In the

Supreme Court of the United States

JAMES CHAFFIN,

Petitioner,

v.

LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY,

Respondent.

No. 71-6732

Washington, D. C.
February 22, 1973

Pages 1 thru 41

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

JAMES CHAFFIN, Petitioner, v. LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY, Respondent.	No. 71-6732

Washington, D. C.

Thursday, February 22, 1973

The above-entitled matter came on for argument at 1:57 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

GLENN ZELL, 15 Peachtree Street, N.W., Atlanta, Georgia 30303, for the Petitioner.

RICHARD E. HICKS, Assistant District Attorney, 3rd Floor, Fulton County Courthouse, Atlanta, Georgia 30303, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 71-6732, Chaffin against Stynchcombe.

Mr. Zell, you may proceed whenever you are ready.

ORAL ARGUMENT OF GLENN ZELL, ON BEHALF OF THE PETITIONER

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

This case involves the resentencing of a man to a higher sentence from retrial.

In the first trial, Mr. Chaffin was indicted and convicted of robbery by open force and violence. He received a sentence of 15 years. I was then appointed to appeal his case. I appealed to the Georgia Supreme Court. I raised one issue, that of an instruction involving putting the burden of proving alibi on the defendant. It was affirmed. I thereafter went in the Federal District Court. In the Lee case in Georgia, the alibi instruction in Georgia was struck down.

Now, Mr. Justice White might be more familiar with the alibi instruction in Iowa when he was on the Eighth Circuit. He struck down a similar instruction in Iowa.

The State did not appeal. Mr. Chaffin then was tried again on the same charge. The evidence was exactly the same. I would like to draw on this point for just a moment.

At the second trial I was ordered to represent him in his trial. I decided to add the defense of insanity. I felt it involved this particular person. The evidence as to the crime was exactly the same, one eye-witness, the victim; one other witness who thought he couldn't identify Mr. Chaffin but he saw a man who resembled him. The extra evidence that the Fifth Circuit in their decision points out and the State points out in their brief is that a psychologist and a psychiatrist were called to the stand to testify for and against the defendant. I called the psychiatrist who said he thought he had a mental disorder. The State called the psychiatrist who said he didn't. The State also called a few witnesses to testify as to the man's -- appeared to be rational prior to the crime. That was the extra evidence. No extra evidence related to the crime at all.

The jury then came back with a sentence of life imprisonment, a substantial increase.

Now, let me say this to the Court. I had submitted an instruction to the judge in the second trial that the jury should be charged that they could give Mr. Chaffin no more than 15 years, what he got in the first trial. The judge refused the instruction. After the jury returned a sentence of life, I thereafter objected strenuously under Pearce v. North Carolina. The judge refused and let the life sentence stand.

I might add that when the jury sets the sentence in Georgia, the judge does actually sign the sentence.

QUESTION: The jury had the instruction that you requested?

MR. ZELL: Yes, your Honor.

QUESTION: Part of the trial before they reached a verdict (inaudible) might have later become subject to ... this was a suggestion on the part of ... that he was guilty.

MR. ZELL: Well, let me say this, your Honor. Let me clear it up a little bit, your Honor. At the time of the second trial -- We now have a bifurcatory trial in Georgia. We have guilt and innocence, then we have a sentencing or punishment phase if you stand guilty. At the time of both Mr. Chaffin's trials there was not this. They tried guilt and innocence and punishment at the same time. So the judge charged the jury on guilt and innocence and he also charged the jury on sentence, all in the same set of instructions, you see. So in charging the jury prior to the instructions, I said, "Your Honor, if the jury does find him guilty, would you include in your charge they can give no more than 15 years, what he got on the first trial?" The judge refused the instruction.

QUESTION: What was the charge he gave?

MR. ZELL: The standard sentence of life or death.

QUESTION: He charges the jury, if you find him guilty, then you must impose sentence and the limits are such and such?

MR. ZELL: Up to death. In fact he charged death -- I'll cover that. The jury was out about two hours on the death sentence. They came back finally with life.

Now, at this point, of course, we are familiar with Stroud v. United States in which this Court in 1919, the Bird Man from Alcatraz, I think, I think he was known as, received a life sentence. He appealed it and reversed it. And on his retrial he got death. And this Court affirmed it. Now, of course Furman v. Georgia has come out in my State and that only may or may not still be in force, I don't know.

QUESTION: Didn't the Green case intervene and solve that problem?

MR. ZELL: Well, there has been the Green case. But that deals with conviction with the crime itself. We are talking about punishment. Green dealt with first degree and second degree arson. The Georgia case, I think it was Price v. Georgia, that was a manslaughter-murder verdict. Do you remember that? He was found guilty of manslaughter. Georgia tried to try him again for murder. They said, you can't do it. He was acquitted of murder. Manslaughter was the most he can get on his second retrial.

We are talking here about punishment, not about crime,

which apparently there is a difference. Now, the late Justice Harlan, Mr. Justice Marshall, Mr. Justice Douglas say that double jeopardy applies to punishment as well as the crime. I have taken this attack as well and have accepted it, naturally. I also argue due process and equal protection.

