Supreme Court of the United States

October [redacted] TERM, 1969

In the Matter of:

JAMES CONWAY,

Petitioner

vs.

CALIFORNIA ADULT AUTHORITY, ET AL.

Respondents

Docket No. 40

Place Washington, D. C.

Date November 12, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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No. 40

Washington, D. C.

Wednesday, November 12, 1969

The above-entitled matter came on for hearing at 11:17 o'clock a.m.

BEFORE:

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

APPEARANCES:

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San Francisco, California 94103
Counsel for Petitioner

ARLO E. SMITH, Chief Assistant
Attorney General
San Francisco, California
Counsel for Respondents

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 40. Conway against California Adult Authority.

Mr. Ralston, you may proceed whwnever you are ready.

ORAL ARGUMENT BY CHARLES S. RALSTON, ESQ.

ON BEHALF OF PETITIONER

MR. RALSTON: Thank you, Your Honor.

Mr. Chief Justice, and may it please the Court: This case is on a writ of certiorari to review the denial by the Chief Judge of the United States Court of Appeals for the Ninth Circuit of an application for a certificate of probable cause to appeal from the denial petition for writ of habeus corpus.

The Federal District Court had denied the petition on the merits without requiring either a response from the Respondents here and without hearing. It was denied on the grounds that the petition failed to present a Federal Constitutional question and the certificate for probable cause was denied by both courts on the same grounds.

Petitioner in this case, James Conway, wasconvicted in California in 1952 on two counts of robbery in the first degree. He, since that time, and is presently, incarcerated by the State of California under the provisions of the California Indeterminate Sentence Law. And it is this law and Petitioner's challenges to them that are at issue in this case;

not only the law itself, but the manner in which it has been administered by the California Adult Authority, the Respondent in this case.

Petitioner claims on a number of bases that the law and the manner in which it is administered, violates the 14th Amendment's guarantees against the denial of due process. Before discussing Petitioner's contentions themselves, I'd like briefly to describe the functioning of the Adult Authority and the California Indeterminate Sentencing Law in relation to the particular facts of Petition's case as he has alleged them in his petition for writ of habeus corpus.

I stated before, Petitioner was convicted in 1952 on two counts of robbery in the first degree. Following this conviction, Petitioner was sentenced to state prison and in doing this, the Court neither gave him a suspended sentence or gave him probation. Now, parenthetically, it is not evident at all in the record in this case on what basis probation or suspended sentence was denied. It might have been under the provisions of Section 1203 of the California Penal Code that at that time the Superior Court Judge was prohibited from granting probation. That section, particularly as it existed in 1952, contained a prohibition against probation in certain kinds of cases, among them: armed robbery where a deadly weapon is used.

In any event, since no probation or suspended sentence was given, the judge's action was governed by California

Penal Code, Section 1168. That section specifically prohibits the judge from specifying the term of duration of sentence. It requires him to merely sentence the Defendant to the terms described by law to state prison.

Now, for the crime of robbery in the first degree the law prescribes a five-year minimum term that establishes no maximum. Section 671 of the Penal Code states that where there is no maximum set by the specific statutes, but only a minimum term of years, that punishment shall be imprisonment during natural life, subject to the provisions of Part III of the Penal Code. Part III is that section which deals with the powers and duties of the California Adult Authority. Specifically, Section 3020 of the Penal Code, which states that all persons sentenced under the provisions of the section 1168, the California Adult Authority may determine and redetermine what length of time a person shall be imprisoned.

Yet another section of the Penal Code, Section 577 delineates the two basic powers of the Adult Authority. The granting and revocation of parole, which is not involved in this case and the fixing of sentences, which is the issue here.

Petitioner, following his sentence by the court, following his imprisonment, made a number of appearances before the Adult Authority. Finally, in 1959 after he had been in prison for some seven years, approximately, the Adult Authority acted pursuant to Section 3020 and fixed Petitioner's terms at

two five-year sentences to be served consecutively. I might just point out that the Superior Court Judge had specified that the sentences were to be serve consecutively. Again, however, no term whatsoever was set by the Superior Court Judge.

Q Mr. Ralston, if you know, is it usual for the Adult Authority to come in at a point and fix a sentence, the way it was done here, generally?

A Well, under the statute it has the duty to do so.

Q Yes. I understand they have the power and the duty is -- is there any pattern that is reflected as when that power is exercised?

A I do not have any specific information as to at what point this power is exercised. It is my understanding that these terms are, in fact, set at some point during the person's stay in prison, particularly to deal with once the minimum term is going to be served. As to exactly the pattern, I could not say.

