

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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WASHINGTON, D.C. 20543

CAPTION: JIMMY JONES, SUPERINTENDENT, MISSOURI TRAINING
CENTER FOR MEN AT MOBERLY, Petitioner, v.
LARRY P. THOMAS
CASE NO: 88-420
PLACE: WASHINGTON, D.C.
DATE: April 26, 1989
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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 JIMMY JONES, SUPERINTENDENT, :
4 MISSOURI TRAINING CENTER FOR :
5 MEN AT MOBERLY, :

6 Petitioner :

7 v. :

No. 88-420

8 LARRY P. THOMAS :

9 -----x
10 Washington, D.C.

11 Wednesday, April 26, 1989

12 The above entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:30 o'clock a.m.

15 APPEARANCES:

16 STEPHEN D. HAWKE, ESQ., Assistant Attorney General of
17 Missouri, Jefferson City, Missouri; on behalf of
18 the Petitioner

19 SPRINGFIELD BALDWIN, ESQ., St. Louis, Missouri; on
20 behalf of the Respondent.

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1 In 1975, the conviction was affirmed by the
2 Missouri Court of Appeals. Two years later, in 1977,
3 the respondent initiated a post-conviction action in the
4 Circuit Court of the City of St. Louis. A
5 post-conviction action in State Court in the State of
6 Missouri is called a 2726 motion, and we'll probably
7 refer to it as that today.

8 In the year 1980 and in 1981, the Missouri
9 Supreme Court issued two opinions in cases called State
10 v. Olds and State v. Morgan. In those cases, the
11 Missouri Supreme Court determined that the Missouri
12 legislature did not intend that there be multiple
13 punishments, did not intend that the, that, that, that
14 defendants be punished twice for felony murder and
15 underlying felony.

16 Shortly after those opinions, on March 27,
17 1981, the 2726 motion, the PCR motion, was amended to
18 include a double jeopardy claim on the basis of State v.
19 Morgan and State v. Olds. Later that year, three months
20 later in June 16, 1981, then Governor Christopher Bond
21 issued a commutation to the respondent for the attempted
22 robbery conviction and sentence.

23 One year later, June of 1982, the Circuit
24 Court of the City of St. Louis granted respondent's
25 motion for 2726 Relief. The attempted robbery

1 conviction and sentence were vacated.

2 QUESTION: Why was, why were these repeated
3 actions taken after it had already been decided? I, I
4 just didn't understand why we had two additional
5 proceedings after it had already been resolved.

6 MR. HAWKE: Okay. Olds and Morgan are
7 collateral proceedings. They involve completely
8 different defendants, and it was not until after Morgan
9 and Olds were decided by the Missouri Supreme Court that
10 the 2726 motion was amended to, to include a double
11 jeopardy claim. Before Morgan and Olds, there was no,
12 there was no indication in the Missouri Jurisprudence
13 that there was a, there potentially could be a double
14 jeopardy problem here. In fact, in State versus
15 Overstreet, the Missouri Supreme Court indicated that
16 there was no double jeopardy problem.

17 QUESTION: I guess you didn't understand my
18 question. I didn't understand why there was a
19 commutation and then later this second proceeding to
20 set, set it aside.

21 MR. HAWKE: Okay. When the 2726 motion was
22 initially filed in 1977, it was denied. The denial went
23 up on appeal to the Missouri Court of Appeals and was
24 remanded back to the Circuit Court of the City of St.
25 Louis because there was an incomplete record for the,

1 for the Missouri Court of Appeals to consider the 2726
2 appeal.

3 The Governor's commutation is completely
4 separate. It is completely different. There is no, I
5 do not believe that there's any relationship between the
6 Governor's commutation and the double jeopardy claim.

7 During the late 70s and early 80s, uh, there
8 was a program with the Missouri Department of
9 Corrections where governors commutations were issued
10 where a prisoner serves seven-twelfths of his time in a
11 peaceable manner. And there is discussion of that old
12 governor's commutation program in cases called Love v.
13 Black and Parrish v. Wyrick, which I believe are cited
14 in brief, uh, on, in the main brief.

15 But the, but to answer your question directly,
16 there is, I do not believe that there is any
17 relationship between the commutation and the litigation
18 in the Circuit Court of the City of St. Louis.

19 The 2726 relief was granted by the St. Louis
20 City Circuit Court. The attempted robbery conviction
21 and sentence were vacated and held for nought. The
22 respondent appealed to the Missouri Court of Appeals
23 arguing that the attempted, that the first-degree murder
24 conviction need to be vacated as well. The Missouri
25 Court of Appeals affirmed the denial of relief and held

1 the procedures used by the rule 27.26 circuit court did
2 not prejudice the respondent.

3 With those facts in mind, it is now necessary
4 to examine what exactly happened in the courts below,
5 the federal court below, after the petition for writ of
6 habeas corpus was filed. And in the appeal to the, uh,
7 to the United States Court of Appeals for the 8th
8 Circuit. As the Court knows, in a panel opinion there
9 were three different opinions issued by the panel, uh,
10 the effect of which were to, uh, rule that a double
11 Jeopardy violation existed but to remand the case to the
12 state court to determine if, if the double jeopardy
13 violation could be cured.

