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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MELVIN R. BLANTON AND MARK D. FRALEY,
Petitioners V. CITY OF NORTH LAS VEGAS, NEVADA

CASE NO: 87-1437

PLACE: WASHINGTON, D.C.

DATE: January 9, 1989

PAGES: 1 thru 51

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 MELVIN R. BLANTON and MARK D. :

4 FRALEY, :

5 Petitioners, :

6 v. :

No. 87-1437

7 CITY OF NORTH LAS VEGAS, NEVADA :
8 -----x

9 Washington, D.C.

10 Monday, January 9, 1989

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

14 APPEARANCES:

15 JOHN J. GRAVES, JR., ESQ., Las Vegas, Nevada; on behalf
16 of the Petitioners.

17 MARK L. ZALADORAS, ESQ., Deputy City Attorney, North Las
18 Vegas, Nevada; on behalf of the Respondent.
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PROCEEDINGS

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 87-1437, Melvin Blanton v. The City of North Las Vegas.

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

ORAL ARGUMENT OF JOHN J. GRAVES, JR.

ON BEHALF OF THE PETITIONERS

MR. GRAVES: Thank you, Your Honor. Mr. Chief Justice and may it please the Court:

Blanton and Fraley were arrested and charged with driving under the influence in the City of North Las Vegas, Nevada, in July and June, respectively, of 1986. Blanton made a written demand for a jury trial in the municipal court, and that demand was denied. We took a petition for a writ of mandamus to the district court, our court of general jurisdiction, and that request was denied. And we took an appeal to the Nevada Supreme Court.

Mr. Fraley, in the North Las Vegas municipal court made a written demand for a jury trial that was denied. He entered a plea of guilty to the charge. He took an appeal of trial de novo to the district court and the demand for a jury trial was granted. From that

1 granting of the demand for a jury trial, the City of
2 North Las Vegas took an original writ of certiorari to
3 the Nevada Supreme Court.

4 QUESTION: The Nevada Supreme Court made no
5 point about Fraley having pleaded guilty.

6 MR. GRAVES: No, sir, they did not.

7 The Nevada Supreme Court construed the Baldwin
8 case rather strictly, wouldn't we -- woodenly we think,
9 and stated that the Baldwin standard of six months and
10 \$500 was the only standard that it would stand on. And
11 as a result of that, the request for a jury trial in
12 driving under the influence cases was denied.

13 In its decision it also indicated certain
14 policy reasons. Part of this was expense of the jury
15 trials, general inconvenience in rural areas,
16 non-lawyer/judge problems. And it finally concluded by
17 suggesting that it was up to the legislature to resolve
18 this problem.

19 QUESTION: Well, it didn't stand that strictly
20 on it because wasn't the fine -- wasn't the possible
21 fine here more than \$500?

22 MR. GRAVES: Yes, sir. It was \$1,000, but it

23 --

24 QUESTION: So, it wasn't really all that
25 wooden.

1 MR. GRAVES: Sir?

2 QUESTION: It wasn't all that wooden.

3 MR. GRAVES: No, sir. The \$1,000 fine has
4 been in the law in the State of Nevada for several years
5 now, but I think that in most of the lower court cases I
6 believe that the fine of \$500 has been abandoned by most
7 of the courts. I think even in this Court. I think in
8 *Muniz v. Hoffman* you indicate that it's not talismanic.
9 So --

10 QUESTION: Selectively wooden.

11 MR. GRAVES: It was partially wooden, yes,
12 Your Honor. All right.

13 As this Court knows, this country is at war
14 with drunk drivers. In the State of Nevada that
15 offensive has taken this shape. Upon conviction of a
16 first offense, there is a mandatory fine of \$200 and a
17 maximum of \$1,000. There is a mandatory incarceration
18 of two days or 48 hours of community service while
19 dressed in distinctive garb identifying the person as a
20 DUI violator. And with the permission of the Chief
21 Justice and the Court I would ask to be able to show you
22 this distinctive garb here today. It has been described
23 in our brief at pages 14 and 15.

24 QUESTION: Go ahead.

25 MR. GRAVES: Thank you. This is the front of

1 it. It looks much like a prisoner's uniform. Property
2 of North Las Vegas Court. We received the permission of
3 the city, by the way to leave this with the Court.
4 Property of North Las Vegas Court. On the back is a
5 rather large circle, DUI offender, with a skull and
6 crossbones and a bottle of liquor with it looks like a
7 hatch mark thing -- you, you can't -- you can't drink.
8 Not exactly a designer, but --

9 QUESTION: And how long do you wear it?

10 MR. GRAVES: For 48 hours, sir. It's not as
11 if it were just two days, but it says --

12 QUESTION: You could stay at home, couldn't
13 you?

14 MR. GRAVES: No, sir. You'd want to stay at
15 home with this.

16 QUESTION: Well, I know, but where do you wear
17 it?

18 MR. GRAVES: You wear it in the community
19 where you're working the 48 hours of community service.

20 QUESTION: Oh, I see. I see. I see.

21 MR. GRAVES: It's actually like six eight-hour
22 days or eight six-hour days. It's actually 48 hours.
23 It's not like two eight-hour days.

24 QUESTION: But --

25 MR. GRAVES: So, while you're working typing

1 or whether you're sweeping the road or whether you're
2 sweeping a hall in a public building --

3 QUESTION: But, Mr. Graves, do you -- do you
4 -- if you get a jail sentence, do you also have to do
5 this?

6 MR. GRAVES: No, sir.

7 QUESTION: So, this -- but your position is --
8 is this even worse than six months in jail?

9 MR. GRAVES: Most of my clients want to do the
10 jail time. They don't want to be caught --

11 QUESTION: They'd rather go to jail for six
12 months than wear this for 48 hours?

13 MR. GRAVES: Not for six months, but for the
14 two days. First offenders normally don't go to jail for
15 six months. They'll -- normally just the minimum --

16 QUESTION: But -- but how is this a more
17 severe penalty than six months in jail?

18 MR. GRAVES: I'm not sure that this is a more
19 severe penalty than six months in jail. I think that --

20 QUESTION: Well, if they got six months in
21 jail, that would be the maximum under the statute,
22 wouldn't it?

23 MR. GRAVES: Yes, sir.

24 QUESTION: Then why -- why isn't this case
25 squarely controlled by Baldwin?

1 MR. GRAVES: Well, it's our position that --
2 I'm not sure that we can make that analogy exactly, Your
3 Honor, because most of the time in most of the offenses
4 that I have anything to do with, it's two days in jail
5 or the 48 hours wearing this particular uniform.
6 (Inaudible).

7 QUESTION: But that's -- that's the choice of
8 the defendant, isn't it?

9 MR. GRAVES: Yes, sir. It is the choice of
10 the defendant generally. The courts would prefer --
11 most courts -- It's a mixed bag. Some of the courts
12 have said that they are going to make the choice and the
13 defendant will do the community service because they
14 would rather have the defendant out in the community
15 working as opposed to sitting in jail. And that's the
16 decision that most of the courts make, although
17 sometimes the defendant can make a choice of going to
18 jail for two days.

