OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1636

TITLE T.L. MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, Petitioner V. JAMES MICHAEL MATHEWS

PLACE Washington, D. C.

DATE November 4, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

T. L. MORRIS, SUPERINTENDENT,
SOUTHERN OHIO CORRECTIONAL FACILITY,
Petitioner,
v.
JAMES MICHAEL MATHEWS

No. 84-1636

Washington, D.C.

Monday, November 4, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 o'clock, a.m.

APPEARANCES:

RICHARD DAVID DRAKE, ESQ., Assistant Attorney General of Ohio, Columbus, Ohio; on behalf of the Petitioner.

MICHAEL G. DANE, Cleveland, Ohio; on behalf of the Respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Morris against Mathews.

Mr. Drake, you may proceed whenever you are ready.

ORAL ARGUMENT OF RICHARD DAVID DRAKE, ESQ.

ON BEHALF OF PETITIONER

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

The issue in this case is, under what circumstances a jeopardy barred criminal conviction may be modified to that of a lesser and included offense which is not jeopardy barred. It is submitted that such a remedy is available, unless the defendant alleges and demonstrates that evidence otherwise inadmissible in a trial for the lesser and included offense was presented to the tryer of fact during the course of the jeopardy barred trial, and that such evidence resulted in actual prejudice to the defendant.

A conviction can thus be modified, unless a defendant specifically identifies the claimed inadmissible evidence and demonstrates its prejudicial impact. Such cases are analogous to the spillover prejudice that arises in misjoinder of offense cases.

Whereas here, the same evidence would have

been admitted in a trial for the lesser and included offense, as what is admitted during the jeopardy barred trial, a per se rule of automatic reversal can only serve to force the defendant and the prosecution to yet a third proceeding.

QUESTION: Mr. Drake, would all the same evidence be admissible, in your view?

MR. DRAKE: In the case before the Court, all the evidence would be admissible had the Respondent in this case been indicted for murder; in other words, had the prosecution not sought the enhanced penalty, and we are talking here about an enhanced penalty case, the evidence would have been identical.

QUESTION: I guess your -- the Respondent takes the position that not every bit of that evidence would be admissible at the new trial?

MR. DRAKE: In the brief of the Respondent before this Court, he fails to identify one iota of evidence that came in, in the jeopardy barred trial, that would not have come in in the murder trial. I believe perusal of his brief demonstrates such. He does not identify one shred of testimonial or physical evidence that was presented, and it must be borne in mind that this case was not tried in a vacuum.

The very motive for the homicide was to cover

up the bank robbery, by the Respondent's own admission. In other words, but for the commission of the bank robbery, the homicide would never have occurred.

An analysis of the facts of the instant case demonstrates the remedial action taken by the Ohio Appellate Court was wholly consistent with the double jeopardy clause and the due process clause. It's undisputed that Respondent and his accomplice robbed a federally insured bank at gunpoint. During the opening statements at the trial in question, the defense attorney informed the jury that defense did not contest the fact that the Respondent was a participant in the bank robbery.

Upon exiting the bank the witness saw a vehicle and reported the license number, and a high speed chase immediately ensued. The chase ended when the Respondent and his accomplice went to a farmhouse in order to take hostages.

They were unsuccessful in this endeavor. The house was completely surrounded by various law enforcement officers from a variety of jurisdictions. Two shots were heard in the home, at which time Respondent exited. The accomplice was found dead, having suffered a fatal blow to the heart at point-blank range with a sawed off single shot shotgun.

Respondent was taken into custody and gave a series of statements. His initial statement to the police was made under oath and reported by a stenographer. He therein stated that he had been kidnapped by the accomplice, and that both his life and that of his girlfriend had been threatened. Therefore, he participated unwillingly.

That very evening agents of the Federal Bureau of Investigation arrived and Respondent conceded that he was in fact a willing participant in the bank robbery. He did, however, deny having shot the accomplice.

