In the

Supreme Court of the United States

STATE OF ARIZONA,	)	
	)	
PETITIONER,	)	
	)	
V.	)	No. 79-621
	)	
WILLIAM DALE MANYPENNY,	)	
	)	
RESPONDENT.	)	

Washington, D.C.
November 10, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,

Petitioner,

v. No. 79-621

WILLIAM DALE MANYPENNY,

Respondent.

Washington, D. C.

Monday, November 10, 1980

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:01 o'clock p.m.

APPEARANCES:

DANIEL JESSE SMITH, ESQ., Chief Deputy, Appellate Division, Pima County Attorney, 111 West Congress St., Tucson, Arizona 85701; on behalf of the Petitioner.

JAMES D. WHITNEY, ESQ., Suite 219, 655 North Alvernon Way, Tucson, Arizona 85711; 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 Arizona v. Manypenny.

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

ORAL ARGUMENT OF DANIEL JESSE SMITH, ESQ.,

ON BEHALF OF THE PETITIONER

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

The Court granted certiorari in this case to review two questions. The first is whether a state government is stripped of its right to appeal whenever a state criminal prosecution is removed by the defendant to federal district court pursuant to the Federal Removal Statute.

The second question on which review was granted was whether a federal district court has jurisdiction to enter judgment of acquittal pursuant to Rule 29(c) on its own motion beyond the seven-day limit called for in Rule 29(c), in this case 11 months after a jury has returned a guilty verdict.

This case arose out of a shooting that took place in Southern Arizona in March, 1976. Respondent Manypenny was employed as a United States border patrol agent. While he was on duty taking aliens into custody near the Mexican border he shot an unarmed alien in the back as the alien was heading back towards Mexico.

The respondent was indicted by the State of Arizona

for assault with a deadlly weapon. The respondent filed a removal petition and thee trial was held in the federal district court. Respondent was cconvicted by a jury and then filed a Rule 33 motion for a neww trial and a Rule 34 motion for arrest of judgment. Resspondent never filed a Rule 29(c) motion seeking a post-verdict jjudgment of acquittal.

The district ccourt initially granted the motion in arrest of judgment, the state then moved for reconsideration of this order. The disttrict court took no action for 11 months and then reversed its ruule in arresting judgment and instead, sua sponte, construed thhe motion in arrest of judgment as a motion for a judgment off acquittal and entered a judgment of acquittal.

The State of AArizona appealed to the 9th Circuit alleging two things, firstt that the district court was wholly without jurisdiction to entter the judgment of acquittal on its own motion 11 months aftter the verdict. And secondly, even assuming arguendo that tthe district court had jurisdiction, that the entry of a judggment of acquittal was an abuse of discretion and error on the face of the --

QUESTION: Thaat's not before us now, is it?

MR. SMITH: Noo, we didn't petition on that issue, Your Honor, and the 9th Circuit did not address it.

A divided 9th Circuit held that the state has no

right to appeal when a state criminal prosecution is removed to federal court, irrespective of whether that state has the right to appeal in its own courts. Judge Kennedy in dissent found that both 18 U.S.C. 3731 provided the Court of Appeals with a basis for hearing the case; and he also found that in the alternative 28 U.S.C. 1291, which provides for review of all final decisions in the district courts, would also give the 9th Circuit jurisdiction to hear the appeal.

Judge Kennedy's dissent further examined the merits of the case and he stated that he would reverse the judgment of acquittal and reinstate the verdict. Even the majority noted in its opinion that the concerns of Congress that led to the enactment of 3731 are equally applicable to removed state criminal prosecution. They further stated that their decision would have a substantial effect on the delicate balance of our federal system.

The majority opinion vests every federal district court in the country with unreviewable power to block any state criminal prosecution of a federal removal defendant. It creates a specially privileged class of defendants in federal court who can enjoy the unreviewable benefits of judicial errors committed in their favor, and it will serve to encourage forum shopping.

The Solicitor General filed an amicus brief at the request of this Court. They took the position that both

18 U.S.C 3731 and 28 U.S.C. 1291 gave the Court of Appeals jurisdiction to hear the State's appeal and they further stated that the policy considerations that led to the enactment of the removal statute in the first place are in no way furthered by the decision of the 9th Circuit which simply gave a windfall benefit to removal defendants.

QUESTION: The removal statute is a fairly old statute, isn't it?

MR. SMITH: Yes. Its history is traced in this Court's opinion in Willingham v. Morgan. It apparently goes back to 1812, and then it was allowed to lapse for a long while and was revived after the Civil War.

QUESTION: And of course, even after it was revived, as of that time there was no appeal in a criminal case for anybody, was there?

MR. SMITH: Certain state courts allowed appeals but --

QUESTION: I mean, in a federal?

MR. SMITH: In federal court there wasn't any right to an appeal until 1907.

QUESTION: Right, for either.

QUESTION: In a capital case there was no right to appeal in the federal courts before 1907, was there?

MR. SMITH: No, and I think the Sanges case of this Court states that prior to the late 1880s there wasn't even an

appeal by a defendant in federal court; nobody had a right to.

