In the

Supreme Court of the United States

NATHANIEL BROWN,

PETITIONER,

V.

STATE OF OHIO,

RESPONDENT.

No. 75-6933

Washington, D. C.
March 21, 1977

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Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

NATHANIEL BROWN, Petitioner,	:	
v.	:	No. 75-6933
STATE OF OHIO, Respondent.	:	

Washington, D. C.,

Monday, March 21, 1977

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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROBERT PLAUTZ, Court-appointed counsel, 110 Euclid Avenue, Cleveland, Ohio 44115; on behalf of the Petitioner.

GEORGE J. SADD, ESQ., Chief Appellate Prosecuting Attorney, The Justice Center, 1200 Ontario, Cleveland, Ohio 44113; on behalf of the Respondent.

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 75-6933, Brown against Ohio.

Mr. Plautz, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT PLAUTZ, ESQ.,

ON BEHALF OF THE RESPONDENT

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

My name is Robert Plautz, and I'm counsel for petitioner.

This case concerns the assertion by the State of Ohio that it can try twice, convict twice, and punish twice one man for the theft of one 1967 Chevrolet.

The facts in this case are that petitioner Nathaniel Brown was arrested, and in addition to being charged with certain traffic offenses, the complaint that was filed against him charged that he did unlawfully and purposefully take, drive or operate a certain motor vehicle without the consent of the owner of that vehicle.

The complaint --

QUESTION: Does that offense require proof of intent to steal?

MR. PLAUTZ: No, it does not, your honor.

QUESTION: Does the second charge require proof

of intent?

MR. PLAUTZ: It requires proof of intent to permanently deprive the owner of possession.

The complaint that was filed against him in the first charge listed the name of the owner of the automobile, and it listed her address.

Two days later, petitioner answered that charge. He waived counsel, he waived trial by jury, and without any plea negotiations being entered into, he plead guilty to all of the charges that were levelled against him.

He was sentenced to thirty days in the work house, fined $100 and court costs.

Thirty days later, petitioner was leaving the workhouse. Waiting for him at the gates of the work house were police officers. These officers arrested petitioner, and charged him with stealing the same motor vehicle that had been the subject of the first charge.

This time the complaint that was filed against him, though, alleged the offense to be ten days prior to the date that was alleged in the first complaint.

After certain procedural matters, petitioner conditionally plead guilty to the charge, with the express understanding that a subsequent motion to withdraw the plea and dismiss the indictment on grounds of double jeapordy could be filed. The state agreed to this

procedure.

The motion was filed, the hearing was had, the motion was denied.

Petitioner then was sentenced to six months in the county jail. The sentence was suspended, he was placed on one year probation.

Petitioner appealed his conviction to the Ohio Court of Appeals Eight Appellate District. That Court affirmed the conviction, holding that two charges for the same offense within the meaning of the double jeapordy clause, applying this Court's test in Blockburger.

And it said they were the same offense. However, because different dates were alleged in the complaints, supposedly different crimes were committed.

QUESTION: What if the Ohio legislature had, in enacting the statute that prohibited the driving of a car without the consent of the owner, put in a provision that each day on which this offense occured shall be a separate offense?

MR. PLAUTZ: There would have been nothing wrong with that. They could constitutionally charge a person there with multiple counts provided they give the person adequate notice that this was an offense.

I would cite examples of those types of crimes. They are more -- not really crimes of common law; emitting

noxious odors, each day is a --

QUESTION: Regulatory type of offenses?

MR. PLAUTZ: Right. But there also are -- each day you operate a gambling house, or some body house, or some sort -- whatever the statutes say. Those statutes give the accused adequate notice that each day he does it, he's going to get nailed for his misdeeds. And also, in those instances, there are valid state interests that the state has in protecting an individual -- protecting society from that type of offense.

Now, admittedly, I'm sure, you know, Gloria Ingram didn't feel any better by having her car -- Gloria Ingram was the victim -- by having her car missing ten days as opposed to only a few hours, but --

QUESTION: Well, is there some constitutional calculus that enables us to weigh the valid state interests behind ordinances that prohibit the emission of noxious fumes as opposed to driving cars without consent. So that one might be a stricter application of the double jeapordy clause than the other?

MR. PLAUTZ: Yes, I think you'd have to look at the arbitrariness of what the state does with its statutes when they apply them to the accused. You could -- well, in a theft case, I was going to -- getting into that later -- any theft case such as this, just because it was the alleged

different dates in the complaint doesn't make it two different crimes. They could have conceivably, under the Ohio Court of Appeals opinion, have alleged -- filed ten complaints against him, alleging different dates. And it would have been -- just arbitrary just as on the face of it. And I would cite this Court's opinion in --

QUESTION: What if I borrow your car on October 1st and say I'll return it to you on October 2nd, and I don't return it to you on October 2nd. I take it under Ohio law that on October 3rd, I'm guilty of driving without your consent?

MR. PLAUTZ: That is correct, your honor.

QUESTION: And the longer I put off returning that car to you in accordance with my promise, don't you suffer a greater wrong?

MR. PLAUTZ: The wrong -- yes -- not a greater wrong. I'm being wronged.

