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# Supreme Court of the United States

October Term, 1968

In the Matter of:

JOHN McMILLAN GREGG,

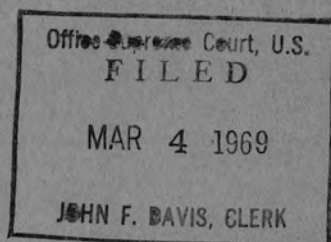
Petitioner,

vs.

UNITED STATES OF AMERICA.

Docket No.

453



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Place Washington, D. C.

Date February 25, 1969

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C O N T E N T S

ORAL ARGUMENT OF:

P A G E

Dean E. Richards  
on behalf of Petitioner . . . . . 2

Sidney M. Glazer, Esq.  
on behalf of The United States . . . . . 21

REBUTTAL ARGUMENT OF:

Dean E. Richards, Esq.  
on behalf of Petitioner . . . . . 40

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 - - - - - x  
4 John McMillan Gregg, :  
5 Petitioner, :  
6 v. : No. 453  
7 United States of America :  
8 - - - - - x

9 Washington, D. C.  
10 Tuesday, February 25, 1969.

11 The above-entitled matter came on for argument at  
12 1:20 p.m.

13 BEFORE:

14 EARL WARREN, Chief Justice  
15 HUGO L. BLACK, Associate Justice  
16 WILLIAM O. DOUGLAS, Associate Justice  
17 JOHN M. HARLAN, Associate Justice  
18 WILLIAM J. BRENNAN, JR., Associate Justice  
19 POTTER STEWART, Associate Justice  
20 BYRON R. WHITE, Associate Justice  
21 ABE FORTAS, Associate Justice  
22 THURGOOD MARSHALL, Associate Justice

23 APPEARANCES:

24 DEAN E. RICHARDS, Esq.  
25 609 Union Title Building  
155 E. Market Street  
Indianapolis, Indiana  
(Counsel for the Petitioner, appointed by this Court)

SIDNEY M. GLAZER, Esq.  
Criminal Division  
Department of Justice  
Washington, D. C.

1                                    P R O C E E D I N G S

2                    MR. CHIEF JUSTICE WARREN:   No. 453, John McMillan  
3 Gregg, Petitioner, versus the United States.

4                    THE CLERK:   Counsel are present.

5                    MR. CHIEF JUSTICE WARREN:   Mr. Richards.

6                    ORAL ARGUMENT OF DEAN E. RICHARDS

7                    ON BEHALF OF PETITIONER

8                    MR. RICHARDS:   Mr. Chief Justice, and may it please  
9 the Court.

10                   My name is Dean Richards of Indianapolis, Indiana.

11                   Because the facts of this case can be summarized  
12 easily I will begin with a brief summary. The Petitioner was  
13 convicted of a crime in the Western District of Kentucky Federal  
14 Court.

15                   Immediately after the jury returned its verdict and  
16 without pause or recess the Court ordered the Petitioner before  
17 the Bench. The Court asked if the Petitioner had any comment  
18 to make and after a brief response the Petitioner, then quiet,  
19 at this time the Court started to make final disposition of the  
20 case and at this time defense counsel asked that a Pre-sentence  
21 Investigation be made.

22                   The Court interrupting counsel stated that a Pre-  
23 sentence Investigation had been made, it was before him and he  
24 had read it and then the Court pronounced sentence.

25                   This was complained of in a direct appeal to the



1 Sixth Circuit and the findings and holdings in the Sixth  
2 Circuit were: That there was no basis for inferring prejudice  
3 from the facts that the District Judge had seen the Pre-  
4 sentence Investigation Report prior to the time that the jury  
5 had returned its verdict and the District Judge sentenced the  
6 defendant immediately thereafter.

7 Counsel upon noting that in a Seventh Circuit Court  
8 of Appeals case, Calland versus the United States, and a similar  
9 case in fact the Court held just the opposite in that in the  
10 Seventh Circuit case the Court stated that the facts in the  
11 record before us effectively rebut the presumption of prejudice  
12 from an apparent violation of Rule 32(c)(1).

13 Q Well, Mr. Richards, as a matter of fact, there  
14 is nothing in this record to show that the Judge saw it while  
15 the jury was out is there?

16 A The Sixth Circuit Court of Appeals had a set of  
17 facts presented to them. The Sixth Circuit Court of Appeals  
18 stated that there is nothing to, no basis for inferring  
19 prejudice from the facts that the District Judge had seen the  
20 Presentence Investigation.

21 Q Well, I am familiar with that statement, but  
22 where in any record is there anything showing that he saw it  
23 while the jury was out?

24 A The jury returned its verdict. The defendant  
25 was in the Court room. The Trial Judge was on the Bench. The

1 Petitioner was asked to come immediately before the Bench.  
2 There was no pause and no recess. The defendant was asked if  
3 he had any response. He made a response and then the Judge  
4 started to dispose of the case.

5 Q Well, did the Judge say that I read this while  
6 the jury was out?

7 A No.

8 Q Did anybody see him read it while the jury was  
9 out?

10 A Did anyone?

11 Q Yes, sir.

12 A There is no record on this.

13 Q Well, where does the Court of Appeals get the  
14 fact and I emphasize fact that the Judge read it while the jury  
15 was out?

16 A Because ---

17 Q Where is the fact?

18 A The fact would be the time element. When would  
19 the Judge have had time to have read it?

20 Q Well, that is not a fact is it? That is a  
21 conclusion.

22 A Conclusion. But when ---

23 Q But there is nothing in the record to show that  
24 he read it before?

25 A Well, the question here is not whether he had

1 seen it but whether the Judge was in receipt of the Presentence  
2 Investigation.

3 Q Well, when did he receive it?

4 A It would be our conclusion that he had to receive  
5 it and be in receipt of the Presentence Investigation before  
6 the jury returned its verdict.

7 Now, upon nothing this conflict between the Seventh  
8 Circuit that there is a presumption of prejudice, where there  
9 is a violation of Rule 32(c)(1) by premature reading, of a  
10 Presentence Report, the the Sixth Circuit holding there is no  
11 significance in a trial Judge reading a Presentence Investiga-  
12 tion prematurely, unless also it was in the record showing  
13 some violation that was actually harmful to the defendant.