14 The 8th Circuit sitting en banc reheard the
15 case and ruled on a five to four decision that the
16 respondent's double jeopardy rights were violated.

17 With this background and procedure in mind,
18 it's now necessary to examine exactly the, what the
19 Court of Appeals for the 8th Circuit ruled and to
20 examine whether or not the respondent's double jeopardy
21 rights have been violated.

22 The Court of Appeals ruling held for nought
23 the litigation that occurred in the, in, in the state
24 court. Held for nought the litigation that vacated the
25 multiple punishment. For the respondent to be entitled

1 to federal habeas corpus relief, he must demonstrate
2 that he is "In custody in violation of the
3 Constitutional laws or treaties of the United States."
4 That is the language of the habeas corpus statute.

5 Now, the respondent attempts to invoke the
6 double jeopardy clause. The double jeopardy clause of
7 the, of the Constitution, as this Court noted in North
8 Carolina v. Pearce, protects against reconviction after
9 an acquittal, mind that's not the situation here. It
10 protects against, uh, uh, a reconviction after, after a
11 conviction. It prohibits reprosecution after a
12 conviction. That's not the situation here. North
13 Carolina v. Pearce also describes that the double
14 jeopardy clause precludes multiple punishment.

15 This Court in its, has described what it means
16 by multiple punishment in a series of cases from back in
17 the early 80s in DiFrancesco, in Whalen and in Missouri
18 v. Hunter. This Court has described the multiple
19 punishment aspect of the double jeopardy clause as
20 prohibiting punishment that is in excess of what the
21 legislature intended.

22 In this situation, the legislature --

23 QUESTION: Does that mean that if I get, if I
24 get sentenced, uh, for a particular crime for five
25 years, uh, and, uh, then under a statute that allows

1 five to 20, and the trial judge later has second
2 thoughts, uh, he can call me back and give me another
3 10? Think that's all right?

4 MR. HAWKE: It depends on the context of what
5 you are describing.

6 QUESTION: Or even a different trial judge
7 calls me back and gives me another 10. That's okay,
8 because we haven't exceeded what the legislature
9 intended.

10 MR. HAWKE: I, I, that's, that is a close
11 question. I --

12 QUESTION: I don't think it's close at all.
13 That's, that's the problem.

14 MR. HAWKE: What you have, what you are
15 looking at there is the, at the expectancy of the
16 defendant. In the DiFrancesco case, the court, uh,
17 affirmed a procedure where the Court of Appeals could
18 increase the punishment because the defendant's
19 expectation, uh, uh, of finality in the punishment was
20 not brought in the question. If the defendant is just
21 brought in five years later and the trial judge says,
22 well, I'm going to increase your sentence to 20 because
23 for whatever reason, I, I believe that, I believe that
24 the defendant's expectancy in punishment would certainly
25 be implicated here.

1 QUESTION: Expectancy is not to be punished a
2 second time for the same offense. And here he was
3 sentenced and punished once, and you are saying, despite
4 your expectation that you were sentenced and punished
5 and once, we're going to bring you back and sentence you
6 again because you got off on the other one.

7 MR. HAWKE: In this particular case, when the
8 defendant was sentenced, his expectancy was to serve 15
9 years imprisonment followed by a term of life
10 imprisonment. His, when he filed a rule 2726 motion in
11 State Court, that --

12 QUESTION: Expectancy for the defense was to
13 serve 15 years or as much less as he could get off with
14 if he, if he came under the Governor's commutation
15 program. Wasn't that his expectancy on this offense?

16 MR. HAWKE: On this offense, when he was
17 sentenced, he had the expectancy of serving 15 years
18 followed by a life term.

19 QUESTION: Not on the single offense.

20 MR. HAWKE: When he was sentenced.

21 QUESTION: When he was sentenced. What do you
22 -- did he get the two terms for the, for, for a single
23 offense?

24 MR. HAWKE: He received two terms for the, uh,
25 for the attempted robbery. But at that time, at the

1 time he was sentenced, there was, there was, there was
2 no, there was no way for him to predict Morgan and Olds
3 would come down. His subjective expectation at the time
4 he was sentenced was to serve 15 years followed by a
5 life term.

6 When he initiated a rule 2726 motion, the
7 multiple punishment that had become exposed under Morgan
8 and Olds was revealed. And the sentence was lowered
9 from 15 years followed by a life to a term of life
10 imprisonment. A, a term that is authorized by the
11 Missouri legislature. So, under this Court's Juris --

12 QUESTION: Well, I think we are playing games
13 here. Uh, I think it depends on what you mean by the
14 same offense. He was originally sentenced for two
15 different offenses. Then the Supreme Court of the State
16 said no, you can't, you can't prosecute under two
17 different statutes for this one, for this one, uh,
18 offense, and therefore, only the first offense stands.