QUESTION: Well, that's what I meant, that a defendant prior to 1900 in a capital case could appeal.

MR. SMITH: Well, I'm not familiar with that, but I know that there was no general right to appeal for a defendant prior to the act that was construed in Sanges. This Court in Younger v. Harris stated that, "Since the beginning of our nation's history Congress has manifested a desire to let state courts try state cases free from interference by federal courts, subject to a few sharply delineated exceptions."

In Colorado v. Symes, which was a 1932 removal case before this Court, the Court stated that the right of a state government to enforce its criminal laws is equal to the right of the federal government, and that the removal statute before the Court had to be construed with the highest regard for that equality.

In Tennessee v. Davis, which was the seminal case in removal jurisprudence -- that was an 1880 decision by this Court, the Court set forth the rule that for the trial of removal cases the federal district courts are to apply the substantive law of the states and the procedural law of the federal courts. And this was codified in Rule 54(b)(1) and the comment to Rule 54(b)(1) makes it explicit that in the intended removals of prosecution, the state government stands in the shoes of the United States Government for procedural

purposes.

Arizona law allows for appellate review in the circumstances of this case, irrespective of whether the Court deems the right to appeal by the sovereign to be substantive or procedural; the State of Arizona --

QUESTION: Mr. Smith, may I interrupt for just a second? You cited the Tennessee v. Williams. That would be --

MR. SMITH: Tennessee v. Davis.

QUESTION: And then it had -- that was in 1880, was it?

MR. SMITH: Yes.

QUESTION: At that time that case was decided, there was removal jurisdiction to the federal court and is it your view that there was an appeal allowable at that time?

MR. SMITH: Well, this hasn't come up before. At that time, it would be our position that had the state government provided for the right to appeal in its own courts and were the right to appeal deemed substantive rather than procedural, then there would have been a right to appeal under Tennessee v. Davis, but that never arose.

QUESTION: Even if there was no right of appeal to the United States in a federal prosecution?

MR. SMITH: Yes, if Davis is applied literally, that would have been the case. But again, that's not before this Court because --

QUESTION: Well, somehow or other the Tennessee v. Davis got to this Court, so somebody must have appealed it.

MR. SMITH: Well, in Tennessee v. Davis, it got to this Court prior to trial where the State of Tennessee was challenging the constituionality of the Removal Act itself.

QUESTION: By what sort of procedure?

MR. SMITH: I would assume by writ of mandamus.

QUESTION: I see.

MR. SMITH: I haven't re read the case recently, so --

QUESTION: I don't know either.

MR. SMITH: But the State of Tennessee raised two contentions. One, they contended that removal was per se unconstitutional, and I obviously didn't read the briefs on that case but I think some of the history that I cited in my opening brief would lay the basis for that. That was rejected by the Court.

The second contention was that Congress in enacting the removal statute had not provided for any explicit procedure for the trial of removal cases, which is very similar to the objection that respondent raised in this case, that there's no explicit authorization for a removal appeal in a removal case.

This Court rejected that as being a frivolous argument. They said that the mode of trial was sufficiently obvious, and federal courts are equipped to set forth that rule.

QUESTION: But it also said that state law governed the substantive aspects?

MR. SMITH: Yes.

QUESTION: And is it your position that appealability is a substantive matter, to be controlled by state law?

MR. SMITH: Your Honor, we haven't taken a position on that issue because the State of Arizona, which is the only state I'm representing today, does provide for appeals in this type of situation. However, under Arizona State law, the right to appeal is a substantive right, although the mode that appeal takes is considered procedural. Obviously, that shouldn't govern in this Court.

QUESTION: It makes quite a bit of difference what position you take, I suppose. I suppose the result of the United States position is that Arizona could appeal in a removed case even if it couldn't appeal in its own courts. Is that right or not?

MR. SMITH: I think that was the position the Solicitor General took, although they noted --

QUESTION: Is that your position?

MR. SMITH: Well, after I've reiterated the fact that it's unnecessary for the disposition of this case, it would be our position --

QUESTION: I know, but you have to -- you just can't say, reverse, or append, at the bottom. You have to say, why.

So what is your theory of appealability?

MR. SMITH: Well, under most of the case law that I've read, substantive law defines what is a crime and the punishment for a crime, and procedure governs how that result is supposed to be reached. It would be our position that because of the different nature of state and federal judicial systems, different controls, direct and indirect, over the petitioner, that --

QUESTION: Do you rely on 1291, or -- ?

MR. SMITH: Well, we would rely both on 3731, which provides, Subsection (e), that the provisions of this statute shall be liberally construed to effectuate its purposes. The purposes of 3731 --

QUESTION: Then you would apparently say that Arizona could appeal under that statute even if it couldn't appeal in its own courts?

MR. SMITH: That would be our position, were we faced with that situation. But again, the State of Arizona isn't.

QUESTION: Well, I know, but if we decide on that ground, why then we are deciding that Arizona could appeal in a federal court, even if it couldn't in its state court. But if you relied on 1291 and said state law determines it -- ?

MR. SMITH: No, we're also relying on 1291 under the basis of the literal language of 1291.

