IN THE SUPREME COURT OF THE UNITED STATES

THOMAS W. WHALEN,

Petitioner

v. No. 78-5471

UNITED STATES

Washington, D. C.

Wednesday, November 28, 1979

The above-entitled matter came on for further argument at 10:48 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

SILAS J. WASSERSTROM, ESQ., Public Defender Service for the District of Columbia, 451 Indiana Avenue, N.W., Washington, D.C. 20001; on behalf of the Petitioner.

ANDREW J. FREY, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume the arguments in Whalen v. the United States and at this point Mr. Frey, I want to inform you and Mr. Wasserstrom that we will enlarge your time two minutes and since with our aid by questions Mr. Wasserstrom used all his time, we will allow you two minutes for rebuttal.

Mr. Frey.

FURTHER ORAL ARGUMENT OF ANDREW J. FREY, ESQ.,

ON BEHALF OF RESPONDENT

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

Preliminarily I would like to point out in response to a question that Mr. Justice White asked my colleague yesterday, the Petitioner did argue in his opening brief in the Court of Appeals that the sentence violated the double jeopardy clause.

QUESTION: On his sentences.

MR. FREY: On his sentences, yes. So I think he did preserve the constitutional --

QUESTION: Yes, he preserved it. The Court of Appeals never addressed it, really.

MR. FREY: It didn't address it in constitutional terms, no.

QUESTION: Mr. Frey, to get back perhaps to as you

say fundamentals, my understanding of the reading of the double jeopardy clause of the Fifth Amendment is that nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

Was the Petitioner here tried separately twice?

MR. FREY: No.

But there is of course language scattered about in opinions of this Court going back as far as Ex Parte Lange which suggests that the double jeopardy clause may have some bearing on punishment as well as on successive trials.

QUESTION: It squarely held that the double jeopardy clause permitted dual punishment for one offense, didn't it?

MR. FREY: That it permitted it, or prohibited it?

QUESTION: Prohibit it --

MR. FREY: Well, the Ex Parte Lange --

QUESTION: -- for a single offense.

MR. FREY: Ex Parte Lange is a --

QUESTION: It didn't have to hold that, but it did hold that.

MR. FREY: Yes, I think it rested its holding that to impose a sentence that the legislature had not authorized on the defendant violates the double jeopardy clause.

QUESTION: Mr. Frey, why don't you suggest that Lange is just another brand of two trials. Lange involved two sentencing proceedings.

MR. FREY: Well --

QUESTION: And there isn't any case that I know of that speaks about double punishment that didn't involve two different proceedings.

MR. FREY: Well, let me say -- well, there are of course Blockburger line of statutory cases which did not involve two separate proceedings.

QUESTION: They didn't involve the punishment.

MR. FREY: Well, Blockburger involved punishment and not successive trials.

I think the point that I am making which -- and I agree with you -- but this case involves a single sentencing proceeding following a single trial. It does not involve multiple trial such as North Carolina v. Pearce involved. Nor does it involve bringing the defendant back after he has been once sentenced for re-sentencing.

And our contention here is that the double jeopardy clause has -- imposes no restrictions on the sentencing court. It establishes no test that must be satisfied in imposing sentence in a single sentencing proceeding following a single trial.

Now, we have said in our brief that the double jeopardy clause restricts the sentencing court to imposing a sentence that has been authorized by the legislature. And we say that because there is language in this Court's opinions, going back

to Ex Parte Lange, that suggest that. But I think that is an essentially trivial proposition which I would not have ascribed to the double jeopardy clause myself, but to the due process clause.

QUESTION: Well, the Court applied that doctrine in North Carolina v. Pearce, didn't they?

MR. FREY: Yes, but of course was a case involving two trials and two sentences.

QUESTION: No, it was also a case involving a subsidiary issue in that case, wasn't it. It involved precisely the Ex Parte Lange doctrine, as I remember. I haven't re-read it, and I didn't write it.

MR. FREY: I am not sure what you are referring to, but the question was whether the defendant once having been sentenced to a particular sentence for a particular crime could have in place of that sentence following a re-trial, a higher sentence imposed. And the Court indeed said that the double jeopardy clause didn't bar that.

QUESTION: They barred part of it though.

MR. FREY: It barred not giving the credit --

QUESTION: They had to give a credit.

MR. FREY: That is correct.

QUESTION: And the reason was the double jeopardy clause.