19 QUESTION: But supposing the statute made the
20 maximum penalty two days in jail or, alternatively,
21 wearing this for two days, would that violate -- would
22 you then be entitled to a jury trial?

23 MR. GRAVES: That would be a little bit closer
24 case. I think that this is a badge of dishonor.

25 QUESTION: Well, I understand that, but you --

1 what, what's your answer to my question? Do you think
2 you would be entitled to a jury trial? Say that was the
3 only penalty. You have to wear this thing for two days.

4 MR. GRAVES: If this was the only penalty and
5 you had to wear that for two days?

6 QUESTION: Yes.

7 MR. GRAVES: I don't think so.

8 QUESTION: Well, isn't that what the only
9 penalty is for most people?

10 MR. GRAVES: No, sir. You've got a mandatory
11 minimum fine of \$200 up to \$1,000.

12 QUESTION: Well, say there was -- this -- wear
13 this for two days plus a \$1,000 fine. That's the
14 maximum penalty. Would that entitle you to a jury?

15 MR. GRAVES: That would be a closer case.
16 That might entitle to us to a jury trial.

17 QUESTION: You think so?

18 MR. GRAVES: Because it's just -- it's, it's
19 just something that most of my clients don't want to be
20 seen in, and it's a badge of dishonor.

21 QUESTION: Well, I -- I sympathize with that,
22 but I -- you're telling me something new now. I thought
23 that under these statutes you couldn't force anybody --
24 a judge could not force anybody to wear that, that it's
25 -- it, it has to be at the defendant's option.

1 MR. GRAVES: Not always, sir. The courts are
2 split on that. Sometimes a judge will require the
3 defendant to do community service. Sometimes --

4 QUESTION: Well, what does the statute say?
5 Doesn't it -- I thought the --

6 MR. GRAVES: It just has an option, Your
7 Honor. I don't think it specifically says who has the
8 power to require --

9 QUESTION: It just says it's an option. It
10 doesn't say who has the option?

11 MR. GRAVES: I don't believe so. The courts
12 have construed it in different ways.

13 QUESTION: When you say the courts, you mean
14 the various courts in Nevada --

15 MR. GRAVES: Yes, sir.

16 QUESTION: -- the district courts?

17 MR. GRAVES: I say the lower courts that are
18 dealing with this problem on a daily basis. There is --

19 QUESTION: (Inaudible).

20 MR. GRAVES: There is normally a choice.

21 I have had clients -- I don't want to try to
22 mystify you on this, but I have had clients that have
23 wanted to serve the two days in jail as opposed to
24 wearing the uniform, and the courts have allowed them to
25 do that. It's not a hard and fast rule, but they must

1 do one or the other.

2 QUESTION: Where is the statute? How does it
3 read? I'm sorry -- this point is important to me. I'm
4 -- where --

5 I think we have a different case if, if
6 somebody can be forced to wear this thing for however
7 long. At least I think it's different.

8 (Pause)

9 QUESTION: Well, if it's going to take a lot
10 of time, you, you can do it on rebuttal if you like. I,
11 I didn't mean to -- I thought you'd have it right at
12 hand.

13 MR. GRAVES: Thank you, Your Honor, if we can
14 do that, please. I just can't lay my hand on it right
15 away.

16 In any event, with the mandatory fine, the
17 mandatory incarceration, or dress for 48 hours in this
18 distinctive garb, there is as well a mandatory education
19 course on alcohol abuse. There's also a, a mandatory
20 license revocation for 90 days, the second 45 days of
21 which a driver may request a hardship or restricted
22 license.

23 Of course, additionally this particular crime
24 is hedged around with the additional conditions of being
25 non-negotiable by the prosecutor and, of course, the

1 court has no jurisdiction to reduce the jail time of the
2 incarceration.

3 QUESTION: You, of course, don't recognize the
4 rule that any charge that is less than six months does
5 not need a jury trial. You, you just don't recognize
6 that rule?

7 MR. GRAVES: No, sir. We, we recognize --

8 QUESTION: (Inaudible)?

9 MR. GRAVES: We recognize that rule and we in
10 our briefs have indicated to the Court that we don't
11 think you need to abandon that rule because it has
12 served well for 20 years and we don't want to --

13 QUESTION: Now, explain to me again why this
14 is different.

15 MR. GRAVES: Because what the State of Nevada
16 is doing is that they're pecking underneath the line.
17 Your rules have said and the State of Nevada has said
18 it's six months. You puncture that particular
19 incarceration, and then you go into a serious crime.
20 The State of Nevada is staying underneath the line, but
21 it's increasing the punishment so that all they have to
22 say is, well, ladies and gentlemen of the Supreme Court,
23 all -- we don't have more than six months. All we have
24 is six months.

25 What we're saying is that they're pecking

1 under the line and making other kinds of penalties that
2 will -- ultimately, especially in this kind of case,
3 that will require a jury trial. We, we don't ask you to
4 abandon your --

5 QUESTION: Well, would six months and two days
6 of house arrest be bad?

7 MR. GRAVES: I'm sorry, sir. I did not
8 understand you.

9 QUESTION: Two -- six months and two days of
10 house arrest.

11 MR. GRAVES: Would that require a jury trial?

12 QUESTION: Yes.

13 MR. GRAVES: That probably would require a
14 jury trial.

15 QUESTION: It's -- what's the difference
16 between that and this one, because he can stay at home
17 with that. He doesn't have to wear that.

18 MR. GRAVES: Well, he can't. In the State of
19 Nevada, he can't go -- he can't go home. He must go to
20 a jail for two days. Besides, there are additional
21 penalties here.

22 QUESTION: But didn't you say he could wear
23 that for two days?

24 MR. GRAVES: Yes, sir, but he has to do
25 community service.

1 QUESTION: But he doesn't -- he has to be out
2 on the street.

3 MR. GRAVES: Yes, sir. You can't be at home
4 doing this. You can't be dusting your furniture.

5 QUESTION: And so, that's enough for a jury
6 trial?

7 MR. GRAVES: Yes, sir. I think so.

8 QUESTION: That is the only difference.

9 MR. GRAVES: Not the only difference, no, sir.
10 There are other penalties here. One of the other
11 penalties is a --

12 QUESTION: Let me have them.

13 MR. GRAVES: Sir?

14 QUESTION: Let me have the other penalties.

15 MR. GRAVES: The additional penalties are loss
16 of your license for 90 days, 45 days of which are
17 non-suspendable and you cannot drive for 45 days. The
18 other 45 days, at the tender mercies of the Department
19 of Motor Vehicles in Nevada, you can have a restricted
20 license.

21 QUESTION: May I ask on that suspension? If
22 you go to jail for six months, can you have the 90-day
23 suspension concurrent with the time in jail?