19 And his expec -- his expectation under that
20 first offense, it seems to me, was 15 years.

21 MR. HAWKE: I, uh, I, I must respectfully
22 disagree. At the time he was sentenced, his subjective
23 expectation was to serve 15 followed by life. And, even
24 if you were to look at it from the way that you descri
25 -- the way that you described it, he could expect to

1 serve, his legitimate expectation would have been to
2 have served 15 years or a life term. And in this
3 situation, he is going to serve a life term. Now that
4 fulfills his, uh, any, the objective expectation that
5 you are describing there.

6 QUESTION: Mr. Hawke, may I, may I --
7 supposing he had served the full 15 years on the armed
8 robbery conviction and was one year into the life
9 sentence in the time. The Governor then commuted the
10 life sentence on the ground that, the very ground he did
11 here. Could then the Judge have resented him on the
12 already served 15 year sentence, I'm going to change
13 that to life because you expected to serve life anyway?

14 MR. HAWKE: I do not believe so, Your Honor,
15 because the state statute for attempted robbery set as a
16 maximum sentence 15 years Imprisonment. Uh, the
17 respondent was sentenced maximum term 15 years. So, uh,
18 I, I don't, I, in your situation, I do not believe they,
19 that, that the Judge could have done that because the
20 sentence would have been in excess of what the, of what
21 the, uh, legislature intended.

22 QUESTION: Well, but, see here, isn't that
23 what it, what happened here? Did he set aside the, he
24 set aside the, uh, murder conviction or the robbery
25 conviction?

1 MR. HAWKE: The attempted robbery conviction
2 was what was set aside by the state court.

3 QUESTION: The murder conviction remains
4 undisturbed, isn't that correct?

5 MR. HAWKE: That is correct. That is correct.
6 The cases that are primarily relied upon by
7 the, by the, by the Court of Appeals for the 8th Circuit
8 are cases called Lange and Bradley. In Lange, I believe
9 that you can read Lange as consistent with the Court's
10 opinions in Whalen and in Hunter and the other, and, and
11 the other ca -- DiFrancesco.

12 In, in, in the Lange case the defendant was
13 sentenced to a term that was not authorized by the
14 statute. The sentencer, uh, sentenced the defendant to
15 a term, to a term and to a fine where the statute only
16 authorized a sing--, an alt--, one or the other, a fine
17 or a term imprisonment. So, Lange certainly stands for
18 the proposition that the sentencer cannot sentence, uh,
19 a defendant to a term greater than what the legislature
20 authorizes.

21 Bradley, the other case relied upon by the 8th
22 Circuit, is in--

23 QUESTION: Well, but Lange stands for more
24 than that. Because it also says you can't even sentence
25 him, make him serve a sentence that legislature did

1 authorize if he has already paid the fine or served the
2 other branch of it.

3 MR. HAWKE: There is language to that effect
4 in --

5 QUESTION: Well, that's the holding.

6 MR. HAWKE: I, I must respectfully disagree
7 with that, Your Honor. I think that there is language
8 to that effect in Lange, but I believe that language
9 would be dicta.

10 QUESTION: Well, what did the case hold, do
11 you think?

12 MR. HAWKE: I believe that the case hold,
13 holding is the same as in Whalen, DiFrancesco and
14 Hunter, that the sentencer cannot sentence a defendant
15 to a term greater than what the legislature authorized.

16 QUESTION: And the reason it was greater is
17 because there were two sentences, only one of which
18 would have been authorized.

19 MR. HAWKE: That is correct.

20 QUESTION: Wasn't that exactly what was true
21 here?

22 MR. HAWKE: No, that is not.

23 QUESTION: There are two sentences, only one
24 of which would have been authorized, because it's only
25 one offense.

1 MR. HAWKE: But the amount of time that is
2 authorized by the Missouri legislature is a term of life
3 imprisonment for, for a murder conviction. The
4 defendant has not been sentenced to any term greater
5 than life imprisonment.

6 QUESTION: Why can't you say the same thing
7 about Lange?

8 MR. HAWKE: In that situa-- in that, in Lange,
9 Your Honor, the defendant was sentenced to a term, uh,
10 to a term of, uh, uh, of, uh, well, to a term and to a
11 fine.

12 QUESTION: Right. Either one of which would
13 have been permissible.

14 MR. HAWKE: And once he paid the fine, then,
15 then the courts held that, that, that the defendant
16 could not be required to serve prison time. Now --

17 QUESTION: Why is that different from serving
18 15 years when you are sentenced to both 15 years and
19 life on just one offense?

20 MR. HAWKE: The key here, Your Honor, I
21 believe, is that the defendant, that the defendant's
22 time for the attempted robbery charge was credited, once
23 the attempted robbery sentence was vacated. The time
24 that he had served was credited towards completion of
25 the first-degree murder conviction and sentence. So,

1 you don't have multiple punishments here. You have, you
2 have a single punishment. This defendant --

3 QUESTION: Well, that would be like saying
4 we'll give you the \$10 fine back. That, it, would they
5 have saved it in Ex parte Lange if they had offered to
6 return the fine?

