ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1479

TITLE JUSTICE OF BOSTON MUNICIPAL COURT, Petitioners v. MICHAEL LYDON

PLACE Washington, D. C.

DATE December 6, 1983

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(202) 628-9300
440 FIRST STREET, N.W.

IN THE SUPREME COURT OF THE UNITED STATES

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JUSTICE OF BOSTON MUNICIPAL COURT, :

Petitioners, :

v. : No. 82-1479

MICHAEL LYDON :

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Washington, D.C.

Tuesday, December 6, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 o'clock a.m.

APPEARANCES:

BARBARA A.H. SMITH, ESQ., Assistant Attorney General of Massachusetts, Boston, Massachusetts; on behalf of the Petitioners.

DAVID ROSSMAN, ESQ., Boston, Massachusetts; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Justices of Boston Municipal Court against Michael Lydon.

Miss Smith, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF BARBARA A.H. SMITH, ESQ.,

ON BEHALF OF THE PETITIONERS

MISS SMITH: Mr. Chief Justice, and may it please the Court, the Justices of the Boston Municipal Court seek reversal of an order and judgment of the First Circuit Court of Appeals which granted pretrial habeas corpus relief to a state defendant freed upon personal recognizance pending a de novo trial which he had requested.

The Court of Appeals found that the evidence introduced at the initial bench trial was insufficient to support conviction, and therefore held that the double jeopardy clause precluded the de novo trial. The court ordered that Mr. Lydon be freed from the personal recognizance he was on, that he not be required to answer any summons for trial, and effectively precluded or enjoined the Commonwealth from providing the de novo trial which he had requested.

Since this case arises within the context of

the Massachusetts de novo system, I will briefly explain that system. When charged with a misdemeanor or lesser felony, a defendant at his option may execute a written waiver of his right to a jury trial in the first instance and proceed to a bench trial. If dissatisfied with the result of that bench trial, his sole remedy is a de novo trial before a six-man jury or a judge and the jury session if he so decides. By claim --

QUESTION: But there is an absolute right to the jury, is there not?

MISS SMITH: Absolute right to the jury, Your Honor.

By claim of the de novo trial, the bench trial conviction is wiped out, vacated. All alleged errors of law or fact are rendered immaterial. The defendant is granted a totally fresh determination of guilt or innocence without any need to demonstrate any error of the law. The --

QUESTION: Does anything in the proceedings below get into the de novo trial?

MISS SMITH: No, Your Honor, it is not a review on the record.

QUESTION: No, but what I was getting at is, suppose he takes the stand at the bench trial, and then he takes the stand at the de novo trial. I take it his

testimony at the bench trial may be used to impeach him.

MISS SMITH: That's correct, and the defense counsel has the opportunity to use prior inconsistent statements in cross examination of the witnesses. What is wiped out are errors of law, alleged errors of fact, the conviction, the judgment, and the sentencing.

However, a defendant may also have --

QUESTION: May I ask just one?

MISS SMITH: Yes.

QUESTION: Is the maximum range of sentencing at the jury trial precisely the same as at the first trial?

MISS SMITH: Yes. The District Court cannot impose a sentence to a house of correction greater than two and a half years or a state prison five years.

QUESTION: And that is at eithe stage?

MISS SMITH: That's right. Yes, Your Honor.

QUESTION: But suppose at the bench trial he gets six months. May the -- and then he is convicted by the jury at the de novo trial. May he get two and a half years?

MISS SMITH: Yes, Your Honor, or he can get less.

QUESTION: Yes.

MISS SMITH: Either way. The de novo trial, as I said, represents a completely fresh determination of guilt or innocence. However, the defendant can initially, and he has no absolute right to, exercise his right to a jury trial in the first instance, with the right of appellate review if dissatisfied with the outcome of that trial. The decision is solely his.

Mr. Lydon took the first --

QUESTION: Where would that appeal take place?

MISS SMITH: To our Massachusetts Appeals Court.

Mr. Lydon opted for a bench trial. At the close of evidence, he moved for directed verdict or required finding of not guilty. That motion was denied, and he was found guilty. He then claimed a de novo trial. He remained free on personal recognizance as he had been prior to the bench trial. The conditions of personal recognizance require that he appeared when summoned until a final judgment is rendered by the court and he is formally discharged by the court. He is also required to keep the peace.

Prior to the de novo trial, Mr. Lydon moved for dismissal of the charges, arguing to the jury trial judge that the evidence at the bench trial had been insufficient to support conviction, and therefore under

the doctrine of Burks versus United States, the double jeopardy clause prohibited the de novo trial.

QUESTION: Ms. Smith, what is the difference in courts between the one where the bench trial takes place and the one where the jury trial takes place?

MISS SMITH: It is all in the District Court, Your Honor.

QUESTION: All in the --

MISS SMITH: There is now a six-man jury session established in the Boston Municipal Court.

QUESTION: Different divisions of the Municipal Court?

MISS SMITH: That's correct, Your Honor. Under our prior system that this Court had upheld, the de novo appeal was to the Superior Court. It now remains in the District Court.

QUESTION: Since all of this transpired, does Massachusetts now ask a defendant in this situation to expressly waive any Burks right that might exist?

MISS SMITH: No, Your Honor, I can't say that it does. There is no unified waiver system dealing with this particular problem. The waiver form in the Boston Municipal Court now provides that one specifically acknowledge that they are waiving appellate review. It does not, and I doubt that we could, require an

individual to waive the protections against double jeopardy or waive his right to go into the federal ccurt to claim constitutional error.

After the trial judge denied the defendant's motion for dismissal, he appealed to the single justice of cur State Supreme Court for exercise of the court's superintendency power. The single justice reported the question to the full bench, and our court held that where a defendant's voluntary choice of a bench trial -- where a defendant has a voluntary choice of a bench trial, it does not create a situation in which the double jeopardy concerns are implicated.