MR. FREY: But for purposes of this case it seems to

that those --

QUESTION: Ex Parte Lange --

MR. FREY: Well, in Ex Parte Lange what happened was a sentence was imposed that the legislature had not authorized; and not only that, but the judge when he went to correct it in Ex Parte Lange and he said, "Well, I will eliminate the fine and I will just leave you with the jail sentence," the fine had already been paid and there was no way for returning it. So even though the judge said he was only sentencing him to prison in Ex Parte Lange, in fact he had to pay a fine and go to prison.

QUESTION: Is that in the opinion, that they couldn't get it back?

MR. FREY: I believe it is. That is my recollection the last time I looked at it.

QUESTION: Was Ex Parte Lange a case from a State court or from this Court?

MR. FREY: No, it was a Federal case.

QUESTION: That could well be under the supervisory power of this Court, that you just don't impose sentences in excess of those authorized by law.

MR. FREY: Well, it could well be. I don't think you need to resort to the supervisory power. It seems to me that in a Federal case if a sentence is imposed that Congress has not authorized, then all you do is apply the sentencing

provision of the statute to reverse the sentence.

QUESTION: You don't need a constitutional docket.

MR. FREY: But I would have to say that in a -- if you had a State case in which the defendant in which the sentence was authorized by statute was five years imprisonment and the trial judge said, "Well, this is such a heinous version of this crime that I am going to give you ten years imprisonment," I have two comments about what would happen when this case got up here.

The first is that nobody would really suggest that that was a double jeopardy case.

And the second is that I think everybody would agree -- I certainly would -- that that violates the due process clause.

QUESTION: Now, in North Carolina v. Pearce it was not a Federal case but a State case.

MR. FREY: That is true.

QUESTION: And in --

MR. FREY: Due process --

QUESTION: And in holding that the double jeopardy clause absolutely requires that punishment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense, in that case the court directly applied the doctrine of Ex Parte Lange, as a double jeopardy doctrine.

MR. FREY: Well, I am not --

QUESTION: That is not just casual verbiage. That is the holding of the court.

MR. FREY: Well, I have not sought to maintain the position that the double jeopardy clause has nothing to do with sentencing. The position I am maintaining is that the double jeopardy clause has nothing to do with a single sentencing proceeding following a single trial.

Now, there is a petition before you that we filed in a case called United States v. DiFrancesco which involves the right of the Government to appeal a sentence. Now, that involves an issue under the double jeopardy clause -- I can see that. And I suppose if the judge sentenced somebody to three years imprisonment for an offense where he could have sentenced him to 10, then after the three years were up he called him back in and said: "I have changed my mind, I think you deserve more," that I think would involve a double jeopardy question.

But this does not involve a double jeopardy question. I simply don't see where it comes from.

QUESTION: Mr. Frey, can I address your theory with a thought that has been running through my mind.

You remember a year or two ago -- I think you argued the case, it came from the Seventh Circuit -- there were two gun control statutes. One provided I think a three-year sentence and the other a one-year sentence which overlapped.

And the Seventh Circuit had held that since it was basically the same crime you can only impose the lesser sentence. And I think you persuaded us to reverse and say, well the Government can choose between the two and we can impose -- go under the section that allowed the longer sentence.

I take it your view now would be that they could apply both, even though they are precisely the same offense they could impose 40 years.

MR. FREY: I didn't argue that case.

QUESTION: Of course the Government didn't have to in that case.

Is that correct? And similarly, if in the confusion of legislative process they had enacted the same provisions 14 different times throughout the Criminal Code they can impose -- cumulate all 14 sentences even though they are the same offense.

MR. FREY: I don't think that --

QUESTION: There would be no constitutional problem, that is what you said.

MR. FREY: I don't think that that need trouble the Court because that kind of case is always dealt with as a matter of legislative intent. We are not suggesting that the intent of the legislature should be ignored by the Court and in your hypotheticals, and I think it is certainly true in title IV and title VII of the --

QUESTION: You are saying there is no constitutional problem.

MR. FREY: No constitutional problem under the double jeopardy clause.

Now, it may be that if Congress passed the same statute a thousand times and the defendant had to face a thousand charges and a thousand sentences there might be some problem under the due process clause.

QUESTION: I am saying in one trial. I think you have agreed there couldn't be separate trials.

MR. FREY: That is right.

QUESTION: Because in one trial Congress -- you could cumulate punishments as often as you want.

MR. FREY: Yes. That is absolutely our position.

Now --

QUESTION: I understood in your opening that you suggested that this statute and its history shows that Congress clearly intended to give punishments for each of the offenses.

