

In the
Supreme Court of the United States

STEVEN COSTARELLI,

Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS,

Appellee.

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No. 73-6739

Washington, D. C.
March 17, 1975

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No. 73-6739

Washington, D. C.

Monday, March 17, 1975

The above-entitled matter came on for argument at

1:48 p.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:

ROBERT W. HAGOPIAN, ESQ., Wrentham, Massachusetts
02093, for the Appellant.

DAVID A. MILLS, ESQ., Assistant Attorney General,
Chief, Criminal Appellate Section, 131 Tremont
Street, Boston, Massachusetts 02111, for the
Appellee.

I N D E X

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 73-6739, Costarelli against Massachusetts.

Mr. Hagopian, I think you may proceed now.

ORAL ARGUMENT OF ROBERT W. HAGOPIAN

ON BEHALF OF THE APPELLANT

MR. HAGOPIAN: Mr. Chief Justice, and may it please the Court: This case involves an appeal from the Municipal Court in Boston. In Massachusetts we have what is commonly known as a two-tier trial de novo system. There is a set of lower courts that is comprised of the district courts and the municipal court of Boston, and there is a second tier in the de novo procedure which is basically the superior court.

The superior court and the district courts or the lower courts have concurrent jurisdiction over most crimes. One limitation is that the first tier, or the lower courts, can only have jurisdiction over crimes which are punishable up to five years in the State prison. There are a few exceptions that go up to ten years -- burglary, breaking and entering at nighttime, the district courts have jurisdiction.

In the district courts in Massachusetts as so construed by the Massachusetts Supreme Judicial Court, you cannot obtain a trial by jury in the first instance. You have the option there of pleading not guilty and going to trial or you have the option of pleading guilty. If you are

convicted after you plead not guilty, you have a supposedly unqualified and unfettered right for a trial de novo in the second tier of the Massachusetts procedure. If you plead guilty, you cannot get a trial de novo in the second tier. You may appeal the sentence itself, that is, if you are imprisoned, the length of confinement, but there is no trial in the second tier on the merits of the controversy.

There is no procedure in the Massachusetts two-tier procedure for any appellate review of a decision in the lower court or the lower tier. There are a number of collateral remedies that are available, that is, if you go to trial in the district court and you are convicted and imprisoned, you may bring a writ of habeas corpus. There is another writ called a writ of error, which is unlike the writ of error that used to come to this Court many years ago and is what is normally known. That writ of error is not available for any collateral relief. It's an independent and distinct proceedings.

The third possibility is to petition the Supreme Judicial Court for extraordinary relief under their supervisory powers.

Now, in this particular case the appellant, Steven Costarelli, requested a jury trial in the first instance. He was charged with a crime for which he could have received two years in prison and a fine. The trial judge denied that motion notwithstanding the fact that Mr. Costarelli had asserted his

specific constitutional rights and the right to a speedy trial which he interpreted that to mean a speedy trial by jury or a speedy trial that comports with constitutional standards, and also his right under the double jeopardy provisions.

From the denial of that motion he filed an appeal in this case. In this case the Court has set down the issue of jurisdiction. I submit to you, your Honors, that this Court has jurisdiction over an appeal from the Boston Municipal Court because that court is the highest State court within the meaning of those words in section 1257. That is, there is no further appellate review. Massachusetts' argument to this case or to this point in jurisdiction is very simple, that the appellant has the right to a trial de novo, and of course that's what the basic issue, what this case is all about. In terms of jurisdiction, a trial de novo is not an appeal on the record of the lower court proceedings. It grants the petitioner a new trial. There is no means of reversing errors that went on down in the lower court.

QUESTION: Mr. Hagopian, what if your client had been initially tried in the district court on the same charge and was acquitted and then he was tried again in the district court and found guilty and you wanted to raise the claim of double jeopardy. Could you raise that in the superior court on an appeal from that second verdict?

MR. HAGOPIAN: Yes. Certainly an issue --

QUESTION: Why can't you raise your jury trial claim here in this --

MR. HAGOPIAN: That is a very complicated question, but the answer to that is that I think that after he has gone up to the superior court he can raise the issue of double jeopardy in the form of a motion in bar. I don't believe he can collaterally attack what went down in the district court. If the denial of a jury trial is a purely reversible error, it may be mooted by the fact that if the judge denies this motion in bar in the superior court and he is granted a jury trial and he's convicted there, then he has had a jury trial and the issue may be moot, that is, if you consider the fact that a denial of a jury trial is a purely reversible error, forgetting the double jeopardy claim or the speedy trial claim, if it is clearly a reversible error, it's been cured by the fact that he has had a jury trial.

QUESTION: But you could have, I suppose, under those circumstances, after making your point in the superior court claiming the right to a jury trial, they rule against you, at least brought it here from the superior court on the ruling on that motion rather than just from the district court.

MR. HAGOPIAN: Yes, that's quite correct. I have that issue now before the Massachusetts Supreme Judicial Court, and that case is currently being litigated there. But I don't think that that cuts away from this Court's jurisdiction.

A man was tried down in the district court, the Municipal Court of Boston. He does not have to suffer a second trial before he can get appellate review in this Court. That is the foundation on which this Court's jurisdiction is predicated under section 1257.

QUESTION: If your answer to my question is right, he wouldn't have had to suffer a second trial, he could have gotten a ruling on his motion in the superior court and before he ever went to trial in the superior court he could have brought it here.

MR. HAGOPIAN: No, that's not correct, I don't believe that's correct, because then it would not be a judgment from which an appeal could be taken. If it was simply a denial of a motion, he would have had to have gone through the trial in the superior court. He can't appeal from the denial of a motion in the superior court, he can only appeal under section 1257 from a denial of a judgment, that is a final judgment from a superior court. That would be piecemeal adjudication of the trial or the proceedings in the superior court, and I don't believe that jurisdiction would apply under that procedure.

QUESTION: What you are saying, then, is this: Although he can appeal from the final judgment of a district court, had he taken the State proceedings a step further, gone into the superior court and made his motion, he couldn't appeal

from that.

