Supreme Court of the United States

October Term, 1968

In the Matter of:

CURTIS M. SIMPSON, Warden, Kilby Prison, Montgomery, Alabama,

Petitioner;

vs.

WILLIAM S. RICE,

Respondent.

Docket No. 418

Place Washington, D. C.

Date February 24, 1969

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C O N T E N T S

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vs.	:	No. 418
WILLIAM S. RICE, Respondent.	:	

Washington, D. C.
February 24, 1969

The above-entitled matter came on for argument at 1:35 p.m.

BEFORE:

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

APPEARANCES:

PAUL T. GISH, JR., Esq.
Assistant Attorney General
of Alabama
Counsel for Petitioner

THOMAS S. LAWSON, JR., Esq.
57 Adams Avenue
Montgomery, Alabama
Counsel for Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 418, Curtis M. Simpson, Warden, versus William S. Rice.

Mr. Gish.

ARGUMENT OF PAUL T. GISH, JR., ESQ.

ON BEHALF OF PETITIONER

MR. GISH: If the Court please, Mr. Chief Justice, I am Paul Gish, Assistant Attorney General of Alabama, representing Warden Simpson, the petitioner in the case of Simpson versus Rice.

In this case Mr. Rice was convicted in 1960 on four separate cases of second degree burglary. He received on a plea of guilty on each case four years in one case and two years in each of the other three cases, making a total of 10.

His plea of guilty was entered without aid of counsel, so on post conviction, he received a new trial some two and a half years later. A counsel was appointed for his new trial. He was tried, I believe, in December of 1964, I think that is right, in two of the cases.

He was convicted by the jury and the same judge who had passed the earlier sentence gave him 10 years on each of those two convictions, making a total of 20.

On the third case the same judge sentenced him to five years imprisonment. The State prosecuting officer made

a motion to nol pross the fourth case and that is what the trial judge did. The fourth case was nol prossed.

Now, this case, if the Court please, is singular of course to the North Carolina Pearce case. However, there were some points argued by counsel that we don't have here. Because this man did receive harsher punishment, he received much harsher punishment on his second trial than he did on the first.

He not only did that, but technically at least he received no credit for the 2-1/2 years served between his first convictions and his post convictions.

Now, our position is that the trial judge had used complete discretion to sentence after a judgment of guilt. He used many factors, some of which are connected with the crime itself, some of which may be connected with the man, some of which can be connected with history of the case itself, some of which, if the Court please, depends upon how much the trial judge knows about this particular case.

In other words, on a plea of guilty, I have seen, and the record doesn't show it, but I have seen in hundreds of cases in which agreements are made between the prosecuting officer and -- in which they will entertain a plea of guilty.

Q Mr. Gish, would you suggest that among those things that a judge takes into consideration might also be the fact that a man who appeals and gets a reversal should be

punished more than a man who did not take an appeal?

A Mr. Chief Justice, I must agree with you. But our position is that the judge who is an elected or appointed official in Alabama does not have to say, prescribed by the legislature or prescribed by the Courts, why I am giving you more punishment.

Q How would defendant ever raise the question as to whether the judge had that in his mind or not when he sentenced him?

A I don't see how he could, Your Honor.

Q You don't think that would be permissible, do you, to have that motive?

A Your Honor, if I disagree with you it is because I think that if there are circumstances that we don't know about where vindictiveness could be shown, then we would have a case where a man could show that his rights are violated by a vindictive judge. He did this to punish me.

But what I am saying, my position is, that the mere fact that he receives, that the accused receives, a harsher punishment and in this case a much harsher punishment can be and should be pointed to other sentencing factors and not just vindictiveness.

Q Well, here we have the same judge, the same evidence and dismissal of one of the charges for the second trial and still the judge gives him accumulated sentences of

25 years instead of the 10 that he gave him on the first trial. What more could one ask in trying to determine whether it was vindictative or not.

A If Your Honor please, I agree with every part of your question except where Your Honor states that it is the same evidence.

Q I thought that was in the record here, that it is the same evidence.

A On a plea of guilty.

Q I beg your pardon?

A On a plea of guilty, as this man entered the first time, in a crime of this sort, many times, no evidence at all is presented to the court.

Q I see.

A Now we don't know who from the record whether the judge had any help but we do know that the judge had the evidence on the jury trial.

Q I was under the impression that there had been a trial in most cases. I was wrong in that.

A That is right.

