OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: RAY A. LEWIS, Petitioner v. UNITED STATES

CASE NO: 95-6465

PLACE: Washington, D.C.

DATE: Tuesday, April 23, 1996

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IN THE SUPREME COURT OF THE UNITED STATES

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RAY A. LEWIS, :

Petitioner :

v. : No. 95-6465

UNITED STATES :

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Washington, D.C.

Tuesday, April 23, 1996

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:10 a.m.

APPEARANCES:

STEVEN M. STATSINGER, ESQ., New York, New York; on behalf of the Petitioner.

CORNELIA T. L. PILLARD, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 95-6465, Ray Lewis v. United States.

Mr. Statsinger.

ORAL ARGUMENT OF STEVEN M. STATSINGER

ON BEHALF OF THE PETITIONER

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

By requiring jury trials in all criminal prosecutions, the Framers made a lasting statement about the structure of Government and the balance of political power. In cases where the threat to liberty is dire, the power to convict does not belong to the State, it belongs to the people themselves.

The Framers regarded the jury trial as such a potent instrument against Government oppression that they included the guarantee in the Constitution not once, but twice.

These bedrock political values, the plain language of the Sixth Amendment guarantee, and this Court's decisions construing the Sixth Amendment, all point toward a single conclusion. My client, who faced 1 year in prison on the two counts in which he was tried, was entitled to a jury trial.

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QUESTION: But wouldn't be if the counts were split up into two separate prosecutions.

MR. STATSINGER: That is correct, Justice Ginburg -- Ginsburg.

QUESTION: So if we accept your view in order to make anything but sort of a farcical rule we would have to, I suppose, have a rule of compulsory joinder.

MR. STATSINGER: I disagree with that, with all respect, Justice Souter. The reason is that in the first place it strikes us as very unlikely that the Government would seek to sever counts in order to circumvent this rule. The reason is that -- for that is that the Government derives a benefit from joining counts, and has every incentive to join them and not to sever them.

QUESTION: Well, it may, it may not. I mean, it may get a benefit if the evidence, in fact, is common to all of the counts, or all of the separate indictments, but if the Government really wants somebody to do the maximum amount of hard time, I suppose even under the guidelines there's some reason to believe the total will be greater if they're tried separately.

So the Government might be under conflicting motivations and it might in some cases decide to sever, and I would suppose if it does, unless we have a compulsory joinder rule, then the rule that you argue for

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is not going to be of any practical effect.

MR. STATSINGER: I continue to disagree with that view. I think that the value to the prosecution of joining counts would outweigh those concerns, because the Government would get not only the administrative convenience of a single proceeding, but it also does derive a tactical advantage from joining the counts in the first place.

The finder of fact gets to hear evidence that the defendant is, in essence, a worse defendant, because he or she has committed more than one offense, and there's also the possibility of some sort of spillover that might bolster some of the weaker counts.

QUESTION: You, at any rate, are not arguing for a compulsory joinder rule along with your view of the jury trial requirement.

MR. STATSINGER: I am not, Mr. Chief Justice. To the extent necessary, we believe that the Due Process Clause might give sufficient protection to protect against that kind of abuse.

QUESTION: Mr. Statsinger, how does your -- how does the rule you're urging square with the proposition that you cannot avoid jury trial requirement by committing that you will not ask for a sentence of more than 6 months? I mean, can the prosecution, by making that

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commitment and the judge, by saying at the outset, I -- it is understood that whatever -- eve if the defendant is found guilty he will not be sentenced by more than 6 months, can you eliminate the jury trial by doing just that?

MR. STATSINGER: No, you cannot, Justice Souter.

QUESTION: Now, why would that be consistent with the rule that you're urging here? It seems to me what it means is, by subtracting you can't avoid the jury trial. Why, by adding, should you require it?

MR. STATSINGER: The two positions are entirely consistent, Justice Souter, for this reason --

QUESTION: He's Souter, I'm Scalia.

MR. STATSINGER: I'm sorry, Justice Scalia.

(Laughter.)

QUESTION: You have paid me a great compliment.

(Laughter.)

MR. STATSINGER: With that proposition I agree.

QUESTION: Our jurisprudence is very similar. I can understand -- I can understand --

(Laughter.)

QUESTION: Since your questioning is similar, yes.

(Laughter.)

MR. STATSINGER: Justice Scalia, the two

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propositions are not in conflict, and the reason is because the way this Court has defined criminal seriousness for jury trial purposes is by looking at the authorized penalty regardless of whether it's the authorized penalty for a single serious offense or for the aggregate authorized penalty of petty offenses.

Once a case is serious, it is serious in the same away, regardless of whether it is serious by virtue of aggregation or serious because of the authorized penalty on a single --

QUESTION: Well, so then it's not just the power of the judge that you're concerned with, it's the dignitary or the interest or the stigma that's attached to the crime.