QUESTION: Well, you're losing the use of your car for a longer period of time, in a very tangible, economic sense, aren't you?

MR. PLAUTZ: Yes, but the State of Ohio hasn't provided that each day I'm more aggrieved, as far as their criminal statutes are concerned. They feel that, you do it once, you did it.

QUESTION: Well, that goes to the question of

whether they provided that each day was a separate offense. But I thought you were making the additional argument that even if they put in such a provision, this Court would have to weigh how valid it was to make that kind of provision, and how arbitrary the legislature had acted in doing so.

MR. PLAUTZ: Oh, yes. I would make that argument if that were this case.

QUESTION: Mr. Plautz, what would you do --

MR. PLAUTZ: Yes, sir.

QUESTION: -- if they arrested a man for the use of the car, and he explained, well, I was just a young kid and I was going for a little joyride? And he's given thirty days and sentenced. And they find out later that he's a leader of a stolen car ring? He couldn't be prosecuted, could he? Under your theory?

MR. PLAUTZ: Those aren't the facts in this case, but I would think that he could, if the second statute --

QUESTION: Well, I think I know enough about that first statute. It wasn't meant to cover people who had a car for tendays? Am I right?

MR. PLAUTZ: It means --

QUESTION: Am I right?

MR. PLAUTZ: Admittedly, your Honor --

QUESTION: It's a joyriding statute. That's what it's called.

MR. PLAUTZ: It's sometimes called joyriding. That doesn't mitigate --

QUESTION: The kid says, I took it for a ride. Not ten days.

MR. PLAUTZ: Your honor, that statute does not require intent to permanently deprive the owner of possession. Admittedly, there are close cases. But under that statute, a person could have the car for as long as a year. And as long as he doesn't have informed intent, all the elements in that statute are not proved.

Now, obviously, there does come a time when a person does have a car for such a long period of time, as a matter of law, it's a steal, it's not a joyride.

QUESTION: Well, couldn't a jury infer from the recital of facts that you've just given that he did formally intend to steal it when he kept it for a whole year?

MR. PLAUTZ: They could.

QUESTION: Without any --

MR. PLAUTZ: They could. But I'm sure if it had gone to trial, they would introduce the confession that they did obtain from him within two hours after his arrest. And in that confession he states that he did not have the intent to permanently deprive the owner of possession. He was just going to take the car until he found a job.

Now, obviously, whether a jury is going to buy

that or not is another issue. They could very well have though.

The Ohio Supreme Court denied further State appellate review in this case.

Now, there are three important facts to note inthis case. And first, as we've gone into, is that the same automobile was involved in all of the charges.

Secondly, petitioner had no notice of that second charge at the time of his uncounseled plea on the first charge.

Similarly, petitioner was not given an opportunity to defend himself on that second charge until after the expiration of his first charge.

And finally, another important fact to note, is that the second charge is alleged to have occurred prior to the first charge.

Now, petitioner contends --

QUESTION: It's not raised in any pre-trial attack on the indictment?

MR. PLAUTZ: Your Honor, the issue that the Ohio Court of Appeals decided this case on was not raised at all in the two trial courts.

QUESTION: I know. But will you address my question: did theychallenge the indictment pre-trial?

MR. PLAUTZ: Oh, yes, yes, your Honor.

QUESTION: On this ground?

MR. PLAUTZ: On double jeapordy grounds.

QUESTION: On -- attacking this problem of the date?

MR. PLAUTZ: No, your Honor. The reason was that in the two trial courts -- we had,really, two trial courts, even in this same one -- in the East Cleveland Municipal Court and the Cuyahoga County Common Pleas Court, both of those judges were concerned whether or not they were lesser included offenses. As far as they were concerned, if there were lesser included offenses, the indictment had to be dismissed.

All the papers and motions and arguments in the trials courts was focused on whether they were lesser included offenses. It made no difference about the dates in the complaints.

We took the case up to the Ohio Court of Appeals. In looking at the briefs in that case, all the arguments were addressed to lesser included offenses. And that is why the Ohio Court of Appeals spent so much time in their decision stating that it was a lesser included offense.

Then all of a sudden they came out with this decision that it was because of the dates of the offense.

I then filed a motion to reconsideration, timely filed in that case, which I'm allowed. I filed a timely

motion for reconsideration, stating that it was a continuous offense. And that is why we have a differeent issue here today. And we do not have the issue of lesser included offense.

Because the Ohio Court of Appeals explicitly held that it was a lesser included offense.

Now, in this case we are dealing with a State statute --

QUESTION: But in effect it held -- as I understand their opinion -- they held that this particular operating of the vehicle without the owner's consent was not a lesser included offense of the stealing, because -- not the same act or same transaction at all.

MR. PLAUTZ: That's the color they put on it. The acts, the dates.

QUESTION: Well, that's what they held. In this particular case, it was not a lesser included offense. That's what they held.

MR. PLAUTZ: Statutorily constructed, it is the same offense. But as to the acts in the complaints, no, it is not. They are supposedly two different crimes committed.

QUESTION: Well, I know. But it's just as though the -- two entirely different crimes were involved, as far as they are concerned.

