

In the
Supreme Court of the United States

ALLEN F. BREED, ETC.,)

Pettitioner)

v.)

GARY STEVEN JONES)

LIBRARY C'

SUPREME COURT, U. S.

No. 73-1995

Washington, D. C.
February 25, 1975
February 26, 1975

Pages 1 thru 56

Duplication or copying of this transcript
by photographic, electrostatic or other
facsimile means is prohibited under the
order form agreement.

HOOVER REPORTING COMPANY, INC.

Official Reporters
Washington, D. C.
546-6666

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE
FEB 31 9 40 PM '75

IN THE SUPREME COURT OF THE UNITED STATES

----- X
: Allen F. Breed, ETC.,
:

Petitioner
:

v.
:

No. 73-1995
:

GARY STEVEN JONES
:
----- X

Washington, D. C.

Tuesday, February 25, 1975

Wednesday, February 26, 1975

The above-entitled-matter came on for argument at
2:22 o'clock p.m. on Tuesday, February, 25, 1975 and
was continued for argument until 10:03 o'clock a.m. on
Wednesday, February 26, 1975

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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:

RUSSELL IUNGERICH, ESQ., Deputy Attorney General,
600 State Building, 217 West First Street, Los Angeles,
California 90012 For Petitioner

ROBERT L. WALKER, ESQ., Youth Law Center, 693 Mission
Street, San Francisco, California 94105 For Respondent

C O N T E N T SORAL ARGUMENT OF:PAGE:

RUSSELL IUNGERICH, ESQ.,
For Petitioner

3

ROBERT L. WALKER, ESQ.,
For Respondent

30

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-1995, Breed against Jones.

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

ORAL ARGUMENT OF RUSSELL IUNGERICH, ESQ.,

ON BEHALF OF PETITIONER

MR. IUNGERICH: Mr. Chief Justice, and may it Please the Court:

This case is a federal habeas corpus action brought by a ward of the California Youth Authority who is currently in custody on parole.

It presents an important question under the Double Jeopardy Clause of the Fifth Amendment as applied to the states through the Due Process Clause of the 14th Amendment and this question is whether a juvenile such as Respondent Jones, is placed twice in jeopardy when the Juvenile Court orders his trial as an adult after an adjudication of delinquency and upon a finding that he is unfit for treatment as a juvenile.

The facts in this case are not in dispute.

In a petition filed in the Los Angeles County Superior Court, Respondent Jones was charged with the commission of an act which, if committed by an adult, would have constituted a robbery under California law.

In a jurisdictional or adjudicatory hearing on this petition, Respondent Jones was found to have committed the robbery alleged in that petition.

We submit, as far as this case is concerned, to the Court that we treat this particular proceeding as a trial and I don't think there is any question of our agreement between the parties on that point that the jurisdictional or adjudicatory hearing is, in every sense, a court trial.

After this adjudicatory or jurisdictional hearing, a second hearing was held, known as a dispositional hearing and at this hearing the juvenile court had what amounts to four choices under California law.

He could place the juvenile on probation.

He could commit the juvenile to a juvenile institution within the jurisdiction of the juvenile court -- in other words, a county camp for juveniles or one of the other county facilities available to juveniles.

He could order a commitment to the California Youth Authority or he could do what he did in this case, exercise his power under Welfare and Institutions Code Section 707 and that is, transfer the case to the adult court for trial of the juvenile as an adult.

QUESTION: These four alternatives were entirely within his discretion, were they?

MR. IUNGERICH: All four alternatives are within his

discretion under California law although they occur in separate divisions of the code -- of the Welfare and Institutions Code.

QUESTION: What is the age limit, 18 in California?

MR. IUNGERICH: It is 18 at this time, yes, your Honor. The age was 21 at the time the statute was amended, subsequent to this particular juvenile's transfer.

He was 17 at the time of his transfer.

QUESTION: And if he chose the alternative of incarceration, how long could he imprison him, up until what age?

MR. IUNGERICH: Well, I believe up until age 26, depending on whether or not there is ultimately a proceeding under the -- if he was committed to the Youth Authority and he was -- ultimately came back at age 21 and it was found that he still constituted a danger to society, under the particular sections involved in the Youth Authority, he could technically be committed up until age 26, I believe, at that time.

