In the

Supreme Court of the United States

MICHAEL J. CASSIUS,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

No. 74-5140

Washington, D. C.
January 21, 1975

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The above-entitled matter came on for argument at 1:49 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

FREDERICK S. KLEIN, ESQ., Assistant Public Defender, Third Floor, Pioneer Title Building, 45 West Pennington Street, Tucson, Arizona 85701, for the petitioner.

WILLIAM J. SCHAFER, III, ESQ., Chief Counsel, Criminal Division, 159 State Capitol, Phoenix, Arizona 85007, for the respondent.

I N D E X

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Cassius against Arizona, No. 74-5140.

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

ORAL ARGUMENT OF FREDERICK S. KLEIN ON BEHALF OF PETITIONER

MR. KLEIN. Mr. Chief Justice, and may it please the Court: This case involves a challenge to the constitutionality of an Arizona statute, title 13 of the Arizona Revised Statute, section 1580, which provides, and I quote: "A person who is convicted of committing any felony offense, whether federal or state, which felony offense is committed while such person is released on bail or his own recognizance on a separate felony charge, is guilty of the offense of committing a felony while released on bail or his own recognizance and upon coviction of such crime shall be punished by imprisonment in the state prison for not more than five years. Such penalty shall be in addition to and shall be served consecutively to any penalty imposed for the offense committed while released on bail or on his own recognizance."

Were a violation of this statute to take place, three events must occur: First, a defendant must be charged with a felony which I would call Charge A and must be released on that charge; second, the defendant must subsequently be charged with another felony, which I would call Charge B, which

is alleged to have occurred while he was released on Charge A; and thirdly, the defendant must be convicted of Charge B. He need not be convicted of Charge A, and in fact it doesn't make any difference what the result on Charge A is as far as section 1580 is concerned.

In this case, the petitioner, Michael Cassius, was arrested and charged with burglary of a motor vehicle. He was released on that charge and he was subsequently arrested at the scene of an apparent burglary of a business establishment. He was charged with the second charge of burglary and also with the charge of committing a felony while released on cognizance under section 1580.

On January 4, 1973, a hearing was held in the Superior Court at which time the defendant pleaded guilty to the second burlgary charge. The first burglary charge was dismissed --

QUESTION: Do you know why?

MR. KLEIN: Why it was dismissed? It was dismissed as part of an agreement to plead to the second burglary charge.

QUESTION: Would it be fair to say that the State had concluded that it was satisfied with one guilty plea that would have a substantial sentence even though the man had apparently committed two criminal acts?

MR. KLEIN: Well --

QUESTION: I apply "apparently" with emphasis.

MR. KLEIN: I realize that the fact that it was disposed of in this way, of course, denies us the opportunity to look at the substance of the first charge. But it was dismissed as pardon plea bargaining.

QUESTION: The problem is there are three crimes, aren't there?

MR. KLEIN: That's correct, your Honor. And the charge under Section 1580 was then submitted to the Court for trial and the defendant was found guilty on that charge. The defendant was sentenced to a term of one to two years imprisonment on the burglary charge; he was sentenced to a consecutive term of one to three years on the Section 1580 charge.

On appeal the Arizona Court of Appeals held that Section 1580 as applied to this petitioner violated his rights under the equal protection clause of the 14th amendment. But the Arizona Supreme Court vacated the Court of Appeals decision and held that section 1580 neither constituted double jeopardy nor denied equal protection.

QUESTION: Mr. Klein, just to go back. I'm not sure it's quite clear in my mind. There was a plea bargain.

MR. KLEIN: Yes, that's correct.

QUESTION: Under which the first burglary charge was dismissed. There was, what, a guilty plea to the second burglary charge?

MR. KLEIN: That's correct, your Honor.

QUESTION: And what did the bargain have to say, if anything, about the 1580 charge?

MR. KLEIN: Well, the bargain provided that the defendant was not going to plead guilty to the 1580 charge and the trial court was advised that the reason for this was that the defendant wished to reserve his right to challenge that statute on appeal.

QUESTION: Because there was no -- what was done was exactly in accord with the bargain.

MR. KLEIN: That's correct.

QUESTION: Thank you.

MR. KLEIN: You are welcome.

QUESTION: Mr. Klein, do you know, is this statute frequently used by the prosecution in Arizona?

MR. KLEIN: In the experience of our office it is frequently used. However, our experience is also that very often this charge is dismissed as part of plea bargains. But I am aware that there are a number of individuals in the State prison serving sentences under this charge.

We have presented two questions to this Court. The first is that section 1580 violates the double jeopardy clause of the fifth amendment as applied to the States through the due process clause in the 14th amendments.

QUESTION: On this issue, if he had entered a guilty

plea to the first charge, then sentenced, and then a guilty plea to the subsequent charges, would you think that would be a waiver, or what would be your view? You have made the point that you haven't had a chance to test out, which is correct, the truth of the first charge except as there is some tacit admission involved in the so-called bargaining negotiations. But if he had been found guilty, had his day in court on that first one, either by plea or by trial.

