

ORIGINAL

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

**DKT/CASE NO.** 84-5004  
**TITLE** TRUMAN LEWIS BALL, Petitioner v. UNITED STATES  
**PLACE** Washington, D. C.  
**DATE** January 9, 1985  
**PAGES** 1 - 38



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IN THE SUPREME COURT OF THE UNITED STATES

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TRUMAN LEWIS BALL, :  
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 : Petitioner, :  
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 : V. : No. 84-5004  
 :  
 : UNITED STATES :  
 :  
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Washington, D.C.

Wednesday, January 9, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:59 o'clock a.m.

APPEARANCES:

JO S. WIDENER, ESQ., Bristol, Virginia; on behalf of the petitioner.

ANDREW J. PINCUS, ESQ., Assistant Attorney General of Massachusetts, Boston, Massachusetts; on behalf of the respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Ball against United States.

Ms. Widener, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JO S. WIDENER, ESQ.,  
ON BEHALF OF THE PETITIONER

MS. WIDENER: May it please the Court, I am here this morning on behalf of Truman Lewis Ball to ask the Court to vacate one of his convictions and one of his sentences under the cases of United States against Batchelder and Blockburger against the United States.

This is a direct appeal from two convictions suffered by Mr. Ball, one for 922, receipt by a convicted felon of a firearm, and 1202, possession of a firearm by a convicted felon.

The government proved three incidences of possession in this case, all of which occurred at or about the same time. The first was when Truman Ball reached into a bag of beer and came out with that gun. The second was when he had the gun in Clarence Music's yard and waved it at him. The third was when they arrested him, when the police officers arrested him at Gary Music's house and saw the gun in his back pocket.

There are a few other critical facts to this



1 case as well. Mr. Ball is now in prison, where he has  
2 been for the last 15 months. He is serving a three-year  
3 sentence on the 922 receipt. At the same time, he is on  
4 probation for the 1202 conviction. He has two years'  
5 probation, and he is fully subject to the conditions of  
6 that probation at the time that he is in prison now  
7 serving those three years.

8 This is under the case of Burns against the  
9 United States, which is a case we have not cited in our  
10 brief. The citation to it is 287 US 216. Any time  
11 between now and the next nine months, if Mr. Ball should  
12 get into any sort of confrontation there in the prison  
13 or any trouble at all, if he should infringe upon any  
14 prison regulation at all, he is subject to having his  
15 probation revoked.

16 At whatever time he has that probation  
17 revoked, he is then subject to having an extra two years  
18 imposed upon him, two years that he will have to serve.  
19 That, of course, will be concurrent with the sentence  
20 that he is now serving, but it will still mean to him  
21 that after he has served his three years on the 922  
22 offense, he will yet have one more year or at least up  
23 to one more year, somewhere between three months and one  
24 year, of a sentence to serve because of the 1202  
25 concurrent sentence that is now imposed upon him.

1           In other words, he is worse off today because  
2 he has a probation to serve than he would be if he  
3 simply had two years to serve on that sentence and it  
4 was running concurrently, because if he had two years to  
5 serve, it would be over in two years. However, now we  
6 have no certainty that it will be over in two years, and  
7 we have no certainty for the next nine months.

8           We say that this is not an adverse collateral  
9 consequence of this concurrent sentence. We say that  
10 this is a direct, immediate consequent to Mr. Ball that  
11 he is suffering under today, and therefore this case  
12 ought to be reviewed.

13           QUESTION: Ms. Widener, the government says  
14 you didn't make these arguments in the Court of Appeals,  
15 and therefore we shouldn't consider them.

16           MS. WIDENER: Your Honor, we would argue that  
17 we did make these arguments. We asked for both the  
18 conviction and sentence to be vacated. That was the  
19 opening sentence in our brief, and we also asked in our  
20 notice of appeal that -- our notice of appeal was taken  
21 from the judgment of the District Court, including the  
22 finding of guilty and also the sentence that was imposed  
23 upon each of these -- on each of these two convictions.

24           QUESTION: I don't think anyone doubts you  
25 appealed to the Court of Appeals for the Fourth

1 Circuit. The question is, what arguments did you make  
2 to that court? Were they the same as you are making to  
3 us?

4 MS. WIDENER: Yes, Your Honor, they were  
5 exactly the same as we are making here. The only  
6 difference is, we left out the two words "and  
7 convictions," and the reason we did that was because  
8 under the Burton case we suffered some great danger that  
9 we would not be heard at all, as Burton had not been  
10 heard on his direct appeal.

11 Nevertheless our arguments here are exactly  
12 the same. We are still arguing Blackburger and we are  
13 still arguing Batchelder, which we argued in the Court  
14 of Appeals.

15 The Batchelder case we did not argue  
16 specifically in the Court of Appeals, but this was  
17 because we were faced with the Burton construction of  
18 the Batchelder case. Burton had already decided what  
19 Batchelder meant for the Fourth Circuit, so we were  
20 locked into that.