Petitioner has claimed in his petition for habeus corpus that he believes the reason the Adult Authority did not act before it did was that he had refused to confess guilt to the crimes for which he was punished, convicted.

Q That, apparently, is challenged here?

A No, I do not believe the Attorney General has challenged his contention about the initial fixing. The

Attorney General has challenged that the revocation of that fixing was based on his later refusal, but Petitioners also allege that he believes that Adult Authority did not set his sentence prior to 1959 because he had consistently refused, every time he came up before the Adult Authority, to admit that he was guilty of the crime. It was only when he did in 1959 say, "I am guilty," that they then set the term at the two five-year sentences at a minimum.

Now, as to what the general practice is of the Adult Authority, this record does not reflect it and on itself, I am not sure what the specific practice is.

Q Well, unless we know the factual basis for that action how can we know that we have a Federal question here?

A Well, the problem in this case, Mr. Justice Douglas, is that there is, in essence, no record in this case. All there is is the petition for writ of habeus corporus. And it's because of the lower court's statement that there is no Federal question presented at all by the challenge to the action of the Adult Authority, and the dismissal on that basis did not require a response from the Attorney General; no response was filed. There is no stated; it was simply denied on its face.

The basic contention here is that at the least there should be a remand to the lower court in order so that the facts can be developed to findout what, in fact, the California Adult Authority did do in Petitioner's case, and also

the Attorney General made the first time in this Court concerning practices and procedures.

The unfortunate thing about this case is that there is no record because of the attitude of the Lower Court towards challenges to the Adult Authority. It simply, in a sense, says thatthe Adult Authority is insulated from constitutional challenge; that the state can set up this system and they can work in whatever way it works, and that these issues are now raised upon Federal habeus corpus.

Q The state says you ran out of time in the Court of Appeals; is that so?

A No, Your Honor, we feel the state has basically misconstrued the Federal habeus corpus act requirements. It is clear from the record that the Petitioner did file in the District Court an application for certificate of probable cause in 30 days from the denial of the petition for writ of habeus corpus. That was denied. He attempted to file notice of appeal, according to the allegations of his affidavit, which he filed in the Ninth Circuit and the District Court Clerk refused to take it, the notice of appeal, presumably because there is no certificate for probable cause. He then attempted to go to the Ninth Circuit. The Ninth Circuit, Judge Chambers, treated the certificate of probable cause on its merits and denied it on its merits.

We believe that the correct approach and the correct

rule was that taken by the Third Circuit in a case cited in reply brief. The crucial thing is that something showing -- absolutely and clearly showing an intention to appeal be filed within 30 days after the initial denial, particularly when you have a state prisoner acting in pro per. Otherwise the whole system gets encrusted with wholly artificial times that are not warranted by the Habeus Corpus Act or the Federal Rules or Federal statutes.

Q Well, technically at least, all we have here is the denial of a certificate of probable cause by Chief Judge Chambers; is that correct?

A Yes, sir. It's the same situation as House versus Mayo, where the Court decided that the denial for petition of probable cause for error and they sent the case back down to the District Court, for determination on the merits.

Q Under the statute, after a denial by a Circuit Judge of a certificate for probable cause can there be an application for justice for such a certificate?

A I am not sure, Mr. Justice Stewart. I cannot say. I think it's clear, though, that --

Q That would be about 2241 or 2242?

A -- I think it's clear from such cases as House versus Mayo that certiorari does widen the denial of the certificate of probable cause itself.

Q Whyis that? By one judge?

A Yes, Your Honor.

Q How about by the District Judge?

A Well, from the District Judge then what has to be done is to go to the Circuit Court.

Q But not on appeal. You don't go to a Circuit Court on Appeal, you go to a Circuit Judge --

A Yes.

Q For a certificate and if that's denied then if there is authority then to apply to a justice, Circuit Justice or another Justice, that would be the way to proceed.

A Quite frankly, I have not looked into the specific matters. I believe, however, that it is proper to go on writ of certiorari from the denial of the certificate of probable cause itself; that a new application for certificate of probable cause from a Circuit Justice is not required and does not divest this Court of jurisdictionover certiorari.

Q But I think you have some cases on your side.

A I believe that in the case of Maxwell versus Bishop as I recall, by appearances, this was the situation.

Q Yes.