MR. KLEIN: Well, let me turn that question around, if I may, Mr. Chief Justice. Part of our argument with reference to our equal protection claims is that the statute, because it in a sense presumes the defendant guilty of the first charge even though it may not be proven contravenes the presumption of innocence. And if the statute were drafted so to say that the State must prove a conviction of both the first and the second charge, it would seem to me that there would be no infringement upon the presumption of innocence.

But I'm not sure -- the statute as drafted does not require a conviction of the first charge, and this defendant was in fact not convicted of the first charge.

Does that answer your question?

QUESTION: In some places.

QUESTION: What element does the State have to prove, Mr. Klein, in 1580?

MR. KLEIN: That's a good question, your Honor.

Neither of the Arizona courts which wrote an opinion in this case indicated what the elements of the 1580 charge were. In fact, the Arizona Supreme Court said that the charges of which this defendant was convicted, burglary and 1580, had no elements in common.

Now, the State in its petition, in its brief, has argued that there are two elements. They say that, first of all, there is an element of conviction of a felony, and secondly, that there is an element of commission while the defendant is released on a felony charge. And I submit that that statement is also ambiguous in terms of determining what the elements are.

QUESTION: What was the proof in the trial of this 1580 charge, Mr. Klein?

MR. KLEIN: The proof was that the court was asked to take judicial notice of the fact that burglary was a felony, that the defendant had entered a plea of guilty to burglary, and it was stipulated that the defendant had been charged previously and had been released on that charge and had remained released during the period of time in which the second burglary charge was alleged to have occurred. And the only reason there was need for that stipulation was that the justice of the peace who released the defendant had not issued an order, entered one into the record, and so the court couldn't take judicial notice of that.

QUESTION: Do you regard your client as having been free and at large by virtue of a constitutional right or by virtue of a statutory provision?

MR. KLEIN: We regard him having been at large by virtue of a State constitutional right which also receives Federal constitutional protection, although I submit that it's unclear what the parameters of that protection are. This Court has said, for example, that the presumption of innocence would be meaningless if defendants could not be released prior to their trial, because if they could not, they would be punished before they were tried.

QUESTION: Of course, we would all agree that the Federal Constitution doesn't guarantee the right to be released on bail, but merely that they may not be required to furnish excessive bail. Is that not correct?

MR. KLEIN: Well, that's certainly what the eighth amendment protection provides, your Honor. I would submit, though, that the fact that a right to release is not absolute, does not make it any less fundamental. Even the right to free speech, which is one of the most nearly absolute rights, is not absolute. You can't yell, "Fire!" in a crowded theater.

QUESTION: Mr. Klein, we keep peppering you with questions. I think I understand your double jeopardy approach. Suppose Arizona, however, instead of having this statute which seems to me to be a fairly unusual one, provided that

the punishment for burglary shall be X years, but the punishment for burglary committed while on an RPR after one being charged for a felony, is Y years, Y being greater than X. Anything unconstitutional about that, drawing a distinction in punishment as distinguished from making it a separate crime?

MR. KLEIN: If I understand your question, it is, if the statute had been drafted as a punishment enhancement statute rather than as a separate crime, would this violate the double jeopardy clause, and my answer would be no, although there might still be some problems under our equal protection argument.

QUESTION: And yet the same result would be accomplished as the State claims is accomplished here.

MR. KLEIN: Not exactly. Well, the same result the State seeks would be accomplished, but the effects upon the defendant would be different. For example, because it is charged as a separate offense, the defendant is subject to recidivous penalties, that is, for his one criminal act, it goes down on the record as two offenses committed one after the other, and he is not entitled to the advantageous good time credits that he would be entitled to were he a first offender. His parole eligibility date is --

QUESTION: But the State legislatively could attach all those consequences to a single crime of committing burglary while on bail just like it attaches a higher penalty,

perhaps.

MR. KLEIN: There are additional consequences, your Honor. The fact that it is a separate offense and not a punishment enhancement statute gives the prosecutor opportunities which the double jeopardy clause was designed to prevent. For example, there is no need to prosecute 1580 at the same time as the first felony offense.

QUESTION: Well, I know, but that argument would go to cases where any one act is broken up into several crimes and they are all prosecuted at once.

MR. KLEIN: But the difference is that -- our argument is that this is the same offense, and what I am saying is that a punishment enhancement statute, while it would serve the same objectives that the State claims to have, it would not have precisely the same consequences on the defendant, a punishment enhancement statute would not.

QUESTION: But it would solve the double jeopardy argument, wouldn't it?

MR. KLEIN: Yes, it would, your Honor.

QUESTION: But you think you would still have an arguable equal protection claim.

MR. KLEIN: Well, I think that a punishment enhancement statute could be drafted so as not to come within the equal protection arguments that we raise. For example, as I say, the infringement upon the presumption of innocence

could be done away with by requiring a conviction on the first as well as the second offense. I think that a punishment enhancement provision could be drafted to serve the same objectives without violating either of the guarantees that we argue were violated in this case.

QUESTION: Mr. Klein, do you think Blockburger is consistent with your double jeopardy argument?