After the conviction of life I went to the Georgia Supreme Court and they affirmed it, again citing a previous Georgia case. I then went into the Federal District Court in the second go-around and Judge Sidney Smith affirmed it, denied the writ. Then I went to the Fifth Circuit. The Circuit affirmed. I lost in four courts and I am now before this Court. I didn't get a dissent yet.

I would like to then get into the constitutional questions involved here. Very shortly, of course, it's the right of appeal, obviously. If a man gets a sentence, if he gets a high sentence, of course, he has less to lose. He will appeal if he gets a life sentence certainly, or certainly a death sentence. But if the man gets one or two years -- now, for example, rape in Georgia is anywhere from one year to 20 years, life or death. If a man gets one or two years on a rape charge or a robbery charge, which is anywhere from one to 20 years, life, or death, or burglary which is one to 20, forgery is 1 to 10, theft or ... is one to ten. So if a man gets the low end of a sentence, one or two years, there is this threat by the State, it's an implied threat obviously,

that if you appeal on a retrial, we will go for the maximum sentence. This is a built-in threat, it's not an expressed threat, it's an implied threat, not to appeal.

Now, I think in any system of justice, we should encourage a man to exercise his rights, whether it be for jury trial or for an appeal. And we should encourage an appeal --

QUESTION: That is the limitations imposed in Pearce that the rule was aimed at averting the possibility of vindictiveness.

MR. ZELL: I think we have a more subtle vindictiveness, your Honor. In Pearce it was the --

QUESTION: But you are saying we should just simply say that the chances of a higher penalty deters the right to appeal.

MR. ZELL: That's correct.

QUESTION: And that's the end of it.

MR. ZELL: Well, it's like playing Russian roulette with a man's freedom.

QUESTION: So your answer is yes.

MR. ZELL: That's correct.

QUESTION: But that isn't Pearce, is it?

MR. ZELL: Well, no, you weighed a different problem in Pearce. Pearce deals with an obviously vindictive judge, there is no question about the judge. He was increasing the

sentence with no reason.

QUESTION: No, but the rule that is stated in Pearce is certainly not the one that you are --

MR. ZELL: That's correct. But there are words in Pearce that I could certainly use.

QUESTION: That wasn't the holding of Pearce.

MR. ZELL: That's correct. Pearce just dealt with a vindictive judge.

QUESTION: There is just almost any case that you can use for some other case, can't you?

MR. ZELL: Correct. My argument is -- I think I have several points in my argument. I will discuss Jackson v. U.S. I think it's a very similar argument to this case, the Lindberg kidnapping kind. There if the man pled guilty, he couldn't get death, but if he had a jury trial he could get death. And this Court struck it down. Justice Marshall wrote the opinion. This chills a man's rights. So Jackson v. U.S. I could use for my argument. It fetters a man's rights. It says don't try a jury trial or you might get death. So plead guilty to life. Now, this Court struck down that provision of the death penalty in the Lindberg statute.

QUESTION: Isn't there another aspect of Russian roulette, as you put it, that if this sort of an approach, your approach should prevail, you put a premium on every trial judge to give the maximum sentence in every case so that this

can't happen?

MR. ZELL: That's a possibility, your Honor.

QUESTION: Isn't it more than a possibility? Isn't it a real probability over which some public defenders are somewhat concerned?

MR. ZELL: Yes, your Honor, but I would hope judges, in their fairness and honesty, compassion, will set a sentence in line with the crime. I think our whole legal system is based on fairness and justice. I'd like to think that a judge --

QUESTION: On that basis there is an argument for permitting the sentence to be increased later. I mean, after all, the system is supposed to be right.

MR. ZELL: Yes, your Honor.

QUESTION: It's supposed to match the penalty to the crime, you say. So the question should be not whether it's higher or lower than the first time, but whether it's on its own basis all right.

MR. ZELL: But you raise the proposition, what is the State's interest in increased penalty? What is the policy? Why should a State --

QUESTION: You just stated it. You just stated it.

MR. ZELL: I see very little, if any --

QUESTION: No, you just stated it, that the sentencing should be rational, it should be based on the facts

of the case. So your question should consider the sentence at the second trial on its own two feet without regard to the first.

MR. ZELL: But, of course, then you place -- the man is going to appeal his first conviction, is he not, and then he won't appeal it, because he is afraid of an increased sentence, if he got a particularly low sentence the first time.

QUESTION: By the way, Jackson just set aside the sentence, not the conviction.

MR. ZELL: That's correct. All I am asking in this case is to reduce the sentence, I'm not asking to set aside the conviction.

QUESTION: Are you going to try to bring this case within the principles stated in Pearce?

MR. ZELL: Well, there are words in Pearce that are very helpful to this case about the right to exercise due process, the right to appeal, that you shouldn't be worried about getting an increased sentence. You could certainly use that to --

QUESTION: Did the jury know anything about the first trial?

MR. ZELL: No, they did not.

Now --

QUESTION: Was there any possibility of vindictiveness?