14 The Petitioner then filed application for writ of  
15 certiorari noting the Points: One, that there was a conflict  
16 between the Seventh Circuit and the Sixth Circuit; Two, that  
17 why this Court should not exercise its supervisory powers over  
18 the Federal system of criminal justice to invoke Rule 32(c)(1);  
19 and, also, to prohibit further the taking of Presentence  
20 Investigations before a determination of guilt had been made by  
21 a defendant or the defendant has plead guilty in the absence  
22 of an intelligent consent.

23 Q That is what the rule says, isn't it? Your  
24 report shall not be submitted to the Court unless defendant  
25 has pleaded guilty or has been found guilty.

1           A     That is correct.

2           Q     I gather your argument is, in this instance, it  
3 was clear since the judge said he had it that somehow it had  
4 been submitted to him before the jury returned its verdict?

5           A     That is right. That he was in receipt of the  
6 report.

7           Q     If the rule means what it says then obviously  
8 the court below was wrong, wasn't it?

9           A     That is correct. There was an apparent violation.

10          Now, the stated exactly what position we have in view  
11 of the Solicitor General's brief I think it is appropriate to  
12 state very briefly what this appeal is not.

13          In our petition for writ of certiorari no constitu-  
14 tional provisions were invoked. No mention was ever made of the  
15 United States Constitution.

16          In the Solicitor General's brief, however, a very  
17 substantial effort was made to characterize our case as a due  
18 process case and then argue it on the harmless error versus  
19 prejudicial error from a substitute standpoint.

20          In our brief on its merits no constitutional provisions  
21 were invoked, nor was the United States Constitution mentioned.  
22 Likewise, it should be noted that in the granting of the writ  
23 of certiorari no constitutional provisions were mentioned.

24          The Solicitor General's brief has made much of the  
25 fact that the petitioner has not demonstrated actual prejudice

1 to himself resulting from this apparent violation of Rule  
2 32(c)(1).

3 Q Well, then again I suppose if you are going to  
4 require a showing of prejudice you are requiring something the  
5 rule doesn't require?

6 A That is correct. The Sixth Circuit places upon  
7 the petitioner an almost irrebuttable presumption of non-  
8 prejudice when a trial judge prematurely reads a Presentence  
9 Investigation.

10 Q I suppose the rule was written as it was with  
11 some definite objective in mind, wasn't it?

12 A Yes.

13 Q And what was it?

14 A Well, our feeling that why it should not be  
15 submitted to the Court would be possible prejudice to the  
16 defendant and I also along with this I argue that the rule also  
17 states that a Presentence Investigation should not be made  
18 before a conviction or a plea of guilty unless there is  
19 intelligent consent.

20 A Presentence Investigation can be very helpful to  
21 the Defendant in granting probation if he is convicted.

22 Now, in the present case there was no consent by Gregg.  
23 He did not know a Presentence Investigation had been made of  
24 him.

25 Q That is not really before us as I recall you



1 argued that at great length. That question on whether the  
2 Presentence Investigation might be made without petitioner's  
3 consent before a guilty plea or finding of guilt is not really  
4 presented by this case, is it?

5 A That is correct that this writ of certiorari  
6 was granted upon facts concerning Rule 32(c)(1) and because it  
7 manifests social importance I did add it in my brief.

8 Q But is it really anything for us to decide  
9 beyond whether the rule is going to be enforced as written?

10 A Yes.

11 Q If it is a prophylactic rule whether or not there  
12 is prejudice I suppose is unimportant. If under the language  
13 of the rule it means what it says, then what happened here was  
14 wrong.

15 A That is correct. The prejudice that we are  
16 speaking of here is not prejudice to the defendant's substantial  
17 or substantive rights.

18 Q I don't even see why you talk about prejudice.  
19 If your position is that the rule should be enforced as written  
20 why isn't that the end of your case?

21 A Because we have mentioned it in our case because  
22 the Solicitor General's brief, in response to our brief has  
23 tried to make a question of this as to why I am mentioning it  
24 before the court now.

25 Are we prejudiced to the Federal rules? The Federal

1 rules of criminal procedure are mandatory or they are advisory.

2 Q Mr. Richards, what do you want us to give, a  
3 new trial?

4 A Yes.

5 Q A new trial?

6 A Yes.

7 Q How did this affect the jury's verdict?

8 A I feel that ---

9 Q How, how did this, the jury didn't see this,  
10 did it?

11 A They did not.

12 Q The Presentence report?

13 A They did not.

14 Q Well, how did this affect the jury's verdict?

15 A Because, it could have affected the Trial Court's  
16 handling of the trial. I feel that it was there, but from the  
17 record I cannot make a ---

18 Q Are you arguing to us that the Judge had it  
19 before the trial? If you say yes, I am going to ask you where  
20 do you get it from.

21 A I do not know when the Judge had it before the  
22 trial. He announced after the verdict was returned that he had  
23 it in his possession and that he had already read it.

24 Q Because the judge, according to you, violated  
25 the rule?

1 A Yes.

2 Q The man is entitled to a whole brand new trial?

3 A Yes.

4 Q Well, he could still be tried on the same  
5 indictment, I hope.

6 A That is correct.

7 Q Thank you.

8 A The rules, if they are advisory, the Defendant  
9 Gregg has no standing. If they are mandatory, then certain  
10 rules, based upon constitutional considerations, can be in due  
11 course enforced by due process considerations.

12 But the rest of the rules, how can they be enforced?  
13 They can only be enforced by this court using its supervisory  
14 powers on strict enforcement of the Federal Rules of Criminal  
15 Procedure.

16 Q Wasn't it physically possible for the Judge to  
17 have read, to have seen and read the report after the jury came  
18 in and returned its verdict?

19 A Well, we are contending no.

20 Q Why?

21 A A Presentence Investigation is generally a  
22 lengthy document.

23 Q How long was it?

24 A I have not seen the Presentence Investigation  
25 in that there has not been a court order to let counsel read

1 the Presentence Investigation.

2 Q Well, why do you say he couldn't have read it?  
3 It might have been a page, might it not?

4 A Well, this is very possible but the jury with  
5 the petitioner in the room, the trial judge in the room, the  
6 jury walked back into the courtroom, and then it returned its  
7 verdict and at this time the trial judge asked the defendant  
8 to approach the bench and asked if he had any response.

