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In the

Supreme Court of the United States

LONNIE NORTH,

Appellant,

vs.

C. B. RUSSELL, et al.,

Appellees.

No. 74-1409

Pages 1 thru 40

Washington, D. C.
December 9, 1975

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v.	:	No. 74-1409
C. B. RUSSELL, et al., Appellees.	:	

Washington, D. C.

Tuesday, December 9, 1975

The above-entitled matter came on for argument at 1:37 o'clock 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:

CHARLES E. GOSS, Esq., Central Street, Harlan, Kentucky 40831; for Appellant.

ROBERT L. CHENOWETH, Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601; for Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-1409, North against Russell.

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

ORAL ARGUMENT OF CHARLES E. GOSS, ESQ.,

ON BEHALF OF THE APPELLANT

MR. GOSS: Thank you. Mr. Chief Justice, and may it please the Court:

My name is Charles E. Goss, and I am counsel for appellant. My client, Lonnie North, is under sentence of 30 days imprisonment in the Harlan County Jail, which was imposed upon him by one of the appellees in this case, Judge C. B. Russell, who is the judge of the Lynch City Police Court, Lynch, Harlan County, Kentucky.

This appeal is from the Court of Appeals of Kentucky and challenges on Fourteenth and Sixth Amendment grounds the constitutionality of certain Kentucky statutes which empower non-lawyer judges to preside in criminal cases and to impose sentences of imprisonment. Since this appeal tests the competency and the capacity of the trial judge in this case, Judge Russell, I will begin by discussing Judge Russell's credentials, his qualifications to act as a judge.

I would start by saying that Judge Russell is not a lawyer. He is a coal miner, and he has had absolutely no legal training whatever.

Q How long has he been on the bench?

MR. GOSS: Your Honor, at the time the appellant was tried, Judge Russell had been on the bench for six months in this small fifth class city which does not augur for very much experience because they do not have a very heavy case load.

Q This is part time?

MR. GOSS: It is a part-time job, Mr. Chief Justice.

Q Much like the magistrates and the justices of the peace and some others in England, for example, and in some states in this country.

MR. GOSS: Much like some of the states in this country. I was in England recently and did a very brief study of the lay judge system over there, and I found that the lay judge system in England is quite different from the system in our country in that there they sit in panels of three and they have at their disposal the services of a clerk, what they call a clerk, and he is the gentleman who really makes the legal decisions and the man who advises the court as to what the applications of the law ought to be.

Q Is he a lawyer?

MR. GOSS: He is a barrister or a solicitor, yes, Mr. Justice Rehnquist.

Q I suppose, Mr. Goss, there is not any question here about the lack of qualifications of Judge Russell, is there?

MR. GOSS: Mr. Justice Blackmun, I certainly hope that there is no question about it.

Q That is why I wonder why you emphasize them so. It seems to me they are fairly clear, that he was not qualified.

MR. GOSS: I emphasize them, Mr. Justice Blackmun, because I felt that it was important to this argument to bring into focus the lack of competency and capacity of this particular judge, it being the crux of this case.

Q Would you take the same position about an appeals court judge, a judge that was reviewing convictions on appeal, if he was not a trained lawyer?

MR. GOSS: Mr. Chief Justice, yes, indeed I would.

Q Then you might have that problem here some day. There is no requirement that any member of this Court be a lawyer. The Senate could confirm now for the present vacancy a non-lawyer, if they wanted to. Would you then say the court was incompetent as a whole or just that one man was disqualified, one person?

MR. GOSS: I would suppose that if that situation every confronted the Senate, the Senate would be most reluctant to confirm a man who was untrained in the law.

I might say this, that my research does not indicate that there has ever been in the history of this Court a judge who was not trained in the law, who was not a lawyer.

Q Mr. Goss, are you familiar with the former New Jersey Court of Errors and Appeals, the top court of that state?

MR. GOSS: Your Honor, I am not.

Q That was a 16-judge court of whom six members were laymen.

MR. GOSS: There are many variations of court systems in the different states.

Q I just wonder if its judgments would come under the same criticism.

MR. GOSS: I was very interested in the English courts, Mr. Justice Brennan, and the way that they are put together. The three judges over there are lay judges. Often they sit stipendiary magistrates who are trained barristers or solicitors. They are largely a blue-ribbon jury because the decisions they make are largely factual decisions rather than decisions of law, although they do apply the law to a case much in the way that a jury does in this country.

Q But then England does not have a due process clause, does it?

MR. GOSS: That is correct, Mr. Justice Marshall, and they do not live under the same kind of constitution that we live under.

Q Mr. Goss, your discussion of qualifications and some of the colloquy from the bench suggests almost assuming

the point in argument from the beginning. When you say the man was not qualified and he was not competent, all you mean is that he was not legally trained, he did not have a law degree.