Q Well, how long -- when you are denied a certificate for probable cause in the District Court -- you don't go up on appeal then but you go to the Court of Appeals, is there is a time limit on when you have to go? Do you wait a year to ask the Court of Appeals for --

A The Third Circuit has essentially, I don't believe, set any particular time limit on it in their particular rules.

Q If the appeal time applied you would be out of time?

A If it were the appeal for the denial of the certificate of probable cause, that was a 30-day period.

However, Petitioner did file an application for certificate of probable cause which clearly shows his intention to appeal with the District Court within 30 days. And then he attempted -- his affidavit demonstrated that he made every attempt --

Q That was the wrong instrument to take to say he was going to appeal. He should have gone to the Court of Appeals.

A Well, he attempted to do that. His affidavit states that he had tried to file appropriate papers to show his intention to appeal in the Court of Appeals within the time, but this had been blocked by the actions of the state prison authorities, who had takenaway his papers.

Q But, nevertheless, the proper procedure was to ask the Court of Appeals for a certificate of probable cause.

A Yes, Your Honor. And Judge Chambers treated the affidavit he filed as that.

Q But in any event you would say that he

eventually did do that and you would say there isn't any time limit on when you could ask for that certificate of probable cause?

A Then there must be some --

Q Isn't what happens when you get a certificate of probable cause, then there is an appeal?

A Yes, sir.

Q So that what you are really saying is that you're going to have to protect an appeal and I would suppose that the appellant time limits might be relevant as to when you have to get organized to get the certificate of probable cause.

A Yes, Your Honor. Again, the Third Circuit set down no specific guidelines as to how long a lapse might be, but again, looking at the facts inthis situation, there was action within the 30 days and every effort was made by Petitioner, who again was sitting in prison, acting on his own to get the things filed in the Court of Appeals on time and was blocked, according to his affidavit, by actions of the state.

It was perfectly proper for the Chief Judge of the Ninth Circuit to accept that as a certificate of probable cause and deny it on the merits; that's what he did.

Now, in June of 1961, nine months before Petitioner's discharge date would have been set, Petitioner appeared for what he alleges was an annual parole hearing. He was asked what he planned to do when he was released and he said he wished

to return to Bakersfield to fight his case. At this point, according to Petitioner, objections were raised to his doing this and mention was made for the first time of extending his term to allow for a longer period of supervisional parole.

Petitioner declined and said he wished to stay with his previously set sentence and serve it and be released. Then subsequently, at some later time, not revealed by this record, the Adult Authority revoked the two five-year terms, with the effect of resentenging Petitioner to two consecutive life terms.

Petitioner contends in this factual context that his rights to due process as guaranteed by the 14th Amendment have been violated in a number of respects. First, he urges that the California Adult Authority has been given the broad and sweeping power to sentence and resentence, uncircumscribed by any standards for controlled or specific procedures. That is, it has an arbitrary power which, he claims, is in fact, exercised in Petitioner's case, by revoking its prior determination and resentencing -- in essence, resentencing Petitioner for an invalid reason.

From this argument, Petitioner urges that the lack of either standards or constitutionally-adequate procedures permits the Adult Authority to revoke and refix for invalid reasons and essentially prohibits Petitioner from effectively influencing and bringing to bear onthe determination of the Adult Authority

those considerations which properly go intothe fixing of the sentence.

Petitioner, in the second major argument, urges that the refixing of the sentence, once set and begun to be served, violated Petitioner's rights under the double jeopardy clause, as it applies to the states by virtue of the 14th Amendment.

Now, returning to Point 1 of Petitioner. He contends that this case is governed in its essentials by this Court's decisions in a number of decisions in a number of cases, including Townsend versus Burke, Mempa versus Rhay and North Carolina versus Pearce which was decided in the last term of this Court. These cases and others establish beyond the question the requirements of the due process clause due to apply to the sentencing function.

Now, what the State of California has done in this case, is to transfer a substantial and significant portion of that sentencing function from the judge to an administrative agency, the California Adult Authority. But, its doing so, does not, therefore, divest that function of these constitutional protections.

These protections, as set out in the cases I mentioned, involve a number of things. Mempa, for instance, involved a statutory scheme quite similar to California where the judge was required to sentence to the maximum term but the actual fixing of the sentence was done by a board. The Court

there, although it recognized that the sentencing judge's functions had been circumscribed, said neverthless, the basic constitutional protection must apply to even what the judge did, which was simply to gather information to pass on to the board which would make its eventual determination.

It would seem to follow, necessarily, that these same protections would adhere to the board itself when it makes the determination it does. And among these protections, in addition to those involved directly in Mempa, is that not increasing or even originally setting a sentence for an improper reason.