9 Then he made a response, then the judge started to  
10 pronounce sentence and then defense counsel asked that a Pre-  
11 sentence Investigation be made.

12 Then the trial judge stated a Presentence Investigation  
13 has been made, I have read it, and it is before me now. Then  
14 he read from a small portion of the Presentence Investigation.

15 Q Then it was right before his eyes?

16 A Yes. It was there on the bench at this time.

17 Q Was the jury polled?

18 A Yes.

19 At this time when the jury returned its verdict ---

20 Q Do you think the judge could have read the  
21 report during that time?

22 A Your Honor?

23 Q Do you think the judge could have read the  
24 report during that time?

25 A Well, the judge at this time was polling the jury.

1 And when the jury was polled then there was a comment con-  
2 cerning when they were to return to further jury duty and at  
3 that ---

4 Q Did the judge poll the jury in this case or the  
5 clerk?

6 A The judge, I believe, asked counsel if --

7 Q Uh huh (no), the judge himself says by the  
8 court, "I will ask each individual juror if that is your  
9 verdict" which I suppose means the judge himself polled them.

10 A That is correct. Then without pause, without  
11 recess, the defendant was called before the bench. This is  
12 when the petitioner found that a Presentence Investigation had  
13 been made without petitioner's consent and the petitioner was  
14 asked to respond if he had anything to say for himself not  
15 knowing that a Presentence Investigation had been made.

16 In Smith versus United States Justice Clark in two  
17 concurring opinions, two concurring justice, in a separate  
18 opinion of that case said that there is a presumption of  
19 prejudice when there is an apparent violation of of Rule 32(c)(1)  
20 and he further, Justice Clark made it clear that the presump-  
21 tion of prejudice that he wrote was reached without due process  
22 considerations.

23 His considerations were strictly procedural. And  
24 that the Court through its powers of supervision over the  
25 exercise of power of supervision of the Federal system of



1 criminal justice should grant a new trial in this matter.

2 Now, the question before us is whether the conduct of  
3 the trial judge and the conduct of the probation officer in  
4 this case constitutes such a procedural, not constitutional,  
5 but procedural irregularity as to require an exercise of  
6 supervisory powers of this court.

7 Power of the Federal rules of criminal procedure  
8 says you are going to be enforced if the defendant does not  
9 enforce it. The Government certainly will not. The rules  
10 will not be enforced unless you would give him some type of  
11 a bounty to enforce the rules. Give him a new trial.

12 If he is not given a new trial then why would a  
13 petitioner ever want to seek his appellant relief if there is  
14 a violation of the Federal Rules of Criminal Procedure.

15 Q I gather a resentence in this case is meaningless  
16 because this is a mandatory sentence, isn't it?

17 A That is correct.

18 Q Twenty-five years?

19 A Yes.

20 Q I mean in this case, I gather one of your argu-  
21 ments is that it is not enough just to send it back for  
22 resentence is because the judge is powerless to give him  
23 anything less than 25 years. Is that right?

24 A That is correct.

25 If this case is remanded back for resentencing then

1 we still have ---

2 Q How come they can put him on probation?

3 A He has an alternative decision, probation or  
4 mandatory 25 year sentence with no possibility of parole.

5 Q Oh, well then it could be, it could be a re-  
6 sentence procedure. Is that it here?

7 A No.

8 Q Why?

9 A It could be but that ---

10 Q When he got this mandatory 25 years?

11 A That is correct.

12 Q But on resentence it might be that he will get  
13 probation, is it not?

14 A The District Judge has read the Presentence  
15 Investigation and a Presentence Investigation was made without  
16 even an interview made of the defendant.

17 Q But, isn't your argument that the purpose of  
18 this rule is to prevent the trier, the judge, presiding judge even  
19 with the jury from becoming prejudiced against the defendant  
20 by reading the Presentence Report?

21 A The petitioner is speaking of prejudice to the  
22 Federal rules.

23 Q This is sort of an arrid principle?

24 A That is correct. Procedural irregularities.  
25 Advisory or mandatory.

1 Q Would you say that we not only, that it isn't  
2 because of possible prejudice against the defendant during the  
3 trial that you want a new trial?

4 A No. That is correct.

5 Q Just because as a deterrent, as a remedy, as  
6 a remedial matter you order a new trial to make judges obey  
7 the rules?

8 A That is correct. That is our contention. We  
9 argue that we did not have a due process contention before this  
10 court. We are asking the court to exercise its supervisory  
11 power and enforce the Federal rules.

12 Q And you don't suggest there was any prejudice?

13 A Yes, I feel that there is prejudice.

14 Q I mean prejudice to the defendant in any  
15 concrete way.

16 A Yes.

17 Q In having looked at the report?

18 A Yes, I do.

19 Q What is it?

20 A I have not looked at the report.

21 Q I know, but what would you say the prejudice is?

22 Q You don't have a right to look at it.

23 A I understand that.

24 Q You are not raising that point, too, are you?

25 A No. If any prejudice -- now I am not stating

1 that there is prejudice to the defendant. If there is  
2 prejudice there ---

3 Q Would you say there is a likelihood of  
4 prejudice in this case?

5 A I feel that there is prejudice. I feel that  
6 there is prejudice.

7 Q What is it?

8 A Well, the prejudice would be from the record such  
9 as the courts not letting the defendant have instruction unless  
10 you include defense, the undue haste in which this trial was  
11 given or was directed through, now allowing ---

12 Q Was there a competency hearing in this case?

13 A No. A premental examination was made of the  
14 defendant to determine whether he was competent to stand trial  
15 and that report was submitted to the court.

16 Q What did that have in it?

17 A What did that have in it?

18 Q Yes.

19 A It had part of the defendant's past criminal  
20 background. It had his education, his mental problems, his ---

21 Q Do you suppose it had as much in it as the  
22 Presentence Report?

23 A It could have but I presume the premental  
24 examination report would be only used for the purpose of  
25 determining whether the petitioner was competent to stand trial,

1 not to be used to determine whether the petitioner should be  
2 given probation or should be given a 25-year mandatory sentence.

3 Q Well, I must say from what the Court revealed  
4 about the Presentence Investigation, the report contained, at  
5 page 7, it was quite a lengthy report.