MR. HAGOPIAN: Unless he completed the trial in superior court. Then he would have to go to the Massachusetts Supreme Judicial Court because the superior court is not the highest State court within the meaning of those words. He would have had to have gone all the way up through the ladder, through the appeals court in Massachusetts and the Massachusetts Supreme Judicial Court. And let me just state for the record, and perhaps that's not too clear, it should be clear in the record, Mr. Costarelli has lodged an appeal for trial de novo in the superior court. That was done under compulsion, and I don't believe he should have been forced to elect his remedies at that stage of the proceedings.

QUESTION: Is that pending now?

MR. HAGOPIAN: Yes, it is, and the Chief Justice of the superior court has stayed those proceedings pending the disposition of this case.

QUESTION: And does that go up on the record he made in the district court?

MR. HAGOPIAN: Well, the only record that technically goes up, a complaint is filed in the district court, he's found guilty, that record and the disposition that goes on in the district court goes up to the superior court. Other than that there is no record in the district court, and you cannot collaterally attack anything that went on in the district court.

It's a trial de novo. That is what is meant by trial de novo in the definition.

QUESTION: What goes up to the Supreme Judicial Court on your motion for extraordinary relief?

MR. HAGOPIAN: If he brings a motion for extraordinary relief in the Supreme Judicial Court from proceedings in the district court, nothing goes up. The record does not go up. He must file a complaint, just like he would initiate in a civil proceedings.

QUESTION: The complaint is just like a complaint in a trial.

MR. HAGOPIAN: No. That is, if you are an aggrieved defendant in a district court proceeding and you wanted to go to the Supreme Judicial Court under their supervisory powers, you would have to swear out a complaint just like you would in a Federal --

QUESTION: Just like a writ of prohibition or mandamus, you allege what you claim --

MR. HAGOPIAN: That's right, the record does not go up. Of course, that's a crucial issue.

QUESTION: Suppose you get to the court of general jurisdiction on the appeal or trial de novo, and I don't use with any meaning at all, and you say this court doesn't have jurisdiction to try me. Could the court pass on its own jurisdiction?

MR. HAGOPIAN: I'm sorry, your Honor, I didn't understand that question.

QUESTION: The court doesn't have jurisdiction to try me.

MR. HAGOPIAN: The superior court?

QUESTION: Yes.

MR. HAGOPIAN: The superior court in Massachusetts --

QUESTION: Suppose a motion is made that the superior court does not have a right to try me because the court is without jurisdiction.

MR. HAGOPIAN: Well, I don't think that the fact that he did not have a jury trial in the district court affects the jurisdiction.

QUESTION: I didn't say one word about a jury trial. I said the motion is made that the court is without jurisdiction.

MR. HAGOPIAN: I suppose you could make it, your Honor, but I don't know why it should be denied because --

QUESTION: Well, suppose it is denied, could he appeal it?

MR. HAGOPIAN: Not without going through a trial, your Honor, no.

QUESTION: You mean, in Massachusetts you make a point that this court is without jurisdiction because the judge is 60 years old and everybody on the jury is dead, that that can't be appealed?

MR. HAGOPIAN: I don't believe there are any procedures in the Massachusetts system that allows piecemeal adjudication of the issue of jurisdiction.

QUESTION: Jurisdiction is not piecemeal.

MR. HAGOPIAN: I understand that from a Federal viewpoint, your Honor, to a certain extent, but I don't believe in Massachusetts there is any remedy for getting into an appellate court other than going through a trial in the superior court.

QUESTION: At this time I will take your word for it, at this time.

MR. HAGOPIAN: I believe that's correct, your Honor.

QUESTION: Of course, you would be in the superior court only because you as a defendant had invoked its jurisdiction. It would be kind of an odd thing to go in there and invoke its jurisdiction and then file a motion saying it doesn't have jurisdiction.

QUESTION: Did you invoke its jurisdiction there?

MR. HAGOPIAN: Well, yes, your Honor, I --

QUESTION: I thought you said they made you file it.

MR. HAGOPIAN: Pardon, your Honor?

QUESTION: You said that they made you file this motion in the superior court.

MR. HAGOPIAN: No, your Honor, I don't believe I said that. When Costarelli was convicted in the district court

we appealed, I appealed for him, and he has a pending trial de novo in the superior court. The proceedings in the superior court have been stayed by order of the Chief Justice of the superior court pending the resolution of this case in this Court. And I don't believe that because Mr. Costarelli has elected to go forward with that, he still has the right to come to this Court alleging that that is the highest State court, the district court in Massachusetts. The fact that he elected a trial de novo cannot constitute a waiver of his Federal rights under section 1257.

QUESTION: Let me ask you a question. Is there any way in the Massachusetts system whereby Mr. Costarelli could have bypassed the district court?

MR. HAGOPIAN: No, there is not, your Honor. He may not even waive a trial like in Colten v. Kentucky, there is language in this Court, and I believe it's the procedure in Colten where you can circumnavigate a trial. You must stand trial, and I believe my brother concedes this, there is no means of waiving a trial in the district court in Massachusetts. You must stand trial. And if you remain silent, the court convicts you, you stand guilty, and the burden is upon you in superior court. If you default, if you do not show up in the superior court, judgment will be entered in the superior court under the Massachusetts statute, the sentence that was imposed in the district court will be imposed upon you,

notwithstanding the fact that you have never waived your right to trial by jury.

QUESTION: But if you just go across and then file, take your appeal, the proceeding is annulled.

MR. HAGOPIAN: That's not true, Mr. Justice White, there are collateral consequences --

QUESTION: It's a de novo matter in the superior court.

MR. HAGOPIAN: It's a de novo matter, but there are collateral consequences that attach, very serious ones. In Mr. Costarelli's case, the statute provides that whoever uses a car without authority, if he's convicted in the district court, his license will be revoked, notwithstanding the fact that he's ..

QUESTION: When you go to superior court, what happens to the judgment that's been entered against you?

MR. HAGOPIAN: Well, technically, in terms of fiction, it's vacated.

QUESTION: Well, it is no longer in force.