MR. ZELL: There is none, obviously not.

QUESTION: Why not?

MR. ZELL: Because the jury did not know the first sentence.

QUESTION: I know, but in Georgia, does it make any difference what the prosecutor goes for? Can the prosecutor argue about the sentence in Georgia?

MR. ZELL: In the sentencing in the case in trial he argues for a greater sentence to the jury. Yes, he does. He argues for --

QUESTION: Does that have any effect, do you suppose?

MR. ZELL: I am sure it does occasionally. They hope it does, I think, the prosecutor.

But let me say this --

QUESTION: And the judge knows about it, doesn't he?

MR. ZELL: Yes. We have different judges, by the way, which makes no difference.

QUESTION: How about the prosecutor? Is he the same?

MR. ZELL: I think the prosecutor was different, the judge was --

QUESTION: Certainly the file was the same, though. Everybody knows that he was tried first.

MR. ZELL: That's correct.

QUESTION: Except the jury.

MR. ZELL: Except the jury, that is correct.

QUESTION: Did I understand you to say that this man

was tried before the bifurcated trials?

MR. ZELL: Before. That's correct.

QUESTION: So he was tried all at once. So that the prosecutor is considerably more inhibited in a single trial than he is in a bifurcated trial when you come to the sentence.

MR. ZELL: That's correct. In a bifurcated trial you can present more evidence as to sentence. We have a complete statute on what evidence is admissible in a sentencing phase trial.

QUESTION: Did the prosecution go for death in the first trial?

MR. ZELL: No, they didn't. I didn't try the first case --

QUESTION: Did they or not?

MR. ZELL: I don't think they did. But they went for it in the second.

QUESTION: I would think you might argue that that case on its face would apply to a situation like this.

MR. ZELL: There is no question when I argue vindictive -- as to the possibility of the death penalty, on that point it would be vindictive. They did go for the death penalty.

Let me say this, too, on the point of vindictiveness. Prior to the second trial Mr. Chaffin was in a dilemma as many of these appellants would be, defendants would be. You

have now been convicted and reversed. Let's take a real low sentence like one year. You have appealed, there were legal errors and you've reversed it. Now, what do you do at the second trial? T protect yourself against an increased sentence by jury, you would waive your jury trial and try it to the judge. The judge obviously knows your prior conviction, he would have access to it, would read the advance sheets. So we considered this, by the way, waiving his right to jury trial in the second trial. We considered that.

He asked me my advice, I remember, prior to the trial, what should we do, would I get an increased sentence? I told him I couldn't answer that question, I didn't know, the law was unsettled.

Toward increased sentences and life to death, four States do not follow Stroud, and apparently three do. Iowa in 1926 allowed a sentence to go from life to death on the second trial and the man was executed. The same in Louisiana. I think Massachusetts in dicta said they would allow going from a life sentence to death.

Now, whether we are talking about going from five years to 20 or going from life to death, I think this just offends due process, to me.

QUESTION: I don't find in the appendix the closing argument of the prosecutor to the jury in this case. Was it recorded?

MR. ZELL: Yes, your Honor. I better not say that. I don't know.

QUESTION: Was there a full transcript of the trial?

MR. ZELL: No, there was no record made in this case and let me explain why. When I filed the writ the second go-around in the Federal court before Judge Sidney Smith, he just asked for briefs, he did not allow anything in the record.

QUESTION: No. Is there a transcript of the State court trial extant anywhere? Does one exist?

MR. ZELL: Yes, on both trials, they do exist, sir.

QUESTION: Aren't the final arguments recorded in Georgia?

MR. ZELL: They normally are. I do not want to state to this Court that they were recorded in this particular instance.

QUESTION: They may have been, but they may not have been transcribed.

MR. ZELL: That's correct. I don't remember. The actual trials were transcribed to show that the evidence was exactly the same.

QUESTION: Who would you ask to find that out? You?

MR. ZELL: Well, I could check with the clerk of Superior Court to send the records up if the Court wanted them or get them sent up.

QUESTION: Your colleague on the other side may know.

MR. ZELL: They were recorded in court, both transcripts. They are filed in the clerk's office down in the trial court.

QUESTION: You don't know whether the closing arguments are --

MR. ZELL: I do not. I do not know.

QUESTION: Is it possible the closing argument might have been transcribed but, rather taken down by the reporter but not transcribed because neither party designated it?

MR. ZELL: Possibly, yes, your Honor, possibly. I can't answer that. It's been a long time. I think he was tried the second time in 1971. It's been almost two years ago. I don't want to say for sure whether it was transcribed or not.

I would say this to the Court. I would be willing to file an affidavit, because I clearly remember it, that Mr. Bill Weller did try for the death penalty. I do remember the jury being out for about three hours.

QUESTION: You don't remember whether he did the first time or not.

MR. ZELL: No. I didn't try the first case. I clearly remember the second trial, the reason he went for the death penalty, because when I went out in the corridor of the trial, the victim was running up and down the corridor laughing.

QUESTION: How about at the first trial? Is there a transcript of that?

MR. ZELL: Of the trial, but I don't know about the final argument.

