Supreme Court of the United States

October
[redacted] TERM, 1969

In the Matter of:

ROBERT BALDWIN, Appellant, vs. THE PEOPLE OF THE STATE OF NEW YORK, Appellees.	Docket No. 188

Place Washington, D. C.

Date December 9, 1969

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October [redacted] TERM 1969

ROBERT BALDWIN,

Appellant

vs

No. 188

THE PEOPLE OF THE STATE OF NEW YORK,

Appellees

Washington, D. C.
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The above-entitled matter came on for argument, at 1:40 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

WILLIAM E. HELLERSTEIN, ESQ.
The Legal Aid Society
100 Centre Street
New York, N. Y. 10013
Counsel for Appellant

MICHAEL R. JUVILER, Assistant
District Attorney of New York
155 Leonard Street
New York, N. Y. 10013
Counsel for Appellees

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 188. Baldwin against New York.

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

ORAL ARGUMENT BY WILLIAM E. HELLERSTEIN, ESQ.

ON BEHALF OF APPELLANT

MR. HELLERSTEIN: Mr. Chief Justice, and may it please the Court: New York City and the five boroughs of which is comprised, is the only jurisdiction in this country which denies to its citizens the right of jury trial for a crime punishable by as much as one year's imprisonment. Indeed, in the remaining 57 counties of the State of New York, a person is entitled to a jury trial of six, requiring a unanimous verdict.

Thus, the question which this case brings to this Court, whether Section 40 of the New York City Criminal Court Act, set forth on Pages 3 and 4 of our brief, violates the 6th Amendment, as applied to the states in the 14th. In denying jury trial for what we deem to be a serious offense, and also in viewoof the provisions for a jury trial elsewhere in the State of New York, whether the equal protection clause is so violated.

The record facts inthis case are relatively simple.

MR. JUSTICE HARLAN: I missed that. How does the equal protection argument get into this?

MR. HELLERSTEIN: Primarily, Mr. Justice Harlan, in that the State of New York, making available to all its residents, except those who reside in the City of New York, the right to a jury trial.

MR. CHIEF JUSTICE BURGER: What you are saying, in effect, is that every State must be exactly the same. Every state, city, county.

MR. HELLERSTEIN: Well, no, Your Honor. I'm saying that where the state has undertaken to provide most of its other citizenry, apart from one city, with the right to a jury trial, given what this Court has said inDuncan about the importance of the right to jury trial as provided by the state. Indeed, in deciding Duncan, this Court looked to the states to see how important that right was and they found that it was applied and provided for in all the states.

MR. CHIEF JUSTICE BURGER: Well, I was really just pushing your argument just one step beyond that, that once you have a fixed cutoff time in one state the citizens of every other state which does not comply with that favorably, is involved in an equal protection problem.

MR. HELLERSTEIN: Oh, Your Honor, I misunderstood Your Honor's question. If that's all that's involved, then there is no problem there, because New York is the only state -- New York City, I mean -- is the only city that has the problem that is before this Court, namely: the right to a jury

trial for a year and we don't have to equalize anything among the other states, because this Court has already decided that a six months period of time on the fence is petty, and since all the other states do not deprive anybody of a jury trial for a year's time, then there is no equalization applied between New York and the rest of the country.

There is equalization required between New York City and the rest of the state, but I would like to get to that equal protection argument a bit later.

The record facts are very simple. This appellant was convicted after a one-judge bench trial for the crime of jostling. And secondly, to one year's imprisonment. The evidence in the case is that he was observed with co-defendant crowding a woman on an escalator on the Port of Authority Terminal. The arresting officer said that he saw the defendant take either a loose cache of money from the woman's handbag, or a $10 bill.

A motion for jury trial was made in the criminal court and was denied. The New York Court of Appeals, by a majority decision, 5 to 2, felt that this Court's decision in Duncan did not require a holding that one year was a serious crime, nor did it require any different holding on equal protection. The justices that dissented, Judges Burke and Keating, took a much different view and, of course, is much more consonant with our position.

Essentially, our Sixth Amendment argument is really broken down into three parts. We think that although Duncan did not decide this question, the thrust of Duncan, the logic of Duncan, resolves the issue for us.