And Petitioner has contended and seeks to show that there was, in fact, an improper reason for the Adult Authority's action in his case.

MR. CHIEF JUSTICE BURGER: I think probably, Mr. Ralston, that is your warning light.

THE MARSHAL: He asked to be notified --

MR. CHIEF JUSTICE BURGER: I see.

MR. RALSTON: That, to, in essence, revoke the previous sentence and put a prisoner back on life term merely because he wishes to prove his innocence once he gets out, flies in the face of the rules and decisions of this Court, and again for instance, in the Pearce case, where an analogous situation this Court made it clear that the state could not impose conditions such as increasing the sentence on a

Petitioner's trying to fight his case in another means, to appeal for habeus corpus.

It might be noted in this case that there is no indication of what the Adult Authority meant when it did not want Petitioner to fight his case. If the action of the Adult Authority can stand it could very well set out and enforce a rule that a person who did not admit -- completely subject himself to the Adult Authority, even to the extent of giving up any rights to legal process, would not be let out or if a term was set, would be revoked and increased.

Further, Petitioner contends that because State of California has granted the kind of arbitrary powers as to the Adult Authority, that its actions must be circumscribed by adequate procedures so that the reasons and bases for its actions appear and so that, again, the Petitioner can adequately bring to bear whatever considerations he feels are necessary for the Adult Authority's decisions. These procedures, again on the basis of this record, do not exist. Certainly nothing like the procedures of protection when a judge in a Court Trial sentences and determines the sentence, are here.

MR. CHIEF JUSTICE BURGER: Would you concede, Mr. Ralston, that in this kind of sentencing scheme or system, that some considerable flexibility must be allowed to the State to deal with it. Is that your point, that you claim it needs procedural devices to protect it?

A Yes, Your Honor. Flexibility is one thing, but arbitrariness is another. And in order that flexibility can be preserved in such a system with sufficient protection so that the sentencing board does not just do anything it feels like doing.

MR. CHIEF JUSTICE BURGER: If I read your briefs accurately, my impression is that you say once having fixed it they never can increase it; is that right?

A This is the second part of the argument which is an independent from the first part. And that, very briefly, and then I would -- unless there are any other questions, I would like to reserve the remainder of my time for rebuttal, is that a line of cases; a long line of cases in this Court and in virtually every Circuit Court has held that once a sentence has been set and fixed, and begun to be served, cannot then be reset, except Pearce allows an exception where the reason to sentence no longer exists because an appeal had been taken and won. Then, under certain circumscribed situations the longer sentence may be set. But this is not this case. This case, there has been no appeal; sentence has not been set aside; it is the same sentence and Petitioner contends that double jeopardy clause prohibits the resetting of it to a higher amount after it has been set.

Q Could I ask you, please, where in the petition for habeus corpus in the District Court it is alleged that he

was denied his parole or his parole was revoked because he refused to confess.

A Yes, Your Honor. There is a footnote on Page 14 and again, it was not a -- Page 14 or 15 where it is set out the colloquy between the Petitioner and the Adult Authority. And Petitioner says that when he appeared before the Adult Authority he was asked where he would go if released on discharge and Petitioner replied to Bakersfield and then subsequently they began discussing about why -- about increasing the parole and at the bottom of the paragraph it says: Obviously, the only reason for this action was to coerce Petitioner to plead guilty and not challenge the conviction after being released on discharge.

Q But the only Federal question you raised in the petition was the California Law was void as vague?

A And also the double jeopardy issue was raised. Yes, it is vague and uncertain to the extent that it grants the Adult Authority the authority to act, as it says at the top of Page 16, "at their own will and caprice."

Q Well, yes, but if you just say it on the ground that the sentence is vague and uncertain.

A Well, yes, Your Honor, but I think this can be reasonably contrued to include the issues of when a grant of this kind has been given that allows the Adult Authority to act, again "freely and at its own will and caprice," that this

requires certain kinds of constitutional protections to have some assurance that this will not, in fact, happen.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Ralston.

Mr. Smith.

ORAL ARGUMENT OF ARLO E. SMITH, CHIEF
ASSISTANT ATTORNEY GENERAL OF CALIFORNIA
ON BEHALF OF RESPONDENTS

MR. SMITH: Your Honors: I might reply to your question if you look at Page 4, Mr. Justice White, you will note --

MR. CHIEF JUSTICE BURGER: Of the appendix?