MR. KLEIN: Yes, your Honor, I do. The Court has devised a number of tests for determining whether two offenses are the same, and the Blockburger test is probably the narrowest or the most restrictive of these tests. But I believe that our case meets that test as well.

QUESTION: Was Blockburger said to rest by the Court on double jeopardy?

MR. KLEIN: My recollation is that it was, your Honor.

QUESTION: You think that Justice Sutherland relied on the double jeopardy clause in Blockburger? You didn't even mention it so far as I know.

MR. KLEIN: Then I stand corrected, your Honor. I do know that in subsequent cases Blockburger has been relied upon as a test for double jeopardy.

QUESTION: Let me ask you one more question about what I guess are basically the facts. In the proceedings before Judge Marks resolving doubts of facts and so forth in favor of the prevailing party, as we do here, can it fairly

be said that Judge Marks found that your client had committed the second burglary?

MR. KLEIN: Well, the defendant pleaded guilty to the second burglary.

QUESTION: He pleaded guilty to the second burglary.

MR. KLEIN: That's correct, your Honor.

QUESTION: Were there any contested issues of fact tried before the trial judge?

MR. KLEIN: No. And one of our objections to the way 1580 is drafted is that it really only requires a determination whether a defendant falls within a particular class defined by the statute.

QUESTION: So the only factual element of the crime, at least the second burglary element, was the commission of the crime while on bail. Your client pleaded guilty.

MR. KLEIN: Pleaded guilty to the second burglary, that's correct, your Honor.

QUESTION: And it was conceded that he did it while on bail?

MR. KLEIN: That's correct, your Honor.

QUESTION: There really weren't any factual issues in dispute in the 1580 proceeding?

MR. KLEIN: I would say that's correct.

QUESTION: But you reserved this issue on your guilty plea.

MR. KLEIN: Yes, your Honor. Yes, because -- and it was obvious in the context that the defendant's counsel believed that the statute itself was subject to challenge.

QUESTION: Some State supreme courts and perhaps some courts of appeals have held there is no constitutional problem about defining certain crimes as more serious and subject to greater punishment when they are committed, for example, within a prison, an assault on a prison guard, an assault on a fellow prisoner, killing of a prison guard.

You, I take it, concede that a statute could be drawn which would impose the greater punishment for the commission of a crime while on bail without regard to whether that issue of fact on the first crime for which he was bailed was ever tried out. The question may be a little confusing.

MR. KLEIN: I'm not sure I quite understand the question.

QUESTION: You concede that a greater punishment could be imposed constitutionally for committing a crime while on bail, without regard to whether or not there is ever a trial in that first charge.

MR. KLEIN: In terms of our double jeopardy argument, yes, we do concede that. But that would be different from providing for a subsequent prosecution for that crime.

QUESTION: Mr. Klein, I still have trouble finding your two trials. There is only one trial.

MR. KLEIN: Well, it's my understanding, your Honor, that the protection of the double jeopardy clause which derives from the common law plea of former conviction does not require two trials. It requires a trial following a conviction, and that conviction may be on a guilty plea.

In this case there was a guilty plea entered, and then the defendant was tried, that is,as much as you can have a trial under 1580, on the 1580 charge.

QUESTION: Was it a trial?

MR. KLEIN: Well, I think that depends upon whether you interpret the statute as indicating separate elements or whether you consider it a bill of attainder.

QUESTION: You mentioned a minute ago all the difficulties in this as contrasted to an enhanced sentence. I don't see but one, and that is he has two convictions. I don't see anything else.

MR. KLEIN: Well, in terms of the fact that the prosecutor has discretion whether or not to charge 1580 and when to charge it. If the prosecutor, for example --

QUESTION: The results after it is done.

MR. KLEIN: Well, the double jeopardy clause is designed to protect certain interests. One of those interests --

QUESTION: I'm not talking about double jeopardy now. I'm talking about the difference between being convicted and getting five years because you did it while you were a felon

as contrasted to two and a half years if you did it without being out on bail. And you gave a whole lot, and I don't see but one, and that is you get two convictions. That's the only --

MR. KLEIN: Well, you have two convictions and the fact that you have two convictions gives rise to a number of collateral consequences.

QUESTION: Which the legislature could have stopped.

MR. KLEIN: But in addition --

QUESTION: Does the legislature say if you commit a felony while out on bail, you shall not be eligible for parole ever?

MR. KLEIN: That's an issue I would rather not address myself to, because we have some cases like that at the present time.

QUESTION: I mean the sentencing is within the power of the State legislature.

MR. KLEIN: Within certain limits, surely.

QUESTION: One limit, parole .. Do you know another one?

MR. KLEIN: Well, there are limitations placed upon it by the due process clause, certainly.

QUESTION: About the length of a sentence?

MR. KLEIN: On the matter of imposition of sentence.

QUESTION: We are off on the wild blue yonder now.

But I have great difficulty with the legislature taking one of two choices. I guess you say they didn't have two, they only had one. They could enhance it. There is no problem about that.

MR. KLEIN: Under the double jeopardy clause.

QUESTION: There is no problem about that. And that the only problem here is that instead of that you get another "trial" on the same thing. That's it.