MR. HAGOPIAN: Well, that's not strictly true because of the fact that --

QUESTION: You just told me it was vacated.

MR. HAGOPIAN: Well, it is, but if you default in the superior court, it is then imposed.

QUESTION: It may be, but it's within your power to

annul that judgment by invoking the superior court proceedings.

MR. HAGOPIAN: That's correct, but there's a great deal of difference ---

QUESTION: So you may not have to plead guilty to get there, but you could just default and get there, just have judgment entered against you.

MR. HAGOPIAN: You mean in the district court in Massachusetts?

QUESTION: Yes. Just default.

MR. HAGOPIAN: You can't default, the judgment will not be entered by default in a criminal proceedings in Massachusetts.

QUESTION: What did you tell me? I thought I understood you to say that if you defaulted in the district court judgment would be entered against you.

MR. HAGOPIAN: No, I am sorry, your Honor, I think I didn't say that. What I meant was that in the superior court upon trial de novo, if you default there the judgment of the district court where you had been found guilty will now be imposed.

QUESTION: What if you stand mute in the district court or what if you just don't show up, you say, "I'm not going to court today."

MR. HAGOPIAN: You can't default.

QUESTION: Well, you can't default. They will bring

you to court but you just sit there. So you do have to expose yourself to the State's evidence.

MR. HAGOPIAN: That's correct.

QUESTION: And then it may not be much of a trial, but --

MR. HAGOPIAN: Well, there are serious consequences because if you remain silent and the government puts their witnesses on --

QUESTION: You are going to be found guilty.

MR. HAGOPIAN: Well, it's more than that. If those witnesses die in between the district court and superior court, their unimpeached testimony will be introduced against you in superior court. So there is a certain amount of risk to taking that procedure.

QUESTION: .. a preliminary hearing, too, isn't it?

MR. HAGOPIAN: Yes, as a matter of fact, it is a .. preliminary hearing. But there is a great deal of difference between a preliminary hearing and a trial and that point was brought up in Callan v. Wilson, and Justice Harlan, the first Justice Harlan of this Court said that there is a great deal of difference between a preliminary hearing and a trial in the de novo system and that the trial in our Massachusetts system, like it was under the D.C. procedure here, is a full trial and full .. In a preliminary

hearing, if you default in superior court, there isn't going to be any judgment that is entered against you. That's the difference.

QUESTION: There is another side of the coin and that is if you stand mute and hear the State's evidence, you know what the State's case is.

MR. HAGOPIAN: And the difficulty with that is that the Massachusetts system attaches collateral consequences to that judgment. It's not totally vacated. Your driver's license may be yanked. If you are on probation, you will automatically be sent to jail, and those collateral consequences are very severe and this Court has affirmed those collateral consequences in a case last term.

QUESTION: I thought you just admitted to Mr. Justice White that you could nullify that entire effect.

MR. HAGOPIAN: You can't nullify the collateral consequences, you see, because of the fact in the Massachusetts procedure, the statutes empower the registrar, say, to yank your motor vehicle license, entirely separate. That's not part of the judgment of the district court. They independently give powers to attach to these collateral consequences. They are not vacated by the district court judgment and they are imposed. And I raised that issue in the three-judge court last year, in the Federal district court, and they refused to declare that that procedure was being putting a price on what is supposed

to be his unfettered right of appeal, and this Court affirmed that decision. So I assume that --

QUESTION: When does the judgment of the district court become annulled? Suppose you are found innocent in the superior court?

MR. HAGOPIAN: That's the end.

QUESTION: Then what happens to you?

MR. HAGOPIAN: The government hasn't -- there's no more trial.

QUESTION: I know, no more trial, but nothing happens to -- nobody reverses anything.

MR. HAGOPIAN: That's correct.

QUESTION: Now, wait a minute, is this being found innocent in the district court or --

QUESTION: No, no.

QUESTION: I think Mr. Justice White asked you suppose you were found innocent in the superior court.

MR. HAGOPIAN: Then, yes, then you are declared innocent and then the registrar has to give you your license back. But you see, it's that intervening time --

QUESTION: I understand.

MR. HAGOPIAN: -- between the district court and the superior court that is the nub of the matter.

QUESTION: You say the judgment stays in effect until you finish the --

MR. HAGOPIAN: Well, let me say this: The collateral consequences are not part of the judgment, there are a separate statutes that are involved. The judgment is technically vacated, but if you default in the superior court, the superior court judge has the power to pass sentence on you when you are not even there in default. He passes the sentence of the district court.

QUESTION: It's very much like an appeal.

MR. HAGOPIAN: It is. It exactly is. It is an appeal, and it is an appeal like in Colten v. Kentucky is an appeal, and that, of course, goes to the nub of the matter. And let me just say this on the issue of Colten. In Colten it wasn't transmitted up to the superior court, it's a real true de novo system here. In the Massachusetts system the judge and jury, everybody knows where these cases came from and they know that the man has been convicted. In addition to that, of course, the critical issue in Colten was that Colten was entitled to a trial by jury in the first instance.

Let me just say briefly on the merits of this case, I think that the large issue, the broad issue in this case is not whether the rule in Callan v. Wilson is incorporated and the State should be bound. I think that the real broad issue in this case is whether the States have a right to deny a person a specific procedural constitutional right, whether it's a right to counsel or whether it's a right to an impartial

judge or it's the right to a trial by jury. I don't believe it's any answer for the State to say, well, we will give you a trial de novo. I think the man is entitled to those rights in the first instance, right to counsel, right to trial by jury, right to an impartial judge. And it's no answer on the part of Massachusetts or the other States to simply say we will give these to you after we have subjected you and you are forced with the stigma of a conviction of guilty.

Now, I think trial de novo has a legitimate place in the purposes of the administration of criminal justice in the State system, and I am not asking this Court to bar a trial de novo. All I am asking them to do is to say that Massachusetts must do what Rhode Island has to do, that when the defendant comes before the district court, if he doesn't want to proceed at that stage of the proceedings, he should have a right to circumnavigate that trial and go right to the superior court or the State has to give me trial by jury in the first instance. That's the only thing that I am asking for. I'm not asking to take the whole trial de novo system down. That, of course, would have some serious consequences. If the State wants to give somebody a trial de novo as an equivalent to an appellate remedy, I think that's fine. There is nothing wrong with that, as the procedure in Colten. But I do object to the fact that the State of Massachusetts can deny somebody his specific Sixth Amendment constitutional

right, and I think that that's what the heart of this case is all about.

