

# The Burger Court Opinion Writing Database

## *Justices of Boston Municipal Court v. Lydon*

466 U.S. 294 (1984)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

February 1, 1984

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Re: 82-1479 - Justices of Boston Municipal  
Court v. Lydon

'84 JAN 33 A10:07

Dear Byron:

I join.

Regards,



Justice White

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

April 5, 1984

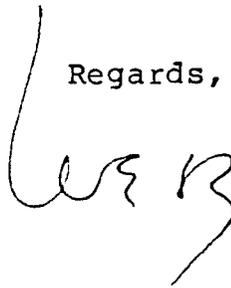
Re: 82-1479 - Justices of Boston Municipal Court v. Lydon

Dear Byron:

Since I gave you an early "join," I have followed the voluminous exchanges in this case with great interest. My chief concern centers on what emerges in the expansion of the "custody" concept and I now conclude I cannot join what really is an expansion of Hensley. Habeas has had almost a "Belgian" inflation and I prefer to "freeze it."

As of now, I will join the judgement and avoid more writing.

Regards,

A handwritten signature in cursive script, appearing to be 'W. J. White', written in black ink.

Justice White

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Washington, D. C. 20543

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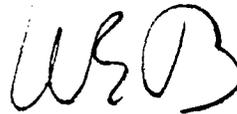
April 6, 1984<sup>84</sup> ABR -9 P2:30

Re: 82-1479.- Justices of Boston Municipal Court v. Lydon

Dear Byron:

Since a majority of the Court holds that there is jurisdiction to hear the case, I will join all but Part IIA.

Regards,



Justice White

Copies to the Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

April 16, 1984

Re: 82-1479 - Justices of Boston Municipal Court v. Lydon

Dear Lewis:

Please show me joining your concurring opinion.

Regards,



Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

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SUPREME COURT OF THE U.S.  
JUSTICE Wm. J. BRENNAN, JR.

January 16, 1984

'84 JAN 16 A11:02

Re: Justices of Boston Municipal Court v. Lydon,  
No. 82-1479

Dear Byron:

As you know, I voted at conference to affirm, concluding (1) that Lydon was in "custody" within the meaning of the habeas statutes, (2) that Lydon had exhausted all available state remedies on his constitutional claim, and (3) that Lydon's imminent second trial would violate the Double Jeopardy Clause. I fully agree with your treatment of the first two points and therefore join parts I and II of your opinion.

I might note my disagreement with Sandra's suggestion that you collapse part II into one sentence or "bury" it in a footnote. When a threshold jurisdictional question has been fully addressed below and briefed and argued by the parties here, it seems to me at best disingenuous to decide the issue elliptically simply because we wish to reach the merits. In any event, I believe your approach to the custody question is sound and supported not only by Hensley, but by our unanimous decisions in Peyton v. Rowe, 391 U.S. 54 (1968), and Jones v. Cunningham, 371 U.S. 236 (1963). See also Braden v. Kentucky, 410 U.S. 484 (1973). As you note, Lydon's two-year jail sentence will certainly be reimposed unless he undergoes a trial that he claims will violate double jeopardy. Accordingly, "incarceration [is] inevitable absent federal intervention" or irretrievable forfeiture of a constitutional claim.

Although I think your discussion of the merits in parts III and IV has much to recommend it and I may ultimately be persuaded, I am not yet prepared to change

my initial view of the double jeopardy question. As the cases you cite indicate, the concept of "continuing jeopardy" is, at best, a label for the strong reasons justifying retrial after reversal for trial error. See, e.g., Burks v. United States, 437 U.S. 1, 15 (1978); Breed v. Jones, 421 U.S. 519, 534 (1975); Price v. Georgia, 398 U.S. 323, 329 n.4 (1970). The opinion in Burks, it seems to me, provided the best explanation for that rule: "[R]eversal for trial error, as distinguished from evidentiary sufficiency, does not constitute a decision to the effect that the government has failed to prove its case .... Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect ...." The state, without regard to the defendant's guilt or innocence, has "a strong interest in obtaining a fair readjudication of his guilt free from error ...." Burks, 437 U.S., at 15. This rationale does not support retrial when the state "has been given one fair opportunity to offer whatever proof it could assemble." Id., at 16. For that reason, Burks establishes that, if the state has had a full and fair opportunity to present its best case, it may not retry a defendant if the evidence at the first trial was insufficient as a matter of law. The evidence is, of course, insufficient as a matter of federal constitutional law when it fails to meet the standards announced in Jackson v. Virginia, 443 U.S. 307 (1979). See also Tibbs v. Florida, 457 U.S. 31, 41 (1982); id., at 48, 50 (WHITE, J., dissenting); Hudson v. Louisiana, 450 U.S. 40 (1981); Green v. Massey, 437 U.S. 19 (1978).