MR. SMITH: Ofthe appendix. A document called a petition for writ of habeus corpus, and it does raise the issue of cause. Page 4 of the printed appendix, 10-C.

"C" under both 10 and 11 seeks to raise the issue of unconstitutional revocation for lack of cause.

Q On Page 15 it says --

A I can see that the record is very confusing.

Q The petition for habeus alleged the Federal question --

A Alleges the Federal question?

Q Yes.

A It alleges a violation of the constitutional right; yes. But it is our contention -- we have three contentions: First, we contend that this matter isn't even properly

in this Court; first, because it was an untimely appeal to the Court of Appeals. Secondly, as tothe issue of an unconstitutional cause, that that wasn't even properly before the District Court and a review of the documents filed in this case indicates clearly that this contention was never presented to any California Court.

Q Well, what I'm trying to get at is that you are saying that the allegations of the habeus petition alleges a substantial Federal question, how can you say that that a Federal question was not before the District Court.

A We say that there was no improper denial for certificate of probable cause. This is our third point, but the Circuit Judge here, based on the fact that the constitutionality of these statutes, an indeterminate sentence law, has been determined for some, nearly70 years, has been merely uniformly held as constitutional by Circuit Courts or state courts. That is our contention, that if the Chief Judge cannot deny a certificate of probable cause based on such a long line of precedents, then the requirement of --

Q Is this your suggestion, then, that the only Federal question raised is the constitutionality generally of the California statute?

A That is right.

Q Well, let me pinpoint it a little more. What about this -- as just has been pointed out to us as Footnote 1.

This is a statement that the California Adult Authority have been accused of coercing each prisoner coming before them to plead guilty as a condition to getting a parole discharge, for exploration of the maximum sentence provided by law.

Now, do you --

A We say that that was not properly before the District Court.

Q WEll, this allegation --

A This allegation is not properly before the Court and not properly before this Court for two reasons:

Q Why was it not properly before the District Court?

A This is a footnote to a supplement to a petition for a writ of habeus corpus which is unsworn to; which appears in the printed record and appears in the record before the District Court. AS pointed out, we entered the case for the first time on a petition for cert; we were never served with the documents found in the District Court as noted in the original denial of the petition by the District Judge, and in fact, have never received those documents.

However --

Q Could you explain this supplement?

A Yes, I did. It's a supplement.

Q Well, where does it appear that it's a supplement?

A Well, the petition for habeus corpus starts at Page 2, and ends at --

Q Wait a minute, now, Page 2?

A Yes. It ends at Page 7; that's the sworn petition for habeus corpus.

Q Well, what is it that starts --

A Page 7.

Q Yes; what starts at Page 8?

A Well, you see that -- you are at an affidavit of poverty; that is sworn to.

The second document, which is dated April 27, but was filed August 25th, purports to be a petition for writ of habeus corpus. It is a discussion, as you can see, of the statement of the case; of the proceedings in the state court and review of the proceedings in the Federal Court. There is a footnote, to what is not clear, whether it to be the proceedings in the state or the Federal Court, which contains these statements of fact.

This document is not sworn to, as indicated by Page 16; there is no statement that -- is omitted. In view of the original record of file in this court --

Q Well, does it appear that the District Court acted -- well, let me put it the other way -- does it appear on what the District Court acted when it denied this certificate of probable cause?

A It doesn't.

Q And we did not act on this, what you call "supplement"?

A We say --

Q Do you know whether the District Judge --

A No, we do not. But I say you could not act on it because it was not a sworn-to allegation; a statement of fact and we could not accept it as true in this Court.

Q But if the certificate had been issued, you would have had a hearing and you would have had a record?

A That's correct.

Q You would have had "sworn testimony"?

A You mean if District Judge had issued an order to show cause; yes, and the record had been developed, that's correct.

Q Are these Adult Authority proceedings transcribed? And if so, are they available to the Court?

A They are not transcribed. The procedure of the Adult Authority is to -- both in the fixing of terms and in the refixing of terms, as a result of a hearing -- "hearing," (quote surrounded) with the inmate involved, at the correctional council and the Adult Authority had reviewed the entire case file which includes what is called a case settlement, which includes the reports of the psychological report, the psychiatric report, the vocational report, the educational report, the

social report and the custodial report; all referred to his adjustment; his rehabilitation, his --

Q Well, how could we ever find out as to whether or not the Adult Authority requires everybody to admit their guilt or they stay in? How can we find out whether that's a rule or not?

A Well, I think that there are two answers: I was hoping to summarize my argument, but I'll -- let me summarize that part of our argument right now.