I would like to reserve the rest of my time.

QUESTION: You don't suggest, I take it, that -- I will put an objective question. If he is tried in this first tribunal with a jury, found guilty, takes an appeal, in quotation marks, but gets a trial de novo, any problems about that in terms of double jeopardy?

MR. HAGOPIAN: No, your Honor. That's the procedure in Rhode Island now and was the procedure in Kentucky in the Colten case. You have a right to a trial by jury. I don't object to this.

The double jeopardy issue is that I don't think a person should have to suffer two trials to get what he is entitled to at least once, and this Court just recently, and I guess it was Wilson v. United States a few weeks ago, held that the real underlying prohibitions of the double jeopardy clause is that the multiple trials, the trial process itself isn't bad, but that may result as a manifest necessity, obviously all trials can't be perfect.

QUESTION: But if the State did give the jury trial in the first instance, all they would need to do is have a review on the record if they provided any review at all. Is that not so?

MR. HAGOPIAN: That's correct. I'm not arguing that

they have to provide a review at all.

MR. CHIEF JUSTICE BURGER: Mr. Mills.

ORAL ARGUMENT OF DAVID A. MILLS ON

BEHALF OF THE APPELLEE

MR. MILLS: Mr. Chief Justice, and may it please the Court: I believe that Mr. Justice Rehnquist has asked the single critical question with respect to the issue of jurisdiction. However, by way of introductory overview, I would like to suggest to this Court that Massachusetts has presented a brief with five parts, and hopefully we will argue today in five parts.

Those parts are, first, in accordance with rule 16, the question of jurisdiction. And by way of introduction we suggest that this Court does not have jurisdiction because this appeal fails of the prerequisite statutory jurisdictional prerequisites in section 1257.

Our second point will be that the Massachusetts jury procedure as it currently exists is a system which is basic and fundamental and is justifiable as adequate under the Fourteenth Amendment standards that have been enunciated by this Court.

Our third position as presented in the brief will be that the Massachusetts jury system as it presently is in practice is a procedure and system which provides for the function and purpose of jury trial in America, as has been

enunciated in standards and decisions by this Court.

Our fourth position will be that the right to a speedy trial is not properly in issue before this Court, and our final position will be that double jeopardy and the claim of a violation of double jeopardy in this case is controlled by this Court's decision in Colten v. Kentucky.

First, with respect to the issue of jurisdiction, Massachusetts suggests that the prerequisites of section 1257 have not been satisfied. We suggest that for purposes of an appeal to this Court pursuant to 1257, there are three prerequisites. The judgment of the State court must be final; the judgment of the State court must be of the highest court in which a decision could be had; and for purposes of appeal under subsection (2) of section 1257, the constitutionality of a State statute must have been drawn in question with a determination in favor of its validity. And Massachusetts suggests that each of these statutory prerequisites are missing in this case.

With respect to finality, this Court has stated that no self-enforcing formula can be defined as to determine when a State judgment can be final. And as early as 1869 in the case of Thompson v. Dean, this Court implicitly rejected a mechanical application of a formula of finality speaking rather in terms of the degree of finality essential to appeal.

On page 5 of our brief we have extracted from the

decisions of this Court principles that we suggest should go into a determination of the degree of finality, and our primary principles upon which we suggest this issue should be determined are suggestions from the cases of Richfield Oil Corporation, Market Street Railway Company, and Banks v. California, which are all cited at page 5, and the criteria that we suggest are controlling are these; That the judgment, the State judgment, in order to be final must be an effective determination of the litigation and subject to no further review or correction in any other State tribunal, that is the first criteria; and the second that available appellate review within the State court system be pursued if available.

The Massachusetts Supreme Judicial Court has spoken to the nature of the de novo review most recently in Mann v. Commonwealth, which is also cited in our brief. That trial court has said that upon the de novo review, the district court proceeding is wiped out entirely and transferred to the superior court are all questions with respect to the case: Guilt, sentencing power, and all related matters.

QUESTION: I didn't get the beginning. That's when you file it or after it's completed?

MR. MILLS: When the appeal is claimed, your Honor.

QUESTION: When it's claimed?

MR. MILLS: Yes.

QUESTION: Is that a peculiarity of Massachusetts law

to speak of claiming an appeal? Does that mean the same as file a notice of appeal?

MR. MILLS: As far as I know, your Honor. When the appeal is claimed, it transfers the whole case for redetermination completely divorced from the earlier proceeding.

QUESTION: And what of the collateral consequences your friend was discussing?

MR. MILLS: The collateral consequences, your Honor, I suggest, this point has also been raised in the amicus brief of the Massachusetts Defenders Committee. They suggest, as does the appellant, that this Court should enter an order or take some action suggesting that the Massachusetts defendant at the district court level should be able to waive a trial and proceed directly to a jury because of the collateral ancillary inconveniences of a district court adjudication of guilt. However, each of these positions, the position of the amicus and the position of the appellant, I suggest are based upon an independent due process question with respect to driver's licenses. That is not the question that is before this Court. I believe it's an important question, but not a question that goes to whether or not this particular judgment is final.

We suggest that the redetermination of the question of guilt or innocence which is available in the superior court explicitly contraindicates that the earlier Boston Municipal

Court decision determined this matter. And in that regard we suggest that the Boston Municipal Court judgment is not final.

Additionally, we suggest that the decision made by the Boston --

QUESTION: May I ask, I suppose -- does that suggest that particularly in this case, whatever you call it, a proceeding is now pending in the superior court?

MR. MILLS: We do not know that of record, your Honor. However, what we do know of record is that at the time that this particular appellant who was a defendant in the Boston Municipal Court on the day that he was found guilty in the Boston Municipal Court, the record indicates that he claimed an appeal. As of record, we do not know what happened to that appeal or where it is.

