

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-904

TITLE OHIO, Petitioner v. KENNETH M. JOHNSON

PLACE Washington, D. C.

DATE April 25, 1984

PAGES 1 thru 49



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IN THE SUPREME COURT OF THE UNITED STATES

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OHIC :
Petitioner, :
v. : No. 83-904
KENNETH M. JOHNSON :
-----x

Washington, D.C.
Wednesday, April 25, 1984

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 12:59-o'clock a.m.

APPEARANCES:

JOHN E. SHOOP, ESQ., Painesville, Ohio; on behalf
of the Petitioner.

ALBERT I. PUROLA, ESQ., Willoughby, Ohio; appointed
by this Court; on behalf of the Respondent.

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1 one count each of murder, involuntary manslaughter,
2 aggravated robbery, and grand theft.

3 The defendant/respondent had already fled the
4 jurisdiction before the Grand Jury indictment had
5 returned. And 20 months later he was apprehended in the
6 State of Tennessee and returned to the State of Ohio.
7 On October 9, 1980, the defendant/respondent appeared
8 before the Lake County Common Pleas Court for the
9 purposes of arraignment on the aforementioned indictment.

10 At that point, he proffered pleas of guilty to
11 involuntary manslaughter and grand theft, and not guilty
12 pleas to murder and aggravated robbery. The State
13 objected.

14 Bond was set, and the case assigned to a
15 different trial court, which had then to decide whether
16 to accept the proffered pleas of guilty which the first
17 court reserved ruling upon. On November 26, 1980,
18 following written arguments, without any testimony or
19 evidence even proffered, the trial court was persuaded
20 by the defendant/respondent to exercise its discretion
21 and accepted the guilty pleas on involuntary
22 manslaughter and grand theft.

23 At the -- going back for a moment --

24 QUESTION: Mr. Shoop, is that a common
25 practice in Ohio for the judge to refuse the

1 prosecution's demand to go on to trial? The prosecution
2 was asking to go to trial on all the issues?

3 MR. SHOOP: Correct.

4 QUESTION: Is this a common thing, this event
5 that occurred here?

6 MR. SHOOP: The event is not directed at
7 whether or not it's common reject the prosecutor's
8 plea. Most of the courts in Ohio accept recommendations
9 from the prosecuting attorney and so forth on various
10 events. As far as written guilty pleas or pleas at the
11 arraignment, this was a unique situation evidenced by
12 the trial court. The initial -- the arraigning judge's
13 initial comments when the guilty pleas were proffered,
14 and he said, "This is unusual; we will have to think
15 about this. Does everyone know what is happening? Do
16 you recognize the consequences of this?"

17 And at that point, the trial attorney
18 responded, "Yes. This may anticipate some -- double
19 jeopardy provisions may be implicated here.

20 QUESTION: Who? The prosecutor or defense
21 counsel?

22 MR. SHOOP: Both. The defense counsel
23 evidenced that immediately.

24 QUESTION: Did they specifically mention
25 double jeopardy?

1 MR. SHCOP: Yes.

2 QUESTION: And I take it, under Ohio practice,
3 grand theft is a lesser included offense of aggravated
4 robbery --

5 MR. SHCOP: Not in every instance.

6 QUESTION: Or at least is a lesser offense.

7 MR. SHCOP: It is a lesser offense.

8 QUESTION: All right.

9 MR. SHCOP: On November 26, 1980, following
10 the written arguments, without any testimony even
11 offered or proffered, the trial court was persuaded to
12 accept the guilty pleas, as I said. The court sentenced
13 the defendant/respondent to consecutive sentences, three
14 to ten years on involuntary manslaughter. That is -- in
15 the State of Ohio we have indeterminate sentences, so it
16 is a minimum of three to ten years, and of course the
17 minimum can be reduced by the Ohio Adult Parole
18 Authority. And the second sentence was two to five
19 years on grand theft, to be served consecutively.

20 QUESTION: It's possible that he'd serve any
21 five years altogether, isn't it?

22 MR. SHCOP: It is possible that he could serve
23 only five years, and likely that he would serve even
24 less because of the Ohio Adult Parole Authority's
25 interpretations and understanding and control of release

1 of those that are incarcerated under indeterminate
2 sentencing.

3 Following these pleas the defendant/respondent
4 moved to dismiss the murder and aggravated robbery
5 counts on the grounds of double jeopardy, arguing
6 multiple prosecution and collateral estoppel.

7 On March 31, 1981 the trial courts, after
8 briefs and arguments, again without any evidence or
9 testimony even proffered, granted the defendant's motion
10 to dismiss on the double jeopardy grounds. Thereupon,
11 the State appealed to the trial court's dismissal of the
12 murder and aggravated robbery.

13 QUESTION: Mr. Shoop, you mentioned that the
14 motion was granted without any testimony. Would one
15 ordinarily expect testimony in connection with a motion
16 to dismiss on double jeopardy grounds?

17 MR. SHOOP: Not necessarily, Your Honor,
18 Justice Rehnquist. What I'm looking for is -- or trying
19 to establish in the fact pattern is that we have not
20 ultimately had one full litigated trial. I'm attempting
21 to establish that through the fact pattern also, that
22 nothing has been testified to.

23 The State appealed this dismissal to the Court
24 of Appeals and again, based on double jeopardy
25 provisions and understandings of the double jeopardy

1 provisions of the Fifth Amendment of the Constitution of
2 the United States, the appeal was affirmed, the trial
3 court's dismissal on those grounds; thereupon, we
4 appealed to the State Supreme Court, which on August 31,
5 1983 affirmed the Court of Appeals' decision upholding
6 the trial court's dismissal, again all based on federal
7 double jeopardy understandings and provisions.

8 QUESTION: Mr. Shoop, the Supreme Court
9 opinion never says clearly whether involuntary
10 manslaughter is a lesser included offense of murder. In
11 fact, it seems to say contradictory things; in one
12 place, that the two offenses are mutually exclusive.
13 And then it says that the Blockburger test for the same
14 offense is met.

15 What do you think the Supreme Court meant in
16 its opinion? What is it holding? I couldn't understand.

17 MR. SHOOP: I agree with Justice O'Connor. I
18 have the same apprehensions through every decision of
19 each court and judge, except for the dissenting judge,
20 Judge Iocar in the Ohio Supreme Court, "They have
21 misunderstood and misapplied all the Blockburger double
22 jeopardy, North Carolina v. Pearce applications of
23 double jeopardy in this situation."

