In the

Supreme Court of the United States

OTIS LOPER,

Petitioner,

vs.

GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

No. 70-5388

Washington, D. C.
January 13, 1972

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OTIS LOPER, Petitioner	No. 70-5388
v.	
GEORGE J. BETO, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS	

Washington, D.C.
Thursday, January 13, 1972

The above-entitled matter came on for argument at 10:52 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOHN T. CARAHISS, ESQ., 2500 Humble Building, Houston, Texas 77002, for the Petitioner.

ROBERT DARDEN, ESQ., Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 70-5388, Loper against Beto.

Mr. Cabaniss, you may proceed.

ORAL ARGUMENT OF JOHN T. CABANISS, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case involves the constitutional rights of a criminal defendant in circumstances where he has been affected by collateral use of prior convictions, presumptively broader than Gideon.

In this case, the collateral use was impeachment of testimonial credibility.

Loper was convicted in November of 1947, in Harris County, Texas of the offense of statutory rape of his eight-year-old stepdaughter. In his state court trial, the prosecution's witness, the only one to identify Loper as the violator, was Betty Fay Darty, and she indicated that he was guilty and did it.

Otis Loper took the stand to testify in his own defense. He denied complicity, denied guilt of the offense, and on cross-examination, the state was allowed by the court to elicit from him details regarding prior convictions that he had suffered in the States of Mississippi and Tennessee.

There were four prior felony convictions in all. The state brought out the details as to the term of these offenses, where they occurred, the fact they were all for burglary.

In the District Court hearing below, evidence was introduced regarding these prior convictions. This evidence consisted both of the testimony of Loper as to the circumstances surrounding those convictions and also consisted of a certified record that had been obtained from the courts in those proceedings which reflected in most instances that the defendant had appeared in person, that he had appeared in his own proper person, and otherwise silent regarding the absence or presence of counsel.

It is Loper's contention that the evidence thus introduced, uncontradicted by the State, renders those convictions presumptively void under the mandate of this Court in Gideon.

Q Mr. Cabaniss, Judge Connally found as a fact in the District Court that he refused to believe Loper's testimony that he had not been previously represented?

MR. CABANISS: He certainly did, your Honor. He refused to believe anything that Mr. Loper said.

Q So you are asking us to upset that factual determination?

MR. CABANISS: I am, your Honor, on this basis: Other courts have indicated in similar circumstances that

where the defendant, the one who is convicted, introduces testimony as to the fact that he did not have counsel, was not represented by counsel, and then he introduces evidence to corroborate that testimony, in this case certified representations of the State board proceeding, we would contend that those records are sufficient to carry his presumption that he was in fact not represented by counsel and had not waived his right to counsel, and that the trial court's action in disregarding that, the fact that the burden had been shifted to the State to prove he had waived counsel, we believe that that cannot be upheld. That is our contention.

Q When we granted certiorari in this case, did we give it limited certiorari?

MR. CABANISS: Yes, sir, you did, your Honor. In all there were six points I believe raised in the petition for certiorari. This is the only one upon which the petition was granted.

Q And you say this is the only one? What specifically is the question?

MR. CABANISS: The issue presented, your Honor, is whether on the facts presented by this record--

Q Are you reading this now from the writ of certiorari?

MR. CABANISS: No, I'm not.

Q I'm asking you to be quite specific, if you will.

MR. CABANISS: Does the use of prior void convictions for impeachment purposes deprive a criminal defendant of due process of law, where the use might well have influenced the outcome of the case.

Q Under that question, it is not open to us to decide whether or not the prior convictions were void, is it?

MR. CABANISS: Well, your Honor, I had believed that--

Q I am trying to be of help to you.

MR. CABANISS: It seems to me, your Honor, again we are proceeding in this case, we have throughout from the beginning, proceeded on the basis--

Q The issue we decided in this case to grant certiorari on was whether or not the use of prior void convictions for impeachment purposes violated the rule of Burgett against Texas.

MR. CABANISS: I will proceed to that rule, your Honor.