The court distinguished Burk as involving an appellate determination that the evidence supporting the conviction below was insufficient, and under such circumstances --

QUESTION: Is it true that the prosecutor conceded that?

MISS SMITH: No, Your Honor. I would say that the prosecutor conceded for the purpose of reporting of the legal question only that the evidence was insufficient. Our Supreme Court then went on to hold that the single justice did not sit as a reviewing court, and there was no determination in the state court as to the sufficiency of the evidence because no court

has jurisdiction to review on --

QUESTION: But there is no way for any court to pass on that, is there?

MISS SMITH: That's correct.

QUESTION: Because there is no record.

MISS SMITH: There is no appellate review, there is no reviewing court, there is no review on the record of the bench trial proceeding.

QUESTION: Is there a record of the bench trial proceeding?

MISS SMITH: There is a recording at the bench --

QUESTION: There is a recording?

MISS SMITH: Yes.

QUESTION: It is not here, is it?

MISS SMITH: I believe part of the record is not the recording, but counsel for Mr. Lydon has had that recording transcribed.

QUESTION: And that is here?

MISS SMITH: Yes, Your Honor.

QUESTION: Thank you.

MISS SMITH: Burks did not address the issue involved here, namely, whether a defendant has a right in the de novo system to appellate review of the sufficiency of the evidence question prior to a de novo

trial. The Supreme Judicial Court, finding no constitutional requirement that such form of review be granted, declined to extend Burks to the instant situation. At no time was the sufficiency of the evidence ruled on in the state courts.

Mr. Lydon then sought certiorari from this Court which was denied. He then proceeded to file a petition for writ of habeas corpus in the Federal District Court, alleging that the de novo trial would violate his double jeopardy rights. The District Court denied respondent's motion to dismiss, and found that it had jurisdiction, that Lydon was in sufficient custody for federal habeas corpus purposes, that it had the authority under Jackson versus Virginia to rule upon the sufficiency of the evidence, which it did, and found it to be insufficient, and then, applying Burks, ordered that the writ be granted, and further ordered that Mr. Lydon be released from personal recognizance, and that the Commonwealth not retry him in the jury session. The Court of Appeals affirmed.

Our appeal to this Court centers on three fundamental propositions. First, that release upon personal recognizance without surety prior to trial when one does not stand under conviction and sentence does not constitute a sufficient restraint upon one's

personal liberty to constitute custody within the meaning of the habeas corpus statute. Neither Hensley nor the Jones case relied upon by the First Circuit require a different conclusion.

Second, we will argue that even were the federal court within its jurisdiction, exercise of that jurisdiction prior to trial where the petitioner is not under conviction is inappropriate and violates principles of comity and federalism.

Third, we would argue that the Massachusetts system based upon a defendant's totally voluntary initial choice of the trial procedures he wishes to pursue does not implicate the whole jeopardy considerations made manifest in Burks, nor is the Commonwealth constitutionally required to provide appellate review.

As I have indicated previously, the restraints imposed by the conditions of personal recognizance are minimal. The cases relied upon by the court below do not support a finding of custody. In Hensley, the petitioner had been convicted and sentenced to a period of incarceration. Only execution of sentence had been stayed pending appeal, and the petitioner released on personal recognizance.

QUESTION: Ms. Smith, let me go back a little

bit. In response to the inquiry by Justice Marhsall, Judge Garrity certainly says this in his opinion. "The prosecution conceded and the single justice concluded that the evidence had in fact been insufficient to convict." And then Justice Wilkins in his opinion for the Supreme Judicial Court, it seems to me, phrased that a little differently. He said, "Accepting the defendant's claim that the evidence at the bench trial did not warrant third convictions, reserved and reported two questions of the full bench."

I suppose it is in those observations that the case centers, isn't it?

MISS SMITH: In -- I believe the full bench of the Supreme Court, in a decision written by Justice Wilkins, made quite clear that he did not sit as a reviewing court sitting as a single justice, and there was no finding by the state court on the sufficiency of the evidence claim.

Now, Justice Garrity and petitioner in the federal court has continued to insist in light of the state court's finding that no court has jurisdiction to review it, and that it was not reviewed, insist that they had.

QUESTION: Of course, if there had been a finding by the court sitting as to the insuffiency of

the evidence, we would never reach the --

MISS SMITH: We wouldn't be here, Your Honor.

QUESTION: We wouldn't be here, but what about the concession by the prosecutor? Is that recital true?

MISS SMITH: No --

QUESTION: Was there a concession?

MISS SMITH: I think it was conceded by the prosecutor that if the complaint as written was strictly construed, the evidence, I think it only fair to say, would have failed, but he only conceded that for the purpose of argument in the single justice session so that the single justice could frame questions of law for the report to the court. And I would suggest that even if the prosecutor in a sense conceded it, that is not an equivalent of a reviewing board making that determination. Certainly our refusal --

QUESTION: Well, it may not be, but it may not be, but it would still leave the question of whether or not it is a sufficient event such as a -- the action of a reviewing court in order to trigger the operation of the double jeopardy clause.

MISS SMITH: I would say that it was not conceded in that sense, that it was conceded for the purpose of argument, and I believe that is the factual

determination made by our Supreme Judicial Court, and I would suggest that that would be binding under these circumstances.

QUESTION: Do you know of any other state or commonwealth that has this single justice routine?

MISS SMITH: I really don't know another state that does. It is an exercise of supervisory powers in extraordinary cases.

QUESTION: Ms. Smith, are concessions such as those that you have been talking about with my colleagues fairly common for the sake of enabling the single justice to certify a pure question of law?

MISS SMITH: Yes, Your Honor. There is nothing uncommon about assuming for the purpose of the report that the evidence is such and such.

QUESTION: Really, that question doesn't make any difference, does it, because the federal courts found an insufficiency of evidence, and you don't challenge that for purposes of the cert petition.

MISS SMITH: No, I challenge the jurisdiction to make such a --

QUESTION: Just the jurisdiction.

MISS SMITH: Right.