7 MR. HAWKE: Well, that was the situation that
8 the court was faced with in Bradley. Uh, and --

9 QUESTION: -- question, isn't it?

10 MR. HAWKE: They gave an answer to that
11 question that is inconsistent with this Court's
12 Jurisprudence with double Jeopardy.

13 QUESTION: Well, but it gave the answer. The
14 answer was no.

15 MR. HAWKE: That is gave an answer and an
16 answer that was unsupported by, by case law, except for
17 the dicta in Lange and it provide, it provide, the
18 holding, that particular holding in Bradley has not been
19 followed by this Court since then.

20 QUESTION: It's never been expressly
21 questioned, has it?

22 MR. HAWKE: Uh, it has been expressly
23 questioned by the lower courts. But it has not been, it
24 has not been expressly questioned before this Court
25 until today. Now, the, the language that you are

1 referring to is the language that says, when an
2 alternative term is, uh, uh, uh, an alternative term of
3 punishment has been completed, then the power to
4 sentence or to punish is over. Now that does not fit in
5 to this Court's description of the double jeopardy
6 clause, uh, since, since the Bradley case.

7 QUESTION: Well, may, may not Bradley have
8 rested partly on the, on the statutory idea, too. That
9 was totally within the federal courts. That is correct.
10 And that's something that, that has struck me about both
11 Lange and Bradley is that it's a federal court
12 supervising a federal sentence.

13 In here you have a situation where the state
14 court, uh, heard a claim of multiple punishment. The
15 state court, the 2726 court examined the amended motion
16 for 2726 relief and vacated the attempted robbery
17 conviction and sentence, with that time being credited
18 towards completion of, of, of the murder sentence.

19 When you look at the habeas statute, the
20 habeas statute says, whether or not the petitioner is in
21 custody in violation of the constitutional laws or
22 treaties of the United States.

23 QUESTION: But may I just ask, at the time
24 they vacated the, that, that sentence, had not the
25 Governor already commuted it?

1 MR. HAWKE: Uh, yes. He had commuted about a
2 year early.

3 QUESTION: So they vacated a sentence that had
4 fully been served at that time.

5 MR. HAWKE: He, uh, that is correct. They,
6 they con--, uh, it was vacation of a conviction that had
7 already been served. That is not unprecedented. There,
8 in, in Missouri --

9 QUESTION: I agree. It's exactly like the Ex
10 parte Lange. It is not unprecedented.

11 MR. HAWKE: It's a situation where Missouri
12 remedies exist where defendants can vacate, uh,
13 convictions that have already been served. In Missouri
14 procedure we have a procedure called writ of error coram
15 nobis that is exclusively available for petitioners who
16 have already completed service of their sentence. So
17 it's not unheard of at all.

18 Now, and in fact, I believe this Court heard
19 last in, last month a case called Mullain where the
20 Court is considering expanding the scope of federal, uh,
21 of 2254A to include petitioners who have already
22 completed service of their sentences.

23 So, you know, the, the fact that the, that
24 the, uh, vacation occurred after the commutation I don't
25 believe is particularly significant and should not be

1 particularly significant. We shouldn't say that on
2 Janu--, on June 15 of '81 the defendant was, could,
3 could get 2726 relief and that on June 17, the day after
4 the commutation, that he couldn't. That doesn't make
5 real good sense. That's drawing a line based really on
6 a technicality, uh, because the defendant was entitled
7 to relief from the state court and that's what he got.

8 Now, the, the, the technical nature of this
9 situation, the technical reliance upon the, the
10 technical aspect of relying upon Bradley and upon Lange,
11 best is really described well by the dissent from the en
12 banc opinion of the 8th Circuit. In, when you follow
13 those cases blindly, you're destroying the intent of the
14 Missouri legislature for this crime of attempted robbery
15 with a murder along with it. The, the Missouri
16 legislature intends that there be life imprisonment.

17 You are also destroying the intent of the
18 sentencing judge. The sentencing judge was showing
19 society's outrage at the heinous nature of the
20 respondent's crimes when he sentenced the respondent to
21 15 years and life imprisonment, the maximum terms, and
22 then ordered them to run consecutively.

23 Now, if the, if the sentencing judge had not,
24 had done the opposite, if he had set the life term
25 first, we would not be before this Court. There would

1 not be any problem. If the sentencing judge had been
2 nice to the defendant, if he had ordered that the terms
3 run concurrently, again, we would not be before this
4 Court. The, as the opinion below notes, that's due to
5 just the whim of the 15 year term running first is
6 because, is because it was the first count in the
7 charging document. Just happen chance. Happen, happen,
8 happenstance that it occurred that way.

9 So, really when you are looking at this case,
10 the, the situation is really not like Lange and Bradley
11 as long as you interpret Lange and Bradley as only being
12 consistent with this Court's jurisprudence in multiple
13 punishment areas. This defendant today has one
14 conviction. This defendant has one sentence. This
15 defendant has only served time since 1973 for the
16 completion of that felony murder sentence. There is no
17 multiple punishment. There is no multi --

18 If I may, I'd like to reserve the remainder of
19 my time for rebuttal.

20 QUESTION: Very well, Mr. Hawke. Mr. Baldwin?

21 ORAL ARGUMENT OF SPRINGFIELD BALDWIN

22 ON BEHALF OF THE RESPONDENT

23 MR. BALDWIN: Mr. Chief Justice, may it please
24 the Court:

25 I think that if the Court sees fit to reverse

1 the United States Court of Appeals for the 8th Circuit,
2 the law of double jeopardy is going to be about as
3 confused as I think the argument I just heard was.