Q We didn't decide to take the case to consider the issues of whether or not theseprior convictions were void. We limited the grant of certiorari, didn't we?

MR. CABANISS: I'm sorry, I didn't understand your question, Mr. Justice. I will proceed to the question of

Burgett.

We have utilized Burgettin the District Court and Fifth Circuit without success. We have contended throughout that the Burgettrationale applies to Mr. Loper's circumstances, and that the use against him of the prior void convictions to impeach his testimonial credibility was a violation of that rationale.

Now the state contends and the Fifth Circuit has held that we go too far, that Burgett itself involved enhancement of punishment and that impeachment of testimonial credibility--it goes only to credibility, it is not nearly so serious as enhancement, which may add years of imprisonment to the sentence of a defendant.

But there are a number of factors we relied upon in asserting that Burgett is not so limited. Most importantly, although Burgett did involve convictions alleged in a recidivist count, it involved four prior convictions alleged in a Texas indictment. The fact of the matter is that Burgett itself involved no enhanced punishment. The evidence introduced indicated that the Texas conviction was broad on its face. As I recall, it was never introduced. The Tennessee conviction that was introduced in evidence was held to be presumptively void.

The Court withdrew all evidence of those and instructed the jury not to consider the prior convictions for

any purpose. The defendant Burgett was convicted and he was sentenced to ten years imprisonment. The maximum for the offense involved was 25 years.

So we submit that the constitutional precept that was established was on the facts of Burgett, not one that was limited to a situation where enhancement occurred as the State in the Fifth Circuit would have us believe.

Q Well, in the Burgett case, what was the purpose of the introduction of the prior convictions? Let's forget the consequence for the moment. What was the purpose of their introduction?

MR. CABANISS: The purpose was, your Honor, under a recidivist count.

Q To enhance the punishment?

MR. CABANISS: That is correct.

Q Now, whether the jury did or did not apply it that way, as you suggest, really is not the issue, is it?

MR. CABANISS: The point I would make, your Honor, through, is that it seems to me that in the absence of enhancement, the result in Burgett was that the jury was aware in its deliberations upon the primary substantive issue of guilt of four prior void convictions.

Now, what difference does it make if that was done under enhancement counts or if it was done to impeach the credibility of a witness who took the stand to testify in his

own defense? If the convictions are void and the jury is made aware of those convictions, then the rationale applies. To permit a conviction obtained in violation of Gideon against Wainwright, to be used against a person, either to support guilt or enhance punishment for another offense, is to erode the principle of that case.

Q The Petitioner was the only defense witness, was he not?

MR. CABANISS: That is correct, your Honor.

Q And his stepdaughter was the only prosecution witness?

MR. CABANISS: No, Mr. Justice, the prosecution also put on medical testimony from a Dr. Weller, which simply established that apparently an offense had occurred, and he stated it appeared to be relatively recent.

Q Did the jury set the sentence here?

MR. CABANISS: I believe so, your Honor, 50 years.

Q It might be of some importance.

MR. CABANISS: I believe the jury did set the sentence in this case.

Q And what bounds of discretion, do you know?

MR. CABANISS: Two years to death.

Q Two years to death and the jury set 50 years and under Texas procedure, the sentencing judge was obligated to take the jury's assessment on sentence?

MR. CABANISS: Mr. Justice, I am not aware of that question. I am not sure.

Q In this case, it did.

MR. CABANISS: I believe that is the answer. I think he was convicted by the jury and sentenced.

Q And the jury sentenced him even on a finding of guilty, and the jury could have sentenced him, even on a finding of guilty to as short a term as two years?

MR. CABANISS: I believe that is the minimum in Texas for that offense.

Q So it is your submission that both branches of Burgett are involved here, both the finding of guilt and the imposition of sentence?

MR. CABANISS: The fact it was harmful, your Honor.