However, we also feel that if Your Honors were to credit New York's looking to its own historic experience to deprive the Appellant of a jury trial, and even under what we concede to be erroneous criteria, our argument still prevails. And the people have misunderstood our argument on this point because they seem to say in their brief that we offer it to the Court as an affirmative indication of our position.

I'm only saying that if we were forced to, we could win our case even on the criteria that the Court of Appeals followed, even though we think its wrong.

Thirdly, I think perhaps the ghost in the closet on this case, has to be the question of the impact of the Court's decision, on the criminal court problem in New York City, because I really believe that if this case had come from Casanovia, as the people would have it, this would not be a consideration.

Now, although the New York Court of Appeals spoke of the problems of the New York Criminal Court on the equal protection issue, I can't help but feel I would like to come to grips with that end of the argument of the Sixth Amendment, lurking behind this problem that the Court faces, is the problem of the calendar chaos of the New York Criminal Court.

Hence, looking towards the decision in Duncan, as I read the opinion, the court looked to the -- what I would call the objective criteria, chiefly the existing laws and practices in the Nation, to decide whether Louisiana's assault statute, requiring a two-year maximum of imprisonment, was a serious or petty offense.

Looking to national criteria, the Court found that nowhere else in the land was a two-year sentence countenanced without a right to jury trial. Applying that method of analysis, the Court would arrive at the same conclusions respecting New York City; namely that nowhere else in the land does a situation prevail in which the defendant facing one year's imprisonment was denied a right to jury trial.

MR. JUSTICE HARLAN: I thought there were a lot of states, though, although they gave a jury trial in the one-year misdemeanor type of case, they had six man juries and what not.

MR. HELLERSTEIN: Yes. I think, Mr. Justice Harlan, you are getting to what the people are, and they hang their case on it, I might say; namely: that our position depends on whether we are entitled to a common-law jury or not. And I think this is an error, for the same reason that it was an error or at least was irrelevant to the decision in Duncan. Primarily,

Primarily, in Duncan, the Court -- I think Mr. Justice Fortas in his concurring opinion in Bloom, Mr. Justice White, a foot note; Mr. Justice Harlan, dissenting opinion. All

discussed whether the entire bag and baggage of the Sixth Amendment must come in the Duncan decision. This is a question left open in Duncan.

The unanimous jury, the 12-man jury -- I think, again, this is a question left open in this case and one which we need not resolve, because all, I think, and depending on Duncan, that we are asking for, is some form of a jury trial.

For instance, in Louisiana, after Duncan, the jury trial which is now provided is not a common-law unanimous jury; it is a five-man jury for the one-year crime. What Louisiana did was they knocked a lot of crimes down to six months and for the ones that were over they provided a five-man jury. I don't think the record in this case, nor the issues in this case have to depend on whether a Sixth Amendment jury with all its bag and baggage, is required.

What the New York Court of Appeals did thatfor, is they looked away from Duncan and at least read [illegible], looking to its own historical experience; namely, that in New York we have always considered a misdemeanor a petty offense and a felony a serious offense and the one year decided which was which.

But the six-month cutoff, nationwide, even historically, has much more support with respect to the issue of the jury trial, than does the one-year cutoff upon which the people and the New York Court of Appeals based their opinion.

MR. CHIEF JUSTICE BURGER: Now, if we adopted your argument, this would preclude the idea of any states cutting back as they find jury trials more difficult to adminster?

MR. HELLERSTEIN: I think, Your Honor, it would preclude the state from denying a jury trial to anything more than a six-months period of imprisonment. Unless, of course, the Court, upon reconsideration of a decision, could be forthcoming in this case, and in Duncan, might reconsider the whole record of what the problem was.

I think that it is interesting in the People's brief, they attempt to call the Court's attention to the Minnesota experience with requiring a jury trial in certain lesser crime situations by showing that delays were resulting. Their brief doesn't reflect, however, the next two lines of the Minnesota Law Review Article, which also discloses that the Bar Association of Minnesota, in response to the delay and the question of whether the decision of the Minnesota Supreme Court should be made in , recommended that it was much more important to retain the jury system than to disregard it as a result of some momentary shortages of space and facilities, and I will get to that again later.