The rule in Burks is not, of course, engaged unless the conviction at the first trial is reversed and the state seeks a retrial. But Burks clearly limits the state's ability to retry the defendant whenever a conviction based on insufficient evidence is reversed -- even if the authority reversing the conviction rests its conclusion on trial error and does not evaluate the sufficiency of the evidence. As you explained in your opinion in Tibbs, when a conviction is reversed, even on state law grounds, "retrial is foreclosed by the Double Jeopardy Clause if the evidence fails to satisfy the

Jackson standard. Hence, the Jackson issue cannot be avoided; if retrial is to be had, the evidence must be found to be legally sufficient, as a matter of federal law, to sustain the jury verdict." Tibbs, 457 U.S., at 51 (WHITE, J., dissenting). See also id., at 45 (maj. op.) (indicating that state appellate judges may not order retrials barred under Jackson and Burks). This obligation to evaluate the sufficiency of the evidence before ordering a retrial is simply the corollary of the defendant's right, under Burks, Hudson, and Green, not to be retried after a conviction based on constitutionally insufficient evidence.

In this case, Lydon's conviction was vacated by virtue of his request for a de novo jury trial. Accordingly, as the Court explained in Ludwig v. Massachusetts, 427 U.S. 618, 631-632 (1976), Lydon "is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial." Thus, as in Tibbs, unless the defendant has waived it "the Jackson issue cannot be avoided; if retrial is to be had, the evidence must be found to be legally sufficient, as a matter of federal law, to sustain" the conviction. I certainly agree that the state's own process of review is the preferable forum for determining whether the evidence was constitutionally sufficient; indeed, I understand the majority opinion in Tibbs to indicate that, absent waiver, such review before retrial is part of the appellate court's "obligation to enforce applicable state and federal laws." 457 U.S., at 45. But when the state fails to meet this obligation -- either by wrongly rejecting the Jackson claim, "masking" it by relying on other grounds, or simply refusing to entertain it -- the federal habeas court is fully authorized under Jackson itself to vindicate the claim. (In Jackson, you will recall, the Virginia courts had rejected petitioner's evidence sufficiency claim. 443 U.S., at 311 and n. 4.). It seems to me, therefore, that your conclusion that only a state court may "terminate" jeopardy by directing an acquittal would permit those

courts to evade their responsibilities under Jackson, Burks, and Tibbs.

I do not in any way suggest "that the State is required by the Federal Constitution to afford appellate review of the evidence presented at the bench trial before proceeding with the second-tier trial." Op. at 12. Because the two-tier system is an optional alternative to a normal trial and is, as you note, highly advantageous to the defendant, the State can reasonably condition its availability on the defendant's waiver of certain constitutional requirements, such as trial by jury at the first tier. As Massachusetts has apparently concluded in light of the decision below, the state can easily avoid the disruption to the system produced by this case by requiring a defendant choosing the two-tier system to waive any evaluation of the sufficiency of the evidence at the first tier. In Lydon's case, however, I am inclined to doubt that there was such a waiver: Two Massachusetts courts had previously held that Burks applied to the first trial and the judge at Lydon's second trial as well as the single Justice of the SJC apparently assumed the same. Lydon's counsel may therefore have acted with reasonable reliance on Massachusetts precedent when, after his client was charged with the wrong offense, he chose the two-tier system with the expectation that the defendant would be entitled to a judgment of acquittal after the trial at the first tier.

I recognize, as you explain in Part IV, that the Massachusetts system, far from being an instrument of "governmental oppression", seems very favorable both to defendants and to the state and that an affirmance would appear to sanction some disruption of that scheme. I do not, however, believe the absence of "governmental oppression" can provide an independent basis for holding that the Double Jeopardy Clause does not apply. Your opinion implicitly recognizes as much by noting that a retrial after acquittal at the first tier -- whether by verdict or a state judgment on Jackson grounds -- would be barred under Burks despite the fact that the defendant

voluntarily chose this system. Nor do I think the possible disruptive effect of the decision should lead us to depart from the principles I have described. In any event, as I have indicated, I think the waiver Massachusetts now requires will eliminate any disruptive effects on the two-tier system.

In sum, while I join your Parts I and II, I am not yet at rest with respect to Part III. I might go along with the judgment if we could reasonably conclude that Lydon's waiver of appellate review of the first trial included a waiver of his Jackson/Burks rights, if the state courts had reasonably rejected the Jackson claim and the federal district court had unreasonably reversed that conclusion, or if the first tier could be characterized as a sort of preliminary hearing at which jeopardy did not attach. (For the reason you note, op. at 11 n. 3, this last approach seems to me difficult in light of the State's concession that it could not retry Lydon if he was acquitted at the first tier.) Accordingly, I intend to think further about this case before deciding whether or not to write separately about the issues you address in Part III. I will try to advise you of my plans in the very near future.

Sincerely,

*W. J. B., Jr.*  
W. J. B., Jr.

