In the

Supreme Court of the United States

STANLEY BLACKLEDGE,
Warden, et al.,

Petitioners,

v.

JIMMY SETH PERRY,

Respondent.

No. 72-1660

C.2

Washington, D.C.
February 19, 1974

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v.	:	No. 72-1660
JIMMY SETH PERRY, Respondent.	:	

Washington, D. C.,

Tuesday, February 19, 1974.

The above-entitled matter came on for argument at 1:51 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:

RICHARD N. LEAGUE, ESQ., Assistant Attorney General of North Carolina, Post Office Box 629, Raleigh, North Carolina 27602; for the Petitioners.

JAMES E. KEENAN, ESQ., Paul, Keenan & Rowan, 202 Rigsbee Avenue, Durham, North Carolina 27702; 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 next in No. 72-1660, Blackledge against Perry.

Mr. League, you may proceed.

ORAL ARGUMENT OF RICHARD N. LEAGUE, ESQ.,

ON BEHALF OF THE PETITIONERS

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

I am Richard N. League from Raleigh, North Carolina, to argue this case for the petitioners.

Before beginning argument, I'd like to apologize to each of you for the shabby condition I understand the briefs and records came up here in. I hope you will accept my apologies in that regard, and that it won't let your -- jaundice your view of the case too bad.

This case presents two issues to the Court for decision:

First, whether or not double jeopardy is a matter that would be waived by a voluntary and intelligent plea of guilty.

And, secondly, if the record in this case is good enough to show that such plea made here was voluntary and intelligent.

The facts on which this arises are briefly as follows:

Jimmy Seth Perry was tried in the lower level of our two-tier system in North Carolina, the District Court, on a warrant charging him with misdemeanor assault.

After conviction there and sentenced to a consecutive six months' sentence, he appealed to the Superior Court division, the higher division of the two-tier system, in which there is trial by jury. He appealed for trial de novo as a matter of right.

Prior to the case coming on to be called there, then, the Solicitor obtained an indictment charging him with a higher grade of the offense: felonious assault. And to this he pled and received a sentence in the Superior Court of some five to seven years. However, this sentence was consecutive to the sentence he had at the time he made the plea, and, accordingly, the actual extension of time beyond the six months' consecutive sentence he received below, something like about three and a half months at that time.

Subsequently, in this proceeding in the Eastern District, he obtained habeas corpus relief on the issue of pretrial credit also.

QUESTION: Mr. League, could you speak up a little? I'm having a little bit of difficulty hearing you.

MR. LEAGUE: Oh, I'm sorry.

QUESTION: I am, too, Mr. League.

MR. LEAGUE: Right.

I think to say, in point of the facts as I've just mentioned them, Your Honor, was that the five to seven-year sentence concurrent with the sentence he was then serving operated to give him about a three-and-a-half-month increase over the six-month consecutive sentence he had received in District Court, until the time of this action when he received pretrial credit on the first penalty, which created a greater disparity between the two.

My position briefly, on the first issue, is that double jeopardy is a matter which would be waived as an independent basis of collateral attack by virtue of his guilty plea in this case.

That he can only use that in a habeas corpus action as evidence of some other basis for relief; such as ineffective assistance of counsel.

Mr. Keenan has suggested to you that you ought to adopt a system-related, guilt-related distinction with regard to determining whether or not such waiver has been made in a given case.

But our eulogy should not accept that, it is not always clear just what is guilt and what is system-related. In fact, part of the rationale, as I understand it, of the double jeopardy clause is to prevent punishment, the conviction of the innocent through repeated prosecution.

Accordingly, I think this right would definitely

partake both of being a system-related right and a right which is guilt-related as well.

What it --

QUESTION: Did I understand you to say innocence is involved in double jeopardy?

MR. LEAGUE: To prevent; one of the bases for the prohibition against it, Your Honor, is to prevent the likelihood of the conviction of the innocent through repeated prosecution. So, in that sense, I would view it as possibly guilt.

QUESTION: Do you give a citation for that?

MR. LEAGUE: Sir?

QUESTION: A citation for that.

MR. LEAGUE: I believe it is in Benton v. Maryland. I believe it's in Green.

QUESTION: That innocence is a part of it?

MR. LEAGUE: Just what I said, Your Honor, that one of the rationale, one of the parts of the rationale against double jeopardy, is what I said; like --

QUESTION: Double jeopardy is against being twice tried.

MR. LEAGUE: Yes, sir; but I'm going beyond what I said, down to that --

QUESTION: What has innocence got to do with -- oh, you want to add that to it?

MR. LEAGUE: Sir?

QUESTION: You want to add that to it?

MR. LEAGUE: No, sir. I believe it's been stated in those decisions, that a part of the rationale underlying prohibition on double jeopardy is the possibility of conviction of the innocent through repeated prosecutions.

Now, that's not the only part, prior to that, I believe, in the quotation, something like relief of anxiety, embarrassment or ; a State with all its resources should not be permitted multiple attempts. All these things are mentioned there. And I do recall that they are in both the Benton and the Green decisions.

Perhaps I'm wrong on the latter, but I believe I'm right on the former.

MR. CHIEF JUSTICE BURGER: Mr. League --

MR. LEAGUE: Yes, sir?

MR. CHIEF JUSTICE BURGER: -- keep your voice up.

MR. LEAGUE: I'm sorry, Your Honor.

MR. CHIEF JUSTICE BURGER: We're all having a little difficulty.

MR. LEAGUE: I am terribly sorry.

In addition, as a second reason, I would urge upon you for rejecting the system, guilt-related distinction, the basis for weight, is that if you look at the things that are normally not wavied by a guilty plea, such things as mental incompetence, coercion, ineffective assistance, failure to

plea; you see that while they are in some sense system-related, they also have a common factor which isn't present in this case.

And I think that common factor is that in none of those cases is the plea a reliable indicator that there may be a valid basis for it.

Certainly in Perry's case, if we're just to throw aside his accusation -- or his allegations, pardon me --

QUESTION: Well, what are -- is the State's position that there was double jeopardy but that it was waived, or -- why was it even double jeopardy in the first place?