MR. FREY: Well, we do argue that, although of course we have also argued that that is not a matter that this Court ought to reach. But our constitutional argument, Mr. Chief Justice, does not depend directly on the fact that in this case Congress did authorize. Our constitutional argument is that you simply don't have a double jeopardy inquiry in this kind of case. All you have is your conventional inquiry into

legislative intent which can be aided by the Blockburger test or anything else.

QUESTION: Was Brown v. Ohio a double jeopardy case?

MR. FREY: It definitely was.

QUESTION: And isn't that quite similar to this one?

MR. FREY: There were two trials there.

QUESTION: There were two trials. But if one begins with the doctrine of Ex Parte Lange, I understand the dichotomy that you assert in your brief --

MR. FREY: Well, let me address the point that Petitioner raised. He said that it would somehow inconvenient or undesirable to have different tests for successive prosecutions and for multiple punishments following a single prosecution. Now, I am not sure that I understand what he means, because of course we are suggesting that in the punishment context there is no test, you simply do what you would always do in determining the propriety of a particular punishment under the statutes.

The test that is difficult --

QUESTION: You do it under the compulsion of the double jeopardy clause.

MR. FREY: I think you do it under the compulsion of ordinary rules of law.

QUESTION: It wasn't done in North Carolina and this

Court held that it had to be done under the double jeopardy clause.

MR. FREY: In North Carolina v. Pearce?

QUESTION: Yes.

MR. FREY: This Court held it had to be done under the due process clause.

QUESTION: Double jeopardy.

MR. FREY: Oh, you are talking about the crediting clause.

QUESTION: Yes.

MR. FREY: But that -- I can't --

QUESTION: It wasn't done as a matter of course in that State. And this Court said that the Constitution, i.e. and specifically the double jeopardy clause required that North Carolina do it.

MR. FREY: But that was not a single-sentencing proceeding following a single trial. I mean I just -- I have not attempted to deny that the double jeopardy clause applies in the situation in North Carolina v. Pearce. But my point here is that this is a very different situation. We are not talking about punishments being imposed twice on the defendant except in a very hypothetical sense, which is derived from -- well, let us look at Brown v. Ohio for a moment.

Because the Court said in Brown, and I think it was

clearly in passing, that the Blockburger test is the test for determining the propriety of multiple punishments under the double jeopardy clause.

Now, I think you would have to agree that Brown did not involve any multiple punishment issue except a derivative of a successive prosecution issue. And elsewhere in the same opinion the Court says that the role of the double jeopardy clause is not to restrict the legislature but to make sure the courts and prosecutors don't exceed their legislative authorization.

Now, we have a case here where if you accept the statutory construction of the District of Columbia Court of Appeals it is clear that the sentence imposed on this Petitioner did not exceed the legislative authorization. And what Petitioner wants to do is to say even though Congress meant to allow this man to receive this sentence for the crimes that he committed, the double jeopardy clause somehow and in some mysterious way by virtue of the Blockburger test and by virtue of the fact that a lesser included offense is the same offense, bars this.

Now, I cannot see that it is appropriate to take a dictum -- and let me say also that the statement in Brown about the Blockburger test being the test for -- constitutional test for multiple punishments sprung full blown like Palace Athena from nowhere. There is nothing in the prior decisions

of this Court that ever suggested that the Blockburger test was a constitutional test for multiple punishments in a context such as we have in this case. Indeed, in Iannelli which was I think two terms before Brown, the Court expressly said that the Blockburger test is the test for ascertaining legislative intent. Indeed, it said that about Wharton's rule in a case where the substantive offense necessarily involved conspiracy, the Court said that is a test for ascertaining legislative intent.

Now, I certainly submit to the Court that the dictum in Brown is at this point subject to reexamination and ought not to stand in the way of adopting a rule that is consonant with the purposes of the double jeopardy clause and doesn't apply in an area where it doesn't really fit. And what is being done with the Blockburger test if Petitioner has his way, is to pervert the test from its original purpose which was to follow the legislative intent into a test which is being used to thwart the intent of the legislature.

QUESTION: But you wouldn't -- you are not arguing against using the Blockburger test as to when there can be separate trials.

MR. FREY: We are not opposed to using that. We think it is appropriate but I might note that as Harris v. Oklahoma indicates and, indeed, as in re Neilson indicates you may go beyond the Blockburger test. This is a very murky

area. I think Justice Brennan has adopted a position which is quite clear as to that is the same transaction test.

QUESTION: I have never had more than two others agree with me.