QUESTION: But we assume for purposes of our problem that there was not enough evidence.

MISS SMITH: Yes, Your Honor. As I indicated befcre, in Hensley, the Court focused on the fact that incarceration was certain when it found that he was in sufficient custody for habeas corpus. Here, incarceration is only a possibility contingent upon a finding of guilt by the jury, and a further determination by the jury trial judge that the individual should be incarcerated and not merely subjected to a fine.

Moreover, unlike the situation in Hensley, the federal court's finding of custody in this situation does very seriously interfere with the Commonwealth's significant interest in the efficient operation of its two-tier system. Under this decision, yet a federal third and fourth tier have been created before the Commonwealth can conclude the proceedings in these relatively minor though numerous offenses.

Nor does Lydon face any of the restrictions upon his liberty placed upon one released on parole. His movements are not restricted. He is not required, as in Jones versus Cunningham, to live or work in a particular place or perform a particular job. His continued liberty, unlike Jones again, is not placed in the hands of the lay members of a parole board. Any revocation of his recognizance could only follow a

judicial determination that he had violated some condition of that recognizance, and even then, such a determination need not require his incarceration, but merely an increase in terms of the recognizance or the addition of a surety.

If this Court, I would suggest, holds that personal recognizance prior to a de novo trial is sufficient to involve the federal court in a state criminal proceeding, it in effect establishes that federal court as a court of interlocutory appeal over pretrial -- denial of pretrial motions in a state criminal proceeding, and this is a situation, I suggest, never contemplated by the Constitution nor Congress in enacting the habeas corpus statute.

Here, Lydon has been granted pretrial review by a federal court over a denial of a motion for directed verdict of acquittal, rendering the situation, I submit, even more agregious because interlocutory review of such motions are not permitted by a number of the circuits within the unitary federal system itself.

For example, the Fourth, the Fifth, the Ninth, and the District of Columbia Circuits do not permit appeal of a denial of a motion, a defendant's motion for directed verdict of acquittal based upon the insufficiency of the evidence following a mistrial, and

this is so even though there, as here, the defendant attempts to couch his claim in terms of double jeopardy.

To permit such collateral review of a state court proceeding far exceeds, I suggest, what is permitted within the federal system itself.

Now, I am aware that this Court has granted certiorari to review the District of Columbia decision in the Richardson case, but I would suggest that even were this Court to find such interlocutory review permissible within the federal system, that would not control this case, because principles of comity and federalism would have to be addressed, I believe, before the Court could order such review over a state criminal proceeding.

Moreover, a decision permitting interlocutory review in the federal system based on the nature of the claim presented would, I suggest, have no logical effect on a determination of custody.

The court, the federal court relied upon Jackson versus Virginia for its authority to review a claim that a state court conviction rests upon insufficient evidence. I will not belabor the obvious distinction between Jackson and the instant case, namely, that Jackson was in custody pursuant to the

conviction he attacked under Section 2254 of the habeas corpus statute, while Lydon is in custody only upon a pretrial recognizance, having as a matter of state law vacated the prior conviction by claim of de novo trial.

Jackson does not require or authorize the federal court to review a claim of insufficient evidence when a defendant does not stand under conviction based upon that evidence. In Jackson, this Court merely defined the standard of review to be applied in a Section 2254 proceeding. It did not enlarge habeas corpus jurisdiction to permit the federal court to review the sufficiency of the evidence at a trial in which the verdict and sentence have been set aside prior to the petitioner ever arriving in the federal court.

The Federal District Court itself acknowledged in the last sentence of its order that the petitioner was no longer subject to verdict or sentence of the bench trial judge.

QUESTION: Suppose after the jury trial and the conviction and the sentence after the jury trial --

MISS SMITH: After the de novo jury trial, Your Honor?

QUESTION: Yes. The defendant appeals in the state system, and claims -- Is the sufficiency of the evidence at the bench trial open?

MISS SMITH: I would say logically it is not, Your Honor.

QUESTION: I would think you would have to --

MISS SMITH: Yes, because we --

QUESTION: -- or you wouldn't be here -- I doubt if you would be here if it were open, would you?

MISS SMITH: I don't see how I could say that it were, because the bench trial conviction is vacated when you -- de novo.

QUESTION: And you would say also -- You would also then say that a federal habeas corpus court after conviction at the de novo jury trial could not review the evidence at the bench trial, even though it could under Jackson review the evidence at the de novo jury trial?

MISS SMITH: Yes, Your Honor, because the bench trial is wiped out by the claim of the de novo trial. Now, there is a circumstance in which it would be presented in a very different posture, and that is if a defendant convicted at a bench trial did not claim the de novo appeal and wipe out that conviction --

QUESTION: Oh, yes.

MISS SMITH: -- but went to the federal court for review. We have such a case now pending in the First Circuit Court of Appeals.

QUESTION: Ms. Smith, if Massachusetts had put on this first hearing instead of a bench trial a preliminary hearing, would there be any problem?

MISS SMITH: A preliminary hearing, Your Honor?

QUESTION: Yes.

MISS SMITH: We only provide for two possibilities. You have an absolute right to a six-man jury trial. You have --

QUESTION: You also in most states have a preliminary hearing which you can have or you can waive.

MISS SMITH: Yes, Your Honor.

QUESTION: So this one they can have or they can waive.

MISS SMITH: If --

QUESTION: Both are before a judge. If, as I understand it, if Massachusetts adopted that system, this point wouldn't be here.

MISS SMITH: If we had a preliminary hearing --

QUESTION: No, if you called --

MISS SMITH: -- and the court found that there was insufficient evidence --

QUESTION: If you just changed the name of it, and called it a preliminary hearing instead of a bench

trial.

MISS SMITH: Well, then if we did that, Your Honor, a lot of the efficiency of the system would be destroyed, because if it is only a preliminary hearing we don't have any final judgment, and for those not wishing to claim the de novo trial, he is left nowhere.