24 MR. GRAVES: There is no provision for that
25 that I'm aware of.

1 QUESTION: You mean --

2 MR. GRAVES: The penal and the administrative
3 are different. No, sir.

4 QUESTION: But -- but say you're convicted on
5 January 1 and the judge enters an order, sends you to
6 jail for six months. When will your license be
7 suspended?

8 MR. GRAVES: It will be -- it'll be probably
9 suspended even before you go to trial or even before you
10 enter a plea of guilty. They are very, very rapid --

11 QUESTION: So, you -- the suspension -- what
12 I'm trying to find out, the suspension would have been
13 completed before you finished your six months in jail.

14 MR. GRAVES: Yes, sir, under one way or the
15 other. Yes, sir, it would.

16 Upon his second conviction of driving under
17 the influence in the State of Nevada within seven years,
18 it's a 10-day mandatory jail time and a \$500 mandatory
19 minimum fine and a one-year loss of license. And
20 there's no restricted license there.

21 The third conviction within seven years is one
22 year to -- to six years in the Nevada State prison.
23 It's a felony. It carries a mandatory minimum \$2,000
24 fine and three years' loss of license.

25 QUESTION: But we're speaking only of the

1 first conviction in this case.

2 MR. GRAVES: Yes, we are. But what we're
3 suggesting is that the second and third convictions are
4 conditions and provisions that this Court can take into
5 consideration to gauge the seriousness of this crime in
6 the minds of the people of the State of Nevada through
7 their legislators.

8 QUESTION: Well, it is pretty serious, of
9 course.

10 MR. GRAVES: Yes.

11 QUESTION: Incidentally, your statute is in
12 the petition for cert, if you need it.

13 MR. GRAVES: Thank you. Just a moment.

14 This Court has historically used two types of
15 tests for gauging the seriousness of a crime. One of
16 those is nature of the offense, and the other is the
17 penalty of the offense, and then there is sort of a
18 subtest which is the actual numbers of states which --

19 QUESTION: Mr. Graves, didn't the Baldwin case
20 really move to a -- a more bright line test?

21 MR. GRAVES: Yes, ma'am, it did.

22 QUESTION: And why should we get away from
23 that?

24 MR. GRAVES: You don't have to get away from
25 the bright line test except that this case doesn't have

1 a bright line holding. You have gotten away from bright
2 line tests in the past in your Franks case -- in the
3 Frank case.

4 QUESTION: Well, this meets Baldwin in a sense.

5 MR. GRAVES: It does. It meets Baldwin, and
6 if -- if the Court sends a message to the states that
7 you can have other penalties besides the six and five,
8 which is what we used to call it when I was in municipal
9 court, six months in jail and a \$500 fine, then we're
10 going to have all sorts of things that are going to be
11 happening underneath the line because as long as the
12 state doesn't puncture the line and move into the
13 serious area, then we can have all sorts of penalties
14 underneath.

15 QUESTION: Well, don't you think we have to
16 adjust the \$500 for inflation? When did -- when did we
17 -- what's the inflation rate since we picked \$500? I
18 mean, I know the Constitution says how many dollars for
19 a -- for a civil -- civil jury, but I really don't think
20 our Court opinions are as written in stone as the
21 Constitution is.

22 MR. GRAVES: I don't think so.

23 QUESTION: So, \$500 -- maybe \$1,000 is the
24 equivalent nowadays of \$500 before now.

25 MR. GRAVES: I -- I do not stand on the fact

1 that the -- the \$500 is written in stone. It could be
2 \$1,000 or it could be even \$2,000. I just -- again, I
3 agree with the Court. I don't think it's talismanic,
4 and we -- we really don't hold to that.

5 QUESTION: Baldwin didn't say anything about a
6 fine, did it?

7 MR. GRAVES: No, sir. I think it was pretty
8 much the incarceration factor.

9 QUESTION: Six months.

10 MR. GRAVES: And I think you pretty much stood
11 on that.

12 But the nature of the offense. The bright
13 line test lived in Baldwin and in -- and in the Duncan
14 cases. But you've got a residuum test that lives beyond
15 that, which is the nature of the offense of the test,
16 and the lower courts have found -- many lower courts
17 have found -- there are some that have not -- have found
18 that this is, in fact, a serious crime, that the nature
19 of the offense is serious.

20 In Baldwin, for example, in footnote 6, any
21 incarceration in excess of six months carried the right
22 to jury trial. And in that footnote, per Justice White,
23 there was no overruling of Clawans or Colts. And in
24 Duncan, which preceded it by two years, sentences up to
25 six months if the offense otherwise qualifies as a petty

1 offense. And even as late as 1976, in Ludwig v.
2 Massachusetts, it's a petty offense usually defined by
3 reference to the maximum punishment.

4 And as far as the nature of the offense, of
5 course, although it's sui generis, this Court still uses
6 the nature of the offense in contempt cases. So it's
7 certainly a test that is viable and is usable. And we
8 have cited cases that the lower courts have found
9 driving under the influence to be a malum in se crime.
10 It was not apparently indictable at common law, although
11 there was one case, United States v. Hart --

12 QUESTION: I, I assume you'd be satisfied if
13 the penalty was a minimum of 25 years and you were given
14 a jury trial.

15 MR. GRAVES: I would not be satisfied with
16 that, sir. I wouldn't want this to get out of hand.

17 QUESTION: Well, I was just wondering the way
18 you were going with your argument.

19 MR. GRAVES: Well, sir, I don't -- I can't
20 make a general statement. I just know that under the --
21 the statute that we have here, sir, that we feel that
22 this particular crime is serious not only because of the
23 nature of the offense, but also because of the penalty
24 and because 30 -- or 43 or 44 --

25 QUESTION: (Inaudible).

1 MR. GRAVES: Sir?

2 QUESTION: If it's serious, then the penalty
3 should be more.

4 MR. GRAVES: Yes, sir. And in --

5 QUESTION: Is that your argument?

6 MR. GRAVES: No, sir, I'm not --

7 QUESTION: Well, we can't raise the penalty.

8 MR. GRAVES: I'm not suggesting, sir, that the
9 penalty ought to be more and then grant us the right to
10 a jury trial. I'm suggesting that the crime per se
11 carries the right to a jury trial because it is malum in
12 se and has been so held by the lower courts.

13 What I'm suggesting to the Court is that 20 to
14 22 states, in fact, do punish first offense driving
15 under the influence by one year: New York, Alabama.
16 There are places that punish driving under the influence
17 first offense by one year, and they give you a right to
18 a jury trial.

19 And if the Court reviews its cases in this
20 regard -- and you take Callan, for example, 1888. Is --
21 it is an offense of a grave nature affecting the public
22 at large. That's DUI. Schick, 1904, it is a crime of
23 moral delinquency. That's DUI. Colts, 1930, it is a
24 grave offense. That is DUI.