MR. STATSINGER: That is a component of this as well. Even if the judge promises a lenient sentence as a result, in order to extinguish the jury trial, the defendant is still left with the possibility of the conviction on more than one count, which itself carries not only a stigma but other collateral consequences, and indeed, it appears that the core of the jury-trial right was protection against the conviction power, and that there was less concern per se about the sentencing power.

QUESTION: But that's not the way our cases have interpreted it. I mean, the Nevada case, several others,

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have focused primarily on the potential for incarceration.

MR. STATSINGER: That is true, Mr. Chief Justice, but I think the important distinction between the Court's prior cases and this case was that in each of those cases the defendant was only being tried on a single count, so in a sense the question never arose in those cases, but it is our position that --

QUESTION: So you say there's a lot worse stigma being convicted of two counts than one?

MR. STATSINGER: It may not be a lot, Mr. Chief Justice, but I believe that there is some, and I -- again, I -- this is not our exclusive justification for this. We believe there are other justifications for allowing this.

QUESTION: That has to be your principal justification if the judge says, or the prosecution says at the outset that 6 months is the maximum. If that's taken out of play, then what are you left with, other than this stigma argument?

MR. STATSINGER: Well, we are left with the stigma, and we are left with the possibility of an unfair or an unjust conviction in the first place.

The reason why this Court has, and the Framers have always preferred jury trial is because they were viewed as the fairest mechanism for adjudicating the facts in a criminal case, and a defendant who comes before a

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court could reasonably view a jury trial, even today, as being a fairer proceeding than a bench trial.

QUESTION: Well, but if that's logical, why did the Court ever say that a jury trial doesn't carry over to misdemeanors? I mean, should you have an unfair misdemeanor trial where your maximum sentence is 3 months?

MR. STATSINGER: The Court -- the Court did that for two reasons. It looked back at common law history and found that there was a historical basis for saying that a trial on a single petty offense could be tried without a jury.

There also appears to be, particularly in Duncan, some concern about the administrative convenience, the balance between administrative convenience and the possible threat to a defendant, but again, that balance was struck in cases where the defendant was only being tried on a single count, and that balance has been struck only in cases where the defendant's sentencing consequences are 6 months or less.

And in this case the balance is tipped in the other direction because the sentencing consequences -- regardless of the promise, the sentencing consequences at the beginning are -- were well in excess of 6 months.

QUESTION: Well, why do you say regardless of the promise?

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MR. STATSINGER: I say that because the relevant measure of criminal seriousness has always been what is authorized rather than what is actually imposed.

QUESTION: Well, so you say the sentencing consequences, and it is quite an abstract thing. It doesn't have anything to do with the maximum sentence which this particular defendant might face.

MR. STATSINGER: That is correct, Your Honor. Perhaps I used the term injudiciously. The Court has always focused more on the authorized sentence rather than the likely or possible sentence, or, indeed, even the actual sentence imposed in a particular case.

QUESTION: And the reason for that was, as we've said in recent cases, the judiciary should not substitute its judgment as to seriousness for that of a legislature, which is far better equipped to perform the task.

Now, when you string together a bunch of offenses, each of which the legislature has found to be not serious because the sentence is under 6 months, how does that create a new legislative judgment that this case is now serious? It doesn't. It seems to me the legislative judgment remains the same, no matter how many legislated crimes you string together.

MR. STATSINGER: Justice Scalia, the legislative judgment that we are discussing is embodied in section

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3584(a), which authorizes consecutive sentences on multiple counts. It is our view that that statute confers a substantive authority on the Court to impose --

QUESTION: I see. I see.

MR. STATSINGER: -- consecutive sentences, and that it reflects a judgment that the commission of multiple offenses is a more serious transgression than the commission of a single offense.

Indeed, it is the same judgment that goes into authorizing a -- the particular penalty for any single offense. In either case, what the legislature is doing is it is setting the maximum penalty for the worst possible instance of that offense.

The maximum penalty for a single offense represents the authorized consequences in the worst possible case. Similarly, the authorized sentence for multiple offenses authorizes a particular sentence for the worst possible instance of that combination of offenses.

So it is our view that the judgment embodied in that statute is identical to the judgment that the Court has always looked to, or at least since Duncan has always looked to in determining criminal seriousness.

I believe that this is also consistent with the plain language of the Sixth Amendment itself. Although the Government takes the view that the jury-trial right is

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what they call offense-specific, or attaches only to categories of offenses, that is not borne out by the language of the Sixth Amendment, which says that the right attaches in all criminal prosecutions.