QUESTION: Well, does that help the state or the defendant? Or does it confuse both?

MISS SMITH: I think it confuses both.

QUESTION: As witness this case.

MISS SMITH: Yes. I am not sure that is the --

QUESTION: So Massachusetts just doesn't want to change it.

MISS SMITH: I don't believe that the federal court or the constitution requires any change in our system. It has already been upheld once by this Court, and then under circumstances where the bench trial was mandatory. What we now have is a totally voluntary system where a defendant has two totally fresh chances for a not guilty finding.

QUESTION: If you had a probable cause type of hearing, could you inflict any penalty simply on a finding that there was probable cause to believe that the accused had committed the offense charged?

MISS SMITH: No, Your Honor, we couldn't.

QUESTION: Is it correct that if in this case the defendant had not asked for the jury trial, say he had accepted the verdict of guilty and let the time run on it, then filed his petition for habeas corpus, and if the record is as we now believe it to be, he would be a free man?

MISS SMITH: If he were in sufficient custody.

QUESTION: Well, would he not be in custody if you let the time run?

MISS SMITH: He would be -- if indeed he filed the petition. That is the problem in the case we also have in the First Circuit. If he files the petition within the time he is under sentence from the bench trial judge, yes. If he wants until, in the other case, probation has expired prior to filing his habeas corpus petition, we suggest no.

QUESTION: Well, what was the sentence this man received?

MISS SMITH: Two years, Your Honor.

QUESTION: So if he had let the time for the jury trial expire, then filed his petition for habeas corpus, and if he is right about the record, he would be out.

MISS SMITH: Yes, Your Honor.

QUESTION: Yes.

MISS SMITH: I would suggest that the habeas statute contemplates an avenue of relief from unconstitutional custody flowing from a conviction which has been obtained and is in effect at the time the habeas is filed, just the situation that Justice Stevens has mentioned. However, with the exception, of course, that one could challenge the constitutionality of its pretrial custody as violative of the Eighth Amendment. But we do not have such a challenge in the instant case.

What we do have, I suggest, is a misuse of the great writ to provide for an end run around the principles of Younger versus Harris, which place strict restrictions upon the federal court's ability to enjoin ongoing state court proceedings. The same notions of comity and federalism underlying Younger should have been applied to the instant case, I suggest, and would have required the federal court to forego exercise of its habeas corpus power in the absence --

QUESTION: Well, is your position -- I don't quite understand about -- You say that if he does not opt for a de novo jury trial, but is convicted in the bench trial, he may forego the jury trial and go right into federal habeas?

MISS SMITH: The state -- He could, but then we would have a problem of exhaustion of state remedies.

QUESTION: That is why I wonder why you answered Justice Stevens the way you did.

MISS SMITH: I think the position of the Federal District Court, as Mr. Lydon, of course, in this case has an available remedy, a de novo trial, the federal court, as I understand the opinions, got around the exhaustion question by saying that that was not an adequate state remedy, and therefore petitioner was not required to go forward with the de novo trial.

QUESTION: Well, you certainly don't agree with that, do you?

MISS SMITH: No.

QUESTION: Well, then, I don't see -- What is your position in this other --

MISS SMITH: But you could, in this other case --

QUESTION: In this additional case, what is your position?

MISS SMITH: In this additional case, aside from the fact that he was no longer in custody when he filed the habeas corpus --

QUESTION: Yes.

MISS SMITH: -- he took a 211(3) in order to resolve the sufficiency of the evidence case. That being denied, much like Mr. Lydon's was denied, the

Court felt that there has been sufficient exhaustion.

QUESTION: I see. So your position is not that a defendant convicted at the bench trial may, without availing himself of a de novo jury trial or any other state remedy, he may not go directly into federal habeas?

MISS SMITH: I would, I am quite convinced, make several arguments against him doing that, but at least he is in the position of going into federal court, where he stands under the conviction which he is attempting to challenge in the federal court, and it seems that habeas corpus is to release someone from the unconstitutional custody.

QUESTION: But those are two different questions. One is whether he is in custody, and the second is whether he has exhausted his state remedies.

MISS SMITH: Yes, Your Honor, I agree with you, and I would maintain, and I have maintained in the federal court, that he has not exhausted his state remedies until he undergoes a de novo trial.

QUESTION: Normally, under Younger and Harris in a criminal case a person may not just go into federal habeas after -- without an appeal.

MISS SMITH: That is correct, Your Honor, but under Younger generally the case comes up as a motion

for a preliminary injunction and declaratory relief, and if that had been the avenue of relief sought, then I think the Court should have addressed the Younger principles and a finding of bad faith or harassment or irreparable injury would have been required before the federal court could effectively enjoin the state proceeding. But here, federal habeas corpus was used to, I think fairly described, do an end run around the Younger principles.

QUESTION: Yes.

MISS SMITH: Finally, I would submit that the Massachusetts de novo system, by reason of its totally voluntary nature, does not implicate double jeopardy interests protected by the Burks decision. The fundamental concern of the double jeopardy clause is to protect against governmental oppression. There is no governmental oppression involved where a defendant may freely choose the particular mode of trial he wishes to proceed with.

In this instance, Mr. Lydon waived appellate review. He claimed a bench trial with de novo review only.

Moreover, the Commonwealth is not constitutionally required to provide for appellate review within the de novo system.

QUESTION: What would be the consequences, Ms. Smith, if after the bench trial and after the defendant convicted in a bench trial made his election to have a jury trial, if a couple of the witnesses died, and the state simply didn't have any evidence to go ahead with the jury trial? Would the bench trial have any effect, the judgment of the bench trial have any effect, or would he simply --

QUESTION: No, once he opts for the de novo trial, and if we make the determination that we have no evidence, we would have to null pross the proceedings.

QUESTION: Even though there had been a conviction at the bench trial?

MISS SMITH: Yes, Your Honor.

