, and I'm coming to that.

Q All right.

Q And when you get to it, would you say, too, whether any of them said they had also identified him before the grand jury?

MR. TWOHIG: They said they had not, Your Honor.

Q Well, the witness Betty Moore, if that was her name, changed her story. She told one story first to the grand jury, and then she changed it.

MR. TWOHIG: Yes. She had testified twice, Your Honor, --

Q Right.

MR. TWOHIG: -- before the grand jury. And it's my impression that she said -- she gave different stories each time.

Q Yes.

MR. TWOHIG: But on no occasion had she identified Connor, although she had known Connor for several years.

Q Well, because of the holdup --

MR. TWOHIG: Right.

Q -- at her place of employment --

MR. TWOHIG: No, before that. No, not because of the holdup.

Q Yes.

MR. TWIHIG: Connor was not involved in the holdup. Connor was, I believe, in jail at the time of the holdup, and

released the day of the holdup.

Q Yes.

MR. TWOHIG: But two days later he became eligible to be charged in the murder by virtue of being at large. The witnesses, the two witnesses did not identify Connor before the grand jury. And that was their testimony at the trial. And since one of them admitted at the trial, in order to testify at the trial, that she committed perjury on the occasions when she testified before the grand jury, although this grand jury was the same one, still in session, at the time when Connor was brought before the court, it was impractical for the prosecutor to go back to the grand jury with the same two identifying witnesses for some reason, and that is the reason -- and it was on that ground that I asked repeatedly for the grand jury minutes, because if there was any evidence in that transcript that was favorable to Connor, I felt that I was entitled to have it, as stated in Brady v. Maryland.

The identification must have been favorable to Connor, if any there were. And I don't believe there was any before the grand jury. But there might have been other evidence that they gave relating to the events of the robbery two days before the murder, and relating to the events that night before the murder or the homicide or whatever it was.

There might have been something there which was

favorable to Connor. I believe that I was entitled to have that, and I was denied that, of course, repeatedly, right up to the time and during trial.

The court then having adopted the amendment on the 13th, on the 13th there was another action taken by the court, this time without any information whatsoever. It was just brought to the attention of the Clerk. I suppose the statute had been read more carefully in the meantime by the prosecutor. That an entry should be made in the record in accordance with the statute, to the effect that the true name of the man indicted was James J. Connor. And, in fact, the copy of the amendment which was served upon Connor when he was in jail, after appearing in court on the 13th, contained his name.

Now, the indictment, of course, handed down by the grand jury did not contain his name. That was not the indictment which was served upon him in the jail.

So the, in my view, not only the Constitution of Massachusetts and the Constitution of the United States were violated by this procedure, but the law itself, the statutory law of Massachusetts was violated, and he was denied due process, on the grounds, I suppose, stated in Gedzium, that when a miscreant conceals his identity during the commission of a crime, he has no right to complain if he is arrested on a general warrant.

This is of course contrary to all the previous traditions of the Commonwealth of Massachusetts, and the history, the judicial

history that preceded the establishment of the Commonwealth.

Q Of course we're not concerned here with whether or not the statutory or common law of Massachusetts was violated in this case, that -- it was determined by the Supreme Judicial Court of Massachusetts that it was not, that this was in conformity with the law of Massachusetts.

MR. TWOHIG: Yes.

Q And we accept that. What we're concerned with here is the --

MR. TWOHIG: Federal question.

Q -- only a federal constitutional question, and that alone.

MR. TWOHIG: Now, the federal questions were also presented to the Massachusetts Supreme Judicial Court, and I have reviewed the presentation of these questions in my brief. In --

Q Where do we find in your brief that you specifically rested on the federal constitutional grounds of equal protection, that I think you were --

MR. TWOHIG: Page 21.

Q Page 21 of your brief or the transcript?

MR. TWOHIG: My brief, YOur Honor.

Q Very good.

MR. TWOHIG: In the second paragraph, I say:

"The constitutional and legal issues arising out of the indictment and arrest were also fully argued in Connor's Brief in the

Supreme Judicial Court, pages 10 to 14, as to probable cause, the absolute limitations on material amendments to indictments in serious cases, the nullity of the indictment as an indictment in blank and the warrant as a general warrant, all involving the violation of Connor's rights under" -- and I'll skip the Massachusetts laws -- "under ... the Fifth and Fourteenth Amendments to the Constitution of the United States."

