In the

Supreme Court of the United States

RICHARD I. LUDWIG,

Appellant,

v.

MASSACHUSETTS,

Appellee.

No. 75-377

Washington, D.C.
April 28, 1976

Pages 1 thru 53

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

.nks

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD I. LUDWIG,

Appellant,

v. No. 75-377

MASSACHUSETTS,

Appellee.

Washington, D. C.,

Wednesday, April 28, 1976.

The above-entitled matter came on for argument at 10:36 o'clock, a.m.

BEFORE:

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

APPEARANCES:

ROBERT W. HAGOPIAN, ESQ., Wrentham, Mass. 02093;
on behalf of the Appellant.

JOHN J. IRWIN, JR., ESQ., Assistant Attorney General of Massachusetts, Chief, Criminal Bureau, One Ashburton Place, Boston, Massachusetts 02108;
on behalf of the Appellee.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 75-377, Ludwig against Massachusetts.

Mr. Hagopian.

ORAL ARGUMENT OF ROBERT W. HAGOPIAN, ESQ.,

ON BEHALF OF THE APPELLANT

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

The basic underlying issue in the merits of this case is whether a defendant in a criminal proceeding has a right to a trial by jury when he's charged upon an offense in which he faces a maximum prison sentence in excess of six months.

In the instant case, the defendant, Richard Ludwig, was denied a right for trial by jury in the first instance, and he was convicted in the first tier of the Massachusetts court system, and he took an appeal -- whatever that word might mean -- to the second tier in the Massachusetts system.

At that time he presented a motion to dismiss, based on the grounds of double jeopardy, and also on the grounds that his first trial was an error, that there were errors in the first trial. I don't know what type of motion to dismiss that is, but, leaving that aside, that's what Massachusetts calls it, some sort of a motion to dismiss.

In the second-tier proceedings, he waived his right

for a trial by jury and that was on my advice as counsel to prevent a mootness issue from arising. That decision took place prior to this Court's decision in Costarelli vs. Massachusetts, and I exercised my best judgment as to what I thought the state of the law was at that time.

Ludwig was convicted by a judge; eventually took an appeal to the Massachusetts Supreme Judicial Court, which took the position that he was not entitled to a trial by jury in the first instance. That this Court had not made that clear in Duncan vs. Louisiana and subsequent decisions; they alleged that the state of the law is in a flux.

They did not apply the Fourteenth Amendment in the absence of any prior decisions by this Court.

This case comes here on appeal, and although the Commonwealth has not raised it, I think that there is somewhat of a problem in the jurisdiction of this Court. At least in view of Costarelli, in a certain sense, when Mr. Ludwig took an appeal from the first tier to the second tier, he vacated the judgment.

Now, let me see if I can draw an analogy here which will make it a little bit clearer, what I'm talking about.

In a single-tier system --

QUESTION: At that point, at the first tier, if there were conviction and a sentence of imprisonment imposed, and then a man took it on appeal, does he go to prison --

MR. HAGOPIAN: No, he doesn't. It's vacated automatically as a matter of law. The judgment is vacated.

But that's subject to several limitations. One is this: he also may lose his license, which is in Ludwig's case.

Now, I would suppose that that's not part of the judgment, in the sense that the judge doesn't write down on the complaint; but the statute says whoever is convicted down in the district court, the clerk of the court sends a notice to the registry, and the registry yanks his license.

To me that's part of the judgment. It's a criminal punishment to be imposed upon him.

QUESTION: Yes, but the judgment doesn't exist any more.

MR. HAGOPIAN: But his revocation exists, of his license. That is in effect. And that is a penalty that's being imposed because he's convicted of a criminal offense. That's not a civil sanction, it's a criminal sanction.

QUESTION: But he hasn't been convicted if it's set aside.

QUESTION: Well, whatever the theory may be, the law of Massachusetts is that even after it's set aside his license is revoked; is that what you're telling us?

MR. HAGOPIAN: That's quite correct. And it's because of -- it arises out of the criminal offense. It's

not a civil sanction, it's a penalty that's imposed.

If you read Boyd vs. United States, and those forfeiture cases, where they also take the forfeit of goods, of an automobile, because it's been used in a heroin case.

QUESTION: Well, without reading anything, you're telling us that the law of Massachusetts is that a conviction in the district court, even after it's set aside, has -- in a driving case of this kind -- has the collateral consequence of depriving a person of his driver's license?

MR. HAGOPIAN: That's correct. There's no question about that.

QUESTION: Is there a Massachusetts decision to that effect?

MR. HAGOPIAN: Yes, there is.

QUESTION: It's in your brief?

MR. HAGOPIAN: No, it is not in my brief.

QUESTION: Could you give us the citation?

MR. HAGOPIAN: Yes. It's Boyd and Whitmarsh vs. the Registrar of Motor Vehicles; and I don't have the citation, but I will say that I raised the same issue in the federal district court in a case called Omeda vs. Massachusetts, and this Court affirmed that decision.

I must confess, in that --

QUESTION: Is that the Whitmarsh case that was cited in Costarelli?

MR. HAGOPIAN: Yes, it is, Your Honor.

QUESTION: No.

MR. HAGOPIAN: No, wait a minute, I take that back; there were two Whitmarsh decisions. The first Whitmarsh decision, which was cited in the Costarelli brief is the one on the trial de novo issue itself.

QUESTION: No, I'm referring to the Whitmarsh decision as cited in our opinion.

MR. HAGOPIAN: Yes. It --

QUESTION: I've got it, 316 N.E. 2d 610.

MR. HAGOPIAN: No, there was another Whitmarsh decision, Your Honor, that was against the Registrar of Motor Vehicles. That Whitmarsh decision, which was cited by this Court in Costarelli, involved an aspect of just the criminal aspects of it. We had a separate case going on against the Registrar, see.

QUESTION: You don't have the citation of the other one?

MR. HAGOPIAN: I don't, Your Honor, but we'll furnish that subsequently.

MR. CHIEF JUSTICE BURGER: Just supply it to the Clerk.

QUESTION: Did the Supreme Court of Massachusetts say that a man's driving license can be taken for a conviction that has been completely nullified?

MR. HAGOPIAN: Yes, absolutely and unequivocally. And what's worse is the statute says that once he is -- if he's acquitted in the second --

QUESTION: I'm not talking about the statute, I'm talking about what the Court said.

MR. HAGOPIAN: Yes, absolutely and unequivocally, Your Honor.

There is no question and no doubt about that. That is black level law in Massachusetts, if there is such a thing.