Justice White

Copies to the Conference

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Brennan**

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84 MAR 14 A11:48

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-1479

JUSTICES OF BOSTON MUNICIPAL COURT,  
PETITIONERS *v.* MICHAEL LYDON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT

[March —, 1984]

JUSTICE BRENNAN, concurring in part and concurring in  
the judgment.

I agree that, because respondent was "in custody" within  
the meaning of 28 U. S. C. §§ 2241(c)(3) and 2254(a) and be-  
cause he had exhausted all available state remedies for his  
constitutional claim, the District Court had jurisdiction to en-  
tertain his habeas corpus petition. Accordingly, I join Parts  
I and II of the Court's opinion.<sup>1</sup> I analyze the merits  
differently than does the Court, however, and therefore do  
not join Parts III and IV of its opinion.

I

The Court rejects Lydon's Double Jeopardy claim by rely-  
ing on the absence of "government oppression" and the pres-  
ence of "continuing jeopardy." For many of the reasons ad-  
vanced by the Court, as well as others, see *infra*, at —, I  
completely agree that the two-tier trial option available to  
Massachusetts defendants appears eminently fair and reason-  
able and that there is therefore no evidence of the kind of  
"governmental oppression" that might, apart from other an-  
alytical considerations, provide an independent basis for a

<sup>1</sup> Although it appears in Part II in which I otherwise concur, I do not  
agree with the implications of footnote 7 of the Court's opinion. See n. 6  
*infra*.

style + 1

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-1479

JUSTICES OF BOSTON MUNICIPAL COURT,  
PETITIONERS *v.* MICHAEL LYDON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT

[March —, 1984]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins,  
concurring in part and concurring in the judgment.

I agree that, because respondent was "in custody" within the meaning of 28 U. S. C. §§ 2241(c)(3) and 2254(a) and because he had exhausted all available state remedies for his constitutional claim, the District Court had jurisdiction to entertain his habeas corpus petition. Accordingly, I join Parts I and II of the Court's opinion.<sup>1</sup> I analyze the merits differently than does the Court, however, and therefore do not join Parts III and IV of its opinion.

I

The Court rejects Lydon's Double Jeopardy claim by relying on the absence of "government oppression" and the presence of "continuing jeopardy." For many of the reasons advanced by the Court, as well as others, see *infra*, at —, I completely agree that the two-tier trial option available to Massachusetts defendants appears eminently fair and reasonable and that there is therefore no evidence of the kind of "governmental oppression" that might, apart from other analytical considerations, provide an independent basis for a

<sup>1</sup> Although it appears in Part II in which I otherwise concur, I do not agree with the implications of footnote 7 of the Court's opinion. See n. 6 *infra*.

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2, 3, 4, 9, 13, 14

To: The Chief Justice  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

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3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-1479

JUSTICES OF BOSTON MUNICIPAL COURT,  
PETITIONERS *v.* MICHAEL LYDON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT

[April —, 1984]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins,  
concurring in part and concurring in the judgment.

I agree that, because respondent was "in custody" within the meaning of 28 U. S. C. §§ 2241(c)(3) and 2254(a) and because he had exhausted all available state remedies for his constitutional claim, the District Court had jurisdiction to entertain his habeas corpus petition. Accordingly, I join Parts I and II of the Court's opinion.<sup>1</sup> I analyze the merits differently than does the Court, however, and therefore do not join Parts III and IV of its opinion.

I

The Court rejects Lydon's Double Jeopardy claim by relying on the absence of "government oppression" and the presence of "continuing jeopardy." For many of the reasons advanced by the Court, as well as others, see *infra*, at 12-14, I completely agree that the two-tier trial option available to Massachusetts defendants appears eminently fair and reasonable and that there is therefore no evidence of the kind of "governmental oppression" that might, apart from other analytical considerations, provide an independent basis for a

<sup>1</sup> Although it appears in Part II in which I otherwise concur, I do not agree with the implications of footnote 5 of the Court's opinion. See n. 7 *infra*.

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To: The Chief Justice  
Justice Brennan  
~~Justice Marshall~~  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice White**

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1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-1479

JUSTICES OF BOSTON MUNICIPAL COURT, PETITIONERS *v.* MICHAEL LYDON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[January —, 1984]

JUSTICE WHITE delivered the opinion of the Court.

We granted certiorari, — U. S. — (1983), to review a decision of the Court of Appeals for the First Circuit affirming the issuance of a writ of habeas corpus. The Court of Appeals agreed with the District Court that the trial *de novo* of respondent Lydon, pursuant to Massachusetts' "two-tiered" system for trying minor crimes, would violate his right not to be placed twice in jeopardy for the same crime, because it determined that insufficient evidence of a critical element of the charge was adduced at the first-tier trial. We reverse.