MR. KLEIN: Yes, but, in that, your Honor, for example, if the prosecutor were dissatisfied with the sentence that Mr. Cassius received on his burglary plea and supposing that he had not at that time chosen to prosecute under 1530. He could then prosecute under 1530 in order to bring the punishment more into line with his view. Now, that's analogous with the protection double jeopardy provides in cases of former acquittal where we say a prosecutor shall not be allowed to increase his chances of obtaining the conviction by reprosecuting for the same offense. Here he is trying to increase his chances of getting the sentence he believes to be appropriate by being allowed to reprosecute following the conviction.

QUESTION: I see.

QUESTION: Mr. Klein, I suppose the only additional element under your statutory crime is being out on bail or on an R.P.R. That in itself isn't criminal, is it?

MR. KLEIN: Not to my knowledge, your Honor. To be out on bail is not a crime. I'm not sure I understand your question, though.

QUESTION: Well, there may be no sense in it, but I guess what I am asking is whether the difference between burglary and the offense under the special statute is only an element which in itself is not criminal.

MR. KLEIN: That would be my interpretation of it, your Honor, that it is an element, if you can call it that, which is not what we have traditionally regarded as an element of criminal responsibility.

QUESTION: And yet the legislature here has made it an element of criminal responsibility.

MR. KLEIN: Well, at least that is, as I read it, the Arizona Supreme Court's interpretation of that statute.

QUESTION: You are subject to kind of additional constraints while on bail, don't commit any crimes, et cetera, that the ordinary person is not subject to in the sense of a judicial injunction.

MR. KLEIN: I would agree that you are under additional constraints, but I would not agree that the duty to obey the law is an additional constraint. That's the same duty whether you are released on a charge or not. Everyone has that same duty.

QUESTION: Except your bail can be revoked if you

don't obey the law when you are on bail. And an ordinary citizen if he doesn't obey the law has to go through a full criminal proceeding before his liberty can be restrained.

MR. KLEIN: Well, in the sense that the conditions of his bail can be established in the same way. I'm not sure that I would quite agree. But the reason that a condition of good behavior is put into bail agreements is precisely so that the court, if it has reason to believe that an individual has not been behaving himself while released so that he can re-examine the conditions of his release.

QUESTION: And to that extent he is in a different spot than the person who has never been arraigned in the first place.

MR. KLEIN: In a different position, but not with regard with his duty to obey the law. He has the same duty.

QUESTION: But different consequences attach to a breach.

MR. KLEIN: Well, a person who commits a crime is subject to loss of his liberty. That's true whether you are released or not.

QUESTION: Mr. Klein, in a case like this, does the man have his bail revoked, too?

MR. KLEIN: Section 1580 does not provide for that, your Honor. There are provisions in Arizona law for revocation of bail.

QUESTION: It's not in this case, but do they have a statute on a parolee committing a felony?

MR. KLEIN: Not to my knowledge, your Honor.

QUESTION: Just curious.

MR. KLEIN: If I may, I think I would like to reserve the remainder of my time.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Klein. You may, surely.

Mr. Schafer.

ORAL ARGUMENT OF WILLIAM J. SCHAFER, III,

ON BEHALF OF RESPONDENT

MR. SCHAFER: Mr. Chief Justice, and may it please the Court: I am William Schafer, Assistant Attorney General for the State of Arizona, and I represent respondents.

Before I begin the discussion of the merits, I think I should answer one question that was raised during Mr. Klein's argument, because it did occur to me and I did attempt to do some research to find out the extent of it. The question was asked if section 1580 is frequently used.

My research has indicated that section 1580 is not frequently used except for one county in the State of Arizona, and that is Mr. Klein's county, Pima County. And there I have been very reliably informed that it is used almost every time that it is available. I believe there is some kind of an unwritten policy that it will be used whenever it does apply in

a particular case.

The other counties, however, do not use it on any kind of a regular basis whatsoever.

QUESTION: Is Pima County regularly the way it was here, to make two separate offenses, and in this case with consecutive sentences? Or is it just used to make one conviction on an aggravated offense?

MR. SCHAFER: Your Honor, I believe in Maricopa County it is not used on any regular basis whatsoever. It was a difficult time trying to find that out. I believe it is only used once or twice really. And that does lead into another question, I suppose, that has not been asked directly, but has been indirectly, and that is: Is this used as part of an ordinary plea bargain? Now, my experience has also told me in my attempt to find out here that is not the case. However, I could be corrected. There was a plea bargain here. Obviously, from the reading of the transcript in this case from the very beginning it appeared as though there was some kind of a plea bargain struck, and conceivably there could be more to the plea bargain than what we can piece together here because at the very end we also find out that Mr. Cassius did work with the police and in his estimation cleared up 15 burglary cases, I believe. So conceivably there was more to the plea bargain.

But in direct answer to your question, and perhaps a

little of my own there, I do not believe that wherever this statute has been used it has been used as something to plea bargain to or down from.

Other than Maricopa and Pima, I have not been able to find, I believe, any instance of where this statute has been used.