The six-month cutoff has historical significance. This Court, in Duncan, mentioned the fact that for the most part in the 18th Century, the six-month cutoff, with exception, was a general experience.

Also, the reason why New York's experience doesn't really help, the New York experience was not the only type of experience that the colonies had had. New York, New Jersey and as Justice Frankfurter in his article with Mr. Corcoran, point out, were much harsher in their denials of trial by jury than many of the other colonies. So, we attempt to locate in history exactly what's at stake is not really a fruitful thing, but I think we have got the better of it in terms of the fact that there were more lenient policies.

I think it is interesting to note that at least two commentators, Professors Goebel and Naughton, in our brief, think that the New York denial of jury trial is serious and in petty offenses or serious offenses, depending on where you place the label, have something to do with the aristocratic structure of the colony.

I veiw the New York experience, although we affirm it consistently over the years by the court, as sort of a vestige of this old colonial policy.

The dissenting opinion, as we do, took the position that you couldn't tell, even if you looked to the New York experience, that the citizens of New York had not opted, had not felt that over six months was a serious offense. And the reason that the legislation had given a jury trial elsewhere inthe state, and that at the recent Constitutional Convention, the elected representative of the people, drafted the

constitution with a new provision which this Court called attention to in Duncan, that would have limited the denial of a jury trial to a six months period. Of course, the constitution was defeated; it was a package deal; nothing to do, I don't believe -- I am almost certain -- with the jury trial provision.

So, I don't think the New York Court of Appeals is right in saying that the New York citizenry do not view a one-year sentence as a serious crime.

MR. JUSTICE STEWART: How long has this dichotomy existed between New York City and the rest of the state?

MR. HELLERSTEIN: The dichotomy has existed -- it was the history of New York entirely, until 1824 when the legislature cut back and said to the rest of the state, we will provide some form of jury trial.

MR. JUSTICE STEWART: Up until 1824 it was all analogous to what New York City is now.

MR. HELLERSTEIN: It is curious, as we point out in our brief, it's interesting that in 1878 the New York Court of Appeals said, when confronted with the question of the validity of that choice: "We no longer can see the reason for denying a jury trial to the citizens of New York."

Of course now, the reasons have become a bit more sanguine, you might say. The city has grown and its problems have become so immense, but in 1878 the New York Court of

Appeals, not having, not feeling itself possessed of an equal protection argument just declined to answer the question on a constitutional basis, although it is not a violation of the New York State Constitution, and let is go at that; but they commented that they couldn't see the distinction.

MR. JUSTICE WHITE: Is there legislation pending in New York on this question now?

MR. HELLERSTEIN: No; not to my knowledge.

MR. JUSTICE WHITE: It would have been included in the constitution that was turned down?

MR. HELLERSTEIN: Yes. And there have been constant efforts by various groups to have it, you know, brought up, but there is nothing pending that I know of in the State Legislature.

The People have attempted to draw Your Honors' attention in their brief, and I think that superficially it has a lot of trappings, but I think down deep it really doesn't cut too deeply, by trying toconvince you that one year as a cutoff really has a lot of sense, a lot of historical sense in our national history. But, the one-year cutoff which they refer to really is a felony-misdemeanor distinction that goes to such things as the right tojury trial; the right toindictment for this crime, the collateral effect of the conviction of a misdemeanor, as distinguished from a felony, and the place of incarceration, with respect to --

But it's interesting at this one-year distinction

that they attempt to draw. It is not a distinction as drawn by any state, except New York, with respect to the right to jury trial. For example: California still draws the distinction between felony and misdemeanor, as a one-year crime, in terms of who goes to what prison; but with respect tothe jury trial a common-law jury is provided in Claifornia for traffic offenses. So, the one-year distinction as/the felony-misdemeanor to really doean't anwer anything, and combined with what I can see as a much more sensible and stronger historical six-months position, really wipes itself out.

MR. CHIEF JUSTICE BURGER: Well, can we decide this question raised under the constitution on the basis of what is sensible?