### I

Under Massachusetts law, a defendant charged with certain crimes in Boston Municipal Court may elect either a bench trial or a jury trial. Mass. Gen. Laws Ann., ch. 218, §§ 26, 26A. If a defendant chooses a jury and is convicted, he has the normal appellate process open to him, while a defendant dissatisfied with the results of a bench trial, if he elects that course, has an absolute right to trial *de novo* before a jury.<sup>1</sup> Ch. 218, §§ 26 and 27A. A convicted defendant who has chosen a bench trial need not allege error at that trial to obtain *de novo* review. On the other hand, he may

<sup>1</sup>At the second-tier trial, a defendant may waive a jury and undergo a second bench trial. Mass. Gen. Laws Ann., ch. 218, § 27A(g).

To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 5-9, 12-14, 16

From: Justice White

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2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-1479

JUSTICES OF BOSTON MUNICIPAL COURT,  
PETITIONERS *v.* MICHAEL LYDON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT

February, — 1984]

JUSTICE WHITE delivered the opinion of the Court.

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To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice White

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JUSTICE

'84 MAR -7 P 3:40  
3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-1479

JUSTICES OF BOSTON MUNICIPAL COURT,  
PETITIONERS *v.* MICHAEL LYDON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
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To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice White**

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SEE PAGES: 6-8

4th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-1479

JUSTICES OF BOSTON MUNICIPAL COURT,  
PETITIONERS *v.* MICHAEL LYDON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT

[March, — 1984]

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<sup>1</sup>At the second-tier trial, a defendant may waive a jury and undergo a second bench trial. Mass. Gen. Laws Ann., ch. 218, § 27A(g).

To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice White

- Stylistic changes  
and pp. 8, 9, 13, 14

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5th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-1479

JUSTICES OF BOSTON MUNICIPAL COURT,  
PETITIONERS *v.* MICHAEL LYDON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
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<sup>1</sup> At the second-tier trial, a defendant may waive a jury and undergo a second bench trial. Mass. Gen. Laws Ann., ch. 218, § 27A(g).

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'84 APR 13 P1:54

To: The Chief Justice  
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Justice O'Connor

From: Justice White

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Stylistic changes  
and pp. 8, 13, 14

6th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-1479

JUSTICES OF BOSTON MUNICIPAL COURT,  
PETITIONERS *v.* MICHAEL LYDON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT

[April, — 1984]

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<sup>1</sup>At the second-tier trial, a defendant may waive a jury and undergo a second bench trial. Mass. Gen. Laws Ann., ch. 218, § 27A(g).

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

April 23, 1984

MEMORANDUM TO THE CONFERENCE

RE: Cases Held for Justices of Boston Municipal Court  
v. Lydon, No. 82-1479

In the Interest of Edward Stephens, No. 83-5494

This case involves a Pennsylvania delinquency proceeding. Under Pennsylvania law, a minor charged with delinquency is usually given a hearing before a master, but he is told that if he objects to the hearing before the master, he has an absolute right to a hearing before a judge. The master's function is to hear evidence and transmit written findings and recommendations to the judge. The master's findings and recommendations become the findings and order of the court when confirmed in writing by the judge. For "cause shown" the judge may order a "rehearing" before the judge, which is a trial de novo. Only the judge has the power to enter a binding judgment.

A delinquency petition was filed against appellant charging acts constituting aggravated and simple assault. After a hearing, the master recommended that the petition be dismissed for lack of evidence. The State requested a rehearing, alleging that the master's determination was arbitrary and capricious because the juvenile had admitted that he engaged in a fight, which constitutes a misdemeanor. The juvenile judge granted the motion, and rejected appellant's claim that a trial de novo would violate the Double Jeopardy Clause. Appellant was found delinquent at the rehearing.

The Pennsylvania Supreme Court rejected appellant's double jeopardy claim. It held that because the master's function was purely advisory, jeopardy had not attached. The Pennsylvania court relied upon Swisher v. Brady, 438 U.S. 204 (1978), for its conclusion that the Pennsylvania system did not violate the Double Jeopardy Clause.

The question presented under Lydon is whether the master's recommendation can in any sense be considered a judgment that should have the effect of a verdict of acquittal, or whether the

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 20, 1984

Re: No. 82-1479-Justices of Boston Municipal  
Court v. Michael Lydon

Dear Bill:

Please join me in your concurring opinion.

Sincerely,

*J.M.*

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 26, 1984

Re: No. 82-1479, Justices of Boston Municipal Court v. Lydon

Dear Byron:

Please join me.

Sincerely,



Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

January 17, 1984

82-1479 Justices of Boston Municipal Court v. Lydon

Dear Byron:

Except for Part II, that I will mention below, I expect to join your opinion substantially as written.

I do think that Bill Brennan is right to the extent he argues that Jackson v. Virginia is a decision we should consider. Bill thinks that Jackson prohibits a retrial of Lydon because of the finding in this case of evidence insufficiency by the federal court on habeas.