MR. GOSS: I would answer that in two ways. I would say that not only did he not have a law degree, Mr. Justice Rehnquist, but I would say also that he did not possess sufficient legal knowledge subjectively to have accorded Lonnie North his constitutional rights, his substantive and procedural constitutional rights.

Q What legal issues would be involved in determining the guilt or innocence in this case and trying to apply the law to the facts?

MR. GOSS: What legal issues would be involved in this case? There were legal issues that were brought to the forefront in the actual trial itself, Mr. Chief Justice. Lonnie North, when he went into the courtroom, entered a plea of not guilty and demanded a trial by jury. The judge retired to an office in the next room for a few minutes. First, he said, "I will give you a jury trial if it takes me all night." He came back after having been in there for a while and said, "I just talked to the city prosecutor, and he tells me I do not have to give you a trial by jury. I am going to try you myself."

That, Mr. Chief Justice, was a decision of law in which he erred grievously, and that was one of the most

elementary propositions in Kentucky, that under the Kentucky Constitution, Section 11, this man was indeed entitled to a trial by jury.

Q Mr. Goss, before you proceed, does Kentucky require a law degree to be licensed to practice?

MR. GOSS: Mr. Justice Powell, it does. You have to have a law degree and you have to pass a bar examination and you have to be licensed.

Q That is fairly recent in terms of an absolute requirement, is it not, the law degree, within the last what--ten to twenty years?

MR. GOSS: Within my memory.

Other legal judgments that were required to be made, Mr. Chief Justice, were decisions that pertained to this man's constitutional rights. He was entatled to be represented by counsel at this hearing, but he did not have counsel.

Q Presumably a good many well trained, legally trained, judges have made that judgment also in recent times past, have they not?

MR. GOSS: Yes, indeed, and I think that they are still making that false assumption; according to a recent report done by the Boston University Law School, many judges are failing to implement the mandate in Argersinger v. Hamlin.

Q Then judgments so obtained would be subject to reversal on that ground, would they not?

MR. GOSS: Reversal on that ground, except that in Kentucky we do not have the review kind of process. We have the trial de novo process in Kentucky.

Q Even better, is it not?

MR. GOSS: That depends, Mr. Chief Justice, on your view of the matter. We read and took to heart the decision in this Court in Ward v. Monroeville in which it was stated, "...nor in any event may the state's trial court procedure be deemed constitutionally acceptable simply because a state eventually offers a man a constitutional trial. Petitioner is entitled to a fair trial in the first instance."

Q Can you not distinguish bias from lack of competence?

MR. GOSS: Yes, Mr. Justice Rehnquist, I can distinguish bias between lack of competence in this respect. Bias usually appertains in a case on a case-by-case basis, and competent pertains across the board in every case on which that person sits.

Q But you do not think that bias is a more serious infection in the process than lack of competence?

MR. GOSS: If I had my choice, Mr. Justice Rehnquist, between a biased judge and a judge who was unfamiliar with the law, I think I would be hard put to make the decision.

Q I will tell you, I would not be. We had justices of the peace in Phoenix where I practiced. We did not

require a law degree. Some were lawyers and some were laymen. And I think many members of the bar would have chosen the laymen to put their case to put their case before just because you could get a pretty competent layman for the salary. But all you could get was the bottom of the barrel so far as the lawyers were concerned.

MR. GOSS: It could present a problem.

Q I think it would present a problem if your view prevailed here.

MR. GOSS: I might say too that in Ward v. Monroeville, Mr. Chief Justice, that that was a case that involved a fine only. Here we are talking about a right which is considerably more fundamental than the right to protect your money and the right to protect your liberty.

Q As Mr. Justice Rehnquist pointed out, that case was dealing with bias, built-in partisanship of the judge, was it not?

MR. GOSS: Built-in partisanship of the judge, yes, it was, Mr. Chief Justice.

Q Because of his conflicting interests.

MR. GOSS: Financial bias was really the basis upon which that case was decided. But there is broad language in there, broad constitutional language, which would indicate that a man need not go through a star-chamber proceeding of the kind that Lonnie North had to go through in order to find

himself eventually in a constitutional court and a court which is able by training and experience and presided over by a judge capable of according him his rights. This judge did not advise Lonnie North of his right to be represented by counsel. He did not advise him of his right to a trial by jury.

As a matter of fact, he did not comply with any of the mandates of the Kentucky criminal code of procedure with respect to advising him of his various constitutional rights, because it says specifically that every accused will be advised of his right to a trial by jury, his right to counsel, of his right not to incriminate himself, of his right to confront the witnesses against him. None of these things were done.

And then when it came down to the trial process, the judge says, "I am going to try you myself," and as it turned out only one witness testified and that was the arresting officer. And it was obvious on the face of this record that this trial contained none of the virtues of a due process trial.

Q All you need to prevail on is the fairness of this particular trial.