MR. LEAGUE: Your Honor, I don't agree that it was, but the thrust of my argument would be you wouldn't have to reach that because it would be waived by his plea.

QUESTION: Well, I know, that seems to me like that's a special sort of a consideration; you don't need to get to waiver if there was never any double jeopardy in the first place, do you?

MR. LEAGUE: Well, I understand you avoid the constitutional question if possible, as to go to waiver --

QUESTION: Well, waiver is a constitutional question.

MR. LEAGUE: Well -- I guess so, Your Honor. At initial outlook, it's less of a constitutional question than double jeopardy.

QUESTION: Well, why would it be a double jeopardy

here?

MR. LEAGUE: I don't think it would be, Your Honor.

QUESTION: He never was -- he was never tried for the more serious offense but once, was he, and even then he pleaded guilty to it.

MR. LEAGUE: That's true. That's true.

I don't believe --

QUESTION: Well, when was he ever tried -- what's the double jeopardy involved, then?

MR. LEAGUE: Double jeopardy, according to Judge Larkins, is the raising of the offense in between the initial trial in the lower court and the subsequent trial.

QUESTION: Well, yes, but it was a different offense, with different elements.

MR. LEAGUE: That's why he claimed -- or Judge Larkins held it was double jeopardy, I believe.

QUESTION: But how -- I thought double jeopardy was a -- that it wasn't double jeopardy if it was a different crime, that he's tried for the second time.

MR. LEAGUE: I don't know that, Your Honor. I wouldn't have thought it was double jeopardy in this case, though, just by virtue of the State's bringing forth the higher degree of the crime for which they could have initially tried him; at least in terms of a probable-cause hearing at the first level.

QUESTION: Well, let me see if I get --

QUESTION: But you say there was double jeopardy?

MR. LEAGUE: I say there was not.

QUESTION: Not. Yeah, I see.

QUESTION: Let me see if I get this correct. He was convicted initially on a misdemeanor of assault with a deadly weapon. And he appealed that, and had he been successful on the appeal he would have had a trial de novo on the misdemeanor charge. Is that right?

MR. LEAGUE: No, sir. He automatically got a trial de novo. Now, the normal expectation would have been that it would have been on the misdemeanor charge; but, in the interim, the Solicitor obtained an indictment charging him with the higher offense.

QUESTION: Oh, I see. Well, now, in other words, when he went -- he appealed the misdemeanor charge, did he?

MR. LEAGUE: Yes, sir.

QUESTION: And did he -- was he tried de novo on the misdemeanor charge?

MR. LEAGUE: No, sir.

QUESTION: No. Because intervening the trial de novo was the indictment on the felony charge.

MR. LEAGUE: Yes, sir.

QUESTION: And what's the difference between the elements of the felony offense and the elements of the

misdemeanor offense?

MR. LEAGUE: Two additional in this case, Your Honor.

QUESTION: What were they?

MR. LEAGUE: One was inflicting serious injuries, and the other intent to kill, to my recollection, there was --

QUESTION: Well, I know, but it was the same, the same event, wasn't it?

MR. LEAGUE: Same event, same person, same act.

QUESTION: The same assault. Except that -- and the condition of the victim was the same in respect of the trial on the misdemeanor charge as it was in respect to the trial on the felony charge, wasn't it?

MR. LEAGUE: Yes, sir.

QUESTION: So the only thing that happened -- well, then, why isn't that -- why isn't it double jeopardy?

MR. LEAGUE: Your Honor, I don't think it's double jeopardy because the thing is -- there's no real risk of jeopardy in this lower, lower system unless the man accepts that he can --

QUESTION: But you didn't need any different evidence on the felony charge than you had -- than the State had to introduce on the misdemeanor charge?

QUESTION: Or you had to prove some elements that

you didn't have to prove.

MR. LEAGUE: Yes, sir.

QUESTION: What? What? I thought you said the condition of the victim was exactly the same.

MR. LEAGUE: Well, Your Honor, whether or not, in practical --

QUESTION: The condition of the victim maybe was the same, but the evidence required to prove the --

QUESTION: Well, what different evidence did you have on the felony trial that you didn't introduce in the misdemeanor trial?

MR. LEAGUE: Your Honor, there was no felony trial, but we don't have the record, we don't have the record of --

QUESTION: I see.

QUESTION: Did he ever go to trial on the misdemeanor charge?

MR. LEAGUE: I understand he did, from his allegations, Your Honor. The District Court records were gone, when we filed our return, so we're --

QUESTION: Well, I'm reading from your brief --

MR. LEAGUE: In the --

QUESTION: -- I'm reading from your brief, and it's your brief that says he was initially tried and convicted in August 1969 on the misdemeanor assault; he appealed it,

and then you say: "Perry appealed the assault conviction to the Superior Court and received a trial de novo."

MR. LEAGUE: Yes, sir. He pled guilty at the trial de novo, sir.

QUESTION: Then you've got: "However, during the interim between appeal and trial de novo, the solicitor obtained an indictment" --

MR. LEAGUE: Yes, sir.

QUESTION: -- "charging him with a felony."

MR. LEAGUE: That much, Your Honor.

QUESTION: And he pleaded guilty to that.

MR. LEAGUE: Right.

QUESTION: Well, then, I misread what you say: "and he received a trial de novo"; he did not in fact receive one, is that it?

MR. LEAGUE: He received a trial de novo, at which he pled guilty. No evidence was put on.

QUESTION: That wasn't a trial de novo on the misdemeanor charge, that was --

MR. LEAGUE: That was on the event, that was on --

QUESTION: -- that was on the trial on the felony charge.

MR. LEAGUE: That was on the event, Your Honor.

QUESTION: But had they gone to trial on the prior charge, the second or de novo trial, they would have had to

prove intent, which was not required in the first case; is that true?

MR. LEAGUE: Intent and serious bodily injury.

QUESTION: And serious bodily injury.

MR. LEAGUE: Right.

QUESTION: Those two elements.

MR. LEAGUE: And pray for whatever -- it may have been the same in either, but it would have had to also meet the requirements to sustain those two elements, Your Honor.