I might also say at this time that I believe that the Sixth Amendment was involved.

"These issues were of course also stated and argued in the United States District Court at length", and I have the citations there.

Q I notice that the Supreme Judicial Court opinion dealing with this indictment issue doesn't treat, at least, in equal protection of Fourteenth Amendment terms, does it?

MR. TWOHIG: No, they did not, Your Honor. Although I raised the Fourteenth Amendment at that time, and I believe I mentioned the equal protection in my brief a couple of times. I did not stress it or emphasize it.

Q That is in your brief.

MR. TWOHIG: Due process was my main reliance, but the Fourteenth Amendment in its entirety was also relied upon.

Q Does your brief include it in the --

MR. TWOHIG: I believe I -- yes, I have supplied a copy of my brief to the Court, but I have another copy here which I will

give to the Court Clerk in case I didn't do that.

Q Mr. Justice Kirks' dissenting opinion in the Supreme Judicial Court of Massachusetts seems to rely on the State Constitution, on Article XII of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts. Is that the way you read it?

MR. TWOHIG: Yes. Yes, it does, Your Honor.

Q I don't see any reference to the federal Constitution.

MR. TWOHIG: I didn't get that, Your Honor.

Q I don't see in his dissenting opinion any reference to the Constitution of the United States.

MR. TWOHIG: No, I don't believe there was. But I believe that the Constitution of the United States was nevertheless violated, Your Honor.

Q I understand you do.

MR. TWOHIG: The Circuit Court pointed out clearly to me what I had failed to emphasize, although I had mentioned it, and that was that equal protection was also involved. But I do believe, nevertheless, that due process also is involved here.

The procedure, then, that was -- the procedure that was authorized in Gedzium was thus expanded and elaborated upon in this particular case to include something that had never been applied to any other defendant in Massachusetts, and clearly in violation of his federal constitutional rights.

The case then proceeded, and I continued to protest from time to time about the indictment. I asked for the grand jury minutes, in order that I would get some information which would enable me to ask for an evidentiary hearing as to whether or not the grand jury had been intending to indict Connor or some other person.

I asked for the grand juzy minutes also on several other grounds: to prepare my case for inconsistent statements; to prepare for cross-examination. But I was principally concerned with the question of whether or not Connor should ever have been brought to trial and forced to respond to a charge of murder in the first degree. That was my objective in asking for the grand jury minutes, primarily.

I was denied the grand jury minutes. I think I must have asked for them formally at least a dozen times. They were kept from me on pretext after pretext. I have stated these pretexts in the brief on page -- beginning on page 25. And it continues for several pages thereafter.

Q Mr. Twohig, before I forget it, just in case we don't have your brief on the Supreme Judicial Court -- you say you have a copy here?

MR. TWOHIG: I have, Your Honor.

Q Be sure to leave it with the Clerk.

MR. TWOHIG: I will, Your Honor.

May I say, Your Honor, that the one I have is marked in

pencil, and I apologize for that, but --

Q We won't read the notes.

MR. TWOHIG: All right.

The grand jury minutes were withheld from me, at any rate, although there were, I think, several constitutional grounds on which I was entitled to them. And this policy of secrecy and the withholding of evidence material to the defense was applied to the matter of interviewing the true identifying witnesses.

I had never even seen the identifying witnesses up to the time of the trial, except on one occasion when I visited the courthouse back in, I believe, the end of August, 1965, when I saw a girl in conference -- the door opened, and inadvertently I saw this girl in conference with several police officers, and the Assistant District Attorney in charge of the case, whom, at the trial six or seven months later, I recognized as a material witness. They had her there at that time.

Q That was the witness Moore?

MR. TWOHIG: Betty Moore.

Q Yes.

MR. TWOHIG: Very attractive young lady, tall, slim, dark, and one that was easy to recognize later on.

(Laughter.)