MR. GOSS: We need to prevail on the fairness of this particular trial, and we need to prevail on the fairness of the trial to come, Mr. Justice White. If this case were reversed by this Court, I feel certain that under the laws of Kentucky, it would be sent back to Kentucky for retrial.

Q Are you suggesting that any trial whatsoever tried by a non-lawyer would fail to be a due process trial?

MR. GOSS: I am saying, Your Honor, that the probability of an unfair trial in a court presided over by a non-lawyer judge is so great--

Q So, you say yes.

MR. GOSS: I say yes.

Q You say it does not make any difference how otherwise well trained a person was. Suppose one of these judges had been on the bench for 20 or 30 years, had studied the law, had just never been admitted to practice, but as far as anybody knows he probably knows more about his business than the lawyers that appear before him. And you would suggest that your fears there should prevail and upset any conviction before a judge like that?

MR. GOSS: Mr. Justice White, I will say this, in 17 years of practice I have not found that judge. I have practiced before many magistrates, many justices of the peace that have been on the bench for longer periods than the period you suggested, and I never saw one yet that was able to conduct a fair trial, a constitutional trial in accordance with the Fourteenth Amendment and in accordance with the lawus of the Commonwealth of Kentucky.

Q And apparently you would say that is true no matter what the issue in any case was?

MR. GOSS: I think there may be cases--I think there may be cases, non-imprisonment cases.

Q Would you ever let one take a plea of guilty?

MR. GOSS: With proper training, perhaps yes.

Q Proper training--what do you mean by that? Do you mean as a lawyer?

MR. GOSS: On that one restricted point it might very well be that in terms of one particular point or in terms of performing one particular service that a person could be trained to adequately perform that service even though he were not a lawyer.

Q Would you say that would also be true where the plea is not guilty if the only issue in a case happened to be a particular kind of issue, like whether he was hurt or not and the fellow happened to be a doctor?

MR. GOSS: I would say, Mr. Justice White, that a criminal trial is a very, very complex matter. This Court has said that many, many times. It has said it in Powell v. Alabama--

Q Is a criminal trial always a very, very complex matter?

MR. GOSS: It depends, Your Honor, upon the participants in the trial. I would say that the trial is being conducted against the background of what could be a very complicated proceeding.

Q Mr. Goss, on the other hand, suppose the judge in

this case were a lawyer who had practiced probate law exclusively for 20 years and then he was made a magistrate; he would be all right.

MR. GOSS: Mr. Justice Marshall, I think that is right, under the standard that we are asking the Court to articulate in this case.

Q That is what you are asking us.

MR. GOSS: That is correct.

Q In contrast, if he had gone to Harvard College and had been first in his class and gone two years and seven months to the Harvard Law School and been first in his class, then had to leave for reasons of illness or never resumed the practice of law and therefore had never been admitted to the bar, he would be unqualified under your test.

MR. GOSS: Disqualified, yes, Mr. Justice Stewart.

Q Mr. Goss, if your client had been charged only with a misdemeanor that called for no prison sentence, would you be making the same argument?

MR. GOSS: If that had been the case, Mr. Justice Powell, I would not be here today.

Q Suppose your client were charged for the third time, say, with some traffic violation and the Kentucky law authorized the revocation of his license and the issue were whether he would be convicted and, if so, his license would be revoked.

MR. GOSS: I would regard that as principally a civil matter.

Q Right. You would draw the line where Argersinger--

MR. GOSS: We would draw the line exactly where Argersinger drew the line because we realize and understand that in this country there are over 50 million traffic cases heard every year, and there are so many misdemeanors on the books that never really result in imprisonment.

Q And yet if you were a traveling salesman and lost your driver's license, the sanction might be very much more serious for you than if you were confined to jail for a night or two.

MR. GOSS: I would say, Mr. Justice Powell, in a situation like that a trial de novo procedure might be adequate to protect the interests of the driver.

As I see this line of questioning, if I may be permitted to say this, the other trial participants in a criminal case are lawyers. I think that the trial court was described by the chief justice as a tripartite, consisting of three elements--the trial judge, defense counsel, and counsel for the prosecution. It is our contention that when one faction of this tripartite breaks down, then for all practical purposes you are dealing with an unconstitutional court.

Q The book did not say anything about the judge

being a licensed lawyer, did it?

MR. GOSS: That is correct, Mr. Chief Justice.

Q It does not really help you very much, does it?

Q Mr. Goss, enlighten me a little bit about the Kentucky system. You do have a second tier in the de novo trial that is available. Could Mr. North have peaded guilty and then demanded a jury trial in the second tier without the plea standing against him?

MR. GOSS: Yes, Mr. Justice White, he could have. That is de novo procedure.

Q So that in the de novo procedure he could have obtained everything, the lack of which is the basis of your complaint now.

MR. GOSS: That is correct.