QUESTION: Then you're saying that the state is just

a party that can appeal?

MR. SMITH: Yes.

QUESTION: Wholly aside from whether it could appeal in its own courts?

MR. SMITH: If the Court's going to base its decision on 1291, that would --

QUESTION: Well, why are you citing Tennessee then?

MR. SMITH: Because one of Respondent's arguments is that Congress never explicitly provided for this situation, and it would be our position that because Tennessee v. Davis was decided in 1880, 27 years before the first criminal appeals act was passed in 1907 --

QUESTION: So you don't really care about Tennessee's holding that state substantive law governs? It's the other aspect of it that the federal system has all you need to try the case?

QUESTION: Well, as I understood your argument, Mr. Smith, it was this, that you don't need, and we don't need to decide whether this is procedural or substantive under Tennessee v. Davis, since Arizona has a right of appeal under state law, in any event, and you say that the federal statute gives Arizona a right of appeal under federal law, in any event?

MR. SMITH: Right. That's --

QUESTION: So whether it's substantive or procedural,

in your plan Arizona wins. That's your theory?

MR. SMITH: That's our theory.

QUESTION: In a diversity case that's removed to federal court from state court, that's just a simple civil action, the federal statute controls the appealability of that, doesn't it?

MR. SMITH: Well, if the Court's asking about the Erie Doctrine, this isn't a classic diversity case. This is not --

QUESTION: I realize that but I mean, I'm hunting around for some analogy. Supposing you simply had a civil action which was filed in the Superior Court of Pima County and properly removed by the defendant to the district court of Arizona, and after judgment one of the parties wants to appeal. He looks to the federal statutes governing appeal to the Court of Appeals for the 9th Circuit, does he not?

MR. SMITH: I would think, again -- I'm not familiar with the civil law, but on the Erie question, which is useful by analogy, I would request that the Court consider the late Chief Justice Warren's opinion in Hanna v. Plumer, in which he said that the twin policies of the Erie Doctrine, were to discourage forum shopping and to the avoidance of the inequitable administration of justice. And I would submit that both those policy considerations are undercut by the decision of the 9th Circuit and would be furthered by a ruling

from this Court that a state does retain its right to appeal. when a criminal prosecution is removed.

In United States v. Wilson, which was the case where this Court interpreted the modern version of 3731, per Justice Marshall, wrote that "the congressional intent behind the amendment was to eliminate all statutory barriers to government appeals and to allow appeals whenever the Constitution would permit. And as Mr. Justice Marshall noted in that opinion, there is no right to benefit from a judicial error committed in your favor, when that can be reviewed without subjecting the defendant to a second trial. We submit that Wilson controls this case, even if Tennessee v. Davis didn't; unless the Court's going to retreat from the language in Wilson that it does, there is no statutory barrier to this appeal, and therefore it's authorized under 3731.

In the alternative --

QUESTION: Well, just so I have your argument -- if it's authorized under 3731, you are arguing that the State of Arizona should be treated as "The United States" within the meaning of 3731?

MR. SMITH: Yes.

QUESTION: And not be permitted to appeal except where 3731 would permit the United States to appeal?

MR. SMITH: Well, if the appeal rights of the State again are to be predicated on 3731, that would be logical that

we would have the same rights as the United State Government, were prosecution commenced by the United States Government.

QUESTION: Or the absence of such rights as they do not have?

MR. SMITH: Yes. That would be simpler to administer. In the alternative, if this Court finds that the words "United States" in 3731 do preclude that statute as being used for the jurisdictional basis of this appeal, we submit that 1291 should also be read literally and that this appeal is plainly authorized by the all-final decision language in that statute.

QUESTION: But if you take that view, then 3731 really wasn't necessary for the United States to have the right to appeal.

MR. SMITH: Well, that's not so, because prior decisions of this Court prior to the amendment of 3731 and Wilson did hold that the United States Government couldn't appeal except where expressly authorized by statute.

QUESTION: In other words, prior decisions, it said that 1291 doesn't cover appeals by the prosecution?

MR. SMITH: That's the general drift of the Court's --

QUESTION: If that's the case, how can we now read 1291 to allow appeals when the State of Arizona is the prosecutor?

MR. SMITH: Because now 1291 should be read in light

of the congressional amendment to 3731, which is the --

QUESTION: Well, then, you're still relying on 3731 as a necessary part of your 1291 argument?

MR. SMITH: Yes, In the 9th Circuit, in the United States v. Hetrick, which was the case that was decided September 16, that I sent to the Court several weeks ago, they did hold that in light of the new construction of 3731, that 1291 did provide the basis for a government appeal in a criminal case, although that was an appeal by the United States Government, not a state.

Unless there are any further questions on the first issue, we would request that the Court not ratify the creation of a specially privileged class of defendants at the expense of state sovereignty. We urge the Court to hold that a state does not lose its right to appeal in a removal case.

On the second question presented --

QUESTION: We'll never get to the second question if we decide against you on the first, is that correct?