QUESTION: What kind of hearing is the transfer hearing?

MR. IUNGERICH: What type of hearing is the transfer hearing? Well, basically, I think that transfer hearing is set out in the case of Jimmy H. In other words, there are a number of factors to be considered.

The first factor, of course, the factor that is expressly included, is just taking a look at the gravity of the offense alone. The California statute expressly provides that that alone is not enough for transfer.

What the judge will look at are three factors under the Jimmy H. case and those three factors are, first, you take a look at the circumstances of the offense that is involved and the circumstances of the offense -- the circumstances that surround the offense in the particular case.

He also takes a look at the juvenile prior conduct, in other words, any of his behavior patterns whether or not, as in this case, he has committed prior crimes, again within the Juvenile Court jurisdiction.

In this case, Respondent Jones had committed two prior armed robberies.

QUESTION: Is this an adversary proceeding?

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

QUESTION: Examination and cross-examination of witnesses?

MR. IUNGERICH: Yes, your Honor.

It is provided in all the California Juvenile Court proceedings and of course, that is -- the mandate, of course, as we would read the combination of Gault and Kent -- in addition to looking at the particular circumstances of the case, of course, he is going to look at the minor's degree of

sophistication would be the third factor and the extent of his criminal involvement in this particular case.

QUESTION: Are there findings in support of the order of transfer?

MR. IUNGERICH: Are the findings here?

QUESTION: Are there findings?

In these transfer proceedings?

MR. IUNGERICH: Well, the findings are not normally formally made.

In other words, in the sense of findings of fact and conclusions of law such as you have in a motion for summary judgment. Basically the report, probation report if it is held at the end of the transfer hearing, as in this case, is before the judge.

He has the testimony and at that point he makes his decision and he may state the factors that guide him as far as transfer.

I doubt that there is any express requirement in California law that all of those factors be placed on the record at the present time.

QUESTION: How about in this case? Were there findings?

MR. IUNGERICH: Well, I think it is quite clear in this case, as far as the disposition hearing, the findings were -- the primary reason that he felt that this man should

be transferred --

QUESTION: Should be tried as an adult.

MR. IUNGERICH: -- was the fact that he had committed two other armed robberies, that he had been committed to juvenile institutions in both of those cases and that, basically, he wasn't amenable to the Juvenile Court process for that reason.

I think it is a clear case of non-amenable as -- under any standard that would be applied in that type of hearing.

QUESTION: I take it, if there were a dispute of fact, of one of these important elements, there would be a finding?

MR. IUNGERICH: If there was a dispute of fact? I would assume that the judge would state his reasons why he was finding one way or another but under the California rules, as this would come up on appeal, of course, if there was evidence in the record that would support the ultimate result the judge reached, then, of course, those implied findings would be what the California court would rely on in that situation.

I think, though, that basically the point that you have brought out here is one that I think is very important as far as considering the nature of the questions involved here.

Basically, what double jeopardy means in this

particular context, in this particular case is, that a hearing is foreclosed at any point except prior to the adjudicatory hearing on the question of transfer and the question that really -- the double jeopardy issue really is determinative of is whether or not the state should be permitted the flexibility to have the hearing either before or after and I think arguments could be made for a preferential -- for preference one way or another depending upon the individual case.

I submit that where you have a serious felony, as robbery or murder or rape, you have a likelihood of a contest of facts and although technically we are not considering guilt or innocence at the transfer hearing, nevertheless, the judge is going to want to know the facts involved in this. The questions need to go into the same questions of fact that would be involved here.

QUESTION: Is it a combination of those two inquiries in one proceeding?

MR. IUNGERICH: What?

QUESTION: Is there ever a combination of those inquiries in one proceeding? That is, a determination of the offense and a determination of the findings?

MR. IUNGERICH: No, that has been expressly ruled out, that you can't make the determination in one proceedings. What we do is, we save the possibilities of having

three proceedings and we only have two, if we permit the alternative, the dispositional alternative of allowing transfer after trial.

Basically, what you have if you don't have the dispositional alternative after trial -- the advantage of the dispositional alternatives, if there are contested issues as to the minor's involvement in the crime, as to the circumstances surrounding his involvement in the crime, those usually would be brought before the judge at the adjudicatory hearing and he can rely on what he learned at the adjudicatory hearing to shorten the process when it comes before him on disposition, whereas if you hold this hearing before, you may have actually two duplicate trials, both of which, covering the same subject matter and, as it is conceded by all parties in this case, as we agree, it would, in that situation, if you hold it prior, you will require two judges.