The following day Respondent was taken and given a polygraph examination which he passed. He later made a statement to the police wherein he admitted he had fixed the test by crossing his toes and otherwise making efforts to fool the polygraph.

Inexplicably the initial coroner's report ruled the cause of death to be suicide, a rather startling report which proved to be wholly erroneous. The coroner indicated that shots had come from a high powered rifle. It's undisputed that they came from the same sawed-off shotgun.

The Respondent was indicted only for the bank robbery and promptly entered a plea of guilty. Two days thereafter, while in the county jail, Respondent asked

to speak with the investigating officer. That request was granted.

For the first time the Respondent admitted having murdered his accomplice. A verbatim transcript of the Respondent's handwritten statement is included in the Joint Appendix at pages 5 and 6.

Of material import, Respondent said, and I quote, "I said to myself real quick that if he was dead I could say that I was kidnapped and they couldn't prove that I robbed the bank." Respondent later gave a tape recorded confession where he reiterated his -- the reason for the homicide to cover up the bank robbery, escape culpability, and perhaps return and recover the $15,000 in stolen money which he had hidden.

After his confession Respondent was indicted for what is called aggravated murder, which is that he did purposely cause the death of another and the aggravating circumstance here being that of fleeing from an aggravated or armed robbery, the distinction between simple murder, which is the highest level of homicide in Ohio, and aggravated murder is that the Ohio General Assembly has made a legislative judgment that a murder, an intentional killing committed under certain circumstances, here while fleeing a bank robbery, warrant enhanced punishment.

While the aggravating factor here, the bank robbery, is an element of the crime it is not a lesser included offense, and the trial judge would err were he to instruct you on the bank robbery itself.

QUESTION: Mr. Drake, why would the State allow the entry of the guilty plea to robbery when it knew that there was a murder charge that should have been made?

MR. DRAKE: Your Honor, at the time they did not know that. They were confronted with a coroner's report which was wholly erroneous, which ruled the cause of death suicide, and they also were confronted with the fact that he had taken and passed a polygraph examination, Your Honor.

QUESTION: Well, I thought that the correct information had been made available before the entry of the guilty plea.

MR. DRAKE: The forensic pathologist from Cincinnatti, Ohio, had forwarded his findings to the prosecutor, that's correct. They were aware that the coroner's factual assessment was incorrect. They were not, obviously, aware that his conclusions vis-a-vis suicide is incorrect.

The conclusion stood, and they were also faced with someone who, a day after the commission of the act,

had passed this polygraph test, albeit he had fooled the operator and later conceded such. As a matter of fact, he later took a stipulated polygraph examination and failed it quite miserably when he was not allowed to cheat.

QUESTION: Mr. Drake, he was prosecuted for aggravated murder, was he not?

MR. DRAKE: Correct, Your Honor.

QUESTION: And did the State concede in the federal court, not just state court, that the trial for aggravated murder violated double jeopardy?

MR. DRAKE: Yes, that was a concession that was made. For purposes of this argument, that concession is made, although in light of --

QUESTION: Does that have any bearing on the issue we have to decide?

MR. DRAKE: No, in light of Garrett versus United States, there's much to be said for the proposition that this is not a double jeopardy violation. However, again for purpose of this argument it's presupposed that there was a double jeopardy violation, Your Honor.

QUESTION: So, there's still the issue of the modification of the sentence?

MR. DRAKE: The case before this Court is one

of remedy, at this juncture.

QUESTION: May I go back, since you have been interrupted, to Justice O'Connor's question earlier about whether the same evidence would have been admissible in the trial for the lesser offense than was actually received. After our remand in the light of Vitale, the Ohio Court of Appeals reduced the charge, as I understand, reduced the sentence.

Did they base that on just an automatic rule that that took care of the double jeopardy problem, or did they also decide that the evidence would have been the same anyway? Or, they didn't reach that, as I remember.