Q Without going through a trial.

MR. GOSS: Without going through a trial.

Q But you would still make the same argument even if he had had a lawyer to advise him to plead guilty and take his de novo procedure?

MR. GOSS: Under that hypothetical situation, yes.

Q You said that you would let him plead guilty before an untrained judge.

MR. GOSS: If I said that, Mr. Justice White, I said it in error.

Q You did not say that; you said perhaps somebody

could be trained to take pleas of guilty.

MR. GOSS: Yes, Your Honor.

Q But this one was not.

MR. GOSS: This one was not.

I might say this, that on this whole issue of trial de novo there are some things involved that really turn on the question of fair trial. There are the economic disadvantages to a man in having to go through two trials instead of one, having to pay a lawyer twice.

Q I thought you just said he did not have to go through two trials, that he could plead guilty and go right up and have his de novo trial.

MR. GOSS: There has to be an appeal lodged in the circuit court from the lower court, which involves activities in the lower court, including the acquisition of a judgment, statement of trust, and bringing it into the circuit court and getting a bond and lodging the matter in the lawyer court, in the circuit court.

Q He can do it all in one stroke, can he not?

MR. GOSS: He can do it all in one stroke, that is correct. But our contention is and our question is, Why should he?

Q Could he bypass Judge Russell entirely in this case? "I do not want to have anything to do with your court. I want a de novo trial in the regular court."

MR. GOSS: Mr. Justice Blackmun, no, that is not an available procedure under the law.

Q He would have to file a plea of some kind?

MR. GOSS: He would have to file a plea of some kind. There would have to be a judgment of conviction, whether entered on a plea of guilty or following a trial before the de novo process could be invoked.

With respect to this whole idea of why a lawyer as opposed to a layman, I think if one starts with the premise that we are dealing here with two of the most fundamental rights that we enjoy as citizens, one being the right of a fair and impartial hearing, in the first instance, another the right to effective assistance of counsel, both of which are said to be by this Court very valuable fundamental rights, then determination must be made as to what is the best way to protect those rights. What kind of judge should you have on the bench? Should you have a judge who is familiar with the rules? Should he know what the Fourteenth Amendment provides? Judge Russell did not. should he know what the Kentucky rules of criminal procedure say or be at least nominally familiar with them? Judge Russell was not.

He was asked one question there in the course of this hearing if he knew why the decisions of the Court of Appeals of Kentucky were important in the administration of law. His response was very curious. He said, "I could say

misrepresentation of justice." I do not know what that means except that it means that he really did not know what he was talking about.

Q A good many people say that about appellate courts, including lawyers.

MR. GOSS: I do not think, Mr. Chief Justice, that is exactly what he meant. I think he was trying to tell us that he did not really know.

Q He did express a view about some of the decisions of this Court, I noticed, in the hearing.

MR. GOSS: Yes, Mr. Justice Stewart, he certainly did, saying he did not agree with most of them.

If you ask rhetorically why not have lawyers in these courts, then I think you really reach the crux of this case in terms of what I am trying to put across. As I said, the other people in the case, the other three parts of the tripartite, the other two parts are lawyers. Why not the judge? And should not the judge be the best trained participant in the criminal process?

The Sixth Amendment does not say anything about counsel having to be a licensed lawyer, but it has always been presumed that counsel must be a licensed lawyer.

Q In Argersinger itself, am I accurate in my recollection that the opinion suggested that counsel need not be a licensed lawyer for purposes of the Argersinger

requirement.

MR. GOSS: Yes, Mr. Justice Stewart, there is some suggestion in there. And I believe, as a matter of fact, that the Solicitor General made that suggestion in an amicus brief that he filed with the Court. I do not know how you are going to get around the state requirements of the state bar associations.

Q Am I right in my understanding that in many states those formerly very rigid requirements have been loosened up somewhat, at least to allow law students to participate in defense of indigent criminal defendants?

MR. GOSS: That is right. And they have in Kentucky also.

But there are such questions as, Do you adopt an objective standard or do you adopt some subjective standard? Do you put the benchmark here somewhere and you say this man has to at least be able to read and write his own name? Which you do not have to be able to do in Kentucky to be judge of a sixth class city.

Q I gather that under your judicial article, this court goes out of existence in '78, does it not?

MR. GOSS: In '78.

Q And is replaced by what?

MR. GOSS: By an all-lawyer court, a unified court system staffed wholly by lawyers.

Q This is a constitutional amendment, is it?

MR. GOSS: Constitutional amendment.

Q Is there not an exception to the statement you just made?

MR. GOSS: There is this exception, that if there are not available within the community lawyers with which to staff the district court, then lay persons may be called upon, assuming that they are properly qualified. But they have to be approved by the chief justice.

Q But they could not be. You would have the same objection to those laymen, would you not?