21 The facts here are indistinguishable from the  
22 case of Batchelder. There a convicted felon bought a  
23 gun from an ATF agent while Mr. Batchelder was tending  
24 bar in Bellview, Illinois. When he -- and the Court  
25 said in Batchelder that when Mr. Batchelder reached

1 across that bar and took that gun from the AFT agent, at  
2 that moment he was guilty of both. He was guilty of  
3 922, receipt, and he was guilty of 1202 just by that  
4 single act.

5 Here we have the exact same facts. When Mr.  
6 Ball reached into that bag of beer, he was guilty of  
7 both receipt and possession by that act, and Batchelder  
8 said that Congress had intended in passing these two  
9 statutes to have two independent statutes each fully  
10 enforceable on their own terms, and Batchelder also  
11 confirmed that this very conduct violated both  
12 statutes.

13 When a single act violates two statutes, as we  
14 have in this case, we look to -- the courts always look  
15 to the case of Blockburger against the United States to  
16 determine whether there is one offense or whether there  
17 are two offenses.

18 The first question to ask under the  
19 Blockburger analysis is, did Congress intend to  
20 cumulatively punish for this offense?

21 QUESTION: Isn't that really the first and  
22 last question? I mean, Blockburger was a case of  
23 statutory construction. The ultimate question in a case  
24 like this is just the one you meant. Did Congress  
25 intend to cumulatively punish in the circumstance? If



1 the answer is yes, the other Blockburger questions are  
2 just irrelevant. If the answer is no, they are also  
3 irrelevant.

4 MS. WIDENER: Yes, Your Honor, I think that is  
5 true. Blockburger is a statutory construction, but  
6 there are some -- there is sort of a procedure to go  
7 through under Blockburger. The first is to look at the  
8 statute, as I understand it, the statute and the  
9 legislative history, to see what can be gleaned there,  
10 and if there is no clear intent indicated either in the  
11 legislative history or in the statute itself, then one  
12 resorts to the test of Blockburger to determine what  
13 Congress's intent was in passing those two statutes.

14 So, yes, you are correct, as I understand it,  
15 that it is a statutory construction problem.

16 The Circuits -- the Courts of Appeals that  
17 have considered this question, all except the Tenth  
18 Circuit say that there is -- there was no cumulative  
19 punishment intended by Congress when they passed these  
20 two statutes. When I say all of those Circuits that  
21 have considered it, that means the Third, the Fifth, the  
22 Seventh, the Ninth, the D.C. Circuit, and the Fourth  
23 Circuit.

24 These Circuits base their analysis, all except  
25 the Third, which is underneath a case which the

1 government conceded, but the other Circuits all base  
2 their analysis on the Batchelder case, where the Court  
3 in Batchelder had said that the government could  
4 prosecute on either.

5 The Circuits then interpreted this to mean  
6 that the government could not prosecute all the way to  
7 judgment, to conviction, to sentence on both of those  
8 statutes at the same time.

9 These same Circuits say when the government  
10 has not chosen either one or the other but has chosen  
11 instead to proceed on both statutes, that the remedy  
12 there is to vacate one conviction and one sentence.  
13 This is all except the Fourth Circuit, of course. The  
14 Fourth Circuit says that the remedy is to make the  
15 sentences run concurrently.

16 But even if the Circuits' reasoning is wrong  
17 under Batchelder, still looking to the statutes  
18 themselves and to the Congressional history, there is no  
19 explicit clear statement in any of that indicating that  
20 Congress intended to cumulatively punish under these  
21 statutes, and the most recent case of Missouri against  
22 Hunter teaches us what kind of language should be there  
23 if, or we should look for to determine that intent,  
24 language such as "in addition to." There is no such  
25 language in either of these statutes.

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In the absense of --

QUESTION: Ms. Widener, does conviction alone constitute punishment?

MS. WIDENER: Yes, Your Honor, we say that conviction alone does constitute punishment. In this case, Mr. Ball's two convictions can be used subsequently if he should get into any other trouble and have to ever be on the witness stand again, those two convictions can be used to impeach his credibility. Those two convictions could possibly be used against him in a recidivist situation.

QUESTION: Well, has this Court specifically held that a second conviction with a concurrent sentence is to be treated as punishment for purposes of the double jeopardy clause?

MS. WIDENER: Your Honor, I could find no specific holding as to that effect. Nevertheless, when I looked back through the cases, it seemed to me that in all cases except for the line of cases under Prince, that the remedy when there is a double jeopardy question has been to reverse the judgment or to vacate the conviction. Always the entire judgment was considered, and not just the vacating of the sentence, as the Fourth Circuit has done here.

QUESTION: Well, I think in our Ohio against

1 Johnson case, last spring, I thought we said there could  
2 be two convictions so long as there weren't two  
3 punishments.

4 MS. WIDENER: Your Honor, we would argue that  
5 a second conviction in this case is an additional  
6 punishment on Mr. Ball, and because of the effect of his  
7 concurrent sentence here, he is also suffering  
8 additional punishment, and very realistically may suffer  
9 an extra year on his punishment.

10 QUESTION: If you are arguing sentencing,  
11 there is no doubt, at least in my mind, that you are  
12 correct, but to say that the conviction as well amounts  
13 to a punishment I think is more debatable.