24 QUESTION: Well, do you know which the court
25 was holding?

1 MR. SHOOP: I can only understand from all of
2 the court's holdings in Chic that there is no decision
3 that we can find which specifically states that murder
4 or involuntary manslaughter is a lesser included offense
5 of the crime of murder. And in the respondent's brief
6 he cites State v. Willis for supporting that
7 proposition, and upon perusing State v. Willis you'll
8 find out that that is -- or have found out -- that that
9 is a sexual assault case and goes to the charging
10 instrument, has nothing to do with the crimes of murder
11 or involuntary manslaughter.

12 QUESTION: Are the two offenses mutually
13 exclusive?

14 MR. SHOOP: In my argument I say yes, they
15 are. And the difference is that, as the courts below
16 have tried to interpret the mental states requisite in
17 order to include these in the Blockburger test or under
18 Ohio Revised Code 2941.25, which is our multiple counts
19 statute, they have attempted to say that the mental
20 state requisite in murder, which under the laws of the
21 State of Ohio is purposely, that mental state is
22 fulfilled with any lesser mental state which may be
23 encompassed in the involuntary manslaughter charge.

24 And I vehemently disagree with that
25 proposition.

1 QUESTION: Mr. Shoop, before
2 Justice C'Conner's question, you made the statement that
3 the Ohio courts have reached their conclusion on federal
4 double jeopardy grounds. Do you include both
5 combinations? On the one hand, murder and manslaughter,
6 I think I can go along with you.

7 What about aggravated robbery and grand
8 theft? Do you think plausible argument can be made that
9 their decision there was on adequate and independent
10 State ground?

11 MR. SHOOP: I would have to state that armed
12 robbery -- excuse me -- aggravated robbery and grand
13 theft, that because of peculiarity in the charging
14 verbiage that was used, aggravated robbery can be
15 charged either as threatening the force or, in the
16 second section, having a concealed weapon or weapon upon
17 their person, whereas theft then would only encompass
18 the theft.

19 I would say that that, because in this
20 instance of the charge and the way it was framed, that
21 in this instance I would have to agree that probably the
22 theft and the aggravated robbery have been charged as
23 lesser included offenses.

24 QUESTION: This takes me, of course, to what I
25 regard as a very strange rule, this syllabus rule you

1 have in the State of Ohio, and I'm not sure it's in
2 effect anywhere else. But as I read the syllabus on
3 that side of the four issues, it sounds to me like it's
4 all state law.

5 MR. SHOOP: I don't believe that it's all
6 state law, because they apply all of the Blockburger
7 tests in their application and understanding. Whether
8 they're using 2941.25 or they're using just the double
9 jeopardy standards, everything that points and applies
10 to this situation and their understanding and their
11 interpretations of even the state statutes is all done
12 in light of federal double jeopardy standards, case law,
13 and decisions.

14 I did not quite finish with Justice O'Connor's
15 question, but I believe that the separation of the
16 murder and the involuntary manslaughter can be shown
17 under Blockburger and the mental state requisite in the
18 murder statute is purposeful, and the mental state in
19 the involuntary manslaughter may be totally absent of
20 any mental state requisite to causing the death of an
21 individual.

22 In this case the requisite mental state --

23 QUESTION: When the trial judge indicated he
24 was going to accept these pleas, did the State ever
25 propose dismissing those charges and going ahead on

1 murder and aggravated robbery?

2 MR. SHOOP: No, the State did not. We never
3 proposed dismissing those charges because case law in
4 the State of Ohio up to this point had not said anything
5 that gave any indication that involuntary manslaughter
6 in this specific case could be a lesser included offense
7 of the crime of murder in this specific case.

8 We had no indication until we got to Johnson,
9 then, that the court was going to make any kind of
10 ruling with this regard.

11 QUESTION: May I ask, though, in Johnson
12 itself, did the Ohio Supreme Court uphold that
13 involuntary manslaughter is a lesser included offense of
14 murder?

15 MR. SHOOP: I do not believe that they stated
16 it is a lesser included offense. I believe, as a
17 specific term of art, lesser included offense. It is a
18 lesser offense. It may be an allied offense of similar
19 import, according to our statute --

20 QUESTION: Is there any difference between the
21 two offenses as a matter of Ohio law, other than the
22 mental state of the defendant?

23 MR. SHOOP: Yes. And that is what I was
24 trying to explain.

25 QUESTION: What is there, other than the

1 mental state of the defendant, that is different between
2 the two offenses?

3 MR. SHOOP: We have a lower offense which has
4 a separate, distinct element necessary in its proof, and
5 a higher offense which also has a separate and distinct
6 element.

7 QUESTION: And what is that element, apart
8 from the mental state of the defendant?

9 MR. SHOOP: It is only mental in -- that is
10 part of the misinterpretation of the Ohio courts. It is
11 only mental in the murder case. There may be no mental
12 state at all, other than some mental state to commit the
13 crime itself.

14 QUESTION: In other words, in the murder case
15 you have to prove purpose.

16 MR. SHOOP: Purpose to kill.

17 QUESTION: Purpose to kill. All right.
18 That's an element of murder. What element of
19 involuntary manslaughter is there that is not an element
20 of murder?

21 MR. SHOOP: All right. That is the element of
22 the theft offense or some misdemeanor or some --

23 QUESTION: No, no. I'm asking only about the
24 involuntary manslaughter and the murder. My question
25 is, what element of the offense of involuntary

1 manslaughter is not also an element of the offense of
2 murder?

3 MR. SHOOP: The act of committing some
4 misdemeanor. That is an element of the involuntary
5 manslaughter. Any misdemeanor commissioned which can
6 proximately be related to the cause of death of somebody
7 else is the only element. It is the distinguishing
8 element.

9 QUESTION: Well, Mr. Shoop, on this question,
10 getting back to my brother Blackmun's question to you
11 about that silly rule of yours on syllabus, do I take it
12 that they (1) -- those two paragraphs, they are the
13 holdings, are they, of your Supreme Court? Syllabi, at
14 page A1?

15 MR. SHOOP: Under syllabus law, that is
16 initially --

17 QUESTION: What is syllabus law? Are we
18 foreclosed in trying to determine what your Supreme
19 Court held from looking at the opinion? Are we limited
20 by the syllabus rule to what's stated in those two
21 paragraphs?