QUESTION: Does your argument on finality rest at all in this case on the fact that he did claim an appeal?

MR. MILLS: No, your Honor. The option is available to --

QUESTION: Whether he did or not.

MR. MILLS: Whether he did or not.

QUESTION: You still say the district court judgment is not final for purposes of 1257.

MR. MILLS: Yes, your Honor, because he had available to him under Massachusetts law a redetermination, and I equate

redetermination somehow with the fact that it has not been fully determined if it is subject to redetermination.

QUESTION: Mr. Mills, what do you understand his Federal constitutional issue is here?

MR. MILLS: His issue here, your Honor, is whether or not was deprived of a federally protected constitutional right when he was not provided with a jury in the first instance in municipal court.

QUESTION: How does he ever raise that up through the Massachusetts system? He is found guilty in the municipal court, he claims an appeal. How does he present to the superior court his claim that having to go through the municipal court is a burden on his jury trial right?

MR. MILLS: Your Honor, that question was explicitly noted by the Massachusetts Supreme Judicial Court in a September 1974 decision which has been submitted to this Court as an amendment to the appellant's original jurisdictional statement.

QUESTION: Yes, but, again, how does he bring this before the superior court? If he is tried there and found innocent, the case is over. If he is tried there with a jury and found guilty, then what does he claim? How can he present that to the superior court?

MR. MILLS: Well, he wouldn't be presenting it to the superior court, he would be presenting it either to the

Massachusetts Appeals Court or to the Massachusetts Supreme Judicial Court.

QUESTION: Then when he is convicted, when he is convicted in the superior court, he then appeals and says this conviction is invalid because, why?

MR. MILLS: Well, I don't think he would say the conviction was invalid. He would say the conviction was invalid -- let me answer your question, your Honor. You said by what vehicle.

QUESTION: Yes.

MR. MILLS: The defendant in the superior court would file a motion to dismiss the complaint at the superior court level because the case was improperly there because he was not afforded a jury trial in the first instance.

QUESTION: He took the case there by definition, didn't he?

MR. MILLS: Yes, he did, your Honor. He still has the jurisdiction to move that court to dismiss the complaint for failure of constitutional prerequisites at the district court level. And were that motion to dismiss the complaint be denied at the superior court level, he would have taken exception and take his properly -- if acquitted, excuse me. If found guilty, he would take his properly perfected exception to the Massachusetts Appeals Court as of right and under certain conditions to the Massachusetts --

QUESTION: What would he say in the Appeals -- say he's found guilty after a jury trial in the superior court what does he say to the Massachusetts Court of Appeals or to the Massachusetts Supreme Judicial Court? What does he say?

MR. MILLS: He says that it was error for the superior court to not grant his motion to dismiss because he was entitled to a jury trial in the first instance and he did not receive it. Therefore, there is error, therefore --

QUESTION: The State comes back and says, yes, but now you have been given a jury trial and you have been found guilty. You are just claiming an error for which there is no remedy.

MR. MILLS: I suggest that's hypothetical, your Honor, and contraindicated by the --

QUESTION: Has this ever in fact been what has happened under your procedure that someone's been convicted without a jury in the district court, taken the appeal to the superior court, made the motion that you suggest he is privileged there to make, had it denied and convicted, and then gone to either the Court of Appeals or the Supreme Judicial Court?

MR. MILLS: It has not happened to my knowledge, but I believe --

QUESTION: Let's assume that if that procedure just weren't open in the Massachusetts courts, I suppose you would

have to conclude that his Federal issue had been finally decided in the State courts, by every court that would decide it. But I would suppose that if you are right, if that kind of a motion is open in the superior court and can be taken up through the State courts, you've got something to your finality argument, I suppose.

MR. MILLS: I suggest, your Honor, that if the Massachusetts --

QUESTION: But if it isn't right, you may not have much to your finality argument.

MR. MILLS: Well, if the Massachusetts Supreme Judicial Court has suggested in its opinion of Whitmarsh v. Commonwealth that that is an available vehicle for a plaintiff similarly situated, then I suggest --

QUESTION: Where did this come from?

MR. MILLS: Where is that case?

QUESTION: That one just came out, too.

MR. MILLS: September of 1974, your Honor, Whitmarsh v. Commonwealth.

QUESTION: We haven't any way of sending this back to anybody to find out whether you or your adversary are right, have we, for reconsideration in light of Whitmarsh? This comes directly here from the district court, doesn't it?

MR. MILLS: Yes. This is not the Whitmarsh case.

QUESTION: I know, but if you have an intervening, as

I understand it, it Whitmarsh has been decided since this judgment?

MR. MILLS: Yes, that's correct, your Honor.

QUESTION: This brief cites it and it's in the brief of the appellant on page 5 and he shows why it's inadequate for him.

MR. MILLS: And we claim that it is adequate, your Honor.

QUESTION: You are saying, then, that you would make the same argument in the Massachusetts Court of Appeals that he is making here now on the merits.

MR. MILLS: I am saying that that is possible, your Honor.

QUESTION: Yes, that it would be open to him.

MR. MILLS: Yes.

QUESTION: That's important. You say it would be open to him. He says it wouldn't be open to him.

MR. MILLS: I say it is open to him, and if finality were a principle of finality, then perhaps finality would be defeated, because as a matter of fact and law the Supreme Judicial Court has since the filing of the jurisdictional statement in this case considered this constitutional issue twice, in two different courts.

QUESTION: We are the ones to decide finality, aren't we?

MR. MILLS: Correct, your Honor. That's why I say

if futility were, which it is not.

QUESTION: What are the circumstances in which the Supreme Judicial Court of Massachusetts could take the case directly from the district court, do sudden passing under some circumstances? Is it a certiorari jurisdiction or a certiorari before a judgment?

MR. MILLS: There is a procedural vehicle which is General Laws chapter 211, section 3, under which this particular question has reached the highest Massachusetts court twice, only in each instance, although the court did consider the issue, it said that it was doing so for a matter of convenience and that the particular vehicle had been improperly used. So I would suggest that there is no direct route from the Boston Municipal Court to the Supreme Judicial Court. It requires that the intermediate courts, the superior court and the Massachusetts Appeals Court be utilized.