14 MS. WIDENER: I think that under the cases of  
15 Sylburn against Ohio and Street and that line of cases  
16 in which the Court looked to whether or not there were  
17 adverse legal consequences of convictions, I believe the  
18 Court has said that these consequences do exist, and in  
19 this case, this man is a man who is not well educated.

20 He is not someone who can defend himself from  
21 these convictions and from the effect that they are  
22 going to have on his life. They will affect him in his  
23 employment situation. They will affect him every time  
24 he is put on the witness stand.

25 He in a further prosecution -- it is



1 unrealistic to suggest that he, pitted against a well  
2 educated and well trained prosecutor, could possibly  
3 convince a jury that these two -- that he should not  
4 have two convictions here, that he should only have one  
5 conviction.

6 Nor could he convince a sentencing judge in  
7 the future that he should not have two convictions here,  
8 he should simply have one, because the very fact of  
9 those two convictions existing on that paper seem to  
10 indicate to a judge that he is guilty of both.

11 QUESTION: Perhaps even if your Blockburger  
12 analysis is right, the answer is, he may not be  
13 sentenced on both convictions, but he can be convicted  
14 on both of them, and in that case your argument that he  
15 couldn't convince people that he shouldn't have had two  
16 convictions would be true because he ought not to be  
17 able to convince people that he shouldn't have two  
18 convictions.

19 MS. WIDENER: Well, Your Honor, I would, I  
20 guess, fall back on the argument that since Congress has  
21 not told us specifically what to do in this situation,  
22 it has not told us when this conduct violates those two  
23 statutes, whether we should convict or sentence under  
24 both.

25 We do know, however, that it has not

1 authorized two convictions for either of these  
2 statutes. The only punishment that it has authorized  
3 here is a conviction and punishment under either of  
4 those statutes.

5 I do not believe that without a clear  
6 statement that more than one statute is violated or what  
7 to do in the case when more than one statute is  
8 violated, that you could impose an extra punishment on  
9 him which in this case his conviction would be an extra  
10 punishment.

11 QUESTION: As I read the government's brief,  
12 they are really arguing a sort of harmless error without  
13 calling it that. At Page 5 of their brief they make a  
14 statement which is directly contrary to the one you have  
15 just told us, and I would like to see which is correct.

16 The government says here, the additional  
17 conviction will not increase the defendant's prison  
18 term, and will not impose any other adverse consequence  
19 upon him.

20 Now, in your earlier argument, I believe, you  
21 said that is not so.

22 MS. WIDENER: Yes, Your Honor. That is not  
23 so. He is subject to not only a sentence of three years  
24 that he is serving right now, but under what the Court  
25 of Appeals did when they made these sentences run.

1 concurrently, he is also subject to the terms of his  
2 probation right now.

3 So that in addition to his three-year  
4 sentence, should for any reason, and of course prison is  
5 not a place where you are not easily to bump into  
6 someone else and get into some sort of trouble, if in  
7 the next nine months he should get into any small  
8 infraction of prison regulations, he would then be  
9 subject not only to whatever penalty they would enforce  
10 upon him for doing that in the prison, but he would also  
11 be subject to having his -- to being called back before  
12 Judge Williams in the District Court and having his  
13 two-year probation, which he is now serving, having that  
14 revoked, and --

15 QUESTION: Well, we will wait to see what your  
16 friend has to say about that when his turn comes.

17 QUESTION: Suppose both violations are charged  
18 in the indictment, and the case is tried that way, and  
19 it goes to the jury on both charges, and he is convicted  
20 on both, but the judge then says, well, he has been  
21 convicted on both, but I know from reading the Supreme  
22 Court cases, at least the way I read them, I shouldn't  
23 sentence on both, so I am going to impose a single  
24 sentence for possession or for receipt, and that is all  
25 he imposes. Would you have gone to the Court of

1 Appeals?

2 MS. WIDENER: Well, I certainly should have,  
3 Your Honor, because we do argue that these convictions  
4 themselves were a problem. The reason that it could not  
5 be argued in the Court of Appeals --

6 QUESTION: Well, you can't punish them. The  
7 only rule that seems to come through is that he can't be  
8 punished for both.

9 MS. WIDENER: But Your Honor, there is a  
10 real --

11 QUESTION: The question the government may  
12 have to elect which to proceed on before trial.

13 MS. WIDENER: I beg your pardon?

14 QUESTION: Are you arguing that the government  
15 should have to elect which statute to proceed under  
16 before trial?

17 MS. WIDENER: No, we are not arguing that. It  
18 does not affect our position one way or the other  
19 whether they --

20 QUESTION: When does the limitation on the  
21 conviction come, when the judge instructs the jury and  
22 you tell the jury you can only convict on one of these?

23 MS. WIDENER: Yes, Your Honor.

24 QUESTION: Is that what you think should  
25 happen?



1 MS. WIDENER: Under Melanovich, or indeed, if  
2 he does not instruct the jury that way, he should not  
3 allow two convictions to be imposed on these two  
4 statutes.