In my view, Lydon's claim that the evidence at the first trial was insufficient does not state a violation of any federal right and therefore was not within the jurisdiction of the federal courts on habeas. Jackson prohibits only a final conviction on the basis of insufficient evidence, and Lydon's conviction was never final. It was vacated at his own election when he chose to undergo a second trial at which both the evidence introduced at the bench trial, and the conviction, would have been inadmissible.

This is an entirely different situation from that in Burks. Nor do the policies that underlie the double jeopardy clause support the extending of Burks to the Massachusetts system - a system that may be the most generous to a defendant one can find anywhere.

As to the "jeopardy" question, I share Sandra's concerns and yet - as Bill Rehnquist implies - we may have made the controlling mistake in Hensley.

Sincerely,

Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 23, 1984

82-1479 Justices of Boston Municipal Court v. Lydon

Dear Byron:

Your second draft, circulated yesterday, has prompted me to take another look at this case.

I am still inclined to think, as indicated in my letter of January 17, that there is no violation of any federal right and therefore no habeas corpus jurisdiction. I will try to write something out along this line, but probably will not get to it until after our argument session next week.

On the assumption that we do have jurisdiction, I find your opinion quite persuasive. I hope to join portions of it on this assumption.

Sincerely,



Justice White

lfp/ss

cc: The Confernce

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February 28, 1984

82-1479 Justices v. Lydon

Dear Sandra:

I will be glad to join your excellent concurring opinion, enclosed with your note of February 24.

As I was on the Court when Hensley was decided, I am bound by it - perhaps somewhat more directly than you are. I therefore am inclined to write a separate concurrence along the lines enclosed. It actually adds little to what you have said.

Also, I believe we can join Parts I, III and IV of Byron's opinion, as I have indicated.

Sincerely,

Justice O'Connor

LFP/vde

2/27/82

Justices of Boston Municipal Court v. Lydon

No. 82-1479

JUSTICE POWELL, concurring.

I agree with JUSTICE O'CONNOR's opinion, and would hold that there is no federal habeas corpus jurisdiction. I continue to believe that Hensley v. Municipal Court, 411 U.S. 345 (1973), was wrongly decided for the reasons indicated by the dissent in that case. But accepting Hensley as the law -- as I do -- there is no reason to extend it to find that Lydon was in "custody" because he is free on his own recognizance. As JUSTICE O'CONNOR explains, Hensley is best understood as interpreting "custody" to include those cases where a criminal defendant, already convicted and sentenced, would be imprisoned without further state judicial action had

March 1, 1984

Re: 82-1479 Justices of Boston Municipal Court v.  
Lydon

Dear Sandra:

Thank you so much for your letter of February 29.

I quite agree with your point as to Byron's language with respect to the attaching of double jeopardy where the first trial is optional for the defendant.

Bill Rehnquist's letter to Byron of the same date makes your point, and I will wait to see whether Byron makes the change requested by Bill.

Sincerely,

Justice O'Connor

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 29, 1984

82-1479 Justices of Boston Municipal Court v. Lydon

Dear Byron:

Please join me in Parts I, IIB, III and IV of your opinion.

I will circulate, perhaps today, a brief opinion agreeing with Sandra as to federal habeas corpus jurisdiction.

Sincerely,

*Lewis*

Justice White

lfp/ss

cc: The Conference

03/29

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Powell**

Circulated: MAR 30 1984

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-1479

JUSTICES OF BOSTON MUNICIPAL COURT,  
PETITIONERS *v.* MICHAEL LYDON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT

[March —, 1984]

JUSTICE POWELL, concurring in part and concurring in the judgment.

I agree with JUSTICE O'CONNOR that there is no federal habeas corpus jurisdiction. I continue to believe that *Hensley v. Municipal Court*, 411 U. S. 345 (1973), was wrongly decided for the reasons indicated by the dissent in that case. But accepting *Hensley* as the law—as I do—there is no reason to extend it to find that Lydon was in “custody” when he is free on his own recognizance. As JUSTICE O'CONNOR explains, *Hensley* is best understood as interpreting “custody” to include those cases where a criminal defendant, already convicted and sentenced, would be imprisoned without further state judicial action had not the prison sentence been stayed by the federal court on habeas. The state had “emphatically indicated its determination to put [Hensley] behind bars,” *id.*, at 351-352, and would have done so but for a stay by the federal district court.