QUESTION: So if it's a comparison we want, we would have to have both trials.

MR. ZELL: That's correct. I think I can get affidavits from the attorney. Mr. Grenay tried the first trial. I can get an affidavit from him. And the District Attorney, Bill Weller, tried both trials, the District Attorney. And I think we can get affidavits to verify, or clear up that. But I do know they did go for the death penalty the second trial, knowinghe only got 15 years the first. The death penalty in the second trial.

QUESTION: He asked the jury to impose it.

MR. ZELL: That's correct, knowing that he had 15 the first. And that's vindictiveness to me, is it not? Knowing he got 15.

QUESTION: They frequently ask for more than they think it can get, perhaps than it wants, doesn't it on the penalty phase?

MR. ZELL: Yes, your Honor, very definitely. The question we are faced with here, of course, is does this chill your right of appeal?

QUESTION: Well, supposing the prosecuting attorney thought that the 15 years sentence awarded at the end of the first trial was a very just and proper one and he wanted to get

just that again, if he has any sense he's not going to ask the jury for 15 years. He's going to ask them for something more because you will be asking for something less and the chances are the jury will split it.

MR. ZELL: That's absolutely correct.

QUESTION: Isn't that the inference of the adversary system?

MR. ZELL: Here is my answer to that, your Honor. In the Federal system, in 43 of the 50 States, Mr. Chaffin could not get increased sentence. What's good for the goose should be good for the gander. And that's what the Fifth Circuit argument in Salisbury v. Grimes, they said, well, heads you win, tails -- that's not true in the Federal system, if you appeal you don't get any more the second trial.

QUESTION: You mean 43 of the 50, that's counting the ... for Pearce.

MR. ZELL: No, no. Only 7 States, the jury sets the sentence, only 7 States. Now, all 7 are against me, including Georgia.

QUESTION: Oh, sure.

MR. ZELL: All allow increase. The Fourth Circuit agrees with me, the Fifth Circuit, of course, disagrees, and there are three district courts in Tennessee who agreed with me. And, of course, it's 43 in States going from life to death in my favor, I believe. So there is involving the

principle of increased sentence. Of course, this Court has only reached this issue once in Stroud.

QUESTION: You say there are only 7 States where the jury sets it.

MR. ZELL: That is correct, and they are all against me.

QUESTION: On this issue.

MR. ZELL: Yes, your Honor.

QUESTION: They have all decided this issue?

MR. ZELL: Yes, your Honor. It's in my brief about footnote -- it's on page 6, footnote 2.

QUESTION: Thank you.

MR. ZELL: And I also cite the case in the Fourth Circuit in Tennessee on the same page.

But it's strange, it's 7-0 against me and on life to death it's 43 in my favor. So apparently as the sentence gets higher, they kind of draw the line, I guess.

Now, this Court -- I want to mention Colten v. Kentucky. I was quite surprised by that decision, obviously, but there you drew the line on misdemeaners.

QUESTION: I thought you were on the other side.

MR. ZELL: That's correct.

QUESTION: It doesn't help you here, does it?

MR. ZELL: No, it doesn't. It sure doesn't. But there you drew the line with misdemeaners. You said, well,

misdemeaners, there wasn't really an appeal, it was just going from a JP to a legal court. What's the big deal about going from a $10 fine to a year in jail. I'm not sure exactly, but I want to point out Justice Brennan's concurring in Ewell v. U.S.. He used words about oppressiveness. This is where they set aside -- the government withdrew an indictment. One count indictment drew a three count indictment. And you concurred with the judge. He said it was certainly oppressive. And that's what we have here, an oppressive threat by a man who if he appeals, what may happen. Now, is this what we want in our system of justice? That's all it is. Can a man correct legal errors?

Of course, you will deny in appellate court the right of jurisdiction over his case. I am sure many appellate courts wouldn't mind that. They are overloaded. But you certainly in a low sense would deny a man a right of appeal. There is no question about it, unless the Court would disagree with that statement.

I was going to raise the death penalty, Bumper v. North Carolina, I might point out where they had a bad death penalty --

QUESTION: But you can't claim that the evil you want to cure was felt by your client. He got a higher sentence, but his right to appeal wasn't deterred.

MR. ZELL: Well, if he had to do it over again, I

am sure he was --

QUESTION: So you are talking about safeguarding the rights of somebody else.

MR. ZELL: Well, I'm asking --

QUESTION: The way you put it, the way you put it. If you're not going to argue vindictiveness, you're talking about the rights of, you know, somebody who isn't here, some later defendant.

MR. ZELL: No, you can correct this for Mr. Chaffin, you can reduce his sentence to 15 years. Or I think under Georgia procedure, if you did vacate --

QUESTION: But not to help him, but to help somebody else.

MR. ZELL: Oh, certainly to help him.

QUESTION: Oh, yes. But the only reason you are doing it is to make sure that somebody else's rights to appeal weren't deterred, because yours weren't. However bad it is to face the risk of an increased sentence, your client wasn't deterred in the least.