MR. PLAUTZ: Yes.

QUESTION: Although operating a vehicle without the owner's consent is a lesser included offense, you're taking about the same day and the same car, in this case they just held to the contrary. They said it wasn't the same act at all.

MR. PLAUTZ: You're correct, your Honor.

Now, we're not asking this Court to interpret that statute. We're asking this Court rather to look to the statutory interpretation of that statute given to it by the Ohio courts, look to the conduct that is prohibited by that statute. Look to the conduct of the accused in this case, Nathaniel Brown. And then judge whether the actions by the state of Ohio violate the purposes and policies of the double jeapordy clause.

Now, that statute under which he was convicted prohibits taking, operating or keeping a car without the owner's consent.

The complaint filed against him charged taking, violating or operating -- now apparently the person who drew the complaint copied the wrong form, because the statute had been amended in March of '72. But at any rate it's never been alleged that nothing but -- the statute in effect at the time of his arrest that he was charged with.

Now, that statute covers all types of means and

methods in which one person can deprive another person of dominion, possession and control of their property. It covers all types of situations in which that can occur.

Now, once the state prosecuted and convicted for that conduct, for operating, taking and keeping that car without the owner's consent, it was barred fromthereafter prosecuting petitioner again for taking and operating the same motor vehicle when there's been no interruption in his conduct.

QUESTION: I thought you had responded to one question that intent -- proof of intent is not an element of the so-called joyriding, and that proof of intent to steal is required in the second?

MR. PLAUTZ: That is correct, your Honor.

QUESTION: Then, will you explain how they are the same?

MR. PLAUTZ: They are the same offense in that --

QUESTION: Just because it's the same automobile?

MR. PLAUTZ: No, your Honor. Well, that had something to do with the evidence being introduced. But once they attach prosecution to his conduct of taking, keeping and operating the car, for as long as he was taking, keeping and operating that car, once they attached that, they got him for that entire conduct.

Applying then the same evidence test in this --

of this Court.

QUESTION: Well, the criminal law doesn't punish you just for conduct, does it? It punishes you sometimes for conduct and sometimes for conduct accompanied by intent, a specific intent to commit a crime?

MR. PLAUTZ: That is correct.

QUESTION: Well, you still have me lost.

MR. PLAUTZ: Once they got him for the conduct, they got him for the conduct as long as it lasted.

Applying then the same evidence test to the events of November 29, 1973, at the very moment he may have had that intent to permanently deprive this owner of possession he was also taking the car, operating the car, and keeping the car. He was also doing that on November 29th.

Now, under the Ohio --

QUESTION: Perhaps he confided that to you, that he had the intent all the time. But on this record, how do we find that out?

MR. PLAUTZ: That he didn't have the intent?

QUESTION: On this record, you've conceded that the prosecution had no obligation to show intent on the joyriding charge, but that it did have an obligation to prove beyond a reasonable doubt the intent to steal from a second charge.

MR. PLAUTZ: Yes, they would have -- yes, and

there was --

QUESTION: Not "if", they did, didn't they?

MR. PLAUTZ: Yes, they would have had that obligation.

QUESTION: Well, they did, and they must have carried it out apparently, or you wouldn't be here.

MR. PLAUTZ: When -- in plea negotiations being entered into, I saw that a jury could have concluded that this was auto stealing. And I made that decision, and I advised the client, and he agreed, and we plead guitly to auto stealing. And there was a confession obtained from the individual within two hours after his arrest by the second prosecuting authorities. And that confession was made available to me, and it was available in front of all of the courts below.

Now, this Court need not expand on any other -- make any new doctrines of constitutional law in this case. It has a test, it has the same evidence test, and just as this Court added some refinements to it, I would say, in the Waller case, barring multiple prosecutions from municipalities, it must refine the test again andsay that it also applies to continuous offenses, which, by their nature ---

Now theoretically, under the Ohio Court of Appeals decision, a witness -- even if it was at one prosecution, a witness -- a victim of a crime such as a theft offense could

get on the stand, and the prosecutor could ask in direct testimony -- in this case it was Gloria Ingram -- did you give permission for the defendant to have the car on December 8th?

No.

Did you give permission for the defendant to have the car on December 7th?

No.

December 6th?

No.

Fifth -- all the way down to November 29th.

Technically speaking, that is different evidence. But on cross-examination, by simply asking the witness, did you ever have possession of the car at all during that period of time, no, I think the evidence then, the complexion of that evidence, substantially changes. And it inherently is the same evidence that he is defending himself against.

And the State need not even bother -- or with the dates of the offense, by changing the dates of the offense, they could do it for every hour or every week, or whatever the crime is they seek to -- do. At the conclusion of a larceny prosecution all they need to do is take the accusatory instrument, cross out the date of the offense, put it in the typewriter, type up anew date, and they have a new crime, entitling it to a new trial and new punishment,

which has happened in this case.

Now, in the previous case that was argued, there were some questions about double punishment. And that's exactly what happened in this case. There is nothing to indicate from the sentence that was imposed at the second trial that it was in any way curative of the first sentence that was imposed. The first time around, he got thirty days in the workhouse, the second time around, he got six months in the county jail, sentence suspended, placed on one year's probation.