Because the judge that is considering the information that comes in in the social study, which is the equivalent of the probation report that a criminal judge would receive at sentencing, he would have many of the hearsay materials that are presented in the probation report that might influence him on the question of sentencing and it felt that he should not then preside on the issue of guilt or innocence, having heard that matter. So you would have to have two judges.

QUESTION: And I take it, at that dispositional

hearing, the disposition is to turn him over to the Youth Authority. That, in effect, is as if it were a sentence, is it?

MR. IUNGERICH: Yes, it is -- in the sense, I would say that that would be much -- it would be tantamount to the sentence in a criminal proceeding.

In other words, if he were committed to the Youth Authority or he were sent to a juvenile institution.

We didn't have that in this case and I think that -- that is the important factor that indicates why we don't have a proper application or a proper case of the application of the principle of double jeopardy in this case.

QUESTION: Is there a Supreme Court of California opinion concluding that this procedure is not a violation of the California constitutional provision against double jeopardy?

MR. IUNGERICH: Yes, I think quite clearly that is the position. The California Court -- I don't recall whether Bryan versus Superior Court, which is the leading case -- Bryan held that there is no violation of double jeopardy to allow this transfer to take place after the adjudicatory hearing and Bryan is cited in our brief.

I do not recall whether Bryan went off on California grounds and I don't think they did discuss the California Constitution, although that option was available

to the Court in applying -- in deciding the constitutional question before it.

But, basically, the rule in California today is that the hearing may be held either before or after and double jeopardy really comes down to the question, must it be limited only before, under the constitutional compulsion of the Fifth Amendment as applied to the states through the 14th Amendment?

I submit that that question -- the resolution of that question is, really turns on the fact that although Respondent Gary Steven Jones was tried twice in this particular case -- and I submit that the submission on the preliminary transcript of the adult case, he was in effect, tried twice and that is the equivalent of a trial under California law because the judge determined all the issues of fact based on the preliminary transfer.

Nevertheless, although he was tried twice, he was not placed in jeopardy twice and I think the critical distinction here is, what is the -- the critical question is, what is a jeopardy for the purposes of the case?

Because even if jeopardy had attached at the point of transfer and even if double jeopardy applied in the extent of saying that jeopardy does attach in the juvenile court, Respondent Jones was not placed twice in jeopardy under the circumstances of this case for the primary reason, first, that

none of the policies behind -- none of the protections that are incorporated in the double jeopardy position were violated in this case.

In North Carolina versus Pearce, those protections were set out. The first was that double jeopardy protects against a second prosecution after acquittal and, of course, I think assumed in that ground is also what is tantamount to acquittal, a dismissal at some point prior to acquittal where there isn't manifest necessity for the dismissal in the determination of the case.

In this case, there was no acquittal. There was nothing tantamount. If anything, what we had here was something that was tantamount to a conviction without a sentence and there has never been a situation where the Court has held that where there actually has not been determination proceedings that there was actually a jeopardy -- a first jeopardy at that point and the commencement of a second jeopardy where you have some sort of a continuance.

QUESTION: You wouldn't dispute, would you, that if the juvenile judge dismissed the charges after this hearing and found them, in effect, not guilty, that then he couldn't be tried as an adult on the same charges?

MR. IUNGERICH: Well, under California law, of course, under Richard M. versus Superior Court, we are bound under our state law by that principle.

In other words, that there jeopardy would attach and that you couldn't retry him if it had been dismissed after the adjudicatory hearing had commenced.

QUESTION: And did your Court put that on the basis of the Federal Constitution of the Supreme Court of California?

MR. IUNGERICH: That, I think, is on the basis of the Federal and the State Constitution. It is clearly on the basis of the State Constitution as well and it does constitute an adequate state law ground on that particular situation so we really are concerned with that point, as to whether or not double jeopardy is applicable in juvenile court proceedings per se in this case because the situation involved here is really a Benton question.

We are talking about the rights of this juvenile when he gets to the point that he is actually in adult court.