Now, let me point to a few things that are not in the brief. In the Goolsby cases which I have in the appendix on the merits on which were not important prior to that case. That have since been important in 215, 7 2d, 598 and 603.

Now, those cases decided subsequent to the second

conviction in this case hold in essence that a man in Alabama cannot receive more punishment for one crime than the maximum provided by statute. Now that is all that Alabama requires. There is no way that I know of to give a man credit in Alabama on his prior conviction of the same case.

The legislature does not leave it to the prison authorities. The prison authorities receive a man with the judgment and sentence of the Court. The prison authorities have no discretion as to what to do with this man except to receive him and let him serve his term under the rules, good time -- there are two types of good time, which is the same as gained time in North Carolina.

Those things are figured by the prison authorities. Now, if I may, let me get to the record in this case. In the appendix on Pages 55 and 56 we have as an exhibit a statement by the prosecutor as to how he handles the second cases on a retrial.

Now, frankly I do not understand the statement of the District Court which flatly accuses the State of Alabama of increasing punishment, increasing sentences, merely for punishment. There is no evidence that that I see in this record except the statement on Pages 55 and 56 and the statement by the petitioner below that he didn't know why he served this sentence.

I don't think that any convicted man could say why

the judge gave him the maximum instead of the minimum. This Court I think has never held that this type of situation or a similar type situation involved double jeopardy.

The Court has held in Alabama that if a man is convicted of a lesser offense you automatically acquitted him of the higher offense. In other words if he was convicted of second degree murder he could not again be tried and convicted of first degree murder.

But we submit that there is a difference between that situation and being convicted of first degree murder with ten years on the one hand and on the second trial being convicted getting off light in the same degree of crime.

There is a case decided by the Second Court of the Fifth Circuit reported in 403 Federal 2nd 1019 that is not cited in any of the briefs filed here in this case.

Frankly, I cannot, from a Constitutional standpoint, understand this case as Williams against the State of Alabama and this case in connection with the case before this Court.

In the Williams case there were three convictions on first trial; each sentence was for five years. On the second trial Mr. Williams was convicted by a jury and given ten years in one case. In the other two cases he was given a year and a half, which put him, of course, in a better position the second time than he was in the first time.

I can see that he is in a better position. However,

Constitutionally, if Mr. Rice was entitled to receive only what he did the first with credit for time served as the District Court held, then Constitutionally why wasn't Mr. Williams entitled to the same treatment, except that on the whole Mr. Williams got a better deal on these cases than Mr. Rice did.

To me as a Constitutional point, I do not understand that. As a point of morality, as a point of what should be done in a particular case, I can understand. But as a Constitutional point if Mr. Rice is entitled to his years with no additions, then I submit that Mr. Williams is entitled to the same thing.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Lawson.

ARGUMENT OF THOMAS S. LAWSON, JR., ESQ.

ON BEHALF OF RESPONDENT

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

My name is Tom Lawson. I am with Mr. Oakley Melton. We have represented the defendant, respondent in this cause, up to this Court.

The facts can be briefly stated from our standpoint. Mr. Rice was unfairly convicted, did not have an attorney at his first trial. The State of Alabama granted him a new trial. At that trial they said, "Mr. Rice, we are sorry that you have spent 2-1/2 years in jail but we don't recognize that that

exists. In fact we are so sorry that you spent that time in jail that we are going to increase your sentence on these three cases from eight years to 25."

At the evidentiary hearing in the District Court the State of Alabama produced no witness, not a single person testified for the State of Alabama. Mr. Rice testified on his own behalf and a member of the pardon and parole board of the corrections outfit testified as to certain time he had spent in jail.

Q If the State offered no witnesses, how did they convict him?

A This is, Mr. Justice Black, this is at the District Court, the Federal District Court, in the habeas corpus proceeding. But at that case Judge Johnson at the conclusion of the case entered his opinion. It is on Page 69 of the appendix. He found that the conclusion is inescapable that the State of Alabama is punishing the petitioner's rights for having exercised his right of post conviction review, for having had the original sentences set aside.

We submit that as the Hon. Attorney General of the State of Louisiana mentioned that this is a flagrant violation of Mr. Rice's Constitutional rights. We realize at the same time that this case is before the Court primarily because of the several splits in the jurisdictions with the Patton case and as to the concepts involved there.

We think that beyond the finding of the District Court that Mr. Rice was being punished for having made this appeal that our case can be supported here on the same three theories as the Patton case.