First, on this point it is our contention that due process does not require at this stage of the proceedings, a refixing of a term any more than that the Adult Authority of other body not act arbitrarily or capriciously or with invidious discrimination.

Q How do you find out whether it is arbitrary?

A Well, under the rules in the California Codes it can call for and does call for the records of the Adult Authority. This includes the kind of documents attached here: disciplinary proceedings and the case summary; the Correctional Officer's case summary.

It is our contention that that is the only scope of review required by due process.

Q You mean if you change a sentence from five years to life you don't have to give any reason for it?

A It is our contention, first, that that is not

changing the sentence; that under California Law -- it's only tentative; it's not fixed. It's subject to being refixed; it's tentative only --

Q Yes, it's tentative, in case he dies ahead of time.

A No, Your Honor.

Q But isn't it true that the Adult Authority can say, "We have decided that your sentence is five years," and then can call him in and say, "Do you admit you are guilty to this or not?" I say I am not guilty. "Well, we now sentence you to life." Is that possible? Is that possible?

A If that allegation is made in the Court of California that the State Constitutional clause wasthe basis. In other words, the allegations that appear here for the first time in the history of courts, were made in the California Courts, the California Court would inquire into it. The burden would shift, in effect, to the Adult Authority.

Q I thought your point was, and perhaps you will develop it after lunch, "the premise in which we brought the case here, namely: that it involved the issue that Mr.Jis Justice Marshall has talked about in fact, is not shown by this record. Isn't that your point?

A That is --

Q Well, I wish you would develop it and make it clear after lunch, because I --

MR.CHIEF JUSTICE BURGER: You have a minute or two yet, before lunch.

MR. SMITH: Let me address myself to that particular point. What we have here in the District Court are three documents, two of them labeled applications for petitions for the writs of habeus corpus and another document which is labeled a 76 page supplement. Now, when you examine those documents, in the 76-page supplement purports to include copies of documents filed in other courts dating back to 1963. In an examination of those documents you will note that in none of them is this allegation concerning this unconstitutional cause made. The allegation was not made in the California Supreme Court or any other Federal or state court. It occurs for the first time in a document dated April 27, 1967, some six years later -- several writs later, for the first time, in a footnote to a supplement to a petition which is not sworn to. And I suggest that the District Court may well have considered the fact that this is a new and novel and unproved allegation which did not appear before and, indeed, is not sworn to.

Therefore, it is our contention that that data was not before the District Court properly. It is not properly here. You need not accept it as true. It should not, and cannot be considered as true, for purposes of this proceeding.

It shows thus that there was no exhaustion of state remedies on the very record file here and it shows that it's

simply an unsworn footnote to a supplement to a petition which the District Court could not and should not have considered and which should not and need not be considered as a factual -- true factual allegation in this Court.

(Whereupon, at 12:00 o'clock p.m. the argument in the above-entitled matter was recessed, to reconvene at 12:35 o'clock p.m.)

AFTERNOON SESSION

12:35 o'clock p.m.

MR. CHIEF JUSTICE BURGER: Mr. Smith, you may pick up where you left off.

MR. SMITH: Thank you, Your Honor.

I would like to devote a few minutes to the question of the timeliness of this appeal. The rules of the Ninth Circuit are quite simple. It requires, as the Federal statutes, that there be a notice of appeal within 30 days from the trial order of the District Court denying the petition for writ of habeus corpus. And, that pursuant to the statute requiring a certificate of probable cause, that such a certificate be obtained. However, within 30 days after the denial of the petition for writ of habeus corpus or 30 days after a denial of a certificate of probable cause by the District Court. These are far more liberal rules than have followed in other circuits such as the first and other regions.

The Court, itself, had the Chief Judge granted the certificate under the cases we have cited, and would have examined this question, either on our motion or its own motion, and would have dismissed the case. The rules are very liberal there. Any paper that looks at intent to appeal will be deemed as a notice of appeal.

What happened here was that the District Judge denied the petition on September 27th. On October 10th, the Petitioner

filed application for a certificate of probable cause. He -- the District Judge denied that application on October 31st. However, under the rules of the Ninth Circuit, that application for certificate of probable cause may be deemed a timely notice of appeal. Of course, that does not protect the appeal. There must be a certificate of probable cause granted timely.

The application and subsequent denial by the District Court, added to this time -- 30 days from October 31st to apply for a certificate of probable cause in the Court of Appeals, or as indicated that he earlier questioned the Circuit Judge assigned to the Circuit, of this Supreme Court.