And the statute also provides that after he's convicted, if he's acquitted in the second tier, the Registrar gives him back his license as a matter of discretion; now, as a matter of administrative procedure, it's automatic, the minute he's acquitted in the second tier he gets his license back.

So, you see, what's happened is they have imposed a punishment on him for the price of a trial by jury. And that not only applies to license revocation, but also applies to probation revocation; and that issue is now before the Massachusetts Supreme Judicial Court.

Well, what usually happens in these cases, when a fellow is on probation, he gets -- and he's convicted of a subsequent offense in the district court, and he alleges a trial de novo, they yank his probation.

QUESTION: Of course, if Massachusetts wanted to suspend -- if the Motor Vehicle Registrar wanted to suspend his driver's license and not impose any criminal sanction, they wouldn't have to afford a jury trial for that, would they?

MR. HAGOPIAN: Well, I'm not too sure about that, Mr. Justice Rehnquist. There's one State court in the United States, in a case I've cited in my brief, that holds that they do.

You see, the reason is that it depends upon why they yanked his license. If it is because he commits a criminal offense as defined by a statute in the State Code, then I'm not so sure that the burden must be beyond a reasonable doubt.

Whether, the jury trial issue gets in there is another matter.

QUESTION: Well, what if Massachusetts simply says that not only is driving while drinking, or whatever your client may have been charged with, a criminal offense, but it is also a basis for revoking one driver's license; and if the Motor Vehicle Registrar thinks there's reason to believe that has happened, he will hold a hearing the way he holds other administrative hearings, without any jury, and, to suspend, he simply needs to find probable cause that it happened. Anything wrong with that, constitutionally?

MR. HAGOPIAN: Well, I would say there would be nothing wrong with that, at least if the hearing was to determine his competency on the road. There are State court decisions which hold that where the revocation is purely as a penalty for committing the criminal offense, whether that's road related or not, then he's entitled to all the criminal rights that a criminal defendant has.

Now, there's one case I've cited in my brief, up in the State of Alaska, and they have held squarely that he's entitled to a trial by jury if you're going to yank a man's license for a year. Because that period of time is such a lengthy period of time, and that's such a penalty, that he's entitled to it.

And right in this District here, the District of Columbia vs. Colts, of course there was a fine imposed and I think there was a maximum prison sentence of two months. But they talk about, in District of Columbia vs. Colts, that that is a penalty in the context that it's being revoked.

Now, I understand what you're saying, but there are a number of similar cases. I think three or four years ago there was a case called One Lot Emerald Stones, which involved this issue. I think that was a forfeiture case.

Now, I suppose in these forfeiture proceedings they can be civil in nature, and only the civil burdens are required of the government. But where that imposed in Boyd,

in the Plymouth car case -- and I've cited those in my brief -- there are cases in this Court that hold that you must afford the accused criminal protection, or his criminal rights in these types of situations.

One of these cases is One Lot Stones vs. United States. There's a footnote in that -- I believe Mr. Chief Justice wrote that opinion. And the other one is One 1958 Plymouth Sedan vs. Pennsylvania, and Boyd vs. United States.

Now, I've also cited on pages 50 and 51 the Alaska -- decision of the Alaska Supreme Court on this particular issue.

But getting back to the jurisdictional issue again, let us take the single tier system. If a man is convicted in the single tier system, at the end of the trial he has the option -- he may or the State may afford him -- to grant him a new trial. He may make a motion for a new trial.

The minute he makes that motion for new trial and it's granted, he doesn't have any right to complain about what's happened before in the first trial.

And the de novo procedure is in the same sense. The fellow has an option to elect a trial de novo. Let's assume -- there are many jurisdictions, I think there are 16 jurisdictions in the United States where you can get a jury trial in either the first tier or the second tier.

Now, at the end of the first tier, a fellow has that

option to get another trial de novo by jury or by judge, he doesn't have to exercise that option. And to me if the State doesn't grant him the right of appellate review at that stage of the proceedings, he has a right to come to this Court, in the United States Supreme Court, either by appeal or certiorari, or he may go over to the federal district court by habeas corpus, or, if a fine is imposed, he may go over, perhaps, under the Civil Rights Act.

I have a case where a fellow did not want to go to the second trial.

QUESTION: Well, didn't Costarelli last year cast some doubt on your proposition?

MR. HAGOPIAN: Well, in that case, Costarelli exercised his right for trial in the second tier. But I have cases where a fellow in the Cambridge district court was convicted and fined $65 for larceny. Instead of going for a trial de novo, we walked over to the federal district court, under the Civil Rights Act, even though a fine was only imposed, and seeking a collateral attack on that first tier conviction.

I think he's entitled to federal review of that conviction, without going through the second trial. In a sense, that's the whole basis of the merits of this case. That an accused doesn't have to go through two trials. He has a right -- he should have the right to have a trial that

comports with the Constitution in the first instance. And he should have a right for appellate review in the federal court, if the State does not grant him appellate review at that stage of the proceedings.

QUESTION: In your Massachusetts system, is he able to stand aside at the first tier? As was the case in Kentucky, in Colten v. Kentucky?

MR. HAGOPIAN: No, he can't.

QUESTION: What does he do?

MR. HAGOPIAN: The most he can do is just sit with his counsel, the government will put on their witnesses; he can -- there is an informal procedure, that's not statutory, what's known as submitting to informal admissions of facts. Which means that you're not really going to contest the trial, you'll allow hearsay to go on. The government still puts its parade of witnesses on. But it's a means of speeding up the first tier trial. But he's still convicted if found guilty. But there's no way of by-passing that at all.

QUESTION: So he finds out what the government's case is, just by keeping quiet, if he wants to? Can't he waive appearance at all, and --

MR. HAGOPIAN: Well, that has a certain amount of danger, Mr. Justice Blackmun, because that testimony -- and that's what happened in Whitmarsh, the chief witness, the

police officer, against Whitmarsh died subsequent to the first trial. And then when the second trial came up, they wanted to try Whitmarsh again and introduce his testimony, the police chief officer's testimony from the first trial. And if you don't attack his credibility when you're cross-examining him in the first trial, that evidence can be used against you in the second trial. So that there's a certain amount of risk --

QUESTION: Well, that's true of a preliminary hearing, too. Your preliminary hearing doesn't give you a jury.

MR. HAGOPIAN: Yes, I know that, Mr. Justice Rehnquist.

QUESTION: What was the fine imposed at the first trial here?

MR. HAGOPIAN: Twenty dollars, Your Honor.

QUESTION: No prison --

MR. HAGOPIAN: No, no prison sentence involved in the case.