Q Mr. Lawson, may I ask a question?

A Yes, sir.

Q I understand that this offense of second degree burglary carries a maximum of 10 years.

A That is right.

Q Suppose there had been only one count to which there had been a guilty plea and there had been a sentence of 10 years that the denial of assistance to counsel didn't come to light until after he had served eight years of the 10 years, if he could have served that long -- could he?

A Yes, sir.

Q Could he have served that long?

A Your Honor, it gets rather complicated in figuring out good time and I can't say offhand it would probably more in the neighborhood of six years than ---

Q Let us take six years then. Just before he had served his six years, then he proceeds in getting the conviction set aside for denial of assistance to counsel and he goes to trial. Now do I understand that on conviction on trial he could get another 10-year sentence, that he would have to serve that six years,with good time reduced to six years, so

that the aggregate would be say 12 years for the offenses only maximum of only 10 years under the statute; is that right?

A Your Honor, I think the law in Alabama has been changed by the Goolsby case in that regard. It now puts a maximum ceiling in what you can get after those two trials. It cannot be above the maximum specified in the statute. But in this case it did occur, exactly the same situation that you said, Your Honor, occurred.

In the first case ---

Q In fact, then, Rice has to serve an aggregate time in jail which exceeds the maximum for the offense?

A In one of the offenses, that is true, not in all three, because he had not entered into service of all three of these cases. But on the first case he had served some two years of the four-year sentence. He was resentenced to 10 years in jail, so that basically he had received ---

Q On how many counts?

A Sir, that was on one case.

There were four cases originally, one was nol prossed. As Judge Johnson mentions in here on Page 71, Judge Johnson found that the case was not nol prossed as the State contended in order to compensate the petitioner for the time that he had served in the previous case, but it was done because the main witness that the State had to rely on was not present.

Of course, we do contend, and quite seriously, that

the evidence in the record as presented to the District Court is sufficient to sustain his findings -- that Mr. Rice was being punished for exercising his right of appeal.

You have to put this in the context of time. The Gideon case had been decided and later Escabito and Alabama had then reinstated the old Writ of Novus as a State procedure for hearing these Constitutional claims. The Habeas Corpus in Alabama is not broad enough to hear those.

It was only after this had been done that Mr. Rice was able to bring these things before the State Court. He was --

Q You say that the judge as a fact that this was done in order to punish him for taking his appeal?

A Yes, sir.

Q What page?

A Page 69, Your Honor, of the appendix, the last part of the second paragraph.

Also in connection with the punishment it is also important to realize that this man was the first one of his knowledge to file one of these Writs after the Gideon decision in this particular county in Alabama.

I think the effect in this and the reason for it can be illustrated by a case, United States District Court case, in which the sentencing judge who was about to release someone on Habeas Corpus wrote in his opinion to, not just to the person, but to all the other prisoners and he said, "Let me remind you

that it may not be a real rainbow that you see these Writs that you are filing to get a fair trial. At the end of that rainbow there may be nothing but a pot of fool's gold."

Q A pot of what?

A Fool's gold.

Q Fool's gold.

Who said this?

A This is in a District Court case, Your Honor, 230 Fed. Supp. 601.

Q Is that in your brief?

A No, sir. I just ran across it. The point of law is not important but it shows what these prisoners are confronted with in attempting to obtain a fair trial.

Q What is the citation?

A 230 Fed. Supp. 607.

Q Your basic point is the due process point; is it?

A My basic point to begin with goes really beyond due process ---

Q What are they? Is that the most you can say for them is that they are fundamental concepts?

A I can go back to Chambers versus Florida ---

Q What Constitutional ---

A It would have to be due process. Here you have a person of being convicted of something that is, in effect, not a crime. The only thing that he did was to appeal, a right

which the State had given him, and it was for that that the District found that he was punished.

Q For the Constitutional right to appeal?

A You have never held that he has a Constitutional right to appeal but this Court has indicated that perhaps the States must provide at least one means of reviewing Federal question.

Q Why can't you approach it as just a burden on the other Constitutional rights that he would be urging on appeal?

A The unconstitutionality ---

Q That is a condition necessarily of due process.

A Well, due process because only in our view of the case based at this point on the District Court's findings, Your Honor, and we have got two different views: 1, if the Court punished him for something that was not a crime that is we say not due process. That is not law in any county. But if the Court was not punishing him for a crime, we think then that we can go back to Patton and to the basic concept developed in that case and support our position ---

Q They went on three grounds.