However, nothing was done and the record reflects, until December 14th when the Clerk received a document labeled "affidavit," in which two allegations were made: (1) That the Petitioner had sought to file notice of appeal in the District Court on November 17th and had tendered the $5 fee which was taken from the trust account of a fellow-inmate, and the Clerk had refused to file it. Well, this is irrelevant, because there is good notice of appeal under the Rules already filed.

He also asserts that he attempted to file in Circuit Court a write of mandate -- a petition for writ of mandate requiring the warden to permit him to withdraw $5 from the trust account of this same fellow-inmate for the purpose of his filing fee, which, of course, is inconsistent with his earlier statement that he had tendered the $5.00. Then he asked,

generally, for an extension of time. This is some 44 days after the denial of the certificate of probable cause in the District Court some 74 days after, or longer, after the denial of the petition for writ of habeus corpus. He is out of time.

The Judge did deem this document to be an application for certificate of probable cause and denied it. But we say on review the panel would have, under the rules of that court, have found it untimely. Such a rule is certainly not unreasonable; certainly not unconstitutional; there must be time limitations of policy under the statute requiring 30 days for a notice of appeal certainly contemplates that the time for appeal -- that notice be given timely and that the clerk, the Court, the parties, know that the appeal is pending and that the option for protecting the appea- might not be left with the Petitioners.

Secondly, it facilitates the policy of Congress requiring and limiting the appeals of these kinds of cases, by virtue of the fact that in large measure they place a great burden upon the Federal Courts upon the states, because as a class, they are generally meretorious.

Furthermore, this man is not cut off from any right. The denial for application of petition of habeus corpus is not final; you can always go back and file. Hehas not lost anything, as you mihgt lose a right to pursue the point in an appeal from a criminal conviction.

Finally, we will argue that there was no abuse of discretion here by the Circuit Court in the denial of the Applicant -- denial for the application for a certificate of probable cause, based on the long-standing precedents offered this Court in the Pacific Courts.

We say that there was no substantial Federal question presented. Our next contention is that on the facts of this case the Petition has, in fact, received what he claims he must receive, his term has been refixed for cause and I might clarify the point raised earlier that this is not final. The state law bears an indeterminate sentence; in this case five to life, consecutive; it's fixed by statute at maximum. The Adult Authority fixed it, the term -- the minimum in this case. They then refixed as they do in the case of any violations, at the maximum, but that is not final. They, normally, usually, in virtually every case, refix it again at less than maximum.

Now, in this case the Petitioner -- the record reflects that there was cause. He was -- and that he had received notice and a hearing. His term was fixed in 1959 and he appeared before the Board in 1960. In December of 1960 he engaged in a fight with a fellow inmates; he was given notice of the Complaint which set out those facts. He was notified there would be a hearing before the disciplinary board; a hearing was granted; he appeared and gave his version of the facts. It was found that he participated in this fight. This report,

pursuant to the rules of the Adult Authority, was forwarded to it; it adopted the findings of the prison disciplinary group; it set his hearing over for six months. At that hearing the record reflects that by his own allegations that he discussed time.

He had a hearing in that sense; he had notice and the notice -- original notice filed in December, indicated that one of the results of this hearing could be a refixing. So, he is notified in writing; he knew, in fact.

Q In California what is the maximum for assault and battery?

A Assault and battery? Oh, it's a misdemeanor.

Q Was that what he was guilty of?

A You mean in this -- well, I don't know the facts. The man had a cut lip --

Q Well, assume there was just a fight.

A That was assault by a prisoner on another prisoner serving a life term.

Q If he had been tried on the outside for assault and battery, could he have gotten life?

A The answer to that is "no."

Q But he did.

A He did not.

Q What did he get?

A He got his term refixed.

Q At what?

A At the maximum, but-subject to being refixed.

Q Which was life.

A That's true, but it's not final; it's tentative; it can be refixed at any point. And it is in no way a punishment for that act. It's simply an indication that he's not adjusted and rehabilitated and risk not present a sufficient to be placed on parole, and to have a term fixed to go out into the community. That is all that indicates.

My final argument is that there is -- the constitution does not require in this situation, any more than that there be cause. Due process simply requires -- and the Sixth Amendment is not applicable; these are not criminal proceedings. It is, then, the argument here that this is akin to sentencing and that, indeed, the judge is very limited, which is not so in California.

As we indicated in our brief, only 17 percent of those people convicted of felonies are ever sent to the state prisons. The other 83 percent are given probation, jail, petition to probation and sent to other institutions, such as the Narcotic Treatment Center or Mental -- other mental institutions.