Fundamentally, on the merits of the case, Mr. Chief Justice, on the issue of a right to trial by jury, I think that the issue is a very simple issue. It is that there is no reason at all to justify why Massachusetts has the right to take this man's right to trial by jury away from him than there is his right to cross-examine witnesses,

his right not to self-incriminate himself, his right to counsel. I mean, why can't Massachusetts take those rights away from him and say, hey, we'll give him a second trial de novo, and we'll cure all these defects?

I mean, that argument was in Ward vs. Village of Monroeville, or the Mayor of Monroeville; and I just -- I don't -- I can't distinguish why the right for trial by jury should be any different than any other fundamental right.

It's true we have a six-month demarcation line, but that comes out of historical origin, but there's no historical origin to justify the trial de novo system in England at the time that this country was founded, there was trial de novo, bench trials; and you'll find that in the Colonies, in Massachusetts; but there are extremely few Colonies or States that ever had a trial de novo system of jury trial system as opposed to bench trial system at the time the Constitution was framed.

That basically is the fundamental issue in the case, Your Honor, and I submit that --

QUESTION: Well, it really boils down to the question of whether the rule of Duncan v. Louisiana embraces the doctrine of Callan v. Wilson.

MR. HAGOPIAN: Well, I think that's true, but I wouldn't rest entirely on that, Mr. Justice Stewart.

Let's assume that Callan vs. Wilson never came about to be. I think it's --

QUESTION: Well, you certainly -- I hope you're not going to throw that case aside.

MR. HAGOPIAN: Oh, no, certainly, Your Honor, I agree with -- I agree that that case was decided in this Court here.

QUESTION: That's far and away your best support on the merits, isn't it?

MR. HAGOPIAN: Yes, itis, Your Honor.

Basically. But the underlying basis of that case is that the defendant in that case was deprived of due process. And that's what basically the arguments, the bedrock of Callan is, that he -- in fact, Mr. Justice Harlan, in his words, said that the defendant should not have to suffer the burdens of two trials. And that that is the bedrock of Callan.

I would also like to say, I'm not saying we should do away with trial de novo; all I want is the accused to have that right to have the option for jury trial in the first instance. And that isn't going to affect Massachusetts. I don't believe that the compelling interest doctrine should apply to this case, but even if you do apply it to this case, Massachusetts can easily give the defendant the option. There are very few defendants that are going to exercise that

option.

There are certain instances where that option will always be exercised, but in those type of cases the fellow is almost inevitably going to take the right for a trial de novo anyway.

There are cases, if you do give them the option, there will be a slight increase, perhaps very infinitesimal, in the number of jury trials, but it's only going to be in those cases where the fellow has been deterred originally by the de novo system. And I don't think that the Commonwealth has any right to complain about that end result.

So, in effect, what I'm simply asking here is that the accused have the option to go to the jury first, and I don't understand why Massachusetts should complain about that issue.

I'd like to reserve the rest of my time.

QUESTION: Could I ask you a question?

MR. HAGOPIAN: Yes.

QUESTION: Suppose a man goes into trial at the first tier unrepresented by counsel.

MR. HAGOPIAN: Yes.

QUESTION: And he's convicted. Is he advised as a routine matter in your Massachusetts system that he has a right to appeal it?

MR. HAGOPIAN: Yes. He doesn't -- they don't

advise him he has a right to a jury trial, they say: You have a right of appeal.

And all these convictions where a fellow doesn't exercise his appeal, if you look at the record, on the face of the record, nowhere has he waived his right for a trial by jury.

He has failed to appeal, whatever that term may mean. But there's nothing on the face of the record to show that he's waived his right to trial by jury. And I have cases in the federal district court where prisoners have been released from the Massachusetts first-tier system simply because there is nothing -- even if you sustain or agree with the de novo concept -- there is nothing on the face of the record to show that he has waived his right for trial by jury.

QUESTION: One other question. You mentioned the Callan case. Is one reason that you're not resting on it entirely the fact that it was an Article IV case?

MR. HAGOPIAN: Well, yes, Your Honor. But the principle underneath Callan is very simple, it's a deprivation of due process, it's a burden. The defendant -- why should he have to go through two trials? Not only to get what he's entitled to in the first instance. Likewise, why should he have to go through two trials before he has the right to federal review? The jurisdictional issue is --

QUESTION: Well, what you're saying is that you're relying on the Fourteenth Amendment, --

MR. HAGOPIAN: Yes, Your Honor.

QUESTION: -- whereas in Callan they relied on Article IV.

MR. HAGOPIAN: Yes.

QUESTION: Well, Callan, I notice, does mention those Massachusetts early cases --

MR. HAGOPIAN: Yes, it does.

QUESTION: -- do you think the Court's opinion really expressly disapproved them, or just kind of puts them to one side?

MR. HAGOPIAN: Well, Justice Harlan in that case said he wouldn't follow it. He didn't say why he wouldn't follow it, he disapproved of it. But the decision is not all that clear as to what his reasoning is.

But you get into this problem of what is required in the federal system as opposed to what is required in the States. And I think -- you know, Harlan didn't obviously address himself to that issue.

QUESTION: He didn't have to.

MR. HAGOPIAN: No, that's right, he didn't have to. And, of course, that's the problem.

But, underneath -- the bedrock of that case is very simple, and Harlan expressed it. The man shouldn't have to

go through twice what he's entitled to in the first instance. And that's the bedrock of that decision. It seems to me that sounds under the Fourteenth Amendment, in due process.

QUESTION: Of course, Article IV says that he's entitled to a jury trial.

MR. HAGOPIAN: Yes, Your Honor, and of course that -- he's interpreting that to -- as to what that meant. And I suppose in the Sixth Amendment -- and he, in a sense -- Callan also interprets what was in the Sixth Amendment, too. The words in the Massachusetts Constitution are almost identical or equivalent, that's what Chief Justice Shaw said in the Massachusetts case, he said it's the same thing as interpreting the Sixth Amendment.

But Chief Justice Shaw also does not show any historical basis for sustaining his decision.

And I don't believe that there is historical basis to sustain the de novo procedure.

QUESTION: What is your -- what precisely -- what is the constitutional provision you're relying on?

MR. HAGOPIAN: I rely on the Fourteenth Amendment, Your Honor.

QUESTION: But are you relying on the right to jury trial as incorporated?

MR. HAGOPIAN: Yes, Your Honor.

QUESTION: And nothing else?

MR. HAGOPIAN: And also fundamentally due process. I think the fundamental issue of due process.

QUESTION: Well, which is it? Both of them?

MR. HAGOPIAN: Yes, Your Honor, both of them.

QUESTION: And also, at least in your brief, a double jeopardy claim?