6 A Yes, it was.

7 Q He certainly had quite a record, didn't he?

8 A Yes.

9 Q Juvenile record, 1960, an automobile, stolen  
10 automobile, parole in '65, paroled in '62, parole violator in  
11 '65, convicted of armed robbery in Yuma, Arizona, 7 to 10 years,  
12 several warrants now against him.

13 A That is correct.

14 Q It is a pretty long report.

15 Q That was in the competency report, too.

16 A That was in the competency report, yes. That  
17 was submitted to the court. We are stating that there is  
18 prejudice to the rules. That who is going to enforce Federal  
19 rules of criminal procedure. Why would a defendant seek his  
20 appellant remedies unless he could get a new trial if a Federal  
21 rule is violated during the course of his trial?

22 Or if he would only be given a resentencing, we are  
23 arguing that the Federal rules should be made mandatory and if  
24 there is a violation, such as a violation of Rule 32(c)(1) that  
25 the defendant should be given a new trial.



1 Q Well, suppose in this case that the Pre-trial  
2 Investigation, mental capacity, showed every fact from the  
3 beginning to the end and every word in the same language that  
4 was shown in the Presentence Report, would you still say that  
5 the case should be reversed?

6 A I do not know what was in the Presentence  
7 Investigation.

8 Q I know you don't, but you were saying it should  
9 be automatically reversed. But would you say it if it had all  
10 been read in a proper report?

11 A Yes, because our appeal is based on prejudice  
12 not to the defendant but prejudice to the Federal Rules of  
13 Criminal Procedure.

14 Q Well, maybe the rules don't have a right to  
15 appeal.

16 A But defendants do and the only way that ---

17 Q I know, but you say prejudice to the Federal  
18 rules.

19 A That is correct.

20 Q Prejudice done to the Federal rules.

21 That is the appeal.

22 A That is the appeal.

23 Q I thought it was the appeal of the defendant?

24 A That is correct, but the defendant has asked that  
25 this court for a strict enforcement of the Federal Rules of

1 Criminal Procedure.

2 Q If you assume it didn't hurt him, he is entitled  
3 to it?

4 A That is correct.

5 Q To vindicate the rules?

6 A Your Honor?

7 The issue here is not a due process, but whether this  
8 court should invoke its supervisory powers over the Federal  
9 rules and make the Federal rules of Criminal Procedure mandatory.

10 Q The purpose of the rule is to prevent what the  
11 Rules Committee and presumably Congress thought was prejudice,  
12 possible prejudice to defendants?

13 A That is correct.

14 Q If all of the stuff that is in these Presentence  
15 Investigatory Reports, hearsay, gossip or whatever is in there  
16 were scrutinized by the judge in the course of the trial, isn't  
17 that the purpose of the rules?

18 A That is correct.

19 Q And when you say that you are not claiming  
20 prejudice to the defendant you mean you are not relying on them.  
21 But back of the rule, the purpose of the rule is not just to  
22 say something for fun, but it is to safeguard, protect against  
23 what the draftsman of the rule considered a potential source  
24 of unfairness and and danger to defendants?

25 A That is correct, your Honor.

1 Rule 32(c)(1) says the Presentence Report shall not  
2 be presented to the court. The Sixth Circuit findings stated  
3 that even if the trial court did receive the Presentence  
4 Report prematurely and read it prematurely or was in receipt of  
5 it prematurely, then still this is no basis for inferring  
6 prejudice.

7 The Smith case stated that it is presumptively  
8 prejudicial and Justice Clark put it ---

9 Q If the contrary practice were permitted it would  
10 be like tolerating an ex parte statements to the judge about  
11 the character of the defendant, his associates and whatnot,  
12 ex parte statements with no evidentiary restrictions and with  
13 no opportunity for counsel for the defendant to know what is  
14 being said to the judge, with no rules against hearsay gossip  
15 or whatnot. Isn't that right?

16 A That is correct. That is exactly correct.

17 Now, in the closing paragraph of the Government's  
18 brief, they stated that petitioner herein, in one breath, wants  
19 the recognition of a previously unrecognized right and the  
20 enforcement of that right on a sweeping scale.

21 Now, in our closing statement I would like to say  
22 that this case may or may not have far-reaching implications  
23 but to the petitioner the implications are very singular and  
24 very unique.

25 All that the petitioner here wants is a new trial.

1 In view of this manifest violation of Rule 32(c)(1), as applied  
2 to petitioner herein, the petitioner does not feel that he is  
3 asking too much of this court.

4 Q When did this rule take its present form?

5 A I do not know -- July 1966.

6 Q These rules were recently revised. Do you think  
7 that is correct, '66?

8 A I believe so.

9 I would like to reserve remaining time for rebuttal.

10 MR. CHIEF JUSTICE WARREN: You may.

11 MR. RICHARDS: Thank you.

12 MR. CHIEF JUSTICE WARREN: Mr. Glazer.

13 ORAL ARGUMENT OF SIDNEY M. GLAZER, ESQ.

14 ON BEHALF OF THE UNITED STATES

15 MR. GLAZER: Mr. Chief Justice and may it please the  
16 court.

17 The Court of Appeals decided this case and petitioner's  
18 argument rests upon the assumption that the District Judge saw  
19 the report, probation report prior to the time the jury returned  
20 its verdict.

21 While we believe strenuously this assumption is not  
22 supported by the record and that this assumption developed from  
23 the manner in which the issue was presented below, it is also  
24 our position that there is no occasion to set aside this con-  
25 viction even if the trial judge saw the report prematurely.

1           We reach this conclusion because it affirmatively  
2 appears in this record that petitioner would not have been  
3 prejudiced either by the jury's determination of guilt or by  
4 any of the court's ruling by the -- a premature examination  
5 of the probation report.

6           Q     Excuse me, Mr. Glazer, may I ask you the question  
7 I asked Mr. Richards.

8           When did this rule take its present form?

9           A     1948. 1948 and the rules were recently amended  
10 in 1966.

11          Q     I am speaking of the sentence, the report shall  
12 not be submitted or its contents disclosed unless the defendant  
13 has pleaded guilty or has been found guilty. How long has that  
14 sentence been there?