QUESTION: Mr. Statsinger, I have a question -- I don't know whether it goes to standing, but this sentence here was probation, right? Why would a defendant who got probation, no jail time, want to risk a new trial before a jury when the end result of that could be jail time?

MR. STATSINGER: I don't think it is a standing question. I think that the answer to that, Your Honor, is that we view the likelihood of an increased sentence, assuming he were convicted on retrial, as very slim, and the North Carolina v. Pierce line of cases we think protects Mr. Lewis from a more severe sentence should the case be retried and should the retrial end in a conviction.

But the jury-trial right has always been viewed as a structural right, or an absolute right, that is not contingent or affected by the sentence actually imposed. Certainly the defendant in Duncan, who received 60 days when he was facing 2 years, must have made that same calculus, and made the decision that the core importance of having a jury determine guilt or innocence in the first

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instance was more important, and certainly --

QUESTION: It sounds like the kind of determination that lawyers might make instead of the clients. I hope that's not the case here.

MR. STATSINGER: I don't believe it was the case --

QUESTION: Yes.

MR. STATSINGER: -- in this case.

QUESTION: Perhaps you'll argue that this is quite irrelevant either way, but I have no sense of how burdensome this rule that you propose would be on all of the State courts. It would seem to me that in magistrates' courts, municipal courts all over the country, multiple charges are frequently made. Prosecutors like to have multiple charges, misdemeanor varieties and so forth, but it seems to me this might be a very, very burdensome rule, but I have no statistics. I have no real grasp for that at all.

MR. STATSINGER: The answer, Justice Kennedy, is that this would not be a burdensome rule. We did look at statistics that were compiled by the Administrative Office of the United States Courts, which indicated that in fiscal 1994 the Federal courts heard an enormous number of petty cases, over 60,000.

Of those 60-odd thousand, exactly 74 went to

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trial, and of those 74, perhaps 15 involved multiple counts.

QUESTION: But that doesn't go to the State court situation that Justice Kennedy was asking about.

MR. STATSINGER: That is correct, Mr. Chief Justice, but I have looked at that as well. One of my amici has indicated that their research indicates that at least 30 States already grant, either by statute or State constitution, a jury-trial right that is broader than what the Sixth Amendment requires. My own research indicates that the number is more like 34, so we are, in fact, talking about a very small number of States to begin with.

QUESTION: We're talking about 17 or 20, I guess.

MR. STATSINGER: Roughly 17 or 20, Mr. Chief Justice.

I might add that I think the real instance where that burden was looked at and rejected was in Duncan, when the court applied the jury-trial right to the States in the first place. I think that the balance struck then was the appropriate one, and that there certainly has -- nothing had been changed in the last 30 or so years to indicate that the balance should now be weighted in favor of administrative --

QUESTION: Yes, but this -- no one is saying

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here that Duncan should be changed. This is just an application of Duncan, and surely it's a fair question of how is this going to affect prosecutions in the States?

MR. STATSINGER: I agree that it is a fair question, Mr. Chief Justice, but I believe that the answer to the question is that it will not have a tremendous impact on the States.

QUESTION: Well, it seems to me likely that it will, because 6 months is a fairly common cutoff point for petty offenses, and it seems to me quite ordinary, quite frequent for prosecutions to charge more than one petty offense.

MR. STATSINGER: Even if it is, Justice Kennedy, the possible consequences to a defendant who has a large number of 6-month offenses stacked up are severe indeed, so severe we believe as to trigger what the Sixth Amendment was intended to do, which is to protect defendants who are facing serious consequences from the potential abuse of power that the Framers saw in a bench trial.

So even if it is a -- even if it is a large number of cases, which I dispute, I submit that the Sixth Amendment values that that situation implicates are in this case more important.

QUESTION: I suppose you're arguing that the

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larger the number, the more important it is to vindicate the right.

MR. STATSINGER: I don't need to argue that, Justice Stevens --

QUESTION: Yes, that's your point. Yes.

MR. STATSINGER: -- but it may well be right, certainly with respect to what the Sixth Amendment really means and the core values that it contains, a society in which large numbers of defendants are subject to many years -- and the Government would concede that there's no limit, potentially unlimited exposure -- that those are exactly the kinds of cases that the Sixth Amendment is supposed to cover, and that --

QUESTION: Well, but you argue that there's no right, even if there's an agreement in advance, undertaking in advance to limit the sentence.

MR. STATSINGER: I do agree with that, and again, I say so for two reasons. The first is that the -- and I say this with all respect, the core value of the Sixth Amendment is to protect defendants from judges, and I think it would be contrary to what the Framers envisioned in the Sixth Amendment if judges could single-handedly or unilaterally take away or remove the power that was supposed to curb that power in the first place.