25 And then when you take a look at the mala

1 prohibita crimes, the Colts in 1930 -- for the Court to
2 characterize reckless driving, or in this case DUI, as a
3 petty crime, would be to shock the general moral sense.
4 And this -- this Court may write a decision that says
5 that driving under the --

6 QUESTION: In fact, this is a malum
7 prohibitum, isn't it? What's the alcohol level here?
8 Is it the case that everyone who has this -- this amount
9 of alcohol in his blood is necessarily impaired? I
10 thought the level was set at such a point where someone
11 could be, and so even if you have a greater immunity,
12 the effect of alcohol on some other people, if you get
13 picked up, it's your tough luck. And I would consider
14 that a malum prohibitum.

15 I mean, to be fall -- falling down drunk when
16 you're driving is malum in se, but to have your alcohol
17 level above a certain point where someone else might be
18 affected but you aren't, do you consider that malum in
19 se?

20 MR. GRAVES: Well, yes, sir. But I'm not sure
21 that you can make the distinction between an alcohol
22 level and whether somebody else is going to react
23 differently to alcohol than anybody else. In the State
24 of Nevada --

25 QUESTION: Well, you're saying it's malum in

1 se to have point whatever the -- the thing in your blood
2 is?

3 MR. GRAVES: Well, what I'm saying is that
4 that is the, the considered judgment of the legislature
5 of the State of Nevada that there are two ways to
6 convict in the State of Nevada for driving under the
7 influence. One is .10 or greater, and that's per se.
8 It's presumptive that you're driving under the
9 influence. The second one are the factual, that if you
10 refuse a test, for example, then if you're weaving down
11 the road and if your -- your breath is wreaking of
12 alcohol and there are other physical attributes, then --
13 I think that in any event, that it's malum in se.

14 QUESTION: Is it --

15 MR. GRAVES: The same penalties.

16 QUESTION: You're saying if the legislature
17 makes it unlawful, it's malum in se.

18 MR. GRAVES: No, sir. No, sir.

19 QUESTION: Well, then, then, then you have to
20 convince me that having .10 in your blood necessarily --
21 that, that no reasonable person, no -- no honorable
22 person would consider driving with .10. I don't know
23 that that's true. I think that's -- that's a number
24 picked with a good deal of, of, of safety margin to --
25 to embrace some people who may, indeed, not be affected

1 at that level.

2 MR. GRAVES: Well, as a practical matter, they
3 are tried together. The .10 and also the physical
4 characteristics, of course, are all tried together.

5 But in any event, the .10 and the driving
6 under the influence both carry the same penalties. So,
7 no matter how you prove the case, you're still subjected
8 to the same sentence and the same conviction of driving
9 under the influence, and I don't think that the .10 or
10 whether it was a .15 would make that much difference in,
11 in the analogy. Perhaps I -- I'm missing the question,
12 but I don't --

13 QUESTION: (Inaudible) I'm trying to figure
14 out I guess how heinous this, this crime is viewed by,
15 by the citizenry and if to be convicted means you were
16 falling down drunk when you were driving, yes, I'd say
17 that's pretty -- a pretty heinous thing.

18 But suppose the state passes a law that says
19 we don't want people on the roads who have had anything
20 to drink and they set the level, you know, real minimum.
21 You shouldn't drink any alcohol within three hours
22 before you drive. Now, would you consider that malum in
23 se to violate that law?

24 MR. GRAVES: I'm not -- just for the fact of
25 driving three hours before -- or drinking three hours

1 before you --

2 QUESTION: That's right. The state says we're
3 taking no chances. Nobody should have any alcohol in
4 the blood. No drinks within three hours of driving.

5 MR. GRAVES: So, any amount of alcohol in the
6 blood then is going to be a malum in se?

7 QUESTION: Yes. Would that be malum in se?

8 MR. GRAVES: I don't think that that would be
9 malum in se.

10 QUESTION: Well, then you've got to tell me
11 why .10 is -- you, you have to convince me that .10
12 really means that, that the average -- at least the
13 average person is, is seriously impaired --

14 MR. GRAVES: Are we talking about driving and
15 drinking at this time, the three hours before? All I
16 can tell you, Your Honor, is that the -- the State of
17 Nevada has picked .10. Thirty-nine states have picked
18 that level as presumptively under the influence, and
19 that's the standard that we have to work with.

20 And I'm sorry that I can't answer your
21 question any more specifically, but if we're moving back
22 from the area of driving under the influence to drinking
23 three hours before you get onto the road and that is
24 going to be a crime, just drinking three hours, that is
25 a petty crime. That's malum prohibitum. But once you

1 get behind the wheel, then you trigger this offense.
2 There is no driving impaired in the State of Nevada.
3 It's just driving under the influence.

4 QUESTION: (Inaudible) call it driving under
5 the influence would be any alcohol in your blood.

6 MR. GRAVES: That -- that probably would be a
7 malum prohibitum crime because it is just too low.
8 After three hours it would be in any event.

9 The penalty provision -- the -- of this crime
10 is not just the fine and incarceration as in Baldwin.
11 As the Court has seen, the State of Nevada has moved
12 away from just the fine and imprisonment and has moved
13 on to other areas. Basically, what the state wants is
14 to have their cake and eat it too.

15 One of the, the penalties that I think is the
16 most important of this particular crime is losing your
17 license because you're losing the right to use the
18 public highways. And the State of Nevada -- and we're
19 only talking about the State of Nevada.

20 QUESTION: Is your license revoked in the
21 criminal proceeding, or is it a separate administrative
22 proceeding?

23 MR. GRAVES: It is a separate administrative
24 proceeding.

25 QUESTION: Well, that really isn't a criminal

1 penalty then in many senses of the word.

2 MR. GRAVES: Yes, sir, it is because as soon
3 as you are convicted of driving under the influence,
4 then the court sends notice to the Department of Motor
5 Vehicles and they will automatically revoke your license.

6 QUESTION: Well, I, I thought you said a
7 moment ago that your license could have been revoked
8 before trial.

9 MR. GRAVES: Yes, sir, it can. There are two
10 provisions in the State of Nevada. One of the
11 provisions administratively is that as soon as you are
12 arrested, if you have .10 or greater blood in your --
13 of, of alcohol in your blood, then your license is
14 revoked because of that. Then later on --

15 QUESTION: That doesn't make -- that doesn't
16 make it a criminal proceeding.

17 MR. GRAVES: No, sir.

18 QUESTION: Not so far.

19 MR. GRAVES: No. No, sir.

20 And then we move on to when there is a
21 conviction. And then when you are convicted, they
22 revoke your license on the basis of the conviction.
23 Now, they do give you credit for the time that you
24 served over here. So, if your blood was .10 or greater
25 and you got a 90-day suspension, you're convicted, and

1 then over here you have a revocation because of the
2 conviction. You are given the credit for the 90 days
3 you have here over here. But there's still a penalty
4 involved because you've got -- the actual revocation is
5 on your record at the Department of Motor Vehicles.