15          A     It has been that way since 1948.

16          Q     I see, thanks.

17          A     Petitioner has pointed out that the record shows  
18 that immediately following the verdict the jury was polled,  
19 the defendant was called forward for sentencing and the court  
20 advised him of the mandatory 25-year sentence which the statute  
21 imposes for the robbery of a postal station when lives are  
22 placed in jeopardy by a dangerous weapon.

23          At that point the court asked defense counsel and  
24 defendant if they had anything to say before sentence was  
25 pronounced.



1 Defense counsel then requested a delay in sentencing to  
2 the following week to enable petitioner to spend a few more days  
3 with his family.

4 When the court indicated that such a stay would not  
5 be granted the defense counsel asked for a Presentence Report.  
6 The court at this point replied that a Presentence Investigation  
7 had been made and it is before me now. I have read it.

8 The court thereupon sentenced the defendant to the  
9 mandatory 25-year sentence.

10 Q How long did all of that take, how many minutes?

11 A The record doesn't reflect how long that took,  
12 your Honor.

13 Q I understood something in the briefs that it was  
14 a time between 3:30 and 3:36.

15 A Well, that is right.

16 Q Now that is six minutes for all of this to  
17 happen and for the judge to review the Presentence Report, and  
18 so forth?

19 A In the circumstances of this case, considering  
20 the options that the judge had, the judge could have scanned  
21 the probation report during the time of sentencing.

22 Q You are certain that the judge could have looked  
23 at this probation report during this time?

24 A Yes, your Honor, he could have looked at it.

25 Q Let me ask you one question before you get so

1 certain. How long was the probation report?

2 A The probation report has been logged with the  
3 Clerk's Office. We wrote a letter to the probation officer and  
4 asked him to send the report to the Clerk of This Court.

5 Q How long is the report?

6 A The report is four pages long.

7 Q Four pages long and it took six minutes?

8 A Right.

9 Q Now that would be about, what, it might take  
10 six minutes to read four pages.

11 A Well, if the judge had said, "I am reading the  
12 report" or "I have scanned it" we wouldn't have a lawsuit here.  
13 Now he said, "I have read it."

14 Q Now he said, "I have read it," which means I  
15 have read it within this six minute period according to you?

16 A This is a situation a he could have read it,  
17 speed read it, during the six minute period considering the  
18 fact ---

19 Q Is there anything in the record to show the judge  
20 had taken speed reading?

21 A No, your Honor.

22 Q Well, my point is that seriously it appears to  
23 be that in this six minute period he should have been listening  
24 to what defense counsel was arguing and he didn't do it. For  
25 his client, he should have been listening to what the defendant

1 said, yet he used six minutes in reading this four-page document.

2 A In the first place all defense counsel said  
3 during this period is, "I want a stay until Monday morning  
4 because my client is facing a long sentence and I would like  
5 him to spend the last few days with his family."

6 Q He also read that his wife was pregnant and  
7 other things and other items in there ---

8 A Right, and it would be very simple for the  
9 District Judge to just scan the report, because this is not a  
10 --- this is a case where the District Judge was familiar with  
11 the defendant's background.

12 Six weeks earlier he had a psychiatric report which  
13 detailed the defendant's prior record, detailed the defendant's  
14 prior psychological and psychiatric problems.

15 Q Do you mean by such things that he could wipe  
16 out the necessity of seeing the report, the probation report?

17 A No.

18 Q And decided on those things and not in accordance  
19 with the report?

20 A No, it seems to me your Honor, that once you  
21 have a probation report in the case, and once the issue of  
22 competency is in a lawsuit, the judge cannot divorce that issue  
23 from his mind throughout the lawsuit, because ---

24 Q But should he be prejudiced by it if there is  
25 anything good in the probation report?

1 A Should he be prejudiced by it?

2 Q Yes. By what he knew before?

3 A There is no indication he was prejudiced by it.

4 Q Well, you said he knew all about the defendant

5 and I suppose you meant by that that ht knew about his criminal  
6 background and so forth before ---

7 A He knew about his social history and the  
8 problems of ---

9 Q Do you suppose he decided on that or is this  
10 probation report supposed to have some significance?

11 A The probation report has significance but in  
12 this situation what did the judge have to decide upon sen-  
13 tencing? This is not a case where he had the right to decide  
14 to impose any sentence up to 25 years. He had -- hos options  
15 were two, either place this man on probation or give him the  
16 mandatory 25-year sentence.

17 Now, this man had been also, and this came out in the  
18 evidence in the case as well as in the psychiatric report, had  
19 been the week following the date that this crime was committed  
20 had been arrested for bank robbery in another state.

21 And that case was also pending in the Federal court.  
22 And the judge, therefore, knew that he either had to put him  
23 on probation or sentence him to 25 years.

24 The facts of this crime were such that the defendant  
25 here with a companion went into a postal substation, tied and

1 gagged two women, put a gun to one woman's head and threatened  
2 to blow her brains out.

3 Now, in these circumstances the judge doesn't have to  
4 study every single word of the Probation Report to realize he  
5 is not going to put the man on probation. He doesn't have to  
6 study every single word to decide what should I give him, five  
7 years or twenty-five years.

8 His options are either 25 years or probation and it  
9 seems to me this is the type of case where he could just scan  
10 the report and on the basis of that decide that this is not a  
11 case for a probation and since his hands are tied by Congress,  
12 to impose the 25-year mandatory sentence.

13 Q What was the date of trial?

14 A What was the date of trial? I think the date  
15 of trial was in May 1967, which was about 5 or 6 weeks after  
16 arraignment.

17 Q How long did the trial last?

18 A The trial lasted one day. The evidence consisted  
19 of two women who were in the postal substation and also some  
20 evidence concerning the defendant being arrested in a motel  
21 with a gun and blank money orders which had been taken from  
22 this station and also, there is also evidence that on the day  
23 preceding on the day of the robbery, the same, the gun in which  
24 the defendant was found in his possession was purchased in  
25 Louisville which was the place of the robbery.

1 The defendant offered no evidence.

2 Q Was that all the evidence offered on either side?

3 A That was all the evidence. The defendant  
4 offered no evidence.

5 Q May I ask, Mr. Glazer, I take it part of that  
6 six minutes was taken up by the judge who was polling each of  
7 the jurors?

