In the

Supreme Court of the United States

CLIFFORD HERRING,

Appellant

v.

NEW YORK

No. 73-6587

Washington, D. C.
February 26, 1975

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IN THE SUPREME COURT OF THE UNITED STATES

CLIFFORD HERRING, Appellant	:	
v.	:	No. 73-6587
NEW YORK	:	

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Wednesday, February 26, 1975

The above-entitled matter came on for hearing at 11:57 o'clock a.m.

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:

MISS DIANA A. STEELE, The Legal Aid Society, 119 Fifth Avenue, New York, N.Y. 10003 For Appellant

NORMAN C. MORSE, ESQ., Assistant District Attorney, Richmond County, County Courthouse, St. GEorge, Staten Island, New York 10301 For Appellee

GABRIEL I. LEVY, ESQ., Assistant Attorney General of New York, New York City For Appellee

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-6587.

Miss Steele.

ORAL ARGUMENT OF MISS DIANA A. STEELE

ON BEHALF OF APPELLANT

MISS STEELE: Mr. Chief Justice and may it please the Court:

The issue on this appeal is whether Section 320.23C of the New York Criminal Procedure Law which authorizes the trial judge in the nonjury trial to preclude closing arguments violates the due process clause of the 14th Amendment and the right to counsel provision of the 6th Amendment.

The section in issue here is contained in a provision governing the nature and conduct of the non-jury trial and provides that the Court may, in its discretion, permit the parties to deliver summations.

It was passed in 1971 and prior to that date, no statute governed the conduct of a nonjury trial.

In this case, at the close of all the evidence, counsel specifically requested to be heard on the facts on behalf of his client and the Court, invoking the statute, denied his request.

Eight minutes later, he delivered the guilty

verdict.

It is our position that the statute invoked is unconstitutional, both on its face and as applied because it deprives the defendant of his due process right to be heard and his right to the effective assistance of counsel.

I think it is basic to our adversary system of criminal justice that Defendant has a right to be heard on his own behalf and that that right is really inseparable from his right to be heard by counsel at every critical stage of our trial process.

I think this tenant is reflected in the historical development and protection of the right to closing arguments by the state courts and I think it is also reflected in the decisions of this Court since Powell versus Alabama, which have held that in certain of counsel's professional functions are inherent in the defendant's rights to the guiding hand of counsel.

QUESTION: How long should the summation be allowed, Miss Steele?

MISS STEELE: Well, I think that the Court has discretion to stop closing argument and I think that his discretion is reviewable on appeal.

This is the way it has been handled in the jury trial context, where the right has been established, really, since about 1827 [when] it was first recognized and I think when the

Court cuts off closing arguments, there may be a colloquy demonstrating what more counsel wanted to say and was able to say and I think that that is readily reviewable on appeal.

But the absolute preclusion of closing arguments doesn't include any indication of what counsel would have said were he permitted to and I think that in this case, the statute authorizes that absolute preclusion.

QUESTION: Are you saying that there is no right to review under the New York system as a matter of discretion?

MISS STEELE: Under the New York statute, an abuse of discretion would be reviewed.

QUESTION: It is reviewable.

MISS STEELE: It is reviewable, yes. But it is my position that there is no situation in which the Court can preclude summations altogether and have that not constitute an abuse of discretion because it really is depriving the defendant of his right to be heard.

MR. CHIEF JUSTICE BURGER: We'll resume at that point at 1:00 o'clock, Miss Steele.

[Whereupon, a recess was taken for luncheon from 12:00 o'clock noon to 1:01 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Miss Steele, you may continue.

MISS STEELE: May it please the Court:

Picking up what I left off, I think that this statute in question really runs counter, both to the historical development of closing arguments by the states and also counter to this Court's decision which has recognized that the benefit of certain counsels' professional skills are inherent in the guiding hand of counsel concept to which a defendant is entitled.

QUESTION: Miss Steele, does this statute apply to oral arguments in the appellate courts?

MISS STEELE: No, it does not.

QUESTION: And if it did, it would be different?

MISS STEELE: Yes, I think that that would be a different situation, Mr. Justice Brennan, because in the appellate court you have an opportunity to file a brief, so you do get to insure that the theory of your case is presented to the decision-maker and you can insure that everything you want to present to them is presented.

But in the trial process, there is really -- there is nothing. The judge is left with the disparate pieces of the evidence. The defendant is really left to the mercy of the judge to weigh all the evidence and then, hopefully, to

draw the inferences that counsel would have urged upon him had he had an opportunity to do so.