6 So, they've got two chances to revoke your,
7 your license, but we don't particularly speak about the
8 first one since that really doesn't have anything to do
9 with the criminal case unless you're actually convicted.

10 In summation, I would -- I would advise the
11 Court that we think that you should apply all three
12 tests and not to abandon the Baldwin standard. Now, it
13 may be presumptively petty if the Baldwin standard is
14 not breached, but we feel that in this particular case
15 that all three should be utilized by the Court for this
16 particular offense.

17 My own opinion is that driving under the
18 influence is really sui generis. There is no other
19 crime of which I am aware that is really vying for
20 serious status -- none. And I've been in this area for
21 probably six or seven years, and although, of course,
22 defense attorneys always try to get jury trials as a --
23 as, as a practical matter, they don't get them.

24 This case -- the lower courts -- this type of
25 offense -- the lower courts are riddled -- riddled --

1 with instances where the, the courts have given jury
2 trials in these types of cases.

3 And, of course, this Court has said that there
4 is, indeed, a commitment to jury trials. I mean, when
5 you consider the types of offenses that this Court has
6 denied jury trials in -- the Clawans case; selling the
7 unused portions of railway excursion tickets; and the
8 Schick case, failure to stamp the oleomargarine; Natal,
9 a private market six squares from a public market --
10 those are trifling offenses. This is not a trifling
11 offense.

12 The cost of this --

13 QUESTION: Now, when you say the courts are
14 riddled with these cases, you're speaking of Nevada
15 courts?

16 MR. GRAVES: No, sir. I'm talking about --
17 no, sir.

18 QUESTION: Let's talk about Nevada, shall we?

19 MR. GRAVES: All right. The State of Nevada
20 -- there is no right to trial by jury in a driving under
21 the influence case. Now, in the lower courts, state and
22 federal, many courts have allowed the right to jury
23 trial in DUI cases. That's what I'm saying.

24 If this Court were to rule for us, for the
25 Petitioners, and allow a jury trial in the State of

1 Nevada, this is probably what's going to happen. The
2 state legislature is going to move this offense into the
3 district court. Just like Ludwig v. Massachusetts,
4 you're going to move it right -- it's going to be moved
5 right up there. There's a great waiver factor. I mean,
6 we've shown that in our opening brief that there's a
7 great waiver factor, not only in misdemeanor cases
8 generally, but in DUI cases in particular. And it is
9 also true in the Baldwin case.

10 I mean, even in the State of Nevada, they're
11 giving DUI jury trials in Washoe County, but we don't
12 have them in Clark and the rest of the surrounding
13 areas. So, even in the State of Nevada itself, we're
14 granting jury trials.

15 And lastly, I think that since the Court has
16 ruled on punishment other than incarceration --

17 QUESTION: Washoe County granting jury trials
18 after the opinion of the Supreme Court of Nevada in this
19 case?

20 MR. GRAVES: Yes, sir. It's my understanding
21 from the ACLU's amicus curiae brief that -- that in fact
22 they are -- I'd have to defer, but I think they're still
23 granting jury trials. They just feel that it's coming,
24 and they're going ahead and preparing of it -- for it.
25 And I think in 1987 they only had 12 at a cost of \$4,000.

1 QUESTION: We can't take judicial notice of
2 facts in an amicus brief, can we?

3 MR. GRAVES: No, sir.

4 QUESTION: Well, what are you telling us that
5 for?

6 MR. GRAVES: Well, I'm just -- I'm just
7 indicating to the Court that I feel that -- that may be
8 true. I cannot persuade the Court otherwise, but that's
9 just what I'm led to believe.

10 But in any event, I would sincerely urge the
11 Court to grant us jury trials in driving under the
12 influence cases in the State of Nevada.

13 And I would reserve the rest of my time if I
14 could.

15 QUESTION: Thank you, Mr. Graves.

16 Mr. Zalaoras, we'll hear now from you.

17 ORAL ARGUMENT OF MARK L. ZALAORAS

18 ON BEHALF OF THE RESPONDENT

19 MR. ZALAORAS: Mr. Chief Justice, and may it
20 please the Court:

21 At the outset, I wish to point out that the
22 issue raised earlier with regard to the DUI punishment
23 provisions in Nevada is set out -- the statute, the
24 punishment statute in full, is set out in the Nevada
25 attorney general amicus brief, Appendix A, pages 1a and

1 2a. And essentially what that provides is it is the
2 court's discretion whether to allow the defendant, the
3 convicted defendant, to perform 48 hours of community
4 service wearing the distinctive garb or whether to serve
5 the minimum two-day jail sentence. That is literally
6 what the statute provides. In, in --

7 QUESTION: Why, why, why do you think they
8 have that -- wear that distinctive garb with that thing
9 on the back of it? I -- isn't that great indication
10 that this is a shameful thing?

11 MR. ZALAORAS: I think it's a --

12 QUESTION: I mean, you -- it wouldn't mean
13 anything to have somebody wear that kind of a thing and
14 it says I sold the unused portion of a railroad --
15 railway ticket. That wouldn't --

16 (Laughter)

17 QUESTION: That wouldn't get, get anybody to
18 think less of you particularly, would it?

19 MR. ZALAORAS: No. It -- clearly it serves a
20 couple a functions, one of which is --

21 QUESTION: It's shameful, isn't it?

22 MR. ZALAORAS: -- deterrence to the others.

23 I would submit it would be to the person
24 wearing it, yes.

25 QUESTION: It's shameful.

1 Now, what if a state decides we're not getting
2 enough conviction -- convictions in child molestation
3 cases because the, the young witnesses get intimidated
4 by the courtroom and the jury and all of that, and we
5 think that the real punishment in a child molestation
6 case is just being convicted because that will ruin you.
7 So, we're going to reduce the sentence from five years
8 to six months and we're going to provide for trial of
9 all child molestation cases without a jury. We're sure
10 we'll get a lot more convictions, and that will be worth
11 it. What do you think? Could a state do that?

12 MR. ZALAORAS: Is Your Honor's question would
13 that offense still a serious offense in the --

14 QUESTION: That's right.

15 MR. ZALAORAS: -- constitutional context?

16 QUESTION: Yes.

17 MR. ZALAORAS: Not under the rulings from this
18 Court, no, it would not.

19 QUESTION: You think -- do you think that's
20 what we'd hope -- we'd hold?

21 MR. ZALAORAS: I believe that's what the Court
22 would hold under the present --

23 QUESTION: You would like that result that,
24 that people could be convicted of child molestation
25 without a jury trial. And you think --

1 MR. ZALAORAS: Not particularly.

2 QUESTION: -- that's what the Framers really
3 thought they were doing.

4 MR. ZALAORAS: Not particularly, but I
5 seriously doubt, although I accept your hypothetical,
6 that a state would make such a serious offense -- if I
7 may, by way of analogy to the state statutory scheme in
8 Nevada, we have a misdemeanor annoying a minor offense,
9 and that characteristically is prosecuted where there
10 was no physical harm or no physical touching of the
11 child other than perhaps exterior. We then have more
12 opprobrious offenses providing a higher punishment than
13 the six-month misdemeanor line.