MR. SMITH: Yes. Although the second issue can still be reviewed and considered pursuant to this Court's mandamus jurisdiction under 28 U.S.C. 1651, because mandamus, as this Court's prior decisions have held, does not lie where there is an adequate remedy by appeal. But if the Court decides the first question adversely to Petitioner and the Court goes on to find what this district court was wholly without

jurisdiction to have entered this order, then the 9th Circuit and this Court both have jurisdiction to reinstate the verdict pursuant to its mandamus jurisdiction.

QUESTION: Well, if we decide in favor of you on the first question it would seem to me that we would not reach the second question. The 9th Circuit shouldn't then have dismissed the appeal and we should simply reverse the judgment of the 9th Circuit and send it back to the 9th Circuit.

MR. SMITH: Well, the Court could certainly do that. On the other hand, we would submit there are several compelling reasons why the Court ought to take the second issue.

QUESTION: In any event we did grant certiorari on both issues?

MR. SMITH: Yes, and they were both fully briefed below, in the courts below. If Mr. Justice Rehnquist would like the response as to why we should take jurisdiction, I'll --

QUESTION: No, you do the responding.

MR. SMITH: Okay. We would submit that perhaps the most compelling consideration for this Court not to remand it to the 9th Circuit would be considerations of comity; that this case is more than four years old, it's gone through four prior decisions already, and we're in an extremely delicate area of federal-state relations in removal jurisprudence.

Secondly, Judge Kennedy in dissent stated that he took a position in conflict with the 5th and 10th Circuits and

would find that the district court did have jurisdiction to consider the untimely judgment of acquittal. And while, obviously, that's a dissent and not controlling, under your supervisory powers you know that you have a judge down below who's on record as taking what we submit is a wrong position, and that would be a further reason for this Court to consider the second issue.

As I stated in my statement of facts previously, in this case no Rule 29(c) motion was made by Respondent at any time. Rule 29(c) in its text provides for a 7-day limit for the making of such motion or for the asking of an extension of time to make such motion.

There is nothing in respondent's Rule 33 and Rule 34 motion, both of which are reproduced in the Joint Appendix, pages 5 and 16, that can be construed as an allegation that the State failed to produce sufficient evidence at this trial. Had it been labeled a Rule 33 motion but had attacked the sufficiency of the state's evidence, that would be a different case, but that's not what happened here.

In United States v. Smith case, which dealt with Rule 33 motions, this Court in 1948 held that virtually identical language was in fact jurisdictional and set forth several policy reasons why the Rule should be literally enforced. The 5th and 10th Circuits have both held that the seven-day limit is in fact the jurisdictional limit, and we submit there is

no reason for this Court not to extend the identical ruling that this Court did in the Smith case to Rule 29(c) motions, since the identical relief can be obtained by this respondent or any defendant on direct appeal or on federal habeas.

If there is insufficient evidence as a matter of law in the record, that can certainly be dealt with on appeal. The district court if he somehow feels that he's missed something can release the defendant on an appeal bond or on his own recognizance pending appeal. And in that situation the case will be reviewed on a full set of transcripts with a full set of briefs.

In the instant case, the State had no notice whatsoever that the federal district court was even considering this motion, and did not have any transcripts prepared prior to the entry of this order. And as Judge Kennedy noted in his dissenting opinion, the reasons that the judge advanced for the granting of the judgment of acquittal in his opinion, which is reproduced in the Appendix of the petition for cert., bear no relation to what appears in the transcripts. And that's the consequence, we submit, of dealing with the case 11 months after the fact outside the time limit provided for in Rule 29(c).

Unless the Court has any further questions at this time I would like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Whitney?

ORAL ARGUMENT OF JAMES D. WHITNEY, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I think there is one fundamental difference and I think this Court is going to have to resolve that difference before the case makes any sense at all, and that is the constant references by counsel to the appealability of a judgment of acquittal under the Arizona State Statutes. There is no such right.

Now, it was argued by Judge Kennedy in his dissent that there was language talking about jurisdiction being given to the state or to the appellate courts for states' appeals in orders rendered after judgment. One could say, well, perhaps loosely. This is the legislature saying in effect, what we have here is a judgment of acquittal.

All right, that's a great argument until you read those rights given to the defendant in the State of Arizona to appeal, where they specifically state, and specifically set forth judgments of acquittal.

So there is no right, and I would refer, please, to pages 17 and 18 of our brief.

QUESTION: Well, Mr. Whitney, I understand your colleague to take the position that the State has the right to appeal in the federal courts, whether they have the right to

appeal in the state courts or not.

MR. WHITNEY: That apparently is true, sir. That apparently is, he is taking --

QUESTION: Well, if he's right about that, we needn't get into state law.

MR. WHITNEY: Why I bring that, there was quite a colloquy between counsel, Justice White, concerning what basis it was that he was appealing on, and I never got it straight that he wasn't attempting to --

QUESTION: I know he submits --

MR. WHITNEY: He submits as policy argument the fact that there was an appeal and --

QUESTION: And several times he submits that the State shouldn't lose its right to appeal by a removal.

MR. WHITNEY: That's right, sir.

QUESTION: But the grounds that he urges, independent of whether there's a right to appeal in the state courts or not.