QUESTION: That isn't entirely true here, though, is it? I mean, Mr. Adams was able to make an opening statement at the beginning of the trial and he argued at the close of the state's evidence the inference that he thought should be drawn in urging the dismissal of the various counts. It was just at the close of the evidence that he wasn't allowed to argue.

MISS STEELE: It was after everything was elicited that he was -- that, in effect, the guiding hand of counsel was withdrawn.

I think that --

QUESTION: Miss Steele --

QUESTION: Also there's -- excuse me -- there is quite a difference between a trial and an appellate procedure in that at the trial, particularly in a bench trial, there are no questions of law, really. There are factual issues to be resolved.

MISS STEELE: Yes, that is right.

QUESTION: And just the opposite in an appellate process.

MISS STEELE: Yes, I think that is true.

QUESTION: I don't know which way that cuts, but that is --

MISS STEELE: Well, the appellate court, I think, it's jurisdiction, in New York, at least, can be determined in fact but they don't redetermine them with the same -- with the same standard that the trial court does. They don't redetermine credibility.

QUESTION: No.

QUESTION: They sometimes consider sufficiency of the evidence when it is urged on them, do they not?

MISS STEELE: Yes, they do consider sufficiency of the evidence.

QUESTION: What about the courts of appeals today that are dispensing with all oral arguments on sufficiency of the evidence cases, including cases raising the issue of sufficiency of the evidence?

MISS STEELE: Well, I think that when you have a brief, I think you are in a different position. I think that you are not in as strong a position to urge the defense because you don't have the give and take that is inherent in an oral presentation but I think that -- that you can at least insure a minimal level of presenting your theory of the case in an appellate court which you really can't do in the trial process, unless you are permitted to submit --

QUESTION: And yet I suppose, Miss Steele, at least for some judges, it is easier to hear. They get more out of listening than they do out of reading.

MISS STEELE: I don't think I --

QUESTION: But is it that good for that kind of judge, just to have a brief in appellate review?

MISS STEELE: Well, for that kind of judge, yes.

I mean, I don't -- I think that you would be in a different position if counsel had a right to submit a written document in support of his position at trial.

QUESTION: Would that satisfy you here under this statute?

MISS STEELE: It wouldn't satisfy me, no, because I think that in a summation, particularly in the nonjury trial, there is an opportunity for give and take.

There is also, the rapport between counsel and the judge would put you in a better position, I think --

QUESTION: Well, how much rapport are you going to have if the judge says, I don't like to hear summations. It is not my custom to hear them. And the lawyer says, well, the law requires you to hear them so I am going to go ahead and give one, anyway.

MISS STEELE: Well, I think that -- that would be something of the judgment of counsel, I think, that he would-- to judge the effectiveness of his summation in that situation.

I think even the most cynical judge may have his mind jogged by counsel's presentation and may, in fact, have something pointed up to him.

I think it is important in the nonjury trial, particularly, to insure the right to closing argument because I think it is important for the integrity of the fact-finding process.

A judge makes his decision totally alone in the nonjury trial. Unlike the jury trial, where the decision-making process is collective and I think that the shortcomings of individual jurors are compensated by this process, in the nonjury trial, the judge gets no input at all into his decision-making process.

QUESTION: What if the judge said, I have many other things to do and there is a tape recording here. Go ahead and make your argument and I'll -- you will excuse me, please.

MISS STEELE: I think that would put me in a different position. I think that it wouldn't be a deprivation entirely of the right to the guiding hand of counsel but for the same reasons as the written document, I think, that you wouldn't have the give and take, essentially.

It would be comparable, I think, to the written brief.

QUESTION: Is it customary, in the New York trial courts, to have trial memoranda? Some jurisdictions do that and some may have never heard of it.

MISS STEELE: On the issues of law, I think it is,

but not on summations. Not on issues of fact, I don't believe.

QUESTION: Well, Miss Steele, what about the different kinds of cases -- you have got a case where there's one prosecuting witness and the defendant and that is all there is and the case took a whole day.

Would you have to have argument in that one?

MISS STEELE: If counsel wanted to be heard, I think he would have a right to be heard. Certainly in the jury trial context, regardless of the weight of the evidence, counsel would have a right to present a summation.

I think that really to say that he wouldn't be entitled to a summation in that sense is to conclusively presume, in spite of his thought that he has something to say that he didn't.