I also -- so that really is our primary point of

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view on that, and I think that the record in this case actually serves as a good illustration of the dangers of allowing it.

The record in this case contains a lengthy argument about the legalities of trying this case without a jury, but no mention at all of the seriousness of the case, and it is plain from this record that the pretrial promise here was simply a manifestation of the magistrate's desire to try this case without a jury. And I submit that this is the precise evil that the Framers were concerned about when they insisted on the wide use of jury trials to begin with.

I would like to return to the preliminary question of the authorities suggesting that this case was, indeed, a serious case and worthy of a jury trial to begin with, and I think that the Court's decision in Codispoti is really on all fours with this situation.

QUESTION: Except Codispoti, there was no limit on the sentence for contempt, was there?

MR. STATSINGER: There was no limit on the sentence for contempt.

QUESTION: Then it really isn't on all fours, is it?

MR. STATSINGER: Mr. Chief Justice, it's on all fours on the preliminary question of whether the

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prosecution was serious enough to trigger the jury-trial right in the first place.

In that case, the Court concluded that a trial on joint petty counts, in that case contempt counts, was a serious one when the aggregate penalty, petty penalties exceeded 39 months, and I don't think that there can be a meaningful distinction between Codispoti and what was happening here in terms of the preliminary question of whether the case was serious.

It is true that the Codispoti decision did not involve a pretrial sentencing stipulation --

QUESTION: Well, except that if our guideline is for determining seriousness what the legislature determines is serious, then Codispoti has no relevance for us, because the legislature hadn't made that determination.

MR. STATSINGER: It does, Justice O'Connor, because the Court has repeatedly said that the actual sentencing decision in a contempt case represents the identical judgment to the legislative judgment in a statutory offense case, so it is our view that in a sense the Court has turned to the sentence imposed, actually imposed in contempt cases as a substitute for the legislator's judgment, but the court has always viewed them as equivalents.

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QUESTION: Add that in Codispoti each individual sentence was for less than 6 months, so when you combine that with Blanton, you have a series of 6 months offenses. That's your argument, isn't it?

MR. STATSINGER: Yes, Your Honor.

QUESTION: All right, so that's -- and -- go ahead. I just wanted to see that that was --

MR. STATSINGER: Oh, yes.

Our position is that a series of six amendments, when -- 6-month counts, when joined, triggers a jury trial. When they are tried separately, they do not, because if each individual trial on a single petty offense falls outside of the Sixth Amendment, then any individual one does.

Moving back to the pretrial sentencing stipulation again, there is a secondary reason besides the policy behind the Sixth Amendment that I think indicates that such a stipulation procedure should not be authorized in this case, and the reason is that it is inconsistent with this Court's decisions that have refused to hold that the sentence actually imposed can deprive someone of a jury trial.

The relevant question is, and always has been, whether a serious sentence was authorized by the legislature, and the Court has consistently held that a

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judge cannot trump that view of seriousness, and in fact the Court has had many opportunities to look at this rule and has never changed it.

QUESTION: Maybe I should ask, because the thing that I find difficult with Codispoti is, it seems to me that Codispoti's -- you have cases that stand for the proposition if you have more than a major -- minor offense, you have to have a jury, all right, and here we have only minor offenses.

Codispoti seems to stand for the proposition that if you add them all up and they add to more than 6 months, you have to have a jury, right?

MR. STATSINGER: Yes, Your Honor.

QUESTION: All right, so why isn't the obvious answer to that here, well, the Constitution forbids your client from being punished by more than 6 months. He wasn't. End of case.

MR. STATSINGER: Well, the Court -- certainly the Court has never held that in the context of statutory offenses, even though it has in the context of contempt cases, and I think one problem with that is that it would have the, in a sense, perverse result of granting a broader Sixth Amendment right to contempt cases than for statutory offense cases.

QUESTION: Why?

MR. STATSINGER: Because the contempt cases where the counts were -- the contempt cases where the counts were stacked would always trigger a jury-trial right unless there was such a promise.

QUESTION: There need be no promise. The Constitution forbids a person tried for a series of minor offenses, each of which has a maximum, from going to prison for more than 6 months.

If they try to put him in for more than 6 months, he's released on habeas.

MR. STATSINGER: I see your point, Justice Breyer.

Again, we continue to believe that the constitutional provision at issue here has never operated, and has -- has never operated on -- by looking at or considering the sentence actually imposed or to be imposed. It has always looked in a more general sense at the authorized penalty.

I'm not sure how that rule could be squared --

QUESTION: To Codispoti.

MR. STATSINGER: Aside from that, I'm not sure how that rule could be squared with a rule that would say, in any case, whether it be for a felony or a string of misdemeanors --

QUESTION: No. Two things. You get a jury

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trial if you're being punished for other than a minor offense. That's where you start, and in addition to that, you get a jury trial if you're going to be put away for more than 6 months. Codispoti.