MR. FREY: I understand that, the Court has not adopted it. But the Court --

QUESTION: You are not urging it either, I take it. We are not urging it.

MR. FREY: But I find far less difficulty as an analytical matter to find that in the double jeopardy clause than I do to find the result the Petitioner --

QUESTION: No case, Harris or any other case has suggested the Blockburger test is the test you use in connection with punishments -- double punishment.

MR. FREY: Excuse me. In connection with punishment?

QUESTION: Yes. It hasn't suggested that. The cases that involved Blockburger involved two proceedings.

MR. FREY: Well, that is correct, except -- that is correct, every case that involves Blockburger, except there is a reference I believe in the opinion in Simpson to the statement in Brown. And Simpson was a single proceeding. But, again, it was dictum. Simpson was a case which did exactly what we think the Court ought to do, that is it looked at the intent of the legislature.

Now, let me make just one point in passing, and I did

want to make myself clear, because when I talk about whether the Blockburger test is or is not satisfied in this particular case with these offenses I don't want to be thought of as endorsing the Blockburger test as an appropriate test in the context of a single sentencing following a single trial. But if we must have the Blockburger test because the Court feels bound by what was said in Brown v. Ohio or independently concludes that it is appropriate in this circumstance, it shouldn't be restricted to necessarily included offenses. That is, robbery, which is a necessarily included offense of armed robbery, the kind of situation which you cannot commit the greater offense without at the same time committing the lesser.

Now, what we have here is what we have called in our brief "compound and predicate felony."

QUESTION: Under that approach, isn't some felony a necessary element of proof?

MR. FREY: Absolutely. That is why we have said what we have here is a compound felony and a predicate felony. The compound felony consists of showing a predicate felony, which it can be one other class.

QUESTION: Which is an essential element of the compound felony.

MR. FREY: One or another, that is right.

QUESTION: Yes. But some predicate felony is an

essential element, is it not?

MR. FREY: Well, I think we have said at one point in one of our papers in this case that you can't by sheer force of logic decide whether the Blockburger test is satisfied or not satisfied.

QUESTION: One of the virtues I always thought the Blockburger test had was it was logically very, very easy to apply.

MR. FREY: Explain to me why -- I mean our position is very straightforward. You don't have to commit rape in order to commit felony murder.

QUESTION: You do if the predicate felony is rape.

MR. FREY: The Blockburger test has always looked at the provisions under which sentence is being imposed and the element set forth in those provisions in the statute. And if you look at the rape statute you will of course not find a killing.

QUESTION: And also if you look at the felony murder statute you can't find a basis for convicting unless you also convict him of a felony.

MR. FREY: But the felony is not necessarily rape.

QUESTION: Not necessarily rape, no --

MR. FREY: I don't know how to resolve that conundrum except I want to make one point which is very important. Obviously we don't care very much in practical terms about

what happens with felony murder and the underlying felony, because felony murder carries a sentence of life imprisonment with a minimum of 20 years. We are not talking about a lot that is at stake in the particular context of the felony murder statute.

It is of course important that the double jeopardy clause be understood in a consistent and rational way. And it is very important to us as applied to the firearms statutes. That is Section 924(c). Now, there you have a statute which is exactly parallel to the felony murder statute. You must have a Federal felony and the use or the unlawful carrying of a firearm in the course of that felony. So whatever the Federal felony is, highjacking, bank robbery -- although there are some problems with bank robbery -- assault, homicide, you must prove that felony in order to prove the violation of 924(c).

QUESTION: How many felonies were involved in here, in this case that are within the six felonies that make a felony murder?

MR. FREY: I am not sure whether the burglary in this particular --

QUESTION: There was a burglary involved here.

MR. FREY: He was convicted of a burglary and he was convicted of a purposeful killing. And even if the burglary were not --

QUESTION: But his original conviction was for burglary, rape and felony murder; is that correct?

MR. FREY: Two counts of felony murder. And the burglary was reversed not because of any failure of evidence but because of the Court of Appeals view of ex parte ban in permissible amendment of the indictment.

But as the case now stands, he stands convicted only of rape and of felony murder based on the rape. That is all we have here.

Our position is that there is nothing in the Constitution that prohibits if Congress wants to say 15 years for the rape and 20 years additional for the felony murder. There is absolutely nothing in the Constitution.

QUESTION: Well, you certainly are making it much more difficult to win your case to suggest, as you do, that you could convict of rape in a separate trial.

MR. FREY: Excuse me.

QUESTION: Aren't you -- convict of rape in a separate trial?

MR. FREY: I don't believe I have suggested that; no.