To proceed with the fact of impeachment, Mr. Chief Justice has raised the point they were in an enhancement context, but we have tried to point out that where you have a criminal defendant who takes the stand in his own behalf, his credibility is a material factor to his guilt or innocence. If his credibility is attacked by evidence of prior convictions that are void under Gideon, such that the guilt was not there reliably determined, the argument must be made that any conclusion of untruthfulness by a jury of the impeached witness is equally unreliable, so it seems to us to follow that impeachment evidence of that nature tends

directly or indirectly to support guilt by causing the jury to disbelieve testimony of Loper, and proceed along the lines where the prior conviction is used for that purpose, then the defendant clearly under Burgett suffers anew from the deprivation of that Sixth Amendment right.

Now we are supported in our conclusion as to the meaning of Burgett by a number of cases. They are cited in the brief and they are applicable to impeachment, not just enhancement situations. I note particularly in Gilday versus Scavati, Ninth Circuit, which is one of the first, the opinion is particularly lucid.

Also the Ninth Circuit in Tucker versus United States, I note that this Court on Monday of this week disposed of that case by remanding in a situation where the sentence had been, I would say, enhanced. It was the maximum sentence they had reversed because of the possibility of prejudice resulting from prior convictions there involved. We are not discouraged by that case at all.

Q Well, I shouldn't think you would be.

MR. CABANISS: We're not.

Q You think that case bears on the problem?

MR. CABANISS: No, your Honor, except from the standpoint that I like the language about the sentence being based upon misinformation of a constitutional magnitude. I would like to utilize that one concept.

Q Well, in that case, the Court of Appeals for the Ninth Circuit, as you have just told us, disagreed with the Court of Appeals in the Fifth Circuit in the present case.

MR. CABANISS: That is correct, your Honor.

Q We didn't make any disapproval, did we, of the Ninth Circuit's view? Then it went on to find it was harmless error in that case.

MR. CABANISS: But the Ninth Circuit specifically decided that Burgett included impeachment, and it did on the facts presented by that record, go on to determine that it was there harmless error.

Q And we have affirmed the judgment.

MR. CABANISS: That is correct.

The State in its brief cites two cases that I must mention. These cases are Harris against Nelson and Walden against the United States. These were impeachment cases and the State asserts these can be relied upon as limiting the application of Burgett. It should be kept in mind this is not a case where the defense counsel, as part of its trial strategy, introduced invalid prior or introduced prior convictions to soften the blow, so to speak. That is often done. Nor is this a case where the record will show that Loper to bolster his credibility denied he had ever been convicted on criminal on direct examination. The first time these

convictions were brought out was by the State in its cross-examination, and it is on this basis that neither Harris nor Walden would conclude that Burgett would not apply to the impeachment context situation.

Harris and Walden were both concerned with the situation of perjury.

Q Well, there was no occasion in 1947, when this man was tried, I suppose, for him to have any reason to challenge the nature of the conviction, was there?

MR. CABANISS: None at all, your Honor. The right was not yet decided and that of course is the reason why it would be fruitless to search the records for an objection on the constitutional basis here involved. The District Court pointed that out.

Q But your contention is that when you are in the District Court now in 1970, when you were there on the habeas corpus proceeding--

MR. CABANISS: 1959, Mr. Chief Justice.

Q --1959, that at that time, you do not have the burden of proving convictions were obtained without counsel? You merely establish it by his testimony that he didn't have counsel?

MR. CABANISS: Mr. Chief Justice, I did not mean to imply that the testimony of the defendant as to those facts is all that is needed: I don't believe that is the case. I am

saying that in this instance, that was not all that was introduced. The testimony that Loper gave, which Judge Connally discredited, we would like corroborated by the certified records introduced at the trial, reflecting--

Q Are you telling us that that is strong corroboration or solid corroboration of that testimony?

MR. CARANISS: No, your Honor. I am saying his corroboration, the aspect we do not have a record like Burgett had, one in which there were two versions of a conviction in Tennessee, which were cited in one of them that the prosecutor and defendant in person, without counsel, the second version simply being the defendant in person. We don't have two entries involved here but all of the entries involved, none of them recite that he appeared with counsel and it can be fairly inferred from at least one, and perhaps others, that the wording used reflects that he did not have counsel. For example, in 1940, on conviction, the entry that appeared was "came the District Attorney who prosecutes for the State and came also the Defendant in his own proper person, both of whom are now ready for trial."