QUESTION: Well, if you're right in your primary argument that upon conviction of a lesser included offense you cannot under the double jeapordy clause even be prosecuted for the greater offense, then the question of punishment you don't get into. It's a violation of the constitution to even be charged with a great offense.

MR. PLAUTZ: That is not entirely true, your Honor, with regard --

QUESTION: Well, I thought that was your argument.

MR. PLAUTZ: My argument --

QUESTION: I'm not saying it was true. I thought that was your argument.

MR. PLAUTZ: That is not my argument, your Honor. There are limited situations where the greater offense could be subsequently charged, such as United States versus Diaz.

This is not United States versus Diaz, because here, that greater charge that is alleged to have occurred prior to the lesser charge, ten days before, and the State had adequate notice that it occurred. This is not something where an element of the crime occurred after --

QUESTION: I thought you were making the same basic argument that was made in the previous case, that the double jeapordy clause, as a general rule, prohibited a prosecution for a greater offense after a conviction for a lesser included offense?

MR. PLAUTZ: As a general rule, yes, sir, but there are exceptions which I've just mentioned, the United States versus Diaz.

QUESTION: Well, are you making that argument or not?

MR. PLAUTZ: Yes, I am, your honor.

QUESTION: Well, then the matter of dual punishment doesn't -- you don't get to it. If it's a constitutional violation even to prosecute.

MR. PLAUTZ: Well, that would be true. But if this court finds that they could have prosecuted for the greater offense, he still was subject to the double punishment then. It's unclear from the Court's opinions here -- it seems that he'd have more of a due process argument than a double jeapordy argument. He still, nonetheless, makes the

argument that he was subject to a second punishment the second time around.

QUESTION: Well, another aspect of the double jeapordy clause does guarantee against dual punishments for the same offense.

MR. PLAUTZ: Yes, your Honor.

QUESTION: Well, the Ohio Court of Appeals' interpretation of this statute as discussed by you in your colloque with Justice White is upheld, and these are in fact two different offenses, then not only can he be prosecuted twice for them, he can be punished twice, can he not?

MR. PLAUTZ: Oh, for sure. For sure. If one thing falls, everything else falls. Such as what happened in Blockburger and Gore. There's nothing -- would be nothing wrong with consecutive sentences in that situation. But that was because the test in those cases were separate offenses. This is essentially the same offense.

QUESTION: Well, what would you do if a man stole a car in Ohio, and drove it to California, and they picked him up in California for joyriding, couldn't Ohio try him for stealing?

MR. PLAUTZ: He would be charged under the California statutes for joyriding under their state statutes?

QUESTION: Yes.

MR. PLAUTZ: It would appear to me that the

present state of the law is that the State of Ohio could prosecute him for auto stealing.

QUESTION: And so the difference between that case and your case is, both of them ended in Ohio.

MR. PLAUTZ: Same sovereign. Ohio Court of Appeals made that explicitly clear, citing Waller v. Florida.

QUESTION: And that's the only ground?

MR. PLAUTZ: Only ground for which, I'm sorry --

QUESTION: For the double jeapordy point; same sovereign?

MR. PLAUTZ: Well, the Ohio Court of Appeals didn't even consider that. It's the same sovereign, yes. Oh, yes, of course, your honor.

QUESTION: Well, I'm wondering what you do in a town like Texarkana, where the state line runs down the middle of the street.

MR. PLAUTZ: Well, I think the quote in one of the cases, we're going to fritter away constitutional rights on such metaphysical subtleties, something like that.

QUESTION: I think your basic argument that I have trouble with is that they knew that he was guilty of the major crime.

MR. PLAUTZ: They -- they had enough proof. If they wanted, they had enough proof within two hours after his arrest.

QUESTION: They knew?

MR. PLAUTZ: Yes, your honor.

QUESTION: And that was what?

MR. PLAUTZ: He signed a full confession saying I took the car on November 29th. They had enough proof that he had the car ten days, they had enough proof to take it in front of a jury.

QUESTION: Well, is ten days -- is there any case in Ohio that says that the difference between these two statutes is a number of days?

MR. PLAUTZ: Not involved in this case. But there is another subsection in this statute, subsection (b) of this statute, that does provide for 48 hours. If you keep it for more than 48 hours it becomes a felony. But that isn't the statute he was charged at.

But in answer to your question, they had -- you know there is no case that interprets this statute that says that x amount of time equals intent. But there obviously are close cases, and a jury could very conceivably, after enough proof that he had the car for ten days, he had the intent to permanently deprive the owner of possession.

QUESTION: There was one additional point that had to be shown.

MR. PLAUTZ: In the second prosecution?

QUESTION: Yes.

MR. PLAUTZ: Yes, your Honor. Intent to permanently deprive the owner of possession.

QUESTION: Mr. Plautz, the prosecutions were in different counties, weren't they?

MR. PLAUTZ: Yes, and as the Ohio Court of Appeals made clear, it didn't matter.

QUESTION: Say that again; what?

MR. PLAUTZ: As the Ohio Court of Appeals made clear, it didn't matter in their decision at all. It was the same sovereign.