QUESTION: Had he not appealed, could he have been indicted?

MR. LEAGUE: No, sir.

QUESTION: So, because he appealed, he was indicted.

MR. LEAGUE: I would say so, yes, sir.

QUESTION: Thank you!

MR. LEAGUE: But I would not attach perhaps the same significance as -- to it as Your Honor. This well could have been an event where they tried to get it out of the way down below in the --

QUESTION: Why couldn't he have been indicted for a felony if his -- if he hadn't appealed his misdemeanor conviction?

MR. LEAGUE: I think, Your Honor, under State law at least it would have become final within ten days. It's only voidable at the instance of the defendant.

QUESTION: Well, then the misdemeanor conviction would have become final.

MR. LEAGUE: Yes, sir.

QUESTION: Well, why couldn't he have been indicted for a felony?

MR. LEAGUE: Well, I think because of the greater offense and lesser offense as to that.

QUESTION: Well, I don't understand that. You mean under State law they won't let -- you may not --

MR. LEAGUE: Under State law, at least, Your Honor, if you're tried for -- tried for the same act and it would -- the offense, the elements of the offense of the lesser one would also be elements of the offense of the greater one.

QUESTION: But --

MR. LEAGUE: Then you couldn't retry.

QUESTION: But you would have to prove something in addition to prove the felony.

MR. LEAGUE: Even though that were the case.

QUESTION: That's -- is that State double jeopardy law, or is it statutory law, or what?

MR. LEAGUE: It would be State law. It well may be federal also, Your Honor; but I know it is at least State.

QUESTION: Is there any decision of your Supreme Court that supports that proposition?

MR. LEAGUE: What I just said about the lesser

included offense?

QUESTION: That would say that if this misdemeanor judgment had not been appealed, this individual could not have been indicted for the felony.

MR. LEAGUE: Well, there's an old exception in the case of State v. Birckhead, which Mr. Keenan brings out.

QUESTION: Is it in his brief?

MR. LEAGUE: Then it -- sir?

QUESTION: In one of your briefs?

MR. LEAGUE: In his brief, yes, sir. That's an early Fifties case, it relies, I don't know whether directly or the interior cite within relies on one of the Philippine Island cases, decided by this Court back in the early 1900's.

Now, whether or not that's still a viable exception, I do not know, Your Honor.

QUESTION: Well, that would -- it would be double jeopardy, would it not, if a person were tried and convicted for manslaughter, he couldn't then be indicted for first degree murder in that court or any other court for the -- for precisely the same killing, could he? Without violating the double jeopardy clause, whether in your State or in any other court in the federal system?

MR. LEAGUE: That's right; yes, sir.

QUESTION: Isn't that correct?

MR. LEAGUE: That's what I understand, yes, sir.

QUESTION: That would be my understanding, I think.

QUESTION: You know, I think if you'll wind it up, you'll be able to -- you see, on the side over there, you can wind that lectern up, and you won't have to --

MR. LEAGUE: Oh.

QUESTION: Then we'll hear you better.

MR. LEAGUE: I'm sorry for that, Your Honor. My voice has no carriage, I knew that.

Returning to why this matter should or should not be waived, I would just say that in reference to these things that we know are not waived, that there's no dispute about whether or not they're not waived.

They seem to have at least one common factor, which is absent from this case, and that is that the plea is not a reliable indicator, the valid basis for it exists here, if we cut out Perry's allegations, that he pled to receive a totally concurrent sentence. That was his expectation.

We see he traded, an argument over double jeopardy, for a sentence of about three and a half months.

So I think under that basis it could well be assumed that there was a basis for the plea --

QUESTION: Does that bring you up against the Pearce case, about increasing sentences, in any way?

MR. LEAGUE: No, sir, I don't think Pearce is applicable to this case, by virtue of really what we said in

the Colten decision, that the possibility for vindictive punishment does not occur sufficiently within the two-tier system to warrant the imposition of the prophylactic rule in Pearce.

Now, in any given case, Your Honor, it could be the case, but there's not the incidence of it to warrant the placing of the Pearce restrictions on this type situation.

QUESTION: I suppose some of this comes down to precisely what the word "offense" means in the Fifth Amendment double jeopardy clause. If you treat "offense" as being synonymous with "criminal acts", you perhaps get one result. If you treat "offense" as describing and meaning the offense described in the indictment or charge, then perhaps you get another result. Isn't that true?

MR. LEAGUE: Yes, sir, you would.

QUESTION: Which do you think it is?

MR. LEAGUE: The former.

QUESTION: The same act?

MR. LEAGUE: Yes, sir.

QUESTION: Well, then, how could he be -- then why haven't you got a double jeopardy problem?

MR. LEAGUE: I think you don't get it, Your Honor, because there's no real risk of punishment, that inherent in the double jeopardy system you have to have that risk, and you don't have it in the lower District Court, so long as the

plea is voidable by the defendant. Pardon me, the verdict is voidable by the defendant.

That would be my impression of the case.

It was also suggested, I believe, that a basis would be, from Judge Larkins' standpoint, was that the reason was -- pardon me, the right was fundamental.

I don't think much need be said about that. They are all that way. And I believe this Court rejected that idea recently in the school taxation cases.

It's true that if sustained this plea could bar the prosecution entirely, but that would be the case, I think, with any given constitutional right in a particular case.

And, lastly, the retroactive decision idea of Mr. Keenan, I had thought would not aid him if he won on his major contention, there wouldn't be any necessity to come to this; and if he did not, it wouldn't help.

Absent any questions, I'll rest there, and thank you very much for your attention.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Keenan.

ORAL ARGUMENT OF JAMES E. KEENAN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I appear on behalf of respondent Jimmy Seth Perry.

With the Court's permission I would like to run briefly back over the facts because, though they are a little bizarre, I nevertheless think that what happened in this case was rather clear.

On August 1, 1969, Jimmy Perry was serving a five-to-seven-year sentence in the North Carolina Department of Corrections for uttering a forged instrument.