MR. DRAKE: Yes. Upon remand from this Court, it was never -- the spillover prejudice argument was presented for the first time in the Federal Circuit Court. It wasn't even presented to the District Court, Your Honor.

I rather vehemently objected to bringing it up at that juncture, but as the Court below indicates in a footnote they found my arguments to be --

QUESTION: At the time of the remand in light of Vitale, was there another argument before the Ohio Appellate Court or did the Court just take the case and then issue its judgment?

MR. DRAKE: Your Honor, I honestly do not know if there was additional briefing or additional argument.

QUESTION: One of the things that's worrying me about the case, if the issue should be controlling, and I'm not saying it should but as Justice O'Connor raised the question, I'm just wondering, where in the first instance should the decision be made as to whether there would have been some admissibility problem in another case?

I hate to get into that myself as a federal judge. I just wonder what your views should be on how that should be done.

MR. DRAKE: Most assuredly, had the issue been raised the Ohio Appellate Court would have been forced to make that assessment. As I indicated, it was not raised before the Ohio Appellate Court.

QUESTION: But you're also not sure they had a chance to raise it, as I understand, because there may not have been briefing at that time?

MR. DRAKE: I really do not know, Your Honor, correct. I do know that the issue wasn't -- they certainly had the chance to raise it in the Supreme Court of Ohio and did not.

QUESTION: I see.

MR. DRAKE: And they had the chance to raise

it in the Federal District Court and did not, and in the first instance raised it in the United States Court of Appeals for the Sixth Circuit. Had they raised it, they certainly abandoned it rather expeditiously.

As I indicated, it is briefed before this Court, the Respondent does not articulate so much as one piece of evidence that was admitted in the enhancement homicide trial that would not have been admitted in a trial for so-called simple murder.

In such circumstances, to mandate that both the prosecution and the defense suffer yet a third proceeding is not only not commensurate with the double jeopardy values, but actually frustrates the very value of finality. The prohibition against the second prosecution, subsequent to an earlier -- for the same offense, subsequent to an earlier conviction, is grounded upon an analysis that you want to prevent both prosecutorial overreaching, bad faith, there is no allegation of that here, and you want to promote finality.

Any precept of finality has been totally undermined in this case. The remedy is clearly commensurate -- the remedy of the Ohio Appellate Court is clearly commensurate with perceived violation.

What the Respondent wants this Court to do is

apply a due process analysis which is akin, identical if you will, to the analysis used in misjoinder of offense cases where we're talking about a state court conviction, the accused defendant, the convicted defendant, must demonstrate actual prejudice.

QUESTION: Mr. Drake, we're dealing with a constitutional violation. Does that mean we have to apply a Chapman type standard?

MR. DRAKE: No, Your Honor. I don't believe Chapman is engraved in granite for all constitutional violations. For instance, were this a violation of the cruel and unusual punishment clause of the Eighth Amendment, surely the conviction would not be reversed but the sentence reduced.

Were this a Sixth Amendment ineffective assistance of counsel case, there is a rule of automatic or per se reversal on such a demonstration. In this instance the supposed violation of the double jeopardy clause was remedied when the defendant was placed in the position that he should have been.

The proceeding itself should not have occurred. I would note that Respondent here did not endeavor to take an interlocutory appeal once the trial judge overruled his motion to quash the indictment, which could have in theory at least prevented this

entire difficulty.

QUESTION: Well, what's the standard, no reasonable possibility of prejudice?

MR. DRAKE: No. The standard that is -- as we suggest, and I believe is the appropriate standard, is that used for misjoinder of offenses which is that the accused, the Respondent here, must articulate with specificity those items of evidence that were admitted that were otherwise inadmissible, and must demonstrate actual prejudice as a result of that admission.

QUESTION: You think the burden of proof is on the defendant?

MR. DRAKE: That's correct, because we're essentially talking about a due process rather than a double jeopardy analysis. The double jeopardy clause that he -- what the Respondent endeavors to do here is to garner relief from the double jeopardy clause when he's already been afforded that relief.