QUESTION: You said he received six months on the second go round.

MR. PLAUTZ: Yes, your honor.

QUESTION: You didn't mention it was suspended.

MR. PLAUTZ: I thought I did, I'm sorry.

QUESTION: Why do you think that more serious crime ended up in a suspended sentence?

MR. PLAUTZ: I think it was more serious because the first prosecution -- the first prosecution occurred in a more rural county, where they come down harder on offenses like that, and the second prosecution happened in urban Cleveland.

QUESTION: You don't think the second one was more lenient because of the service of that first sentence?

MR. PLAUTZ: No. I know -- I can make a

representation to that, that he just denied the motion. And it didn't make any difference.

QUESTION: Does this record show whether that was part of your plea agreement? You had a rather comprehensive agreement. On the second charge, was there an agreement that the sentence would be suspended?

MR. PLAUTZ: No, that wasn't discussed at all. Whatever -- you know. There was no discussion that if we lose on the motion, judge, will you give us credit. There was none of that discussion at all.

QUESTION: Let me follow through. Where is Lake County, Ohio?

MR. PLAUTZ: It is contiguous to Cuyohoga County in certain places.

QUESTION: East or West?

MR. PLAUTZ: It is east of Cuyohoga County, from where he was first apprehended with the car to where he first took the car, it's about a 45 minute drive.

QUESTION: Ashtabula?

MR. PLAUTZ: It's West of Ashtabula.

QUESTION: West of Ashtabula.

QUESTION: Well, that isn't very far. That isn't much difference between rural and urban.

MR. PLAUTZ: I think there's --you can make some indication of that.

QUESTION: The first prosecution I thoughtwas in a municipal court, wasn't it?

MR. PLAUTZ: Yes, your Honor.

QUESTION: Of East Cleveland.

MR. PLAUTZ: Yes -- no, your Honor. The first prosecution was in the Municipal Court of Willoughby.

QUESTION: Oh, yes.

MR. PLAUTZ: And that court had full subject matter and territorial jurisdiction to prosecute the auto theft. They could have simply bound petitioner over to the Lake County Grand Jury and returned the same indictment that a Cuyohoga County Grand Jury did a couple of months later.

QUESTION: How would they have jurisdiction over the theft if the theft was in another county?

MR. PLAUTZ: There's a specific Ohio statute that says that upon -- any person -- well, there's two statutes as a matter of fact, one dealing with all theft offenses, the other dealing specifically with motor vehicles, saying that when you take the car and you've gone to another county, you can be tried, prosecuted in any county in which you took the car. And that statute specifically says, prosecution and acquittal in one county bars prosecution and acquittal -- prosecution in another county. The Ohio courts ignored that statute.

You'll also notice that in my brief I argued that

this Court could, if it wanted to, adopt the same transaction test. It is a way this Court could go. I would urge that that test does have some relevance at times, but this Court need not take such a radical approach to the issue. And it has enough existing case law under the Blockburger test and the same evidence tests.

I know there were some questions in the prior argument about whether that's amatter of constitutional law. But looking at the Ohio Court of Appeals' decision, they took that test to be a matter of constitutional law. They cited Blockburger and they quoted from it, each statute requires proof of -- other does not -- and they concluded that that was the same offense within the Fifth Amendment double jeapordy clause. They applied that case to be a constitutional test, and there are countless other state court opinions that would do likewise.

I reserve the balance of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Sadd.

ORAL ARGUMENT OF GEORGE J. SADD, ESQ.,

ON BEHALF OF THE RESPONDENT.

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

On November 29th, 1973, an automobile belonging to Gloria Ingram was stolen by petitioner-appellant,

National Brown, from a parking lot in Cuyohoga County, Ohio.

Nine days later, on Decmeber 8th, 1973, Brown was arrested in a different county of Ohio called Lake County and charged with the misdemeanor of operating a stolen motor vehicle without the owner's consent.

Two day's later, the petitioner entered a plea of guilty to the offense of operating a stolen motor vehicle in LakeCounty, and was sentenced to thirty days in the Lake County workhouse and fined $100 and costs.

The record, contrary to Mr. Plautz' assertions before this Court, does not contain any reason for the Lake County law enforcement officials to contact the East Cleveland law enforcement officials in Cuyohoga County.

Mr. Plautz has addressed this Court, and told this Court numerous factors that are outside the record. HAd he deemed these items sufficiently important, he would have included them in the record. He made note that the Cuyohoga County prosecutors -- or officials were there at Lake County thirty days after the misdemeanor sentence was served.

QUESTION: Do you object to our taking judicial notice that the statutes of Oklahoma -- I mean, of Ohio?

MR. SADD: Yes.

QUESTION: You object to it?

MR. SADD: I object to any material matter that is not contained in the record before this Court?

QUESTION: I limited my question to the statutes of Ohio, which I understand is in our library. Do you object to us taking notice of it?

MR. SADD: No.

QUESTION: I thought that was what you were doing.

MR. SADD: I thought you said something different, I'm sorry, Mr. Justice Marshall.