4 The facts in this thing are simple. In fact,
5 I'm amazed that there has been all this commotion over
6 this case. I think since the Fifth Amendment was
7 adopted, when a man was convicted of what is legally one
8 crime, served one legal, lawful sentence for it, he was
9 entitled to go free.

10 QUESTION: There's a certain ludicrousness
11 about what happened here, Mr. Baldwin.

12 MR. BALDWIN: Mr. Chief Justice --

13 QUESTION: I'm asking you a question.

14 MR. BALDWIN: I beg your pardon, sir.

15 QUESTION: I said, there's a certain
16 ludicrousness about what happened here, because the man
17 was convicted of attempted robbery. He was convicted of
18 murder. He ends up serving a sentence for attempted
19 robbery, seven or eight years, and the 8th Circuit says
20 he's free under the double jeopardy clause. Now, that
21 wouldn't make any sense to an awful lot of people if you
22 just explained it to them.

23 MR. BALDWIN: Well, I would say this. I think
24 one thing that has been completely overlooked in this
25 case so far is the effect of a governor's commutation of

1 a sentence. When the Governor commuted the man's
2 sentence, then the legal position in Missouri and in, I
3 think, the universal law, accord--, at least according
4 to American jurisprudence, is that the man's legal
5 position is the same as if he had been originally
6 sentenced to that length of time.

7 Now this Court, in Whalen v. the United
8 States, held that, uh, where there is a felony murder
9 the underlying felony is a lesser-included defense, and
10 unless the legislative body had decided there should be
11 multiple punishment, there should not be one. It was
12 one crime.

13 And this man committed one crime. They call
14 it first-degree murder. But it is the codification of
15 the old felony murder. He received the robbery
16 sentence. He apparently was a very good boy in prison
17 and so forth. We are not informed as to why the Governor
18 commuted his sentence, but I know from the motions I had
19 to file to get that writ of habeas corpus that he had
20 completed his high school equivalency, had completed,
21 uh, two years of college with grades of A and B. Uh,
22 and he is now living with his sister, the school
23 teacher, and is now employed.

24 Uh, my opponent said there would be no problem
25 if he had only been sentenced to life imprisonment first

1 and not the 15 year sec-- not the 15 years first. That,
2 I submit, is not true. Because no matter which he had
3 been sentenced to first, when the Governor commutes one
4 of them, he has served one complete, legitimate sentence.

5 Uh, the concept of Lange, Lange definitely
6 held.

7 QUESTION: Well, when a sentence is commuted,
8 why is that, uh, equivalent to having the sentence be
9 served? You say when the sentence is commuted that he
10 served the sentence.

11 MR. BALDWIN: That is true. Uh, it is --

12 QUESTION: Suppose he'd begun, suppose he was
13 serving the sentence for life first and the Governor
14 said, by the way, I'm going to commute your second
15 sentence. You wouldn't say that that sentence had been
16 served, would you?

17 MR. BALDWIN: Yes, I would.

18 QUESTION: Why?

19 MR. BALDWIN: Because the Governor says so.
20 He says his time shall on that sentence shall end as of
21 such and such a date.

22 QUESTION: Well, perhaps I don't understand
23 what a commutation is. Is a commutation in that respect
24 different than a pardon, I take it?

25 MR. BALDWIN: I would believe it is. I mean,

1 --

2 QUESTION: Well, in this case it was commuted
3 to time served, wasn't it?

4 MR. BALDWIN: I think that's true.

5 QUESTION: That, that sounds to me, uh, in, as
6 a distinction from a complete pardon.

7 MR. BALDWIN: Yes, it was not a complete
8 pardon.

9 QUESTION: The effect of it is is that the
10 sentence simply doesn't have to be served.

11 MR. BALDWIN: That's right.

12 QUESTION: Mr. Baldwin, how did these
13 commutations come about? Was this the only case which
14 Governor Bond exercises commutation power or were there
15 a string of them at the same time?

16 MR. BALDWIN: I do not know.

17 Uh, Lange was a case where a man had been
18 stealing mail bags and, uh, the district court sentenced
19 him contrary to the statute to two sentences. The
20 statute provided he could be fined or imprisoned. And
21 the judge assessed both against him. The lawyer ran in
22 and paid the fine. And the Supreme Court said, the
23 judgment is satisfied. It was a legitimate alternative
24 penalty of the law and he satisfied, and it's over.
25 He's to be discharged.

1 A double jeopardy clause, of course, applies
2 to the states as held in Benton v. Maryland by this
3 Court. And now, that, that, uh, the respondent Larry
4 Thomas has served one legitimate sentence for his felony
5 murder, he is entitled to be discharged. And I think
6 that's pretty open and shut.