In other words, we are talking about -- sorry --

QUESTION: My question hypothesized if he were in adult court just as he is in your actual case but the difference was, that he had been acquitted of the juvenile charges.

MR. IUNGERICH: He is in adult court and he has been acquitted of the juvenile charge. In other words, what the district attorney has done in this case is refiled against him?

QUESTION: Yes.

MR. IUNGERICH: In a subsequent case?

QUESTION: Yes.

MR. IUNGERICH: Well, I think that I would reserve that question until a future case because I think there may be some cases pending on this Court's docket.

At this point I would think that jeopardy, at least as far as what this Court might say, would have attached in the lower proceeding but I think that is a quite different case from ours because we don't have that problem here and I think the states that have statutes that permit that at least ought to be allowed to defend that in this forum without my conceding away their cases, where we don't have that problem involved in California.

QUESTION: In California, if you try a juvenile in an adjudicatory hearing and he is acquitted, or whatever you call that -- what do you call it, dismissed?

MR. IUNGERICH: It is dismissed, yes. It is a dismissal.

QUESTION: Then could you bring him back and try him again for the same thing in the juvenile court?

MR. IUNGERICH: If it is dismissed, no -- under the authority of the case of Richard M. versus Superior Court.

QUESTION: That is a constitutional ruling.

MR. IUNGERICH: That is a constitutional ruling.

QUESTION: State constitutional.

MR. IUNGERICH: Under our State Constitution.

QUESTION: And federal?

MR. IUNGERICH: And federal. It was predicated on both counts.

QUESTION: So there is jeopardy. Under the California law, jeopardy attaches.

MR. IUNGERICH: Under California law, jeopardy attaches.

QUESTION: So your argument here is that it doesn't attach.

MR. IUNGERICH: It isn't that it doesn't attach. It is that even if it does attach, it is not a violation.

QUESTION: It has never been over. I mean, there has never been a case --

MR. IUNGERICH: There has never been an end to the jeopardy. There is no new jeopardy when he is transferred to the adult court.

QUESTION: Now, Bryan was after Richard M?

MR. IUNGERICH: Yes. Yes, your Honor.

QUESTION: So Bryan -- Bryan approves this procedure but doesn't approve the retrial?

MR. IUNGERICH: Right. That is correct, your Honor.

QUESTION: Now, in this case, after he was transferred to the regular adult court, he could have been acquitted, couldn't he?

MR. IUNGERICH: Yes, your Honor. He would have a second opportunity, really.

In this case what we have is a situation where the juvenile was given an opportunity for two adjudications beyond a reasonable doubt and two opportunities for acquittal and the state loses the conviction, in effect, that they obtained in juvenile court to put at risk, again, in adult court, of obtaining another conviction by the standard of beyond a reasonable doubt.

The difference between the proceedings, of course, and the reason why we have to conduct a second adult trial is that all of the basic rights that are accorded to an adult criminal defendant have not been incorporated into the juvenile court process, particularly, under McKeiver, the right of jury trial and in order to accord the juvenile those rights before he is actually convicted in adult court, we have to give him the second adult trial, as California views the Constitution.

I think the important point here is that, in analyzing the protections of the Constitution that we have of double jeopardy in the protections that it gives, really, what we have here is a situation where if any of the protections that are mentioned in North Carolina versus Pearce apply, it would have to be the protection against a second conviction but I think that basically the language, the

understanding of -- that I have of the protection against the second conviction is this, that you actually have to have two separate and distinct risks of punishment and in this case there is one risk of punishment throughout.

When the petition was filed in the juvenile court proceedings, at the very beginning of this case in California, the Respondent was under -- on notice that the possibility of transfer and the possibility of an adult criminal sentence was in that case and until he was actually committed to the facilities of the juvenile court, that risk did not depart the case.

At the point that the case is transferred, the only thing that departs the case is not higher risk of punishment that is involved in the adult criminal proceedings but the lesser punishments that would be involved -- or the lesser disposition of being kept in juvenile court.

It is really what you might say is the converse of the Green situation, in Green versus the United States, where there, on the initial case, there was a verdict of guilty with regard to second-degree murder which meant an implicit equivalent of first-degree murder.

Thereafter, the state tried to retry Green for first-degree murder ^{it was} and/held that there was some type of implicit acquittal.