On that day a fellow inmate by the name of Eugene Sawyer received a fourteen-inch cut in his back. An investigation ensued by the authorities of the Odom Farm Unit in Northhampton County, North Carolina, and on the 18th day of August 1969, a warrant was sworn out by a prison guard charging Jimmy Seth Perry with the misdemeanor of assault with a deadly weapon.

On August 20th, 1969, Mr. Perry was brought to court in the Northhampton County District Court, which is the proper court in North Carolina for the trial of misdemeanors. All misdemeanors must be tried in the first instance at the District Court level.

On that date the solicitor or the District Attorney

who was trying the case, after conferring with the officer, felt that the conduct necessitated a charge of a felony. Therefore he made a motion in open court to amend the warrant, to charge the felony of assault with a deadly weapon with intent to kill, resulting in serious bodily injury.

Under North Carolina law they would then proceed to hold a preliminary hearing in the District Court, but not a trial.

However, later that same day, the solicitor learned that the victim, Mr. Sawyer, would refuse to testify against Mr. Perry; and, in fact, was claiming total lack of recall as to what happened.

Therefore he had a very practical problem. He did have a statement that Mr. Perry had made to the officer, who had sworn out the warrant: yes, he had cut him, but it had been an accident.

Therefore, the solicitor made a deliberate choice to move again, to reamend the warrant to charge the misdemeanor.

QUESTION: Had the trial court granted the first motion?

MR. KEENAN: Yes, sir, it had. It had been -- amended the charge to a felony. And the record of the warrant shows the various markings on it, that it was first a misdemeanor, then a felony, then a misdemeanor again.

He proceeded to trial in cistrict Court on a plea of

not guilty to the misdemeanor. He was tried before the court alone, because under North Carolina law one charged with a misdemeanor is not entitled to a jury trial in the District Court.

He then, after conviction, --

QUESTION: And as to that, there couldn't have been a felony charge in that court?

MR. KEENAN: He could not have been tried for a felony in that court.

QUESTION: That's what I mean, yes.

MR. KEENAN: That court could have conducted a preliminary hearing on the --

QUESTION: But he couldn't have been tried there?

MR. KEENAN: No, he could not have been.

He then appealed to the Northhampton County Superior Court, which is his absolute right under North Carolina law.

Upon giving a notice of appeal, the solicitor then asked the judge if they could go up on the felony. The judge said: Fine. And found probable cause on a felony warrant, which at that point didn't even exist.

The State then took an indictment to the Northhampton County Grand Jury --

QUESTION: Here now -- I think you lost me there. You said the solicitor asked the judge if he could go up on the felony.

MR. KEENAN: Yes, this was --

QUESTION: Now, what do you mean by that?

MR. KEENAN: This was after Mr. Perry had been given a six-month sentence --

QUESTION: He had been convicted of the misdemeanor?

MR. KEENAN: Appealed --

QUESTION: And sentenced.

MR. KEENAN: And sentenced, and appealed.

QUESTION: And appealed. And an appeal sets aside that conviction and sentence, does it not, automatically?

MR. KEENAN: Yes, it does, and it entitles him to a trial de novo --

QUESTION: Right.

MR. KEENAN: -- in the Superior Court.

QUESTION: Right.

MR. KEENAN: The solicitor then inquired of the judge if he could go up on the felony.

QUESTION: Now, what do you mean by can I -- may I -- "Judge, can I go up on a felony"? What does that mean?

MR. KEENAN: In effect it means that: since he's appealed, I've decided I want to try him on the felony rather than the misdemeanor, the second time around.

QUESTION: Well, why did he have to ask the District Judge's permission?

MR. KEENAN: Well, I would contend that he had no

right to ask anybody's permission, --

QUESTION: No.

MR. KEENAN: -- because at that point he was bound by his election to trial on --

QUESTION: Well, I know that's your contention. But why do you suppose he thought he had to ask anybody's permission?

MR. KEENAN: Because I think he wanted to find a probable cause on the question of a -- on the subject of a felony. To take to the Grand Jury for proper action by the Grand Jury.

QUESTION: Then he would proceed to a preliminary hearing, does he?

MR. KEENAN: Pardon?

QUESTION: Did the judge then have a preliminary hearing?

MR. KEENAN: No, there was no new hearing conducted. The --

QUESTION: Well, what kind of proceeding is it?

QUESTION: Yeah.

MR. KEENAN: It was a farcical proceeding in this particular case.

QUESTION: Well, is there any provision for it under North Carolina law?

MR. KEENAN: No. Under North Carolina law they could

have conducted a trial, which they did conduct, on a misdemeanor; they could have conducted a preliminary hearing on a felony.

QUESTION: And then bound him over to the Superior Court.

MR. KEENAN: And then bound him over to the Grand Jury.

But they did conduct a trial on the misdemeanor --

QUESTION: You mean on both, sort of.

MR. KEENAN: They only conducted one set of factual hearings.

QUESTION: Yes. Right.

MR. KEENAN: But, in effect, made two judgments.

The first judgment was to give him a six-month sentence --

QUESTION: They tried him and convicted him on a misdemeanor --

MR. KEENAN: Yes.

QUESTION: -- and then they more or less had a preliminary hearing and bound him over on the felony. Is that it?

MR. KEENAN: No new evidence was heard.

QUESTION: No. But on no new evidence.

QUESTION: Did they enter a judgment or any kind of order?

MR. KEENAN: Yes, the judge -- the minutes of that day show that the judge, on his trial calendar, did enter a notation of a six-month sentence. It also shows that on the official minutes he entered the finding of a probable cause after a plea of not guilty to a misdemeanor and a finding of guilty.

Under North Carolina procedure, that is an impossible set of circumstances: where he, in effect, was tried on a misdemeanor, pled not guilty, found guilty, then the minutes say probable cause found and is bound over to the Grand Jury.

That is, just simply, not a possible procedure; but that is in fact what the minutes show.

QUESTION: Do you ordinarily have a preliminary hearing before the solicitor takes the case to the Grand Jury in North Carolina?

MR. KEENAN: It's not required to, Your Honor, but it is the normal procedure: that a person charged with a felony in the first instance will be brought into District Court, will be appointed counsel if he needs counsel, is entitled to counsel. At that point a preliminary examination will be conducted. If the judge finds probable cause, it will be bound over to the Grand Jury.