QUESTION: I suppose your response is that the Constitution says you get a jury trial if it's a criminal prosecution.

MR. STATSINGER: That is an excellent response to that.

(Laughter.)

I may do that. And it was a response to that that was developed by considerably wiser individuals than me who were very, very concerned not only with the sentencing consequences but with the power to convict.

And that rule, while providing a measure of security to defendants, does not change the core value, the possibility of the abuse of State power, the possibility of a conviction that is itself unfair or unjust because the common sense and -- the common sense community values and the impartiality of the jury wasn't brought into the case in the first place.

And I think it's relevant to note at this point that, although the Court has not decided a very large number of cases in this area, it has approved of bench trials either implicitly or explicitly in a number of

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them, but a significant number of those cases, even though the Court approved of the bench trial, the Court reversed because the proceeding itself was unfair for some other reason.

And I think that in a sense speaks to this particular concern, that the Court has always viewed jury trials as better, a fairer way of adjudicating the facts in criminal cases, and --

QUESTION: Well, that might be persuasive if the reason bench trials were reversed here was because there was no evidence to support the judgment conviction, but I take it that's not what you're saying.

I mean, a judge presides over a jury trial just as well as a bench trial and can make all sorts of errors even with a jury present.

MR. STATSINGER: Of course he can, Mr. Chief Justice. I only pointed that out in the general sense of marshalling this Court's position that it does view jury trials as fairer, and it does, in a sense, force the parties to do a more complete job and to make sure that a judge does what is necessary so that the jury can understand the evidence. That would be our position with respect to that.

I'll reserve the remainder of my time for rebuttal.

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QUESTION: Very well, Mr. Statsinger.

Ms. Pillard, we'll hear from you.

ORAL ARGUMENT OF CORNELIA T. L. PILLARD

ON BEHALF OF THE RESPONDENT

MS. PILLARD: Thank you, Mr. Chief Justice, and may it please the Court:

In our view, any case involving only offenses that Congress has defined as petty may be tried without a jury. Petitioner has no right to a trial by jury because both of the offenses in this case were defined by Congress as petty.

Petitioner acknowledges that the United States could have charged him with the same offenses in two separate informations and tried him without a jury in two separate trials. In fact, he could have been tried in separate seriatim trials before the same judge on the same day, and he could have been sentenced to a total of a year in prison in the two proceedings. In petitioner's view, he would have had no jury right in that situation.

The petty character of obstruction of the mails is unchanged by the prosecutor's decision in this case to try the two counts together.

QUESTION: Of course, it's true that in the examples you give, those would have been separate prosecutions.

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MS. PILLARD: Those would have been separate prosecutions, Justice Stevens.

QUESTION: Whereas, here you have one prosecution.

MS. PILLARD: Here you have one prosecution.

QUESTION: And the Constitution refers to prosecution as the test.

MS. PILLARD: We believe there's no basis to petitioner's textual argument that the constitutional reference to criminal prosecutions means that the prosecution as a whole is the relevant unit for purposes of the jury-right analysis.

The petty offense exclusion has already made clear that criminal prosecutions exclude prosecutions of petty offenses. Moreover, this Court in Callan v. Wilson specified that the Sixth Amendment did not expand the jury right as articulated in Article III of the Constitution.

Article III refers not to prosecutions, but to crimes, and this Court's cases have made clear that crimes, as specified in Article III, and the criminal prosecutions as specified in the Sixth Amendment, are limited to serious crimes.

Therefore, petitioner's argument reduces to arguing that serious offense prosecutions are covered by the Sixth Amendment. It doesn't support the weight he

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tries to give it.

Under the petitioner's theory, the criminal prosecution theory also makes no sense, because under his theory an individual charged with two petty crimes that are tried separately but who faces the same total year consequence would be treated differently from an individual who is charged with those two petty offenses in one --

QUESTION: But he argues as a practical matter the prosecution isn't going to do that. If you've got a couple of petty offenses like this, why would the prosecutor separate them?

MS. PILLARD: Well, the joinder rule is discretionary, it's not mandatory.

QUESTION: I understand, but isn't it in 99 and 99/100th percent of the cases of this kind that would be tried jointly?

MS. PILLARD: I think there are plenty of practical situations in which two offenses perhaps arising, one a couple of months later than the other, might happen to go to trial separately, that individual could have --

QUESTION: Yes, I know you could give a lot of hypothetical cases, but as a practical matter it's just a waste of time to have two separate trials in a matter like

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this. I mean, prosecutors don't -- are too busy to do what you're suggesting, it seems to me.