MR. WHITNEY: I hope that the Court takes that position in rendering a decision, because it seems to me that we have at least three grounds that counsel is proffering as a basis for appeal, and the principal ground among those is that appeal should be allowed not only by reason of the language in 3731 calling for a liberal construction -- I call the Court's attention to the fact that the liberal construction applies

to this section, 3731. Congress did not say, in each and every instance where there is an appeal, whether by the state or by the United States, that there should be liberal construction. It's that kind of transfusion that we have in United States v. Hetrick that has created so much conflict in this area.

Now, insofar as Section 3731 is concerned, that speaks solely of the United States, as Judge Choy in the majority decision specifically set forth: "The United States is an entity. The United States is not the several states; the United States" -- this is key, now -- "The United States is not the possessions, the District of Columbia and so forth for purposes of federal judicial jurisdiction."

QUESTION: Mr. Whitney, let me ask you to go back for just a moment. There was a judgment entered in this case, wasn't there?

MR. WHITNEY: Yes, there was; yes, there was.

QUESTION: Then look at page 18 of your brief, the statutory subsection 5, specifying appealability. "An order made after judgment affecting the substantial rights of the state." Wouldn't this come under that heading?

MR. WHITNEY: Well, sir, I believe you're referring first of all to our order. We had an order in the first instance, and that order was granting a motion in arrest of judgment. In this case I think that this statute, and the

cases that I've seen construing this statute, they happen to have been cited by Judge Kennedy in the 9th Circuit. It's Dawson and Allen, State v. Dawson and Allen. They were speaking about the court having entered a judgment of acquittal in the first instance. I think this is the Allen case. And then, some time beyond the seven-day limit as provided in Arizona, some point after that, entering an order vacating that judgment in that case.

The court held that it was far beyond the jurisdiction of the trial court to enter an order after the judgment.

QUESTION: Well, but, it's one thing to say the trial court couldn't do something and it's another thing to say you can't appeal from what it has done, whether it was authorized by law to do it or not. I would have read the Subsection 5 as authorizing an appeal by the State if an order was made after judgment affecting substantial rights of the State, as this certainly did.

MR. WHITNEY: It affected it; it was a judgment, and I would point, sir, in the response to a petition for a writ of certiorari, the estate of State v. Hunt, where the Arizona appellate statute was almost identical to the one that we have before us today. And in State v. Hunt, the Court held unequivocally that there was no appeal from a judgment of acquittal. It just said that the State Legislature had not seen fit to so expressly provide.

And my argument is this, further, if I may go on. My argument is that the Legislature was fully aware of the importance of a judgment of conviction and chose to designate appealability from a judgment of conviction in the case of a defendant, while in the case of the State omitting it entirely.

QUESTION: Well, the state presumably wouldn't want to appeal from a judgment of conviction.

MR. WHITNEY: It probably wouldn't; you're correct, Judge.

QUESTION: You referred to State v. Hunt, but I don't see that cited in your brief. State v. Hunt?

MR. WHITNEY: State v. Hunt, sir, and it was in my Response to Petition for a Writ of Certiorari.

QUESTION: Do you say that held that Subdivision 5 did not include appeals from judgments of acquittal?

MR. WHITNEY: Yes, sir. I don't mean to mislead the Court. As I remember State v. Hunt, the situation was this, an appeal by defendant -- and we do have to envision then that the State may counter appeal on matters of law -- the court simply said, it is not important to us whether or not the defense in this particular instance has appealed. We are simply holding that the statute does not expressly provide for the appeal from a judgment of acquittal on the part of the state.

QUESTION: Is that case in your brief?

MR. WHITNEY: It was in my Response to the Petition for Certiorari, sir, State v. Hunt. It was Second Division of the Court of Appeals in Arizona.

QUESTION: Mr. Whitney, is your client still in the Border Patrol?

MR. WHITNEY: His employment was terminated, I believe, some three or four months after this indictment came down in this case. He was relieved as soon as the indictment came down. Now, 1291, as I believe it has been pointed out, and responses made by counsel to the court, the prior law as far as 28 U.S.C. 1291 was that that covered criminal matters only so far as those matters were ancillary to or an adjunct to the general framework or fabric of the criminal case itself. There was one instance.

QUESTION: This whole case is one that falls between the cracks, in a sense, isn't it?

MR. WHITNEY: In what respect, sir?

QUESTION: Well, in that Congress has provided for removal to a federal court when a federal officer is tried. The state has set up a criminal prosecution system and provided for appeal by the state in certain instances. The Congress has also provided for appeals from United States under the criminal code. And this simply was never focused on.

MR. WHITNEY: It was at one time, sir, if I may?

QUESTION: Okay.

MR. WHITNEY: In the case of Maryland v. Soper, and they call it number one, that Chief Justice Taft rendered a decision on. Chief Justice Taft was faced with the propriety of a mandamus to this Court, whether or not the petition of removal as required under statute at that time had been met in the petition filed, I believe it was in Maryland or Tennessee. It's one of these illegal still cases.