QUESTION: Arizona is a State, isn't it, where the county attorney of the individual county has the primary discretion to determine prosecution policy?

MR. SCHAFER: Yes, it is, your Honor. I have to smile at that because we just argued that issue before the Arizona Supreme Court last week. Unfortunately, the Arizona Supreme Court refused to take that issue, but by refusing to do it, they indicate, yes, he has almost the sole responsibility within the county.

QUESTION: How many counties?

MR. SCHAFER: Thirteen, your Honor.

QUESTION: At least you don't have 80 or 90 different prosecution policies as some States do, then.

MR. SCHAFER: No, we do not. And if you go beyond Maricopa and Pima, the occasions for using such a statute probably arise very seldom.

It seems odd that from the very beginning almost, the petitioner and respondent, myself, here have really been arguing essentially the same test and perhaps the same case or

at least based upon the same case since we started. Apparently we both read that case, we both read the test, and we come out really with a different result. And the test and the case I refer to are the same evidence test which is called by various other names, but that's the one that typifies it best to me, and the Blockburger case.

There was a question earlier whether the fifth amendment was the ground upon which Blockburger rested, and I could have answered that question by saying I do not recall the fifth amendment being mentioned in that case. However --

QUESTION: Not even anything else, not even the word "Constitution" appears.

MR. SCHAFER: I can't say that, your Honor, but I do remember, I think the second or third time reading it, that I suddenly found that the fifth amendment was not in that case.

However, there is a later case which I cite in the brief, Gore, which does go back to Blockburger, and it does have, next to the last page, a reference in the majority opinion that if this were not the rule or if this rule were to be changed, then all sorts of cases would also have to be changed, and the contention was specifically raised there whether this was in violation of the fifth amendment.

We both do start out with the Blockburger test. We both rely on that same evidence test. I think we begin to diverge, however, on something that came up very early here

this afternoon, and that is as to whether that test really pertains to the actual evidence that was introduced to prove two violations, or whether what the court was concerned with in Blockburger and all the cases after that was as to the elements of the particular charges and not necessarily the actual proof that was put in at the trial.

Now, our contention is that which either of those two avenues is selected here, both have been satisfied in this case under the same evidence test. It is difficult here, of course, because of the guilty plea to go back and determine actual proof. We cannot really do that.

QUESTION: If you would agree, perhaps your friend might even agree, that if there has been a guilty plea to both burglaries, but with an agreement that contemplated the aggregate punishment the same as was actually entered here, that that would eliminate a good deal of his argument.

MR. SCHAFER: The double jeopardy argument on it? Yes. And that gets back, I'm sure, to the enhanced punishment.

QUESTION: And the presumption of innocence argument which he separated from his double jeopardy.

QUESTION: Well, you would still have the conviction under 1580. That's the problem here.

MR. SCHAFER: I was going to say if you mean the two burglary convictions, I separate the first burglary conviction. I will discuss and the discussion in the brief

really concerns only -- and I hate to call it this, but it's the second burglary and the 1580. And I believe we can really separate out that first burglary conviction. And if the question pertains to enhanced punishment, I think we can refer to the second burglary and the 1580,and in a sense the legislature could draft a statute.

QUESTION: I thought the first burglary charge was dismissed, there was no conviction.

MR. SCHAFER: No, your Honor. I am prefacing my remarks to show I thought the question involved a guilty plea.

QUESTION: I'm sorry. I thought you referred to the first burglary conviction. There is only one burglary conviction here.

MR. SCHAFER: That's why I hate to call it first and second. Yes, the initial burglary that started this entire case.

QUESTION: They dismissed that one.

MR. SCHAFER: Right. And that eventually was eliminated entirely.

As I say, we contend --

QUESTION: There was a second burglary conviction in that he was convicted of burglary while on bail on a felony charge.

MR. SCHAFER: Yes. That is true, your Honor.

QUESTION: There were two burglary convictions,

one on a guilty plea and one on the judge's finding on agreed facts.

MR. SCHAFER: No, your Honor.

QUESTION: Is that right?

MR. SCHAFER: No. Mr. Cassius was initially charged with burglary, and he was released O.R.

QUESTION: Right.

MR. SCHAFER: Approximately a month and a half after that occurred, he was then caught in a building and was charged with another burglary.

QUESTION: Right.

MR. SCHAFER: And at the same time he was charged with what I will call 1580.

QUESTION: And that was for committing a burglary while he was on bail on a felony charge.

MR. SCHAFER: Yes, committing a burglary on which he was found caught in a building.

QUESTION: Right.

MR. SCHAFER: Now, when we get to the plea bargaining --

QUESTION: Can he also be charged with the first burglary? Had there been three?

MR. SCHAFER: He had been charged with the first one.

QUESTION: Could he have been convicted?

MR. SCHAFER: He could have been, your Honor.

QUESTION: Then he could have had three convictions.

MR. SCHAFER: He could have.

QUESTION: But whether or not he was convicted on the first charge from which he was released on his O.R. has nothing to do with the issues in this case.