MS. PILLARD: The basic point, though, is that you look not to the prosecutor's decision under Rule 8 whether to join or not to join, but the established methodology for determining which offenses are serious is to look to the legislative assessment of the seriousness of the offense or the offenses, and the prosecutor's decision whether or not to join is not a legislative assessment. When the legislature authorizes a maximum sentence of 6 months incarceration, that's the legislature's determination.

QUESTION: But can you not say the legislature has authorized a maximum punishment of 12 months on the facts in this particular prosecution?

MS. PILLARD: No, and that follows on the response that petitioner's counsel gave to Justice Scalia. Petitioner's counsel relies on section 3584, which authorizes consecutive sentencing.

However, that provision is not a prosecution-specific provision. That provision applies equally to the cases that are -- the two petty offenses that are separately tried seriatim as it applies to the two cases consolidated together, so you can't say that that is a legislative determination speaking to the seriousness of

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any particular offense or combination --

QUESTION: Well, the legislature certainly decided that if these two misdemeanors are tried together, the judge is authorized to impose a sentence of 12 months.

MS. PILLARD: The Congress --

QUESTION: Is that not correct?

MS. PILLARD: The Congress --

QUESTION: Is that not correct?

MS. PILLARD: Justice Stevens, I think it's not correct, because 3584 speaks to the situation of multiple crimes without regard to whether they're tried together, whereas petitioner's rule --

QUESTION: Correct, but it includes the cases that are tried together.

MS. PILLARD: It does, but it includes --

QUESTION: And it does authorize in the cases that are tried together a 12-month sentence.

MS. PILLARD: I think my point, Justice Stevens, is that because that legislative authorization, 3584, speaks equally to the situation of separate trials and to the situation of trials together, it can't reflect a determination by Congress that the together situation is more serious.

QUESTION: It can't reflect the determination that two misdemeanors are more serious than one, or twice

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as serious as one?

MS. PILLARD: That's precisely right, it doesn't reflect that, because the two tried separately, as petitioner concedes, are not subject to the jury right, and therefore that congressional determination --

QUESTION: And, of course, they're not subject to it because they're not one prosecution within the meaning of the Sixth Amendment.

MS. PILLARD: Moreover, I would point to this Court's language in Blanton v. Las Vegas, in which the Court pointed to the relevant legislative determination of seriousness as the determination that the legislature includes within the definition of the crime itself that in setting the maximum penalty for the particular offense, it's looking at that offense as the unit and setting the maximum penalty for that offense.

QUESTION: But if you do look at the prosecution as a unit, you could have, I suppose, 10 or 15 misdemeanors joined together in 10 times 6 months in a single prosecution. That's your position, is it not?

MS. PILLARD: That's our position.

QUESTION: Yes.

MS. PILLARD: As a theoretical matter, you could. You could also have that same result as a result of serial, separate prosecutions.

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QUESTION: Or a prosecution decision to have 10 separate trials instead of one joint trial.

MS. PILLARD: That's right.

QUESTION: Ms. Pillard --

QUESTION: Well -- go ahead.

QUESTION: Thinking of an analogy to the Seventh Amendment on the civil side, there's a whole string of cases in this Court that said the old idea that the judge could set the order of trial by putting the equitable claim before the legal, that didn't fly because the jury-trial right was so basic that whenever there was a choice the legal claim had to be treated first so that the jury would preempt the judge.

Now, if that's the mind set that was supposed to bring to jury trial the Seventh Amendment, why shouldn't it be the same in the Sixth Amendment, and you say well, you could argue it as the prosecution is the unit, you could argue it as the crime is the unit, but in view of the importance of jury trial, you take the prosecution as the unit, and if the two add up to more than 6 months, you get a jury trial.

MS. PILLARD: Justice Ginsburg, in the criminal area as well, where a collateral estoppel issue would arise and where the jury right would apply to the separate claims, we believe the same principle would follow.

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But I think the broader point, whether the importance of the jury right requires a jury right here, is clearly refuted by the common law antecedents of the jury right, that those were the antecedents that the Framers had in mind in excluding the petty offenses from the coverage of the Sixth Amendment.

The Court's categorical distinction between petty and serious offenses derives from the common law practice of trying petty offenses to juries. The petty offense exclusion was around at the time of the Framers, and the common law basically establish a jurisdictional divide. It had petty offenses which went to justices of the peace and were tried without juries. Serious offenses went to a jury.

And given that sort of jurisdictional, structural allocation, it makes clear that it doesn't make a difference, for example, if at common law an individual committed the petty offense of window-breaking. If that individual committed the petty offense of breaking two windows, by the same token, that case jurisdictionally would be assigned to the justice of the peace to be tried without a jury.

QUESTION: Would the justice of the peace have the authority to send the defendant to prison, though, as opposed to a jail?