MR. HAGOPIAN: Yes, there is the double jeopardy issue, and the double jeopardy issue, Your Honor, is a very simple issue. It is that you can't force the man to go through two trials, to jump the hoop twice. That's exactly what double jeopardy is.

When the -- the double jeopardy provision limits the government to a single proceeding, that means a single proceeding that comports with constitutional standards. I don't see how that the double jeopardy clause can be read any other way. I mean that's the whole underlying basis of the double jeopardy clause.

QUESTION: I suppose Colten v. Kentucky is against you on that one, isn't it?

MR. HAGOPIAN: No, it isn't, Your Honor, because in Colten vs. Kentucky the man had a right to a jury trial in the first instance in Colten; he waived that right in Colten.

I also have a summary of the de novo procedures in 30 jurisdictions, that was prepared, not by myself, but if

the Court would like this; just briefly, there are 30 jurisdictions, 16 of them allow a jury trial in the first tier or the second tier; one jurisdiction allows a jury trial in either one tier or the other, you take your pick; and the 13 remaining jurisdictions, in those you cannot get a jury trial in 7 of them in the first instance, in 6 of them you have a right to bypass the first tier trial and go directly to a jury trial in the second tier trial.

If the Court would like, I'd be glad to submit all the statutes in the 30 jurisdictions.

QUESTION: Have those been published anywhere?

MR. HAGOPIAN: They are not, Your Honor.

There is something by the National State Courts, but it's nowhere near as comprehensive as this.

I submit it for your information purposes.

MR. CHIEF JUSTICE BURGER: Will you lodge that with the Clerk, and give it to your friend?

MR. HAGOPIAN: He has a copy of it; I supplied it.

QUESTION: Now, when you went to the second tier, you did not want a jury, is that correct?

MR. HAGOPIAN: That's correct, Your Honor. I didn't want it. I didn't want to moot up the issue. And I thought that if we -- after a jury trial, that if he was convicted, there would be nothing to complain about. And if he was found innocent, that would have been the end of the

matter.

That was just a decision based on the law at the time. The government never raised --

QUESTION: Are you suggesting you were afraid you might win in the second tier?

MR. HAGOPIAN: No.

[Laughter.]

QUESTION: It sounded like it.

MR. HAGOPIAN: You mean before a jury?

QUESTION: Yes.

MR. HAGOPIAN: Well, I don't know, Your Honor -- that gets us back to things that are not on the face of the record.

QUESTION: What's at issue, twenty dollars?

MR. HAGOPIAN: Yes, Your Honor; twenty dollars is at issue.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Irwin.

ORAL ARGUMENT OF JOHN J. IRWIN, JR., ESQ.,

ON BEHALF OF THE APPELLEE

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

On behalf of the Commonwealth of Massachusetts, I think that in a preliminary way I would like to outline the

-- probably in an overview fashion -- the course I hope to pursue in my argument.

I would first touch on a jurisdictional situation that I think is appropriate to bring before this Court. I then would proceed to a discussion of what, at least in the judgment of the Commonwealth, the Massachusetts court said in the Ludwig decision. I would then try to impress upon the Court what we conceive to be the notion of de novo procedure in Massachusetts, and what it's all about.

Thereafter, try to evaluate that particular procedure in the light of what this Court said in Duncan v. Louisiana. Stating at least minimally that our position is that Duncan v. Louisiana stated a right to trial by jury rather than a mode.

Then trying to establish to the Court what the mode of delivery of that right is in Massachusetts.

And whether or not it fulfills the basic concept -- constitutional concept of jury trial, as has been enunciated by this Court.

And finally, hopefully to discuss the double jeopardy considerations.

Proceeding on that outline, I would like, first of all, in a jurisdictional way to ask this Court to consider that the record before it constitutes a petition for certiorari, rather than an appeal.

The Commonwealth does that, fully knowing that we

have not briefed it. But in preparing for this particular argument, I was referenced to the decision of this Court in Costarelli, where this subject matter was raised by a footnote, and also in reviewing the brief of the Commonwealth in the Costarelli case, it was footnoted there.

I think it is significant, and I would suggest to the Court that it regard this procedure or this review as certiorari rather than appeal for the following reasons:

Section 2, which is used by the Appellant to invoke the jurisdiction of this Court, I think quite clearly suggests that a statute has to have been put in issue before the State court, allegedly repugnant to the Constitution, which statute was decided in favor of the Commonwealth or in favor of the State at the highest court possible for the defendant or for the appellant to have a judgment.

I regard that as being construed, or that word "statute" being construed literally. I would respectfully suggest to the Court that what is in issue here really is an assertion of a right that is, I suppose, comprised out of a procedure in Massachusetts that has evolved, at least arguably, over a period of two centuries at least, and probably three centuries.

In that extent -- to that extent, what he is doing is asserting a right under Section 3, and therefore, if the Court agrees that certiorari is the appropriate way in which

this Court has review, I would further suggest to the Court that it has broad jurisdiction or discretional jurisdiction in whether or not it would in fact grant that particular writ.

And having in mind the scope of the relief that the appellant seeks here, it would seem to me appropriate that this Court have before it a much broader detailed record, dealing with the issues that he claims deprives him of a constitutional right of jury trial, and, absent that, the Court would deny his application for writ of certiorari.

QUESTION: And you say the reason this isn't properly an appeal is because the challenge is not to the Massachusetts statute, but to the custom and practice following in the Massachusetts court system?

MR. IRWIN: Yes, it is -- that is primarily the reason that I assert, Mr. Justice Rehnquist. I would suggest that there is no statute in Massachusetts that says specifically that in a first tier situation a defendant has no right to a trial by jury. I think that has developed historically.

QUESTION: But it is -- it's well-settled Massachusetts law, as a matter of judicial construction of the statute, is it not?

MR. IRWIN: Yes, it is, Mr. Justice Stewart.

QUESTION: Well, then, that's what the statute means, because that's what the Massachusetts courts have said that it

means. Wouldn't that follow?

MR. IRWIN: I would suggest it does follow.

I think what I'm suggesting is that he is, under Section 3, asserting more of a right rather than a statutory situation, and that therefore the Court, I suppose just in terms of oddly appellate procedures, should construe that statute very literally.

QUESTION: Of course, it's not up to us to construe the statute; that's been done for us by the Massachusetts court, and which has made it very clear that there is no right to a jury trial at the first tier.

MR. IRWIN: That's right.

QUESTION: But your position is the reason that they've made it clear is not because of any provision of the statute, but because of their own ruling as to the right of jury trial in Massachusetts trial courts?

MR. IRWIN: That's exactly right, Mr. Justice Rehnquist.