5 QUESTION: Because you think that is the  
6 intent of Congress?

7 MS. WIDENER: Yes, Your Honor, I do. I don't  
8 think there is anything anywhere that would indicate  
9 that when the same conduct violates those two statutes,  
10 he should be convicted under both because of the adverse  
11 consequence of that extra conviction, that it is  
12 something that is going to follow him around forever.

13 QUESTION: Well, assuming you are right, but  
14 there are still concurrent sentences, and you must at  
15 least convince us that the two convictions instead of  
16 one will have an adverse consequence on your client.

17 MS. WIDENER: Well, Your Honor, I believe that  
18 the convictions will have, because of the concept of  
19 recidivism statutes, where he now under this record has  
20 at least his third conviction because of this excessive  
21 conviction. Therefore in many states he would be  
22 subject as of this moment to ten years. In some states  
23 it is a life sentence for the third offense.

24 QUESTION: On that basis, the whole concurrent  
25 -- that approach would undermine the entire concurrent

1 sentence doctrine, if there ever was one.

2 MS. WIDENER: Well, Your Honor --

3 QUESTION: Because your argument would almost  
4 always be true.

5 MS. WIDENER: Well, certainly under these  
6 facts it is true in this particular case. Of course, if  
7 a man had a death sentence and a concurrent sentence,  
8 that would not be true. Then it may not be a rule that  
9 should be implied.

10 The D.C. Circuit has an interesting way of  
11 applying the concurrent sentence rule. They determine  
12 that if, in order to promote judicial economy and not to  
13 have to consider a sentence, they look at the two  
14 interests involved.

15 Since there is no interest that the government  
16 actually has to protect, and the government here has  
17 conceded that in their brief, that they really have no  
18 fundamental objection to this rule that we are talking  
19 about right now.

20 Since the government has no interest to  
21 protect, and since the possible adverse legal  
22 consequences to the defendant are very real to him, the  
23 D.C. Circuit, without review, vacates these sentences  
24 and convictions on the theory that they could be  
25 reimposed at some later time if it was shown, for

1 example, that the first sentence was reversed on  
2 appeal.

3 Of course, if the first sentence was reversed  
4 on appeal, and they look at the second sentence here,  
5 there would be nothing to prevent the prosecutor from  
6 reprosecuting under that first sentence at that point.

7 QUESTION: I can see how you could reimpose a  
8 sentence, but I don't see how you could reimpose a  
9 conviction if it were vacated. I would think that would  
10 take a new trial.

11 MS. WIDENER: Yes, Your Honor, that's what I  
12 mean. A new trial could be taken. This is the D.C. --

13 QUESTION: That is hardly much solace to the  
14 government, that they have a chance to try the person  
15 again for something which he has already been convicted  
16 of.

17 MS. WIDENER: Of course, in most situations  
18 that is not going to arise, however, because the court  
19 under the concurrent sentence doctrine determines one  
20 sentence is valid before they determine not to look at  
21 the other sentence, so the chance of having the first  
22 sentence that has already been determined to be valid  
23 reversed is very minimal.

24 And that is why I would take issue with the  
25 D.C.'s policy there, because if there was ever any time

1 to have to reimpose that second sentence that they  
2 vacated, of course, that could be done by retrial, but  
3 it is a very slim possibility.

4 Since I am beginning to eat into my rebuttal  
5 time, I think that I will try to reserve the rest of my  
6 time for rebuttal.

7 CHIEF JUSTICE BURGER: Very well.

8 Mr. Pincus.

9 ORAL ARGUMENT OF ANDREW J. PINCUS, ESQ.,

10 ON BEHALF OF THE RESPONDENT

11 MR. PINCUS: Mr. Chief Justice, and may it  
12 please the Court, I would like to first briefly discuss  
13 our waiver argument with reference to the colloquy that  
14 Justice Rehnquist had with my opponent.

15 QUESTION: Would you raise your voice a  
16 little, Mr. Pincus?

17 MR. PINCUS: I am sorry. I would like to  
18 first briefly discuss the waiver argument with reference  
19 to the colloquy that Justice Rehnquist had with my  
20 opponent.

21 In the Court of Appeals there was no request  
22 that one of the convictions be vacated. The only  
23 reference to the convictions was that there was an  
24 appeal from the convictions, but this relief was not  
25 requested, and there was no discussion of the



1 possibility of adverse consequences as a result of the  
2 additional conviction and the other issues that are  
3 before this Court.

4           Therefore, we believe that the waiver argument  
5 is valid, and that it provides grounds for the Court to  
6 dispose of the case without reaching the merits.

7           QUESTION: May I ask you a question about  
8 that? They did ask to have one of the sentences  
9 vacated, didn't they?

10           MR. PINCUS: Yes, Your Honor.

11           QUESTION: And the Court of Appeals did not do  
12 that. It made it run concurrently, but it didn't  
13 vacate.

14           MR. PINCUS: Yes, Your Honor.

15           QUESTION: So then isn't the issue of whether  
16 the second sentence should be vacated something we must  
17 decide? That was argued.