MR. ZELL: That's correct, he --

QUESTION: He did appeal.

MR. ZELL: He exercised his right and got punished for it. That's correct. We have had about four subsequent Georgia cases on the same point. I might point out something in my brief. I reversed a case --

QUESTION: So the way put it, you are going to have to make the argument he was punished for it, and you didn't make that argument in your brief.

MR. ZELL: I am making it now, and I clearly --

QUESTION: Yes, now, after the --

MR. ZELL: I clearly state in my brief that he was punished, he did get an increased sentence.

QUESTION: Does punishment connote some sort of intentional vindictiveness when you use the word?

MR. ZELL: Well, it's a scheme by the State certainly, to go for, in this case, death penalty. What if they didn't go for it, they just went for life?

QUESTION: O.K., what evidence did you introduce in your habeas corpus proceeding before Judge Smith in Atlanta to show this sort of intentional vindictive element?

MR. ZELL: I didn't get a chance, your Honor. I filed the writ and after briefs were filed, he didn't ask for any transcripts. That's why I'm up before this Court. He denied the writ. We're talking about the second go-around now on an increase.

QUESTION: You mean you haven't had a hearing.

MR. ZELL: Did not have a hearing, yes, sir.

QUESTION: And if you did, what would you offer?

MR. ZELL: I would offer the two trial transcripts to show the trials were exactly the same, not as the Fifth

Circuit seems to say. They were exactly the same evidence. No reason for the increase, except of course the jury didn't know the first sentence.

QUESTION: You allege in your habeas corpus petition.

MR. ZELL: Basically we relied on Pearce that he was punished for his right of appeal.

QUESTION: Did you allege that there was some sort of intentional vindictive conduct on the part of the State?

MR. ZELL: Well, I alleged vindictiveness by the State, yes, I think he used the word "vindictive." By the way, it's in the appendix. We have it laid out.

QUESTION: Excuse me. Did you imply a moment ago that if your client had it to do over again he wouldn't do it? And you seemed to rest something on that as something wrong in the system of justice. But if you have a man who is offered in plea negotiations a five-year sentence and he finally rejects that and goes to trial and then gets a 15-year sentence, would you say that there is something wrong with the system of justice, then?

MR. ZELL: That is plea negotiation, your Honor, has apparently been upheld by this Court, I think, in Alfred v. North Carolina. You upheld even the man says he's innocent, you allowed the plea.

QUESTION: Is there something wrong with that when he has made a conscious choice with advice of counsel or perhaps

against the advice of his counsel to reject a guilty plea and five-year sentence, and then he goes to trial and runs it out and gets 15. Is something wrong with that?

MR. ZELL: It certainly bothers me because the man exercised his right --

QUESTION: It bothers the defendant when he made that choice, but I'm talking about a principle now.

MR. ZELL: I don't accept that principle because it does punish him for saying, I understood my right is to have a jury trial, is that right?

Yes, you do.

Well, I'm going to go to trial.

Well, if you go to trial and we find you guilty by jury, we are going to give you 15.

It bothers me because why did they offer him five in the very beginning if he didn't deserve the five? It's somewhat theoretical. What does this man deserve for punishment for what he has done, not because he asked for jury trial or because he asked for an appeal?

QUESTION: Your approach would stop all plea negotiations entirely, then.

MR. ZELL: That's the problem, the other side of the coin. It would possibly break down -- I don't know if it would, but it would break down plea negotiations. Now, in many counties in our State we do not have any plea negotiations.

And it works, the system works. Other counties, such as Atlanta, which is a big city, Fulton County, we have plea negotiations. I don't know what the answer would be if we didn't punish a man for trying a case. I think in the Northern District of Georgia the Federal Court, I don't like to think, and I don't believe the Federal judges punish the man for trying his case. I don't think they do. They do in the State courts obviously. I accept that. I concede that.

QUESTION: Mr. Zell, looking at pages 4 and 5 of the appendix which is your petition for writ of habeas corpus, I don't claim to have read every word of it, but I would characterize it as simply alleging that the sentence was increased and therefore Pearce was violated. I don't see any allegation of any sort of vindictiveness or intent on the part of the State.

MR. ZELL: Page 5, paragraph 7, that the entire re-trial is void and illegal since the jury was qualified on the death sentence and several jurors were excluded and the State argued the death penalty and the trial judge charged on the law of capital punishment to the jury.

QUESTION: That is the extent of the allegation of vindictiveness?

MR. ZELL: Yes. I think it would be a reasonable --

QUESTION: What about in paragraph 5, the second clause, that to increase his sentence without any legitimate

reason penalizes petitioner for appealing his first conviction.

MR. ZELL: And I cite Griffin and Douglas which is, of course your cases on avenues of appeal. Once they are open they should remain --

QUESTION: I notice you also in paragraph 2 allege that at the first trial the jury was qualified for the death penalty and the trial judge did charge on the law of capital punishment.

MR. ZELL: Yes, your Honor. Apparently he did charge, but they only found 15 years. So apparently they did go for the death sentence in both cases.

QUESTION: At least you allege they did.