The solicitor does have the option of going directly to the Grand Jury.

QUESTION: Mr. Keenan, is any of this in the record?

MR. KEENAN: Yes. The original petition, the pro se petition of Mr. Perry, basically set forth the facts that he had been tried, given six months --

QUESTION: Well, you're not talking about this, though?

MR. KEENAN: No. No. I'm talking about his petition in the record. I'm not talking about the brief.

QUESTION: Right.

QUESTION: But this is not the brief, this is the Appendix I'm looking at.

MR. KEENAN: The Appendix just contains excerpts from the petition. I believe the record itself shows that Mr. Perry pled in his petition that he had been tried in the District Court --

QUESTION: No, I'm talking about all this you said that the man came in and said, and he said, and she said, and the solicitor said.

MR. KEENAN: No. No, that's not in the record. That has been gained from my discussion with the counsel involved in the case.

The record --

QUESTION: So it's third-hand.

MR. KEENAN: Second-hand, I reckon.

QUESTION: Second-handed hearsay!

MR. KEENAN: The record does show that Mr. Perry was

tried on a misdemeanor, given a six-month sentence, appealed, and then indicted on a felony. The State, in its answer, admitted these allegations.

So there was no evidentiary hearing conducted in the District Court on these allegations.

We contend -- well, to finish up briefly.

After -- after the matter had been bound over to the Grand Jury, he was indicted for the felony, the ten-year felony. He came in to court. He had a disagreement with his lawyer, a new lawyer was appointed. And at that time a plea of guilty was entered, as charged, to the ten-year felony. And he was given a five to seven-year sentence concurrent with the sentence being served at that time.

Which, the District Court found, effectively raised his sentence by one year, five months, and one day over the sentence received in the District Court.

Now, our basic contention is, first, that the act of the State in proceeding to charge Perry and attempt to try him with a felony in the Superior Court denied Perry double jeopardy, and that, therefore, there was -- there is an independent constitutional violation we can show.

QUESTION: Granted --

MR. KEENAN: Pardon?

QUESTION: Granted it's --

QUESTION: Subjective, yes.

MR. KEENAN: Granted; right.

We contend this because Perry, in appealing the misdemeanor conviction, we allege, did not waive his double jeopardy right as to a felony charge with which the State had chosen not to try him in the first instance.

QUESTION: Do you have an authority on whether or not that is -- Federal authority on --

MR. KEENAN: We think Green and Price control this particular instance.

QUESTION: Well, he was never charged with the -- he was never charged with the felony when he was first tried for the misdemeanor.

MR. KEENAN: That is correct. But we think what's important is that the State had the full opportunity to make a decision whether they were going to proceed on the felony or the misdemeanor.

QUESTION: No, that isn't Green.

MR. KEENAN: It's not Green exactly --

QUESTION: And there's no case that you can cite, is there?

MR. KEENAN: Well, Wood vs. Ross in the Fourth Circuit.

QUESTION: Well, it's not here, you haven't any cases here on that, have you?

MR. KEENAN: No, but I contend that the rationale

of the --

QUESTION: Oh, I know what you contend --

MR. KEENAN: -- of Green and Rice cannot be distinguished.

Excuse me, Green and --

QUESTION: Green was a case in the federal system, wasn't it?

MR. KEENAN: Right. And Price was a case in the State system, in which I think the Green test was basically applied.

QUESTION: But he was never acquitted -- he was neither convicted nor acquitted of the felony?

MR. KEENAN: That is correct. In the District Court.

QUESTION: Well, he was never -- he was never -- when he was tried for the misdemeanor he was never either acquitted or convicted of the felony.

MR. KEENAN: That is correct.

QUESTION: He couldn't have been tried for it there, even.

MR. KEENAN: He could not have been tried for the felony in the District Court.

QUESTION: So when was he ever tried or convicted or acquitted of the felony, twice?

MR. KEENAN: Our contention is that the State, in a matter like this, has to make en election. They are not free,

through a series of successive courts, to keep elevating the charge up, simply by arguing that the lower court did not have jurisdiction.

QUESTION: Well, they don't have to make an election as to -- they could have tried him for both in the first instance.

MR. KEENAN: No, they could not. Because there was only one incident here.

QUESTION: Well, they could have -- they could have, I suppose, had one -- do you think/this one was a lesser included offense?

MR. KEENAN: There's no question, under North Carolina law, that it is a lesser included offense.

QUESTION: All right. So they could have tried him for both of them, then, in the -- not in the lower court but in the court to which it appealed?

MR. KEENAN: Absolutely not.

QUESTION: Well, suppose the State had tried out -- started out with the felony.

MR. KEENAN: Okay.

QUESTION: And indicted him in the Superior Court. Now, they would have tried him for the felony and they could have found him guilty of the lesser offense?

MR. KEENAN: That is correct.

QUESTION: So they could have tried him for both

things?

MR. KEENAN: No, they -- they could have tried him on the felony and found him guilty of the misdemeanor. They could not -- they could not, in effect, have two successive trials --

QUESTION: Well, he could not have been convicted, I gather, on the felony indictment, both of the felony and the misdemeanor.

MR. KEENAN: That's correct.

QUESTION: He could have been convicted of the felony or the jury could have convicted him of the misdemeanor.

MR. KEENAN: That's correct.

QUESTION: And if they had tried him on the felony and the jury convicted him of the misdemeanor, certainly then he could not be tried again for the felony.

QUESTION: Under Green,

MR. KEENAN: That's correct.

QUESTION: That's Green.

MR. KEENAN: Right.

But we contend that the State was not free, having made their election in the first instance, to then reverse course and attempt to try him on the felony in the Superior Court.

QUESTION: You're saying, in effect, that they've done the same -- attempted the same thing as they went through

with in Green.

MR. KEENAN: Right. Right.

And the major point I would make is that we would contend that if Perry had not appealed -- for instance, he had been given the six-month sentence in the District Court; if he had said, Fine, that's a just sentence and I'll take my punishment and go off to jail -- we certainly contend, at that point, the State would not have been free to turn around and say: Well, you're going up to Superior Court on this felony charge.