22 MR. SHOOP: Initially, the limitation would be
23 there if the syllabus can be construed to be clear and
24 unambiguous on its face.

25 QUESTION: All right. Now, right there the

1 first one is "Aggravated robbery is an allied offense of
2 similar import to theft." Now, that's -- you, I think,
3 said earlier that indicates that theft is an element of
4 the offense of aggravated robbery.

5 MR. SHOOP: Yes.

6 QUESTION: For double jeopardy purposes.

7 MR. SHOOP: For double jeopardy purposes, I --

8 QUESTION: How does that differ from what
9 paragraph 2 says? "The offenses of murder and
10 involuntary manslaughter share the common element of
11 causing the death of another and are distinguishable
12 only by the offender's mental state." Now, is that
13 ambiguous?

14 MR. SHOOP: Yes. To me. And I believe it has
15 been to every court that has attempted to understand
16 that reasoning.

17 QUESTION: Well, I have some -- well, it may
18 be wrong, but that's your law apparently. That's your
19 state law.

20 MR. SHOOP: I think I understand our problem.
21 In our hearts, we know there has only been one death,
22 and we say this is incongruous, that we ought to be
23 allowed to do this kind -- or the State should be
24 allowed to do this. But the State specifically set up
25 guidelines to allow for multiple counts, multiple

1 convictions, even under the federal guidelines in one
2 proceeding. And we have to keep that in mind.

3 Under the federal law, we are still under one
4 proceeding. The courts below have adopted this duality
5 of purpose or subject to future events, causing this
6 case to now be here before this Court as if it is a
7 legitimate double jeopardy application. We have not
8 reached the double jeopardy threshold. The argument
9 presumes an intended result, we certainly hope.

10 But if we reach that upon remand and the case
11 is remanded, then we can address the questions, and
12 there are safeguards within the state statutes to
13 protect the rights so that an individual cannot be
14 charged.

15 The intent -- it is very important, I
16 believe, to understand that the mental state in murder
17 relates to the mental state, the culpability of taking a
18 person's life. The mental state requisite, if any, that
19 the courts tried to attach in the misdemeanor or in the
20 involuntary manslaughter has nothing to do with taking a
21 person's life.

22 The mental states are entirely different. The
23 element of theft or discharging a firearm within a city
24 limits, discharging a firearm, requires no requisite
25 mental intent.

1 QUESTION: You said they are entirely
2 different. They are different, I take it you mean, in
3 the sense that in one case there must be the mens rea,
4 the intent, and in the other case that must be absent.

5 MR. SHOOP: Correct. In the higher crime, the
6 mens rea goes to the intention of killing someone.

7 QUESTION: But then if he's guilty of
8 involuntary manslaughter, he cannot be guilty of murder.

9 MR. SHOOP: I disagree.

10 QUESTION: Well, how can he have both no
11 mental state and the wrong mental state? I don't
12 understand that.

13 MR. SHOOP: Ah, now we're beginning to
14 understand.

15 (Laughter.)

16 MR. SHOOP: They could be mutually --

17 QUESTION: On that point, you said they were
18 mutually exclusive, did you not?

19 MR. SHOOP: That is -- that is my argument.

20 QUESTION: But if that's so, if you find that
21 person --

22 MR. SHOOP: No, I didn't say the --

23 QUESTION: Well, you said that. Now, if the
24 person then is found guilty or pleads guilty to
25 involuntary manslaughter, that would be the equivalent

1 of an acquittal on murder, and you'd be collaterally
2 estopped for going from there.

3 MR. SHOOP: No, I did not say -- I hope I did
4 not.

5 QUESTION: I thought you did in response to my
6 question, that you believed that it was mutually
7 exclusive.

8 MR. SHOOP: Then I perhaps did not understand
9 your question as to the mutual exclusive proposition.

10 QUESTION: You don't think they're mutually
11 exclusive.

12 MR. SHOOP: No. I believe they are entirely
13 separate offenses. And if allowed to be tried, we may
14 be able to establish that they are not even lesser
15 included offenses, and be allowed to convict and charge
16 on both.

17 QUESTION: But then, if I understand you --

18 QUESTION: -- your question of lesser included
19 offense, as between first degree murder and
20 manslaughter, you never had your chance --

21 MR. SHOOP: We've never had that opportunity
22 to present that one full litigated issue or trial.

23 QUESTION: So whatever the law may be with
24 respect to matters arising under the Green case, Green
25 v. the United States, are not at all present here.

1 MR. SHOOP: We have not had one full hearing
2 yet.

3 QUESTION: Mr. Shoop, let me go back, if I
4 may. The Ohio Supreme Court said that involuntary
5 manslaughter involves a lesser mental state, and I think
6 you've agreed that they're different, as it is "killing
7 which proximately results from the defendant's
8 committing or attempting to commit another offense. It
9 is manifestly obvious that these two states" -- and
10 understand, that's two states of mind -- "are mutually
11 exclusive and that in any given killing, the offender
12 may be possessed of only one."

13 As I understand you, you disagree with that?

14 MR. SHOOP: Absolutely.

15 QUESTION: So we should follow you, rather
16 than the Ohio Supreme Court.

17 MR. SHOOP: I would think that I would ask the
18 Court to accept --

19 QUESTION: And to disagree with what the Ohio
20 Supreme Court said about Ohio law?

21 MR. SHOOP: I understand. Because they are
22 interpreting Ohio law and that statute in light of
23 federal double jeopardy standards, and I think you can
24 make a directive back to them that the federal law would
25 understand that these are separate elements for the

1 purposes --

2 QUESTION: Now, whether you are correct or
3 not, or whether the Ohio court is correct, what does it
4 have to do with this case when there was a guilty plea
5 taken on the two very minor charges, and you never got
6 any kind of a homicide case before either a jury or the
7 court?

8 MR. SHOOP: That is part of --

9 QUESTION: So this is really academic
10 discussion.

11 MR. SHOOP: Correct. And that is part of the
12 problem with this entire case, is that most of it has
13 been an academic carrot that has been tossed out, and
14 everyone seems to be leaning over backwards to try to
15 reach for that carrot, and they have missed the double
16 jeopardy constitutional protections that have been
17 provided, that the State has provided and will continue
18 to provide throughout this.

19 I've noticed that my time is up for the moment.

20 QUESTION: Let me ask you, Mr. Shoop, don't
21 you think the Ohio court would have reached exactly the
22 same result without any regard to federal standards
23 under your double -- under your multiple count statute?