QUESTION: If he were to say that the judge could not remember a whole day what happened.

MISS STEELE: Well, I think that there are two --

QUESTION: And that the judge did get that from the lawyer, I'd think that the judge would give him his biased attention and let him argue. And I didn't make a mistake in the word I used, his "biased" attention.

MISS STEELE: Well, I --

QUESTION: Are you telling the judge he doesn't remember what happened a half hour ago?

MISS STEELE: Well, I think that there are two reasons that we must require closing argument in the nonjury trial.

One is to insure that the judge will have an accurate presentation of the facts and will remember accurately.

QUESTION: Well, he's sitting there taking notes.

MISS STEELE: But -- yes, your Honor.

QUESTION: Doesn't he have to make findings? Doesn't the judge have to make --

MISS STEELE: No. Unlike the federal nonjury trial, in New York -- where counsel can request findings of fact and conclusions of law --

QUESTION: That's what I thought.

MISS STEELE: -- in New York, they don't have that rule.

QUESTION: The rule, but he can request it.

MISS STEELE: He can request it, but --

QUESTION: Oh, yes.

MISS STEELE: -- there is no assurance that he would get it.

QUESTION: But suppose he got it? Then would he still have to have arguments?

MISS STEELE: Yes, I think that he would because, while findings of fact and conclusions of law protect the

accuracy of the judge's memory because it insures that he goes over the evidence.

There is also another basis for requiring closing argument and that is --

QUESTION: The judge was a lawyer himself, you know, he can --

MISS STEELE: Yes, your Honor, but I --

QUESTION: He can remember like the lawyer that is trying the case, can't he?

MISS STEELE: Yes, but I think it is critical that the defendant -- that if --

QUESTION: Then he should have the biased opinion of the lawyer.

MISS STEELE: Well, I think that another part of this argument is that the defendant is entitled to have his theory presented to have --

QUESTION: His theory is that he wasn't there.

He has already testified as to his theory.

In my hypothetical, he has testified.

MISS STEELE: Yes, he has, but I think that the defendant is entitled to have his attorney draw the inferences favorable to the defense on that evidence and that is what counsel is there for, to present the defense side of the case and in cross-examination, he may have elicited things that -- without emphasis, because he didn't want to

emphasize things that were damaging to the prosecution and in the closing argument, counsel then can draw those inferences and really present the defense theory to the fact-finder.

QUESTION: The judge says, it is a very simple case and I don't see why you need to argue and the lawyer says, but I insist on arguing and you insist that he has that right and I submit, as a lawyer who has tried a few cases, that that is not going to help the defendant at all.

MISS STEELE: That may be true, Mr. Justice Marshall, but I think that counsel is entitled to make the decision that this will not help the defendant at all and waive the closing argument.

I think that that is a decision which counsel must be entitled to make because even --

QUESTION: If the judge says, I don't want any closing argument and counsel says, but I insist you have closing argument, you think counsel would have that right to cut his own throat?

MISS STEELE: Yes, I do.

QUESTION: Along with his client's throat.

MISS STEELE: Yes, I think that counsel should be entitled to make that decision.

QUESTION: Well,maybe I am arguing for the client, not the lawyer.

MISS STEELE: But I think that you assume that counsel is making, perhaps, the wrong decision but I think the decision on presenting that defense theory must rest with counsel and not with the Court.

I think that -- well, particularly in our urban courts, where the caseload pressure is very high, judges do become cynical. They may be inattentive for any number of reasons and I think that in those situations, closing argument can easily be dispensed with, precisely when it shouldn't because our trial process is based on the assumption that a verdict will be rendered upon a fair evaluation of the evidence.

QUESTION: Mr. Adams really didn't press his point very much, it strikes me, from reading page 92 of the transcript. He says, "Well, can I be heard somewhat on the facts?" And then the judge says, "Under the new statutes, summation is discretionary and I choose not to hear summations." But he didn't go on and say, "Well, even if you don't want to hear summations, I insist I have a right to make one."

He seems to kind of have accepted the judge's determination.

MISS STEELE: Well, under the New York statutes, the judge did have the discretion and I think there wasn't too much more that counsel could say.

He did request to be heard and when the statute was invoked he was denied the right and then the defendant was remanded, right after that.

QUESTION: He made his record.

MISS STEELE: I think he did make his record, yes, your Honor.

QUESTION: Could I go back to -- this may be repetitious, and the Chief Justice may have asked it, but if there is a right to summation, is there a right to a minimum time to summarize?