MR. SCHAFER: That is why I was prefacing my remarks to Mr. Chief Justice that I separate that entirely, and I have attempted assiduously to avoid referring to that in the brief because I think it makes it confusing, and I don't think it has anything really to do with the issues here.

What I am talking about is that second burglary and the 1580. And when I talk about the Blockburger test and the same evidence test, I am talking about those two particular offenses. And I would choose to talk in this case, and I think this is justified by the case law from this Court, as to the elements that are involved in those crimes in whether after considering those elements we can truthfully say that those two particular offenses require proof of different elements, therefore, they are two offenses and there may be two punishments.

Now, Mr. Klein has said and said in his reply brief which I got shortly before I came here that there are no cases and nowhere in the State of Arizona is there anything that will tell us what the elements of a 1580 crime are.

That's not quite right. There is a statement, and I believe they lay it out in the Court of Appeals' opinion, the

Arizona Court of Appeals, what one element is and what the other element is of a 1580 violation. There are no other cases on 1580 in the State of Arizona that either of us have been able to find, I believe.

However, the Court of Appeals' opinion does say that the elements of that crime are conviction of a felony and that felony being committed while a person was on bail or O.R. And I believe over and above whether there are any cases delineating what those elements are, the statute itself is quite clear as to what the elements are that are required to be proved when a prosecutor goes to court. And I don't think there is any doubt when you read that statute that says there has to be a conviction.

The petitioner would say that that is not an element but that is simply a standard of proof that has been inserted into the statute by the legislature, but there is no indication of that whatsoever other than perhaps someone believing that. It is, we contend, an element of proof in that statute.

QUESTION: Then I take it you are arguing that these are separate and distinct crimes.

MR. SCHAFER: Yes.

QUESTION: And that this is not an enhancement of punishment statute.

MR. SCHAFER: Yes, we are, your Honor. And I draw an analogy to enhancement of punishment statutes in the brief.

But I have to admit and concede that this creates a separate offense, whereas the enhancement of punishment statute would not. And along with my analogy of the wording of the statement and the elements that are contained within the wording itself, I don't believe I can conscientiously say that this does not create a separate offense. It seems to, and it seems quite clear that the Arizona legislature meant to create a separate offense if we go upon the wording of the statute.

QUESTION: Well, is it separate or two.

MR. SCHAFER: Well, separate from the --

QUESTION: The second, at least looking at page 4, the criminal complaint, on the first count he committed a burglary, he was convicted and sentenced on that. The second one is he also committed a burglary and was sentenced on that, the same burglary.

MR. SCHAFER: Excuse me. Are you on page 4 of the petition?

QUESTION: Page 4 of the appendix.

MR. SCHAFER: Oh, the appendix.

QUESTION: The charge. It's phrased at least, the second count is he committed a burglary while on bond. And the first one is he committed a burglary, and it's the same burglary referred to in both.

MR. SCHAFER: It is, yes.

QUESTION: So he's convicted twice for the same

burglary.

MR. SCHAFER: Well, that's the petitioner's contention, your Honor.

QUESTION: No, no; as phrased, the way the charge reads.

MR. SCHAFER: I was going to say our answer to that is that the phrasing of the charge really does not indicate the separateness of those two offenses.

QUESTION: In fact, it's quite bad pleading, isn't it, because if you look at the language of the statute on page 3 of the petitioner's brief, the offense doesn't occur until after the conviction on the first burglary.

MR. SCHAFER: That's correct.

QUESTION: So they can't really be charged that way because, I mean, if you think about accurate and artistic pleading --

MR. SCHAFER: Yes.

QUESTION: -- there is no offense under 1580 until there is a conviction of the felony. Is that right?

MR. SCHAFER: That's what we argue.

QUESTION: And that's what the statute says very clearly on page 3 of the petitioner's brief. So this indictment, or this complaint, rather, couldn't be right because they couldn't charge him under count two until he had been convicted under count one, if you take the statute's literal words to mean

what they say.

MR. SCHAFER: That's correct, your Honor.

QUESTION: Mr. Schafer, when the Supreme Court of Arizona vacated the court of appeals' opinion, did it indicate any doubt as to the construction that had been placed on the statutory language by the court of appeals?

MR. SCHAFER: No, it did not, your Honor, and there is no indication in the Supreme Court opinion itself as to what it thought those elements would be.

Reading the opinion, however, I assume we can -- or I could at least read it and get from it the same two elements that the court of appeals did. But, no, I would have to say there is no indication.

QUESTION: This isn't a separate crime; this is an additional crime, isn't it?

MR. SCHAFER: Well, I might say it is an additional crime, your Honor.

QUESTION: But it's not enhancement.

MR. SCHAFER: No, it is not enhancement.

QUESTION: Now I am in trouble. It's an additional crime but it's not enhancement.

MR. SCHAFER: When I use the word "enhancement" as I think it has been used here so far this afternoon, that really gets back to the ordinary enhancement statute.

QUESTION: Well, the difference between enhancement

and this is if these two sentences would run concurrently, nobody would be here. The fact they are here is because the two sentences are consecutive, that's why we are here.