QUESTION: What procedure was followed in Whitmarsh?

MR. MILLS: In Whitmarsh, your Honor, an interlocutory petition seeking the extraordinary relief powers in our highest appellate court under General Laws 211, section 3, and the court while noting that the vehicle for relief was improperly invoked nonetheless briefly gave its opinion as to the determination of the constitutional issue.

QUESTION: Isn't Whitmarsh the critical case here? It has to be in your posture, doesn't it?

MR. MILLS: No, your Honor, not with respect to an argument on this Court's jurisdiction under section 1257.

QUESTION: Of course, it's here, it's before us, Whitmarsh is.

MR. MILLS: Costarelli is before this court.

QUESTION: Well, Whitmarsh is, too. There's a petition for certiorari here that hasn't been acted on.

MR. MILLS: Oh, correct. Excuse me, your Honor.

I would suggest, however, that the question of finality is not to be determined simply on that basis. The question of finality, we suggest, under the decisions of this Court, means that the appellate review be pursued in this particular case, and it was not pursued in this particular case.

QUESTION: Let me repeat my first question. Are you not relying on what you call your Supreme Judicial Court did in Whitmarsh to buttress your posture here? Without its opinion in Whitmarsh wouldn't you be in a much weaker posture?

MR. MILLS: With respect to jurisdiction?

QUESTION: With respect to Mr. Costarelli's case in jurisdiction, yes.

MR. MILLS: I don't believe so, your Honor. The Boston Municipal Court, we suggest, for purposes of jurisdiction, is not the highest court in Massachusetts in which a decision could be had on this question, and I don't think that I need

go on at length. I have suggested that the superior court could make a determination. It is a higher court. That the Massachusetts Appeals Court was available to this appellant as a matter of right; that is a still higher court. And that further and substituted hearings might have been available before the Supreme Judicial Court which is a still higher and our highest court in Massachusetts. We recognize that the highest court in which a decision could be had need not be the highest appellate court in the State. Nonetheless, we suggest that this question could have reached the Supreme Judicial Court, and because that is the highest court in which a decision could be had, this particular judgment is not.

Mr. Justice Rehnquist raised the question as to whether or not the determination of the Boston Municipal Court could be reviewed in another court upon the record made in the district court. I think that that is a critical question. I think that the answer is critical to each side in this particular case. In Largent v. Texas, which is cited, I'm sure, I know, in each of the briefs, this Court seems to have established a rule that if the conviction in the lower court is not examinable in a higher court on the record made in the lower court, then the question has been finally determined for purposes of section 1257. If that is the rule that has been established by this Court, we suggest that mechanically the Boston Municipal Court judgment cannot be reviewed in

another Massachusetts court on the record made in the Massachusetts court. However, an application of that rule we have suggested would not really do justice to the substance of the fact and to the point in this case to which there seems to be no contest whatsoever. The matter of guilt or innocence and the matter of whether or not the district court judge was correct in denying a motion for a new trial, each of those two determinations made by the lower court are subject to redetermination. We suggest, accordingly, that there has been not a determination, a final determination, sufficient for purposes of section 1257.

QUESTION: Wasn't it in Largent, too, though?
Are you asking us to overrule Largent?

MR. MILLS: No. I don't fully under-- To the extent that I read Largent, it seems to be opposite to the position that I argued to you today. Yes, your Honor. Seems to be. I am not convinced that it is. However, I am suggesting that in this Court the substance of the determination made by that lower court has not been fully determined, and under the explicit language of the statute there has been no final determination.

QUESTION: Well, it sounds to me as if what you are contending for might leave open the possibility that if a defendant could get review on writ of prohibition or writ of mandamus, the kind where you file an original complaint,

don't bring the record up, so long as he could review some aspect of the proceedings in a higher court, even though it's by an original action, the lower court's proceeding wouldn't be final. That would be a very significant departure from Largent.

MR. MILLS: If Largent says what I believe it says, your Honor, it would be a significant departure.

QUESTION: And your position would at least -- acceptance of your position here would at least require the Court to modify or explain some of the language in Largent, at the very least.

MR. MILLS: Yes.

QUESTION: You would agree to that, wouldn't you?

MR. MILLS: Or to be made more explicit, yes, your Honor.

QUESTION: Because Largent said if there is no review on the record in any other State tribunal, then it's final for purposes of coming here, isn't that basically what it said?

MR. MILLS: I believe it does, yes, your Honor.

QUESTION: And in this case there is no review on the record in any other court in Massachusetts.

MR. MILLS: Correct, your Honor.

QUESTION: Of the district or Boston Municipal Court proceeding.

MR. MILLS: On the record, you are correct, your Honor, of the determination --

QUESTION: Why don't you just answer that there is more than that, there is more than review on the record, there is a way of having the judgment entirely automatically wiped out.

QUESTION: We said all that.

QUESTION: I know, but why does that require any problem with Largent?

MR. MILLS: Largent disturbs the Commonwealth, your Honor, because it seems to explicitly establish a rule which cannot be complied with in this case.

QUESTION: Right.

MR. MILLS: And we suggest that a mechanical application --

QUESTION: It can be more than complied with. The State not only gives it review, it entirely gives the procedure whereby -- they don't care whether on the record it's valid or not, we will just get rid of it and start over.

MR. MILLS: If Largent requires a record, there is no record here, your Honor. We suggest there need be no record in a redetermination.

QUESTION: I have a little problem with this wiping the record clean.

MR. MILLS: Excuse me?

QUESTION: I have a little trouble with your broad statement of wiping the record clean. He files a notice of appeal to the superior court, right?

MR. MILLS: Yes, your Honor.

QUESTION: Then the record is wiped clear, right?

MR. MILLS: Yes, your Honor.

QUESTION: Can he go to Europe next week?

MR. MILLS: I didn't hear, your Honor.

QUESTION: Can he go to Europe next week?

MR. MILLS: No.