Proceeding along to analysis of what the Massachusetts court did in the Ludwig case, which is the case before this Court, I think it's safe to say, or fair to say that the court simply reaffirmed its judgment in the case of Commonwealth vs. Whitmarsh; and I think that probably a succinct analysis of that decision would be that the Massachusetts court said that its de novo trial procedure, as outlined here

before this Court, at least partially outlined here before this Court, is in fact a constitutionally permissible mode of jury trial, in the light of the Duncan v. Louisiana case. I think the Massachusetts court arguably went one step further and said that it regarded Duncan v. Louisiana not as setting forth an absolute right to trial by jury with all of the appendages, if you want to put it that way, of the federal system, but as establishing a right rather than a mode.

And that in order for us to determine here today whether or not the mode that Massachusetts applies is constitutionally valid, it seems to me that we have to examine, to a great extent, the mechanics or the definition, if you want, of the Massachusetts de novo procedure.

Very briefly, there are four levels of courts in Massachusetts which deal with criminal cases. There are the district courts, they are 73 in number, they are geographically located throughout the Commonwealth of Massachusetts. They are, in their composition, I suppose, rural, urban and suburban. Some of them have several criminal sessions. That 73 includes also the Boston Municipal Court.

Its jurisdiction in criminal cases is covered by Chapter 218 Section 4 of the Massachusetts General Laws, which covers really all misdemeanors and certain felonies punishable by up to five years' imprisonment. Although I think it should be noted that district court judges at that

first tier level, if they take jurisdiction, in terms of a felony involving possible punishment up to five years' imprisonment, the district court judge cannot sentence to the Massachusetts State Prison, he can only sentence to the House of Corrections.

And obviously there are no juries at that particular level.

The Superior Court is the court which I suppose is most adequately described as our great trial court, it has original jurisdiction in all criminal cases. It serves as an appeal court for the cases coming out of the district court. There is somewhat of an interposition, approximately eleven years ago, of a six-man jury trial where, on appeal from the district court, what you can in effect do is waive your 12-man jury trial in the Superior Court and opt for a six-man jury trial. So probably the six-man jury is better described as being in, for the purposes of our discussion, the appeal level or the Superior Court type of level.

QUESTION: Is there a Superior Court in every county in Massachusetts?

MR. IRWIN: Yes, there is, Mr. Justice Stewart. We have 14 counties in Massachusetts, and we have Superior Court that covers all those counties.

QUESTION: Some of them being multi-judge, of course, and some being maybe a single judge?

MR. IRWIN: That's right.

We have 46 justices on the court, in the Superior Court. They sit on circuit, usually month-to-month, different assignments in different counties.

Beyond that, in terms of getting appellate review of cases that are tried in those two tiers, we have just recently, three years ago, enacted legislation which gives us an intermediate appellate court, which, in the first instance, I suppose, reviews all criminal cases except for some very specific exceptions; those would be first-degree murder cases, cases in which the punishment being imposed in the trial was life or death -- I mean life imprisonment or death; and a situation, ironically, where you can get a direct appeal from a six-man jury verdict to the Supreme Judicial Court.

Our Supreme Judicial Court, of course, is the court of last resort, and that is the court that decided the issue in Ludwig here, before us.

I think the next thing that we should consider is that in the context of that particular structure of judicial dealing with criminal cases, what happens at the first tier. And I think that Mr. Justice Blackmun raised a very pertinent point, when he asked, I think in connection -- probably having in mind Colten v. Kentucky -- whether or not a defendant in a Massachusetts trial court, the first

tier court, has the ability to evade or to otherwise move away from that particular procedure in some sort of waiver posture.

I would suggest to the Court that there is a procedure, and it was alluded to somewhat by counsel for the appellant. There is a procedure known as admitting sufficient findings of fact. Wherein the district court -- and this is not a statutory procedure, but an accepted procedure that has evolved over the years in the court -- where the district court justice will hear just sufficiently enough evidence to -- I suppose to warrant him in concluding that there is probable cause for the existence of the complaint. Because that's how we begin in the first tier system, by complaint.

Once having satisfied himself of that, he then can go ahead and enter a finding of guilty and, as a matter of fact, impose a sentence on that, from which -- at least in the contention of the Commonwealth,-- that person who has just made that admission has an immediate right to wipe the slate clean once and forever.

QUESTION: So, functionally, that's not unlike just a binding-over proceeding, is that what you --

MR. IRWIN: That's right, Mr. Justice Stewart.

QUESTION: And is that practice availed of when it's clear that the defendant is going to ask to go to the Superior Court? And only then?

MR. IRWIN: Yes, it is. It's done only then. As a matter of fact, it's almost in the category of waiver, I would say, because what counsel does ordinarily is go to the trial justice in the court and indicate that he really sees nothing to contest here, that he feels that he would be better off in the Superior Court, and he would be better off moving there quickly.

QUESTION: So it's almost by agreement that tradition, isn't it? That it's evolved that this has been converted into a -- just a traditional binding over for trial?

MR. IRWIN: That's right, Mr. Justice Stewart.

QUESTION: Is that it?

MR. IRWIN: Yes, it is.

QUESTION: Except, of course, on his record is this conviction that's now been set aside?

MR. IRWIN: That's right.

QUESTION: Which your brother told us might have the -- in a vehicle case might have the collateral consequence of the deprivation of the defendant's driving license for a period.

MR. IRWIN: It might; yes, it might.

QUESTION: Is the motion to appeal made substantially simultaneously with the entry of the plea of guilty?

MR. IRWIN: Yes, it is, Your Honor.

QUESTION: So all of this could happen in a matter of fifteen minutes, I'd think.

MR. IRWIN: It could happen in a matter of ten minutes, if Your Honor please; and many times does.

QUESTION: Yes. So you -- in effect, you stipulate to probable cause facts, the judge enters a judgment of conviction, --

MR. IRWIN: Right.

QUESTION: -- you say "I appeal", and the judgment is thereupon wiped out?

MR. IRWIN: That's correct, Your Honor.

And his appeal is entered or -- and I think, you know, when we're talking about appeal, my conviction is, or the Commonwealth's conviction is that that is not very well denominated. I would prefer to call it an assertion of his inevitable right to trial by jury in Massachusetts. And I think it's important for this Court to understand that in Massachusetts if a defendant wants, in any criminal case, any criminal case, from the most minute parking violation to first-degree murder, he can in fact get a jury trial of twelve.

QUESTION: And he doesn't even need to purport to allege an error in the first trial in order to assert that?

MR. IRWIN: He does not, Mr. Justice Stewart.

QUESTION: Are there any costs imposed as a result

of the first trial?