QUESTION: Well, you have said that this -- that the Blockburger test is not violated here.

MR. FREY: Well, I also said --

QUESTION: Or did you just misstate yourself on that?

MR. FREY: No, the Blockburger test is not violated here, but the Blockburger test is not the exclusive test for determining the permissibility of multiple prosecutions.

QUESTION: What other test is there? Would the Blockburger test -- would it or would it not bar a separate trial for rape?

MR. FREY: In this case?

QUESTION: Yes.

MR. FREY: It would not be the Blockburger test that would bar it.

QUESTION: Why wouldn't it?

MR. FREY: Because we don't think these offenses pass the Blockburger test.

QUESTION: You don't need to win on that to win your case but --

MR. FREY: No, we don't. But let me make clear my position. A separate trial would be barred under Harris v. Oklahoma. That is not because the Blockburger test is not satisfied here. Harris v. Oklahoma makes no mention of the Blockburger test. Harris v. Oklahoma cites only successive prosecution and not multiple punishment cases, and the case it cites is in re Neilson. And in Brown v. Ohio there is a footnote which points out that in re Neilson was a case where the two offenses, cohabitation and adultery, satisfied the Blockburger test. In order to be guilty of cohabitation you

did not have to be married; you simply had to live with two women at the same time. In order to be guilty of adultery you did not have to live with two women at the same time. The court nevertheless held that successive prosecutions were barred even though the Blockburger test or each equivalent was satisfied by the two statutes.

So all that I am saying is that there is a murky area which I take it includes this area of compound and predicate offenses in which successive prosecutions would be barred.

But multiple punishments present no problem. Let me give you an example: Suppose Congress passed a statute and said that for robbery the punishment would be five years imprisonment; and for armed robbery, the punishment would be the punishment for robbery plus a period of ten years imprisonment.

QUESTION: You say supposing Congress didn't write the statute that way.

MR. FREY: No, but they are saying that --

QUESTION: There is no doubt about the fact they could say if you rape somebody, you get ten years; if they get killed while you are raping them, they get 20 years. They didn't say that.

MR. FREY: Well, that is exactly what the Court of Appeals construed the statutes to mean. And if the double jeopardy clause means that Congress has to put it one statute

and can't have it in two, I just cannot believe that the double jeopardy clause addresses something as insignificant as how many statutes Congress chooses to put something in.

And let me make another point. To go back to Justice Stewart's reference to Ex Parte Lange and the bar in multiple punishments, multiple punishments for a single crime are an every day occurrence in the Federal courts. The defendant can be imprisoned, he can be fined, he can suffer a forfeiture, he can be sentenced to a term of special parole. Now, a fine followed by a term of special parole for exactly the same offense sounds like two punishments for one offense. But if it is imposed following a single trial and a single sentencing proceeding, nobody I think would suggest that there is anything the least bit wrong with it. And I simply cannot bring myself to believe that the double jeopardy clause, to come back to 924(c), means that Congress cannot say if you use a firearm in the commission of a Federal felony you are to receive a consecutive sentence of two years imprisonment, or whatever it may be, beyond the sentence imposed for the underlying felony. That is exactly what Congress has done. And if Petitioner is right, the double jeopardy clause prohibits that. I simply don't think it reaches --

QUESTION: There is a difference in the statutory language in 924(c) which says shall in addition to the

punishment provided for the other offense should get another two years. The felony murder statute does not say that in addition to the punishment for rape there should be an addition of ten years. It simply doesn't read that way.

MR. FREY: No, it doesn't say that.

QUESTION: It provides a separate punishment scheme of its own.

MR. FREY: It provides a punishment for murder and elsewhere there is a punishment for rape. And there is a statute that says --

QUESTION: There is no statute that says that when rape is committed in connection with a felony murder, you can get both the sentence for rape and the sentence for felony murder. There is no statute that says that.

MR. FREY: There are two statutes that say after the D.C. --

QUESTION: Well, the same way that my hypothetical example of 34 different statutes on the same offense would authorize 34 punishments -- precisely that same thing.

MR. FREY: You are only raising a question that goes to the intention of the legislature. You may say that you are not satisfied that the legislature has sufficiently clearly expressed its intention. But the point that I am arguing here is: May the legislature -- may it constitutionally provide for punishment separate, punitive punishment --

QUESTION: We should not reach unless we are satisfied under Blockburger and all the rest that clearly are -- there clearly was an intent to impose multiple punishment under two separate provisions.

MR. FREY: Well, let me turn to that point.