MISS STEELE: No, I think that that would vary on a case-to-case basis. I think that it is within the Court's discretion to limit summation, to cut off summation and that would be subject to review to see if the right had been infringed.

In the context of jury trial summations, that is the way it has been handled in the various states. I think that of all the cases in the footnote on page 14 of my brief, all but four of them arose in the improper infringement of the right when I think that it is readily reviewable because when the Court tries to cut counsel off, counsel can presumably "Well, but I didn't present this theory"and I think that the appellate court can go back and look and see if there was an infringement.

QUESTION: So there is a standard of discretionary

review, then, so long as there is some time granted, but not --

MISS STEELE: Yes, that is right, because I think you are in a very different position when the Court has said, "I've heard enough," from when the Court said, "I don't want to hear anything."

QUESTION: Well, of course, he has been listening to counsel for several days.

MISS STEELE: Yes, in fact, he has been listening to approximately three days that was spread over a five-day period. The weekend intervened and I think you can fairly well presume that the judge did attend to other matters aside from this case.

QUESTION: Well, what you are saying is that even though a judge is satisfied from hearing counsel over this period of time, that counsel couldn't materially assist him in reaching a just decision on the facts, nonetheless, he has got to hear him.

MISS STEELE: I think that it is counsel's decision at the end of the evidence to consider whether he can assist the factfinder, whether his theory of the defense has been presented adequately to insure that the judge will consider all the evidence.

I think that that is counsel's decision.

I think that -- I think that this Court's decision

in Brooks versus Tennessee and in Ferguson versus Georgia points strongly to this effect because in -- well, in Brooks, the Court struck down the Tennessee statute which required the defendant to be the first witness to lose his right to testify and there the Court said that this was so critical to the defense that it had to be left to counsel's decision whether and when to put his client on the stand.

Even more in point, I think, is Ferguson versus Georgia where the Court struck down the Georgia statute which precluded counsel from eliciting from the defendant his unsworn statement to the jury because in Georgia at that time the defendant was incompetent to testify and so he gave an unsworn statement and the Court there held that it was inherent, really, in the concept of the guiding hand of counsel, to insure that facts favorable to the defense were elicited in an orderly. coherent and logical fashion and I think that that function is precisely what comes into play in summation.

Counsel must, in summation, deliver to the fact-finder the defense theory. He organizes it. He presents it cogently -- because that is what he has been trained to do.

QUESTION: Miss Steele, I gather from your reply brief this was a nonjury, misdemeanor type of trial to which this statute applied.

MISS STEELE: An identical statute applies to it.

QUESTION: Yes -- another, but the same kind of statute.

MISS STEELE: Yes.

QUESTION: Now, tell me, in this case, there was, of course, a waiver of jury trial, was there not?

MISS STEELE: Yes, there was a waiver.

QUESTION: Now, the state argues that that waiver of jury trial, because this statute was on the books at the time of the waiver, subsumed -- and I gather you could waive jury trial without the assistance of counsel, can't you, in New York?

MISS STEELE: Yes, I believe you can.

QUESTION: Yes. And that this waiver subsumes, also, where the discretion is exercised against a summation, a waiver of the right to sum up.

MISS STEELE: Yes, that is the state's --

QUESTION: What do you say to that?

MISS STEELE: --position. I think that that argument has no merit.

QUESTION: Why?

MISS STEELE: Because I think that it is putting an impermissible condition on appellant's statutory right to forego a jury. I think that the act that to accept the argument --

QUESTION: Well, how is that unconstitutional? All we can deal with here are the federal constitutional

limitations. Is that a constitutional burden?

MISS STEELE: Well, yes, I think it is because it is requiring him to forego his right to summation when he goes nonjury.

I think the analagous cases would be Green versus the United States and North Carolina versus Pearce, where the defendant was exercising a statutory right to appeal and he was -- in North Carolina versus Pearce he was penalized --

QUESTION: Are the cases we have had a burden on the constitutional right to jury trial?

QUESTION: Like Jackson -- the United States against Jackson involving the Lindbergh kidnapping?

MISS STEELE: Yes, yes --

QUESTION: But it is a burden on your state right, just a burden on your state right to waive.

I mean you can, if you want to sum up, you can go ahead and have your jury trial.

MISS STEELE: Yes, but I -- well, as in North Carolina versus Pearce and in Green versus the United States, that was the statutory right to appeal and yet the court didn't permit penalizing someone for electing to exercise that statutory right.