Q Well, is it possible if we agreed, if we decided the question entered in your favor, namely the prior convictions now void under Gideon may not be used for impeachment, suppose that rule was established, could we decide

this case, resolve this case without sending it back to have a determination of the status of those convictions, four prior convictions?

MR. CARANISS: Your Honor, under the principal I have put forth a little bit earlier, I would admonish the Court that perhaps it could, but what I am saying is that although Judge Connally discredited his testimony, the rights involved here were spoken about in Burgett in no uncertain terms. The records in this case are similar to the record that was introduced in the trial in Burgett, insofar as the "in person" aspect. The records don't state one way or the other whether there was or was not counsel. The Court might determine that in circumstances where the Defendant has suffered this conviction, has suffered impeachment or enhancement contrary to the dictates of Burgett, and where he introduces in addition to his testimony, records that are silent concerning the existence of counsel being there or any waiver of counsel, that that is sufficient under the circumstances to shift the burden.

I was speaking about Harris and Walden. I would only point out that it seems to me they are distinguishable. Clearly as is said in Harris, it does not follow from Miranda that evidence admissible in prosecution of the case in chief, that for all purposes, provided of course the trustworthiness of the evidence satisfies legal standards. It was suggested

that Miranda violations there involved and the illegal search and seizure in Walden are different from the Sixth Amendment rights herein involved with respect to the prior convictions which are inherently unreliable. They are not trustworthy, and in addition, the other basis of course is the fact that both of those cases, this is not one where Loper sought to commit perjury or testified to try to bolster his credibility of never having been convicted prior to that time, so that does not furnish a basis. No perjury was involved.

The State at one point has pointed out that this case should not be reversed from the standpoint that there was no prosecutorial misconduct involved here. I would simply note in passing that I believe this issue is disposed of by Chief Justice Warren in his concurrence in Burgett in which he noted that it is not simply errors based upon misconduct that can be reviewed by this Court; it is the effect of those errors, whether well-intentioned or not, on the constitutionally protected rights of the criminal defendant, which is all we are concerned with here.

I would like to speak to the issue of the harmfulness of the error that was involved. As I previously pointed out, there were two issues before the prosecution in this case, but the only testimony relied upon to establish Loper as the violator of this offense was that of the eight-year-old child, Betty Fay Darty. Loper took the stand--

Q Is there a factual issue on that score now, on the question of this grant?

MR. CABANISS: It seemed to me, your Honor, the last part of that question, whether the use might well have influenced the outcome of the question, it occurred to me that that might indicate that the Court would consider whether or not in the circumstances here presented, the prior convictions introduced did in fact influence the jury in its determination.I am suggesting most certainly that they did. In this instance, it was a case that was built upon a credibility determination. If the jury had believed Loper's version of the facts that occurred that morning, they would have been compelled to acquit him. If they did not believe it, they would have convicted him. And in that background, the prejudice, the influence that resulted from introduction of the invalid priors before the jury with reference to the details of the offenses and thatposture on cross-examination at that time, it seems to me there is no way to conclude that the error involved was harmless error, that it was not harmless beyond a reasonable doubt.

Q Well, was each one of the priors attacked?

MR. CABANISS: No, your Honor.

Q How about in this record, is there evidence of the invalidity of the priors?

MR. CABANISS: There was one prior conviction, a 1932

conviction under the name of Milton Cummings, as to which th ere is no evidence.

Q No evidence and for what was that conviction?

MR. CABANISS: The conviction was for burglary, Mr. Justice.

Q And the five-year penalty?

MR. CABANISS: No, sir, two years.

Q Two years, so there is not attack on that?

MR. CABANISS: There is no challenge in the record. No record of evidence on that.

Q He was impeached on that as well as three others?

MR. CABANISS: Yes, he was, your Honor.

Q And in connection with the others, the record is silent?