MR. GOSS: Yes, I would. I would have the same objection, and it certainly would not be an objection that would be hard to overcome in terms of implementation. There are circuit riding judges in various states in the union that could be utilized in situations of that kind.

On the other hand, if you adopt some subjective standard of judicial compentency such as has been suggested by the attorney general in his brief, then you get into the question of probing a person's knowledge. You have to ask yourself, What does he have to know? How do we find out how much he knows? And what kind of test do we promulgate to determine what his knowledge is? Which to us would be a very, very difficult thing to implement.

Q Could you not measure it by very objective

standards? Just what errors did he make? I gather in this case the judge made three or four or more very egregious and self-evident errors. So, obviously this conviction, if my understanding is correct--I understand it is conceded--then this conviction should have been vacated and was a nullity on the new trial.

MR. GOSS: We took it through the courts of Kentucky, Mr. Justice Stewart. We did not get anywhere with that argument. That is the reason why we are here today.

Q As I read it, you insisted on not bringing up that argument.

MR. GOSS: Yes, that is true. That is true.

Q You obviously did not get anywhere with something that you refused to embrace.

MR. GOSS: We had read the decision in Ward v. Monroeville and taken it to heart, and then I believe that this man is entitled to a fair trial in the first instance. We took the harder ground which led us to this Court today.

Q It was the harder ground in the sense that it was the one that you thought would take you here as distinguished from disposing of the case with much less difficulty for everyone involved. Is that not so?

MR. GOSS: It was a harder ground, Mr. Chief Justice, and was selected in that to us it accorded the kind of relief that ought to have been accorded in this case, to assure Lonnie

North that upon retrial he would be tried in a court presided over by a competent and lawfully trained judge.

Thank you, Mr. Chief Justice.

Q Could I ask you, suppose that the gentleman went to jail after being convicted by this untrained judge and he then went to federal habeas, would he have exhausted his state remedies if he had not appealed?

MR. GOSS: Mr. Justice White, that would be a very interesting question in view of the availability of trial de novo in Kentucky. I am just not that familiar with that particular kind of practice. I wish I could answer your question.

Q But apparently the Kentucky courts accepted this in a state habeas proceeding, accepted this issue, without requiring exhaustion of the appellate process.

MR. GOSS: That is correct. The appellate processes in so far as they provide for trial de novo.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Chenoweth.

ORAL ARGUMENT OF ROBERT L. CHENOWETH, ESQ.,

ON BEHALF OF THE APPELLEES

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

The position of the appellees today is that the Federal Constitution does not require that a defendant who is

accused of a criminal misdemeanor charge from which the possible punishment is imprisonment, that that individual need not be tried by a lawyer judge, that the Federal Constitution does not mandate that kind of requirement.

The Tenth Amendment of our Federal Constitution, the states have the right to establish their own judicial system, and the Commonwealth of Kentucky has adopted a judicial system that handles misdemeanor cases, minor criminal misdemeanor cases, and in part that criminal misdemeanor system utilizes non-lawyer judges.

We do not feel that in the Tenth Amendment there is any constitutional compulsion that a state adopt what might be considered an ideal system of the administration of justice. The fact that a judicial system has lawyer judges does not necessarily mean that they are good judges or that that is a good system or that a judicial system that has non-lawyer judges means that that is a bad judicial system. And the Commonwealth of Kentucky has in part adopted a system using non-lawyer judges.

The issue in this case is not whether the judicial power was constitutionally exercised by Judge C. B. Russell. It was not. The issue is whether that judicial power was constitutionally vested, and we believe that it was. We believe that judicial power may be constitutionally placed with a non-lawyer well in keeping with the requirements of due process

of law. Court proceedings are held for the very solemn purpose of ascertaining the truth. That seems to be the very heart of a fair trial, is the ascertainment of the truth. We readily agree that the Constitution and due process does require a fair trial in a fair tribunal. This Court has considered several times what is necessary for there to be a fair tribunal. The Court has said that the tribunal should be unbiased, that the tribunal should be neutral and detached-- Tumey, Ward, Moore v. Dempsey. In each of these cases there was something to taint the tribunal in terms of his biasness or his neutrality in considering the case.

But we believe that a non-lawyer can be unbiased, he can be neutral, he can be detached. This unbiased, neutral and detached non-lawyer judge can give a defendant a genuinely fair trial. It is a two-part thing. A fair trial and a fair tribunal. And we do not feel that the non-lawyer judge is prohibited by that status from being a fair tribunal, and that status neither prevents him from affording one accused of a criminal misdemeanor a fair trial.

A non-lawyer judge, it seems, can look at a case-- can look at a case in terms of ascertaining the truth against the standard that is required in a criminal case, the burden of beyond a reasonable doubt.