At any rate, Justice Taft said that in granting his writ of mandamus and in examining the allegations of the petition, the amended petition, and finding them inadequate said, now, one of the reasons I'm granting this writ of mandamus is that when these folks get down the line on this removal case no writ of error will issue, and no rights of appeal will be available.

QUESTION: Let me have the citation for Taft's quote. What case was that?

MR. WHITNEY: Maryland v. Soper, sir.

QUESTION: Thank you.

MR. WHITNEY: Now, the implications of that decision are that in 1924 the Supreme Court of the United States had found, they had to find, that the state in a removal action had no right of appeal. I doubt, reading the case, that had they found that there was a right of appeal, that they would have issued a mandamus quite as readily as they did. They recognized, citing ex parte Fahey, the reluctance of this

Court and every other court to grant a mandamus, but found that when the state was put in a position where the actions and the petition, the petition and the actions resulting therefrom, that is the trial of the case on removal --

QUESTION: Your point is that in Soper mandamus would not have issued if there was an appeal?

MR. WHITNEY: Yes, sir. That's it exactly. That Justice Taft had to take that into consideration before he reached the conclusion that he did.

QUESTION: That was also a judgment of acquittal, was it?

MR. WHITNEY: No, sir. It was -- they had reached the stage where the petition had been filed. My recollection is it was attacked in the United States District Court. They filed a number of petitions, I think that one on a remand. The circuit court judge, Judge Soper, had said, okay. This is fine. Now, at that point the -- Maryland took the case to the United States Supreme Court on a direct mandamus.

QUESTION: Attacking the right to remove.

QUESTION: That was it. That involved the propriety of removal.

MR. WHITNEY: Absolutely, sir. Absolutely.

QUESTION: And what Chief Justice Taft had to say is just, it was self-evident back in 1925, that there was no right of an appeal in a criminal case.

MR. WHITNEY: Right, and particularly as it provided for the appeal. But we did have an appeal. We had to --

QUESTION: And he was talking about a judgment of acquittal in that court as final. Well, a judgment of acquittal is final in any court, under the Double Jeopardy Clause, isn't it?

MR. WHITNEY: Well, I thought so; yes, sir. I have some question, though.

What my point is, that to reach the question of the propriety of mandamus he had to go down the line, he had to look down the line and say, look, the state, when we're all finished with this case, has no right of appeal.

QUESTION: Did you say there was a statute providing for an appeal by the United States?

MR. WHITNEY: By the United States at the -- 1907.

QUESTION: And your suggestion is that, implicitly, at least, Chief Justice Taft said that thatwas not available to support an appeal, therefore there was no right of appeal, therefore it had to be mandamus?

MR. WHITNEY: Yes, sir.

QUESTION: Did he discuss at all the appealability of a post-trial motion under Maryland law?

MR. WHITNEY: He never went into it. He just made it as a flat statement. He didn't go into the Maryland law as such. He simply made it as a flat statement. He said, they

have no right to sue under writ of error. They have no right of appeal, the state, in this forum, in this federal forum. They never would have taken it.

Now, I have read Hetrick, and Hetrick -- I don't know whether there has been a petition for rehearing, or en banc, and so forth, but Hetrick is the best of all possible worlds because it says in that particular case, once again, what one the underline, the United States, had a right either under 18 U.S.C. 3731 or 28 U.S.C. 1291, for the purposes of appeal. And I think the trap that that case fell into was that, it said, look, Congress has given us this Section 3731, where it says the provisions of this section -- that would be 3731 -- provide a right of appeal, and that that right shall be liberally construed. Well, looking at that statute, the 9th Circuit immediately leaped upon that language and said, gee, this is wonderful. Now, all appellate rights are to be liberally construed.

Which I don't believe is the case. I don't believe that either Congress or this Court has made the statement that the provisions of 3731 apply to anyone but the United States and its rights to appeal.

QUESTION: But at least that statute was enacted after the Maryland v. Soper dicta, for a state?

MR. WHITNEY: No question, sir; no question.

Now, in Soper, as far as mandamus is concerned,

counsel has suggested that on the principles of comity, federalism, and so forth, that this Court should issue a writ of, or treat it in the nature of a writ of mandamus, apart from the holdings in Soper and Fahey, where great caution is given to this Court issuing writs of mandamus.

I'd like the Court, if it would please, to consider its own rules as applies to mandamus. And the necessities for a petition, the language in that rule, the circumstances must be exceptional, and matters of the like. That is simply a repetition of the language that has come to us through the Arizona statutes and that's all been codified now in a section under our appeals which we ca-l "Special Actions."

Again, too, when we are examining mandamus, as I understand mandamus, and as I believe the rules of this Court portray mandamus, we are not discussing review of error. What we are discussing are such matters as abuse of discretion, lack of jurisdiction, acting without legal authority, and things of that sort, which are of such a nature as they can't be treated, or the pressing thing, the appeal does not give an end to a speedy claim remedy at law.

And, further, that the judgment of the trial court must not be -- excuse me, the reviewing court, in looking at the actions in the trial court, must not be, is it right? Is it wrong?, legally, but in exercising his jurisdiction did this judge go to that extreme where it is necessary

for us to use this very precious, extraordinary right to step in and act.