I would like to just close by saying that I hope the Court will consider these issues within the context they arise, and that is federal habeas corpus review, and the traditional function of that writ is to provide an avenue for relief from fundamental constitutional errors or fundamental malfunctions of the state court judicial system. I suggest that there is -- those conditions do not obtain in this case, and that the court below has in effect devalued the great writ by its overextension in this case, and therefore should be reversed.

Thank you.

CHIEF JUSTICE BURGER: Mr. Rossman?

ORAL ARGUMENT OF DAVID ROSSMAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. ROSSMAN: Thank you, Mr. Chief Justice. May it please the Court, the prosecution of Michael Lydon at his second trial, which is pending, following the Commonwealth of Massachusetts' failure to present a rational basis for his conviction at his original trial is exactly the type of overreaching conduct that the jeopardy clause was designed to prevent.

It is clear that the Commonwealth of Massachusetts has placed Michael Lydon once in jeopardy when it charged him with a crime, presented witnesses, cross examined the witnesses that Mr. Lydon put forward at his original trial. The prosecutor had one full and fair opportunity at that original trial to present whatever evidence existed to convince the judge that Michael Lydon had committed the crime with which he was charged.

Mr. Lydon has established, Your Honor, in both federal courts, and it is not contested here because it is not one of the questions that the Commonwealth asked this Court to consider in its certiorari petition, that the evidence at that original bench trial was

insufficient as a matter of law, and this Court --

QUESTION: Wasn't it positive testimony of two detectives under cross examination and no other evidence? Both of them claimed to be eye witnesses. And you say that is not sufficient?

MR. ROSSMAN: The crime with which Mr. Lydon was charged, Your Honor, was possession of various items that the Commonwealth alleged were burglars' tools, with the intent to use those tools to break into a depository in order to steal property that was secured inside the depository, and Massachusetts state law clearly establishes that in order to convict someone of that crime, the Commonwealth must present sufficient evidence to show that there was property inside of a car if a car is alleged to be the depository in order to establish the intent, and there was no evidence that there was any property inside that car, Your Honor, just --

QUESTION: Well, let me put it another way. Under your theory, if you voluntary take the two-tier method, and you are acquitted by the trial judge, you go free, and on the other hand, if you are found guilty, you cannot have a second trial under the double jeopardy clause, so you go free. My third question is, how can the defendant lose?

MR. ROSSMAN: Well, Your Honor, the defendant

loses if the Commonwealth establishes that any rational person looking at that evidence, giving all of the benefits of credibility to the prosecution, and drawing every reasonable inference from the evidence, if the Commonwealth can meet that bare minimum standard that the defendant is guilty, and a judge finds him guilty, the defendant loses.

What we have here, Your Honor, is a case --

QUESTION: You mean that evidence at the bench trial?

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

QUESTION: You are not talking about the de novo trial?

MR. ROSSMAN: No, I am not. What we have here, Your Honor, is a situation where both federal courts have found that no rational person could have looked at that evidence, no rational person, and concluded that Michael Lydon had committed the crime with which he is charged, and the situation Mr. Lydon finds himself in is, if his double jeopardy claim doesn't have merit after the first tier of the de novo system is finished, how can he win?

He has been convicted without proof irrationally, and his only alternatives at that point which the state gives him are, on the one hand, go to

jail for two years; on the other hand, allow the prosecutor, because that is the only remedy we will give you, a second opportunity in the de novo trial.

QUESTION: Mr. Rossman --

QUESTION: Don't you agree to that in advance? I thought the defendant agreed to that in advance.

MR. ROSSMAN: Your Honor --

QUESTION: Is that correct?

MR. ROSSMAN: No, that is not correct.

QUESTION: He didn't agree to the two-tier system?

MR. ROSSMAN: He didn't --

QUESTION: And he didn't agree to both hearings?

MR. ROSSMAN: Mr. Lydon did not agree in advance that he would give up the protection of the double jeopardy clause as this Court explained it in Burks, and if I may expound on that --

QUESTION: Well, did the lawyer explain it to him?

MR. ROSSMAN: I think it --

QUESTION: Did his lawyer explain Burk to him?

MR. ROSSMAN: No, it was probably a decision made by the lawyer, Your Honor, and I think --

QUESTION: And he did agree to the two-tiered system?

MR. ROSSMAN: As it existed at the time. Yes, Your Honor. And I think it worthwhile to --

QUESTION: Well, he used it to get rid of his first sentence.

MR. ROSSMAN: Excuse me, Your Honor?

QUESTION: He used it to get rid of his first sentence.

MR. ROSSMAN: Yes, he did, Your Honor, because his only alternative at that point was to accept a two-year jail sentence on a conviction.

QUESTION: Well, is that correct, Mr. Rossman? I understood from your opposing counsel that he could have appealed the bench trial decision to the Massachusetts Court of Appeals.

MR. ROSSMAN: No, Your Honor. The only remedy that Massachusetts gives someone convicted in the first tier of the de novo system is to ask for a second trial. State law establishes in a case called Commonwealth versus Whitmarsh that you may not seek extraordinarily relief or any sort of appellate review, common law or statutory or otherwise, from a conviction in the first tier except by giving the prosecutor a second chance. To return to your question --

QUESTION: There is no --

MR. ROSSMAN: I am sorry, Your Honor.

QUESTION: There is no direct appeal then from the bench trial to any other Massachusetts court?

MR. ROSSMAN: No, there isn't. The only possibility would be to ask a single justice of the Supreme Judicial Court to exercise his superintendent's power, which Mr. Lydon did here.

QUESTION: Mr. Rossman?

MR. ROSSMAN: Yes, Your Honor.

QUESTION: If Mr. Lydon had expressly waived any right to review of seek review of the sufficiency of the evidence at the first trial, would that have been binding on him, do you think?

MR. ROSSMAN: Yes, I believe it would have, Your Honor, and this, I believe, goes to the heart of the question that Justice --

QUESTION: Well, is your only complaint then insufficient notice to him of what might happen?