MR. IRWIN: There are not, Mr. Justice Stevens.

QUESTION: What is the purpose of the first trial?

MR. IRWIN: I'm sorry, Your Honor?

QUESTION: What is the purpose that's served -- what interest does the Commonwealth have in having the first trial?

MR. IRWIN: I would suggest that the Commonwealth has this interest: that there is before the Court and in the record here and in the briefs an indication that the Massachusetts district court system as we know it handles approximately one million criminal matters a year. That de novo approach allows the district court, in our judgment, to weed out those cases that appropriately should not go on to the Superior Court, where a proper exercise of judicial judgment will terminate the case by way of a not guilty in the first instance.

QUESTION: Or by way of a guilty and a minor punishment that --

MR. IRWIN: Exactly. That would be acceptable to the defendant.

QUESTION: If there's justice in the case then there's no reason to appeal, is that it?

MR. IRWIN: Exactly.

QUESTION: Well, why not, when the man is going to

appeal, why just say, Well, since you're going to appeal and you're going to get a jury trial, you don't have to go through this other one. What good is the first hearing to the State, where you know the man is going to appeal and ask for a jury trial?

What benefit does the State have for the first tier?

MR. IRWIN: Well, in the situation that you gave, Mr. Justice Marshall, I would say the State really has no benefit if what you're suggesting is, the situation that I think you are, that where they know he's going to appeal.

QUESTION: No, Mr. Attorney General, I'm suggesting the situation you said. You said that where the man goes in and tells the judge: Look, I'm going for an appeal, and I'm going because I want a jury trial.

Now, why doesn't he just go and get the jury trial? Why does the State say: Whoop! Before you do that, you've got to go through this charade.

MR. IRWIN: Well, in the situation that you just posited, Mr. Justice Marshall, the court, the district court in question, given the situation that you just posited, in my judgment, would do nothing more than satisfy itself that there is probable cause to the existence of that complaint, enter a finding of guilty, and say: Leave and go have your appeal.

QUESTION: Why?

MR. IRWIN: Because it's the expeditious way to handle the matter, in my judgment.

QUESTION: Well, the expeditious way is just to transfer it to the other court.

MR. IRWIN: Well, that's, in effect, what they're doing.

QUESTION: The Massachusetts Legislature has said you do it by this particular mechanism, and therefore the judge has no option, does he?

MR. IRWIN: That's right, the judge has no option.

QUESTION: Then he may or may not accept a plea of guilty?

MR. IRWIN: He may accept a plea of guilty in the --

QUESTION: Without any evidence?

MR. IRWIN: Well, no, I don't -- I think what he would do, Mr. Justice White, if a plea of guilty was entered in the district court, where he had final jurisdiction --

QUESTION: Well, may he appeal from a plea of guilty?

MR. IRWIN: Yes, he can; but the only thing that's open to him on an appeal from a plea of guilty is the disposition of the case, the sentencing.

QUESTION: So that he may not have a jury trial if he pleads guilty?

MR. IRWIN: He may not.

QUESTION: These hypotheticals we've been putting to you about his standing aside in order to get a jury trial, do not fit this case, do they, because he did not want a jury trial in the second tier?

MR. IRWIN: That's right, he apparently waived that jury trial. And again I suppose that's why the option is open to him, what he could do even if he gets to the Superior Court, where he might be claiming a 12-man jury, he is empowered under our Massachusetts setup to go ahead and waive his jury trial there.

QUESTION: But you said normally the purpose in most cases of bypassing or standing mute at the first trial, first tier trial, is in order to get a jury.

MR. IRWIN: Exactly.

QUESTION: But that was not the objective in this case?

MR. IRWIN: Apparently it was not.

QUESTION: Mr. Irwin, your sister State of Rhode Island, I think, has a very similar, if not almost identical statutory system, which, as I understand it, has been declared to be invalid, was declared invalid by a district court in Rhode Island and has now moved to adopt by a district court's decree; am I mistaken in this?

MR. IRWIN: No, I think you're correct, if Your Honor please.

QUESTION: And how does Rhode Island go about it now?

MR. IRWIN: I'm not sure, if Your Honor please, how Rhode Island goes about it, except that apparently -- my understanding is that what they do now is offer a jury trial in the first instance, at that first -- at the district court level; allow the defendant to assert his right to a jury trial and set it out for a jury trial.

I think what you have in mind is probably the consequences of the Halliday case.

QUESTION: Halliday; that's the case.

MR. IRWIN: Yes.

QUESTION: Yes.

QUESTION: Could Massachusetts do this without an amendment to your statute?

MR. IRWIN: I would say Massachusetts, I suppose, could advance a court rule, by rule of court, or probably by a legislative change, do exactly that, if Your Honor please.

What I would suggest to the Court, though, is that constitutionally I don't think that's necessary.

QUESTION: But, in answer to the Chief Justice's question, you said at the very outset that the statute itself doesn't explicitly deny a jury trial?

MR. IRWIN: It does not.

QUESTION: At the first tier.

MR. IRWIN: It does not.

QUESTION: So, presumably, the answer to the Chief Justice's question is yes, Massachusetts could do this without an amendment to the statute?

MR. IRWIN: I would say yes. I would say yes, Mr. Justice Stewart.

QUESTION: But you couldn't just sort of refer the case to the second tier?

MR. IRWIN: I don't think you could do that, no, I do not, Mr. Justice White.

QUESTION: Or you couldn't just permit an appeal from a guilty plea?

MR. IRWIN: No, you could not. No, you could not.

QUESTION: Do you happen to know, is the Halliday case cited in the brief -- I thought it was, but I don't seem to find it.

MR. IRWIN: Yes, I believe it is, Your Honor please.

QUESTION: Maybe Halliday isn't the front name.

MR. IRWIN: I think it's the footnote.

QUESTION: What court was that, federal or State?

MR. IRWIN: The Rhode Island Supreme Court, if Your Honor please.

QUESTION: As a matter of Federal Constitution or the State?

MR. IRWIN: I think they decided it as a matter of

State constitutional law.

QUESTION: Well, that's -- here it is, State v. Halliday, 109 Rhode Island 93; is that it?

MR. IRWIN: Yes, it is, if Your Honor please.

QUESTION: Thank you.

MR. IRWIN: Your Honor, moving along in the argument, the Commonwealth's position is that when this Court enunciated Duncan v. Louisiana, what it did really was establish a right to trial by jury, but did not establish a mode to constitutional jury trial. And therefore it is open to Massachusetts, and other de novo States, to examine whether or not the de novo procedures that they have in effect deliver constitutionally mandated jury trial in a constitutional mode.