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MS. PILLARD: Yes, I believe the justice of the peace would have authority to send an individual up to prison for a period of time.

QUESTION: Do you know of any cases where justices of the peace aggregated offenses where you had multiple counts?

MS. PILLARD: We do have cases where the justices of the peace aggregated offenses in the King v. Swallows and Queen v. Mathews. Both those cases dealt with aggregated offenses tried before the justices of the peace, and those were cases that --

QUESTION: And what were the terms there, the length --the length of --

MS. PILLARD: Those were assigned cases. They were not terms of incarceration cases. We don't have cases showing aggregation of incarceration. The petitioners also have been unable to cite any cases were any aggregate term of imprisonment rendered the case non -- ineligible for trial, a nonjury trial before the justice of the peace, so to that extent all we have is those cumulation cases in the file.

QUESTION: It does seem to me that if you have multiple crimes with a common modus operandi and they're aggravated so there's a potential of a 5-year sentence, say, even though individually each crime is only 6 months,

there is something disturbing about saying the defendant must stand before the judge without the protection of the jury in that case.

I recognize that he could go before the judge 5 different days, although that would assume that the Government would deliberately try to defeat the jury-trial right.

MS. PILLARD: It doesn't assume that so much as highlight the focus on not what the rules and the prosecutor and the court do in framing a particular prosecution, but that the focus has always been on what the legislature does, and the legislature doesn't and cannot address the various offenses that might be grouped together in a particular prosecution or might not.

Alternatively, we've argued that to the extent that the Court does believe that the total aggregate sentence faced by an individual in a particular prosecution is relevant, that the Codispoti model applies, and that here, the fact that the magistrate judge stipulated before trial that the defendant would not be sentenced to a sentence greater than 6 months and, in fact, the sentence imposed here was a sentence that did not include imprisonment, defeats any jury-trial right that petitioner might have had under that theory.

QUESTION: That's what I didn't understand about

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Codispoti. It seemed to me the language there was continuously referring to what the sentence for a series of minor offenses actually was, not what he faced.

MS. PILLARD: We don't think --

QUESTION: But I -- and if that's so, then there'd be a constitutional bar, but I don't know that that is what it meant. I mean, I -- that's what I was -- that's why I was quite interested what you thought.

MS. PILLARD: We don't think it makes a constitutional difference whether the ultimate sentence is less than 6 months or whether the promise at the outset of trial --

QUESTION: Well, if it's a promise -- I mean, there's something rather disturbing about saying anyone of, you know, several thousand magistrates here at some point, or judges or whatever, they're all just going to take it on themselves, and they might say some words, and then we'll get into an argument about what they meant, and -- I mean, this whole set of rules, I take it, is a judgemade effort to create a kind of rough order on a common law that was very unrough in terms of the meaning of criminal proceeding.

MS. PILLARD: That's right. I mean, the bottom line is that where the actual sentence imposed is less than 6 months, under the Codispoti model, whether you have

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a pretrial promise or not, whether there's ambiguous language at the beginning of trial or not, when the actual sentence is less than 6 months on a cumulated petty offense trial, that there's no violation of a jury right.

QUESTION: You'd say that there wouldn't be even if was more than 6 months, so long as it just accumulates offenses.

MS. PILLARD: That's right. Under our principal argument --

QUESTION: But even -- you'd say even if you're wrong about that, at least where the ultimate sentence is no more than 6 months, the defendant can have no complaint.

MS. PILLARD: That's exactly right, Justice Scalia.

QUESTION: It's at that point I need some help. That is, there's a kind of chicken-and-egg problem. It's -- I'm not certain what Codispoti means, rejecting your first argument, whether it's face or actual, what the theory is.

MS. PILLARD: I think the premise of the aggregation theory is that the accused has a right to interpose a jury between himself and a possible prison term of 6 months arising out of a single proceeding, but it requires in order even to reach that question that

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you're looking at an actual result for the individual defendant.

And so the bottom line is that if a case is tried to a judge without a jury, a multiple petty offense case, no sentence in excess of 6 months may validly be imposed under this theory, and Justice Scalia is right to point out this is an alternative theory.

We believe that as long as all the petty offenses in a particular prosecution are, in fact, legislatively determined to be petty, that no jury right attaches in that situation, but if you disagree with that, and believe that our aggregation model applies, it follows from that aggregation model that the actual limitation in this case of the sentence to 6 months should obviate any jury-right problem.

There's an inherent tension within petitioner's position between its -- between petitioner's reliance on the prosecution as the unit and on section 3584 as the legislative determination whether that unit is serious.