18           MR. PINCUS: Well, Your Honor, the relief that  
19 is requested here and the thrust of petitioner's  
20 argument --

21           QUESTION: They ask that you set aside the  
22 conviction, right.

23           MR. PINCUS: -- is the conviction. They don't  
24 seem -- in the Court of Appeals they didn't make any  
25 distinction as to why vacating a sentence would provide

1 some additional relief that making these sentences run  
2 concurrently, which was their alternate remedy, would  
3 not.

4 Here they seem to distinguish the remedy  
5 provided by vacating one of the convictions on the --

6 QUESTION: I understand that she asked for  
7 that, but it is true that she also makes the argument  
8 that the second sentence on which he is on probation is  
9 a burden that would be set aside if we went farther --  
10 if we did what the Court of Appeals was asked to do. I  
11 will put it that way.

12 MR. PINCUS: Yes, Your Honor. We take issue  
13 with the contention that the second sentence would be a  
14 burden. We think that the import of the Court of  
15 Appeals mandate was that the petitioner not serve more  
16 than three years in prison, and we think that any  
17 decision by the District Judge --

18 QUESTION: Well, do you think that putting him  
19 on probation on the second sentence complies with the  
20 mandate of the Court of Appeals or does not?

21 MR. PINCUS: We think that the concept of  
22 being on probation while someone is in prison is a  
23 difficult one. We think certainly the district -- any  
24 deprivation of probation that results --

25 QUESTION: But don't you think in kind of a

1 real world sense, would he not be better off if he were  
2 not on probation on the second sentence, if it were just  
3 not there? Is it not --

4 MR. PINCUS: Of course, we think there would  
5 be no difference if the second sentence was a committed  
6 sentence rather than suspended in favor of probation,  
7 and we think that under the mandate, the petitioner  
8 could move under Rule 35 for an alteration of the  
9 sentence to make it --

10 QUESTION: What happens when probation is  
11 revoked? Does he just serve the unexpired portion of  
12 his sentence, or doesn't he start his whole sentence  
13 from scratch?

14 MR. PINCUS: Well, he could serve the whole  
15 sentence from scratch, but we --

16 QUESTION: If that happened then the  
17 revocation of probation would cause him to serve a  
18 longer period of time in the penitentiary than the one  
19 sentence.

20 MR. PINCUS: But we think that the District  
21 Court couldn't order that longer sentence under the  
22 Court of Appeals mandate, that the clear import of the  
23 Court of Appeals decision was that the petitioner not  
24 serve more than three years in prison, and that any  
25 result vis-a-vis the suspended sentence that had that

1 effect would be improper.

2 And we would in fact support a Rule 35 motion  
3 to alter the second sentence to make it a committed  
4 sentence to avoid that slim possibility.

5 QUESTION: Well, what possible interest does  
6 the government have in sustaining both convictions?

7 MR. PINCUS: Your Honor, as we say in our  
8 brief, the government's interest is not very great with  
9 respect to the convictions in this case. The  
10 government's concern is that a decision by this Court,  
11 for example, that a conviction that carries no adverse  
12 consequences constitutes punishment could adversely --  
13 could conflict with the justification for the concurrent  
14 sentence doctrine.

15 QUESTION: Well, I thought -- you agree that  
16 Congress didn't intend to have -- for a defendant to be  
17 punished under both statutes.

18 MR. PINCUS: Yes, well, we didn't intend  
19 cumulative punishment. Yes, Your Honor.

20 QUESTION: Well, would you say it would  
21 satisfy all the interests you had if the judge -- would  
22 you object to an instruction by a judge to a jury that  
23 you can convict under one of these statutes but not  
24 under the other -- but not under both?

25 MR. PINCUS: Well, Your Honor, I think we



1 would object.

2 QUESTION: Why would you object? He certainly  
3 can't sentence consecutively under both.

4 MR. PINCUS: Well, there may be --

5 QUESTION: What possible interest do you have  
6 in having a sentence imposed under both statutes if they  
7 must run concurrently?

8 MR. PINCUS: Well, part of the problem is that  
9 our position depends upon the facts of the case. There  
10 are -- under these two statutes there are situations in  
11 which multiple punishment would be appropriate, for  
12 example, if multiple firearms were involved. That isn't  
13 true in this case, but that might be true in another  
14 case.

15 QUESTION: That is a different problem.

16 QUESTION: You could also get into a situation  
17 where perhaps one section of the statute is held  
18 unconstitutional at some later date, and if you got  
19 another conviction on another one stockpiled, you could  
20 pull it out at that time.

21 MR. PINCUS: Yes, Your Honor, and we feel that  
22 there is no harm to the defendant if there is an  
23 additional conviction where it carries no adverse  
24 consequences.

25 QUESTION: Let's assume it did carry some

1 adverse consequences. Namely, let's just assume you  
2 agree that having two convictions on the record instead  
3 of one would affect parole decisions or later the  
4 possibility of being prosecuted as a recidivist.