He can take that extra step. If he can demonstrate that evidence was admitted, and that evidence resulted in actual prejudice to himself, then the conviction must be vacated and he must be afforded a new trial.

This case is very much akin to the resolution that this Court made in Benton versus Maryland.

Unfortunately -- fortunately that case came upon direct review and the conviction which was alleged to have been tainted as a result of this spillover prejudice was remanded to the state judiciary for review in light of the state's evidentiary principles, which is the common sense approach.

Here, what the Petitioner wants to do -- this is unlike a typical constitutional violation, a Griffin violation, search and seizure violation, where the violation of the Constitution itself is concrete, identifiable, and is the issue before the Court.

What the Respondent wants to do is take an entire trial that might span weeks and look to mere, simple state evidentiary principles, materiality, hearsay, et cetera and ask the federal judiciary to get involved in an ad hoc analysis of whether or not the state judiciary would have made the same evidentiary rulings.

This Court has never taken that Draconian step and there is absolutely no precedent for that, and again I would indicate that this case is a Benton versus Maryland spillover prejudice type case.

To reverse this conviction, as I stated earlier, would serve no useful purpose. The remedy here, afforded to the Respondent years ago, is

commensurate with the violation. If the Respondent can take the extra step and indicate that he was prejudiced by having to defend the greater charge, so be it. He does not articulate one item of evidence that came in tht otherwise wouldn't have come in.

Unless the Court has questions I would like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Very well.

Mr. Dane.

ORAL ARGUMENT OF MICHAEL G. DANE, ESQ.

ON BEHALF OF RESPONDENT

MR. DANE: Thank you, Your Honor. Mr. Chief Justice, and may it please the Court, I ask the Court on behalf of the Respondent to affirm the decision of the Sixth Circuit Court of Appeals in this case.

I make that request on the basis of reasons different from the reasons used by the Sixth Circuit Court of Appeals.

QUESTION: Well, do you defend those reasons, or not?

MR. DANE: Your Honor, I think that the Sixth Circuit decision was right in its consideration of the fairness of the trial, but I don't believe that it appropriately considered fairness because I believe that the issue presented here is one in which fairness of the

trial is not dispositive.

QUESTION: Did you represent the --

MR. DANE: No, I didn't, Your Honor. Our office was assigned by the Sixth Circuit Court of Appeals.

QUESTION: So, you don't -- well, but you were in the Court of Appeals?

MR. DANE: Yes, sir.

QUESTION: Well, did you make the arguments to that Court that you're going to make here?

MR. DANE: Yes, sir. I made them..

QUESTION: They rejected them, or just ignored them?

MR. DANE: They rejected the argument that the fairness issue should not be reached, but when they reached the fairness issue they decided it in favor of the Respondent.

QUESTION: Do you contend, Mr. Dane, that the relief awarded by the Sixth Circuit is the proper relief?

MR. DANE: Your Honor, I agree that granting the writ of habeas corpus is proper. The Sixth Circuit decision says it is remanded for retrial. I take the position there cannot be a retrial on this indictment although the State is free to seek another indictment on a murder charge and retry Mr. Mathews on that charge.

QUESTION: It struck me as a rather odd form of relief for a claim of double jeopardy violation to award the prisoner a new trial.

MR. DANE: I don't believe I disagree with the Petitioner that that is what the Sixth Circuit did. What the Sixth Circuit did was grant the writ of habeas corpus ordering that the Petitioner -- the Respondent be released from custody unless the State of Ohio takes action to bring about a new trial within the 60-day period of time.

The State of Ohio can, quite simply by not acting, bring about the conclusion that the Petitioner should simply be released on the writ.

QUESTION: But it would also be free under the Sixth Circuit's reasoning to retry him?

MR. DANE: That's correct.

QUESTION: Would it be under your reasoning too?