MR. SCHAFER: I would assume that that has a great deal of validity to it, your Honor, yes.

QUESTION: And indeed there would have to be, according to this statute.

MR. SCHAFER: Yes, it's required in the statute.

QUESTION: That doesn't give you any difficulty.

MR. SCHAFER: No, it doesn't give me any difficulty. In fact, I use that to verify my belief in my arguments that what the legislature really had in mind was to make two offenses out of this. And I can call them separate, I can call them distinct, but it's two offenses. And that's why I say I really cannot say that to me this is an enhancement of punishment statute, because that's not what an enhancement of punishment statute is.

QUESTION: I don't know what it means in this case, but it seems to me that I still don't understand why a man is so bad and vicious that you have to give him two sentences and he ends up with five years altogether for burglary. He could have given him five on the one, couldn't he?

MR. SCHAFER: He could have received up to 15 on the burglary and up to five on the 1580 charge.

QUESTION: Why would -- if the same judge is going

to give him a certain number of years, why did he have to split it up and then give him less?

MR. SCHAFER: The simple answer there would be that the statute simply requires it. There are no two ways about that under the wording of the statute, it does require it to be consecutive.

Now, there is something interesting there, however, in the transcript of the sentencing before Judge Marks. One of the arguments that is made by Mr. Cassius' attorney is that the judge take that into consideration that it has to be consecutive sentences. And, of course, it was known by everyone that it could have been up to 15 on the burglary and five on the 1580. There is no indication by Judge Marks that he actually did take that into consideration in the sentence he gave. The only thing he does indicate that he took into consideration was Mr. Cassius' willingness to work with the police. But that is a possibility that that could be taken into consideration and might well in a number of cases by the trial judge.

QUESTION: He imposed a very small proportion of the allowable penalty, did he not?

MR. SCHAFER: Well, yes. I don't want to say that because I know nothing about this case, but it seems that way.

QUESTION: The maximum penalty was what, altogether?

MR. SCHAFER: Twenty.

QUESTION: Yes. And what did he impose?

MR. SCHAFER: One to two and one to three, and the one to three was consecutive.

QUESTION: So he has got a two-year minimum as against a possible 20-year maximum.

MR. SCHAFER: On the surface, at least, it would seem, yes, that that is quite obviously compared to what he could have done at the time. He unfortunately does not go any further in the transcript.

QUESTION: Well, do judges in Arizona ordinarily give some explanations about their sentencing process?

MR. SCHAFER: I think I can answer that that no, they ordinarily do not. However, every once in a while you will run into one who will in this sense. And here I expected something because Judge Marks did go further and say about the boy's working with the police.

QUESTION: The implication I drew from that when I saw that reference was that this is precisely a mitigating factor in his imposition of a sentence. He complied with the statute which required a separate penalty for each one. I take it he would have had the power to suspend one of the sentences, would he, under Arizona law?

MR. SCHAFER: Oh, yes.

I also have to say that that conclusion popped into my mind, but I thought about it later and perhaps thought that

might have been due to what Mr. Cassius' attorney had said at the time. But there is just no indication that that's actually what happened.

QUESTION: It's easier for one of us up here to attribute thought processes to State court judges than it is for you when you have to continue working with them.

MR. SCHAFER: I am sure it is.

There is besides the same evidence test that we have both discussed, there is another test that is referred to in all the pleadings in this case, and that's the same transaction test, and it has been mentioned here, at least inferentially, a couple of times this afternoon.

In the brief, and I think this is borne out by a whole host of cases, none of which I can put my finger on directly, but the same transaction test has generally, we contend, been used in those situations, not of double punishment, but of successive trials. That is not the situation we have here, although it does get fuzzy at times again because we are concerned with a plea as well as with what went on later.

The same transaction test, however, although confused in many cases, confused in the sense that I'm not sure exactly what they were going for, does appear to apply only in those situations where there is more than one trial, and that is not the situation we have here. We have everything done here at the same time. It's conceivable that we could cut hairs and

say that the plea and then the subsequent trial to the court in a sense was another trial. It was, but not --

QUESTION: But on your idea that these are different offenses, the State could try the burglary first and the burglary while out on bail later.

MR. SCHAFER: Yes.

QUESTION: And the same transaction test would say no.

MR. SCHAFER: That generally is true and that's one of the reasons why I mentioned the same transaction test.

QUESTION: But there are some cases in the Court, including perhaps Blockburger, or Gore, that would say that even if they were the same offenses, the fact that you are imposing two punishments does not violate the double jeopardy clause.

MR. SCHAFER: I believe what your Honor is alluding to are --

QUESTION: Well, assume a single act violates three different statutes.

MR. SCHAFER: Yes.

QUESTION: And you impose punishments -- you try them all the same time and punish, impose three punishments for the identical act.

MR. SCHAFER: Yes. That is just about Gore. And in the Gore case there were actually six separate violations.

QUESTION: You have a single sale of narcotics.

MR. SCHAFER: Yes.

QUESTION: But that violates three, four, or five statutes.

MR. SCHAFER: Yes.

QUESTION: You have separate counts for the violation under each statute. You try them all together, he is convicted on them all. You can impose consecutive sentences.