Here he has elected to forego a jury and he is being penalized by --

QUESTION: Well, what if the statute on its face said

you may waive a jury trial if you also waive the right to summation?

MISS STEELE: Well, if you assume that these two can be tied in together --

QUESTION: Well, suppose the statute just said on its face, you may waive a jury trial if you waive the right to summation but not otherwise.

MISS STEELE: I think it would still be an impermissible condition.

QUESTION: You'd be here attacking the statute on its face.

MISS STEELE: Yes.

QUESTION: You mean, there is a constitutional right to waive a jury trial? We have held there isn't.

MISS STEELE: No, I don't think there is a constitutional right to waive a jury trial. No.

But I don't think that the state can place a condition which requires him to forego a totally independent constitutional right.

The right to summation has no relation to the right to forego a jury.

QUESTION: At least I would suppose you would say the first person has the right to argue this.

MISS STEELE: Yes.

QUESTION: You have the right to say I have never --

that I never -- I have the right to claim that this was unconstitutional. I never waived it. I read it and I knew it was unconstitutional. But I certainly didn't waive it. I am going to claim my right. Even if I lose, I should be able to -- it won't be on the grounds of waiver.

MISS STEELE: No. I think the waiver argument doesn't have any merit. I don't think that there is any legitimate state purpose in requiring the penalty of foregoing a jury trial. I think that the New York statute concerning the reasonable procedural regulations going to waiving the jury trial adequately preserves the state's interest on insisting on jury trials.

The only other conceivable interest that this would further would be speed and I don't think that the state has any legitimate state interest in making the nonjury trial any speedier than it already is than the jury trial.

QUESTION: Miss Steele, is this the only kind of case in the New York system where a statute provides for absence of a right to summarize? On the civil side, there is a right to summarize. Is there?

A statutory right?

MISS STEELE: I do not know in the civil cases in New York.

QUESTION: I thought your brief, or somewhere in the briefs, it said so.

MISS STEELE: I think that two states have held that the right in the nonjury trial is absolute in the civil context. In the civil jury trial I believe that there is no question that you have a right to closing argument.

QUESTION: Well, if there were a statute on the civil side, similar to the one under attack here, would your case be any different?

Or are you here because it is only independent of --

MISS STEELE: I am here because I think that this is a deprivation of a criminal defendant's right to counsel and his due process right to be heard on the evidence.

I think I would be in a different posture were this a civil case.

QUESTION: Are there any other cases in other states or in the federal courts that agree with the decision below?

MISS STEELE: Yes, I believe that the weight of authority holds that there is a right to closing arguments.

QUESTION: Are there -- but there are cases that are against you, other cases that are against you?

MISS STEELE: Yes, your Honor. There are four jurisdictions that are against me.

QUESTION: How close is the division?

MISS STEELE: There are nine jurisdictions that hold that it is a fundamental right.

QUESTION: On constitutional grounds?

MISS STEELE: On constitutional grounds.

There are two more states in pre-Gideon decisions that use their state constitutional guarantees of counsel and there are four jurisdictions which have refused to recognize the right.

QUESTION: And holding it is not constitutional.

MISS STEELE: Yes, they refuse to recognize it.

One did it without opinion, I think. Another said that it was a better practice to hear summations. Another was in the juvenile context.

Well, I think, in closing I would simply like to reiterate that I think that the statute is really contrary to the historical development and preservation of the right to closing argument.

I think it really deprived the defendant of the benefit of counsel's professional skill which I think this Court recognized in Brooks and in FErguson and, finally, I think that the right to closing argument, particularly in nonjury trial, is essential to the integrity of the fact-finding process where that fact-finder is a single individual, he is presumably fallible just like anybody else and he may well be in an overburdened court.

I think that those are the three basic reasons why the statute, which deprives Appellant of that right, is

violative of the due process clause of the 14th Amendment and the counsel provision of the 6th.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Miss Steele.

Mr. Morse.

ORAL ARGUMENT OF NORMAN C. MORSE, ESQ.,

ON BEHALF OF APPELLEE

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

It is obvious that the facts in this case did not require the trial judge to exercise any great retentive ability. It seems to me that there were two issues.

One was the issue of alibi, which turned, of course, upon the testimony of the defendant.

The other issue was the -- and his employer, who was, I would say, vague and evasive in his testimony as to when he saw him and so forth.