QUESTION: Well, I gather that you -- your brother agrees, at least under North Carolina law, they could not have tried him on the felony charge had he not appealed the misdemeanor conviction.

As I understood his argument, it is that they could try him on the felony charge because his appeal from the misdemeanor conviction reopened --

MR. KEENAN: I know of no other way they could have tried -- could have retried it.

QUESTION: Yes.

QUESTION: What is the North Carolina rule? Is it a constitutional rule or statutory rule or a rule of practice, or what?

If you -- assume he had an appeal from his misdemeanor conviction --

MR. KEENAN: Well, in North Carolina, it's basically a rule of practice. But I would also contend it's a constitutional rule.

QUESTION: I see. But actually how is it articulated in North Carolina? Just as a rule of practice?

MR. KEENAN: Yes. I mean that it's not articulated in a written form.

QUESTION: You just -- as long as a misdemeanor conviction stands, they just don't convict him -- they just don't charge him with a felony.

MR. KEENAN: Right. Because if it's a felony, they can try him for that in the first instance. They're not forced to, in effect, try him for the lesser included offense and then go on and try him for the felony later. They have the option in the first instance to proceed with the --

QUESTION: Well, anyway, that's your practice.

MR. KEENAN: -- with proceeding with the felony.

QUESTION: But you also submit that that practice is required by the United States Constitution, don't you?

MR. KEENAN: Yes. That's exactly what we submit.

We submit that when the State has made an election, they are bound by that election, that they are not free then to proceed and try to elevate the charge at a de novo proceeding in the Superior Court.

QUESTION: And as my brother Brennan suggested, I

understood your opponent here to agree with you, if the case were that the original misdemeanor conviction had been unappealed, and been undisturbed.

I think the representative of the Attorney General of your State says: yes, in that case, we would not. And I understood him to say: We could not then bring a felony prosecution for precisely the same event.

MR. KEENAN: That's our position.

QUESTION: And the only question is whether that rule is different or disappears when, at the defendant's behest, the original conviction was set aside.

MR. KEENAN: Right. And we contend that a price cannot be put on an appeal that one must face a more elevated form merely for exercising the right to get that appeal.

I want to touch on --

QUESTION: Well, that's a different point. That's not a double jeopardy point.

MR. KEENAN: Right. It's a due process point.

QUESTION: Yes, due process.

MR. KEENAN: But I think that the due process and double jeopardy, at this point, begins to merge.

QUESTION: Well, what you're saying is that it's a burden on the appeal.

MR. KEENAN: There's no question about that.

QUESTION: To try to defeat it or attempt to, as the State did here, by bringing in a felony indictment.

QUESTION: Is there anything in the record to show what happened on the trial de novo on the misdemeanor?

MR. KEENAN: Pardon?

QUESTION: Is there anything in the record to show what happened, this man said I'm appealing --

MR. KEENAN: Yes.

QUESTION: Is there anything on the record to show what happened to that?

MR. KEENAN: In the trial de novo of the misdemeanor?

QUESTION: Yes.

MR. KEENAN: There was no trial de novo.

QUESTION: Well, what happened to it? It just disappeared?

MR. KEENAN: It disappeared into the felony indictment. That's what happened to it. He was never brought to Superior Court on the misdemeanor.

QUESTION: What was the maximum sentence that he was subject to on the misdemeanor?

MR. KEENAN: Two years.

Under North Carolina law, --

QUESTION: And what did he get on the felony?

MR. KEENAN: He got five to seven years concurrent.

QUESTION: Right.

MR. KEENAN: With the sentence being served, which effectively raised his sentence by one year, five days and one month. [sic]

QUESTION: In your de novo appeal to the Superior Court on your misdemeanor, I take it it's then up to the State to reinstitute the prosecution all over again in the Superior Court.

MR. KEENAN: Right.

QUESTION: It isn't a question of a hearing on the record or of the defendant having to take the initiative to bring the case to the court's attention.

MR. KEENAN: That is correct. The solicitor sets the matter down for trial on the warrant, generally, the misdemeanor warrant, and the case is heard, all over, the judgment is stricken, in effect, and the defendant is given a jury trial in this instance, which he cannot waive.

I would like to make one brief point regarding the jury trial.

In order to get a jury trial, which he was constitutionally entitled to because the matter on which he was being tried carried a maximum sentence of two years, he had to first submit to a non-jury trial in District Court because there is no provision under North Carolina law for a jury trial in the District Court.

We contend that this was unconstitutional and that

it deprived him of the right of a jury trial for two reasons:

First, this Court held in Ward vs. Village of Monroeville that there is no authority for the proposition that a constitutional right can be deferred on the ground that it is available at a subsequent de novo proceeding.

QUESTION: Before you -- excuse me; I apologize for interrupting you, but I'm curious. Does the record show or do you know why, after having pleaded not guilty to a misdemeanor, he then pleaded guilty to a felony?

MR. KEENAN: The record doesn't show because there was no hearing held in the District Court.

QUESTION: But you told us that at the earlier stage, the first trial, the man who was cut would not testify against him.

MR. KEENAN: And the man would not testify at the second trial, either.

QUESTION: Well, why did he plead guilty?

MR. KEENAN: He pled guilty -- and I base this on conversations with him and his attorney -- again there has been no evidentiary hearing. He pled guilty because, all of a sudden, this charge which carried a maximum sentence of two years, he was faced with a ten-year felony, which we contend he could not constitutionally be placed in jeopardy of, and was in effect offered a deal --

QUESTION: Well, then it was plea bargaining.

MR. KEENAN: -- in which he was told that he would get a concurrent type sentence if he pled guilty.

QUESTION: I see.

MR. KEENAN: So, in effect, he ran.

QUESTION: Unh-hunh.

MR. KEENAN: If I can come back to the jury trial issue for just a moment.

In Colten, this Court held that a sentence on trial de novo could be increased in a two-tier court system, such as that held in North Carolina.