Lydon's petition does not present such a case. Until Lydon is convicted, he is obligated only to appear at trial and to “keep the peace.” If the trial court finds that he has defaulted on his recognizance, the court may sentence him pursuant to his first conviction; but Lydon then may seek appellate review, see, *e. g.*, *Commonwealth v. Bartlett*, 374 N. E. 2d 1203, 374 Mass. 744 (1978). It trivializes habeas corpus jurisdiction, historically a protection against governmental

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

RECEIVED  
SUPREME COURT  
JUSTICE  
January 16, 1984

'84 JAN 17 A10 :02

Re: No. 82-1479 Justices of Boston Municipal Court v.  
Lydon

Dear Byron:

While I share Sandra's feelings, expressed in her letter to you, that the concept of "custody" has been expanded beyond its statutory intent, I don't think it is you who are doing it in this case. Since I voted to reverse rather than to affirm, I disagree with most of Bill Brennan's observations in his letter to you. Please join me in your opinion.

Sincerely,



Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

February 29, 1984

Re: No. 82-1479 Justices of Boston Municipal  
Court v. Lydon

Dear Byron:

I joined your first circulation in this case some time ago, but one of my law clerks has now called my attention to a change made in the second circulation, and to something I did not catch in the first circulation which is retained in the second circulation, both of which give me problems. I hope that I am not barred by my "join" from raising these questions with you.

Your new language beginning at the bottom of page 6 and continuing through page 7 of your second draft deals with the question of exhaustion of state remedies, but in the course of your discussion you intimate, if you do not decide, that a defendant is entitled as a matter of federal constitutional law to have a claim of constitutional insufficiency of the evidence considered in state court following a termination of the first proceeding against him by a finding of guilt. You cite Arizona v. Washington, 434 U.S. 497 (1978), as "implicitly" accepting this view.

We have the same question pending in United States v. Richardson, 82-2113, which is set for argument in March. I, for one, do not feel bound by any "implications" from Arizona v. Washington on this issue, and would much prefer to leave the question wholly unanswered at least until we have had a conference vote in United States v. Richardson.

On page 13 your first full paragraph begins with the statement "We assume that jeopardy attached at the swearing of the first witness of Lydon's bench trial," followed by a footnote citing Harry's opinion in Ludwig v. Massachusetts as authority for that proposition. As I read the statement

in Harry's opinion for the Court in Ludwig, it is simply describing the Massachusetts two-tier procedure, not expressing the view on any constitutional double jeopardy issue. Again, we have set for argument the case of Thigpen v. Roberts, No. 82-1330, which I believe is scheduled for argument in April, that raises this question. I would be pleased if you could see your way clear to change the above quoted sentence on page 13 to read "We may assume, without deciding the point, that jeopardy attached at the swearing of the first witness at Lydon's bench trial," and delete the footnote reference to Ludwig and the Costarelli case.

Sincerely,



Justice White  
cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

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SUPREME COURT  
JUSTICE JOHN PAUL STEVENS

'84 JAN 17 A10 :02

January 16, 1984

Re: 82-1479 - Justices of Boston Municipal  
Court v. Lydon

Dear Byron:

Your opinion is an excellent presentation of the consensus reached by the Conference. I plan on joining Parts I and II. I do not agree, however, with your analysis of "continuing jeopardy" and "governmental oppression," essentially for the reasons laid out in Justice Brennan's letter. I do think, however, that federal habeas review prior to the second trial is tantamount to enjoining that trial, and should not be permitted under the abstention doctrine. I remain persuaded that at the end of the two-stage process there ought to be available a claim that there was insufficient evidence adduced at the first stage and that the defendant was therefore constitutionally entitled to an acquittal at that time which, in turn, would preclude the State from punishing him on the basis of additional evidence adduced at the second stage. It may be a little hard to explain this position in acceptable fashion, in which event I may end up by joining you entirely, but I thought I should let you know that I will be trying to write separately with respect to that point.

Respectfully,



Justice White

Copies to the Conference

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: **Justice Stevens**

Circulated: MAR 21 1984

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-1479

JUSTICES OF BOSTON MUNICIPAL COURT,  
PETITIONERS *v.* MICHAEL LYDON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT

[March —, 1984]

JUSTICE STEVENS, concurring in part and concurring in the judgment.

It is necessary to analyze the character of the substantive claim made by respondent before addressing the more difficult procedural questions. Properly analyzed, respondent's habeas corpus petition raises two distinct constitutional claims: First, whether the entry of a judgment of guilt at the conclusion of his first-tier trial deprived him of liberty without due process of law because the evidence was constitutionally insufficient, and second, whether the second-tier trial, if held before the first question is answered, would violate Lydon's constitutional right not to be twice placed in jeopardy for the same offense.

The answer to the first question is easy. If, as respondent alleged and the District Court found, the Commonwealth's evidence at respondent's first-tier trial was insufficient to support a finding of guilt in the first-tier trial, he was entitled to an acquittal. Such an acquittal would have given respondent his unconditional freedom. Instead, he was found guilty of a crime and sentenced to two years in jail. It is true, of course, that Massachusetts has afforded him a right to have that judgment vacated, but as the Court has demonstrated, that relief does not terminate his custodial status. As a matter of federal constitutional law, he had a right to a judgment of acquittal that would eliminate the restraints on his

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STYLISTIC CHANGES THROUGHOUT. P 1:54  
SEE PAGES:

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: Justice Stevens

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2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-1479

JUSTICES OF BOSTON MUNICIPAL COURT,  
PETITIONERS *v.* MICHAEL LYDON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT

[April —, 1984]

JUSTICE STEVENS, concurring in part and concurring in the judgment.