The other question, I suppose, would be bias, bias on the part of the complaining witness who said it happened to him and bias on the part of the defendant seeking to avoid any consequences of his act.

It would appear to me that the factual determinations in this case were simple and were of the kind that the authors of the statute had in mind when they drew the statute that a judge, seeing the facts openly and plainly,

without any abuse of discretion, could say, "I choose not to hear." And --

QUESTION: Mr. Morse, assure me as to one thing, I think opposing counsel indicated that the case was reviewable in the state structure on a basis of abusive discretion.

Do you agree to that, that there is no non-reviewable absolute right to do away with summation?

MR. MORSE: There is -- this question was reviewable in the state court. That is correct.

QUESTION: All right.

QUESTION: And under the statute, as my brother Blackmun suggests in his question, I suppose, the standard would be whether or not the trial judge abused his discretion in cutting off the summation.

MR. MORSE: That is correct.

QUESTION: That would be it.

MR. MORSE: That is reviewable.

QUESTION: But then that would be the standard of review.

MR. MORSE: That is right.

QUESTION: Not whether -- that is a rather strict standard.

MR. MORSE: Well --

QUESTION: Is that correct? The standard would be whether or not there was an abuse of discretion.

MR. MORSE: An abuse of discretion in this instance. And had this been a protracted trial, involved issues, perhaps you could say that it had been abuse of discretion, but it was not a protracted trial.

The people knew each other and the issues raised, as I said, were biased on the one hand, which seemed to be absolutely ephemeral and albi, which was vague.

They were resolved against the defendant.

Now, it seems to me here that if there is a right of summation in this instance because of some kind of historical basis, it would seem to me that that right of summation would have to carry over into any fact-finding process if we are to distinguish as to substance and not as to form.

For example, we are now regularly besieged with the procedures on identification, suppression and so forth, voluntariness of confession.

If, in each instance, not only is there a right to the hearing, but there is a right to sum up on the fact-finding question, I think we can see that the overworked urban courts to which my dedicated adversary makes reference would be even more so if, at the end of that fact-finding process, there as an insistence as a matter of right -- I have a right to analyze, sum up, distinguish the most obvious of facts.

So that I feel in this case, therefore, that we should not have to arrive at that conclusion.

We have, I think, substantial waiver -- a substantial case for waiver here.

It would appear to me that since they had to be on record, they were placed on record as to the rights that they were surrendering in accepting a nonjury trial, these were spelled out, I think, by the trial judge with commendable detail that they selected that route and if you will, made no comment whatsoever that I am doing this but remember, your Honor, I still want my right of summation.

QUESTION: Well, did the judge tell him?

MR. MORSE: There was no comment made one way or another with respect to summation and, of course, they --

QUESTION: And that is an intelligent waiver?

MR. MORSE: I say that is an intelligent waiver. It is held to be an intelligent waiver in the federal system, for example, if a waiver of indictment is had.

I don't think that it is incumbent upon anyone to say to a defendant that when you waive indictment in the federal system and that by doing so you waive your right to appear before the grand jury, you waive that possibility that the grand jury may not indict you.

All of the consequences of these things, when a man is represented by an attorney, I think are fairly

presumed to be known to him, else what is his attorney for?

Now, it does seem to me, your Honors, that the Singer against the United States has determined this matter in which it says that there -- in which the Court said that there is no federally-recognized right to a criminal trial before a judge sitting alone and if the State of New York had set up a reasonable nonjury procedure, that that is the nonjury procedure which this defendant, or this appellant elected to proceed to trial by.

He has a right to waive many rights.

He has a right to, obviously, to stipulate as to testimony. He has a right to testify and, with that, face the burden of being examined as to prior criminal activity which could never be introduced otherwise.

But he does this -- when he does this, he does this with the assumption on the part of the Court that he does it with the full knowledge of what he is surrendering.

I say that that same reasoning applies here.

Your Honor, may I reserve the balance of my time for reply?

MR. CHIEF JUSTICE BURGER: Your colleague is going to join you now? He is going to follow you?

MR. MORSE: Yes.

MR. CHIEF JUSTICE BURGER: All right.

Mr. Levy.

ORAL ARGUMENT OF GABRIEL I. LEVY, ESQ.,

ON BEHALF OF APPELLEE

MR. LEVY: Thank you, your Honor and I want to thank the Court for your kind indulgence in accepting our brief quite late.