MR. HELLERSTEIN: Maybe I chose the wrong word, Mr. Justice. Sensible, to me, means logically consistent with the prior decision, and I think what I'm suggesting here is logically consistent with the language in the thrust of Duncan. The commentators who have analyzed Duncan have so rested. Those are the authorities we cite in our brief.

I think, since Duncan looked to the nation as a whole and said, "Let us see what is doing in the other states, that that issue was the result and the only thing that was left hanging was the New York situation.

The right also to attempt to tie a one-year serious petty to the incident of the right toindict, can't work very

well, either, because only eight states inthis country guarantee the right to indict -- now, most states guarantee the right to jury trial, as set forth in our appendix, don't really care about indictment and I would presume to say that if I thought there was one provision in the Bill of Rights that would probably not be incorporated, apart from the Second Amendment, would have to be theright to indictment. The scholarships, the literature on the subject, is against the grand jury indictment, rather than for. I think anyof the old cases, perhaps, it would be for --

Also, the place of confinement, it had 22 states as adversaries, send their felons to state prisons, while misdemeanors go to county jails. I don't think there is any analytical worth to Your Honors, mainly because it's only 22 states, but this distinction arises out of concepts of infamy, concepts of finance, why should a local administration have to bear the costs of a serious felon, when the state could take a more proper interest.

And, indeed in New York, one of the blunders of the penal law, even with its recent modification is that felons can go to the county jail, which we call the New York City Penitentiary. This is something the legislature would like to resolve, but right now it is a matter of practice, felons do go to Riker's Island, which is the penitentiary.

So, what, you really don't, as I see it, get much

mileage out of the distinctions that are to be drawn by the People. The collateral effects are also time-tried and historical. The felon loses his right to vote in most states; in New York, the right to public office, loss of civil rights, as a broad category.

The misdemeanor loses his possible right to his livelihood, hov ing, employment, certain occupations. The majority of the New York Court of Appeals thought these were not very important compared to the right to vote and right to public office.

I think, given the nature of the New York City criminal population, most of the people faced with the misdemeanor conviction, the loss of misdemeanor collateral consequences are much more severe and I would think, certainly neutralize the Court of Appeal emphasis on the felony collateral effects.

I think the most difficult part of the case in terms of the psychology of both below and perhaps here, what the Court conceives of as a problem in the New York City Criminal Court.

New York City Criminal Court is in chaos and it has been in the past in chaos for a long time to the extent -- I don't know how to convey to you, the feeling I would like to if I could take you through our Court Houses. I have tried to document; I would not dare make the claims I have made in my brief without documentation, of what it is like; what the process

of justice has become in our Criminal Court.

The turnstile feeling; the feeling by the minority population, which participates very heavily in that court, of what it is like to have a judge -- to be apart and watch the judge decide his 15th case of the day.

The jury trial -- the right to jury trial was meant, I think, by this Court to protect a defendant against a judge, for whatever the reasons may be, from being case-hardened; from being worn down by the system and the burdens of the court, as we have pointed out, with the addition of new judges, as we assume, that the elimination of the three-judge court would not create much more difficulty. I don't think it makes any sense to permit New York to stop now and say we have only so much; judges only so much and we think we have enough judges for this.

And also one of the significant aspects of the jury trial system is a heavy incidence in waiver; that it makes any sense to stop, permit New York to say, "We can now stop in 1969 with our -- "

I think New York is capable and certainly necessary for it to respond to, what I think the Sixth Amendment requires.

MR. JUSTICE HARLAN: Am I right in understanding then that the present New York laws in a case of this kind, the defendant can get a three-judge court as a matter of right, by moving for it?

MR. HELLERSTEIN: Yes.

MR. JUSTICE HARLAN: And then if he wants a jury, he has to go to the Supreme Court in which it is a purely discretionary matter with that court.

MR. HELLERSTEIN: It's exceptionally discretionary.

MR. JUSTICE HARLAN: It is no different from what I was brought up in, that I was interested in.

MR. HELLERSTEIN: It's really titled a motion remove as a means to prosecute by indictment and jury trial, the law on that, the discretion which the courts have exercised, has been such an arbitrary -- I could get you to see where the judges themselves say, "We have no guidance on this."