And I would respectfully suggest to the Court that on the intense analysis that this Court has made of its procedure, and in weighing it against the perspectives that were set out in analyzing the jury trial right in Duncan v. Louisiana, we can find that the Massachusetts system is basic and fundamental, first by way of historical analysis, second by way of contemporary practices among other States, and thirdly, to the extent that it fulfills the stated function and purpose of the jury trial in America; to wit, I suppose, to stand as a bastion against oppression, and to allow a person accused of crime to have the judgment of his

peers in any given criminal case that is presented against him.

It seems to me that by that analysis and by a fair and objective appraisal of the Massachusetts system, we can find that the Massachusetts system does serve to prevent: one, unfounded criminal charges brought to eliminate enemies; two, judges who are too responsive to the voice of higher authority; three, protection against arbitrary action; four, the Massachusetts system does prevent the corrupt and over-zealous prosecutor; five, it does prevent the situation where you have a compliant or a biased or eccentric judge; six, it does serve to present the exercise of plenary powers over the life and liberty of its citizens by one judge or a group of judges; and seven, it does prevent unchecked power and it does prevent arbitrary law enforcement.

It seems to me that going back and analyzing Duncan v. Louisiana, this Court tried to determine what a constitutional jury trial was in terms of its history and in terms of its contemporary use, I suppose, in our society.

But it seemed to me that thereafter, that when this Court decided cases such as Apodaca and such as Williams v. Florida -- Apodaca v. Oregon -- that what it did really was to lean more toward an evaluation of whether or not this particular jury system that is put in question served those basic purposes that I just outlined.

And if the answer to that is in the affirmative, then the system that is challenged in the given State stands the test of constitutionally fair jury trial.

Finally, the Commonwealth would direct itself for a few moments to the issue of double jeopardy.

QUESTION: What do you do about Callan v. Wilson? Or have you told us?

MR. IRWIN: Well, again, I think that my position in Callan v. Wilson, or the Callan v. Wilson case is this, if Your Honor please:

Duncan v. Louisiana, in interpreting Callan v. Wilson, as it, I suppose, was imposed upon the States, in effect said that where you would be entitled to a jury trial in the federal system for a particular offense, that is beyond petit, you are entitled to a jury trial in the given State.

My understanding of the Louisiana-- Duncan v. Louisiana case was that there was a statute which provided for no jury trial and yet allowed a punishment up to two years' imprisonment.

The Callan case apparently involved imprisonment potential over six months, six months or over; and the Court, I think, simply said, in Duncan v. Louisiana, in interpreting Callan v. Wilson, that where a State seeks to impose punishment over six months, inasmuch as you would be entitled to a

jury trial in the federal court, if that were the case, you are entitled to a jury trial in the State.

So, I guess what I'm saying is -- I know what I'm saying is that if there's a State now that is in a position where it can sentence somebody to more than six months' imprisonment, this Court would say, in terms of Duncan v. Louisiana and Callan v. Wilson, that that State has to provide a jury trial.

I don't suggest to the Court that in Duncan v. Louisiana this Court ever enunciated what mode of jury trial that had to take. As a matter of fact, I think the Court had gone on later on, in Apodaca and in Williams to indicate that certain guarantees in terms of federal jury trials certainly are not binding on the States.

QUESTION: That's consistent with Mr. Justice Fortas's concurring opinion in Duncan.

MR. IRWIN: Exactly. In which he said: we can have the hide, but we don't have to --

QUESTION: Have the tail along with it.

Now, what was the maximum sentence imposable under the offense for which the appellant was tried?

MR. IRWIN: Two years, two years in the House of Correction, and a fine up to $200.

QUESTION: Yes.

And one more question, while I have you interrupted.

I'm correct, am I, in my understanding that on this trial de novo, first of all, will the jury know or will it not know about the first trial and the first judgment?

MR. IRWIN: The jury will not know about it.

QUESTION: If there's a waiver of a jury, with the judge know?

MR. IRWIN: If there is a waiver at the district court --

QUESTION: As in this case there was.

MR. IRWIN: The judge would know, yes, he would.

QUESTION: And if the jury would not know about the judgment, he would presumably also certainly not know about any sentence imposed?

MR. IRWIN: That's right.

QUESTION: But at the new trial there would be a complete and uninhibited freedom for the court to impose any sentence within the statutory limits, regardless of the sentence that had been imposed at the district court level?

MR. IRWIN: Exactly, if Your Honor please.

QUESTION: Thank you.

QUESTION: Is it the practice sometimes to impose a heavier sentence than was initially imposed?

MR. IRWIN: Yes, it is. It's not uncommon.

QUESTION: It happens.

MR. IRWIN: And yet it's not uncommon that they impose the same sentence or maybe even a lighter sentence.

I would say that it varies almost on a 50-50 basis.

QUESTION: It's a true trial de novo in that sense.

MR. IRWIN: Yes, it is, if Your Honor please.

For just the final few moments left to me in this argument, I'd like to address the question of double jeopardy.

It seems to me that Colten v. Kentucky is dispositive of that contention here by the appellant.

I suggest that for several reasons, and one is that my recollection of the Colten v. Kentucky case, directing itself to the question of double jeopardy, contrasted the Pearson v. North Carolina case, or distinguished the Pearson v. North Carolina case, and pointed to the question of vindictiveness, and I think, to a certain extent, that's just been touched upon here.

It doesn't appear that, for example, in terms of, I suppose exerting your right to appeal on trial de novo, that you are in any jeopardy of vindictiveness, because what you are doing is you are going from a different court system to a different -- to a Superior Court, where the people who will adjudicate your claim are in no way connected with the first court.

Secondly, I think the Court's position that if in

fact, in Colten v. Kentucky, you have a true de novo type of system, where there is in effect a wiping clean of the slate, then, obviously, all of those things that are inherent in double jeopardy, such as the hazards of trial, the necessity of utilizing your legal tools, I suppose, at that given hearing, all of those type of things are non-existent in that so-called de novo procedure, and therefore not vulnerable to a claim of double jeopardy as I see it.

And I would respectfully suggest to the Court that it would be totally consistent with the finding in Colten v. Kentucky to find that the Massachusetts de novo system exactly does wipe the slate clean and therefore presents no double jeopardy problem to this particular Court.

QUESTION: Mr. Irwin, are there ever any jury trials in this court?

MR. IRWIN: I'm sorry?

QUESTION: Are there jury trials of any kind in your district court?

MR. IRWIN: There are not.

QUESTION: Not.

MR. IRWIN: There are the situations where we have the six-man jury trials in district courts, but they are on appeal from that district court, as I tried to outline in my -- and I think they are probably more properly considered by this Court to be at the Superior Court level.