MR. CABANISS: There was a 1931 conviction in Parchman, Mississippi, at which time he was 17 years of age. The sentence was six months. That was the earliest conviction.

Q That's the record that was silent. On the other two, it said he appeared in his own person?

MR. CABANISS: That's correct. One said in person and one said in his own proper person, that is correct.

The State apparently in its brief as to this latter point, the harmfulness of the error, would argue that the State was only obligated to establish a prima facie case,

th at it did so, and that therefore there was no harmful error. But in doing so, it would also place the burden upon Loper to show that the error was harmless error; that is, the burden of this issue was put on Otis Loper, that is the burden to prove this issue was put upon Otis Loper. That is, as I construe the case, certainly not the case. The State benefited from the transgression and accordingly it has to show that the tained evidence that was introduced to the jury did not affect or influence the jury's verdict.

We do not believe that it here can.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Cabaniss.

Mr. Darden.

ORAL ARGUMENT OF ROBERT DARDEN,ESQ.

ON BEHALF OF RESPONDENT

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

Petitioner has misrepresented the question of issue presented to the Court now for review. In the 1947 trial for rape, the State, on cross-examination, had Otis Loper testify about four prior convictions, three in the State of Mississippi, one in the State of Tennessee, and this was for impeachment purposes.

Now, all four of these convictions have become final and there has never been any effort to set any of these cases aside. These convictions were valid for all

purposes and will remain valid until set aside by the proper post-conviction state of federal proceedings.

Q Why isn't this a proper proceeding in which to set them aside?

MR. DARDEN: Your Honor, getting to this in the District Court in 1969, the writ of habeas corpus that was filed was just to get relief from the 1947 Texas conviction.

Q But underlying that claim was invalid practice?

MR. DARDEN: In this he asserted that the four prior convictions were void.

Q And he introduced evidence, as much as he had, to prove that, namely about two of them, the transcript of the proceedings or the docket entries--about three of them he did that.

MR. DARDEN: Yes.

Q And nothing about the fourth.

MR. DARDEN: Yes, that's right, Mr. Justice.

Q Wasn't that true in Burgett? They hadn't been officially and conclusively set aside by some other court before the proceedings began, isn't that true?

MR. DARDEN: Yes, Mr. Justice.

Q Again, why couldn't the Court here have said, the Court finds that these prior convictions were invalid, since he pleaded guilty or was convicted without counsel?

MR. DARDEN: Well, as was held by the District Court,

the District Court said the convictions were valid. The Fifth Circuit pointed out in their opinion that since the handing down of Gideon versus Wainwright, which was six years prior to his going to trial in 1969, it did nothing toward getting this removed from his record.

Q But under Burgett, he didn't have to--in Burgett, he had done nothing either.

MR. DARDEN: That's true. We are saying that Burgett does not apply.

Q Well, it bears on the point you are now making, doesn't it? Maybe the overall decision doesn't apply but in Burgett he had done nothing independently until he initiated the Burgett litigation to assert that the priors were invalid, isn't that rue, or am I mistaken?

MR. DARDEN: Yes, sir, you are correct. In that particular case, as I understand, this was used for enhancement and in order for them to bring in the original indictment, they also alleged the two or three priors which was a part of their proceedings. In our case, this was for impeachment purposes alone, and it was not necessary to show other than that these were valid convictions, and in the State of Texas, at that time, it was permissible to impeach any witness that took the stand on prior convictions or indictment or information or complaint, so in this particular case, if they had only brought in the prior indictments in which he would not

have had an attorney either, we could have impeached him in Texas as in 1947. This law was not changed until 1951.

Q In Texas, then, you don't have to show final judgment of conviction, or at least you did not at that time?

MR. DARDEN: In 1947, no, Mr. Justice.

Q In 1947 if a man was indicted and acquitted, you could show him indicted?

MR. DARDEN: Yes, Mr. Justice.

Q But whatever you could have shown, the fact is here you did purport to show previous convictions, not just indictments? You didn't say indicted for this or that, you said he had been convicted, through cross-examination, isn't that true?

MR. DARDEN: Yes, Mr. Justice.