5 Do you say that those consequences are just  
6 nonexistent, or just too remote, or what?

7 MR. PINCUS: In this case, we contend that  
8 they are nonexistent. They might be existent in another  
9 case. Here the parole board has --

10 QUESTION: If we disagree with you, then you  
11 lose the case? Is that it, on that, if it does have  
12 some adverse consequences? Say we agree with your  
13 opponent.

14 MR. PINCUS: Well, the adverse consequences  
15 also would have to rise to the level of multiple  
16 punishment. For example, a consequence in another  
17 proceeding would not constitute multiple punishment in  
18 this proceeding.

19 In other words, the fact that the petitioner  
20 might be subject to punishment under a habitual offender  
21 statute for a different crime wouldn't constitute  
22 multiple punishment for this crime under the Court's  
23 decisions in Kryger.

24 QUESTION: If you have two sentences, you have  
25 two sentences in this case. I don't know why that isn't

1 multiple punishment.

2 MR. PINCUS: Your Honor, because the defendant  
3 will be serving --

4 QUESTION: You've imposed two sentences. How  
5 do you -- that is not one. It is two.

6 MR. PINCUS: But the defendant won't be  
7 serving any additional time in prison.

8 QUESTION: That may be so, but he has still  
9 got two sentences, and two sentences have adverse  
10 consequences outside this proceeding.

11 QUESTION: Mr. Pincus, suppose there had been  
12 two indictments, one on each of these counts, instead of  
13 one indictment with two counts, or one information with  
14 two counts. He is convicted on the first one. Do you  
15 think there would be available to him a double jeopardy  
16 or some other defense on the second indictment, the  
17 second one brought to trial?

18 MR. PINCUS: In a successive prosecution.

19 QUESTION: Yes.

20 MR. PINCUS: Yes, Your Honor.

21 QUESTION: Well, then, why doesn't that answer  
22 the question here that has been posed by several  
23 Justices?

24 MR. PINCUS: I am sorry, Your Honor, the  
25 multiple punishment question?

1                   QUESTION: No, the multiple prosecution for  
2 the same conduct.

3                   MR. PINCUS: Well, because in your  
4 hypothetical --

5                   QUESTION: Do you concede the same conduct is  
6 the basis of each of the charges?

7                   MR. PINCUS: Yes, Your Honor, but in this case  
8 both of the counts were tried in one prosecution, so  
9 there is no successive prosecution problem. That  
10 portion of the double jeopardy clause isn't implicated  
11 here.

12                   QUESTION: Mr. Pincus, your brief on Page 19,  
13 the fourth paragraph, gets me -- do you still agree with  
14 that language, that you don't object to this, that you  
15 don't object to the plan that the petitioner has put  
16 forth?

17                   MR. PINCUS: Well, Your Honor, our problem is,  
18 we wouldn't object if the district judge in this case  
19 had, after the jury returned its verdict, vacated one of  
20 the convictions subject to the condition that if the  
21 unvacated conviction was ever overturned, the first  
22 conviction would be reinstated.

23                   Our problem is that a decision by this Court  
24 holding that the vacation of the conviction was required  
25 would conflict under the double jeopardy clause, for



1 example, would conflict with the rationale of the  
2 concurrent sentence doctrine, because it would rest on  
3 the notion that the mere fact of a conviction without  
4 any adverse consequences was sufficient prejudice or  
5 sufficient punishment to require elimination.

6 QUESTION: Well, you agree this is additional  
7 punishment?

8 MR. PINCUS: No, we don't, Your Honor. We  
9 don't believe that this is additional punishment.

10 QUESTION: Does the government in this case  
11 distinguish between conviction and sentence?

12 MR. PINCUS: Our view of punishment, Justice  
13 Rehnquist, is additional time in prison or an additional  
14 fine, the facts that have been relied upon in this  
15 Court's cases discussing the cumulative punishment  
16 rule. There is no additional time in prison, and no  
17 additional fine in this case, and we don't believe --

18 QUESTION: I don't think you understood my  
19 question, at least gathering from the way you are  
20 answering. I asked you if the government distinguishes  
21 between conviction on the one hand and sentence on the  
22 other, a conviction upon which no sentence is imposed.  
23 Is that punishment? A judgment of conviction returned,  
24 but there was no sentence imposed?

25 MR. PINCUS: No, we don't believe that that

1 would be punishment.

2 QUESTION: You don't ever get to the question  
3 of whether a second sentence might require no additional  
4 time in prison. If there is no sentence at all imposed  
5 on the conviction, your position, I take it, is that  
6 that is not punishment.

7 MR. PINCUS: Yes, Your Honor.

8 QUESTION: Mr. Pincus, what about the  
9 recidivist statutes?

10 MR. PINCUS: Well, Your Honor, the two  
11 recidivist --

12 QUESTION: Under a recidivist statute, if you  
13 had two convictions, you go. If you only have one, you  
14 don't go.

15 MR. PINCUS: Your Honor --

16 QUESTION: You wouldn't consider that  
17 punishment?

18 MR. PINCUS: Well, most recidivist statutes  
19 adopt the rule that the two statutes cited by the  
20 petitioner adopt, which is that if the two convictions  
21 are imposed in a single proceeding, they count as only  
22 one conviction for the purposes of the habitual offender  
23 statute.