You could not be retried under the double jeopardy

clause for the higher crime.

We have a converse situation here, which is that the higher penalty never departed the situation. There is no new risk of punishment involved because the same risk carried on throughout.

QUESTION: But there is a different consequence to the conviction other than the punishment, I take it.

MR. IUNGERICH: Certainly there is a different consequence to the conviction.

QUESTION: I mean, the custody will be different.

MR. IUNGERICH: The custody will be different.

Well, the [inaudible] is the same --

QUESTION: The conditions of custody will be different.

MR. IUNGERICH: -- as in this case because what actually happened was, the adult court decided to use the facilities again of the California Youth Authority and it is possible that both the Juvenile Court and the Adult Court may use that commitment to --

QUESTION: No. That is looking backwards.

That is looking backwards. They could have put him somewhere else.

MR. IUNGERICH: certainly, they could have put him --

QUESTION: That's right and now we have got a conviction which he would not have had if the case ended in

the Juvenile Court.

MR. IUNGERICH: Certainly. But I think that that is basically a question of policy for the state courts to determine. After all --

QUESTION: But just as a matter of fact, it is different. It has different consequences.

MR. IUNGERICH: It has different consequences.

QUESTION: It may affect his right to vote. It may affect lots of things.

MR. IUNGERICH: There are certainly collateral consequences that are involved with a criminal conviction that are not involved --

QUESTION: And, also, he has been tried twice.

MR. IUNGERICH: He has been tried twice.

QUESTION: You both agree that the adjudication is a trial.

MR. IUNGERICH: That is correct.

QUESTION: And your suggestion is that unless there is double punishment --

MR. IUNGERICH: Not double punishment, Mr. Justice White.

QUESTION: Well, exposure to it.

MR. IUNGERICH: He has to be exposed at two different times --

QUESTION: Yes.

MR. IUNGERICH: -- to separate and distinct

possibilities of punishment.

QUESTION: I understand that. And so you say, just the fact that he is tried twice --

MR. IUNGERICH: Is not enough.

QUESTION: So that, on your theory, I take it, that a state should always be able to appeal as long as it agreed not to punish him any more than the sentence that was imposed the first time.

MR. IUNGERICH: I do not think we are saddled with that type of an argument, your Honor. I would not take that position. I don't think that the idea of continuing jeopardy could be extended.

In other words, we made a policy decision, I think, in our constitutional law in this country and after a man has been acquitted, he cannot be tried again.

We do not have an acquittal in this situation, however, where we need to have that type of finality.

What we are really talking about is a separate type of court system which is the Juvenile Court system which is basically making a determination whether or not this juvenile should actually not be treated as an adult and because of the nature of his crime and his prior background, they feel that in order to rehabilitate him, he actually needs to be exposed to the criminal process because they have exhausted their facilities.

We have, I think, quite different policy

considerations here than will be involved in a situation where you have a case where a man has --

QUESTION: Well, at the end of -- assume that he went through the juvenile procedure and the entire juvenile procedure was exhausted when he became, what, 21? In your state?

MR. IUNGERICH: Yes.

QUESTION: 21. Well, at that time you decide that we just failed with this young man so we are going to now try him as an adult. We've had --

MR. IUNGERICH: Frankly, that is not our case. We are not advocating that position. We are advocating only --

QUESTION: Well, I am not sure it is any different, though, than that.

MR. IUNGERICH: Well, at that point, I don't think -- I think that there is a different question, of course, as to whether or not when they make a final, I would say, in my theory where you have a separate risk of punishment, you have two separate and distinct jeopardies at that point because you haven't had the lower -- you have actually committed the man to the juvenile institution. You have made a mistake.

I think the policy of finality, which is inherent in the juvenile -- in the double jeopardy clause -- should apply at that point and say, well, we can't sentence the man a second time.

QUESTION: After you have gone through the dispositional hearing, that should terminate the initial jeopardy?

MR. IUNGERICH: What?

QUESTION: Once you have gone through the dispositional stage --

MR. IUNGERICH: Yes.

QUESTION: -- after its adjudication --

MR. IUNGERICH: The only exception that I think that there might be for that is there is the tentative commitment to the Youth Authority where the man would be referred back to Court,

In other words, this is really an extension of the disposition hearing. At that point, in California, the Youth Authority makes an evaluation of the man and they decide, well, they don't feel they can treat him and they can send him back to Juvenile Court at that point, very much similar to diagnostic studies and in accordance --

QUESTION: You wouldn't, at that point, transfer him under your law?