Q And you say it is a difference between what is in this case, between doing it in this case and when it is solely for enhancement, is that right?

MR. DARDEN: Yes, Mr. Justice.

Q What is the difference, when the jury fixed the time of sentence? What was the difference?

MR. DARDEN: Our contention--

Q Is it true that it is two years to life in this case?

MR. DARDEN: Two to death.

Q Two to death, yes, and the jury can fix from two to death, and you think that's different from where the jury can enhance the sentence?

MR. DARDEN: It is mandatory in enhancement, if they find the prior convictions valid. Then it is mandatory.

Q But it is permissible?

MR. DARDEN: Yes.

Q He did get 50 years?

MR. DARDEN: Yes, sir.

Q Are you familiar with the Tucker case?

MR. DARDEN: No--I think I read it prior to this.

Q Well, if you read the Court of Appeals decision that was affirmed here this week by this Court, that decision of the Court of Appeals confirmed here, required that the case go back for re-sentencing because the sentencing body, in that case the judge, gave consideration to prior convictions that were invalid under Gideon against Wainwright. Now, here the sentencing body was the jury and it certainly had before it these prior convictions, didn't it?

MR. DARDEN: This is true, your Honor.

Q Assuming what I say is a correct description of the Court of Appeals decision in Tucker and this Court's decision, wouldn't you think that at least this should go back for re-sentencing and under Texas procedure, I suppose that

means a new trial because the jury does perform both functions in Texas, is that right?

MR. DARDEN: Yes, your Honor.

Q Does the jury still perform the function of sentencing as it did in 1947 when this case was tried?

MR. DARDEN: Well, the statute has been changed to permit the Petitioner or Defendant to make a request to have a dual trial or to have the judge sentence, depending on what he wants to do.

Q If it were sent back for re-sentencing, now, what would be the mechanism of re-sentencing under present Texas law?

MR. DARDEN: In essence, probably it would be given another trial or permitted to plead for any sentence less than 50 years.

Q He would have the option of a trial on penalty only?

MR. DARDEN: Yes, sir, What we are saying, Loper has tried to accomplish both in the lower courts and this Court--this Court is being petitioned to set aside the Texas conviction and the three Mississippi convictions and the one Tennessee conviction. Respondent submits that this Court in considering this question presented by the Petitioner, must assume the _____ of the Mississippi convictions, the Tennessee conviction and in order to reach the question

presented, the question presented and the question which the Court has been requested to consider is purely hypothetical and there is no case in controversy involving the prior void convictions for impeachment purposes. The prior convictions are valid and remain so until set aside through the proper proceeding.

Under the argument of appointment of counsel, prior to Gideon versus Wainwright, which was decided in 1963, the State of Tennessee and the State of Mississippi required appointment of counsel for indigents upon request, and the record is silent in this case as to whether or not Loper was indigent and that the Court hadknowledge of this and the record is silent as to whether or not he had made a request and that this request had been denied.

On the form of impeachment, Otis Loper took the stand to deny the assault. He also denied that anything was wrong with the complaining witness when he left for town, and that if anything had happened to the complaining witness, this was done by the McGee boy. In this we feel that Harris versus New York is applicable in that when a defendant takes the stand to testify, he is to state the truth and be accurate. Not only did Loper deny the assault, but he also gave an alibi that nothing was wrong with the complaining witness, which we found not to be true on the testimony of Dr. Weller, and also that if anything had happened, such as

the assault, it was the McGee boy.

Q Well, in this case there was no challenge to the impeaching material. The Harris case was one in which the very material used to impeach him was being challenged and was in issue. I have difficulty seeing how this is like Harris.

MR. DARDEN: One was using the prior statements that did not come under Miranda.

Q That's right.

MR. DARDEN: And if we use the same logic here, we are talking about uncounseled convictions introduced to impeach a witness at the _____.

Q Mr. Darden, I wonder if I correctly understood your answer to the Chief Justice when he asked you if this went back for re-sentence, what procedures would now be applied. What did you say?