A Yes, sir.

Q We want to know which one you are going on.

A We urge all three, Your Honor.

Q Do you see an equal protection?

A Yes, sir, I see a very keen issue of equal

protection. Let us first take it as to the denial of credit for the time served, and take it one step further and suppose that he had been on appeal instead of in jail exercising this by right of versiformus novus.

The reason for this is in Alabama you have to go by versiformus novus after your appeal time has run out. But if he had been appealing he would be denied the equal protection that those people have who have the money to get out on bond. They don't spend any time in jail. The time that the other people serve who do not appeal, every minute is credited to their sentence.

But it is only this class, this class that is defined one way, and that is a class of people who have been denied a fair trial, a Constitutionally fair trial ---

Q Didn't this case come up on Federal Habeas?

A yes, sir.

Q Well, now he hasn't been out on bail while he was serving his sentence ---

A No, no. I was making a statement, Your Honor, that the logic in this case becomes more keen when you look at it ---

Q I know, but that isn't this case. Some other case isn't this case. We are talking about this case.

A Yes, sir. Well, in this case you still have people who are in jail under sentence of law who are serving

their sentences and they are receiving credit for it. Only these people had been denied a fair trial, and who have to go back to the Court to obtain a fair trial -- when I am speaking in terms of due process, we are not speaking of State error, procedural error, errors in the admission of evidence that do not reach Constitutional proportions.

Q Did I understand you that under Alabama law before the Writ of versiformus novus was reinstated there was no way of bringing this point up?

A No, sir.

Q Well, then, where do you get the equal protection argument of the wealthy man. He couldn't bring it up either, could he?

A That is true, Your Honor.

Q What happened to the equal protection argument on this case?

A Well, if it is a question of whether you have to provide a forum for these people, it may be that the State does not have to provide any method of appeal for raising these things. But you do get to the equal protection argument on this particular thing when the people who are sentenced and stay in jail and that includes two classes, those people who are denied a fair trial but are scared to get one and those people who had a fair trial and had been convicted and sentenced they get credit for every minute they spend in jail.

Q Well, I suppose your argument, too, is that if on the same day, two who had pleaded guilty to second degree mrglary, each got ten years, one did appeal, at the end of six years he would be out, whereas this other fellow is going to have to serve 12.

A Yes, sir.

Q So that is a denial of equal protection as between prisoners merely because he sought relief from his unconstitutional conviction.

A Yes, Your Honor.

Q How do they belong to the same class?

A Well, it doesn't necessarily have to be framed as to be tried on the same day, but we are speaking of prisoners as a class and that these people who appeal the sentence, w hatever the length of it is, do not have their sentences reviewed.

It may be that that second person needed to have his sentence increased as much as the first person. But if the State of Alabama believes this is unnecessary in and of itself it can provide another means of doing it apart from taking only ote group of people and reviewing their convictions and reviewing their background ---

Q Is there a difference in treatment among the class that has attacked the judgment on the grounds void of Constitutional reasons, those who are in that class -- what is

the difference of equal protection ---

A Between Constitutional reasons and procedural error?

Q Between all the prisoners who are in jail and who have successfully attacked their judgment on the ground that they were illegally convicted.

A I think if you divide it up in your illegal convictions, between those who sought a denial of a fair trial in a Constitutional sense, not having a lawyer or for many of the other Constitutional reasons, and those people ---

Q What is the difference in treatment of them?

A The difference in treatment, sir?

Q Within that class?

A Because if they had been denied the Constitutional right to a fair trial,they go back to seek a fair trial and the State says, "The years that you have served in jail" ---

Q That is quite a different class. It may be that we have no right to classify them that way.

A Yes, sir.

Q It seems to me that that is a different class.

A Well, the class that I am attempting to create are those people serving in jail under sentence of law and it is within that class that I am speaking.

Q Have you considered what the effect of this would be in California?

A No, sir, I have not. I am familiar with the California decision of Henderson and People versus Alley to support our contentions here in this Court. But I am not familia with what you speak of.

Q Suppose the State laws provided that the Court merely sentences the convicted defendant let us say to one year to life and then there is an authority that determines how long he shall serve, makes that determination and redetermination from time to time within that very broad charter and the man takes an appeal, the conviction is reversed, retried, again sentenced from one year to life.