There is nothing inthe record as presented by petitioner's counsel to support any of the allegations that he made. And under this Court's holding of Ciucci v. Illinois materials that are not considered -- cannotbe considered by this Court unless they were presented in this record before this Court.

The State of Ohio urges this Court to affirm this --

QUESTION: Mr. Sadd, of course the complaint and summons that was filed on the joyriding charge does identify the name and address of the owner of the vehicle as being in East Cleveland. So there was knowledge where the vehicle had been taken from, I suppose. Isn't that a reasonable inference?

MR. SADD: I'm sorry.

QUESTION: Is it not reasonable to infer that the prosecutor in the joyriding case knew where the vehicle

came from?

MR. SADD: Not necessarily, Mr. Justice Stevens.

QUESTION: But the complaint says, the owner was Gloria Ingram, it gives her address.

MR. SADD: That information could have been obtained by simply calling the Bureau of Motor Vehicles of the State of Ohio and obtaining the owner of that vehicle, and the residence of that owner.

It doesn't necessarily mean that there was any reason for the Lake County officials to contact the individual law enforcement officers in Cuyohoga County.

QUESTION: Well, but the point isn't critical whether they talked to the law enforcement officers, is it? The point that's critical, isn't it, that they had a reasonable basis for finding out where the theft took place.

MR. SADD: Yes, but it's not in the record.

QUESTION: Well, but the fact is in the record, they knew where the car came from. They knew the name of the owner. All they had to do was pick up the phone, they'd find out where it was stolen, wouldn't they?

Can't we take judicial notice of that?

MR. SADD: I think you could take a very judicial notice of that fact that there was -- but you can't take any judicial notice of the fact that on the record as it was presented that there was any communication between

Lake County and Cuyohoga County.

QUESTION: Don't you have hot car sheets in Ohio?

MR. SADD: We have if a vehicle is stolen, in that it would be reported and placed in a computer to all law enforcement agencies. I guess that's what you're referring to by a "hot sheet" that you report --

QUESTION: Yes.

MR. SADD: I assume that was --

QUESTION: And Lake County has that facility?

MR. SADD: I have no idea; I'm not from Lake County, Mr. Justice.

QUESTION: Well, it's in Ohio?

MR. SADD: Yes, it is.

We urge -- the State of Ohio urges this Court to affirm the decision of the Court of Appeals of Cuyohoga County on the basis of the following rules of constitutional law.

Under the traditional Gavieres test, a defendant is not placed in double jeapordy when he is tried twice; and the elements of each statutory offense with which he is charged requires proof of a fact which the other does not.

In the petitioner's case, both the intent elements and the conduct elements of the separate crimes of operating a motor vehicle without the owner's consent, and stealing a

vehicle, on their face, are sufficiently different to permit the petitioner's second trial for auto stealing.

QUESTION: Do you think that's consistent with the interstate court's holding?

MR. SADD: Not really. I feel thatthe Court of Appeals' erred in its holding that they were lesser included offenses. I think that from the admissions made by the petitioner before this Court, and this Court itself on its face, can determine that the two crimes were totally separate and distinct.

First of all --

QUESTION: Yes, but the Court said, they were -- under Ohio law, they were -- that there was a lesser included offense.

MR. SADD: Yes, sir.

QUESTION: Now, are we -- are we bound by that a s a construction of Ohio Law?

MR. SADD: No. The Ohio State Supreme Court has not passed on the question of whether operating a motor vehicle without the owner's consent is a lesser included offense of auto stealing. This Court has the power and the authority to constitutionalize, for double jeapordy purposes, that question, and find that the two offenses are separate on their face. In Ohio --

QUESTION: Well, I take it though, that in finding

the -- joyriding to be a lesser included offense, the Ohio Court said that every single element necessary to prove that offense was also necessary to prove the greater offense.

MR. SADD: That's correct.

QUESTION: Isn't that what they said?

MR. SADD: That's correct.

QUESTION: I think -- I would think that at least to that extent we're bound by the Court's ruling about Ohio law, that there was no element necessary to prove the lesser included offense that was not necessary to prove the greater offense.

MR. SADD: This Court, for purposes of double jeapordy, can constitutionalize that question of Ohio law, or remand this decision to the Ohio Supreme Court for certification of whether or not operating a motor vehicle is a lesser included offense of auto stealing.

In Ohio v. Ikner, a decision which came down after this decision in the present case, there the Ohio Supreme Court --

QUESTION: Are you supporting the decision -- are you -- you're not supporting part of the rationale of the Court of Appeals.

MR. SADD: That's correct.

QUESTION: Are you supporting the dispositive

part of their opinion?

MR. SADD: Yes.

QUESTION: That this -- that they were just completely different offenses.

MR. SADD: Yes, they are completely different offenses, on their face. And auto stealing requires an intent to permanently deprive an owner of his possession permanently, and requires a physical taking of the vehicle, whereas operating a stolen motor vehicle without the owner's consent is joyriding, and --

QUESTION: You started to tell us, I think, about a decision in the Ohio court system, the Ohio Supreme Court, subsequent to this one?

MR. SADD: Yes.

QUESTION: What was that?

MR. SADD: Mr. Justice Stewart, it was Ohio versus Ikner.