We contend under this decision and under the decision of United States vs. Jackson this creates a dilemma, in that a defendant who has to appeal to get his jury trial of right, because this was a two-year misdemeanor, has to run the risk of an increased punishment.

And we contend this is precisely what the Court said in Jackson cannot be the case, with the exercise of a right to a jury trial.

QUESTION: Well, but he was never sentenced as a result of the District Court's judgment --

MR. KEENAN: Yes, he was. Yes, he was. He was sentenced to six months. He appealed.

QUESTION: And that vacated the thing, without more.

MR. KEENAN: That's correct. But he was placed in jeopardy of receiving up to two years in prison in the District

Court without his constitutional right to a jury trial.

That's our point.

QUESTION: But he was never charged in the Superior Court.

MR. KEENAN: He was charged with a felony in the Superior Court.

QUESTION: Yes, but not with the crime he was charged with in District Court.

MR. KEENAN: No, he was charged with the greater included offense to what he was tried in the District Court.

QUESTION: Well, the State says a separate offense.

MR.KEENAN: No, it's trial -- I don't think there's any question but it's a greater included offense.

QUESTION: "greater included" -- what's that?

QUESTION: That's a novel term: greater included offense.

The State says the elements of the crime tried in the Superior Court were different than the elements of the crime tried in the District Court.

QUESTION: They were, weren't they?

MR. KEENAN: They included two additional elements.

QUESTION: Which you didn't have to prove in the misdemeanor trial.

MR. KEENAN: Which did not have to be proved in the misdemeanor trial. That is correct.

QUESTION: And on de novo, misdemeanor trial would not have to prove either.

MR. KEENAN: That is correct also.

QUESTION: But I gather, had he got his de novo Superior Court trial -- this is Superior Court, is it, in your State?

MR. KEENAN: Yes.

QUESTION: -- he ran the risk of getting his sentence increased if found guilty by the jury, from six months to two years?

MR. KEENAN: That is correct.

QUESTION: Whereas, what in fact happened to him, instead of -- he could have got up -- not more than two years, instead of which he gets five years and seven months.

MR. KEENAN: Well, what could have happened --

QUESTION: I mean five to seven years.

MR. KEENAN: Right.

Though it was concurrent. Nevertheless, it did effectively raise by a year and a half the sentence he received in District Court.

QUESTION: Does the State have the option of starting a misdemeanor trial in the Superior Court?

MR. KEENAN: No, it does not. It must try a misdemeanor in the first instance in the District Court. The statute is cited in my brief on that score. The State

has to proceed in the first instance to the District Court on a misdemeanor. On a felony it can proceed directly to the Superior Court, or it can proceed to the District Court for a preliminary hearing and then on to Superior Court for trial.

A misdemeanor can be tried twice: first in the District Court, secondly in the Superior Court de novo.

QUESTION: When was this Code -- when was this codified in your State?

MR. KEENAN: This has been the procedure for years. I really can't give you the date, Mr. Chief Justice.

QUESTION: A hundred years or so?

MR. KEENAN: Pardon?

QUESTION: A hundred years or more?

MR. KEENAN: I would think so, yes, sir. It's an old established procedure, in the State of North Carolina.

Of course we've got a problem in that Mr. Perry pled guilty in the Superior Court to the felony, and I realize the burden to distinguish that from the Brady trilogy and from Tollett vs. Henderson.

We contend that there are several telling distinctions.

In the first place, and of course this is -- I'll state this is, in effect, taking, as granted, the validity of the double jeopardy argument, on which the whole argument is based. The first argument is that in each of those prior

cases there was a legitimate State interest in punishing the person for the crime to which the guilty plea was entered.

We disagree with Mr. League that the double jeopardy clause is designed just to protect the innocent. I think it's clear that it also is designed to protect the guilty from repeated punishment.

And we contend that the State had no legitimate interest in this particular instance in punishing Jimmy Seth Perry on a felony of assault with a deadly weapon with intent to kill, inflicting serious bodily injury. They lost that right when they made a determination to proceed with a misdemeanor in the District Court.

Secondly, we contend that on the issues involved in the other cases there was a situation that existed where, if the infirmities involved were corrected, the trial could proceed and punishment could be imposed.

For instance, in the case of Tollett vs. Henderson, in an illegally constituted grand jury, this was not to tell the defendant he is free to go, it --

QUESTION: Well, what would you say if the defendant says to his lawyer: well, can I be tried on this felony? And he says: Well, that's an unsettled issue; it's about fifty-fifty, I would guess, in the Supreme Court. I don't know whether you'll win or not, but now we've got to make a choice now.

The prosecutor says: Well, we'll give you a deal, two years if you plead guilty. Now, it may be that you shouldn't plead guilty at all, because that would be double jeopardy.

The prosecutor doesn't think it's double jeopardy; I think it is, but I don't know whether I'm right or not.

MR. KEENAN: In that particular instance, where there is a conscious discussion of the fact that the issue was there, and that it can be presented or not presented, based on tactical considerations, I think that it could properly be held to be a surrender of double jeopardy to plead guilty.

But what I am saying is that in an issue such as double jeopardy, that fact has to be there.

QUESTION: Well, neither Tollett nor McMann certainly spoke in terms of conscious decision and consultation, they said that once you have the guilty plea that's the end of it, so far as everything that antedated the guilty plea, regardless of any waiver type test like you have in your right of counsel cases.

MR. KEENAN: Right. That is correct, but what we're alleging is, in those particular instances the fact that the person pled guilty was significant, because of the fact that the guilty plea, in effect, resolved the factual matters at issue in the case.

QUESTION: Then the guilty plea would have -- based on -- entered after adequate representation by counsel.

MR. KEENAN: Yes.

In this particular instance, the fact that Jimmy Seth Perry may in fact have been guilty of a felony, we contend is just totally irrelevant. If our double jeopardy claim is valid.

The fact that he may have in fact committed the felony would not, in effect, give the State the right to --

QUESTION: Well, if you were representing a defendant and you were as sure of your double jeopardy point as you are here, you would never permit him to plead guilty, would you?

MR. KEENAN: That is correct. I would not have pleaded Mr. Perry guilty.