And it is not a procedure that is used very often.

Just briefly, then, the equal protection issue, we think, is a bit more difficult because people, I think, put their hands on the one possible weakness in our case, and that is if we are right on the 6th Amendment, we are begging the question in a way, because if we have got the constitutional right we don't have to work out a classification problem.

Although I would suggest that if for some reason I can't convince you the 6th Amendment takes us where we would like it, and even without having the Sixth Amendment, where, as I have said at the outset of my argument, the equal protection clause would where the state does provide a right to jury trial, that right, by its mere provision as this Court states the practices in

Duncan, becomes a right of fundamental importance which then requires a rational and perhaps a compelling interest to my citizenry in the state.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hellerstein. Mr. Juviler.

ORAL ARGUMENT BY MICHAEL R. JUVILER

ON BEHALF OF RESPONDENTS

MR. JUVILER: Mr. Chief Justice, and may it please the Court; The boundaries of the petty offense cateogry, as Mr. Justice White said in Duncan against Louisiana, "are ill-defined, if not ambulatory."

This case presents the opportunity to define those boundaries. A subsidiary question raised by Appellants claims, relates to the alleged denial of equal protection of the laws in the geographical classification adopted by the New York Legislature.

I propose to rest entirely or almost entirely on our brief as to that, although I might perhaps say something about it in closing tomorrow morning.

The difficult question which the Court left open in Duncan, as to the boundaries of the petty offense category, does not have to be resolved without guidelines, for indeed, there have been substantial guidelines set out by this Court.

The Court has made clear that imprisonment of itself, does not render an offense serious, such as to require trial by

jury. It has also been stated unequivocally, that an offense punishable by no more than six months imprisonment, is a petty offense.

On the other hand, a crime punishable by two years is a serious offense. That was the holding in Duncan.

So, we have, essentially, in this case, a choice between a six-month cutoff proposed by Appellants and the one-year cutoff, which we urge upon the Court.

There is a temptation in choosing between these alternatives to an a priori judgment, to say, "Well, this is serious or it isn't; I know it when I see it." But there are extensive indications; there is extensive circumstantial evidence in the experience of the states and the Federal system of justice, which point predominately to the one-year cutoff as the proper boundary -- as an objective boundary.

Appellant claims that New York City and provisions for jury trial, stands alone in the entire nation in withholding trial by jury from offenses punishable by up to one year. But it is not that clear as Mr. Justice Harlan implied in his question of Mr. Hellerstein; there are juries and there are juries, and since the issue for this Court is a constitutional issue under the Sixth Amendment, we would best look to the constitutional law as to what is a jury trial. That is a jury which consists of 12 persons rendering a unanimous verdict at a trial in the first instance. This common-law, Sixth

Amendment jury is withheld in 13 states for trials of crimes punishable by up to one year. Thirteen states have adopted this boundary.

MR. JUSTICE WHITE: Does thatinclude New York?

MR. JUVILER: Including New York.

MR. JUSTICE WHITE: Because out of New York City, as I understand it, the right is to a six-man jury.

MR. JUVILER: The right to a six-man jury in all of the other counties, for crimes punishable by up to one year. If a crime is punishable by more than one year, there is a right in the entire state to a common-law Sixth Amendment jury.

And thirteen other states have the same boundary line between this hybrid jury, which the states felt free to experiment with, for crimes punishable by up to a year.

MR. JUSTICE STEWART: In the hybrids, you are including a jury of less than 12 people and also you are including a trial de novo?

MR. JUVILER: Yes; there are, for example, nine states in which there are fewer than 12 jurors for crimes punishable explicitly by no more than one year; that is the explicit cutoff in nine states. In one state a nonunanimous verdict can be rendered in a case punishable by up to one year as the precise cutoff and in five states there is a trial de novo with a jury at the second trial for persons who are found guilty of crimes punishable by up to one year as the expressly-

defined cutoff.

If you add this all together, it's 15, but there really are 13 separate states, because some of the states have adopted several of these hybrid procedures.

MR. JUSTICE MARSHALL: But the real problem is between three judges and six jurors; is that the real problem?