QUESTION: And what did it hold?

MR. SADD: They held and construed a decision a similar statute, section 4945.04, I believe subparagraph (e), which dealt with concealing with a stolen motor vehicle, and the same provision under which petitioner Brown was convicted in Lake County, operating amotor vehicle. And they held that the offenses were separate offenses, following the Blockburger decision of this Court.

QUESTION: Have you got the cite for that case?

MR. SADD: Yes, I do. It's included in my brief.

QUESTION: Well, if it's there, fine.

You didn't give us the name of it, and therefore I thought it was an intervening case, yet another case since you wrote your brief.

MR. SADD: No, it was present.

QUESTION: Fine.

MR. SADD: It's State versus Ikner, 44 Ohio St. 2nd 132 (1975).

QUESTION: But it did deal with a different statute?

MR. SADD: It dealt with a larceny statute of concealing a stolen motor vehicle.

QUESTION: Yes.

MR. SADD: And here we have a larceny statute of auto stealing.

And to support my position that the two offenses are totally separate, we say that auto stealing requires an intent to permanently deprive an owner of his possession permanently, and requires a physical taking, whereas operating a stolen motor vehicle is joyriding or a temporary taking, and not larceny.

To support that in my supplemental brief, I would like to comment on the traditional purpose of the joyriding statute, the legislative service commission wrote, this

section defines the offense commonly known as joyriding. For some years, auto theft has been an increasing problem, and in this type of offense, it is difficult to prove that the offender intended to permanently deprive the owner of the car. The offense of joyriding was designed to alleviate the enforcement problems this creates, and the gist of the offense is simply an unauthorized use of the vehicle. It is unnecessary to prove intent to permanently deprive the owner.

So on that basis we hold -- or we urge this Court to find -- that the two crimes under which the petitioner were convicted were separate and distinct, and have no applications for the purpose of the double jeapordy, and that this --

QUESTION: But isn't this -- maybe with some constitutional limitations -- but isn't it really, in the first instance, at least, the function of the courts of Ohio to determine whether something is a lesser included offense than something else.

MR. SADD: That's correct.

QUESTION: That's -- and we -- and if they've made that determination --

MR. SADD: It might be appropriate --

QUESTION: That's for us to accept, isn't it?

MR. SADD: I still say, Mr. Justice Stewart, that you

can constitutionalize --

QUESTION: Well, that's a matter of State law.

MR. SADD: That's correct.

QUESTION: That's a matter of the state definition of the offenses. If one is a lesser included offense to the other, then it is, as a matter of State law. If it isn't, it isn't, as a matter of State law, and of the State definitions of the various kinds of misconduct.

MR. SADD: Then I would urge that -- this case -- this case may be appropriate for a remand for the Ohio Supreme Court to determine that issue.

QUESTION: Well, the Ohio Supreme Court declined to consider this case. And the Ohio State court that decided was the Court of Appeals in this case which held that the so-called joyriding was a lesser included offense.

MR. SADD: Mr. Justice Stewart, if this Court feels that it is bound by the decision of the Ohio Court of Appeal, then we would urge upon this Court the prosecution for a lesser offense, a lesser included offense, in the first instance does not bar prosecution for the greater offense, because in that particular instance, there's an additional element contained in the felony statute.

QUESTION: Well, there always is.

MR. SADD: That's correct.

QUESTION: That's the definition of a lesser included

offense. If the greater offense requires the same elements as the lesser offense, plus something else.

MR. SADD: And we would urge then for purposes of double jeapordy --

QUESTION: That's the question.

MR. SADD: That the man has never been placed in jeapordy on the additional --

QUESTION: Right.

MR. SADD: -- offense.

QUESTION: Right, and that's the constitutional question.

MR. SADD: Correct, because the Fifth Amendment speaks in terms of, no person shall be placed in jeapordy twice for the same offense.

QUESTION: Well, I don't understand why you don't -- why you don't defend the ultimate rationale of the Ohio Court of Appeals. The Court simply said that if you have a theft on one day, and fifteen days later you pick the fellow up for joyriding, and indict him under that, they in effect said that isn't the lesser included offense.

MR. SADD: That's correct. I was trying to explain it in terms of, first, in my opinion, that this Court should determine.

QUESTION: Maybe that just isn't acceptable for constitutional purposes, I don't know. But that's what they

said. Although if you -- I suppose if you indicted the man for joyriding at the very moment that he stole a car, perhaps the whole thing that joyriding is a lesser included offense would have some significance.

MR. SADD: But then the decision of the Ohio Court of Appeals could be upheld on the basis that they did constitute two different operative acts occurring nine days apart --

QUESTION: Well, that's what they held.

MR. SADD: That's correct.

QUESTION: That's what they purported to hold, anyway.

MR. SADD: That's correct. I would have no quarrel with it in that sense.

QUESTION: Even though one of the lesser included offense -- from the -- in the sense that if somebody were charged with larceny of an automobile, and were convicted of joyriding, he could not then be recharged with larceny of the automobile. It's a lesser included offense in that sense. Is that it?

MR. SADD: That's correct.

QUESTION: Because he would have implicitly been acquitted of larceny when convicted of only the lesser included offense.