8 A It indicates, the record indicates the jury was  
9 polled but ---

10 Q Now it wasn't part of the six minutes taken up  
11 by the judge polling the jury?

12 A I think it was. It may have been. But it  
13 seems to me that the poll consisted of not asking each juror  
14 individually is this your verdict but ---

15 Q What the judge said, "I will ask each individual  
16 juror if that is your verdict." Whereupon all jurors indicated  
17 affirmatively.

18 A Yes. Well, you can't tell from the record. I  
19 assume from this record that this was a situation where all  
20 12 jurors shook their heads affirmatively.

21 Q Why should you assume that?

22 A Well, it may be the other way.

23 Q I used to poll juries and I didn't do it that  
24 way.

25 A Well, normally the juries are polled by



1 the other way, "Mr. So and So, is this your verdict," the  
2 court reporter would write it in the record and since the court  
3 reporter didn't write it in the record I assumed it was the  
4 other way.

5 Q Apparently the judge had some problem as to  
6 whether or not he should ask the jury to come back and that  
7 took a little time in this colloquy, didn't it, out of the  
8 six minutes?

9 A It took some time.

10 Q I mean, some of the six minutes taken up by this  
11 polling of the jury and some of the six minutes taken up on  
12 whether or not they were to be called back and after that was  
13 done he said let the defendant come forward, I wonder how much  
14 of the six minutes were left then?

15 A Also, on the other hand, when the judge came to  
16 recite the defendant's record, it seems that he is reading the  
17 record at that time. In other words like he is looking at it  
18 and he says, "It shows in 1960 this defendant stole an auto-  
19 mobile and given an indeterminant youth sentence, he was  
20 paroled in 1965, he was returned." Now, it indicates that he  
21 was reading the defendant's past record.

22 Q Did he offer the defendant an opportunity of  
23 elocution?

24 A Yes, he did.

25 Q What did the defendant say?

1 5, 10 years, 15 years, 20 years or 25 years, that would be a  
2 different situation. But that is not in this case. In this  
3 case Congress has said, "You will have to impose a 25-year  
4 penalty" from the evidence in this case I submit that the judge  
5 would have ruled out probation just on the evidence in this  
6 case.

7 The fact that he is involved ---

8 Q Then what does he have a probation report for  
9 if he isn't going to pay any attention to it?

10 A Well, he did pay some attention to it but I  
11 think he paid the attention to it that all this case required  
12 -- if -- I would agree with your Honor if he had a situation  
13 where he could tail his sentence to fit the individual, yes I  
14 say maybe he should spend more time.

15 But this is a case where he doesn't have that option.  
16 All he had to decide is whether I should put this man on  
17 probation and I think it is clear from the evidence in this  
18 case, and from the defendant's past record ---

19 Q Does this six minutes we are talking about begin  
20 with the time the probation report was given the district judge?

21 A Well the record in this case ---

22 Q When was it given?

23 A The record in this case does not show when the  
24 probation report was given the judge.

25 Q Where do you get the six minutes from?

1           A     Well, the court has assumed that there is six  
2 minutes on the basis of the jury -- turning to the Government's  
3 brief -- where it says the jury returned its verdict at  
4 3:24 and then that the sentencing procedure occurred at 3:30.  
5 It is in the transcript.

6           Q     That is right.

7           Q     It might be possible that the judge had it while  
8 they were arguing the case and wasn't much interested in hearing  
9 the arguments.

10          A     That is true.

11          Q     It would be a lot more than six minutes.

12          Q     May I suggest to you that the probation report  
13 at which I have just looked is dated May 19 which was the same  
14 day as the trial was held. The probation report is dated the  
15 same day as the trial was held so that in any event it was not  
16 supplied to the judge before the trial but on the other hand,  
17 if the trial had gone on about a week he would have had the  
18 report for a week.

19          A     I understand the practice ---

20          Q     Well, the trial wouldn't have gone on for a  
21 week because they didn't have enough witnesses. They only had  
22 the witnesses who swore that he committed the bank robbery,  
23 isn't it?

24          A     That is right.

25          Q     Well, I thought this trial was on May 31, not

1 not May 19. That is what the record on page 4 said and the  
2 verdict, the sentence was on June 1. Not on May 19.

3 A The record here ---

4 Q Well, that indicates that the judge may have had  
5 the report for two weeks before the trial began which is even  
6 worse violation of the law.

7 Q But didn't you tell me the trial was on May 19?

8 A Excuse me, your Honor, if I did I made a mistake.  
9 Mr. Justice Brennan is correct. The trial was on May 31.

10 Q Perhaps it was my error but then the probation  
11 report which I have here has the date May 19. I am not just  
12 quite clear what that signifies but that is the date that  
13 appears on the probation report.

14 A Well, this record does not reflect when the  
15 probation officer submitted the report to the judge. I under-  
16 stand it is the practice in this district for the probation  
17 officer to remain in the courtroom while the jury is out and  
18 after the jury reaches its verdict, and if the verdict is guilty,  
19 at that time it is the common practice in this district for the  
20 probation officer to deliver the report to the court.

21 Q Is that the record?

22 Is that in the record?

23 A The record has no indication at all.

24 Q Well, why do you ask us to put it on that basis?  
25 I am just -- I am not asking, I am just saying what the practice

1 is. This record does not have any indication as to when the  
2 probation report was submitted to the court. None whatsoever.

3 Q Don't you agree that not only is the rule that  
4 it shouldn't be given to the judge until after guilt has been  
5 determined, but also isn't it assumed that the judge is going  
6 to read it, No. 1; and 2, give it his careful consideration;  
7 and 3, to take mature time to think it over, even if the record  
8 shows the man is guilty as all get-out?

9 Isn't that why we have a probation report or is it  
10 your position that the judge is given a probation report and  
11 he just scans it? Now which is your position?

12 A My position is that whether a judge can ask for  
13 a probation report or not is optional.

14 Q In my case I am talking about where the judge  
15 gets a probation report. There is no question here that he  
16 had one.

17 A Right. Correct, he had one.

18 Q Do you agree with me he should have considered  
19 it, thought it over after having carefully read it? Before he  
20 said he carefully read it I assume that it would take more  
21 than six minutes.