QUESTION: Now -- so, in Brady and the cases suggested suggest that perhaps these cases, once the guilty plea is in, should turn into a representation of counsel case.

MR. KEENAN: That is correct.

QUESTION: Would you think that in view of the state of the law that the attorney representing Mr. Perry was -- furnished inadequate representation by not permitting -- by permitting him to plead guilty?

MR. KEENAN: I'm, in this instance, speaking outside the record, because I've had frequent discussions with

the attorney recently regarding this. At the time the attorney had no comprehension that such an issue existed. He did not discuss it with Mr. Perry. He thought in terms of the fact that it was trial de novo, and therefore the State was free to do what they pleased.

QUESTION: Well, you -- it's hard for you to find a case anywhere also supporting you, isn't it?

On double jeopardy.

MR. KEENAN: I don't think so. I think Green and Price support me. I don't think the double jeopardy question is that hard to see. I think -- in fact I think it's a clear double jeopardy question.

I think that the attorney should have been aware of the fact that it did exist.

QUESTION: You speak rather readily of what you would do, but what if the defendant said: I insist on pleading guilty. And it's quite clear that he has that right, isn't it?

MR. KEENAN: Yes. I think a person has a right to waive double jeopardy, so long as he knows he's waiving it. I don't have any problem with that.

If he makes an intelligent and knowing decision that: yes, it's in my best interests for tactical reasons to, let's say, plead guilty, even though I may have --

QUESTION: Well, would you say that if -- would

you say that if the concept of double jeopardy were an absolute bar to a second prosecution, where it applies?

MR. KEENAN: There might be a situation, Mr. Justice Brennan, where a person, let's say, is charged with ten felonies --

QUESTION: Well, what is the concept of double jeopardy? Isn't it supposed to be an absolute bar to a later prosecution, in any situation where it applies?

MR. KEENAN: That's what I believe it to be.

QUESTION: Well, I must confess I'm surprised to hear you say it can be waived.

MR. KEENAN: I would say it only can be waived only in the instance where a person knows in fact what he's doing. I can see tactical situations where it might be waived.

QUESTION: I don't follow that.

QUESTION: The exclusionary rule of Mapp v. Ohio is an absolute bar to the introduction of evidence wrongfully seized; but certainly that could be waived, couldn't it?

MR. KEENAN: Certainly.

QUESTION: That's quite different from double jeopardy.

QUESTION: I didn't suggest it was the same right as the double jeopardy right.

[Laughter.]

MR. KEENAN: One other point we wish to make is that

with regard to double jeopardy the law on which Mr. Perry primarily was basing his claim in the District Court, Wood vs. Ross, a Fourth Circuit decision, post-dated the entering of his guilty plea.

We contend that the fact that double jeopardy has been given retroactive effect is significant on this particular score.

I realize in prior cases this Court has held that when a guilty plea is made it's not set aside merely because later developments of the law may in fact give a person a valid claim.

But, again, we would go back to our position that in these particular instances the State did have a legitimate interest in punishing the person for the charge involved, in this particular instance there is no legitimate interest.

And, secondly, to perhaps join the point Mr. Justice Brennan just briefly made, this is an instance where, if a person knew of the double jeopardy bar, particularly in the facts of this particular case, there would have been no reason in the world to waive it.

QUESTION: Well, there was no legitimate interest if there was double jeopardy.

MR. KEENAN: If there was -- I'll grant you, I've got to convince this Court there was a double jeopardy violation, or the denial of the right to a jury trial; one or the

other. I can't prevail if there was no constitutional deprivation. I'll concede that.

QUESTION: Well, what's the State supposed to do when the double jeopardy question is unsettled?

MR. KEENAN: I think --

QUESTION: Try him or not?

MR. KEENAN: I think the State has the right to pursue to trial.

QUESTION: Well, then it has an interest, doesn't it?

MR. KEENAN: Yes, it does. But the State -- if the double jeopardy issue should be decided against the State, then the State's interest is forfeited --

QUESTION: Well, in that context, the question is about a plea of guilty.

MR. KEENAN: Right.

QUESTION: In that -- against the background of that unsettled state of the law.

MR. KEENAN: The State -- the State does have an interest, but the question of whether or not the guilty plea surrenders or forfeits the double jeopardy claim, we think in the question of double jeopardy, which we do see as an absolute bar to retrial, brings about the fact that the State must in fact show that the person consciously made a decision to surrender the right.

A second conceivable situation would be where a

person deliberately bypassed State remedies, though again this would be a very, very rare case, because why would a defendant forfeit a possible State remedy.

The other question that was brief related to what Boykin requires, that a defendant be warned of. If the rule is to be a flat rule, that one who pleads guilty surrenders any prior constitutional right, with no qualifications whatsoever, we would contend that a defendant ought to be told that, at the time he pleads guilty.

So that there can be no question in his mind that this is not a matter that's going to be resolved through later risk or through later court proceedings.

In this particular instance, the judge did run through a series of form questions, which are in the record, with the defendant, which indicated that he was warned that he could receive a certain maximum sentence, and that he did have a right to trial by jury, and that he did have a right to be represented by counsel, and so forth.

However, there is nothing in the record that indicates -- and in fact it wasn't asked -- there's nothing that indicates that Mr. Perry was informed: If you plead guilty here, don't ever come back to court on any constitutional claim.

And we contend that if that is to be the rule, then the defendant should be told precisely that.

Thank you very much, Your Honor.

QUESTION: Did Judge Larkins rule on the double -- on the Boykin type claim, or did he just not reach it?

MR. KEENAN: He just didn't reach it, Mr. Justice Rehnquist. He held that there was a violation of double jeopardy, one, and secondly that it wasn't waived by the plea of guilty.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. League, do you have anything further?

MR. LEAGUE: No, Your Honor. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Keenan, you appeared here at our request, by the appointment of this Court?

MR. KEENAN: Yes, sir.

MR. CHIEF JUSTICE BURGER: On behalf of the Court, I thank you for your assistance to your client and your assistance to the Court.

MR. KEENAN: It was my pleasure, sir.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 2:39 o'clock, p.m., the case in the above-entitled matter was submitted.]