MR. ZELL: Yes, your Honor. At least I alleged it. That's right.

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

Mr. Hicks.

ORAL ARGUMENT OF RICHARD E. HICKS, ON BEHALF OF THE RESPONDENT

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

I think the question we have here is a very narrow one relative to the Pearce due process question. I believe this Court has held in Stroud, Pearce and the Colten cases that neither double jeopardy or equal protection impose an absolute bar to a higher sentence. So I think we are limited

in this case to the narrow question of whether or not a jury can impose a harsher sentence on retrial. And the authority involved here is the Pearce case. And as the Fifth Circuit read the case and as I read the case, and hopefully as the Court wrote the case, that was based on the due process argument, requirement, that a prisoner should be free from apprehension that should he appeal, he might receive a higher sentence solely because he appealed. The judge is saying, you appealed my ruling, my sentence, well,I am going to show you.

Now, we just don't have that with juries. There is not the same motivation there. There is just no vindictiveness. A judge has his career to look after. Perhaps, as in Georgia, he runs for election.

QUESTION: What are the odds in Georgia that the jury would be -- or do you know -- about the jury giving death if the prosecutor doesn't ask for it. Or is it wholly out of the hands of the prosecution?

MR. HICKS: Well, we don't ask for it. It's on the statute books.

QUESTION: That's what I mean.

MR. HICKS: It's not up to us to decide.

QUESTION: The prosecuting attorney can (inaudible)

MR. HICKS: Well, he can, yes. He can say --

QUESTION: He can, but sometimes he doesn't.

MR. HICKS: Sometimes he doesn't.

QUESTION: Does he say, "Now, I don't think for a moment that death is appropriate in this case?"

MR. HICKS: Well, what I have said myself many times when the death penalty was in existence --

QUESTION: You're not asking for it.

MR. HICKS: I would say, "Well, we will waive the death penalty, but we are not going to waive anything else."

QUESTION: Yes. So you do have a choice as to what you say to the jury about it.

MR. HICKS: Yes, that's correct.

QUESTION: In your experience, has a jury ever given death if the prosecution doesn't ask for it?

MR. HICKS: They have never given it when I was trying a case.

QUESTION: Whether you asked for it or not.

MR.HICKS: Right.

QUESTION: When you say we are waiving the death penalty, what's the nature of the instruction that the trial judge --

MR. HICKS: Just doesn't charge on death.

QUESTION: Well, here --

QUESTION: He doesn't?

MR. HICKS: No.

QUESTION: If you don't ask for it --

MR. HICKS: That's been my experience.

QUESTION: Then, assuming these allegations in paragraphs 2 and 5, or 2 and 7, of this petition for habeas are true, then it would appear that the prosecutor must have asked for the death penalty since the trial judge charged at both trials on the death penalty.

MR. HICKS: It would appear from that -- I will answer the question that was asked Mr. Zell. The arguments are not transcribed. They may have been recorded, but they are not transcribed.

QUESTION: But the instructions are.

MR. HICKS: The instructions, yes.

QUESTION: Now, did the judge instruct them on the death penalty in the first trial?

MR.HICKS: I don't know.

QUESTION: It's alleged here in one of the allegations.

MR. HICKS: Right.

QUESTION: Or if he did, then the prosecution must have asked for it.

MR. HICKS: Yes.

QUESTION: In both trials.

MR. HICKS: Not necessarily. Perhaps they just didn't waive it.

QUESTION: Oh. You mean not addressed it at all in closing. I see.

MR. HICKS: Right.

QUESTION: If the prosecution doesn't expressly waive but doesn't expressly argue, then does the trial judge charge on it?

MR. HICKS: He normally charges it anyway.

QUESTION: And he did charge life imprisonment.

MR. HICKS: Probably he would charge death, life, or one to 20.

QUESTION: I'm talking about in the second trial.

MR. HICKS: He charged death, he also charged life, and he charged one to 20 in both trials.

QUESTION: What would be your objection to him saying that in this particular case the heaviest sentence you can give is 15 years?

MR. HICKS: Well, I think the problem with that is then the jury says, well, that's the top. Maybe we don't want to give him the maximum. As they said in this case, they said, we want to give him life and we will give it to him. But they say that 15 would be the top limit, so they might come down a little.

QUESTION: Well, if Pearce means what the petitioner here says, it is the top.

MR. HICKS: Well, if there is vindictiveness, that's the way I read Pearce.

QUESTION: That's what I mean. So that he could

then say 15 is the most he can get.

MR. HICKS: He could say that.

QUESTION: Tell me, Mr. Hicks, may a trial judge when the jury brings in life, as in this case, say, well, no, I will cut that back to 30 years, or 15, or something?

MR. HICKS: No, he can't do it on the life or death charge. He could on a less sentence.

QUESTION: That is if it were brought in 20 years by the jury, he could cut it down to 10?

MR. HICKS: That's correct.

QUESTION: But he can't cut either life or death.

MR.HICKS: That's correct. That's cited in our brief, the code section.

QUESTION: Now, do I understand that the instructions of the trial judge to the jury in the second trial are available, have been transcribed and are available?