22 A Well, it seems to me the judge, the amount of  
23 time a judge should spend on a probation report varies with  
24 the individual case. If he has a case of a first offender  
25 or where he has an option of putting a first offender on

1 probation, I say he should spend a lot of time on the probation  
2 report, perhaps ask the probation officer ---

3 Q If he has a crime where all the witnesses on  
4 one side and he doesn't take the stand, I get it you don't  
5 think there is any need for a probation report at all.

6 A Well, I think in this case ---

7 Q They didn't need one.

8 A In this case, there would be no need for a  
9 probation report because he did not have any option as to what  
10 sentence to impose.

11 This is a clear case where probation should have been  
12 denied. I can't conceive of a judge placing a man on probation  
13 who shortly after -- shortly before this crime was committed,  
14 he had been released from a prior institution and had violated  
15 parole previously.

16 Q Well, why did he read it?

17 A What?

18 Q Well, why did he read it? If he didn't need to  
19 read it, why did he waste his time?

20 A I would think that one thing he would be  
21 interested is whether the probation officer's recommendation  
22 agrees with his. The probation officer's recommendation agrees  
23 with his impression of the case, then I don't think he has to  
24 scan every line and carefully read each word.

25 I think the judge, properly based on the evidence in



1 this case and just what he read in open court about the  
2 defendant's past history, that was enough.

3 Q He had to do it that day, he couldn't have  
4 thought it over that night, could he? He had to be sentenced  
5 that day within six minutes?

6 A I don't see any virtue of delaying the sentencing  
7 process. If the judge is clear, that this man robbed a postal  
8 station with a deadly weapon and he has been out on bond before,  
9 it seems to me that the judge, and he doesn't sentence him he  
10 will remain out on bond, it seems to me that it is very reason-  
11 able for the judge to sentence him on the spot and there is no  
12 reason for the delay.

13 Q Mr. Glazer, let me ask you this.

14 Assuming that the court was of the opinion that the  
15 judge had this before the verdict was announced, that would be  
16 a clear violation of the rule, would it not?

17 A Clearly.

18 Q Now in those circumstances, would this man be  
19 entitled to any remedy at all?

20 A I would say not in this case for this reason:  
21 Were it affirmatively appears from the record as it does in this  
22 case that neither defendant's trial, determination of his  
23 guilt, the rulings of the judge, or sentence were affected in  
24 any way by the judge obtaining the report prior to verdict,  
25 that there is no reason to give him a new trial.

1           The reason I say that ---

2           Q     Your belief is that even though the judge has  
3 clearly violated the rules, that it is still incumbent on the  
4 defendant to establish that he was prejudiced thereby?

5           A     No, I would say that the Government will take  
6 the burden of showing lack of prejudice. And I say in this  
7 case, lack of prejudice appears beyond a reasonable doubt.  
8 An examination of the probation report and the psychiatric  
9 report shows that the probation report is derived principally  
10 from the psychiatric report.

11           So, if the judge, the judge who was required to  
12 examine the psychiatric report prior to the trial he may even  
13 have had the psychiatric report in front of him during the course  
14 of the trial.

15           Q     But do you conceive then that in a situation  
16 where the judge does violate the rule, that it is incumbent upon  
17 the Government to establish that there was no prejudice to him?

18           A     Yes, we will accept that. But, we will accept  
19 that rule that the Government should have the burden of showing  
20 lack of prejudice. And we say in this case, because of the  
21 psychiatric report, lack of prejudice is clear beyond any doubt.

22           Q     Well, also, does the record show that he was  
23 prejudiced, the judge was prejudiced?

24           A     No.

25           Q     Is there any indication that he was prejudiced?

1 A No.

2 Q Was there anything in the rule that Congress  
3 consented to have go into effect that fit -- is there anything  
4 in the rule that Congress consented to have go into effect  
5 which says or indicates to anybody that a failure to follow  
6 that rule must always result automatically in reversing the  
7 case of a man when all the evidence that was offered shows he  
8 is guilty?

9 A No.

10 Q How could the defendant show prejudice if he  
11 is denied an opportunity to see the report?

12 A The defendant wasn't denied an opportunity to  
13 see the report.

14 Q He is always denied ---

15 A No, the rule was changed in 1966. The rule was  
16 changed in 1966 which and it provides now the court before  
17 imposing sentence may disclose to the defendant or his counsel  
18 all or part of the material contained in the Presentence  
19 Investigation. And I say the defendant ---

20 Q Why didn't he get it here?

21 A He didn't ask for it.

22 Q I thought he did.

23 A No, he never asked the District Judge to see  
24 all or any part.

25 Q May doesn't mean must as it is used there.

1 Does it?

2 A It says may.

3 Q May means may.

4 A May.

5 Q So the court has discretion.

6 A Right. And the reason the court has discretion  
7 is there are certain situations where there may be confidential  
8 information in the probation report, for example.

9 Q Are you saying to me that all Federal judges  
10 disclose Presentence Investigatory Reports except where the  
11 specific report has confidential information?

12 A No.

13 Q I hope you are not saying that.

14 A No. I am not saying that. But that has been  
15 a great dispute. In my own opinion, in the absence of  
16 confidential information, in the report, such as from a man's  
17 employer or some sort of informant or from a social service  
18 agency I think that the report should be disclosed, but the  
19 Rules Committee didn't go that far and they placed it in the  
20 discretion of the District Judge and some judges disclose it  
21 and others don't.

22 Q I thought, Mr. Glazer, that when petitioner's  
23 counsel requested to be released on bond for short periods so  
24 he could visit his family and that was denied, then petitioner's  
25 counsel asked for a Presentence Report.

1           A     No, he said, "I would like to ask that a Pre-  
2 sentence Investigation be made." He didn't ask to see the  
3 report. He asked the court that a Presentence Investigation be  
4 made. At that point ---

5           Q     You don't think he wanted to see it?

6           A     To me that is the impression I had was he wanted  
7 the probation officer to conduct a Presentence Investigation.  
8 He didn't ask the court ---

9           Q     You think he should have said, "If a Presentence  
10 Investigation Report has been made I would like to see it."  
11 You know it is quite obvious he didn't know that a Presentence  
12 Investigation had been made?