QUESTION: So it isn't clean, is it?

MR. MILLS: Yes, the record is clean. He is still held as a criminal defendant on separate process for a separate proceeding which has been elected at his option.

QUESTION: At his option. Did he have any other one?

MR. MILLS: Three other options, yes, your Honor.

QUESTION: I'm listening. .. being one of them.

MR. MILLS: The language -- yes, your Honor, it is.

The language of wiping the record clean comes directly from Mann v. Commonwealth.

QUESTION: But you do admit he is still held under charges.

MR. MILLS: He is still a criminal defendant subject to process and subject to involvement in criminal proceedings in Massachusetts.

QUESTION: Would you object to another word -- again being put in jeopardy?

MR. MILLS: Yes, I would, your Honor.

QUESTION: You object to that word.

MR. MILLS: Yes, and if you will --

QUESTION: Is he already in jeopardy?

MR. MILLS: He remains in jeopardy.

QUESTION: From the first one?

MR. MILLS: No, he is again in jeopardy now.

QUESTION: I thought you said it was wiped away. Take it or leave it, one or the other.

MR. MILLS: I suggest that it is wiped away, your Honor. The district court --

QUESTION: So he is in second jeopardy. There is a second jeopardy.

MR. MILLS: Not a second as equivalent with double, your Honor.

QUESTION: Have you ever heard of an appeal where you had a trial by jury in any other phase of jurisprudence?

MR. MILLS: Perhaps this is inappropriately labeled under Massachusetts procedure as an appeal. But I would suggest that the particular name or denomination --

QUESTION: Is it a trial de novo?

MR. MILLS: It is a trial, your Honor.

QUESTION: It's a trial. This man would then go

through two trials?

MR. MILLS: Two adjudications, your Honor.

QUESTION: Two trials.

MR. MILLS: There are two trials.

QUESTION: And nothing wrong with it.

MR. MILLS: Well, I would suggest, your Honor, that the Massachusetts procedure by which a criminal defendant may undergo two trials complies -- it may not be the best system. We did not suggest in our brief that it was the best available system. We do not argue today that it is the best available system. We suggest that it is a system that complies with this Court's decision in Duncan v. Louisiana which says that State criminal defendants be afforded the right to a trial by jury. We say that it adequately complies with this Fourteenth Amendment requirement and at the outset we suggested that the Court in Duncan v. Louisiana did not incorporate Callan v. Wilson, and if this Court did incorporate Callan v. Wilson and that doctrine in the decision of Duncan v. Louisiana that the Callan decision should be reviewed because it is based upon a suggestion of hypothetical reasons which are not the practical fact in this case.

QUESTION: Well, in Massachusetts -- I leave this point with this question about having a trial by jury on appeal. I know, and I suggest, that if you go to the Supreme Court in Massachusetts you don't get a jury. You just don't

get juries in appellate courts.

MR. MILLS: Correct, your Honor.

QUESTION: Except in Massachusetts and how many other States?

MR. MILLS: In de novo States, your Honor. We have suggested that there are eight in the brief.

QUESTION: Eight. How many States are there when once you ask for a jury trial it automatically goes to the court of general jurisdiction?

MR. MILLS: We do not know, your Honor.

QUESTION: There are several. Is Rhode Island one?

MR. MILLS: Rhode Island no longer is one. Oh, yes, Rhode Island now is one.

QUESTION: That's right.

MR. MILLS: The Holliday decision.

QUESTION: Several others.

MR. MILLS: There are others.

QUESTION: One right close to you.

MR. MILLS: Yes, it is close. New Hampshire is equally as close, your Honor, and has a different system.

We have examined in our brief the colonial constitutional history of the original States and we find that the de novo system existed in Massachusetts dating from 1647, in New Hampshire from 1679, from Vermont, Connecticut, Rhode Island and Maine from the early 1700's. We suggest that this

constitutional colonial analysis in the brief is appropriate in view of the criteria that were used by this Court in Duncan v. Louisiana, the Williams case, the Apodaca case, and the other recent cases in which this Court has considered the jury trial right with respect to State procedures. We have examined contemporary practices among the States as this Court did in Duncan v. Louisiana, and the results are contained in the brief. We have suggested that the Massachusetts jury procedure fulfills the function and purpose of jury. That is the interposition of the common sense judgment of a group of laymen between an accuser and his accused. In this regard we would respectfully direct the Court's attention to the brief of the amicus filed by the Massachusetts Defendants Committee which I think says better than the appellee has said in its brief that far from being oppressive, indeed the particular Massachusetts jury procedure system in question here may even contraindicate inconvenience let alone governmental oppression.

Finally, we have suggested that the speedy trial right is not in issue in this case as there is no measurable period of delay by which this Court can assess a delay in the terms of the criteria of Barker v. Wingo, and we have suggested that the Massachusetts procedure is not violative of double jeopardy in view of this Court's decision in Colten v. Kentucky.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything

further, Mr. Hagopian?

REBUTTAL ARGUMENT OF ROBERT W. HAGOPIAN

ON BEHALF OF THE APPELLANT

MR. HAGOPIAN: Mr. Chief Justice, the Massachusetts Defendants Committee filed a brief which I received last Friday, and I would like to ask leave of the Court to file a reply brief to that brief. Either that, or I would oppose its submission at this late date.

QUESTION: I was wondering there. Mr. Mills just referred to an amicus brief, and I don't have it.

MR. HAGOPIAN: It hasn't even gotten here.

QUESTION: It hasn't been circulated.

QUESTION: Was that an amicus brief?

MR. HAGOPIAN: Yes, your Honor.

QUESTION: Was permission obtained?

MR. HAGOPIAN: I dissented to it at the time, your Honor.

QUESTION: You did?

MR. HAGOPIAN: Yes, I did, but I didn't assent to its being delivered here after oral arguments or the time for oral arguments. I haven't had sufficient time to reply to that brief and there are matters in there that bear discussion.

QUESTION: You may respond to it, and your friend may comment on that response if he wishes.

MR. HAGOPIAN: Could I refile --

QUESTION: Yes.