Then would the doctrine for which you contend be binding upon the administrative agency in the respect that they could not thereafter compel a man to serve more time than the last time they had fixed prior to his appeal? Would you carry it that far, in other words?

A Well, sir, I might. I am not really familiar enough to know how that works but that is the idea that I have in mind of what the State could resort to if they felt that these constant reviewal sentences were necessary.

If you have this constant review of sentences, administratively perhaps, it becomes very little reason for having it done by the Court. In fact if you look at the public, I mean ---

Q Except I am suggesting that maybe the principle

for which you contend would operate to restrict the discretionary power of the authority in the sense that after a successful appeal and reconviction, I am asking as to whether in that case after a successful appeal and conviction in the second trial you would say that this principle should apply to the administrative authority, namely,that they can't keep a fellow in custody any longer than the last ruling prior to his appeal provided.

A It could have that effect but I think it would not have that effect under the equal protection argument, Your Honor.

It might have an effect under the due process or the double jeopardy argument that we make.

Q I am not suggesting that would be the result but I am suggesting that that is a problem. It might follow as a consequence of the doctrine for which you are here arguing.

I have already touched on, I believe, due process and the equal protection argument. Our double jeopardy argument we can attack in two concepts, really.

One, you can carry forward this fictitious void doctrine that began in Stroud and some of the earlier cases, as the Court did in Green. In that case the Court held that there was an implied acquittal of the first degree murder sentence when he was sentenced to second degree murder. We

think that there is very little reason that it should not be carried all the way forward as it was done in California.

The only argument made by the State in this case has been that this was on a plea of guilty and because of that that the State ought to have a second chance to look at it if the man decides to appeal.

But I think we have to carry it a little further and realize it was on a plea of guilty when he was without counsel. At that time the State's Attorney has a duty owing to the State to see that he does not make an agreement that will require so small a time in jail that the State would be jeopardized.

If the State's Attorney makes the agreement and it is adopted by the Court that it may well, it should represent what the State is going to require out of this crime. We see no reason that the State should have a second chance to look at this man, only this man, not the others who may need their sentences reviewed just as much.

The other viewpoint of double jeopardy is the multiple punishment angle and this began in the case of Ex parte Lange some years ago and that is to look at double jeopardy as being more than one concept but having three different parts to it, retrial after conviction, retrial after acquittal and multiple punishment for the same offense.

It may be that when this man appealed that he waived his right against a double jeopardy not to be retried, but that

does not mean that he necessarily waived his right to have that particular sentence fixed against him.

I think that a lot of these arguments that we have made appear in Professor Van Alstein's article in the Yale Law Review and I would like to give some credit to him because he probably should be the one before the Court today making the arguments in these cases.

Q Mr. Lawson, the Court of Appeals here adopted as its own the opinion of District Judge Johnson.

A Yes, sir.

Q Of course Judge Johnson decided in your favor.

A He did.

Q In doing so, however, he made very explicit that he did not believe that it is Constitutionally impermissible to impose a harsher sentence upon retrial if there is recorded in the Court's record some legal justification for it and I am quoting an opinion.

First of all, I am sure you are not going to look at a gift horse in the mouth, so you don't need to say whether or not you agree, but if he is correct about that, then this means that he has rejected any claim that this would violate the double jeopardy guarantee; does it not?

A Yes, sir. He did not rest his opinion on double jeopardy.

Q And he could not have if he said it is

Constitutionally permissible as he did under such circumstances to impose a harsher sentence.

A Yes, sir, I agree. I agree with the language of the District Court as to your interpretation of it, Your Honor. I don't necessarily agree that the judge should have stopped at that point.

Q If the District Court is right in that statement then that means that your double jeopardy argument cannot prevail; does it not?

A That is true, sir.

I think that there are three views that have been expounded by the District Court. One takes the view that there can be no increase at all, that is the Patton case.

Another takes the view that there can be increase under justifiable circumstances which appear in the record. That was the lower court case in the instant case and also the lower court in the Patton case.

The Marano case takes a position that there can be an increase for reasons appearing, I believe, for things that have occurred after the first sentence. Another view is expressed that it can be for reasons not that have occurred since the first sentence but for reasons in connection with the crime itself.

We believe that the simple solution is to have no increase.

Q Is there another possible view that if the second sentence is within the statutory maximum that really all he is entitled to is to be sure to get credit on time already served?