We believe that the non-lawyer judge can make independent judgments of the truth. There is no real

probability we feel that prejudice will result in a case that is handled by a non-lawyer judge. There is nothing to show that non-lawyer judges convict more frequently, are reversed more on appeal, or that they allow matters into evidence or otherwise handle a minor criminal misdemeanor case in a fashion that is any less than one handled by a lawyer judge.

Q You would not argue that a coal miner who has been on the bench for six months would be competent to decide what evidence was admissible, now would you?

MR. CHENOWETH: I do not believe--

Q Why do you not stick to the fact that in a magistrate's court those questions do not come up?

MR. CHENOWETH: You are absolutely correct, Your Honor. There are, I would say, probably cases where they would come up, but you are absolutely correct that we are looking at the minor criminal offense. We are talking about traffic violations. We are talking about other violations that more than likely would not come up. But I would not begin to say that the non-lawyer judge would necessarily know all of the evidentiary rules that a lawyer does, but I do not believe that that prevents the non-lawyer judge from giving the man a fair trial.

The real purpose, it seems, for due process in a criminal case is to give the accused an opportunity to defend, and we feel that when you do have a tripartite entity,

when you do have an attorney for the prosecution and you have an attorney for the defendant, that these two attorneys will be able to afford the individual accused of the opportunity to defend. The argument has been made that the right to a lawyer judge is required by the Sixth Amendment and specifically the right to counsel thereunder. But we believe strongly that this is not a right to counsel case.

The rights enumerated in the Sixth Amendment give the tools so that one can prepare an adequate defense in a court of law. It is a fundamental right to one accused of a criminal charge to make a defense. Due process says that he must have the opportunity to make that defense. The Sixth Amendment gives those standards that all criminal prosecutions must abide by in order to give that defendant an opportunity to defend.

Sure, he has a right to be informed of the accusation. He has the right to be confronted with the witnesses against him. He has the right to compulsory process for witnesses that would be in his favor. And he does have the right to assistance of counsel. But the rights of the Sixth Amendment, basic to our adversary system of criminal justice, do not have as a part of that bundle of rights to afford an accused the opportunity to defend the right--not part of that bundle of rights there is not existing--the right to a lawyer judge.

Q Certainly some of the most celebrated cases in

the Anglo-Saxon tradition have involved extraordinarily able counsel like Lord Brome in the divorce trial of Queen Caroline before the House of Lords, Burke in the impeachment of Warren Hastings before the House of Lords, and a situation where most of the House of Lords were not judges, have they not?

MR. CHENOWETH: I think that is absolutely correct, Mr. Justice Rehnquist, and this is our belief, that when you do have attorneys who are advocating both sides, that they will help marshal the evidence, they will overlook the proceedings of the other opposing counsel. They do and can require that there be regularity of the proceedings.

Q The Senate tried Samuel Chase 175 years ago, more or less. I suppose not all of the 26 senators from the 13 states were lawyers. Is that not so?

MR. CHENOWETH: I would certainly believe that that is correct. And I think that again we go to the purpose of those individuals sitting to consider those types of matters or to consider the ascertainment of the truth and that they do not have to be a lawyer judge to be able to make an ascertainment of the truth when matters are presented for them. They can fairly and impartially decide those matters as they are marshaled bedore the non-lawyer judge.

Q By coincidence, the presiding officer was a lawyer but the Vice President of the United States might not be a lawyer. The present Vice President is not. If an

executive officer or a judicial officer were tried in the Senate today, the presiding officer ruling on evidence would be a non-lawyer. Is that not so?

MR. CHENOWETH: That is correct, and that individual could surely make a fair and impartial consideration of that case and could ascertain the truth of the charges that he would need to consider. I feel very strongly that that type of proceeding is not in violation of the due process clause of the Fourteenth Amendment to our Federal Constitution.

Q Do you think our Shadwick decision helps your case?

MR. CHENOWETH: I would only say that I think that it recognizes the fact that there are matters that a non-lawyer judge or a non-lawyer individual can make. Here in that case, of course, we were talking about clerks, and they were making determinations of probable cause for warrants on municipal offenses. So, we are not really on square with that case. But in terms of reasoning I believe that we are because it is a recognition that non-lawyers can make decisions. Jurors every day are asked to make just significant decision of beyond a reasonable doubt, and that is a very tremendous burden placed upon these non-lawyer individuals.

Q This case when it was back in the highest court of Kentucky was just reaffirmed, I take it.

MR. CHENOWETH: Yes, as it was presented to our

Kentucky Court of Appeals the second time--and I take it you mean when it was remanded back to this court?

Q Your court said that any errors except the one that is at issue here had been waived or at least not pressed.

MR. CHENOWETH: They had not been presented, yes, Your Honor.

Q Would federal habeas still be open in this case either way it goes? Let us assume that you prevail on the issue here. Would federal habeas still be available, for example, to challenge the lack of a jury trial or a lawyer?