MR. DANE: On a new indictment, yes, sir.

QUESTION: And that's the relief he gets for a claim of double jeopardy?

MR. DANE: I suggest that the Sixth Circuit should not have reached the consideration of the fairness of the trial, Your Honor. The problem here between the Petitioner and the Respondent, the point at

which we part company, is identification of the protected interests.

Respondent -- I'm sorry, Petitioner, the State of Ohio, identifies the interests protected here as the interest in a fundamentally fair second prosecution of the same offense. That's found on page 35-6 of their brief.

I fundamentally disagree with that. I strongly disagree. The interest which the Respondent seeks to protect here is not his interest protected by the clause in a fair trial. It's his interest in no trial. He has got a right under the United States Constitution, under the circumstances of this case, to be free from second prosecution of the same offense, not to have a fair second prosecution of the same offense.

That is the dispositive issue, as I see it.

QUESTION: But he did not have a right, did he, to be free of a trial on the lesser offense for which he now stands convicted?

MR. DANE: He does not have that right now.

QUESTION: And he didn't at any time?

MR. DANE: No, he did not, Your Honor. They could have --

QUESTION: And what their contention is, is that what he got was the equivalent of a trial he could

have gotten?

MR. DANE: No. No, sir. My contention is --

QUESTION: Well, that's their contention, not yours.

MR. DANE: The State was permitted under the double jeopardy clause, having accepted guilty pleas to both robbery and burglary, was permitted to charge him with murder or aggravated murder by prior calculation and design. But when the State accepted those two guilty pleas, to robbery and burglary, those being the only two predicate offenses they could have used in a felony murder prosecution, they thereby foreclosed felony murder prosecution.

Now, he could have been prosecuted on the other offenses but he was not. He was prosecuted for felony murder. The clause says, "nor shall any person subject to the same offense be twice put in jeopardy of life or limb."

QUESTION: Well, why do you want your client to go through another trial on an offense you admit he can be tried for?

MR. DANE: Justice White, I don't want him to go through another trial, but the danger here is that if they can, consistent with the clause, prosecute him for the same offense again, then while this trial had been

taking place, the felony murder trial with robbery as the predicate felony, the State could have sought and obtained an indictment charging him with felony murder with burglary as the predicate felony. Those are block brokered different offenses, and no matter what the outcome of the trial, they could have prosecuted him again.

His interest is being free from successive prosecutions, not -- the interest is not in a fair successive prosecution.

I take the position that this modification cannot be adopted as an appropriate remedy to a successive prosecution-double jeopardy violation by this Court, without overruling the language, the reasoning and the holding in Abney versus the United States, because Abney said, in order to protect the right -- what we have here is a fundamental disagreement on the right protection.

The State is saying it's an interest in a right to a fair trial. Respondent is saying it's a right to no trial. Abney said, in order to protect the right -- because Abney identified the right as one which could not be protected on direct review. In order to protect the right you must allow an interlocutory appeal. You must allow pretrial appeal of a

nonfrivolous double jeopardy claim, because Abney identified the right as the right to be free from trial.

Ohio here says no, we can protect the right through appellate review on direct appeal, and Ohio says that even though the defendant is forced through that trial that the clause says he's entitled to avoid, his double jeopardy interests can still be protected on direct appeal.

QUESTION: Do you agree that you can't show any prejudice?

MR. DANE: Your Honor, I believe that much of the evidence at a second trial on a murder charge would not have been admissible, but I also take the position that the question of fairness or unfairness -- I'm not here to argue that the right was violated because the trial was unfair.

I'm here to argue on behalf of Mr. Matthews that the right was violated because the trial took place, and he can only be protected in that respect by an interlocutory appeal as recognized in Abney and not on direct review through modification.

QUESTION: But in the peculiar circumstances of this case, where the Respondent could in fact be re-charged and tried again, what is to be gained by going through the process again? It just strikes one as

peculiar..