MR. HAGOPIAN: A couple small --

QUESTION: What do you want, five days, seven days, ten days?

MR. HAGOPIAN: Well, your Honor, I have to send those down to Washington, the printers down here take some time. Would I be asking too much for 21 days?

QUESTION: You may submit it in typewritten form if you like in response. I take it you're not going to file an extensive brief.

MR. HAGOPIAN: That's correct, your Honor. May I have 14 days?

QUESTION: Very well.

MR. HAGOPIAN: One thing I would like to mention in reply to Mr. Justice White, there is a procedure in Massachusetts called submitting to a finding of fact in the lower court which is equivalent to what you mentioned, you simply remain silent. The government doesn't have to complete, put all the evidence and follow the rules of evidence, that is, hearsay and things like that go in, that's an informal procedure. You still are judged guilty, but there is no way of circumnavigating that, and the sentence is passed upon you.

QUESTION: Is there a way that you could raise in the superior court the question that -- the Federal question that you want us to adjudicate?

MR. HAGOPIAN: I would suppose the double jeopardy issue certainly could be --

QUESTION: What about the jury trial issue?

MR. HAGOPIAN: Well, it depends upon whether it's a reversible error. The only other possibility is to simply allege that the district court did not have jurisdiction. But that's a fiction. It has jurisdiction over crimes --

QUESTION: Here you are in the superior court, here you are in the superior court, you have taken your case there for trial de novo.

MR. HAGOPIAN: Yes.

QUESTION: Now, is there some way that you can present to the superior court and have ruled on the issue you want us to rule on?

MR. HAGOPIAN: Other than a motion to dismiss on the grounds of double jeopardy, the answer is no, there is no possible way of reviewing any error.

Let me give you an --

QUESTION: Now, let's assume you get convicted after a jury trial in the superior court. Can you present the question you want us to adjudicate here by taking it to the higher courts in Massachusetts just like you are presenting it to us?

MR. HAGOPIAN: The only grounds you could raise it to the higher court in Massachusetts is that the trial judge in

the superior court made a mistake when he denied my motion to dismiss on the grounds of double jeopardy.

QUESTION: Would they entertain that motion on the merits?

MR. HAGOPIAN: Certainly. But if the denial of a trial by jury in the first instance is clearly a reversible error and not double jeopardy, then the claim that he is denied a trial by jury in the first instance is automatically mooted by the fact that he has had a trial by jury. That's where the difficulty is.

QUESTION: Well, if it's mooted in the Massachusetts courts, why isn't it mooted here? If it's not mooted here, why is it mooted in the Massachusetts courts?

MR. HAGOPIAN: Well, it's not mooted here because of the fact that in Costarelli's case, the Chief Justice of the superior court has stayed the trial de novo. He stayed those proceedings.

QUESTION: But you say if he hadn't stayed them, then you would have no case here.

MR. HAGOPIAN: Absolutely.

QUESTION: I know, but let's assume the answer to you in the Massachusetts courts would be just what you say they are. Nevertheless, there is a way -- that may be a wrong answer, constitutionally it may be wrong. But nevertheless you can present the issue to those courts and you can have

your motion ruled on.

MR. HAGOPIAN: That's correct.

QUESTION: Why didn't you?

MR. HAGOPIAN: I have in the Costarelli case. That's pending in the superior court.

QUESTION: Why is the judgment final? Why, then, have you -- how come you have obtained the judgment of the highest court in the State from which you could have obtained the judgment?

MR. HAGOPIAN: Because of the fact that that is a collateral means of reviewing that judgment, according to Massachusetts. It's a collateral means. A man should not have to suffer a second trial to review the error that is made in the district court, and that is the nub of section 1257. That's Largent v. Texas. A man should not have to collaterally attack. The only issue is to whether the jurisdiction in this Court is pending --

QUESTION: There was no trial de novo procedure available in Largent. That was wholly Federal habeas and they said Federal habeas was not available to raise the constitutional question that was involved there. There was no other place you could go.

MR. HAGOPIAN: I believe that there were collateral remedies open in the Texas system in Largent of which he could have raised the issue collaterally.

QUESTION: That may be so, but the court didn't mention them. They said there weren't any.

MR. HAGOPIAN: And I believe this Court mentioned in its opinion, it said, and I quote to your Honor, it says that the fact that there were collateral remedies open does not affect this Court's jurisdiction, and that is the key --

QUESTION: It doesn't affect it over the Federal question which the collateral remedies didn't let him raise.

MR. HAGOPIAN: But this Court stated that since the possibility that the appellant might obtain relief by a subsequent and distinct proceedings and one not in the nature of a review of the pending charge in the same or a different court of the State does not affect the finality of an existing judgment or the fact that this judgment was obtained in the highest State court available to the appellant. I read that language as simply saying that because a man may collaterally attack a judgment in the district court or the lower court in Massachusetts is irrelevant to this Court's jurisdiction under 1257.

QUESTION: In Largent the State proceeding left the judgment final and in effect. And here you have a very ready remedy.

MR. HAGOPIAN: That remedy was taken under compulsion. Suppose I hadn't taken that remedy? I don't think the fact .. in the State court should affect this Court's

jurisdiction.

QUESTION: That's like saying suppose you don't appeal from the superior court of Massachusetts to the Supreme Court. You've got to.

MR. HAGOPIAN: I submit to you that is an entirely different matter, the fact that a man should not have to go through a second trial, a second trial, that does not review the record of the first court.

QUESTION: Well, there is a certain irony in your case and in your opponent's case because the more you make the thing look like an appeal, the worse off you are in the jurisdictional basis, but the better off you are on the constitutional merits. And the same is true in reverse of your opponent's case. The more he can make the second proceeding look like an appeal, the better he looks jurisdictionally, but the worse it looks on the merits.

MR. HAGOPIAN: Yes.

MR. CHIEF JUSTICE BURGER: Mr. Hagopian, you have appeared here at our request and by appointment of the Court. I want to thank you for your assistance to the Court and, of course, your assistance to your client.

Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:46 p.m., the oral argument in the above-entitled matter was concluded.]

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