MR. ROSSMAN: In a sense, Your Honor.

QUESTION: Is that basically your --

MR. ROSSMAN: That's basically it, but it is not a question of having a judge merely inform something to Mr. Lydon which any judge and any lawyer in Massachusetts would have known. In answering your

question, Justice Marshall, about what a lawyer would have told Michael Lydon, I believe it appropriate to ask the Court to consider what advice it would have wanted a competent defense attorney to give Michael Lydon when he had to make that election to participate in the de novo system or not in 1980.

Burks, Your Honor, had been decided a little bit over a year ago. There had been no decision by the Supreme Judicial Court of Massachusetts saying whether Burks applied to the de novo system or not. However, although there was no opinion by the highest court in Massachusetts, there was every indication elsewhere in the Massachusetts system that Burks in fact did apply. In particular, there were three opinions by trial judges in the second tier of the de novo system.

Each of those three opinions said, yes, the Burks interpretation of the double jeopardy clause applies to the de novo system. In addition, the Supreme Judicial Court of Massachusetts had decided in 1978 a case, and it is cited in the amicus brief, Your Honor, at Page 12, Costarelli versus Commonwealth, in which the Supreme Judicial Court said that an individual who goes on trial in the first tier of the system and faces a judge who, when hearing insufficient evidence, dismisses the case and then orders a prosecutor to bring a

different charge which would more closely fit the evidence that the judge heard, that in those circumstances a Massachusetts defendant can raise a double jeopardy motion to dismiss if he is again charged with a crime, and if necessary, he can go to a single justice of the Massachusetts Supreme Judicial Court prior to his second trial in order to get relief from a double jeopardy claim because the state's highest court recognized that double jeopardy protects individuals from the risk of having to undergo a trial, not just from convictions.

Against that background, Your Honor, I submit it would have been reasonable for an attorney to conclude and to advise a client who wished to have that type of sophisticated advice that ordinarily if you choose the de novo system, your only remedy is a second trial. However, if, on the other hand, the prosecutor does not present sufficient evidence to convict you, but the judge for some reason irrationally convicts you, that we may raise this point and this point only by way of a motion to dismiss in the second tier, and apart from the fact, Your Honor, that that is the most reasonable conclusion that one can draw from the record, and it is in fact the conclusion about Mr. Lydon's --

QUESTION: I have read the whole record here

in the last five minutes.

MR. ROSSMAN: Yes, Your Honor.

QUESTION: It is not what you normally would call a record.

MR. ROSSMAN: Well, to the extent, Your Honor, that that is all that is available for one to look at, I think it goes to another point that was made by Ms. Smith, and that is, the prospect that federal courts would be inextricably interwoven with state criminal justice system because of claims that the evidence was insufficient and the brevity of the record if it is relevant to any extent, I think, only goes to show, Your Honor, that these questions are quite easily decided, because the transcript in this case is typical of a transcript that might result from any trial in the first tier of the process.

QUESTION: Well, Mr. Rossman, supposing that instead of this two-tier system which we have been talking about here coming from Massachusetts, you simply had a trial in the Massachusetts Superior Court of a felony, and the defense lawyer makes a motion at the close of the prosecutor's evidence for a directed verdict. The trial court denies it, and he puts on later -- the defendant later puts on evidence in his own case. The case goes to the jury, and the jury hangs.

Now, do you think that the defendant at that point can go into federal habeas corpus and say, I can't be retried here because the prosecutor never put on enough evidence in the case in chief to support the sort of finding that you say a court has to make under Jackson against Virginia?

MR. ROSSMAN: I believe that a federal court would have jurisdiction to entertain such a petition, and then I suggest a federal district court should entertain the same type of analysis of the equities of the situation in order to decide whether to stay its hand or not, that the First Circuit demonstrated in this case. The First Circuit, I submit, Your Honor, was clearly cognizant of the caution it should take in interfering with an ongoing state criminal trial pursuant to the Younger doctrine, and the court looked at various factors that were unique to this case.

QUESTION: Well, but does that help answer my question?

MR. ROSSMAN: Well, to the extent that an individual in the situation you posed was different from Mr. Lydon because, for example, he had not fully litigated the issue that he was attempting to raise in the federal district court in the state system, that might be a factor cautioning a federal court to stay its

hand.

QUESTION: But you say nonetheless it could intervene if it wanted to.

MR. ROSSMAN: It would have jurisdiction, Your Honor, to intervene, and it would be a question of exercising restraint by giving deference to policies of federalism.

QUESTION: Well, do you think the Court, say, in Steffanelli against Manard, had jurisdiction?

MR. ROSSMAN: I don't have the facts of that case sufficiently at mind to answer the question, Your Honor.

The implications of the Commonwealth's failure of proof at the initial trial call into question a central feature of what this Court has identified as the protection of the double jeopardy clause, and that is a tenet that limits the prosecutor to one full and fair opportunity to show that the defendant is guilty. Massachusetts had that opportunity and didn't do so here, and its second attempt, if it is permitted to place Mr. Lydon twice in jeopardy by forcing him to undergo the de novo trial, raises a concern for the value that the double jeopardy clause implements in protecting innocent individuals.

Mr. Lydon established in both federal courts

that the only rational view of the transcript is that one faithfully applying the standard of law that the due process clause embodies must conclude he deserved to go free. Even Judge Campbell, who dissented in the First Circuit, stated in his opinion there was probably no effective way for a prosecutor to supply evidence that Mr. Lydon committed the crime with which he is charged.

If anyone, I submit, Your Honor, deserves the protection of the double jeopardy clause because it protects innocent defendants, Mr. Lydon deserves that protection.

QUESTION: Did the Court of Appeals or the District Court express any view as to whether Mr. Lydon on the evidence presented might have been guilty of some other crime under Massachusetts law?