24 It specifically says that the General Assembly
25 has further effectuated the principles contained in the

1 double jeopardy clause by means of their multiple count
2 statute, and then it quotes the multiple count statute
3 and goes on. It seems to me like they would have
4 reached exactly the same result under that -- just your
5 local statute.

6 MR. SHOOP: They could, but they didn't.

7 QUESTION: Well, I think they did.

8 MR. SHOOP: They did this through application
9 of Elockburger. And I believe that in reviewing the
10 elements there, you can see the different elements which
11 takes this out of that, I argue, double jeopardy
12 provision.

13 QUESTION: You think that they were
14 necessarily relying on federal principles.

15 MR. SHOOP: Correct.

16 Thank you.

17 CHIEF JUSTICE BURGER: Mr. Purola.

18 ORAL ARGUMENT OF ALBERT L. PUROLA, ESQ.

19 ON BEHALF OF THE RESPONDENT

20 MR. PUROLA: Mr. Chief Justice and may it
21 please the Court, obviously some portion of the Ohio
22 syllabus rule is important in this case, and obviously,
23 even though double jeopardy seems to be all around the
24 case, the judgment below rests on an independent
25 adequate state ground. The questions of the Court sc

1 far with regard to petitioner's argument make it clear
2 that that's understood as a problem in the first place.

3 The syllabus rule is, as alluded to during
4 argument that the Ohio Supreme Court's law of the case,
5 the only part of the judgment that commands -- that
6 necessarily commands a majority of the court is
7 contained in the syllabus which is the short sentence or
8 two sentences. It's a point of law that governs the
9 case.

10 QUESTION: Do you suggest that's binding on
11 this Court?

12 MR. PUROLA: I suggest that it is, Mr. Chief
13 Justice.

14 QUESTION: Well then, if that's correct, then
15 a state court could decide federal questions, cases like
16 this on federal grounds, and hide behind a syllabus rule
17 which was silent on the grounds. And this Court could
18 never review.

19 MR. PUROLA: Only, sir, if --

20 QUESTION: I can assure that, speaking for one
21 member of the Court, the Ohio syllabus rule would have
22 no weight with me whatever when it would permit a court
23 to hide behind -- or to decide a federal question, and
24 insulate it from review here by this specious kind of
25 charade.

1 MR. PUROLA: The only way they could do that,
2 sir, would be if the syllabus was a mask, and clearly in
3 opposite to what the controlling language in the opinion
4 was. I don't think that would happen all the time, but
5 I would point out that in *Zacchini v. Scripps-Howard*,
6 this Court recognized in an opinion by Justice White
7 that you will look to the syllabus to define the law of
8 the case that it is controlling.

9 I have no doubt whatever, however, that if the
10 Ohio Supreme Court have decided a question of federal
11 Constitutional law improperly or excessively, they could
12 not hide behind that local rule to prevent review here.

13 QUESTION: If you know, why does the Ohio
14 court file an opinion? If you know.

15 MR. PUROLA: The Ohio jurisprudence,
16 Your Honor, is that the opinion is to explicate the
17 facts of the case, and the syllabus that goes with the
18 opinion is the rule which is to be read in light of the
19 facts of the case. Is the opinion of any precedential
20 value? I don't know, sir.

21 It's to expound on the facts that the
22 particular case that gave the genesis to the syllabus
23 was about. But, in any event --

24 QUESTION: Mr. Purola, as to the second
25 paragraph of the syllabus in this case, dealing with

1 murder and manslaughter, it just says basically that the
2 prohibition v. double jeopardy requires the result. And
3 it isn't clear from the syllabus alone whether it's the
4 federal prohibition of some state requirement.

5 Now, doesn't *Zacchini v. Scripps-Howard*
6 indicate that under those circumstances, we go ahead and
7 read the opinion to see if the reliance was on federal
8 or state law?

9 MR. PUROLA: Precisely, Justice O'Connor.
10 That's exactly what happened in *Zacchini*. The syllabus
11 was just as unclear.

12 QUESTION: Right. So we go ahead and look
13 then at what the opinion said, at least as to that
14 murder manslaughter question, and when we do that,
15 doesn't it show us that the court was relying on federal
16 law as to the murder manslaughter issue?

17 MR. PUROLA: I cannot argue that federal
18 considerations are not present in the opinion. I do
19 argue that it is not clear to me that the rule of
20 *Michigan v. Long* was ever written to contemplate that
21 kind of a situation, where one syllabus is clearly on
22 state law and the other may be on federal law.

23 I think if it were just the second syllabus --

24 QUESTION: Well, you have two issues. You
25

1 have the theft aggravated robbery that you can treat
2 separately, and then you have the murder manslaughter
3 issue, don't you?

4 MR. PUROLA: I think, however, that the Long
5 decision requires the Court to look at the opinion, to
6 determine if within the four corners of it there is an
7 explication of some independent state law ground. And I
8 think that even though there are references to double
9 jeopardy law in the syllabus, the state law analysis,
10 partially that referred to by Justice Stevens on these
11 two things being mutually exclusive, isn't all that
12 clearly a double jeopardy analysis. But I cannot rest
13 entirely by ignoring the Long presumption.

14 QUESTION: What about the multiple state
15 statute that the court referred to as implementing
16 double jeopardy principles? Do you think the court
17 rested on that?

18 MR. PUROLA: I think in syllabus 1 --

19 QUESTION: Well, no; in the opinion. You
20 invite us to look at the opinion in your brief.

21 MR. PUROLA: With regard to syllabus 2.

22 QUESTION: Exactly. And when you do, what
23 independent state ground do you identify? The multiple
24 count statute?

25 MR. PUROLA: The multiple count statute is

1 what I identified, yes. And clear -- it's not clear
2 either, I concede. But with regard to the independent
3 state ground, another question may appear as to whether
4 or not, if the judgment below rests on one clearly
5 stated syllabus and one subject to the Michigan v. Long
6 presumption, whether or not the jurisdiction is here or
7 the desirability of issuing a decision that may not be
8 necessarily viewed as binding in Ohio. And I don't say
9 in any sense of they're ignoring you, but I consider the
10 possibility that Ohio, on remand, could decide this case
11 solely on state grounds to be a potential risk.

12 QUESTION: Under the multiple count statute.

13 MR. PUROLA: Yes, Your Honor. I think that --

14 QUESTION: But then they would be taking
15 exclusive responsibility, were it not asking a sharing
16 of a federal ground.