This witness and the other witness, also a striking young man, his name was Ronald Hayes, were both withheld from any conversations with me or with any of the counsel for the three co-

defendants.

Q Did you make a demand?

MR. TWOHIG: Oh, yes, Your Honor. Several demands. And --

Q Well, I thought the witness Moore was made available to you, and that when you began asking her about her testimony before the grand jury, counsel for the Commonwealth objected, and that then the interrogation was concluded. I thought I saw that in the record. Am I mistaken?

MR. TWOHIG: No, Your Honor. Just before the trial she was presented to the court, and -- at the last hearing before the trial, I think.

Q So she was made available to you?

MR. TWOHIG: No, Your Honor, she was not. She was put on the stand in open court. We were --

Q Before the trial?

MR. TWOHIG: Sir?

Q Before the trial?

MR. TWOHIG: Before the trial. And the judge instructed here that she didn't have to say anything if she didn't want to, that she was entitled to counsel, and so on, and he asked her if she wanted to say anything other than her name and address. And I believe she gave her name, and that was all she would say.

We were never allowed to question her.

The attorney -- I recall now -- the attorney for one of

the other defendants was given an opportunity to see her in the District Attorney's office before that, and when he started to ask her questions, the prosecutor intervened with statements that she didn't have to answer any questions if she didn't want to, and that he was not to ask her anything about what she said before the grand jury; and the conference exploded in an argument and no -- nothing was elicited from her there.

We have maintained, all of us, four counsel, that we never had an opportunity to talk to these witnesses. We didn't consider that incident in court an opportunity to discuss the case with the witness.

I believe that she was advised not to talk to us.

The case was replete with irregularities. There were answers to specifications of two of the other defendants, my own specifications I had no quarrel with other than that they were not responsive and that I got no answers to anything that I tried to get about the information I considered material in the grand jury minutes.

Q Now, do you direct these points to the constitutional issues, Mr. Twohig?

MR. TWOHIG: Yes, I do, Your Honor. The full and fair trial.

It has been the contention, one of the minor contentions, I believe, of the prosecution officers that we had a jury trial. And I think that's been intimated in the decisions, that you always

have the jury trial as final protection.

But we didn't have a full and fair trial, Your Honor, and I believe that that is a fundamental thing which involves the Constitution of the United States and the protection it provides to every defendant.

So I regard it as being involved in the constitutional issue, Your Honor.

I don't think that in any way the rights of the defendant Connor were respected under the Constitution of the United States, under the Fifth, the Sixth, or the Fourteenth Amendments. That he was denied equal protection, and that he was denied due process.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Twohig.

Mr. Irwin, we'll give you -- you have three more minutes.

REBUTTAL ARGUMENT OF JOHN J. IRWIN, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. IRWIN: Mr. Chief Justice, and members of the Court:

By way of rebuttal, I would only reiterate that it's the Commonwealth's position that the constitutional matter before this Court on this hearing is whether or not the respondent, James J. Connor, was deprived of any constitutional guarantees, specifically the equal protection of the Fourteenth Amendment of the Constitution.

With respect to the argument that was made by the

respondent, through his counsel, I respectfully suggest that a reading of the Commonwealth v. Doherty case, that is cited in the brief, with the dissent, will indicate that the Massachusetts Supreme Court was not presented with the constitutional argument, and that the Justices, in deciding that case, were concerned solely with determining whether or not Hurtado v. California was still strong enough to support the doctrine of Jones v. Robbins in the Commonwealth of Massachusetts, and no other issue.

And getting back to the position that the Commonwealth takes in its brief and its argument, I would respectfully suggest to the Court that this particular vehicle, General Laws Chapter 277, Section 19, is strictly a procedural vehicle by which a grand jury, which has a valid interest in seeing to it that there are on occasion John Doe indictments returned, had the power to indict somebody and then require, later, a substitution on a showing of cause, quote, unquote.

It seems to me that in that situation, that if the court wanted to determine whether or not there had been an equal protection violation, that the proper thing to do would be to remand the case to the State court, the appropriate State court for a hearing, consistent with those particular claims.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Irwin.

Thank you, Mr. Twohig. The case is submitted.

(Whereupon, at 11:06 a.m., the case was submitted.)