MR. DANE: Justice O'Connor, what is to be gained is protection of the right, identification of the interest protected. It is the clause which says, not any judge, not any court, with all due respect, it is the clause which says the second prosecution is unfair, and it is always unfair where it is a second prosecution of the same offense.

The right that the accused seeks to protect, his primary interest, is in avoiding being prosecuted for an offense, prosecuted again for the same offense, prosecuted again for the same offense. And if modification is an appropriate remedy, that's what can happen to him. That's the interest that he seeks to protect.

In Burks versus the United States, this Court talked in language of the balancing of equities, and I suggest to the Court that's exactly what the Lincoln County Court of Appeals did here. After remand by the Court, the case went back to Lincoln County, and the Lincoln County Court of Appeals said finally, yes, Mr. Mathews, your double jeopardy rights were violated, but rather than remand further to the trial court to dismiss the indictment, what we will do is take everything into consideration.

We will balance the equities and we will conclude that we can remedy this situation without remand for dismissal of the indictment. We can remedy it by modifying the result.

This Court said in a unanimous opinion in Burks -- and I suggest Abney was also a unanimous opinion -- this Court said, where the clause is applicable, and here we all agree that it is, there are no equities to be balanced. Its sweep is absolute, for the clause has declared the policy. The clause declares the constitutional policy, and the clause says, there shall be no second trial based on grounds which this Court has said are not open to judicial examination.

QUESTION: Well, Mr. Dane, a long time ago Justice McLean of this Court, in the days when the double jeopardy clause was thought to bar even a motion for a new trial and of someone who had been sentenced to be hung made a motion for a new trial, and the Government said, you can't have a motion for a new trial because it would violate his right against double jeopardy to have a new trial.

Justice McLean said, I'm not going to deny his motion for a new trial and save his double jeopardy and preserve his right to be hung. It strikes me as a little bit of the same thing in your argument, that

you're insisting that double jeopardy was violated and yet, what you come out with is another trial for the man.

MR. DANE: Your Honor, I am not advocating another trial. I am simply advocating that the writ of habeas corpus be granted.

QUESTION: But you can see that if it were granted, he would be tryable on the same murder charge on a new indictment?

MR. DANE: I can see that, but that procedure would protect the right. That procedure would identify the interest protected with the clause consistently with the way this Court did it in Abney and in Burks and in Price versus Georgia.

QUESTION: Of course, Abney was a federal case. It was interpretatior of federal rules.

MR. DANE: Yes, sir.

QUESTION: We've never held that a state has to accord an interlocutory appeal to -- prior to trial to protect the double jeopardy --

MR. DANE: Yes, Your Honor. I agree with that, but in response to one of the statements made by Mr. Drake in response to Justice Stevens' question, there was no interlocutory appeal pursued here because this was a state case, and in 1978 Ohio didn't permit that.

It was not until State versus Thomas was decided in Ohio in 1980, two years later, that an interlocutory appeal could be pursued by a defendant. I suggest that the fundamental difference of opinion is over identification of the interests protected.

In the language of Price versus Georgia, what the State is requesting be done here is the conducting of a harmless error test, comparing the trial which did take place to a trial which they imagine would have taken place had they been originally prosecuted with respect to his double jeopardy rights on a charge of murder.

But, this Court in Price, also in a unanimous decision -- and I suggest these are the few bedrock decisions in double jeopardy law. These are the decisions where the Court could agree. Price rejected application of a harmless error test which is in effect being proposed here today.

The decisions which have been unanimous in the double jeopardy area are cases in which issues were presented to this Court that called for their resolution by this Court, upon the Court to look not at interpretation of the language of the clause but to focus its attention instead on identification of the protected interests of the clause.

And, this Court has repeatedly said that the interest in a successive prosecution double jeopardy situation is the interest of the accused in remaining free from that seconid trial for the same offense. That's all Mr. Mathews is asking. He is asking that the decisions in Price, in Abney, in Burks, be applied to this situation.