The fact is that at that point the punitive part of the criminal process has ended. The punitive part of the prison term is that which is the minimum set by the legislature. And when he sends them to the state prison the minimum

represents the legislature's determination that that will suffice -- that will suffice to deter third persons from committing these kinds of acts as here: armed robbery. And this will serve to punish the individual involved.

But, as Judge Goodrich has said: "The period of contentious litigation is over when a man accused of a crime is tried and sentenced. Now the problem becomes one of an attempt at rehabilitation."

There is no place for the punitive process once that minimum term in state prison is fixed. It is our contention that Mempa versus Rhay does not apply here, as Your Honor pointed out and involved counsel, that on the revocationof parole the sentence had not been entered. Counsel was eager to marshal the facts and he stated that even more important was the necessity of helping to preserve rights which otherwise would have been lost, to wit: appeal -- specifically an appeal and a right to withdraw that plea. No rights are lost in this process. It can always be fixed and refixed. There is nothing final.

Secondly, the case of Mempa versus Rhay did not overrule the case of Williams versus New York, in which this Court stated that at that -- at sentencing a man was not entitled to all the procedural protections that were accorded to man during the criminal trial. Specifically, that he did not have the right of confrontation and cross-examination; that a

judge could rely upon probation reports, hearsay, as to the man's background; his social adjustment, his education, his training, his jobs, his family; all of those factors that go into the determination of sentence, along with the punitive element in this sentence.

This Court has said in cases -- and indeed, Mr. Justice Black said there that the due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure.

It is our contention here that the kind of procedure, the very nature of the thing involved is admitted in numerous cases, such as Hanna versus Lodge, the nature of the proceeding must be looked to in determining what due process rights are applicable here. The nature of the proceeding and the burden placed upon that proceeding. The Courts have indicated that they have used a lot of terms; that this is a privilege; it's a matter of grace; it's not an adjudication. But

But I think that the Court in this Circuit properly pointed out that this characterization does not answer the question; that we must look to the nature of what is, not simply characterize it as a privilege or a right. And the nature of what we are dealing with here is the determination by a group of experts who were concerned with the rehabilitation and the readjustment of people committed to the state prisons. And on the other hand, they must look at the risk they present

to the public and there is one point that I would like to make, and that is that in making these evaluations the wider latitude they have in making them, the greater possibility for error; that is, the greater possibility that they made a mistake; that the man may be a bad risk.

And on the other hand, the more difficult it is for such groups to collect that error, then the less latitude they will have in making that determination, either as a matter of fact, or as a matter of state law. I say we do the prisoners no service when we impose upon this procedure any burden beyond that that requires that agency to act with cause.

I suggest that the board must and does look at his entire background in the fixing and the refixing of the sentence.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Smith.

Mr. Ralston, you have but one minute left.

REBUTTAL ARGUMENT BY CHARLES S. RALSTON, ESQ.

ON BEHALF OF PETITIONER

MR. RALSTON: Your Honor, I would like to make a few very quick points. Number one: the issue has been raised concerning whether there is an exhaustionof state remedies in this case. The Lower Court did not dismiss this petition on a basis of exhaustion.

Number two, there are allegations in the second habeus

petition, Page 11, as to what was raised in the Supreme Court of California and his allegations are brief. One of them says "and the Adult Authority took advantage of its loose definition to coerce Petitioner and to make him weak and submissive."

What else may have been in this habeus petition is not in doubt here; it is part of the record and was part of the record in the Lower Court. Again, this issue of exhaustion, whether these issues were properly raised before the state courts is a matter that could best be resolved by a District Court on remand. This is, again, a problem in this case of the dismissal without asking for a response; without having a hearing; without exploring the record to find out what the facts happen to be.

Thank you.

MR. CHIEF JUSTICE BURGER: Would it not be more accurate or perhaps accurate, to say that the Federal Court in the first-go-around, had no occasion to even reach the matter of exhaustion of state remedies by the way that the case was treated?

A Yes, Your Honor. They just said that no Federal question was raised. So, with that disposition they wouldn't even consider it.

MR. CHIEF JUSTICE BURGER: Mr. Ralston, you acted at the request and appointment of this Court and we thank you for your assistance to the Court and, of course, to the Petitioner

and to the whole system. Thank you for your submission and thank you for your submission, Mr. Smith. The case is submitted.

(Whereupon, at 12:52 o'clock p.m. the argument in the above-entitled matter was concluded)