MR. SADD: That's correct. We feel that the

double jeapordy clause in this particular case had not been violated at all. And that this Court, when it considers this question, should hold that -- and permit multiple prosecutions for different acts, and that the true protection of a defendant under double jeaporday purposes is for cumulative sentences.

Petitioner could hardly complain that he was sentenced a greater time for the more serious offense in this particular case.

QUESTION: Mr. Sadd, under the reasoning of the Ohio Court of Appeals, do you think if they had -- instead of having one prosecution for joyriding, and then the second one of stealing on a different date, if the second prosecution had also been for joyriding on a different date, what do you think the Court of Appeals of Ohio would have done?

MR. SADD: I think that perhaps they might have held that it might have been the same offense, but I'm not positive.

QUESTION: In other words, you don't rely on the date difference, then?

MR. SADD: I rely on the date difference?

QUESTION: But you don't think the Court of Appeals relied on the date difference?

MR. SADD: They did rely on the date difference. They said it occurred nine days differently.

QUESTION: But you're saying that reliance is misplaced. I'm trying -- what is your view of the significance

of the dates?

MR. SADD: Of this case?

QUESTION: Yeah.

MR. SADD: Well, under the Court of Appeals decision, I would say that prosecution for a lesser offense would not bar greater prosecution for a greater offense. Because they were based --

QUESTION: Well, but assuming they'd both been violations of subsection (b) is what I'm trying to get at -- both joyriding charges, but involving different dates?

MR. SADD: I would still say the Court of Appeals would have affirmed the decision, saying that they occurred in different counties.

QUESTION: Do you think we would have had an obligation to affirm that decision?

MR. SADD: Yes.

QUESTION: Because of the difference in dates?

MR. SADD: That's correct.

QUESTION: So you have two entirely separate arguments: one, that there are two different dates involved, and second, that even though the offense is a leser included, you can go ahead and prosecute for the greater --

MR. SADD: That's correct. As urged by the governor--

QUESTION: You said the dates only apply to the one crime, but not to the other one.

MR. SADD: That's correct, Mr. Justice.

QUESTION: You couldn't charge him with stealing it for ten different days, could you?

MR. SADD: No, that's not presented for this Court. That issue is not here in this particular case. We would urge also that the arguments made by the Solicitor General in his presentation on the lesser and greater also apply at this particular time.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Do you have anything further, Mr. Plautz?

MR. PLAUTZ: A few minutes.

REBUTTAL ARGUMENT OF ROBERT PLAUTZ, ESQ.,

ON BEHALF OF THE RESPONDENT.

MR. PLAUTZ: I would just -- may it please the Court:

I would just remind the Court again that it's alleged that the greater offense occurred prior to the lesser offense, ten days prior, and in response to Justice Marshall's statement about the hotsheets, that in fact happened in this case.

He was stopped for a traffic offense, they ran a make on the car, they came up with a hit from East Cleveland, they immediately called the East Cleveland police. They, within two hours, went to Lake County, the city of Wickliffe.

obtained the confession from him within two hours.

They waited three days -- it happened on Saturday -- they waited three days and they filed a complaint on a Tuesday. However, on the previous day, Monday, he was in the Willoughby Court for pleading guilty to operating.

QUESTION: But I understand the state position to be that all of those facts, they still can prosecute him for both crimes.

MR. PLAUTZ: Yes.

QUESTION: So, I mean, all this factual material doesn't mean anything to the State, does it?

MR. PLAUTZ: That is correct.

QUESTION: What do you say finally to the State's position? That he is not in jeapordy.

MR. PLAUTZ: It is inherently arbitrary to have a statute thatprohibits conduct to try, prosecute, and convict, punish that individual, for that conduct, and then come around and try to punish him again for that same conduct.

In answer to Justice Stevens' question, yes, under the Ohio Court of Appeals' holding, they apparently could have got him twice for operating, keeping, and taking that car within the ten day period. It makes no difference that's it's an auto stealing charge.

QUESTION: Mr. Plautz, you used the words, inherently arbitrary, a moment ago. Some years ago this Court decided

a case called Palko against Connecticut, in which Justice Cardoza, speaking for the Court, said that the double jeapordy clause did not apply to the State, but that principals of opposed to inherent arbitrariness did.

Then some years later, in an opinion by my brother Marshall, in a case called Benton against Maryland, Palko was overruled. And it was held that the double jeapordy clause did apply to the states.

I take it what you're arguing here is double jeapordy in its technical sense, as originally contained in the Bill of Rights, not some concept of inherently arbitrary under the due process clause, divorced from double jeapordy.

MR. PLAUTZ: Yes -- I'd answer yes to your question. But to explain: I think we have essentially here a crime that was, you know, when the Bill of Rights was written, we have here essentially a crime that was known at common law, a theft, a larceny. And I would think that that would have some merit, rather than opposed to what's been brought up in the previous case, in the 7th Circuit, a highly statutory, complex crime. I think we have essentially a crime that is one continuous piece of conduct, that they can only try, convict and punish once.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:23 o'clock, p.m., the case in the above-entitled matter was submitted.]