MR. HICKS: Yes, sir.

QUESTION: Would you have any objection to submitting them?

MR.HICKS: No, sir. I have a copy in my office.

QUESTION: Get us that on both trials.

MR.HICKS: Yes, both trials.

QUESTION: Did I further understand that the arguments to the jury, at least by the prosecutor, are not available or cannot be made available?

MR. HICKS: They were not transcribed. I know that. Whether or not they were taken down, I don't know, but I could find out.

QUESTION: Would you?

MR. HICKS: Yes, I would be glad to.

QUESTION: Lodge the other materials with the clerk.

MR. HICKS: Yes, sir.

QUESTION: You weren't in the trial of the case, I take it?

MR. HICKS: No, not that case, no, sir.

QUESTION: So you don't know what the posture of the prosecution was at either trial with regard to the death penalty?

MR. HICKS: Well, I do know off the record.

QUESTION: Well, you do know that at least the prosecution didn't waive it --

MR. HICKS: He didn't waive it.

QUESTION: -- in the second trial or the judge wouldn't have instructed on it.

MR. HICKS: That's correct.

QUESTION: And he didn't waive it in the first trial.

MR. HICKS: That's correct.

QUESTION: Oh, no, you don't know that.

MR. HICKS: It's fact.

QUESTION: Oh, yes.

MR. HICKS: I know he instructed it because I have the instructions.

QUESTION: But you don't know whether the prosecutor addressed the jury in either instance as to death.

MR. HICKS: That's correct. I don't know from the record because we don't have the record. Now, personally, the prosecutor's office is right next door to mine and he has told me that he asked for it.

QUESTION: How about the first?

MR.HICKS: Both. The facts in the case (inaudible) He asked for it in both cases.

QUESTION: I see. I see.

QUESTION: And there was a proper instruction in the second trial by counsel for the defense, was there not, asking the court to instruct the jury that 15 years would be the maximum they could --

MR. HICKS: Well, that's what he said. I assume that's true.

QUESTION: Well, would that be a matter of record also?

MR. HICKS: I don't remember reading that myself, so I can't say.

QUESTION: If that is a part of the record, could you submit that to us along with fellow counsel?

MR. HICKS: Yes, sir, the whole thing.

QUESTION: The proffered instruction and what the court said about it.

MR. HICKS: Yes, sir.

QUESTION: In the second trial.

MR.HICKS: Yes, sir.

The appellant here seems to be very concerned with the chilling effect of the possibility of a higher sentence on the appeal. But I think he's overestimating this chilling effect. As it stands now, everybody who is convicted that comes along appeals his case. I think that's a matter of general knowledge. It certainly hasn't been too chilling in my experience so far. And look at the possibilities should he appeal. The fact is that if he appeals, he has four possibilities. He can come out less. He can be turned loose the second time, not guilty. He can come out with less time the second time around. He can come out with the same amount. Or he can get more. But the first two possibilities, that is, that he will be found not guilty or he will get less time seem to be the more reasonable predictions of what will happen, because the second time around, the prosecution, I can tell you, has a hard time getting the witnesses the first time and the second time it's even harder to round up your witnesses. They die, they move, they forget what they said the first time. The information is not clear in their minds

any more. And in fact, the possibilities of getting more time are very negligible. This is the only case I have seen that has come along. Of course, as I have researched, I have seen there have been a few through the course. But it's really not that big a scare. They all want to appeal. It seems to me that the majority of them want to appeal anyway, no matter what their sentence is.

Now, Mr. Zell in his brief in his argument seems to say that we are limited to that first sentence, that first sentence is the best, I guess. But really, we don't claim that the first sentence is anything particularly significant or holy about the first sentence. Perhaps the jury in jury sentencing didn't have all the information that the second jury had. And what we are looking at really is justice, what's right in a particular case, a particular sentence in a particular case, what will bring about rehabilitation in this person if he is rehabilitatable, or what punishment is due if punishment is due.

QUESTION: Do you agree with Mr. Zell that the records are practically identical?

MR. HICKS: No, I don't. The first time around the defendant had purely an alibi defense. He said he was in Warm Springs at the time this crime was committed, and he presented an alibi witness who said he was in Warm Springs. That was his defense. The second time around -- now, of course,

the State's case was the same. We had the same victim, the same outcry witnesses, and things of that nature. But the defendant the second time around said -- he didn't present his alibi witness, he just said, "I was in Warm Springs and I didn't do it." Then he also presented a psychiatrist and a psychologist who said that he didn't know the difference between right and wrong, the McNaughten rule, and he wasn't guilty for that reason.

On rebuttal the prosecutor put up a doctor who examined the defendant within 4 or 5 hours prior to the commission of his crime and said he was perfectly fine. The defense psychiatrist and psychologist didn't examine him until 9 months after the commission of the crime before the trial. So it would seem to a reasonable person sitting on the jury that a doctor who examined the man within hours of the commission of the crime would seem to have more credibility than a doctor who examined him some 9 months later.

QUESTION: Would you see that as a rather remarkable coincidence?