On behalf of the Attorney General of the State of New York, your Honor, the only question here is whether or not there is a federally-protected right to sum up in a nonjury trial -- nonjury case.

Whether the right exists in a non-jury case or not, New York recognizes that right. There is no conditional right in New York to sum up in a jury case. There is a constitutional right to trial by jury.

There is no constitutional right to trial without a jury under the United States Constitution.

The right is granted by the New York State Constitution but you can't engraft onto the Federal Constitution a state constitutional right, as I believe Mr. Justice White pointed out in Leggis against Toomey.

I would point out that this Court has specifically pointed out that there is no such constitutional right to trial without a jury under the Federal Constitution and I'll brief that courts -- states courts rules may provide for a nonjury trial and it is pointed out in Singer there may be reasonable procedural requirements tied in with that waiver.

Now, if we start from the premise that there is no federal constitutional right to sum up in a nonjury case, we don't even have to reach the fact whether or not there is a knowing waiver under New York law and I might point out that this question of abusive discretion was never raised in the state courts.

If it had been raised in the state courts, it could have -- it would have and could have been considered by the state appellate court as to whether or not the judge properly refused to take summation.

This was a very simple case. It was very carefully considered by the Court, even as pointed out by defendant's counsel. Very copious notes were taken and it is right in the record.

At the end of the People's case, the charge of the Class B felony of possession of a dangerous instrument, that was dismissed at the end of the People's case.

What was left for the judge to decide was whether he was guilty of attempted robbery in the first degree, which is a Class B felony which subjected him to a 25 years of imprisonment, or a Class D felony -- attempted robbery in the third degree which only would have subjected him to seven years.

True, it only took the judge eight minutes to decide. He found him not guilty on the most serious crime

and found him guilty on the lesser crime.

So there certainly was a very careful consideration and what summation would add in a nonjury case, especially in the facts here, what right was he deprived of?

I think this is very similar to the right of allocution which was considered by this Court in Hill against the United States, 368 U.S. 424 in 1962 where this Court held that the failure of the Court to permit the defendant to be heard prior to sentencing in and of itself was an error which was neither jurisdictional or constitutional and certainly, whether or not the Court permits summation in a nonjury case is not taking away a constitutional right from him.

We are not dealing with a jury here who are laymen and do not understand the various nuances. We are dealing with a professional trial of the facts -- as one of your Honors pointed out in questioning before -- I believe it was Justice Marshall -- the judge is a lawyer.

We are not dealing -- we weren't -- we are not dealing here with complicated facts. We are dealing here with very, very simple things and what would be -- there might be some gain on the part of a judge listening to summation but there is no constitutional right being taken away here because no constitutional right exists in the first instance.

And furthermore, in New York, a defendant who does waive trial by jury also may waive his unconditional right to sum up if that right of summation is such that he considers it so valuable and that the facts of the case are such that it requires summation, all he has to do is insist on his constitutional right to trial by jury.

And we submit that there is no federal constitutional right to sum up, in the first instance, in a nonjury case and if such right should exist, which we do not concede, the fact that the New York statute makes it discretionary as to whether or not to permit summation -- the waiver -- inherent in the waiver [of] trial by jury is also a waiver of the unconditional right to sum up in a nonjury case.

QUESTION: I take it that there are cases that disagree with you.

MR. LEVY: Yes, I believe there are some cases in various states which --

QUESTION: Do you disagree with your colleague as to what the division is among the states on this question?

MR. LEVY: No, I have gone through the cases and I will concede that I think the weight of authority --

QUESTION: Is against you.

MR. LEVY: Is against us.

QUESTION: Yes.

MR. LEVY: Both pre and post --

QUESTION: And on what federal constitutional ground do those cases turn?

MR. LEVY: They just talk about the Due Process Clause, Mr. Justice Brennan. They don't --

QUESTION: Not the Sixth Amendment?

MR. LEVY: No, they don't talk about the Sixth Amendment as such. I am talking on a general overview now.

QUESTION: This is even before we extended the Sixth to the states, to sum up.

MR. LEVY: Well, I am specifically thinking of the Florida cases which are pre-Gideon, I believe. That was decided in 19 --

QUESTION: Conway and Cochran?

MR. LEVY: If you'll bear with me -- I think it was 1956.

Employed against state -- that was decided, yes, in 19 -- no, I take it back, they specifically did -- they did mention a right to counsel.