And I suggest very frankly that in order to give approval to modification as a remedy to a successive prosecution double jeopardy violation, which violation is admitted here, this Court would have to overrule part two of Price versus Georgia, would have to overrule the reasoning set forth in Abney, because interlocutory appeal is inconsistent with modification on direct review, and would have to overrule Burks to the extent that it says the sweep of the clause is absolute under these circumstances.

I believe that in appropriately deciding this case, one must look and keep in mind that the clause was written, intended to protect the accused. It was not intended to benefit the State. The sufficiency and the appropriateness of a remedy which is proposed should be viewed through the eyes of the party designed to be protected, and this is certainly not an appropriate remedy through the eyes of the accused in this case.

Mr. Mathews was first a victim of a violation of his constitutional rights when Ohio forced him into a trial which they now admit they could not force him into, consistent with those rights.

After that, after his constitutional rights were violated, and after a three-year process through which he appealed, finally this Court remanded in light of Illinois versus Vitale. Then what the Lincoln County Court of Appeals did was compound, not remedy but compound the wrong done to him by saying to him, yes, your constitutional rights have been violated. As a remedy to that we are going to deem you a convicted murderer and sentence you to serve a period of 15 years to life in the Lucasville penitentiary.

That is not a remedy to the violation. That is an aggravation of the violation. There is but one way effectively to insure the protection of the constitutional right of a criminal accused to be free from successive prosecution of the same offense, and that single way is to absolutely bar successive prosecution of the same offense, not to allow the prosecution to take place and force the accused to seek on direct appeal what this Court has said in Abney he is entitled to through an interlocutory appeal.

I fundamentally disagree with the statement of

the issues as it is put by the State of Ohio.

QUESTION: May I ask one other question. Your opponent relies on Benton against Maryland and says the remedy in that case is consistent with the -- the remedy was permitted under this Court's mandate, was consistent with the remedy that the Ohio court granted here. And I understand your response to that was that you think it was overruled by Price against Georgia.

Is that your view?

MR. DANE: Your Honor, I believe that language did not survive Price versus Georgia, but I also would point out to the Court that Benton was not a successive prosecution case.

This is different from the implied acquittal cases that we have in Price versus Georgia and Green versus United States in 1957, where the prosecutor there is seeking but that one conviction he feels the State entitled to. Here the prosecutor has got that conviction. They got it when the defendant pled guilty to robbery and burglary.

Now the prosecutors are seeking another conviction. I don't begrudge them the right to do that, but they should do it consistent with the double jeopardy clause.

Let them seek a second conviction if they feel

that it's warranted, but let them indict him and let them prosecute him on a charge of aggravated murder by prior calculation and design, which is not jeopardy barred, or let them charge him with murder which is not jeopardy barred.

But, when they charge him with felony murder, that is a barred offense, and I suggest that the prosecutors realized what they had done wrong in this case after the guilty pleas had been entered and after Mathews made a statement admitting involvement in the killing.

At that point they wanted to prosecute him for murder and realized that they had foreclosed felony murder prosecution. Having foreclosed felony murder prosecution, they could only proceed with the other offenses and they knew that under the circumstances of this case, because of the controversial things which had happened at the scene and because of the evidentiary problems with this case, they couldn't prove the prior calculation and design beyond a reasonable doubt and they couldn't prove straight murder.

They had to reach back. They had to admit before this jury evidence of bad character which was generated by admitting evidence of what happened during the course of the robbery.

That bad character evidence is designed by the rules of evidence to be prohibited. That evidence requires before it is admitted, a balancing test be conducted by the trial court, which was not conducted here because robbery was an element of the offense, improper but an element of the offense.

That evidence, if admitted, comes in under cautionary instructions. It comes in under limiting instructions. That was not done here.