QUESTION: What if this had not been a removed prosecution but simply a prosecution by the United States, and a judgment of acquittal, and the United States appealed and the defendant claimed double jeopardy, should the court of appeals dismiss the appeal or examine the complaint, or examine the case and affirm, or reverse?

MR. WHITNEY: Sir, we're speaking now of the United States. This was a state court.

QUESTION: I know, but supposing we were dealing with something that had originated in the district court?

MR. WHITNEY: And it was the United States v. XYZ or something? If, if ---

QUESTION: And a judgment of acquittal had been entered.

MR. WHITNEY: My reading of the case is, if there was no jeopardy involved, that the matter did not involve a violation of the Fifth Amendment, then certainly the court of appeals could examine it as an ordinary review under Wilson or under Rojas, which is a 9th Circuit decision cited by counsel in his brief.

QUESTION: I must have missed something there. I thought Mr. Justice Rehnquist's hypothetical question was, the case tried in the federal district court, the jury

returned a verdict of not guilty.

MR. WHITNEY: Sir, I thought his question went to the United States trying the case, not the state court?

QUESTION: Yes. In the federal court --

MR. WHITNEY: Yes, sir.

QUESTION: And there's a verdict of acquittal. Are you suggesting there's an appeal?

MR. WHITNEY: No.

QUESTION: A judgment of acquittal entered by the court afterward.

MR. WHITNEY: I think Justice Rehnquist was saying, let's turn this around and put the whole thing in the nature of a federal prosecution, where you have a verdict of guilty, the United States stepping -- the U.S. district court judge stepping into the case and examining it, and entering then a judgment of acquittal. I think Justice Rehnquist's question then was, do you feel it would be appealable? My response to him was, and I'd just as soon not make it, but my response to him is that probably under United States v. Wilson and the United States v. Rojas, which is a 9th Circuit decision, in the absence of jeopardy that there would be an appeal.

QUESTION: Well, I thought Justice Rehnquist's question was, in that kind of a case, and the government did appeal, should the court of appeals simply dismiss the appeal if it found that there was double jeopardy?

However, whatever his question was, now that I've interrupted you, do you make any double jeopardy claim in this case?

MR. WHITNEY: We did, sir. We did. It was dismissed once; the appeal was dismissed once on the basis of double jeopardy.

QUESTION: Is that here?

MR. WHITNEY: No, sir. Double jeopardy is not an issue before this Court.

QUESTION: So, I suppose it would be possible for this Court to hold that the court of appeals was mistaken in the ground that it gave, that there was no appeal allowed whatsoever by Arizona, and then to remand the case for the court of appeals to consider the appealability under the other ground rules, including double jeopardy. And if it found that the appeal was well taken, then to consider the substantive question, which is question two.

MR. WHITNEY: I believe that would be the order in that. I would urge that this Court not --

QUESTION: I know; you're on the other side.

MR. WHITNEY: Well, I was going to say, not make the decision that -- well, you know, here it is, we can treat it as mandamus. We feel there was an abuse of discretion, you know, go on back and hear the motions --

QUESTION: Well, again, maybe if your brother here on the other side is correct on his alternative argument,

it was up to the court of appeals to treat it as mandamus and it's up to us to tell the court of appeals to do so.

MR. WHITNEY: What I would prefer, sir, is that the court be told to examine its mandamus. Because we are four years down the road now, and I may have certain defenses to that.

QUESTION: Yes; you may.

MR. WHITNEY: That's all I have, gentlemen, unless there are any further questions. Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well. Do you have anything further, counsel?

MR. SMITH: Just briefly, Mr. Chief Justice.

ORAL ARGUMENT OF DANIEL JESSE SMITH, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. SMITH: The Maryland v. Soper case which my brother Whitney has cited on page 23 of his brief, that has to be read in context of the procedural posture of that case. Mr. Soper had not been to trial. He had filed a removal petition that had been granted and the State of Maryland was challenging the granting of the removal petition, which did not happen in this case.

And -- if I can read from the opinion as reproduced in Mr. Whitney's brief, it says, "the order of the United States district judge in refusing to remand is not open to review on a writ of error and judgment of acquittal in that

court is final." And right in that context, what he's saying is that if the case proceeds to trial without it being considered on a mandamus by this Court, should the jury come back, "not guilty," or if he knows that he's prior to Wilson, perhaps if the judge entered a judgment of acquittal, that was considered nonreviewable back then, that the state was out of luck, so if they don't consider it on mandamus prior to trial, the state's going to have no right at all. It's not the situation where the state was trying to stand in the shoes of the United States Government under the Writ of Error Act of 1907.

And it really has no application to this case other than the statement that appears further in that case which I cited in either my brief or my petition, where Mr. Chief Justice Taft says that in removal cases the use of mandamus would be more liberally applied than in normal cases. And to that extent that the Court feels it necessary to reach the mandamus issue in resolving this, we would submit that Maryland v. Soper is authority that this Court ought to grant our petition for mandamus.