MR. HICKS: It is remarkable. It's almost unbelievable the way it happened. The victim in the case lived in an apartment downstairs from the apartment where the defendant lived and they were neighbors. The husband of the victim took the defendant to the doctor on the day this crime was committed. When he came home from the doctor, he

dropped by to see the victim and thank her for her husband taking him to the doctor. And for some reason he then proceeded to strike her in the head, knock her down, take a tee shirt and choke her. The next thing she remembers is waking up in the woods in Clayton County some distance away where she had been brutally beaten, some object had been used on her to sexually molest her, and she was terribly molested and beaten and spent some considerable time in the hospital.

Now, that doctor, we managed to find out who that doctor was that the victim's husband took the defendant to the date of the commission of the crime. And as I understand, Mr. Zell was surprised when that doctor showed up on rebuttal testimony.

QUESTION: That would be reasonable grounds for surprise, under the circumstances.

MR.HICKS: So for that reason, even if we are talking about the Pearce plea of vindictiveness rule under the judge theory, then we think there is reasonable grounds to see that there was some different evidence before this jury to give more time than the first time around. And primarily we say that the Pearce rule of looking for identifiable characteristics after the first trial doesn't apply here because a jury just doesn't apply vindictiveness, they don't have the same motivation. A judge is trying to look out for himself.

QUESTION: On that basis you would say it doesn't make any difference whether the jury knew about the previous conviction and sentence or not.

MR. HICKS: Well, if they knew it, it would perhaps make a difference. But they didn't know. Well, they wouldn't know.

QUESTION: Well, I don't know. It's certainly not unusual for the transcript of the previous trial to be used in the course of examining witnesses.

MR. HICKS: That's correct.

QUESTION: Was it here?

MR.HICKS: It was used here as a matter of fact.

QUESTION: The jury must have known then there was a previous trial.

MR.HICKS: Yes, they knew there was a previous trial, but not a previous conviction or what the previous trial said.

QUESTION: Now, what are the odds, really, if there was a previous trial, there was either a conviction -- the odds are that there was a conviction that was set aside or there wouldn't be a second trial because of double jeopardy.

MR. HICKS: I wouldn't agree with that. There are many mistrials in Georgia, many more mistrials than retrials, I will say that.

QUESTION: So the jury would be confused about what had happened?

MR. HICKS: They would be, yes.

QUESTION: At least you couldn't infer that the jury knew that he had been convicted and moved to set aside his trial.

MR. HICKS: I don't think you could, no, sir.

QUESTION: Or if they knew that, would it be likely that they knew the precise sentence that had resulted?

MR.HICKS: That sentence would not be admissible in Georgia, to say what the prior sentence was. They just wouldn't know that unless it was a highly publicized crime or something. Then they might know. And in a situation where they would know in a highly publicized crime, or if it should come out in the trial, then the Pearce rule to show vindictiveness could be applied to the jury. But in the general run of the mill cases where the jury does the sentencing, the Pearce vindictiveness rule would just not apply as far as we are concerned, and that is what the Fifth Circuit has held also.

MR. CHIEF JUSTICE BURGER: Thank you.

You have a few minutes left, Mr. Zell.

REBUTTAL ORAL ARGUMENT OF GLENN ZELL

OF BEHALF OF THE PETITIONER

MR. ZELL: Let me just say this. My defense was apparently impeached quite a bit by my doctors and this other witness. He really had just seen him and said, "He appeared to be O.K. to me," which you could think your're Napoleon

and somebody might think you're O.K. just for a few minutes.

But anyway the evidence was the same as to the crime. That's the important thing we are concerned with.

This Court has never commented on or discussed the Stroud problem, life to death. We seem to stay away from that, and that's what I am asking this Court to do, overturn that doctrine. What I am saying is I am agreeing with Justice Douglas, and I believe Justice Marshall, in their concurring in the Pearce case. In balancing the sentence upward or downward on a retrial, you should favor the defendant on balance to give him the unfettered right of appeal. That's the primary basis of my argument is Justice Douglas' concurring in Pearce.

QUESTION: I don't remember, for the record here. Was the defendant charged with kidnapping as well as assault?

MR. ZELL: They charged him with many, many other crimes in other countries. Clayton County he mentioned, the adjoining county, he was charged with some sexual act and other crimes. I think they were disposed of.

QUESTION: On this victim or other victims?

MR. ZELL: No, this victim. This victim. And I think they were disposed of either by a concurrent sentence of a few years or dismissed. But the only charge against him was the robbery case. He actually robbed her car. That's what this case was about. After he knocked her out, he took

her car, and that's what he was charged with, stealing or robbing her car by force and violence.

But I want to stress the Stroud doctrine, that is still alive and that's what I want to see overturned from life to death. That is still with this Court. It has never been overturned.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Zell, you came here at our request and by appointment by the Court, and on behalf of the Court I want to thank you for your assistance not only to your client, but your assistance to the Court.

MR. ZELL: Thank you, sir.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:41 o'clock p.m., the argument in the above-entitled case was submitted.]