MR. JUVILER: The problem is that three judges, or even 12 judges, are not a jury; they are not citizens, private citizens interposed between the accused and the government and we do not urge that a three-judge bench is a jury of three persons.

MR. JUSTICE MARSHALL: Well, why have three instead of one?

MR. JUVILER: That is a legislative determination in New York, which is based on long-standing history.

MR. MARSHALL: Well, I think you would say there is a difference between the judge and jury, and now you've got a three-judge bench.

MR. JUVILER: I think it was felt, Mr. Justice Marshall, that in adopting a system which had no jurors at all, there might be an ameliorative factor by interposing, at the option of the defendant, more than one judge so that you could have deliberation.

MR. JUSTICE MARSHALL: It would be more ameliorating with a jury of six.

MR. JUVILER: No question; and it would be even more with a jury of 12, but the question here is what the constitution requires New York State or New York City to provide.

There are five states which provide a trial only de novo, with a common-law jury for crimes punishable by up to one year. That's the cutoff. If a crime is punishable by less than a year, that means in the first instance there is a trial without any jury or as in the case of Virginia, which is one of the states there are five jurors; and on appeal there is a full-fledged common-law jury of 12 for persons who have already been found guilty.

MR. JUSTICE WHITE: But the penalties are the same.

MR. JUVILER: The penalty is the same: punishment by up to one year.

Now, of course, as Mr. Justice White pointed out in Duncan, these procedures are subject to reconsideration as in the case that was ordered to review yesterday, from Florida, involving six jurors, but we take the law as we find it and the prosecution can also find solace in the constitutional law as we find it.

At the momen there are 13 states which would be in violation of the constitution if this Court accepts the Appellant's argument that a one-year sentence renders a crime serious under the Sixth Amendment.

There are only six states on the other hand, which

have adopted a six-month cutoff for the provision of a jury trial of any kind in the first instance. And that is not a bulky evidence of a nationwide feeling of seriousness supporting the six-months cutoff, which Appellant proposes.

MR. JUSTICE WHITE: What do the rest of the states do?

MR. JUVILER: The majority of states provide for a common-law jury at various levels of sentence. For example, in 18 states, including California, a full-fledged jury trial is provided for any crime punishable by any imprisonment whatsoever.

But, since the choice here is between a six-month cutoff and a one-year cutoff, these provisions in 18 states which go far beyond what is required by the constitution, offer no guidance as to which of these two cutoffs should be chosen by the Court.

California has made clear elsewhere in its law that there are two classes of crimes: felonies, punishable by more than one year in a state prison or penitentiary; and misdemeanors punishable by up to one year in the county jail, but California has chosen in legislative wisdom to apply a full-fledged jury trial, even for the petty offenses.

MR. JUSTICE WHITE: What about the other states? That leaves what, 13?

MR. JUVILER: We list quite a few other states in

brief in our argument and inour appendix, Mr. Justice White. And we have broken them down by the specific cutoff chosen in each state. There were 18 states with a -- with no cutoff whatsoever -- every crime was tryable by a jury. There was a handful of states -- I think there were two states with a one-year cutoff for crimes punishable by more than one month, had a jury trial; two states with a three-month cutoff and only six with a six-month cutoff that the Appellant proposes.

MR. JUSTICE BLACK: How many did you say required 12 jurors?

MR. JUVILER: Under the common understanding of the Sixth Amendment, 12 jurors rendering a unanimous verdict.

MR. JUSTICE BLACK: What states?

MR. JUVILER: Well, there are 18 states which provide such a jury in every criminal case, regardless of the crime.

There are two states in three-month cases; two states in two -- in one-month cases, and only six states in six month cases.

We do not hang our hats on the jury trial provisions that I discussed, contrary to the Appellant's argument. We recognize that we're dealing here with circumstantial evidence of seriousness and the jury trial provisions are merely one source of guidance to this Court.

We do point to the clear law relating to the

prosecution of infamous crimes, under the Fifth Amendment.