MR. ROSSMAN: Yes, Judge Briar suggested that Mr. Lydon was probably guilty of some other crime, and that may very well be the case. However, Your Honor, no one seriously contests that a state may charge an individual with one crime, fail to prove the crime with which he is charged, and yet place him in jail because he might have been shown to have committed a separate crime.

QUESTION: I suppose Massachusetts, like the federal government, like most other states, has some

doctrine of amendment of the information, amendment of charge, and constructive amendment on occasion, if it is consented to by allowing evidence to come in.

MR. ROSSMAN: Absolutely, Your Honor, and that was exactly the topic of Justice Wilkins' opinion as a single justice. The prosecutor went in before a single justice and filed a memorandum which was part of the record in the District Court, and that memorandum stated, "The Commonwealth concedes that on the complaint as written the evidence is insufficient," and then cited in that memorandum the very case that Mr. Lydon's defense attorney brought to the attention of the trial judge.

The rest of the Commonwealth's memorandum went on to say, however, at this point in the proceeds, we can now either amend the complaint to conform to the crime we think we proved, or ask the court to construe the papers applying for the complaint as part of the charging document, and Justice Wilkins, for the balance of his opinion, went on to say, as a matter of state law, that would be an amendment of substance. It would charge a completely different crime. The prosecution may not do that. The prosecution must prove Mr. Lydon guilty of the crime that it alleged in the original complaint.

QUESTION: So when you are talking about his innocence, you have to define the term fairly narrowly.

MR. ROSSMAN: In the only sense in which I believe, Your Honor, a system that protects the due process rights of individuals makes relevant, and that is, are you innocent of the crime with which you are charged? As a defense attorney, I would hate to have to get up and argue that someone was innocent of all crimes for all time in order to gain an acquittal.

QUESTION: Mr. Rossman, may I ask you a sort of a non-legal question? If you are right here, it seems to me that -- and if the First Circuit is right, that it would become rather standard practice for a defense counsel at the conclusion of the first stage of the two-tier stage immediately to seek a writ of habeas corpus, and ask the Federal Court to review the District Court record. Maybe that is what the law requires, but if it is, it is going to really make a very significant practical difference, I suppose, in the procedure in Massachusetts, and I am wondering if you might address the possibility of some sort of comity and federalism notion of saying, well, the federal court ought to stay its hand until the review has been had in the Massachusetts system.

MR. ROSSMAN: I don't believe, Your Honor,

there will be a flood of habeas corpus petitions if the First Circuit's decision is upheld, for several reasons. First, Your Honor, as for the future, Massachusetts has stated that it will require individuals who opt to participate in the de novo system to expressly waive their double jeopardy rights as a condition of participating in the de novo system.

So, as for individuals who are part of the Massachusetts two-tier system from now on, they won't have a federal claim that they have been without their knowing consent deprived of the protection of --

QUESTION: I thought I asked that at the outset, and we got a negative answer. Maybe I misunderstood.

MR. ROSSMAN: I believe, Your Honor, that you did get a negative answer, and I would just call to the Court's attention Page 68 of the Commonwealth's brief, where there is a quote from a case that the Massachusetts Supreme Judicial Court decided after the First Circuit decision, but before you granted cert, Commonwealth versus Montanez, and what the Supreme Judicial Court said is that upon a certain interim period, 28 days, from the decision in Montanez, a waiver of a claim of double jeopardy shall be obtained, at the same time as the waiver that someone has to file to

participate in the de novo system.

There is, Your Honor, an example of the kind of form that the Montanez court contemplates attached to my opposition to a petition for certiorari, and I could represent to the Court that as of today, when individuals choose to participate in the de novo system in Massachusetts, they sign a form, and a sentence on the form says, I agree to waive any right I have under the double jeopdrdy clause, or language to that effect.

So, in answer to your question, Justice Stevens, I don't believe in the future it will be a problem.

QUESTION: You are confident such a waiver would create no problem. Supposing you asked them to waive their right to a lawyer. Would that be valid? Or suppose the state asked them, not you. Can we confidently assume -- maybe we don't have to decide it -- that a waiver provision would both have the practical consequences you say and not present any legal question?

MR. ROSSMAN: I don't know, Your Honor, that one can take the idea of waiver to its logical extreme. There certainly must be some minimum standards of due process that a state must incorporate in a de novo system, even if it offers someone an alternative procedure it can use to avoid the de novo trial. It is

not Mr. Lydon's position here today that the Burks protection is one of them if someone has fair notice beforehand --

QUESTION: How does the defendant ever have fair notice that the state is not going to have any evidence of guilt? Basically, he doesn't know what the options are going to be until he has seen the state's evidence.

MR. ROSSMAN: No, it is a question of accepting a risk if something eventuates, Your Honor, and what you need fair notice of is some position by the state court saying, if in fact the trial judge irrationally convicts you, you understand that as a condition of the de novo system you allow the prosecutor to do that which the double jeopardy clause ordinarily prohibits, and that is to hone his strategy, perfect his evidence, improve his position, and gain possibly a sufficient case to convict an individual where you didn't the first time, and I suggest that Mr. Lydon did not have fair warning that that might be the case in his trial, and the position this Court now confronts is the prospect of a second trial where the prosecutor will gain that advantage, and the Court must recognize, as it has recognized in the past, that the double jeopardy clause, by prohibiting that second effort, guards

innocent individuals against the possibility of unfair or perhaps inaccurate convictions.

QUESTION: Mr. Rossman, suppose the waiver system were already in place, or suppose it were clear that there had been a waiver of any Burks right by one menas or another. Do you suppose there are defendants who would nevertheless opt to go to the first bench trial because they have nothing to lose by previewing the state's case, so to speak?

MR. ROSSMAN: I would suspect that a great majority of defendants would opt nevertheless to go to the first trial. To the extent, however, that the question you pose is relevant to Mr. Lydon, I think that a well advised defense attorney, if a waiver system were in effect at the time, would have decided to go to the second tier directly, because I think even though it may take only five minutes to read the transcript, Your Honor, one thing that comes across from the transcript is that the defense strategy in this case was keyed from the very beginning to the palpable and obvious lack of any proof of one of the elements.