7 Now, if you want to abandon that, you are
8 really going to foul up the law of double jeopardy. And
9 I don't think anybody is going to know what it means in
10 the future. Uh, my opponent said that the time that he
11 had served on his 15 year sentence was credited. Now
12 the Missouri Court of Appeals did say that it had been
13 credited. But when I read the lower courts, the
14 Missouri Circuit Court's judgment on a 2726, I did not
15 see where it mentioned that it was crediting that time.
16 But --

17 QUESTION: Follow up the law --

18 QUESTION: We'll resume there at 1:00, Mr.
19 Baldwin.

20 [Recess]

21 QUESTION: Mr. Baldwin, you may continue.

22 MR. BALDWIN: Mr. Chief Justice, may it please
23 the Court:

24 We have the Lange decision of 115 years ago,
25 and then, uh, the next thing we have is, uh, I think,

1 uh, United States versus Benz, which was to the same
2 effect. And that was in 1930. Then we have In re
3 Bradley, which was in 1943. Bradley, of course, was
4 convicted of a contempt of court for threatening a
5 witness in the corridor of the courthouse, fined and
6 sentenced to jail. His lawyer paid the fine, and uh, the
7 court said he had satisfied the judgment.

8 Here, this defendant was charged with robbery,
9 first-degree, and he was charged, I mean, with attempted
10 robbery, and he was charged with felony murder. He was
11 convicted. Judgment was entered on two counts, and he
12 could have been sentenced to either one. And he was
13 sentenced to both. I see no difference in principle
14 between the fact that there were alternative penalties.
15 When he served one, he had satisfied the judgment.

16 And, uh, this kind of law has been the law of
17 this nation, I think, since the beginning. Furthermore,
18 I would really like to emphasize, too, the effect of the
19 Governor's commutation. I'd like to make the analogy.

20 Suppose that there was a federal prisoner.
21 And under the law that passed, Congress passed, some
22 district court judge had sentenced him to forty years,
23 and two days later the President of the United States,
24 under his power to pardon or reprieve, did one or the
25 other so that the man went free, would the court then

1 say, oh, the trial judge intended he serve 40 years.
2 Congress intended that he serve 40 years. We'll just
3 set that first 40 year sentence aside and we'll then
4 reinstate it. That way we get around the President's
5 pardon or reprieve. And so it's only fair that he serve
6 40 years. I don't think you would do that.

7 QUESTION: What if the Supreme Court of
8 Missouri had held in this case that, uh, that, uh, when
9 you have a, uh, felony murder like this, uh, and there's
10 a, and a jury is instructed that they can find one or
11 the other or both, and the jury comes in and finds both,
12 what if a, what if the Supreme Court of Missouri had
13 decided that, that the, the man could only be sentenced
14 to the life, to life imprisonment?

15 MR. BALDWIN: I don't think it decided that.
16 I think it --

17 QUESTION: Well, I know. But what if it had?
18 What if it had?

19 MR. BALDWIN: Then he could only be sentenced
20 to life imprisonment --

21 QUESTION: Well, I know. But then, on the
22 facts of this case, he, he had been sentenced to both
23 and he had served his 15 year sentence. Don't you think
24 the, uh, surely then, uh, he could be left in jail on
25 the grounds that, uh, uh, the only sentence that he

1 could have been sentenced to, really, was the life.

2 MR. BALDWIN: Well, if the Missouri Supreme
3 Court had decided what you suggest, then it would be,
4 uh, I think, a void sentence to sentence him, uh, for
5 both. That's not this case.

6 QUESTION: So the 15 year, the 15 year
7 sentence would just have been void.

8 MR. BALDWIN: That's right.

9 QUESTION: Right. You don't think that's even
10 close to this case.

11 MR. BALDWIN: No, I don't, because it has been
12 the precedent as set in Ex Parte Lange that the
13 sentences in that case, the sentences in, in, uh, In re
14 Bradley, the sentences in United States v. Benz, were
15 voidable, not void. So, since they were voidable, I do
16 not see any reason that the Governor or Missouri could
17 not commute one of them and when he does so, he has
18 served a complete sentence for his crime. And that's
19 the end of it.

20 I think, too, that --

21 QUESTION: Excuse me. What if he hadn't
22 finished his 15 years, or, uh, and there had been no
23 commutation?

24 MR. BALDWIN: Then you're getting in, I
25 believe, to a different class of cases. There is a

1 class of cases where the defendant has not finished the
2 sentence. He's received two sentences. He should have
3 only received one. And neither has been completed.
4 This Court and other federal courts, I don't know, I
5 think this Court, but I know other federal courts have
6 held the trial judge may then make a choice between the
7 two. Uh, vacate one and give him the other. That's the
8 way I understand it.

9 QUESTION: How much of that is double
10 jeopardy, law, uh, Mr. Baldwin, and how much is just
11 ordinary state criminal law or sentencing law?

12 MR. BALDWIN: I believe in those cases that
13 Justice Scalia, I believe, inferentially referred to,
14 that that is double jeopardy law, because I believe the,
15 the defendants in those cases have maintained that the
16 double jeopardy clause was being violated by the court
17 not doing what they wanted. Whereas, the courts have
18 said, in that situation it's what the trial judge wants.