Florida
In the Floyd case in, I believe it was the Fifth Circuit. Yes, the Fifth Circuit -- and this was in 1968 involving the Federal Juvenile Delinquency Act -- held that there was no constitutional right to sum up, at least under the Federal Juvenile Delinquency Act and that, of course, was a nonjury situation.

Of course, we have to bear in mind that with

respect to this case we are dealing with a very, very limited situation. New York is the only state in the United States with such a statute which sets up the right to -- the order of trial in a nonjury case specifically vests in the trial court a discretion as to whether or not to permit summing up only in a nonjury case.

It gives an unconditional right to sum up in a jury case.

QUESTION: How about civil cases in New York?

Or do you know?

MR. LEVY: I know of no statute, Judge White, which provides for summing up in a civil case as such in New York.

QUESTION: Nevertheless, do you have the right --

MR. LEVY: By custom and usage. If by nothing else, Justice Blackmun, you have the right by custom and usage. At least in a jury case.

As a matter of practice in New York there is very little summing up in a nonjury civil case because that is usually handled on a brief-type situation, by the way, which is also available in a nonjury criminal case.

Very often -- I wouldn't say very often but when there are sophisticated questions the judge doesn't have to decide -- there is no immediacy to decide a criminal case and he can request briefs on both the law and the facts.

QUESTION: Of course, there you need a transcript,

don't you, if you are going to brief the facts.

MR. LEVY: By law in New York, there must be a transcript prepared -- taken down in every case.

Any indigent defendant in New York may get an immediate copy of the transcript.

QUESTION: You mean a "daily"?

QUESTION: No.

MR. LEVY: No, no, no -- I think you misunderstand, Mr. Justice. If the court would require or request a brief on the facts and the law, it would be no problem for the court to direct the court reporter to furnish a copy of the transcript to both the district attorney and the defendant.

QUESTION: But some time would elapse.

MR. LEVY: Several days -- depending -- I would assume that --

QUESTION: With a single court reporter you could get a transcript in several days?

MR. LEVY: This was only a 90-page transcript, your Honor.

I mean, of course, if you are dealing with a longer transcript, of course it would take longer.

But it is the old story, "Where there is a will, there is a way."

QUESTION: Well, how does this suggestion for briefing on factual issues in a nonjury criminal case

usually come about? Is it at the request of one of the defendants or of one of the people or is it at the request of the judge?

MR. LEVY: I am just talking about a -- on a hypothetical question. Ordinarily, very often, it is the defendant or the people would request the court if they would -- if it would like briefs and as a rule I think the court would usually decline because the judge -- at least Justice Barlow -- the judges in New York and particularly Justice Barlow did take very, very copious notes with respect to this case.

QUESTION: And that is when it is freshest in the judge's mind, is right after he --

MR. LEVY: That's correct. That's correct.

QUESTION: As I recall it, on Monday he modified, if not reversed, a ruling on evidence that he had made on Friday. Is that not correct?

MR. LEVY: That is correct, your Honor.

It just so happens that Justice Barlow was one of the more eminent and outstanding judges in New York and I think the proof is in the pudding in the facts of this case.

He found him -- he dismissed one charge, found him not guilty on the most serious charge and found him guilty on the least of all the charges and I think there was very careful consideration and obviously -- I don't -- I don't know

what summation could have gained if the defendant here, as Justice Marshall previously pointed out, if you insisted on defendant notwithstanding the requirements of the New York Statute and the judge says, "All right, go ahead," as Justice Marshall said, you would still have basically a biased listener.

What good is having a biased listener?

And with respect to having oral argument on every factural and substantive question, you run into the situation all the time as -- as I believe Justice Stewart --

QUESTION: You keep saying about all. This is only the final end of the trial we are talking about. We are not talking about suppression of evidence.

MR. LEVY: That's correct.

QUESTION: Confession. Well, why do you keep bringing those up?

MR. LEVY: I'm not.

QUESTION: Oh.

MR. LEVY: I'm not -- I am not bringing those up, Justice Marshall.

QUESTION: You promise?

MR. LEVY: I promise.

QUESTION: Okay.

MR. LEVY: And basically there is no fundamental, federally-protected constitutional right to sum up in a

nonjury case and the entire argument of the Appellant here is that such right exists and as I said before, they never raised in the state courts the fact that the defendant -- that the trial judge abused his discretion in refusing to grant summation in this particular case.

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

Do you have anything further, Miss Steele?

Very well, the case is submitted.

[Whereupon, at 1:50 o'clock p.m., the case was submitted.]