14 So, by way of example to the Nevada statutes,
15 I believe what Your Honor is referring to is child
16 molestations where there's some physical violation of --

17 QUESTION: You would acknowledge that if I
18 don't think that I would hold that way in the case of a
19 child molestation statute that's reduced from five years
20 to six months, then my concern in this case would be
21 more than just the six months. It would also be whether
22 this is a shameful crime or not, wouldn't it?

23 MR. ZALAORAS: I, I don't see that that is
24 analogous to this situation when you make it with
25 reference to the distinctive garb. I would respectfully

1 submit that it's not.

2 QUESTION: Just arguing about how shameful it
3 is.

4 MR. ZALAORAS: Well, clearly it's shameful,
5 but there are many misdemeanors for which a penalty such
6 as provided in Nevada in the DUI law are also shameful.
7 I would submit that domestic battery, for example, is a
8 shame -- shameful conduct. So is -- in Nevada we have a
9 scheme by which possession of drugs can be given
10 misdemeanor treatment. That's shameful. Petty larceny,
11 a crime of moral turpitude, is shameful. So -- and
12 there's more moral turpitude in the mens rea involving a
13 petty larceny offense than there is in a DUI offense.

14 The Respondent submits that the decision below
15 was compelled by the holding in logic of this Court's
16 decisions in Duncan, Frank and Baldwin. There are three
17 major points to this presentation.

18 First, the bright line test of Baldwin
19 established six months' incarceration as the threshold
20 between petty and serious offenses. This rule is easily
21 identified and ready -- readily applied. It lends
22 itself to uniform application throughout the --

23 QUESTION: May I interrupt for just a moment
24 because is the quest -- the constitutional question I
25 guess is whether this is a criminal prosecution within

1 the meaning of the Sixth Amendment.

2 MR. ZALAORAS: That's correct.

3 QUESTION: That's where the -- what, what
4 we're boiled down to. The six months was the decision
5 in the Baldwin case.

6 And your position is this is not a criminal
7 prosecution.

8 MR. ZALAORAS: Oh, no, Your Honor. It's
9 clearly a criminal prosecution under Nevada law, but it
10 does not break the threshold established in the Baldwin
11 case, which necessitates under the command of the
12 Constitution, as this Court has interpreted it, for a
13 jury trial.

14 QUESTION: Now, it would be a criminal
15 prosecution within the meaning of the Sixth Amendment if
16 the right to counsel were at stake, wouldn't it?

17 MR. ZALAORAS: The Sixth Amendment right to
18 counsel that Your Honor alludes to clearly applies.

19 QUESTION: To this case.

20 MR. ZALAORAS: Yes, it does. Yes, it does.

21 QUESTION: Because it's a criminal prosecution

22 --

23 MR. ZALAORAS: No.

24 QUESTION: -- because that's exactly -- the
25 Sixth Amendment begins in all criminal prosecutions

1 these different rights obtain.

2 MR. ZALAORAS: That's true, but more
3 specifically because there's jail time that in fact has
4 to be imposed.

5 QUESTION: But what you're really saying is
6 that there are some criminal prosecutions that, that --
7 some prosecutions are criminal within the meaning of the
8 Sixth Amendment for one purpose but not for another.
9 So, the same words have different meanings depending on
10 what the right you're asserting is.

11 MR. ZALAORAS: No. The level of the criminal
12 offense, as defined by the severity of the maximum
13 authorized penalty, determines the jury trial question,
14 not whether it is or is not a criminal prosecution.

15 QUESTION: Well, but that's not, of course,
16 what the text of the Sixth Amendment says.

17 MR. ZALAORAS: That's true.

18 QUESTION: Perhaps you could refer Justice
19 Stevens to the reasoning of the court in the Argersinger
20 case to explain why the word "criminal prosecution," at
21 least in the eyes of the court, could be read
22 differently for one purpose than for the other.

23 MR. ZALAORAS: The -- there is a parallel --
24 and this is a point I wish to make in my argument --
25 between the Sixth Amendment right to counsel and the

1 Sixth Amendment jury trial right. That parallel -- the
2 key factor is incarceration. There is a distinction
3 between the two as they are -- have been accepted in our
4 interpretation of those provisions.

5 First, the right to counsel -- It has been
6 held that that is a key element whether the offense is a
7 minor one, such as a misdemeanor in Nevada would be, or
8 whether it's a more serious offense where a jury trial
9 would come into play, that the accused is entitled at
10 least to understand the nature of the proceedings and
11 have the assistance of counsel. It's more important in
12 the incarceration area -- excuse me -- the -- where jail
13 time is in the offing than it is when you get to the
14 Sixth Amendment right to jury trial. There is great
15 historical precedent that even predates our country for
16 having non-jury adjudications where classified as petty
17 offenses. This is the teachings of this Court's case
18 precedent.

19 The second point to which I refer this Court
20 is that there is no constitutional mandate to provide
21 jury trials for persons accused of drunk driving. To
22 create such a right would extend the present limit of
23 the Sixth Amendment right to jury trial, as applied to
24 the states via the Fourteenth Amendment Due Process
25 Clause, beyond the scope of that imposed upon the

1 federal courts.

2 QUESTION: May I ask one other question along
3 Justice Scalia's lines? Supposing the -- the judge had
4 the authority under this statute to -- not to put
5 anybody in jail for six months, but just, say, make them
6 wear this -- this jacket for six months, do you think
7 they'd be entitled to a jury trial?

8 MR. ZALAORAS: No, clearly not. And that I
9 submit is an appropriate -- although whether one
10 personally agrees with it or not, I think it's an
11 appropriate sanction that a state may impose.

12 QUESTION: What if they asked him to wear it
13 for seven months?

14 MR. ZALAORAS: No, because incarceration --
15 that is, the deprivation of liberty -- is the essential
16 point to the Six -- Sixth Amendment jury trial right,
17 and that does not provide deprivation of liberty, for
18 the same reason the fine amount is not a significant
19 factor in the determination of the jury trial right.

20 QUESTION: Six -- six months and a million
21 dollar fine, which would pretty much pauperize whoever
22 is, is hit with that. That would not entitle you to a
23 jury trial.

24 MR. ZALAORAS: Would that even be the case,
25 the court -- no court demands a million dollar payment

1 or a hundred dollar payment on the spot at the moment of
2 conviction. I would submit that a million dollars
3 excessive. Whether it calls under the jury trial issue
4 or not is another question. And I respectfully submit
5 that's not before the Court at this time.