17 MR. PUROLA: Yes. That would be clearly state
18 law only at the point.

19 In the event, however, that the judgment below
20 is found to be based at least in part on federal law,
21 it's my position that the double jeopardy clause
22 prohibits further prosecution in this case.

23 The first and foremost point that must be
24 considered over and over again as far as the respondent
25 is concerned is that he has been convicted by a valid,

1 unappealed judgment of killing Thomas Hill and stealing
2 his property. That conviction is final, and has been
3 for many -- long period of time.

4 QUESTION: Say that again. He was convicted
5 of?

6 MR. PUROLA: I used the word "killing," sir.

7 QUESTION: Did he plead guilty to --

8 MR. PUROLA: He pleaded guilty to involuntary
9 manslaughter. And that is what he is in jail for
10 today. In my view, that implicates the second prong of
11 the North Carolina v. Pearce test that is the analysis
12 of the double jeopardy protection where there has been a
13 prior conviction. There has been a prior conviction in
14 this case, and it is an extant conviction for the same
15 facts.

16 I think that the general principles of not
17 quite 100 years now, but In Re Nielsen in 1889 point out
18 that where a person has been convicted of a crime that
19 may have multiple parts to it, he may not be
20 subsequently convicted of another one of those parts.

21 QUESTION: Even though he wasn't tried and
22 convicted?

23 MR. PUROLA: Absolutely, sir. I do not --
24 that's my position.

25 QUESTION: Of course, Brown v. Ohio

1 involved a trial of a lesser offense.

2 MR. PUROLA: In Brown I believe that --

3 QUESTION: This is a good way, if you could
4 get away with it, isn't it? How did you ever persuade
5 the trial judge to accept these pleas over the
6 opposition of the State?

7 MR. PUROLA: I am not sure I can say why the
8 trial judge did it, but my position was at that time
9 that at the general issue, at the arraignment, the
10 Rule 11 proceeding, he had the absolute right to enter
11 the statutorily authorized pleas which are, I think,
12 identical to the federal pleas -- guilty, not guilty --
13 and only no contest requires the consent of the court,
14 and he was able, at that time, to not have any
15 prosecutorial participation in his plea when he
16 entered --

17 QUESTION: And why does that follow -- why is
18 the State then prevented from going ahead with a murder
19 charge?

20 MR. PUROLA: Well, because there is an extant
21 conviction. He would be then being successively
22 prosecuted for the offense of this homicide and this
23 theft, in my judgment a lesser included offense. And I
24 think Brown precludes that.

25 QUESTION: But not with the State's consent.

1 MR. PUROLA: Indeed, the State's consent at
2 this stage wasn't required. We certainly don't have the
3 State's consent and never did have it. There is no
4 question about their --

5 QUESTION: Is there any appeal? Are you
6 finished with your answer?

7 MR. PUROLA: Yes.

8 QUESTION: Could the State have taken an
9 appeal from this rather extraordinary action of the
10 trial judge on the question of the trial judge's
11 authority to take the plea to a minor offense and deny
12 the State the right to go to trial on the murder charge?

13 MR. PUROLA: I know of no Ohio practice, Your
14 Honor, that would allow an appeal at that point on that
15 issue. And I make the point in my brief that I think if
16 there is error in this problem -- and the Solicitor
17 General, of course, suggested as amicus -- it is up to
18 the Ohio Supreme Court to have a rule that allows for
19 not accepting those kinds of pleas where the government
20 objects. That isn't the rule in Ohio, and I don't think
21 an appeal is possible.

22 QUESTION: May I ask you a question about the
23 tactics involved in this case? Was there any reason for
24 pleading guilty with a manslaughter charge, other than
25 to obtain a bar to the murder charge?

1 MR. PUROLA: That's the reason, sir.

2 QUESTION: That's the only reason, I gather.

3 MR. PUROLA: Yes, sir.

4 QUESTION: Otherwise, I assume you would have
5 asked for a trial --

6 QUESTION: Right. That was the reason.

7 QUESTION: Well, Mr. Purola, to the extent
8 that the double jeopardy clause was designed to prevent
9 a defendant from going through the anxiety of twice
10 being forced to go to trial, it seems to me that its
11 purpose isn't served by allowing the defendant himself
12 to force entry of a plea and avoid not only two bites of
13 the apple by the State, but even the first bite.

14 MR. PUROLA: Justice O'Connor, I don't agree,
15 respectfully, with what I think is the underlying
16 premise to your question. I don't think that the double
17 jeopardy clause is at all implicated until the State's
18 right to a trial has grown or has appeared. And at the
19 arraignment, they do not have an independent cognizable
20 right to a trial.

21 QUESTION: Well, the point is, the State has
22 never been given an opportunity for even a single trial,
23 and the defendant has been in the position of himself
24 forcing this situation and asking for it. So it's a
25 little hard to see how the policies behind the double

1 jeopardy clause are served by applying it in these
2 circumstances.

3 MR. PUROLA: Well, I think that the double
4 jeopardy clause might reach its highest point if this
5 further trial is protected or is precluded, because it
6 is precisely this present conviction, brought upon by
7 this accepted final plea, that makes this case just like
8 all others in which a prior judgment has precluded the
9 trial.

10 And I think that it is not our position to
11 suggest at all that the State has an independent right
12 to trial.

13 QUESTION: May I ask -- Justice O'Connor
14 suggested that the judge was forced to accept the plea.
15 As a matter of Ohio law, did he have the alternative to
16 decline to accept the plea?

17 MR. PUROLA: Without question, Justice
18 Stevens. One of my arguments is that it is purely a
19 question of state law discretion. He exercised
20 discretion in favor of the plea. He did not have to.
21 And that if there is error in that, that's an Ohio
22 problem which should be corrected there, but it is not a
23 matter of federal constitutional law.

24 QUESTION: Mr. Purcla, you say that the
25 ultimate acceptance of the plea and judgment entered on

1 it makes it just like our other cases where trial and
2 conviction or conviction on a lesser offense barred
3 conviction on a greater offense.

4 But in cases like Brown v. Ohio, there were
5 two separate proceedings in two separate Ohio counties,
6 weren't there?

7 MR. PUROLA: Yes, there were.

8 QUESTION: Don't you think that's -- it's
9 factually different. Don't you think it might be
10 legally different; that here there was all one
11 indictment before one judge?