MR. IUNGERICH: Under that point Bland says we can transfer him under our law.

QUESTION: You made a point in your brief, I believe, that if you do not prevail, this will compel the juvenile courts to superimpose on the present procedural

structure a preliminary hearing of some kind in every case and that that will overburden an already overburdened court.

But isn't it possible -- that is the point you make, isn't it, Mr. Iungerich?

MR. IUNGERICH: Yes, your Honor.

QUESTION: Isn't it possible, reasonably, to identify in advance the cases which might be borderline adult cases and give the preliminary treatment only to those cases?

MR. IUNGERICH: Well, I don't think it is clearly a case that you can identify. You can possibly identify them but you can't --

QUESTION: Before he begins any proceeding, you know what his prior record is, don't you?

MR. IUNGERICH: Yes, the probation department undoubtedly would have his prior record.

QUESTION: Do you know the nature of the crime or the criminal conduct that he is charged with?

MR. IUNGERICH: Yes, your Honor.

QUESTION: And do you tell me that you couldn't identify, in a very large percentage of the cases?

MR. IUNGERICH: Well, the problem is not identifying. I think you can possibly spot the transfer case, you know, especially where you have got a murder or a robbery. Usually the gravity of the offense even tells you something about that although we are not supposed to transfer on that basis.

What we are talking about, though, is that this -- any attorney worth his salt, when he comes into the transfer hearing, is going to want to fully thrash out all of the issues as to why his client should not be transferred and if he does that, what we are going to have is really two trials and I think that that is the important point to make, is that there are situations where the juvenile court judge should have the discretion to hear the adjudication phase first and then make his decision on transfer afterward to avoid two duplicate trials before two different judges.

Because what we are doing by applying double jeopardy in this case to cut off transfer of the dispositional alternatives will, in effect, take that discretion away from the judge so that he can maintain his calendar and take those cases where he thinks that he is going to have two contested hearings and he may have a situation involving two full trials before two different judges and --

QUESTION: What is the percentage of cases that are transferred for adult trial? Do you know?

MR. IUNGERICH: The percentage? It is less than 10 percent and the exact figures at this point I don't know because our figures are -- the last figures we have available, of course, are 1972 figures and the Bureau of Criminal Identification in California hasn't come up with its reports for '73 yet.

But at that point it was less than 10 percent.

The point is, with those cases, though, is that the ones that are considered for transfer -- and we don't know how many -- first of all, there are no statistics on the number of waiver hearings that are actually held in California where transfer is rejected and, of course, those are the cases that are really going to cause the bottleneck for the juvenile court because where transfer is rejected, that is the situation where we are going to have the second trial situation in the juvenile court and, actually, the problem created for the juvenile court calendar -- I think there is no question that both sides in this case agree on the fact that the juvenile courts already have overcrowded dockets and by taking out this possibility of giving them the flexibility to actually void two duplicate trials in this circumstance may really cut into their discretion and actually lead to more congestion on their calendars.

I think that as well as the indication that there is no violation of the principles of double jeopardy, I think as well, the continuing jeopardy exception would give us an additional peg on which to decide that this case does not violate the double jeopardy provision of the Constitution.

In Price versus Georgia this held that its prior cases had formulated a concept of continuing jeopardies -- jeopardy where criminal proceedings against the accused have

not run their full course and I think in this case the proceedings against this individual did not run their full course until he actually went to adult court and there was a determination and an ultimate disposition.

Unlike any other case, there is a link between these two proceedings and the link is the judicial transfer. It is not a transfer that the prosecution can unilaterally determine as for example, filing a new case against this man after the juvenile court has taken him into its own facility.

QUESTION: But it isn't one that commences at the initiative of the defendant, either, the way it did in Price or in Green.

MR. IUNGERICH: It doesn't commence at the initiative of the defendant. I would submit that as the footnote in Green -- I mean, in Price indicates that actually, you have an amalgam of interests in double jeopardy cases but I don't think that it has ever been a preeminent type of thing where you require a waiver other than in, I think, the retrial cases.