6 However, to answer Your Honor's question, even
7 that exorbitant fine is ameliorated by the ability of
8 the defendant to pay it in installments or to work it
9 off in community service. However, in Nevada -- and
10 this is why the million dollar fine, if worked off in
11 terms of community service, would, would not match the
12 million dollar amount. It's because the community
13 service is limited to 120 hours in a misdemeanor.

14 QUESTION: I'm not talking about the
15 particulars of Nevada. I'm talking about the principle
16 you're asking us to adopt. I mean, we, we -- we've said
17 six, six months as a general matter, but you're saying
18 that six months in prison is the only test. No matter
19 what else you do to somebody, a fine of enormous
20 amounts, making them wear jackets or anything else, no
21 -- nothing counts except six months in jail.

22 MR. ZALAORAS: That is the primary or the most
23 relevant criterion --

24 QUESTION: Why? Because we've said that.

25 MR. ZALAORAS: No, because it -- the Court has

1 focused on deprivation of liberty. The restraint on
2 liberty is the key that triggers the Sixth Amendment
3 jury trial right, just as it triggers the right to
4 counsel under the Sixth Amendment. That is the key.

5 QUESTION: How about the liberty to wear what
6 kind of shirt you want?

7 MR. ZALAORAS: Well, I would submit that that
8 is -- it pales in significance to incarceration of the
9 person where they're forced to wear the jail garb and
10 their, their liberty is, is confined to the cell in
11 which they reside at the time of their incarceration.

12 The Petitioners' collateral consequences
13 approach -- and this is my third major point I wish to
14 make -- in reliance on the nature of the offense test
15 are untenable. These concepts lack definable
16 boundaries. They fail to provide courts with a
17 clear-cut guideline to follow, and this is because of
18 their vulnerability to subjective interpretation.

19 The bright line test established six months as
20 the maximum term of incarceration beyond which the jury
21 trial right is triggered. Below that, the Court has
22 held, a jury trial right is, is not invoked by the
23 constitutional provisions. In Duncan, this case
24 extended that jury trial right to the states through the
25 incorporation doctrine of the Due Process Clause of the

1 Fourteenth Amendment. However, there is a limitation on
2 that extension. It applies to the states only to the
3 extent that that jury trial right is imposed in federal
4 courts.

5 Should this Court rule in Petitioners' favor,
6 in fact, there will be extended a greater constitutional
7 right broader in scope than that that is imposed upon
8 the federal courts. This is in direct violation to the
9 Duncan ruling. It also --

10 QUESTION: Why -- why do you say it will be
11 greater than that imposed for the federal courts?

12 MR. ZALAORAS: Because the Petitioners have
13 relied upon not the six-month incarceration rule, but
14 these collateral consequences of the conviction. In the
15 federal courts, the -- well, this Court has determined
16 that in a federal case, Frank v. The United States, that
17 a three-year probationary term, which has more onerous
18 restraints on the defendant than does the statutory
19 scheme of DUI in Nevada, resulted in the Court finding
20 in Frank that it was not a serious offense in the
21 constitutional context of that term.

22 QUESTION: So, what, what, what you're saying
23 in effect is that if we rule for the Petitioner here, we
24 will, in effect, overrule the Frank case?

25 MR. ZALAORAS: That's correct, and, and the

1 Duncan ruling. The application of Duncan, that Duncan
2 made of the Sixth Amendment to the states, is limited to
3 the extent to which it is applied in federal courts. I
4 submit that that -- that would be the only alternative.
5 You'd have to overrule -- you'd have to extend it beyond
6 that provided to the states.

7 Now, I think Frank illustrates the point.
8 Frank was a federal criminal contempt matter. And the
9 court in sentencing -- rather, suspended sentence on Ben
10 Frank and instead imposed a three-year term of probation
11 with, and I wish to note, the specific probationary
12 conditions imposed on Mr. Frank. First, he was not
13 allowed to travel outside the state without permission
14 of the probation officer. He was required to work
15 regularly, secondly. Thirdly, he was required to report
16 any changes in his work schedule with his probation
17 officer. He was told he could only associate with
18 law-abiding persons. And he was to maintain reasonable
19 work hours.

20 I submit that those conditions placed on the
21 probationer in the Frank case are much more forceful
22 restraint on liberty than are the collateral
23 consequences to which the Petitioners rely. I believe
24 this puts Petitioners, in, in essence, in a checkmate
25 position on their argument out of which they cannot come

1 without overturning that -- the basic ruling of Duncan.

2 Again, the critical distinction in the Sixth
3 Amendment jury trial and Sixth Amendment
4 right-to-counsel cases is the deprivation of liberty,
5 the punishment.

6 Specifically, with regard to some of the
7 collateral consequences to which the Petitioners allude,
8 I think a short analysis is appropriate and especially
9 in comparison with the probationary provisions in the
10 Frank case.

11 The mandatory jail provision is ameliorated by
12 the fact that the defendant could perform the 48 hours
13 of community service. It's further ameliorated by the
14 fact that characteristically courts credit the
15 individual for the time he served in jail at his arrest
16 and do not require an additional two days, if in fact he
17 served two days before he came before the magistrate for
18 his initial appearance.

19 Secondly, Petitioners have referred to the
20 enhancement aspect of the DUI statute; that is, that for
21 second and third offenses, the penalty rises, and on the
22 third offense it would become a felony. That is not an
23 unusual statutory scheme, because of the habitual
24 criminal act we have in Nevada and that many states
25 provide.

1 For example, after the third petty larceny, it
2 becomes a felony upon prosecution and conviction of the
3 fourth petty larceny if the, the district attorney
4 determines to file it as a felony. And that calls for a
5 mandatory minimum of ten years in prison with a maximum
6 of 20 years. Moreover, in the petty larceny realm
7 still, after the fifth petty larceny conviction -- that
8 is, upon the sixth petty larceny -- the statute provides
9 for life imprisonment in Nevada.

10 Cannot the same argument be made, unlike what
11 I think counsel for Petitioners has suggested, that
12 someone may come before this Court, if they're able to
13 reach this level, and argue in a petty larceny case
14 that, well, I'm subject to enhanced penalties, and if I
15 commit five more petty larcenies, I'll go to prison for
16 life, therefore, it's serious in the constitutional
17 context? I believe this is analogous to their argument
18 regarding enhancement.

19 It also holds true for the domestic battery
20 situation, with regard to enhancement and also with
21 regard to the claim that the social program that
22 accompanies the conviction for DUI is somehow
23 significant enough to elevate what is otherwise a petty
24 offense into the serious category.

25 For example, in domestic battery in Nevada,

1 the officer must make an arrest if there was a battery
2 committed between persons who are related by blood or
3 marriage and there is some other evidence, such as
4 physical evidence, to indicate that that crime has
5 occurred. That person cannot make bail for 12 hours.
6 It's a non-bailable offense, which at this point, of
7 course, is merely an accusatory stage.