That being so, and that being the defense strategy, if would not be well advised to allow the state to have two opportunities to present a case, because the state would have an opportunity only to

improve --

QUESTION: You mean, the state has got to adopt its procedure to the defendant's procedure?

MR. ROSSMAN: I am sorry. I didn't understand your question, Your Honor.

QUESTION: Well, you said the state would have to adopt its procedure depending on what the defendant does. Is that what you said?

MR. ROSSMAN: No, Your Honor. My position is that if the state wants to adopt a procedure that allows the prosecutor two opportunities to convict, it has got to tell people in advance, this is the risk you run.

QUESTION: The state's language is that the second hearing is an "appeal." Not trial.

MR. ROSSMAN: That's correct, Your Honor, but --

QUESTION: That's correct, and so does the Supreme Court of Massachusetts say the same thing.

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

QUESTION: They consider it an appeal.

MR. ROSSMAN: No, they don't, Your Honor. Using the word --

QUESTION: Well, they said so.

MR. ROSSMAN: The word has historical understanding, Your Honor, and its custom and usage in

Massachusetts indicates that when you appeal for a trial de novo, what you get is a second trial. I would suggest, Your Honor, that the course that Massachusetts has chosen to adopt in response to the double jeopardy problem that it created for Mr. Lydon, in other words, notifying people in advance so that they have fair warning, is not the only course a court system may take if it wants to continue to experiment in the area of criminal justice and have a de novo system.

Pennsylvania, for example, solves the problem that Massachusetts found itself in with Mr. Lydon by allowing individuals who have been convicted on insufficient evidence after an initial trial to obtain a review of the record in an appellate court, through a common law writ of error. The Supreme Judicial Court of Massachusetts in its Lydon opinion stated that if it were wrong about the application of Burks to the double jeopardy -- excuse me, to the de novo system, then judges in the second tier of the system should entertain such motions.

Now, if a state chose to adopt, or as Pennsylvania does, continued to have in operation that type of a system, that, I believe, Justice Stevens, would also answer your question in terms of federal intervention in state de novo systems, because one could

expect that that second level of review would have two effects.

Number One, that second level of review would have the effect of discovering a lot of these mistakes, as indeed the mistake was discovered in Mr. Lydon's case, where the prosecutor conceded the evidence was insufficient and where Justice Wilkins read the transcript, and whether he was a reviewing court or was not a reviewing court, he at least wrote an opinion where he stated, I do not report my ruling that the evidence was insufficient, so that one would expect that if that type of review were incorporated into a de novo system, very few cases would survive and get to a federal habeas corpus court.

A second consequence of that type of review would be to tighten up the procedure for evaluating evidence on the part of a judge and the preparation and presentation of evidence on the part of the prosecutor in the first tier court. I suggest, Your Honor, that the decision of the First Circuit can only have the effect on the quality of justice in the Massachusetts de novo system of improving adherence to the standards of due process by both judges and prosecutors because if double jeopardy does not apply to the first tier of a de novo system, then prosecutors and judges lack the normal

incentive that prosecutors and judges have in our system faithfully to adhere to the standard of proof beyond a reasonable doubt.

And if the Court credits at all the unanimous opinion of commentators, of judges from Massachusetts, of scholars, going back to 1922, when Felix Frankfurter and Roscoe Pound studied the lower criminal courts in the city of Cleveland, that the quality of justice in these courts suffers from a lack of adherence to the standards of due process, I submit that a decision telling these courts that double jeopardy did not apply because Massachusetts had decided never to look at the question of sufficiency of the evidence would be a decision in the wrong direction.

If I can address with the amount of time I have remaining the question of the appropriate nature of federal relief here granting the trial which will violate Mr. Lydon's constitutional rights has not yet occurred, I submit that Younger versus Harris considerations do apply, and I also submit, Your Honor, that Younger itself expressly recognizes an exception for cases where an individual establishes there will be a violation of double jeopardy, because that establishes that there will be an irreparable injury to his constitutional interests.

Jeopardy protects an individual and has always been understood to protect an individual from having to undergo a trial itself. To my knowledge, only one other provision of the Constitution provides that same protection, not just against an unconstitutional conviction, but from the trial itself, the speech and debate clause, which hasn't much practical implication.

Where an individual is threatened with a trial that will violate double jeopardy, unless he gets relief prior to the trial, that much of the Constitution's protection will be irreparably lost if he has to wait until the trial is over to get relief, and Younger versus Harris recognizes that pretrial intervention may be appropriate where an individual can establish irreparable injury plus lack of an adequate remedy.

Well, Massachusetts has already said, we are giving you no remedy because we think there is no violation. Since we wilfully won't look at the predicate for determining a double jeopardy violation, that is, we will never look at the sufficiency of the evidence, therefore, we will never discover a double jeopardy violation. Since we won't discover one, we find --

QUESTION: It would follow from what you say, Mr. Possman, in answer to my previous hypothetical about

intervening at the end of a trial which has come in with a mistrial, a federal court should presumably feel perfectly free to intervene there if the state did not allow any appeal of a -- in fact, there would be nothing to appeal from, because the case would simply be retried.

MR. ROSSMAN: If a state offered an individual in the circumstance you mentioned no review, that factor would weigh in favor of federal intervention. That wasn't the only factor the First Circuit relied on. It also mentioned the fact that the Commonwealth's position before the court showed no need for a speedy retrial, because the state courts had granted a stay of at least eleven months and never asked the federal court to allow it to go ahead with the state criminal trial pending the habeas corpus proceedings.

I see my time has expired. Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Ms. Smith?

MISS SMITH: No, Your Honor. Thank you.

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

(Whereupon, at 11:59 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

82-1479 - JUSTICE OF BOSTON MUNICIPAL COURT, Petitioners v. MICHAEL LYDON

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BY _____

(REPORTER)