12 MR. PUROLA: I don't think it's factually or
13 legally different. In fact, there was obviously one
14 sovereign in Brown, whether it was two counties or not.
15 In fact, they were guilty pleas. I don't believe there
16 was any trial in Brown. He pleaded guilty in
17 Willoughby, which is my city, and then next door in
18 Cleveland. And I think that the point of Brown and the
19 rationale and the policies of Brown are the same as this
20 case. I don't see any difference.

21 QUESTION: Well, one difference, I suppose, is
22 that the State did have an opportunity to proceed to
23 contest a judgement in at least one of its count.

24 MR. PUROLA: That's correct, sir, but that is
25 only important if somebody wants to equate the State's

1 right to proceed with the defendant's right to be free
2 from former jeopardy. And I do not equate those.

3 I think that the State's right to proceed is
4 an independent right coming from the Executive Branch,
5 and it has got nothing to do with the defendant's
6 protection v. governmental oppression, which I consider
7 this a moderate form of, not a great form.

8 With regard to the normal protections
9 attendant with a double jeopardy clause, clearly two
10 things must be satisfied: one is, they must be the same
11 offense, and with regard to these there has been
12 considerable discussion today. I don't think there is
13 any serious question that aggravated robbery and theft
14 are the same offense for purposes of the Fifth Amendment.
15 And, consequently --

16 QUESTION: Are they the same offense as murder?

17 MR. PUROLA: Sorry, sir?

18 QUESTION: The same offense as murder?

19 MR. PUROLA: No. Aggravated robbery and theft
20 are the same offense.

21 QUESTION: What about my question? Are they
22 the same as murder?

23 MR. PUROLA: No, sir.

24 QUESTION: He was charged with murder here,
25 wasn't he?

1 MR. PUROLA: Charged with murder and
2 involuntary manslaughter. I maintain that the
3 manslaughter and murder are the same offense, and the
4 robbery and theft are the same offense in Fifth
5 Amendment terms. So a conviction on any one of those
6 precludes a successive prosecution on the other one.

7 QUESTION: I inquired of your friend -- and
8 perhaps you wish to address it -- is it common or usual
9 or frequent practice of judges to do what the judge did
10 here, accept a plea on a relatively minor charge and
11 foreclose the right of the State to go to trial on the
12 major charge?

13 MR. PUROLA: In my experience, Your Honor, I
14 have never seen it. I could never say it's common. I
15 consider it uncommon. I have never seen it happen,
16 except in this case.

17 QUESTION: Not that you won't tender a plea
18 again?

19 MR. PUROLA: I suppose it will depend on how I
20 do here.

21 (Laughter.)

22 MR. PUROLA: The same offense question is
23 obviously a constitutional prerequisite to any serious
24 application, and I don't think it's arguable with regard
25 to theft and robbery. There have been questions this

1 morning or this afternoon, regarding whether or not the
2 manslaughter and murder are the same offense, or at
3 least are they lesser included offenses. And clearly, I
4 don't think that you can doubt that they are the same
5 offense for double jeopardy purposes, though I'm not so
6 sure that I would want to venture a guess on whether or
7 not they're a lesser included offense either, except for
8 State v. Scott, in which the Ohio Supreme Court makes
9 direct reference to the fact that a trial on murder will
10 always involve a jury instruction on involuntary
11 manslaughter in the case where the evidence would
12 warrant it.

13 So I believe that it is a lesser included
14 offense, but without question --

15 QUESTION: If the case had gone to trial,
16 could he have been convicted of both offenses? If you
17 have both of those instructions, does the trial judge
18 customarily say you can bring in a guilty verdict of
19 both?

20 MR. PUROLA: Yes.

21 QUESTION: He does?

22 MR. PUROLA: In this case if it had gone to
23 trial on all four, he could have --

24 QUESTION: No. I mean just the involuntary
25 manslaughter and murder.

1 MR. PUROLA: Right. He could have been
2 convicted of both of those at the same trial.

3 QUESTION: And get consecutive sentences for
4 the two?

5 MR. PUROLA: I do not believe he could get
6 consecutive sentences. That would obviously -- in fact,
7 I believe that under the statute, 2941.25, only one
8 conviction could survive. The trial judge would have to
9 dismiss one of the cases at that point.

10 QUESTION: You mean the jury could bring in a
11 verdict on both, but he couldn't enter judgment on it.

12 MR. PUROLA: That's right. The statutory
13 prohibition v. more than one conviction -- and I think
14 in my petition, or I mean my brief in opposition to the
15 petition for certiorari, I suggested that what Johnson
16 really did here was decide himself which two would be
17 dismissed, instead of waiting until there was a multiple
18 conviction and letting the judge decide, because it
19 wouldn't take much imagination to determine which the
20 judge would dismiss at that point, and it wouldn't have
21 been the manslaughter.

22 QUESTION: It seems to me what you just said
23 is inconsistent with what you told me a little while
24 ago. You're saying Johnson decided this? I thought you
25 told me the judge had the power to decide whether or not

1 to accept the plea.

2 MR. PUROLA: Oh, yes. I meant that in a
3 little different sense, Your Honor. The judge had clear
4 discretion, could have refused it. When I meant Johnson
5 decided, I meant he attempted to do it and in this case
6 was successful.

7 QUESTION: Well, he would always ask for the
8 lesser offense. He wouldn't have ever asked for murder
9 if he had a choice.

10 MR. PUROLA: Oh, no. He would ask for the
11 lesser.

12 QUESTION: Suppose they had gone to trial.
13 Suppose the judge hadn't engaged in this extraordinary,
14 unprecedented action that you concede was just that.
15 Suppose they had gone to trial.

16 At the end of all the evidence, does the Ohio
17 judge have the power that's common generally to direct a
18 verdict on the murder charge, for example, and leave to
19 the jury the decision only on the other charges?

20 MR. PUROLA: Absolutely, he has that power.

21 QUESTION: Then the State would have had its
22 day in court, wouldn't it?

23 MR. PUROLA: Would have had its trial on this
24 indictment. Yes, sir. Without question.

25 QUESTION: There's no doubt about the judge's

1 power to direct a verdict on the grounds that the
2 evidence would not support the verdict of murder.

3 MR. PUROLA: Rule 29, almost identical to the
4 federal rule, that kind of case.

5 The question on whether or not the
6 defendant/respondent and this court has been in jeopardy
7 twice, obviously must begin with the question of whether
8 he's been in jeopardy once. And I think it is an
9 obvious statement, almost not worthy of repeating, that
10 somebody who was in prison on a valid judgment of
11 conviction must have been in jeopardy.