As I mentioned before, Congress has not and does not speak to prosecutions. Congress speaks to individual offenses, and all petitioner can point to to say there's a legislative determination regarding the seriousness of a prosecution as a whole is the statute 3584, but that statute speaks equally to offenses that are not

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encompassed within a single prosecution.

In view of this Court's established analysis and its common law antecedents, the only sensible way to make jury trial determinations is to make them on an offense-specific basis with reference to the legislature's determination of penalty within the definition of the particular offense itself.

QUESTION: May I ask you if you have any comment on Justice Kennedy's question of your adversary about how serious a problem this really is? Do you happen to know -- he gave figures about the Federal system, which I assume you accept. Do you have any further enlightenment on the extent of the problem in the States?

MS. PILLARD: I really don't have anything systematic, Justice Stevens. I've spoken to prosecutors in the District of Columbia who prosecute under local law, and in their experience a substantial portion -- this is very rough, anecdotal -- in the range of perhaps 30 percent of the prosecutions are multiple petty offense prosecutions.

It's also worth noting that it's extremely rare that individuals, even in multipetty offense prosecutions, receive a term of incarceration as part of the sentence.

QUESTION: Thank you.

MS. PILLARD: If there are no further

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questions --

QUESTION: Thank you, Ms. Pillard.

Mr. Statsinger, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF STEVEN M. STATSINGER

ON BEHALF OF THE PETITIONER

MR. STATSINGER: Thank you, Mr. Chief Justice.

I did not get an opportunity to address our view of the common law procedures in this area, and I did want to take a moment to address them, since it is our position that to the extent there is any evidence of common law practice in this area at all, it does not support the Government's position.

The Government has produced no historical evidence that a common law court of summary jurisdiction could exceed its jurisdictional limits simply by virtue of the joinder of petty offenses, yet that is what the Government is asking this Court to permit now.

Since Baldwin, there has been a jurisdictional limit on the triability of bench trials to 6 months, and the Government is asking the Court to allow joinder to exceed that jurisdictional limit in a way that was never approved of or contemplated at common law.

QUESTION: Do you know whether at common law at the period that would be relevant for us, which would be the time of the founding, that justices committed to

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prison or to jail as punishments as distinct from simply incarceration awaiting trial?

MR. STATSINGER: It is our understanding that -- at least, it is now widely accepted historically that common law justices did have the power to send people to the local jail but not to prison.

QUESTION: In 1791?

MR. STATSINGER: That's -- we don't have a rough sense of the exact years, but I think at this point --

QUESTION: Well, that would matter.

MR. STATSINGER: Right. I under --

QUESTION: I mean, if that developed afterwards, then it wouldn't be comprehended by the Sixth Amendment.

MR. STATSINGER: We would be willing to accept that there was the authority, even before --

QUESTION: I know you would be willing to accept it, but do you have any authority to that effect?

MR. STATSINGER: We do not, Justice Souter.

What it is safe to say is that even assuming there was that authority, and that we assume that as a general framework common law summary courts could incarcerate people for no more than 6 months, they couldn't get around that by virtue of joinder, so to the extent there is a common law basis to this argument at all --

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QUESTION: And what cases do you have for that?

MR. STATSINGER: We don't have cases, Justice O'Connor, we have an absence of cases suggesting that the procedure didn't exist.

It is our view that if the Government is going to invoke the common law, it has the burden of establishing common law principles that are -- were widely enough accepted to be assumed into the Sixth Amendment, and we don't see any such common law practices that would support the Government's position in this case.

QUESTION: You don't consider relevant to this problem that we have that in the old days, 1791, this would not have been a petty offense, it would have been -- this offense would have been a rather serious offense.

MR. STATSINGER: Oh, I consider that extremely relevant, Justice Ginsburg. I think that could conceivably be an independent ground for determining that this case should have been tried by a jury in the first place.

I don't think that the Court has completely abandoned the notion that even a single offense, even if only a petty sentence is authorized, that even a single offense, if it were serious at common law and can be easily established as such, I think that there's still an opening, even in Blandon, that a situation such as that

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would result in a jury trial.

QUESTION: Suppose a State --

QUESTION: I wasn't aware that our --

QUESTION: Suppose a State legislature said that if the prosecution in its discretion, at its option, goes before, say, a municipal court and consolidates offenses, joins offenses, that in that case the sentence for all combined offenses will be no more than 6 months.

MR. STATSINGER: If that were a legislative determination?

QUESTION: Yes, but that if the prosecution had the option, it elected the option to go to another court, that the offenses would be greater. What would be the result there?

MR. STATSINGER: Well, consistent with our view that it is the legislative judgment that is paramount, we would have to defer to the legislative judgment and conclude that in that circumstance there would be no jury trial.

Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Statsinger. The case is submitted.

(Whereupon, at 11:58 a.m., the case in the above-entitled matter was submitted.)

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