While it is ordinarily true that the Court will not decide a constitutional question if it can settle the case on statutory grounds, that is exactly the situation that existed in Pernell v. Southall Realty, exactly. There was a statute Pernell v. Southall Realty. The statute provided under the construction of the District of Columbia Court of Appeals for the elimination of a jury trial in certain kinds of eviction actions or something. And the issue came up here as a Seventh Amendment issue and the Court in an opinion by Mr. Justice Marshall recognized that it might be able to avoid reaching the constitutional issue by construing the statute differently. But it said in the most unequivocal terms that a decision of the District of Columbia Court of Appeals construing a statute of local application will not be reviewed by this Court on statutory grounds, even to avoid reaching a constitutional issue. Rather, that court will be treated as the highest court of a State.

QUESTION: Wasn't there a companion case to Pernell which had been written by Justice Stevens in the Seventh Circuit which it said quite unequivocally that even though

Congress had denied the right to a jury trial, the right to jury trial was constitutional and therefore notwithstanding the right to -- the congressional intent would have to fail when the constitutional provision was involved?

MR. FREY: Well, I am not sure, although I have no doubt that if the Constitution required a jury trial Congress couldn't do away with it, if that is the question.

QUESTION: Actually we held that because of the constitutional issue, we construed the statute to avoid the constitutional issue.

MR. FREY: But in this case I think it is clear that you can't, and I am sorry I didn't have time to explain why.

QUESTION: Your first argument is that we should accept the construction of the statute put upon it by the District of Columbia Court of Appeals.

MR. FREY: That is correct.

QUESTION: Just as we would the construction put on a State statute by a State court.

MR. FREY: And after all, there are 50 other States that this case could as easily have come from and you would have had no choice to reconstrue the legislative intent. So it is hardly a very damaging precedent.

QUESTION: And that construction you say doesn't violate any constitutional right.

MR. FREY: Absolutely.

QUESTION: But then that leads you to the question of whether or not it does.

MR. FREY: I think the Court has to decide the question of whether or not it does. And obviously I think it should decide that it doesn't violate the Constitution here.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Wasserstrom.

REBUTTAL ARGUMENT OF SILAS J. WASSERSTROM, ESQ.,
ON BEHALF OF PETITIONER

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

To begin with, it is argued that if Congress did not intend consecutive punishment here, did not authorize such punishment, then when the lower court makes a mistake of that sort it is making a mistake which results in the denial of the defendant's constitutional rights. And therefore this Court should, and must, review that legislative -- that determination of legislative intent, it is not like other kinds of errors in construing legislative intent.

On the constitutional issue itself though, it is our position -- and we submit it is borne out by this Court's decision in the companion case of Pearce v. North Carolina, the case of Rice v. Alabama, in that case the defendant pled guilty and sentenced to a term of imprisonment. Two and a

half years into his term he successfully challenged his convictions in a petition for quorum novus relief in the State courts. He then was tried on the same charges that he had pled to and he was convicted. The judge imposed a sentence and ordered that credit not be given for time served. He imposed a 25-year sentence and ordered that no credit for the 2-1/2 years be given for time served.

Now, this Court pointed out that the judge could have given a 27-1/2-year sentence with credit for time served. That would have been within the statutory maximum permitted for the offenses of which he was convicted. Nevertheless, this Court vacated and ordered that credit be given -- it didn't vacate it, but ordered that credit be given for time served because by failing to give credit for time served, the defendant was twice punished for the same offense, even though he could have been punished to the same extent with credit for time served.

That decision was a unanimous decision of that Court.

QUESTION: It was a second sentencing proceeding.

MR. WASSERSTROM: Certainly when a defendant moves to have his sentence set aside, he waives any kind of double jeopardy claim he might have with respect to the fact that a second sentencing proceeding occurs. So that case could not have turned on the fact that --

QUESTION: We held he didn't by appealing waive any right that he might have as to a larger sentence. The United States --

MR. WASSERSTROM: This has nothing to do with a larger sentence. It may well be as this Court held in Pearce that a longer sentence after appeal is illegal because of due process considerations. Pearce is not a double jeopardy case; it is a companion case, however. Rice v. Alabama is a double jeopardy case, it relies on Ex Parte Lange. And the Court made it clear that the double jeopardy clause forbid the State from giving him a sentence which did not give him credit for time served even though it could have given an equivalent sentence with credit for time served.

Thank you.

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

(Whereupon, at 10:48 o'clock, a.m. the case in the above-entitled matter was submitted.)

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