12 This Court has recently, as recently as a week
13 ago today, in *Justices of Boston Municipal Court v.*
14 *Lyden*, considered the question of what is the
15 termination of jeopardy and how the necessity for
16 termination must be dealt with in order for a proper
17 claim of double jeopardy to be considered.

18 I argue in this case that jeopardy attached
19 and terminated within the period of time it took to
20 accept the plea and to enter the final judgment.

21 QUESTION: It's almost instantaneous, I guess.

22 MR. PUROLA: Yes. Very short period of time,
23 Your Honor.

24 QUESTION: Well, you've decided the whole case
25 when you say under a final judgment. It didn't dispose

1 of the entire indictment, though, except -- unless you
2 win on your double jeopardy claim.

3 MR. PUROLA: Precisely. If I don't win, the
4 remainder will be considered.

5 QUESTION: Then a final judgment, wrapping up
6 the whole case.

7 MR. PUROLA: Well, yes, but that will all
8 depend on how -- the outcome of this hearing, obviously.

9 QUESTION: The State's position is that there
10 is no valid final judgment outstanding now.

11 MR. PUROLA: I don't know if the State argued
12 that.

13 QUESTION: Part of its position.

14 MR. PUROLA: I'm sorry, sir.

15 QUESTION: Part of its position.

16 QUESTION: He's really not in prison is what
17 he's saying. He is in prison, isn't he?

18 MR. PUROLA: Yes, sir.

19 QUESTION: So there must be a valid judgment,
20 I would think.

21 MR. PUROLA: Three and a half years he is.

22 QUESTION: Let me ask you also, is there
23 anything in the record indicating what your advice was
24 to your client when you advised him to plead guilty?

25 MR. PUROLA: There is nothing in the record to

1 that, except the arraigning judge asked us, the
2 defendant and myself, what problems might be being
3 created by this offer of --

4 QUESTION: Was there any discussion then about
5 whether there might be a trial on the more serious
6 offense?

7 MR. PUROLA: No. There was no discussion at
8 that point, and there's nothing further in the record
9 about my advice to him.

10 QUESTION: If I were the defendant, I would
11 wonder what's going to happen to the other count.

12 MR. PUROLA: Well, I think it was clear. The
13 defendant understand that a motion to dismiss it on
14 these grounds would be made. That's all --

15 QUESTION: You mean at the time of his plea?

16 MR. PUROLA: Or shortly thereafter, before
17 trial was scheduled.

18 QUESTION: Well, I know, before it. But his
19 plea had been accepted and judgment entered before he
20 ever filed a motion.

21 MR. PUROLA: Yes, sir.

22 QUESTION: You want some credit for foresight,
23 I would think.

24 QUESTION: Well, fundamentally, the argument
25 on the other side, based on Jeffers, is that there was a

1 waiver of your double jeopardy claim because you elected
2 to make two proceedings out of it rather than one.

3 MR. PUROIA: The fundamental difference with
4 Jeffers, however, Jeffers did three things. He first
5 denied that the two offenses were the same. He secondly
6 overtly opposed trial together on the offenses, the 846
7 and 848 section, and (3) he never told the trial judge
8 or the prosecution what might be happening.

9 Kenneth Johnson does not fit any of those,
10 because again I have to point out that in Jeffers there
11 was an arraignment and a not-guilty plea and two trials
12 scheduled. When that happens, the prosecutor -- U.S.
13 attorney in that case -- becomes an integral part of the
14 case.

15 One of my major points in this Court is that
16 on state law, when the arraignment is the first
17 opportunity one has to plead to the indictment, a plea
18 of guilty will obviate the necessity of the prosecutor's
19 involvement with regard to that and eliminate the
20 necessity of a proceeding on the same offense.

21 That is different than Jeffers. Jeffers did
22 clearly deny that the two offenses were the same.
23 Johnson took precisely the opposite tack. Jeffers also
24 wanted two separate trials once the issue was joined.
25 That's not what happened here. The issue wasn't joined

1 at all on the involuntary manslaughter and the theft,
2 and clearly the court knew what the defendant's motion
3 was going to be after the plea was accepted.

4 In fact, what this points to is that this
5 somewhat unusual set of proceedings is maybe an aberrant
6 state law arrangement. It maybe isn't a double jeopardy
7 matter because the double jeopardy clause shouldn't be
8 implicated if this whole problem could have been
9 corrected or could be corrected by a state law ruling or
10 a state law modification, which I think is an excellent
11 reason for this court not to produce a decision on the
12 double jeopardy clause on this fact setting, which is
13 unusual, likely to be unrepeated, at least in most
14 cases, and I think that the state law thing is the way
15 to handle this position.

16 The government argues in the amicus brief of
17 the United States that they would just suggest to you,
18 if this were a federal case, that the plea be vacated
19 because it's beyond the power of the federal court to
20 accept it.

21 That isn't the rule in the federal courts
22 either. But this Court clearly, under its power, could
23 suggest that, if not order it. But in state law, that's
24 not a matter for this Court to decide.

25 With regard to why a second trial now, or a

1 trial now will be a second prosecution -- and I point
2 out that Pearce uses the word "prosecution," not "trial"
3 -- would violate the double jeopardy clause is that this
4 is a guilt-related ending of the first proceeding which
5 is significantly different than other interruptions in
6 proceedings that are not guilt-related. And that
7 difference has always made a -- I mean that distinction
8 has always made a difference to the court.

9 In this particular case, Johnson's guilt was
10 established on the very first day, at least to the facts
11 that took place on January 25, 1979.

12 QUESTION: Mr. Purola, may I ask one other
13 question about the situation immediately before the
14 guilty plea was accepted? As a matter of Ohio practice,
15 could the prosecution have dismissed the involuntary
16 manslaughter charge or could you have prevented that?

17 MR. PUROLA: I could not have prevented it,
18 Justice Stevens. He could have nolle'd it at his will.
19 And I guess the timing is important. The original
20 arraignment on October 9th did not result in the final
21 entry of any plea. That judge reserved ruling, sent it
22 to the judge that drew the case, and it wasn't finally
23 decided until the following month.