24 Therefore, the petitioner is not prejudiced  
25 under those statutes, because the two convictions only

1 count as one.

2 QUESTION: Does that cover all recidivist  
3 statutes? I think I have seen them that don't have that  
4 in them.

5 MR. PINCUS: No, Your Honor, I don't believe  
6 it covers all of them, but I think it covers most of  
7 them.

8 QUESTION: I didn't think so. So on those it  
9 does not cover, he has a problem.

10 Yes or no?

11 MR. PINCUS: Well, Your Honor, I don't think  
12 that he would have a problem, because I don't think that  
13 that is still any prejudice that he has incurred right  
14 now from the two sentences.

15 QUESTION: I take it -- excuse me.

16 QUESTION: You do concede there are two  
17 sentences here.

18 MR. PINCUS: Yes, Your Honor, two concurrent  
19 sentences.

20 QUESTION: The government's interest, I take  
21 it, is in maintaining the conviction. If the Court of  
22 Appeals had ordered the District Court to vacate either  
23 one of the sentences but leave the conviction standing,  
24 you would be quite satisfied.

25 MR. PINCUS: Yes, Your Honor.

1 QUESTION: So you don't really mean that the  
2 concurrent sentence would have to stand.

3 MR. PINCUS: No, our concern is not with  
4 petitioner's concurrent sentence.

5 QUESTION: So if the District Court, after a  
6 jury convicts on both sentences, says I will enter a  
7 sentence on one of the counts and suspends sentence on  
8 the other, you would be satisfied?

9 MR. PINCUS: Yes, Your Honor.

10 QUESTION: Counsel, I take it you take the  
11 position then that the double jeopardy clause just  
12 doesn't speak to the question at all of double  
13 convictions as opposed to punishments --

14 MR. PINCUS: Yes.

15 QUESTION: -- when they are handled in the  
16 same prosecution. Is that your position?

17 MR. PINCUS: Yes, Justice O'Connor. That is  
18 our position.

19 QUESTION: All right, so then is it simply a  
20 matter of legislative intent whether there should be two  
21 convictions?

22 MR. PINCUS: There could be a question of  
23 legislative intent, although --

24 QUESTION: Is that what we would look to?

25 MR. PINCUS: Yes, Your Honor, I think you



1 would, although --

2 QUESTION: And what does Batchelder tell us  
3 about that, in your view, with respect to these two  
4 statutes?

5 MR. PINCUS: Batchelder teaches that there are  
6 two separate statutes that can be independently applied,  
7 and we think that if that was Congress's intent, that  
8 would indicate the two convictions would be  
9 appropriate.

10 QUESTION: It did speak in terms of the  
11 prosecution making a choice, however. What do you think  
12 that meant? A choice for purpose of prosecution and  
13 conviction, or only for sentencing?

14 MR. PINCUS: Your Honor, that portion of  
15 Batchelder speaks to the argument that was raised in  
16 that case that the government could not choose to elect  
17 between the two statutes because of the different  
18 penalty provisions, and this Court rejected that  
19 argument and said the government was free to choose.

20 We don't think that Batchelder says that the  
21 government was required to choose.

22 QUESTION: Mr. Pincus, in the light of your  
23 answer to an earlier question, it seems to me that the  
24 government has refined the position it has taken on Page  
25 19 of its brief, where you say, "For the reasons

1 discussed above, a rule barring entry of two convictions  
2 for these offenses is not required. We have no  
3 fundamental" -- what you mean is the imposition of two  
4 sentences.

5 MR. PINCUS: Well, Justice Rehnquist, except  
6 that the petitioner's request is that there be a bar on  
7 the entry of two convictions.

8 QUESTION: Are you saying you have no  
9 objection to that?

10 MR. PINCUS: We have no objection to the  
11 District Court -- to Justice White's suggestion that the  
12 District Court enter sentence on only one of the  
13 convictions.

14 QUESTION: I don't think you are getting the  
15 distinction between conviction and sentence. My  
16 question was addressed to the difference between  
17 convictions and sentences.

18 Well, go on to something else.

19 QUESTION: I would like to follow up on that,  
20 if I may. You seem to have agreed with Justice White  
21 that you had no objection to vacating one sentence,  
22 leaving the conviction standing, refining the position  
23 that Justice Rehnquist indicated.

24 But I don't understand how you square that  
25 with your saying what really is at issue here is

1 preserving the concurrent sentence doctrine, which I  
2 gather hasn't been applied since 1965 by this Court  
3 anyway. That is what we are fighting about.

4 If we vacate one sentence, you are not  
5 preserving your concurrent sentence doctrine, and you, I  
6 think, said that is perfectly satisfactory to the  
7 government.

8 QUESTION: Yes, but you would agree to that, I  
9 take it, on the assumption that you are carrying out the  
10 intent of Congress.