13          A     He could have said that, right.

14          Q     And you think that is what he had to say?

15          A     Apparently, I assume that he didn't realize that  
16 an investigation had commenced.

17                REBUTTAL ARGUMENT OF DEAN E. RICHARDS, ESQ.

18                   ON BEHALF OF PETITIONER

19          MR. RICHARDS: The petitioner's appendix on page 7  
20 clearly shows what happened here.

21          "MR. RICHARDS: Your Honor, I would like to ask that  
22 a Presentence be made up." (the court interrupting)

23          "THE COURT: A Presentence Investigation has been  
24 made, it is before me now, and I have read it."

25                It shows a dire act. He reads briefly from it. And

1 in one continuing sentence and in three paragraphs he goes  
2 ahead and states briefly what the Presentence Report says in  
3 part, and then says it will be the judgment of this court that  
4 this defendant be sentenced to mandatory 25 years, custody of  
5 the Marshal.

6 The petitioner was not given the right of allocation  
7 after the petitioner was informed that a Presentence Investi-  
8 gation had been made or that the record was before the court.

9 Q Where was the defendant and the lawyer at the  
10 time the judge told him there had been one way and get ---

11 A The defense counsel stated, "Your Honor, I would  
12 like to ask that a Presentence Investigation be made." He was  
13 interrupted in the middle of his motion, his request, and then  
14 the court stated that one had been made.

15 Q Well that answers that part of the statement.

16 A That is correct.

17 Q Then what does the defendant or his lawyer say?

18 A The defendant or his lawyer wasn't given a chance  
19 to say anything.

20 Q You mean he cut him off?

21 A Yes, he cut him off.

22 Q They couldn't talk?

23 Was he standing there before him?

24 A The court stated ---

25 Q Were you his lawyer?



1 Q Where is that in here?

2 A Page 7.

3 Q He asked you what do you have to say, "Now does  
4 the defendant or his counsel have anything they wish to say  
5 before sentencing is imposed?" End of quote on page 6?

6 A That is correct.

7 Q And you did speak, and then the court turned to  
8 Mr. Gregg and Mr. Gregg spoke.

9 A That is correct.

10 Q Well, where were you cut off?

11 A When I found out that a Presentence Investigation  
12 had been made, that the court had read it and then the court  
13 pronounced sentence.

14 Q I don't see where you were cut off.

15 A Custody of the marshal.

16 Q Oh, that cut you off. Oh, yes.

17 I see. I see.

18 Q You mean if the boy had wanted to see that thing  
19 you wouldn't have asked him?

20 A At this time we were so surprised ---

21 Q Would you let him cut you off that way?

22 A We were so surprised that the Presentence  
23 Investigation had been made ---

24 Q But why didn't you ask him to see it? To see it?

25 Q Maybe the last paragraph of the colloquy would

1 clear that up.

2 Q I just read it. And it didn't clear it up to me.

3 Q "MR. RICHARDS: Your Honor, I would like to ask  
4 that a Presentence Investigation be made of" -- and then the  
5 court interrupting --

6 "COURT: A Presentence Investigation has been made,  
7 it is before me now and I have read it. It shows a juvenile  
8 record, shows in 1960 this defendant stole an automobile in  
9 violation of the Dire Act was given indeterminant youth commit-  
10 ment sentence. He was paroled in '65, he was returned -- no --  
11 he was paroled in '62, returned as a parole violator in '65 and  
12 was not released full time until May of last year. I am also  
13 informed that he was convicted of robbery in Yuma, Arizona and  
14 given from 7 to 10 years. Several warrants are now pending  
15 against him for robbery for which he is charged. It will be  
16 the judgment of this court that this defendant be sentenced to  
17 the mandatory 25 years, in custody of the marshal."

18 To me that is a plain interruption and a lack of  
19 opportunity for counsel to even to answer the court because  
20 when he says custody of the marshal it is all over.

21 Q Do you believe that a lawyer who represents his  
22 clients from the beginning to the end would be stopped from  
23 talking by what was said there?

24 Would you?

25 Q He was the lawyer.

1 Q Were you stopped from talking?

2 A I certainly was not except ---

3 Q Did you want to see it?

4 A Did I want to see the Presentence Investigation  
5 at that time? No. The defendant turned and walked away in  
6 custody of the marshal.

7 Q You mean after this colloquy was over?

8 A Yes, the marshal stepped forward and the  
9 defendant was taken from the courtroom immediately. Then we  
10 were later brought back and he was advised of his appellate  
11 rights some minutes later, 10 to 15 minutes later.

12 I had left, got into my car and started from the  
13 parking lot, then we were brought back in the courtroom and  
14 advised of the appellate rights that the petitioner had.

15 Q What were you going to say that you didn't get  
16 to say?

17 A At that time I had nothing to say.

18 Q Well, no, when the judge interrupted you there,  
19 when you asked about a Presentence Investigation be made, what  
20 were you going to say that you didn't get said?

21 A I was requesting that a Presentence Investigation  
22 be made of Mr. Gregg --

23 Q That is something you thought would take a little  
24 time and the sentence would be put off until it was complete.  
25 That is what you were after, wasn't it?

1           A     That is correct.

2           Q     Instead of which you discovered I gather it was  
3 something you didn't know about. It had already been done so  
4 you couldn't get a delay in sentence while the Presentence  
5 Investigation was made.

6           A     That is correct.

7           Q     Are you sure you are not answering a leading  
8 question instead of stating what you thought?

9           A     No, your Honor, I don't believe I am.

10          Q     Your leading question or mine?

11          A     At this time I was not going to ask, I was only  
12 asking that a Presentence Investigation be made and I was not  
13 going to ask that it be disclosed to the petitioner or his  
14 counsel.

15                Thank you.

16           THE CLERK: Mr. Chief Justice, Mr. Richards was  
17 appointed by the Court.

18           MR. CHIEF JUSTICE WARREN: Oh, Mr. Richards, the  
19 Court did appoint you to represent this indigent defendant and  
20 we consider that a real public service. We are grateful to  
21 lawyers who do it. We are grateful to you for your diligence  
22 in this case and the Court thanks you for it.

23           And, Mr. Glazer, we thank you also for the diligent  
24 manner in which you have represented the Government.

25           MR. RICHARDS: Thank you, Mr. Chief Justice.

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

1 (Whereupon, at 2:20 p.m. the oral argument in the  
2 above-entitled matter was concluded.)  
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