It is necessary to analyze the character of the substantive claim made by respondent before addressing the more difficult procedural questions. Properly analyzed, respondent's habeas corpus petition raises two distinct constitutional claims: First, whether the entry of a judgment of guilt at the conclusion of his first-tier trial deprived him of liberty without due process of law because the evidence was constitutionally insufficient, and second, whether the second-tier trial, if held before the first question is answered, would violate Lydon's constitutional right not to be twice placed in jeopardy for the same offense.

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Supreme Court of the United States  
Washington, D. C. 20543

January 13, 1984

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

No. 82-1479 Justices of Boston Municipal Court v. Lydon

REC'D  
SUPREME COURT U.S.

Dear Byron,

'84 JAN 16 AM 10:02

Ultimately, I could join parts I and III of your opinion. I do, however, have strong reservations about part II. Unfortunately part II involves the jurisdictional question, so it would be difficult for me simply to join in all but that part.

I am reluctant to join anything that can be read as a strong reaffirmation or extension of Hensley. Hensley, it seems to me, has already stretched the concept of "custody" about as far as is possible. Unfortunately, the facts of Lydon invite us to take it even further. In Hensley, after all, incarceration was inevitable absent federal intervention. The defendant had exhausted all available state court remedies prior to filing for federal habeas. 411 U.S., at 346. In Lydon's case, by contrast, the defendant has scarcely begun to go through the state system.

Of course Lydon has "exhausted" state remedies as to his double jeopardy claim. Federal habeas relief after the second trial would be substantially less useful for protecting double jeopardy rights than habeas relief after the first. But we do have the language of §§2241 and 2254 to contend with. That language strongly suggests that use of the writ must turn on the fact of custody, not on the threat of a violation of other liberty or due process interests.

Nonetheless, the Conference seemed to be of the view that we should reach the double jeopardy question in Lydon's case. I think I could go along, but only if we say as little as possible about the Hensley issue. Frankly, I would like to see your part II collapsed into one sentence. Better still, one sentence buried in a footnote.

I understand that this approach might be unacceptable to you and others. If so, my inclination would be to write separately, briefly addressing the "custody" issue and concluding that the District Court lacked jurisdiction to entertain Lydon's habeas petition.

Sincerely,



Justice White

Copies to the Conference

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: **Justice O'Connor**

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JUSTICE O'CONNOR

'84 FEB 29 A9:55

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-1479

JUSTICES OF BOSTON MUNICIPAL COURT, PETITIONERS *v.* MICHAEL LYDON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[February —, 1984]

JUSTICE O'CONNOR, concurring in the judgment.

I agree that the judgment of the Court of Appeals should be reversed. Unlike the Court, however, I conclude that the District Court lacked jurisdiction to hear respondent Lydon's habeas petition at this stage in the on-going state court proceeding.

The Court suggests that Federal habeas jurisdiction exists whenever (i) a state defendant is subject to minimal legal restraints on his freedom and (ii) the defendant has exhausted state avenues of relief with respect to the particular federal claim brought to the habeas court. Then, perhaps recognizing that this unadorned test might greatly expand federal habeas jurisdiction, the Court, *ante*, at —, emphasizes "the unique nature of the double jeopardy right." In my view the Court first unnecessarily expands the holding in *Hensley v. Municipal Court*, 411 U. S. 345 (1973), and then limits the damage by restricting its exhaustion analysis to double jeopardy claims. I would prefer to search for a more principled understanding of the statutory term "custody."

Under Massachusetts law, as I read it, Lydon is no longer in custody "pursuant" to the judgment entered at his first trial. Lydon has invoked his right to a second trial and appeared at the second proceeding. Under Massachusetts law, therefore, the results of the first trial—together with any incidental "custody" imposed in consequence of that trial—have

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

February 29, 1984

Re: No. 82-1479 Justices of Boston Municipal Court v.  
Lydon

Dear Lewis,

Having expressed my views on the jurisdictional question in a dissenting opinion in this case, it is probably inappropriate for me to worry about anything else. But I am concerned that the sections of Byron's opinion dealing with double jeopardy may lead to results that the Court would be reluctant to accept. Since you plan to join most of Byron's opinion, I will share with you my concerns.