11 MR. PINCUS: Yes, Your Honor.

12 QUESTION: I don't know how you ascertain  
13 that.

14 QUESTION: The intent of Congress was two  
15 convictions and one sentence. That is what they clearly  
16 intended.

17 QUESTION: Rather ridiculous, I think.

18 MR. PINCUS: Your Honor, we think that does  
19 end up splitting hairs, but that is one of the reasons  
20 why we think that the petitioner -- the remedy requested  
21 by the petitioner just isn't appropriate. There just  
22 isn't any -- there isn't any inquiry that can be made,  
23 and it will just lead to litigation over this question  
24 of whether Congress intended two convictions or one  
25 conviction, and it --

1 QUESTION: Just in terms of the practical  
2 consequences of a conviction, we had a case argued a  
3 short while ago where a man on his employment  
4 application answered no to whether he had been convicted  
5 of a felony, and he was later discharged because he made  
6 a false answer.

7 If you had this person as your client, and he  
8 was asked to fill out an employment application, how  
9 many times he had been convicted of felonies, what would  
10 you tell him to do, put one or two?

11 MR. PINCUS: I think he would have to put  
12 two.

13 QUESTION: And that might not be -- that would  
14 not be prejudicial at all to him, I don't suppose.

15 MR. PINCUS: Your Honor, it might be  
16 prejudicial. We don't think that it is punishment that  
17 the double jeopardy clause reaches. The petitioner here  
18 did violate two -- was found beyond a reasonable doubt  
19 to have violated two offenses, and we don't think that  
20 it is unfair that he be subjected to the consequences  
21 that flow from that.

22 QUESTION: Well, in any event, when you say  
23 the double jeopardy clause -- when you talk about  
24 multiple punishments, you are just talking about  
25 legislative intent, aren't you? You are not talking



1 about the double jeopardy clause.

2 MR. PINCUS: The legislative intent is the  
3 inquiry, Justice Rehnquist, but in order for there to be  
4 -- for the double jeopardy clause to supply a remedy, if  
5 you will, there has to be some kind of a double  
6 punishment that it would reach. It may be that even  
7 though Congress -- that even though the legislative  
8 intent isn't clear, the effect still doesn't rise to the  
9 level of punishment that the Constitution provides a  
10 remedy for, such as a conviction that doesn't have any  
11 adverse consequence.

12 QUESTION: I thought in *Alvernaz* and *Missouri*  
13 against *Hunter*, we finally dispelled the notion that  
14 there was a double jeopardy inquiry under the  
15 Constitution, where you are talking about a decision on  
16 the part of the legislative body to impose multiple  
17 punishments for different offenses. That is strictly a  
18 statutory question.

19 MR. PINCUS: Yes, Your Honor, we agree with  
20 that.

21 QUESTION: Well, then, why do you refer to the  
22 double jeopardy clause?

23 MR. PINCUS: Because in order for that clause  
24 to provide a remedy, there has to be some -- even if  
25 there is a deviation from what Congress intended, there

1 still would have to be some kind of a multiple  
2 punishment in order for a petitioner, for the petitioner  
3 in this case to rely on a clause as supplying some kind  
4 of an affirmative remedy.

5 I just want to reiterate our argument based on  
6 the concurrent sentence doctrine, because we believe  
7 that really the principle underlying that doctrine  
8 supports our position in this case, because the doctrine  
9 really as it is now applied by the Courts of Appeals is  
10 based on the notion that a conviction with no adverse  
11 consequences will not prejudice a defendant, and  
12 therefore the conviction can be affirmed even though it  
13 is unreviewed.

14 If petitioner is punished in some way by the  
15 second conviction, then it conflicts with this notion  
16 that there is no prejudice, and therefore could  
17 undermine the concurrent sentence doctrine, which we  
18 believe is a useful tool used by the Courts of Appeals  
19 to avoid reaching issues that don't really have to be  
20 decided.

21 Unless the Court has any further questions, we  
22 urge that the judgment be affirmed.

23 CHIEF JUSTICE BURGER: Very well.

24 Do you have anything further, Ms. Widener?

25 ORAL ARGUMENT OF JO S. WIDENER, ESQ.,

1 ON BEHALF OF THE PETITIONER - REBUTTAL

2 MS. WIDENER: Just a few things, Your Honor.

3 We believe that the concurrent sentence  
4 doctrine has no application here at all. Blockburger  
5 says that for a single offense there should be a single  
6 sentence.

7 A concurrent sentence is an improper remedy to  
8 impose. Therefore, this case really has no effect on  
9 the concurrent sentence doctrine at all, because this is  
10 an improper remedy under Blockburger.

11 The government has conceded that there is a  
12 single offense here. They conceded in the case of  
13 United States against Taylor that there should only be a  
14 single sentence imposed here. In United States against  
15 Martin in the Seventh Circuit, they conceded that there  
16 should only be a single conviction.

17 We would ask the Court thus to vacate  
18 petitioner's sentence and conviction.

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

21 (Whereupon, at 11:42 o'clock a.m., the case in  
22 the above-entitled matter was submitted.)  
23  
24  
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:  
#84-5004 - TRUMAN LEWIS BALL, Petitioner v. UNITED STATES

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BY Paul A. Richardson

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