Infamour crimes are those punishable by more than one year of imprisonment in the state penitentiary or at hard labor. And this is -- including New York -- and this is the Federal system of justice incorporated in the Federal Rules of Criminal Procedure. This is clear evidence, we submit, as to the content of serious crimes under the Sixth Amendment, particularly since both provisions in the Bill of Rights serve the same purpose, and that is to prevent the arbitrary action of officials of the government that Mr. Hellerstein has referred to, to protect the citizens against such action by the interposition of private citizens, between him and the crowd.

MR. CHIEF JUSTICE BURGER: Well, isn't the adjustment of three judges aimed at the same -- alleviating what Mr. Hellerstein was talking about, the arbitrariness of one judge?

MR. JUVILER: Yes; one of the purposes is to see that there are three persons brought to bear on the complaint against the defendant, with their deliberations. And I think you have one judge who has a disposition for or against the defendant or a certain type of crime. That will be ameliorated by two other finders of fact.

MR. CHIEF JUSTICE BURGER: Is there a demand for a three-judge trial exercised frequently?

MR. JUVILER: I would estimate in approximately five to ten percent of the cases; perhaps five to ten percent of the

cases that are actually tried; is brought to trial.

The Defendant in this case didnot exercise that option.

There is a broad field of law in American jurisprudence, pointing further to the one-year cutoff, and that is the classification of crimes throughout the United States, and in the Federal system of justice. In 28 states and in Federal Courts there is a felony-misdemeanor distinction and the misdemeanors are punishable by no more than one year of imprisonment.

Now, this is not dispositive of this case, but it is some evidence as to the community view in the nation as to the location of this boundary between two distinct classes of crimes: petty offenses and serious crimes.

There are other expressions of seriousness that point at the one-year cutoff, many of which have come after this Court's decision in the Duncan case; many of which have been effected after the Duncan decision.

The Omnibus Crime Control and Safe Streets Act, provides a provision for eavesdropping by state law enforcement officials pursuant to court order and one of the categories of crime that Congress has authorized to be the subject of electronic eavesdropping, is crimes punishable by more than one year of imprisonment; not six months of imprisonment. The selection of petty jurors and grand jurors for Federal

prosecutions, has been enacted by Congress after Duncan to exclude and disqualify from these panels persons convicted of crimes punishable by more than one year -- not more than six months -- these are the serious crimes which disqualify American citizens from sitting on a grand or petty jury inthe Federal system of justice.

The Uniform Criminal Extradition Act, which has been adopted in 45 states; Section 14 of that Act, which I neglected to cite in the brief, adopts also a one-year cutoff; not a six-year cutoff; adopts also a one-year cutoff, not a six-year cutoff, for crimes which may -- for which fugitives may be apprehended without a warrant, if he is a fugitive from a crime punishable by more than one year, there may be an arrest for purposes of extradition, without a warrant.

Now, if the crime is punishhhle by up to one year, it is considered not serious enough, and therefore, a judge has toissue a warrant. Now, this, again, is an item of circumstantial evidence guiding this Court in choosing between the six-month boundary and the one-year boundary.

MR. JUSTICE BLACK: In guiding --

MR. JUVILER: Inguiding the Court in choosing between these two boundaries. We do not urge that this issue is crystal clear; if it were, we wouldn't be here today. The Duncan case would have disposed of it, mt I think that the Appellant has failed to point to any considerable body of

evidence, leading to a six-month cutoff.

The one-year cutoff is the predominant one. It is true that in Federal contempt cases, the Court, in the exercise of its supervisory function over Federal justice has seized upon, perhaps out of desperation, the six-month cutoff for the maximum penalty that may be imposed without a jury.

Now, the Court was guided in that instance by Section 1 of Title 18 of the U. S. Code, which defines petty offenses as those punishable by up to six months. But Congress since those decisions, has enacted the Federal Magistrates Act, which substantially changes the Congressional view of seriousness of offenses, and creates a new offense; the minor offense, punishable by up to one year, and it removes the jurisdiction of such minor offenses from the Federal District Court to the Federal Magistrate.

MR. JUSTICE BLACK: Do you think that's highly relevant to what the Founders said in connection with the construction of the constitution?