QUESTION: Mr. Smith, let me go back to Maryland. I may have missed something, but it seems to me that the Court was saying that there can be no appeal by the State of Maryland after the trial is over if Maryland loses it?

MR. SMITH: No, he just said in that that there

would be no appeal from a judgment of acquittal and it's not clear from the opinion whether he's talking about a postverdict judgment of acquittal. It would be more reasonable to assume he meant from a jury verdict of acquittal taking place in the federal district court, because Maryland v. Soper had not proceeded to trial at the time that this Court considered it upon mandamus.

QUESTION: I see what you're saying.

MR. SMITH: The only other point I wanted to --

QUESTION: Of course, it's still not a complete answer if there would have been an appeal from some kinds of acquittals. Then it might have been that mandamus would have been appropriate, wouldn't it?

MR. SMITH: Well, but that wasn't in Maryland v. Soper, and it's more like it's dicta coming out of it in a different --

QUESTION: But there was no appeal from the refusal of a federal district court to remand or remove case back to the state, was there?

MR. SMITH: Yes. That was true in 1924. There was no right to appeal.

QUESTION: But what the case holds is -- and also, there's no possibility of a posttrial appeal. That never did --

MR. SMITH: It didn't say that.

QUESTION: Well, if it didn't say that, why was mandamus necessarily appropriate then? Because then, at the

very end of the proceeding, it might have theoretically been possible to review the removal order.

MR. SMITH: Well, if the jury had come back "not guilty," it would have been moot to review the propriety of --

QUESTION: No, but there could have been an order of say, of conviction, and a judgment notwithstanding the verdict or something like that.

MR. SMITH: Well, that's theoretically possible but it wasn't --

QUESTION: At that point there conceivably could have been review of the removal order.

MR. SMITH: Conceivably, but that wasn't before the court back then. It's --

QUESTION: Was the Soper case on the merits or was it on the removal?

MR. SMITH: Maryland v. Soper was on removal only.

QUESTION: That's what I thought. It wasn't on the merits.

MR. SMITH: That's all it was about. It had nothing to do with the --

QUESTION: The Court did cite United States v. Sanges, in saying that there would be no appeal by the state after verdict, didn't it?

MR. SMITH: Well, that's not in the quotation from Mr. Whitney. If that's what it says, that's what it says.

But again, Sanges was decided in 1892, long prior to the current version of 3731, and we're dealing with not only a different procedural posture, but a completely different statute.

The other thing I wanted to address was Mr. Whitney's comments that Arizona law does not provide for appellate review in the circumstance. The cases that we cite on page 34 of our opening brief, and that Judge Kennedy cited in his dissent at pages 23 through 24a and 38a of the petition, clearly hold that in certain circumstances, including where a judgment of acquittal has been entered by a superior court judge, which is the equivalent of a district court judge, an appeal can lie. That issue wasn't even squarely addressed, and I would --

QUESTION: That's after a verdict of "guilty." A judgment N.O.V., is that what you're talking about?

MR. SMITH: Well, there are two cases where it was addressed by appeal. One is State v. Gradillas, which is at 544 Pacific 2d 1111. The judgment of acquittal was entered at a motion to suppress, which was not the posture in this case. That was set aside on appeal without any discussion of the jurisdictional aspects. But in State v. Allen, which is also cited by Judge Kennedy, that's at 557 Pacific 2d 176, there was a jury verdict of guilty. It was set aside by the trial court and in an untimely manner.

That case first went up to the State Supreme Court on petition for special action, which is roughly equivalent to mandamus but not exactly the same thing. And the State Supreme Court remanded it at -- reversed that and said that was untimely and sent it back. Then the superior court judge then entered a motion in arrest of judgment on the grounds that insufficient evidence had been adduced by the state to rebut the defense of insanity. That was reviewed by the court of appeals as an appeal under Subsection 3 of ARS 13-1712, which sets out the state's right to appeal. And that subsection reads, A Motion Arresting Judgment.

And that case cited United States v. Wilson in it for the proposition that you could review a postverdict entry of judgment of acquittal without violating --

QUESTION: What about State v. Hunt, Mr. Smith?

MR. SMITH: I'm not familiar with that case, Your Honor. But there are several other cases that were cited by Judge Kennedy as well as the case that I sent in on the supplemental petition for certiorari, State v. Superior Court at 606 Pacific 2d 411, where the Arizona Supreme Court vacated the untimely entry of a judgment of acquittal, essentially the exact same facts of this case, by special action.

And if you read the "special action" statute which I've cited, Sub-3 in my opening brief, in conjunction with these cases where it's been granted by appeal, it's plain that

any order that doesn't violate -- any appellate review that doesn't violate double jeopardy is authorized by Arizona case law and state statute.

And again, even if this Court might, reading the state statutes, might read them differently, that's not for this Court to do. The state supreme court is the final arbiter on state law and not a federal court, absent some unconstitutional interpretation in the strict construction field which is not presented by this case.

Unless the Court has any further questions about anything about this case, that's all I've got. Thank you.

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

(Whereupon, at 1:54 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-621

State of Arizona

v.

William Dale Manypenny

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: William J. Wilson