19 So I think double jeopardy has been an issue
20 in those. And, uh, I believe during argument in the
21 court, in the 8th Circuit, I pointed out that the, uh,
22 the Attorney, Assistant Attorney General had, uh, not
23 cited a single case in point on these facts. And, uh, I
24 don't think he has yet.

25 It's a princi-- It's a legal principal that's

1 endured, I would believe, for centuries. And, I don't
2 know why it should be changed. If it is true, and I
3 believe it is, that the founding fathers put the first
4 ten amendments in the Constitution to restrain the power
5 of courts and I respectfully submit you should be
6 restrained and affirm the Judgment of the 8th Circuit.

7 I think there's another reason. If the
8 Governor of Missouri wanted to commute this man's
9 sentence, he gave him a present, so to speak. He may
10 not have realized he was giving him a present, but he
11 gave him one. And now you are asked to reach back in
12 time and make the position of the prisoner more
13 onerous. Now my opponent says, I say that's a ex post
14 facto type judgment, which is forbidden by the due
15 process clause according to your case of Bouie v. City
16 of Columbia.

17 My opponent says that point was not raised
18 originally and cannot now be raised because it's a
19 matter of procedural default. I say that since the
20 Judgment of the United States Court of Appeals for the
21 Eighth Circuit was for the prisoner, that I can cite
22 that as a reason to support that judgment. I don't
23 think you have to cross-appeal. I don't think you have
24 to do anything. Uh, I mean, just to be absurd, if, uh,
25 it was proposed that you engage in 104 constitutional

1 violations, uh, and I argued, uh, oh, that's all right
2 because it wasn't raised in the court below, that's
3 pretty silly.

4 Uh, and here it is proposed that you enter an
5 ex post facto judgment which you have said violates due
6 process. And, uh, I might point out, of course, that
7 the various United States Courts of Appeals have
8 followed these cases of Ex parte Lange, In re Bradley,
9 United States versus Benz, and we have their cases that
10 are right in line. And you are just going to upset the
11 whole thing if you reverse the United States Court of
12 Appeals for the Eighth Circuit.

13 Uh, besides, you are going to really be
14 holding the Missouri Governor's power to commute
15 sentences for naught, because that's going to be taken
16 away from him. He no longer has that. He no longer can
17 say, I served that sentence.

18 No doubt taking that away from him makes his
19 situation more onerous. Uh, you pointed out in Weaver
20 versus Graham that when Florida enacted a statute that
21 took away good time, it was an ex post fact statute as
22 far as those prisoners who had earned good time under
23 that, and made their condition more onerous. And you
24 held it was unconstitutional.

25 You, uh, had somewhat the same, uh, situation,

1 well, not really, but you had an ex post facto judgment
2 in that Boule versus the City of Columbia. There two
3 blacks went into a drugstore, sat at a counter where
4 they, or sat in a booth, where they might be served
5 food. In those days in South Carolina, places were not
6 serving blacks. And they didn't actually refer, uh,
7 refuse to serve them. What they actually did was they
8 asked them to leave. The statute said that, uh, if you
9 enter upon a landowner's property without his consent
10 where you have received notice that you shall not enter,
11 then that's some kind of a crime. And the South
12 Carolina court interpreted this statute to add this
13 additional business which wasn't in it, that if you are
14 asked to leave, you violated that statute. And they,
15 you're, this Court said that's not so. That's an ex
16 post facto judgment.

17 And that's what you're doing when you take
18 this commuted sentence away and say it's of no effect.
19 The simple thing is that once in a while, under the
20 Constitution, things happen that courts don't like. And
21 I think that there is where you have to decide you'll be
22 restrained. So, I would ask that you affirm the
23 judgment.

24 QUESTION: Very well, Mr. Baldwin. Mr. Hawke,
25 do you have rebuttal?

1 REBUTTAL ARGUMENT OF STEPHEN D. HAWKE

2 MR. HAWKE: Mr. Chief Justice, and may it
3 please the Court:

4 One of the last comments that were made by the
5 respondent was, sometimes the federal Constitution
6 requires courts to do things that the courts don't like.
7 If that's the situation, then perhaps there is a
8 fundamental flaw in what the court is thinking. The
9 example here is with multiple punishments. The multiple
10 punishment concept of the double jeopardy clause only
11 prohibits multiple punishment that it, or not, or only
12 prohibits punishment that is not authorized by the
13 legislature.

14 The, the, the application of Bradley to this
15 situation is what creates the problem. It's what
16 created the result of the, of the five judges from the
17 Eighth Circuit. When you look at Bradley, and when you
18 look at it and, and think that the rule announced in
19 Bradley, that completion of service of alternative
20 sentences precludes the power of the court to punish
21 further, that language, the holding in Bradley, which is
22 dicta from Lange, had no support before Bradley, and has
23 not been followed by this Court since Bradley.