Even the retrial cases I don't think uniformly go off on the question of waiver and, indeed, I think Green rejected the waiver theory in its analysis so that I think that it depends on the particular case as to which one of those interests, lack of finality or limited waiver or the

interests of society, which one of those is actually applied in the case.

What I would submit is continuing jeopardy is not a principle that can be solely limited to the retrial case. The genius of our common law is that we can apply a principle in one area over to a situation in another area where substantially the same policy consideration is found and I think that is the situation we have here with continuing jeopardy because the proceedings did not run their full course until we had these adult proceedings against Mr. Jones in this case.

QUESTION: In the capital punishment days in California you had a bifurcated trial system, didn't you?

MR. IUNGERICH: Yes, your Honor.

QUESTION: Do you still have that in some cases?

MR. IUNGERICH: Under the new death penalty statutes in California?

QUESTION: Well, at all. Do you have the bifurcated trial at all?

MR. IUNGERICH: I know I think it was the exclusive -- well, we do have bifurcated trials in the insanity area.

In other words, with insanity, you will have a separate trial and you plead not guilty by reason of insanity at a separate trial.

QUESTION: Well, we had up here McArthur against

California ---

MR. IUNGERICH: Yes, your Honor.

QUESTION: --- in the death penalty case.

Was ever a claim made that that was double jeopardy?

MR. IUNGERICH: To hold two trials?

QUESTION: Yes.

MR. IUNGERICH: In that situation.

QUESTION: Yes, and put the defendant through the trauma of ---

MR. IUNGERICH: I don't recall that there was although there have been some district court attacks that a fifth penalty trial or something like that constituted double jeopardy.

QUESTION: Are you drawing a parallel in this case to that kind of a system?

MR. IUNGERICH: I don't think so. I think that that system is not quite the same situation that we have here because we are not talking about -- well, it may well be, because you have a conviction and then a sentence and the jeopardy doesn't run -- you'd have two trials in that situation.

It may be a close parallel but I really haven't considered that as a possibility because of the uniqueness of the death penalty situation.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Walker.

ORAL ARGUMENT OF ROBERT L. WALKER, ESQ.,

ON BEHALF OF RESPONDENT

MR. WALKER: Mr. Chief Justice and may it Please
the Court:

I would like initially to respond just briefly to
a couple of questions you asked my adversary.

First of all, Mr. Chief Justice, in answer to
your question about how many transfers there actually are
in California. The latest statistics for 1972, which are
the last that are available, indicate that there are exactly
509 transfers out of 50,000 delinquency cases, so only one
percent of the cases result in transfer to adult court.

Secondly, I would resist the characterization of
the fitness hearing in California as duplicate trial. The
cases and the statutes are quite clear in pointing out that
a fitness hearing has nothing to do with a minor's guilt or
innocence.

Under California law, you are merely attempting to
determine, first, if a minor is over the age of 16.

Secondly, whether the minor is charged with a
criminal law violation, and,

Thirdly, whether the minor would be amenable to the
treatment programs or training facilities available to the

juvenile court.

In fact, the statute says that a minor cannot be waived on the basis of his guilt or innocence of the crime. That is not a sole criterion and cannot be used as a criterion for waiver.

 hearsay
QUESTION: Is / considered admissible at the
fitness hearing?

MR. WALKER: At the fitness hearing there is evidence that is admitted sometimes about the nature of the offense.

Commonly, what happens is that the police report may be introduced into evidence because there are no -- hearsay is admissible to fitness hearings so that evidence is admissible but it is admitted solely for the purpose of determining whether the minor is amenable to the juvenile court facilities.

QUESTION: Can counsel for the juvenile then offer evidence of mitigating circumstances?

MR. WALKER: He may well offer evidence of mitigating circumstances, yes, your Honor.

QUESTION: Do you suggest that the preliminary inquiry could not even hear about the nature of the crime and --

MR. WALKER: No, certainly not. The nature of the crime is relevant, but relevant only to the statutory

criterion of amenability.

Naturally, if they are dealing with a minor who is charged with a murder or a rape, those are relevant facts that the Court would take into consideration.

QUESTION: I thought we were told that the case of Jimmy H. in the California courts said that there were three criteria that the court should consider in dealing with this ultimate statutory standard of amenability and one was the seriousness of the offense, two was the previous record and three was his basic amenability to the juvenile corrective procedures.