MR. SCHAFER: Yes.

QUESTION: That's what Blockburger was. And I gather your argument here really is that it's a single burglary but it violated two statutes, disposed of them in the same proceeding, therefore no double jeopardy arises.

MR. SCHAFER: Essentially, except I would add one more thing perhaps to that. I would not quite say just a single burglary. There was a burglary which was the triggering mechanism for the second charge which was --

QUESTION: In that respect I don't understand this at all, if we are going to take the statute as it's read. You can't have an offense under 1580 until and after there is a conviction on the first burglary. Is that correct?

MR. SCHAFER: Correct.

QUESTION: You can't try them all together. If you look at page 3 of the petitioner's brief and see what that statute says, it says a person who is convicted of committing any felony offense while released on bail. So how could you

have a violation of this 1580 until and unless there were a conviction?

MR. SCHAFER: I agree, your Honor, that is the wording of the statute.

QUESTION: Well, doesn't it mean what it says?

QUESTION: Couldn't a conviction occur at a trial for the offense?

MR. SCHAFER: That is essentially what happened here.

QUESTION: Suppose this had gone to trial. Couldn't a jury have been charged, "If you find him guilty of the burglary, then you also may find him guilty of the violation of 1580."

MR. SCHAFER: Yes, that's a possibility. The other possibility would be that they would do what is analogous to enhanced punishment, at least in Arizona, try the one charge and then turn around and do the other one at the same time. It's deceiving to say at the same time, but it would be in the same afternoon.

QUESTION: Yes.

MR. SCHAFER: That is the wording of the statute.

QUESTION: At the same trial.

QUESTION: But they can't reach count two, or the second question under 1580 unless and until they have crossed the bridge on count one, that is, did he perform the act of the burglary.

MR. SCHAFER: Was he convicted of the burglary.

QUESTION: They found that he did the act, which is conviction. A component of the offense is a conviction, is it not?

MR. SCHAFER: Yes.

QUESTION: But you draw no distinction between the result of a plea of guilty and any other type conviction, do you?

MR. SCHAFER: No, I do not, your Honor.

QUESTION: I thought Justice Stewart's inquiry of you was that you can't even indict for a 1580 until you have a first conviction. I take it you can under Arizona practice.

QUESTION: They did in this case.

MR. SCHAFER: They did in this case, and that has never been challenged yet, within my knowledge, neither in the Arizona Supreme Court or in any other court that I am aware of. I do know, as I started out by saying, that they do this in that one particular county consistently. And Mr. Klein can correct me, but I am pretty sure that they do it this way consistently in Pima County.

QUESTION: They can't read very well down there.

MR. SCHAFER: If there are no further questions, we will close. Thank you.

MR. SCHIEF JUSTICE BURGER: Very well, Mr. Schafer.

You have a minute or two more if you have anything

further, Mr. Klein.

REBUTTAL ARGUMENT OF FREDERICK S. KLEIN ON BEHALF OF PETITIONER

MR. KLEIN: Very briefly, your Honor.

The statement to which Mr. Schafer was referring in the court of appeals' opinion, or statements, would appear on pages 34 and 35 of the appendix. And I think that it would be difficult to read this statement as in accord with the decision of the Arizona Supreme Court. The statement in the court of appeals' opinion is that the State argues that the elements of 1580 are different, i.e., one, conviction of a felony, and, two, such felony having been committed during a designated period.

QUESTION: What page are you reading from.

MR. KLEIN: Page 35 of the appendix.

We find such arguments specious. The conviction element is a judicial act, leaving only the burglary as the act of appellant. And the Arizona Supreme Court, while not stating what the elements of 1580 were, said that there were no elements in common between burglary and 1580.

Now, I think there is a point of agreement between counsel in that the statute requires proof of a conviction before one can be found guilty of 1580. Our contention is that that is a requisite form of proof of the element of commission.

QUESTION: Mr. Klein, is it a fact that under this very charge, had this first count gone to the jury, could the trial judge have instructed the jury, "You must find him guilty first of the burglary before you address the second count. If you find him guilty of the burglary, you may then address the second count and find him guilty of that.

MR. KLEIN: I don't believe so, your Honor, because if the jury had called the defendant guilty, it would still be within the court's power to overturn that verdict and therefore it would not be a conviction.

QUESTION: Well, a jury verdict of guilty is not an ultimate conviction; a lot can happen between that verdict and a judicial conviction.

MR. KLEIN: That is my feeling.

QUESTION: The Arizona Court of Appeals is clearly in accord with Justice Brennan's --

MR. KLEIN: I don't believe they are, your Honor. I believe that they would be in accord with my viewpoint that a conviction must be proven, but that the element involved -- that conviction is merely a form of proof of commission.

If there are no further questions, I thank your Honors.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Klein. You appeared here at our request by appointment of this Court. We thank you for your assistance to the Court and, of course,

your assistance to your own client.

Thank you, Mr. Attorney General.

The case is submitted.

(Whereupon, at 2:45 p.m., oral arguments in the above-entitled matter were concluded.)