A Your Honor, that view of the statutory maximum has bothered me considerably because it flies right in the face of the only doctrine that the Courts rely on and that is that the case is void for all reasons.

Q What we are talking about here is what the Federal Constitution imposes in the way of a restraint in this circumstance on a new sentence; isn't that what we are talking about?

A Yes, sir.

Q Focusing on that if he -- actually he sought to have the first conviction set aside in the hopes that on a new trial he would be acquitted, I take it.

A Yes, sir.

Q If that is the chance he wants to take and he failed and the sentence is within the statutory limit on the new sentence, does he really have any justification for asking for more than insistence that he gets credit for time already served on the first conviction?

A Yes, sir, I think he does.

Q Isn't that another possible view of this problem?

A Yes, sir. I have nothing further unless the

Court has some more questions.

MR. CHIEF JUSTICE WARREN: Mr. Gish.

REBUTTAL ARGUMENT OF PAUL T. GISH, JR., ESQ.

ON BEHALF OF PETITIONER

MR. GISH: If the Court please, the accused in this case received on second trial a total of 25 years. His maximum sentence on three indictments for burglary in second degree is 30 years. I do not think we have any question here that this man has received more than the maximum allowed by Alabama s tatute.

On his first 1960 convictions he received 10 years and a maximum term of 40. On the second trial he received 25 years and a maximum term of 30.

Q Plus the time he had already served.

A Two and a half years.

Q Yes.

A It would be 27-1/2 years.

Q Is it true that this is the first collateral attack upon a conviction in your State under the rule of Gideon against Wainwright?

A No, sir, not in my State. It may be in this county.

Q The petitioner alleged that it was.

A The petitioner said it was at the evidentiary hearing. I do not know whether it is correct or not.

Q Of course he wouldn't have the records available to him, I presume. In the record there is uncortradicted testimony at least that this was the first attack upon a conviction based upon this Court's decision of Gideon against Wainwright in this county of Alabama.

A That is correct.

Q And from that fact as well as from the State's failure to present any witnesses at the Habeas Corpus hearing, perhaps from other circumstances, Judge Frank Johnson, the Federal District judge in this case, concluded as a matter of fact that the reason for imposing the harsher sentence was a vindictive reason of penalizing this petitioner's on his sentence?

A It may be so, Mr. Justice, let me say that I do not fully understand Judge Johnson's opinion in two or three respects. He says that he does not hold in the first place that the State cannot increase the sentence. All right, then he says that where the State does not show "by the record the reason for a harsher sentence then due process and equal protection are violated".

My hindsight has always been a lot better than foresight. What if I had at the time of the Habeas Corpus hearing introduced evidence to the judge and prosecutor to let them explain why the defendant was sentenced.

As I read Judge Johnson's opinion even then would not

have helped my cause at that stage of the game.

As I read the opinion he said on the record,and I presume the record on the second trial, must show some reason why I didn't conceive of no reason other than the fact that the judge had the evidence before him the second time and he accepted a plea of guilty the first time.

Now would it be enough for the trial judge to state in the record at the end of the trial when the jury convicts: "Well, this time I have heard the evidence against you. The first time you and the prosecutor entered in to an agreement and I ratified it by accepting your plea, but this time I know more about it. So, therefore, I am going to give you a harsher sentence."

Now, would that be enough, I don't know. I hope that the decision of this Court in this case, and in related cases, is bound to have a tremendous effect upon the sentencing policies of the trial judges all over the country.

But if the State cannot make its bargain in the one instance and repudiate it at the same time the accused repudiates it then the sentencing policies of the trial judges in the land will change.

Q Did I understand you to say a bargain?

A Yes, I call it a bargain?

Q On a plea of guilty.

A Yes, sir.

Q Is that customary?

A I have seen it happen many, many times.

Q What judge tried this case?

A Judge Paul in my county. I don't want you to understand me to say that there is any modus of a bargain as we would make it the buying and selling of property. I meant merely this, that the agreement that I called a bargain would be -- if you leave out the fact of no attorney -- the defense attorney would ask the prosecutor, "How much sentence can we have if we plead guilty?" And there may be bargaining in the sense that there might be some time before an agreement is reached.

Q I don't think you have to apologize for that. I think that ---

A I am not apologizing.

Q In other words, "If you plead guilty, you get this. I don't know what you would get if you get tried."

A Right.

Thank you very much.

(Whereupon, at 2:30 p.m. the argument in the above-entitled matter was concluded.)