If Your Honor please, my time is up, and I would thank the Court for its attention.

MR. CHIEF JUSTICE BURGER: Mr. Hagopian?

REBUTTAL ARGUMENT OF ROBERT W. HAGOPIAN, ESQ.,
ON BEHALF OF THE APPELLANT

MR. HAGOPIAN: I would like to clear up one or two points, Your Honor.

My first point is about this appeal and certiorari jurisdiction.

The statute in Massachusetts, Chapter 218, Section 26, confers jurisdiction on the district courts. District courts have been construed by Massachusetts in Jones vs. Robbins to mean courts without jury. Now, that statute is squarely presented, among other statutes; so I think the case is properly up here, Your Honor, on appeal.

No. 2, Your Honor, there are a lot of consequences about this business in the first tier trials that my brother hasn't mentioned, and the most important one is that once the sentence is imposed in the first tier, if the defendant defaults in the second tier -- supposing he doesn't show up when he's supposed to -- that sentence of the district court is imposed, and the man winds up going to jail, and it's not pursuant to a judgment of his peers by the district court sentence.

That's statutory in Massachusetts, and it goes on

all the time if the --

QUESTION: What you're telling us there is common to all defaults, or many defaults; you're saying that if he defaults he's in trouble. And that's --

MR. HAGOPIAN: Sure, he is, but you can't convict a man in absentia, and that's what it is. It's a judgment by default.

QUESTION: Oh, yes; quite the contrary. Convictions can be had in absentia, if the defendant voluntarily absents himself.

MR. HAGOPIAN: I believe that issue was raised, Your Honor, in Tacum vs. Arizona? -- but I don't think I can -- If he absents himself from trial. But if the State never gets him into court to begin with, I don't believe that he can be tried in absentia. Now, I believe that -- I don't think that issue has been squarely presented by this Court.

But what's happened here is --

QUESTION: Well, you were speaking of his default, his failure to show at the second tier trial.

MR. HAGOPIAN: That's correct.

That's correct, yes.

What happens is the first tier judgment is then imposed.

QUESTION: Well, how else could you get him in court?

MR. HAGOPIAN: I suppose you could arrest him,

Your Honor, which is --

QUESTION: Well, I mean, if you put a rule that if the man doesn't show in the second tier, he goes free --

MR. HAGOPIAN: Oh, I didn't say that, Your Honor.

QUESTION: -- I think you'd have a little difficulty getting him there, wouldn't you?

[Laughter.]

MR. HAGOPIAN: Yes, I do, Your Honor. But, you see, what's happened is it's shifted the burden here to the defendant.

And in the second tier, everybody knows, the juries all know that these fellows have been convicted down in the first tier. The trials are segregated. The district court judges sit on them, not the Superior Court judges. And it's quite obvious that they've been convicted.

QUESTION: But in a single tier system, if you fail to make a timely demand for jury trial, you waive it.

MR. HAGOPIAN: Oh, I don't -- in a criminal proceeding, Your Honor?

QUESTION: Yes.

MR. HAGOPIAN: I don't believe there be any -- it can constitute any waiver of a specific fundamental procedural right in a criminal trial, unless it's expressed. In fact, most courts, most jurisdictions hold it must be written. I don't believe that that's true in the criminal proceedings.

In fact, in Boykin, they hold that unless there's something on the record, forget about whether he even did waive it if it isn't established on the record, the conviction has to be set aside, as I understand that case.

In any event --

QUESTION: Would the privilege to -- would it satisfy your argument if the defendant had the privilege of pleading guilty and then appealing?

MR. HAGOPIAN: I don't like to see the fact that he has to plead guilty, Your Honor, I think that the conviction itself burdens --

QUESTION: I know you don't like it; but how about it as a constitutional matter?

MR. HAGOPIAN: Well, that's a close issue, and of course that's the case in --

QUESTION: Well, what's your position on it?

MR. HAGOPIAN: Well, I'll have to concede to that point, Your Honor, because you wrote the opinion in Colten, and that's what you said. So I guess that's established law.

[Laughter.]

QUESTION: Well, in Colten, --

MR. HAGOPIAN: He has to plead guilty --

QUESTION: -- you suggested in Colten that he could get a jury trial --

MR. HAGOPIAN: Yes, he can.

QUESTION: -- in the first tier court?

MR. HAGOPIAN: That's correct.

QUESTION: I thought he could just plead guilty.

MR. HAGOPIAN: Yes, he can, he can plead guilty and take an appeal and it automatically wipes out the --

QUESTION: Exactly.

MR. HAGOPIAN: You can't do that in Massachusetts. You plead guilty and --

QUESTION: Well, I understand that, but you're suggesting that if he elected in Colten, under the Kentucky system, that he could have a jury trial in the first tier?

MR. HAGOPIAN: Yes.

That also was established in a case called Lemieux vs. Robbins. In the Maine procedure you could plead guilty and do the same thing, and the First Circuit sustained that procedure.

QUESTION: Well, I know, but it isn't quite the same thing to say you can plead guilty and then have a jury trial in an upper court. And to say that you can have --

MR. HAGOPIAN: Yes. That's right. Yes.

QUESTION: Well, all right. Now, which is it in the Colten case?

MR. HAGOPIAN: Well, because you have a right to a jury trial in Colten in the first tier, then I think that if you plead guilty, it's certainly different than if you

didn't have that opportunity for the jury trial.

QUESTION: Well, I'm frank to say I didn't recall that about the Kentucky system. I knew that you could plead guilty and automatically get a jury trial when you appealed.

MR. HAGOPIAN: Yes. But you have that right for the jury trial in the --

QUESTION: You can elect --

MR. HAGOPIAN: Oh, yes. And there are 16 jurisdictions like that.

Lastly, just let me say what happened in Rhode Island --

QUESTION: Well now, maybe you -- but you think it was true in Colten?

MR. HAGOPIAN: Yes, I know it's true in Colten, Your Honor. I read that very carefully. In fact, I believe that you even mentioned that fact yourself in a footnote in Costarelli -- excuse me, or the per curiam court did.

QUESTION: All right.

MR. HAGOPIAN: And I think that's quite clear.

Let me just say in Rhode Island, what happens is if a fellow wants -- unless he signs a waiver, a written waiver for a jury trial in the first tier, the papers are transmitted right up to the Superior Court and he's given his jury trial in the second tier immediately.

Thank you, Your Honor.

QUESTION: You're going to file those data with the Clerk?

MR. HAGOPIAN: Yes, I have that data, and I will supply the citation.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:35 o'clock, a.m., the case in the above-entitled matter was submitted.]