And, the accused should have a right on direct appeal to say that the decision of the trial court admitting that evidence was under the circumstances an abuse of discretion. That right of the accused is lost here because the trial court never made the decision, because any such evidentiary decision was foreclosed when that court improperly allowed the trial to proceed on the basis of a jeopardy-barred charge.

Those are the interests lost by the accused when a double jeopardy violation is allowed to take place. At the heart of the clause is his interest in avoiding successive prosecutions of the same offense, because multiple punishments need not be a primary concern of his immediately if the only way that the State can get to the point at which it can impose multiple punishments for the same offense is through

successive prosecutions, and I suggest that that's what happened here.

There is no such thing, I would suggest to the Court, as a fair trial on a jeopardy barred offense. Any trial on a jeopardy barred offense is an unfair trial. That decision has been made by the incorporation of the clause in the Fifth Amendment to the United States Constitution.

It is a decision which this Court has said is based on grounds not open to judicial examination. When they prosecuted him the second time on the same offense they violated his doublue jeopardy rights. That trial was inherently unfair to him. And fairness in terms of evidentiary considerations is not at issue here.

I respectfully request, accordingly, of the Court that the decision of the Sixth Circuit Court of Appeals, which has ordered nothing more than the granting of the writ, be affirmed and that if this man is to be tried, if this man is to be prosecuted on a murder offense, that that prosecution take place consistent with the rights protected by the double jeopardy clause of the Fifth Amendment.

QUESTION: Do you have anything further, Mr. Drake?

MR. DRAKE: Very briefly, Your Honor.

ORAL ARGUMENT OF RICHARD DAVID DRAKE, ESQ.

ON BEHALF OF PETITIONER - Rebuttal

MR. DRAKE: I simply wish to emphasize as this Court has ofttimes stated that the remedy should be commensurate with the scope of the perceived violation. Here the State of Ohio has forever lost the enhanced penalty which it initially obtained.

Neither in his brief nor in his argument before this Court has the Respondent articulated one concrete piece of testimony or physical evidence which came in at the trial which would not have come in on a trial for simple murder, and for that matter will not come in, if there is a trial for simple murder, and yet a third prosecution.

What the Respondent endeavors to do here is simply punish the Government for making a mistake in a very unsettled area of constitutional jurisprudence. His supposed remedy subjects both the Respondent and the prosecution to yet a third trial proceeding to no useful end whatsoever.

Does the Court have questions?

QUESTION: Could the defendant have appealed prior to his trial? He moved to bar the prosecution based on double jeopardy and was turned down.

He didn't need to wait until he was tried, did

he?

MR. DRAKE: I believe counsel for Respondent is correct, that the decision he cites, the report decision of the Supreme Court of Ohio, had not been cited at that time. But the case, State versus Thomas, someone has to do this in the first instance and this Court had indicated that interlocutory appeals were going to be allowed in the area of double jeopardy jurisprudence on a non-frivolous claim.

There was not a reported decision, but there certainly was no reported decision that says you cannot do it, also to my knowledge, Your Honor.

QUESTION: And let's assume that there was an interlocutory appeal after his motion to dismiss was denied and the trial court was affirmed by the Supreme Court of Ohio. I suppose there could have been petition for cert here, or what is your view? Could he then have gone directly to the Federal District Court on a writ of heabeas corpus?

MR. DRAKE: As a matter of fact, that has happened as of the time of this case. Decision of the United States Court of Appeals for the Sixth Circuit, Pokk versus Herkimer.

QUESTION: So, there are ways now to avoid the trial?

MR. DRAKE: Correct. As a matter of fact, this Court's remand in light of Illinois versus Vitale would have presumably occurred at the same time and we could have avoided this entire difficulty.

The prohibitions against the actual trial itself, and the only way that one can truly protect that, is to allow the interlocutory appeal.

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

[Whereupon, at 10:42 a.m., the case in the above-entitled matter was submitted.]

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:

84-1636-T. L. MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, Petitioner
V. JAMES MICHAEL MATHEWS

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)