24 QUESTION: Mr. Hawke, I suppose your case
25 really depends upon whether that's really true, that all

1 that the, all that the double jeopardy clause provides
2 for is no more penalty than is authorized by the
3 legislature. And I'm, I'm, I'm just not sure that's
4 true. Uh, again, what do you do about the situation
5 where a Judge makes a mistake in sentencing and the
6 fellow serves the sentence and then the Judge says, gee,
7 I made a mistake and he sentences him for the rest of
8 what the legislature authorized. Would you say that
9 double jeopardy clause does not cover that?

10 MR. HAWKE: The, the situation that you are
11 describing refers to the expectancy of the defendant and
12 a finality of the sentencing process.

13 QUESTION: That's right. And that, that's,
14 that has nothing to do with the intent of the
15 legislature, though.

16 MR. HAWKE: The, the Court discussed this in
17 DiFrancesco, and in the situation here, you either have,
18 you have a defendant's subjective expectation at the
19 time of sentencing that he's going to serve 15 years
20 followed by a life sentence. That was his subjective
21 expectation when the sentencing judge announced his
22 intent in sentencing, or announced his sentence.

23 Do you want to look at some objective in
24 expectation of the defendant? The defendant's objective
25 expectation at the time of sentencing was that he would

1 either serve 15 years for the attempted robbery
2 conviction or that he would serve a life term for the
3 murder connected with the attempted robbery.

4 Now, if you look at that objective expectation
5 that the defendant may have, that's what's been
6 fulfilled here. The defendant is under one conviction
7 for one sentence, life imprisonment. So, any expecta--
8 ex, uh, expectancy interest by the defendant is not, is
9 not really at issue in this particular case, be it
10 either at a subjective level or at --

11 QUESTION: You, you, you may be right about
12 that, Mr. Hawke, but how does that respond to Justice
13 Scalia's question?

14 QUESTION: You're saying that as long as it,
15 it doesn't defeat his expectations, it's okay. But
16 before, you said flatly, that as long as the combined
17 sentences don't exceed what the legislature was willing
18 to permit, it was all right.

19 MR. HAWKE: The discussion, I think in
20 DiFrancesco and In Whalen and In Hunter focus primarily
21 upon the intent of the legislature in the punishment
22 process. There may be some type of expectancy interest
23 related to the finality of punishment, uh, that you just
24 can't bring in--

25 QUESTION: So, it's in other words, you do

1 concede that we have to do more than just look at what
2 the maximum sentence the legislature authorizes?

3 MR. HAWKE: Uh, that is uncertain. You can
4 certainly draw, uh, draw that inference from the
5 DiFrancesco case.

6 QUESTION: Well, I think maybe you have to
7 look at more than just his expectations plus the
8 legislature's intent as well. Suppose the sentencing
9 judge says, I'm going to give you eight years right
10 now. I'm really not sure that's going to be enough for
11 you. I'll think some more about it, and I may impose,
12 may impose a further sentence down the line. Do you
13 think that would, uh, be sustainable under the double
14 jeopardy clause?

15 MR. HAWKE: That's a hard case, Your Honor.

16 QUESTION: Well, it tests whether his
17 expectations are what govern. I mean, when you're
18 talking about the double jeopardy clause, you're talking
19 about a very technical provision. I mean the fact that
20 it has some fluky consequences doesn't surprise me any.
21 It, it is in its nature a technicality.

22 MR. HAWKE: And in response to that, I do not
23 believe that the Court should, should examine the, uh,
24 the case under the double jeopardy clause in a technical
25 manner. The Court should look at the purposes behind

1 the double jeopardy clause, uh, in this case be it
2 examining the, uh, making sure the punishment is not
3 exceeding the, uh, the legislature's intent, and perhaps
4 some expectancy interest. I don't think you have to get
5 into any type of expectancy interest in this case,
6 because other under either a subjective or objective,
7 uh, interest in the defendant, would not, is not
8 implicated here.

9 The process of sentencing is not a, is, it it
10 is a serious subject. It's a, it's an important
11 subject, one of the more important things, perhaps most
12 important thing, that a trial judge, be it at the state
13 court level or at the federal court level, has to do.
14 And as this Court noted in Bozza, that sentencing should
15 not be transferred into, into a game. It should not be
16 a situation where, uh, where a technical rule violates
17 the legislative intent or the senator's intent.

18 The situation you have in this case, if you
19 affirm the judgment of the Eighth Circuit is that you
20 have transformed the sentencing process into a game. In
21 particular, a game where the judge didn't have the
22 rules, the sentencing judge didn't have the rules of the
23 game until eight years later. It's like playing
24 Monopoly without having the rules that Milton Bradley
25 gives you. It's just not, it's just not the way that it

1 should be.

2 For the reasons stated, the Petitioner
3 respectfully requests that the judgment of the United
4 States Court of Appeals for the 8th Circuit be reversed.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
6 Hawke. The case is submitted.

7 (Whereupon, at 1:18 o'clock p.m., the case in
8 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:

JIMMY JONES, SUPERINTENDENT. MISSOURI TRAINING CENTER FOR MEN AT
MOBERLY, Petitioner, v. LARRY P. THOMAS

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