Did I misunderstand that?

MR. WALKER: That is incorrect characterization of the case, from my point of view, your Honor.

The Supreme Court of California said in Jimmy H. that the only evidence that must be considered by the court in a fitness hearing is the probation report containing the minor's previous record.

There were a number of other factors, including expert testimony, details about the nature of the offense, but those, the Court said, were relevant only to the question of amenability.

I think it is quite clear in the decision.

QUESTION: Well, the ultimate statutory standard is amenability.

MR. WALKER: Correct. Now, this might --

QUESTION: Mr. Walker.

MR. WALKER: Yes, your Honor.

QUESTION: Before you go on, do I understand your position to be that at the fitness hearing or the transfer hearing, that no evidence may be introduced as to guilt or innocence?

MR. WALKER: No. There may be some evidence of the nature of the crime which may also bear upon the minor's guilt or innocence. That evidence, though, will be taken into consideration by the Court solely in the connection with the statutory standard of amenability.

There is a requirement in California law that if the minor is transferred, he must be given a preliminary hearing within ten days, so the minor would be entitled to that procedural protection under California statutory law.

QUESTION: And the minor is entitled to counsel at the transfer hearing?

MR. WALKER: Yes, he is.

QUESTION: And suppose counsel insists on putting in evidence the minor's innocence? Is he entitled to do it?

MR. WALKER: I am not sure that has ever come up in a case. I suppose in most cases the Court would hear it although technically perhaps it might be considered almost irrelevant.

This minor has been placed in jeopardy in two quite different respects. First of all, he has been tried twice for the very same offense and this there is no dispute about and our basic position is -- and I think this is confirmed by numerous opinions of this Court -- that the double jeopardy clause protects a defendant and let us not forget that this is a convicted defendant, a minor who has been convicted of a felony -- that the double jeopardy clause protects the defendant against the possibility of two prosecutions for the same offense, quite irrespective of the penalties that might be opposed.

He suffered the anxiety, the insecurity, the expense, et cetera of two trials for the very same crime.

Secondly, he was exposed to a considerably more severe penalty at the conclusion of his felony trial.

The maximum penalty that could be imposed by the juvenile court in this case was to commit the minor to the California Youth Authority until age 21.

The maximum penalty that he faced in his adult trial, on the other hand, was a mandatory sentence from five years to life imprisonment. So he is certainly in the position of having faced a very severe jeopardy in terms of the penalty that could be imposed by the adult court.

Now, in this case the adult court chose to commit him to the California Youth Authority and it is quite incorrect

to believe that that means that he has the same sentence as an adult that he would have had as a juvenile.

As a juvenile, he could only be held by the Youth Authority until he was 21.

As a convicted felon, he may be held by the Youth Authority till age 25.

At present time, the minor is on parole from the Youth Authority. He is 22 and a half years of age. If, indeed, he had been sent there by the Youth Authority, he would already be free -- excuse me, by the juvenile court, he would be free of the juvenile court's jurisdiction.

There is another aspect in which he has been exposed not only to a more severe punishment but, in fact, a double punishment and that is, he has been held in Juvenile Hall for approximately three extra weeks as a result of his totally unnecessary jurisdictional hearing in juvenile court.

Under California law he will receive no credit and has received no credit with his commitment in the Youth Authority.

So we have three different respects in which this minor has been placed in jeopardy.

Mr. Justice Rehnquist, you asked a question of my colleague over here before about whether a minor could be transferred after an acquittal. I think that question is

open in California law but I would point out that there is nothing in the transfer statute that precludes that and as far as I know, there is no California case that is directly on point.

QUESTION: I suppose it wouldn't be technically a transfer as a part of the juvenile procedure, it would be the district attorney filing de novo in the Superior Court.

What about Richard M.?

MR. WALKER: Richard M. is a case where the minor obtained an acquittal in juvenile court and then they attempted to retry him in juvenile court.

QUESTION: And that was double jeopardy?

MR. WALKER: That was double jeopardy under the Federal and State Constitutions. I would point out that --

MR. CHIEF JUSTICE BURGER: We will resume at that point in the morning.

[Whereupon, at 3:00 o'clock p.m., the Supreme Court adjourned until 10:03 o'clock a.m. the following morning.]