8 In addition, there are other collateral
9 consequences. Once a, a battery conviction results, the
10 court has the ability to require the person to attend a
11 counseling program, and if the victim is over -- is 65
12 years of age or older, the Nevada statutes provide for,
13 in effect, a doubling of the punishment, in which case
14 it would arise into a serious offense and a jury trial
15 right would have to be provided.

16 But what these illustrate, these examples I've
17 explained, is the fallacy in taking the Petitioners'
18 approach of viewing the nature of the offense. The
19 clear-cut guideline established by the objective
20 approach that Baldwin indicates by looking to the
21 maximum authorized penalty is, to paraphrase the Frank
22 decision, the only objective criterion by which a line
23 could ever be drawn on the basis of the possible penalty
24 alone is how we separate petty from serious offenses.

25 QUESTION: May I ask you one other question

1 about the way the statute works? The statute provides,
2 I gather, the judge can sentence him to two days in
3 jail, no, no -- not less than two or more or to perform
4 48 hours of work for the community while dressed in
5 distinctive garb. Could, could the judge pick the
6 distinctive garb that the judge thought appropriate, or
7 is there a statutory description of it?

8 MR. ZALAORAS: There's no statutory
9 description for it. What is in the statute is all we
10 have in terms of guiding the court.

11 QUESTION: So, if the judge thought that this
12 wasn't distinctive enough, the judge could maybe add a
13 dunce cap and a few other foolish looking things to the
14 uniform?

15 MR. ZALAORAS: Well, as I say, the statute
16 doesn't speak to it, so in theory, yes, it could. I
17 would hope that some decorum would be engaged by any
18 court in such a -- such an endeavor, however. And --

19 QUESTION: But supposing the judge really took
20 something, the most outrageous -- made people work in
21 their underwear with a dunce cap or something crazy,
22 that would still be -- that wouldn't trouble you either
23 I suppose.

24 MR. ZALAORAS: It may trouble me as a
25 prosecutor and an officer of the court. It certainly

1 would. But it does not call into question the jury
2 trial right.

3 QUESTION: Was the defendant -- were either of
4 these defendants sentenced to this particular form of --
5 of punishment?

6 MR. ZALADORAS: Blanton is -- is still not in a
7 convicted status. Fraley is, and I don't recall offhand
8 if his two-day jail sentence was a matter where he was
9 given credit or if he chose community service. He took
10 an appeal, so in fact the -- the conviction -- the
11 judgment following the conviction has never been
12 enforced.

13 QUESTION: Well, has the Supreme Court of
14 Nevada ever approved the sentencing of someone to do
15 their two days' community work in this kind of an outfit?

16 MR. ZALADORAS: No, it hasn't addressed the
17 issue.

18 QUESTION: And the statute says nothing about
19 it.

20 MR. ZALADORAS: That's correct. The
21 opportunity I suppose existed in the decisions below,
22 but it was not addressed as the type of garb that was
23 worn.

24 Regarding the nature of the offense test and
25 the -- the reason I think why it's too subjective is

1 best illustrated by language from *Clawans* which was
2 reiterated in the Frank opinion, wherein it stated that
3 doubts must be resolved not subjectively by recourse of
4 the judge to his own sympathy and emotions, but by
5 objective standards such as may be observed in the laws
6 and practices of the community taken as a gauge of its
7 social and ethical judgments.

8 One other point I wish to make with regard to
9 the national standards test to which Petitioners refer,
10 and that is what I call the head count of states. I
11 don't believe that has constitutional significance.
12 Although it appears as though 44 states provide jury
13 trials for persons accused with a first-offense DUI,
14 they do so for one of three reasons. First off, their
15 state constitution requires it; or secondly, their state
16 statutory scheme requires it; and thirdly, the other
17 reason why they provide jury trials is because the
18 maximum authorized penalty exceeds six months. It
19 exceeds the Baldwin bright line anyway. So, I don't
20 believe that that is -- it's in essence a red herring to
21 argue that 44 states provide it and therefore Nevada
22 should in this case.

23 Moreover, in *Martin v. Ohio*, this Court held
24 that there was no constitutional dimension to the fact
25 that 48 states had a particular approach to a criminal

1 procedure, in that case the self-defense argument, and
2 which side has the burden of proof. In that instance,
3 Ohio and South Carolina were recognized as the only two
4 states that placed the burden of proving self-defense on
5 the defendant. And the Court there found that there was
6 no constitutional dimension to the fact that 48 states
7 did so.

8 Without further questions, I thank the Court.

9 QUESTION: Thank you, Mr. Zalaoras.

10 Mr. Graves, you have two minutes remaining.

11 REBUTTAL ARGUMENT OF JOHN J. GRAVES, JR.

12 MR. GRAVES: Thank you, Your Honor. I'll be
13 brief.

14 QUESTION: You'll have to be.

15 MR. GRAVES: Yes, sir.

16 This Court has ruled in several cases, not per
17 se on the jury trial issue, that the offense of driving
18 under the influence is, is quite serious. Justices
19 White and Rehnquist, now Chief Justice Rehnquist, of
20 course, in that decision, Welsh v. Wisconsin, and in
21 other cases have found --

22 QUESTION: Could you speak up a little bit,
23 Mr. Graves?

24 MR. GRAVES: I'm sorry, sir.

25 Have found -- this Court has, has painted the

1 offense of driving under the influence in very somber
2 tones.

3 Responding quickly to the clear-cut guideline
4 test, the only thing that I can tell the Court is that
5 the lower courts have been applying all three tests for
6 years. Even in the Landry v. Hoepfner case in the Fifth
7 Circuit, which does not rule in our direction, applied
8 all three tests. And I think with respect to them that
9 it was afraid not to because you can't just say, well,
10 it doesn't apply to Baldwin or it doesn't fit the
11 Baldwin rule and therefore we -- we're going to deny the
12 right to jury trial. The --

13 QUESTION: Do you want us to change Baldwin?

14 MR. GRAVES: No, sir. No, sir, not at all.
15 Baldwin has worked well.

16 Counsel spoke about the Frank case and having
17 to overrule Frank. I would think that losing a driver's
18 license is more serious than living the life of a normal
19 citizen in the community. If you lose your license for
20 45 days, you may lose your job. And if you don't get a
21 restricted license, you're going to lose it for 90 days.
22 And I think that's -- that's pretty serious.

23 QUESTION: Yet, you can use -- lose your
24 driver's license by just driving with a -- an expired
25 license. I mean, it wouldn't have to be a criminal

1 proceeding at all.

2 MR. GRAVES: No, sir, that's true. But in, in
3 this -- in this particular case -- and I'm out of time.
4 In this particular case, it is a direct result of the
5 penalty.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
7 Graves.

8 The case is submitted.

9 (Whereupon, at 1:50 o'clock p.m., the case in
10 the above-entitled matter was submitted.)
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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:

No. 87-1437 - MELVIN R. BLANTON AND MARK D. FRALEY, Petitioners V.
CITY OF NORTH LAS VEGAS, NEVADA

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

BY alan friedman
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