Most state or local governments have traffic courts for deciding petty violations. Proceedings in traffic court are typically part of a two-tier system, and the outcome is not binding on the defendant, though it may be binding on the state. A defendant who has just killed or seriously injured someone in a drunk driving accident is often given a ticket for reckless driving or D.W.I. If he has a smart lawyer he will rush to the traffic court, plead guilty, and pay his fine. A month later, when the local prosecutor attempts to charge him with vehicular homicide, the defendant cries double jeopardy. See Illinois v. Vitale, 447 U.S. 410, 415 (1980). See also Thigpen v. Roberts, No. 82-1330 (to be argued in April). Judging from our cert petitions, this fact pattern is not uncommon.

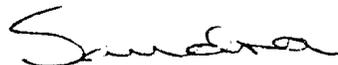
Byron's opinion suggests that jeopardy may attach at the first trial, at least if its outcome is binding on the state. Opinion at 13 and n. 5. That may be a crucial concession in the type of case I'm worried about. And I don't think it's required by the double jeopardy clause. So long as the first trial is entirely optional for the defendant, I see no reason why a state could not permit either side to nullify its outcome. I would therefore be much happier if the Court were to adopt the view that

jeopardy does not attach in any proceeding that the defendant is free to waive, or whose outcome the defendant may nullify at will. That approach, I suspect, would cause us--and the lower courts--less trouble in the future.

I must concede that Byron's opinion does not go very far in the direction that concerns me. The material on p.13 can be read to be in the form of "Assuming arguendo that jeopardy does attach at the first trial ...." And the material on p.14 emphasizes that the jeopardy of the first trial is jeopardy "in only a theoretical sense." This may be enough to prevent the difficulties I anticipate. But I wonder if the Court wouldn't do better to emphasize that Lydon's first trial didn't place him in jeopardy at all, theoretical or otherwise.

Since you plan to join portions of Byron's opinion, perhaps you could still succeed in obtaining a modification to avoid the problem that seems to be lurking within it.

Sincerely,



Justice Powell

PP. 1, 3, 4, 5, 6

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: **Justice O'Connor**

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'84 MAR 12 A11:07  
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3/12/84

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**SUPREME COURT OF THE UNITED STATES**

No. 82-1479

JUSTICES OF BOSTON MUNICIPAL COURT,  
PETITIONERS *v.* MICHAEL LYDON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT

[March —, 1984]

JUSTICE O'CONNOR, concurring in the judgment.

I agree that the judgment of the Court of Appeals should be reversed. Unlike the Court, however, I conclude that the District Court lacked jurisdiction to hear respondent Lydon's habeas petition at this stage in the on-going state court proceeding.

The Court suggests that Federal habeas jurisdiction exists whenever (i) a state defendant is subject to minimal legal restraints on his freedom and (ii) the defendant has exhausted state avenues of relief with respect to the particular federal claim brought to the habeas court. Then, recognizing that its unadorned test might greatly expand federal habeas jurisdiction, the Court, *ante*, at 10, emphasizes "the unique nature of the double jeopardy right." In my view the Court first unnecessarily expands the holding in *Hensley v. Municipal Court*, 411 U. S. 345 (1973), and then limits the damage by restricting its exhaustion analysis to double jeopardy claims. I would prefer to search for a more principled understanding of the statutory term "custody."

I

Under Massachusetts law, as I read it, Lydon is no longer in custody "pursuant" to the judgment entered at his first trial. Lydon has invoked his right to a second trial and appeared at the second proceeding. Under Massachusetts law,

PP. 2, 3

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Connor

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3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-1479

JUSTICES OF BOSTON MUNICIPAL COURT,  
PETITIONERS *v.* MICHAEL LYDON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT

[March —, 1984]

JUSTICE O'CONNOR, concurring in the judgment.

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RECEIVED  
SUPREME COURT U.S.  
JUSTICE BRENNAN

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Stevens  
Justice O'Connor  
Justice Souter  
Justice Ginsburg

'84 ABR 16 A11:32

From: Justice O'Connor

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4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-1479

**JUSTICES OF BOSTON MUNICIPAL COURT,  
PETITIONERS v. MICHAEL LYDON**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT**

[April 18, 1984]

JUSTICE O'CONNOR, concurring in the judgment.

I agree that the judgment of the Court of Appeals should be reversed. Unlike the Court, however, I conclude that the District Court lacked jurisdiction to hear respondent Lydon's habeas petition at this stage in the on-going state court proceeding.

The Court suggests that Federal habeas jurisdiction exists whenever (i) a state defendant is subject to minimal legal restraints on his freedom and (ii) the defendant has exhausted state avenues of relief with respect to the particular federal claim brought to the habeas court. Then, recognizing that its unadorned test might greatly expand federal habeas jurisdiction, the Court, *ante*, at 7, emphasizes "the unique nature of the double jeopardy right." In my view the Court first unnecessarily expands the holding in *Hensley v. Municipal Court*, 411 U. S. 345 (1973), and then limits the damage by restricting its exhaustion analysis to double jeopardy claims. I would prefer to search for a more principled understanding of the statutory term "custody."

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