MR. JUVILER: No; I don't think it's highly relevant, but if you put -- if the Court puts all of these provisions together: the provisions for the common-law jury in cases punishable by more than one year; the provisions for classification of crimes that I recounted tothe Court; all of those together/to a predominant cutoff of one year --

MR. JUSTICE BLACK: You mean a predominant

sentiment.

MR. JUVILER: A community sentiment, rather than a judicial sentiment and as Mr. Justice Marshall pointed out in the Frank case in the last term of this Court, the difficult task of defining serious offenses should be undertaken without regard to the judicial sentiment, but rather with regard to some objective criteria as to how the national community --

MR. JUSTICE BLACK: Are you talking about the Gallup poll?

MR. JUVILER: By legislative enactments by the judicial decisions, and to some extent, by the history of the administration of justice in the various states.

MR.CHIEF JUSTICE BURGER: I take it that you wouldn't be making these points, except that your friend has urged the different--drawing on these sources for a different cut-off date.

MR. JUVILER: I think that they not only rebut, Mr. Appellant's
Chief Justice, the/arguments, but they point the Court towards the one-year cut-off provision, because this is the real choice: Is it going to be six months; or is it going to be one year?

If the sentiment were the answer, I would think --

MR. CHIEF JUSTICE BURGER: The third alternative is -- or is it going to be left to the states?

MR. JUVILER: If that alternative is adopted, I suppose there would be somelimits on the states. For example,

the State of Louisiana chose a two-year cutoff and that was deemed to be impermissible under the Sixth Amendment, but the state, we urge, can choose a cutoff whichis not far out of line with the prevailing standards of seriousness, and the one-year cutoff is the prevailing standard.

The six-month cutoff is out of line.

The other alternative is to say that in every criminal case, as two members of the Court have said, if there is any imprisonment prescribed, whatever, the defendant is entitled to trial by jury, because as to him that is a serious offense. But the majority of the Court has consistently rejected that approach.

And so we urge that guided by these objective criteria, the Court -- the simplest and most substantially-based decision would be to accept the state provision providing for a-one-year cutoff.

MR. CHIEF JUSTICE BURGER: You have about seven minutes, and we willcontinue and let you get back to your homes tonight.

MR. HELLERSTEIN: I only have two or three matters to take up.

Mr. Juviler has tried to tell you that Congress has placed a different emphasis on what is serious. I'm not quite so sure that-- I thinkit was Mr. Justice Black that said' "relevant to the leaders of the world," and it's not quite

accurate, for the following reasons:

In Duncan, this Court pointed to Title 18, Section 1, six-months cutoffs, and said, in a way of the indicia of Duncan, whether the case was tryable by the Federal Court.

That Title I still remains; still stands and is very similar to the New York Penal Law; both prior to -- and now.

The Federal Magistrate's Act, which Mr. Juviler speaks of and writes of, has not changed anything at all with the statute of the availability of a right to jury trial.

Putting aside the constitutional considerations --

Mr. Chief Justice asked the question about the three-judge court and the demand, how frequently. I don't know if it's proper for me to comment on this; there is nothing in the record, but as a member of the bar with a -- carrying out a job for the Legal Aid Society, I feel at least obligated to tell the Court that in the problem of the criminal court system, there is a pressure upon the defendants not to seek a three-judge court. This is one of thethings that does enter into plea bargaining.

Namely: what can it develop with respect to the plea. A three-judge court is not a highly-welcome thing among the people who must work for the court.

And lastly, I would only point out that in the Franl:

case, which Mr. Marshall wrote the opinion for the Court, the maximum term of imprisonment, even though -- was only six months, whereas, in New York, it's classified as a misdemeanor.

The last thing: I have set forth in Appendix B, the breakdown of the Criminal Code of Penal Law of New York and I think Your Honors will see, if you were even curious to look into the nature of the offense, rather than the term of punishment imposed, that New York's C ass A misdemeanor does not strike a chord in terms of petty offenses that one might find in history. You will find the contents of the petty offense, historically, is quite astranger to our Class A misdemeanor in New York. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, for your submissions; the case is submitted.

(Whereupon, at 2:30 o'clock p.m. the argument in the above-entitled case was concluded)