MR. CHENOWETH: I do not believe that the federal habeas corpus addresses itself to considering that kind of issue.

Q Which kind of issue?

MR. CHENOWETH: To addressing matters that are not the judicial errors that possibly were in the case. Here we may have a deliberate bypass.

Q So, what you are saying, unless it were a deliberate bypass, it would be open in federal habeas.

MR. CHENOWETH: I think that that is true. We argue in federal habeas corpus cases, however, that those matters that are known at the time at the time that lower actions are taken, that these do need to be raised, and that federal habeas corpus is no substitute for an appeal.

Q But at least as the case comes to us, I take it,

we ought to judge it as though there had not been any errors before the magistrate.

MR. CHENOWETH: As the case has been framed for this Court, I think that that is correct--

Q In any event, the only thing that is at issue is whether there is a jail term. The conviction is not at issue. It is the term, it is the sentence.

MR. CHENOWETH: It is the fact that imprisonment was part of the punishment meted in this case.

In our Kentucky system and nationwide, I do not believe there is any question but that a man is constitutionally entitled to an error-free trial. Judges who are lawyers make errors. The circuit judge who considered this case, the habeas corpus, he made an error in terms of whether or not a habeas was an available situation in the state, and it is not an available situation. And the Court of Appeals brought that out in the first consideration of this case.

So, there are errors that are made, and these errors are made by lawyer judges and non-lawyer judges. But with our system in Kentucky, with the two-tier system we presently have, with the courts of convenience, the police courts being one of them, we have also the general jurisdiction circuit courts, and judges are required to be attorneys in the circuit courts.

This Court of course had occasion to consider our

two-tier system in Kentucky in Colten v. Kentucky, and it was recognized that these inferior courts, as we refer to them in the Commonwealth, are designed to afford the speedier and less costly adjudications and that if the individual accused is unhappy with the decision that has occurred in the inferior court, that he has the unconditional right to take an appeal--although it is not really an appeal, it is a de novo consideration--to the circuit court where a judge is going to be presiding. There is no record. The judgment in the lower court is not considered. It does not get into the case at all in the circuit court.

Q Perhaps you have answered this indirectly, but under Kentucky law is there any place that this petitioner, if he fails here, could challenge or have reexamined the judgments on the basis of the lack of a jury trial or lack of a counsel?

MR. CHENOWETH: In our state system, Your Honor?

Q Yes.

MR. CHENOWETH: I do not believe so.

Q There is no statutory equivalent of habeas corpus?

MR. CHENOWETH: This case really evolves from a habeas corpus petition--

Q Yes, I know.

MR. CHENOWETH: --in the circuit court up to our Court of Appeals.

Q But you do not have something equivalent to the Federal 2255 for reduction of sentence?

MR. CHENOWETH: I really do not believe so. I have not considered as to whether they would have further redress in our state court system. We most surely have had this case before our highest state court.

Q Not if Judge Kelmore has anything to say about that.

MR. CHENOWETH: I think you are absolutely correct. He was quite unhappy with the developments that came with this case.

Q He was unhappy with your confession of error, I take it.

MR. CHENOWETH: Yes, sir, I think that is a very fair statement.

Q In Kentucky, as I understand it, cities of 20,000 or more do require judges to be lawyers.

MR. CHENOWETH: Yes, absolutely. We are talking about the first and second class cities, as our constitution breaks down by population size. So, we are talking about those cities that have greater than 20,000 people in them. State law does require the police court judge in the first and second class city to be lawyers. It is the third through sixth classes of cities, all the way from less than 20 down to less than 1000 people that we do not require.

Q Judges, whether they be lawyers or laymen, in all cities in Kentucky apply the same state law, I take it.

MR. CHENOWETH: Yes, this is true. The criminal law is all to be applied the same by all of them, and all fifth class cities--the law is applied the same in all the fifth class cities that exist in the state. This is stated in the section of our constitution classifying cities, in Section 156 where it talks about all the cities in a particular class, that their organization and their government, the same laws will apply to them.

Q Is there any reason other than convenience for drawing a distinction between the smaller and the larger cities?

MR. CHENOWETH: Yes, I believe that there very much is. We have, first of all, the consideration that obviously as an outgrowth of that smallness there is not going to be nearly the number of cases. We have part-time police court judges in these smaller cities, whereas in the larger cities they would be a full-time position.

In a small city, being in our rural parts of the state, the police court judges know the people in that small city. And the prosecutions usually are not that vigorous. There are differences in handling of the cases in a smaller class of city.

You also have just the very, very important factor

still existing in Kentucky that we have counties in the Commonwealth of Kentucky where there are very few attorneys, maybe only one or two or maybe only four or five, existing in some 24 of our 120 counties.