24 With regard to one issue that may seem to be
25 in this case, the idea of continuing jeopardy, one that

1 this Court has grappled with, if not directly, at least
2 tangentially recently. It's clear that continuing
3 jeopardy has never been undertaken, at least in the
4 sense of Justice Holmes's dissent, to be an acceptable
5 way of analyzing double jeopardy principles.

6 This case is much like Reed v. Jones in the
7 sense that no analysis could allow the prosecution to go
8 forward on the theory that Mr. Johnson is still in
9 jeopardy, and that's why I think the case decided last
10 Wednesday about Lydon talks about the termination. But
11 I think that ends the jeopardy, because the
12 justifications for a continuing jeopardy referred to in
13 last week's case all seem to be met in this case, and I
14 don't think this would be the case, if this Court were
15 ever inclined to adopt a continuing jeopardy notion to
16 perhaps give the State the right to stay in the case, I
17 don't think this would be the case to adopt it in,
18 though I certainly don't suggest it should be adopted at
19 all, but ideas of fairness to society, lack of finality,
20 and limited waiver are all, in this case, resolved in
21 favor of the respondent.

22 It may not be what all would choose, but the
23 fact that Mr. Johnson has been convicted of involuntary
24 manslaughter and been imprisoned for the maximum term
25 allowed by state law, by the trial judge, is fair to

1 society. He is not escaping this conduct. He was
2 consequently, or in addition, was sentenced
3 consecutively for the theft which was never challenged.

4 It is final, another suggestion in
5 Justice White's opinion last week that deals with
6 continuing jeopardy. This is final. There isn't any
7 obvious need to not have this over with. It is over,
8 and there's clearly no waiver of Mr. Johnson's right to
9 end his case.

10 My time is nearly over. I would like to end
11 by saying that this unique case is not the vehicle, in
12 my view, to change again the principles of double
13 jeopardy that have started to be changed in recent
14 years. It seems that this country survived a very long
15 time on very few double jeopardy opinions.

16 QUESTION: Well, it survived up until 1969
17 without -- or '67 -- without ever incorporating the
18 double jeopardy provision as v. the states.

19 MR. PUROLA: Precisely. And some states took
20 an entirely different view of double jeopardy, notably
21 Connecticut, prior to 1969. But I believe that the
22 principles of cases like *ex parte Lang* and *Perez* and
23 *Nielsen* are sufficient to govern double jeopardy
24 jurisprudence. And even if this case would warrant a
25 different consideration, the unique facts of this case,

1 coupled with Ohio law's very unusual treatment in this
2 case, is not one where this Court should attempt to
3 engraft or to engraft a different view of the double
4 jeopardy clause.

5 This case may not be further prosecuted
6 because another proceeding is barred by the Fifth
7 Amendment.

8 Thank you very much.

9 CHIEF JUSTICE BURGER: Do you have anything
10 further, Mr. Shoop?

11 MR. SHOOP: Just a few comments, Mr. Chief
12 Justice.

13 ORAL ARGUMENT OF JOHN E. SHOOP, ESQ.

14 ON BEHALF OF THE PETITIONER -- REBUTTAL

15 MR. SHOOP: The Fifth Amendment provisions and
16 protections that have steered this entire case through
17 the courts rely upon prohibitions against unlawful
18 government oppressive practices, protections afforded to
19 the accused.

20 In Singer, though, the Court -- this Court --
21 has stated that the State and the government does have a
22 right to one full trial. And we ask for that. There
23 has been no State action by the prosecutor, by the State
24 of Ohio, that is oppressive, that is burdensome, that is
25 placing an extra burden upon this accused. All that has

1 happened is he has chosen to attempt a ploy that would
2 now put restrictive and very binding confines on the
3 application of the double jeopardy provisions to the
4 State in these matters.

5 2941.25 of the Ohio Revised Code is a
6 statutory embodiment of the federal law in this area,
7 and it's intended to extend, by statute, the protections
8 of the Fifth Amendment to the defendant and, in doing
9 so, it extends also the weighing and balancing tests
10 that must be performed and the intended protections must
11 be weighed v. the public interest, both by the double
12 jeopardy provisions and by 2941.25.

13 The State did exactly what it was required to
14 do. The defendant has artificially attempted to create a
15 double jeopardy problem where one does not exist. We
16 ask you to reverse and to remand and to strongly
17 indicate to the courts of Ohio how to properly
18 understand and interpret similar acts and lesser
19 offenses under the Blockburger test, according to the
20 double jeopardy standards that they have attempted to
21 apply.

22 Thank you.

23 QUESTION: You indicate that the State has
24 done everything it could have done. I suppose it could
25 have dismissed the two charges to which -- with respect

1 to which the pleas were proffered. And then you would
2 have your murder trial.

3 MR. SHOOP: Yes. That is an alternative. It
4 is not one that we control. We could have suggested to
5 the court that we would at this point like to nolle or
6 dismiss the case, but the court was free to not accept
7 our refusal and proceed as it did.

8 It was not indicated at the time that it was
9 even going to be a problem.

10 QUESTION: If you would have dismissed, then
11 went to trial on murder, and you lost, you would have
12 been through.

13 MR. SHOOP: On the murder. There are
14 different theories for the applications of the two
15 crimes.

16 QUESTION: You would have been through
17 entirely.

18 MR. SHOOP: Under double jeopardy, your
19 provision is.

20 QUESTION: May I ask just one more question?

21 MR. SHOOP: Yes.

22 QUESTION: If you prevail and there's a new
23 trial and you convict this man of murder, get a judgment
24 for murder, would it be your view that the judgment for
25 manslaughter would remain in effect?

1 MR. SHOOP: Under 2941.25, no, I do not
2 believe that it would. If the Ohio courts continue to
3 apply that statute and interpret it that these are, once
4 they have learned all of the facts and can distinguish
5 whether or not the elements are the same --

6 QUESTION: So it's your view, if I understand
7 you, that you can kind of treat the manslaughter
8 conviction as kind of a hedge and keep that in effect in
9 the event you lose the murder trial, but if you win the
10 murder trial, then you'll take the murder rather than
11 the manslaughter.

12 MR. SHOOP: Yes. And --

13 QUESTION: But you can't have both.

14 MR. SHOOP: I do not believe that the courts
15 would allow us to have both at this time.

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

18 (Whereupon, at 1:55 p.m. the case in the
19 above-entitled matter was submitted.)
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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: #83-904 - OHIO, Petitioner v. KENNETH M. JOHNSON

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BY *Pine Howard*
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