So, we do have a problem that I think you recognize in Argersinger that we still have in the Commonwealth of Kentucky, although the situation in Argersinger as far as the distribution of attorneys in the Commonwealth is quite different, we believe, in this case. In Argersinger the requirement of having an attorney for a criminal misdemeanor case--the fact that that attorney would come from a first class city and drive down the road 25 miles to a class of city, maybe a fifth or sixth class city, that was really very unimportant as long as that man helped the accused present his defense.

But we are talking about here the fact that, as our state has liked--and we, I think, the citizens of the Commonwealth want to have matters handled by one of their own, by residents. And we have residential requirements for police court judges. So, it is not the shuttling of an attorney from maybe where there are too many attorneys--in Louisville, Kentucky, for example--into a small community such as I live in with 4000 people and less than 10,000 people in the entire county, only 50 miles from Louisville.

Q Mr. Chenoweth, is the new district court going

to be countywide, or what is it going to be?

MR. CHENOWETH: The new district court with the judicial amendment, it will be patterned after the judicial districts as we now have with the circuit court, which is our court of general jurisdiction. We have the 120 counties in the Commonwealth divided up now in 55 circuit judicial districts. The district plan is to be placed on top of that.

The judicial amendment specifies that each county shall be entitled to a district court, and this is the problem we get into, at least a problem in terms of the way this case has been framed, is that we do have multi-county judicial districts, and there will be multi-county district court districts. And the new amendment to our Kentucky Constitution would say that each county is entitled to a district court. And the county in which the district court judge does not reside, he shall appoint a trial commissioner. That section of the new amendment goes on further to say that the trial commissioner shall be an attorney if one is available and qualified.

So, again we are back to the same situation much as we find ourself before. If every county is going to be required to have a district court and there maybe is only one or two attorneys in the entire county, one of these is probably going to be the county attorney, one of them is going to be possibly involved in the commonwealth attorney's

office or some other manner such that he could not be--obviously he could not be a judge.

Q But the appointment of the trial commissioner will be by a district judge in the first instance?

MR. CHENOWETH: The district judge has the power of appointing the trial commissioner--

Q I gather though that if he appoints a layman, the layman has to be approved by the chief justice of the Court of Appeals; is that it?

MR. CHENOWETH: I cannot really say that. There are so many things that have not been addressed with this. The General Assembly of course is going to have to meet and put some flesh on these bones that are in our amendment, and of course our new State Supreme Court chief justice, he is given quite a little bit of authority and he has a lot of decision making to make in the next couple--

Q What if a defendant with no money wants to plead guilty and appeal and get a trial de novo; has he got a problem on his hands? Is there some fee involved?

MR. CHENOWETH: I do not believe so. If he wants to plead guilty, he can, and he will go right to the circuit court.

Q What does it cost him?

MR. CHENOWETH: I do not know the cost of that, that it would take him to take his case from the police court

to--

Q My question is, Were there any substantial barriers to his securing a constitutional trial, even assuming that the layman is incompetent?

MR. CHENOWETH: I do not know the cost figure, but we do have--and I believe that the statute KRS 26.010 that sets up the police courts, it gives the police courts concurrent jurisdiction with the circuit court, the court of general jurisdiction that has a lawyer judge.

I believe that the individual who is accused in police court, he can ask that that case be initially brought in the circuit court.

Q But he has no right to it.

MR. CHENOWETH: I believe that he does.

Q You and your colleague then differ.

MR. CHENOWETH: Yes, that is correct. I believe that the statute is that there is concurrent jurisdiction.

Q Let us assume that there is not, that he would have to be either tried and found guilty or plead guilty. Then my question is--which apparently you do not know the answer to--how difficult it is for him financially to have a trial de novo.

MR. CHENOWETH: I cannot really tell you how difficult it is, Mr. Justice White.

There has been raised the equal protection argument

in this case, but we do not feel that there is an equal protection argument in this case, which in part we have talked about already in this argument. And that is that our classification is a classification of cities, and the police courts are incidental to that constitutional clasiification of cities. All individuals who proceed through a court in a particular class of city, have the same situation, is going to be treated the same. He is going to be faced with that non-lawyer judge, if that is the situation.

So, we have I think here clearly a situation that has been recognized, that the equal protection clause protects the people; and it does not necessarily go to a geographical area, at least not in looking at situations as we have here, which have to be recognized as being significantly different from the situation dealing with the right to vote, for example, where you do not necessarily look at geography but everyone's vote should count the same nationwide.

We believe again that the Federal Constitution does not explicitly require and that there is no implicit guarantee that an individual who is accused of a criminal misdemeanor case for which imprisonment is a possibility, that the constitution requires that that case be heard by a lawyer judge. We believe that the non-lawyer judge can in the truth and fact-finding adversary process, that he can make a fair decision. And if he is not biased and if he is

neutral and detached, that he will in keeping with the due process have a fair trial in a fair tribunal.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:35 o'clock p.m. the case was submitted.]

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