MR. DARDEN: It would depend on what the Defendant wanted to do, whether or not he wanted to plead for a lesser sentence or wanted a new trial.

Q You mean that if this Court were to say it had to go back for a re-sentence, the Petitioner would have the option of saying, "I want a new trial"?

MR. DARDEN: Your Honor, I think, Mr. Justice, this would be worked out with his attorney, him and the prosecutor.

Q But he has a choice? Although we send it back only for re-sentence, he has the choice of having a new trial, is that right?

MR. DARDEN: I think this is right, based on the agreement between counsel.

Q Yes, but let's assume that we said that constitutionally his sentence can't stand but the verdict of guilty may, and all Texas has to do is re-sentence him?

MR. DARDEN: This would be a nun pro tunc judgment entered.

Q Well, the sentence would be invalid but the conviction would not be. Let's assume the Court held that, under Texas law would he have to have a new trial? Aren't there procedures just for re-sentencing?

MR. DARDEN: No, this, your Honor, could come under nun pro tunc judgment.

Q Just an appearance before a judge for sentencing without the retrial?

MR. DARDEN: Yes.

Q He's been paroled now?

A Yes, as of September, your Honor.

Q Mr. Darden, did I understand you to say that in one or all of these prior conviction cases, the record does not show whether or not this Petitioner waived the right to counsel?

MR. DARDEN: This is correct, your Honor. There is nothing in the record that shows that he even made the request as required in the State of Tennessee and in the State of Mississippi at that time, or that he was indigent and that the Court had knowledge of it.

Q That is not in dispute.

MR. DARDEN: Well, he came in, in the hearing in 1969 in Houston, in the District Court and said that he couldn't afford an attorney but the cases and the statute in Tennessee and Mississippi, which is pointed out in our brief, states that they have to have knowledge of his indigence and that he makes a request for counsel. This the record is silent upon.

Q And no evidence as to whether or not he was offered counsel and intelligently and knowingly waived the right to counsel?

MR. DARDEN: The record is silent.

Q It is silent on that?

MR. DARDEN: Yes, sir.

Q Well, what did he say? Did he say anything about that at the habeas corpus?

MR. DARDEN: The only thing I remember, Mr. Justice, is that he did not waive counsel, he did not have funds to employ counsel.

Q So the record does contain--

MR. DARDEN: Well, this was just a statement in the District Court from that standpoint.

Q Right, under oath I presume?

MR. DARDEN: Yes, but the District Judge did not believe any of his testimony and held that these convictions were valid.

Q Of course, the Court of Appeals did proceed to decide the legal question, did it not? It just said, "We hold that these prior convictions, even if invalid, can be used for impeachment purposes," didn't it?

MR. DARDEN: Yes; I might add under impeachment, any time a witness takes the stand, his character is in issue. The Federal Rules permit prior convictions for impeachment purposes and Texas in 1947 permitted much further.

Q But Mr. Cahaniss, who is raising perhaps alternatively a narrower question, and that is that in a case such as in Texas in 1947, where the jury imposes the sentence rather than the judge, as in most jurisdictions, that in Texas in those circumstances, then the evidence of impeachment falls within the reach of what the Court has said is not permitted; that is, it goes to enhance the punishment or at least he argues that no one can say that it did not increase the punishment.

MR. DARDEN: We take the position that it did not, Mr. Chief Justice, based on the facts. In their brief they

point out thatonly the eight-year-old is the only one that implicated Otis Loper, the Defendant. Unfortunately, in these types of sex crimes, there are only two people around. But she also testified that this is the same thing that he had done the year before when she was living with her grandparents in Alabama, and that he threatened her and she did not tell them what had happened, and finally told them that she had fallen on a stick to hurt herself. This testimony came out and with this, along with the fact that he was impeached, the jury has now a prior offense which could justify the 50 years.

The only thing he said was, "No, I didn't do it but if it happened, the McGee boy did it." There is nothing in the record that shows the McGee boy was even present at that house on August 9, 1947, or that the boy was present that Friday before.

It is our position that he has not attacked or removed these convictions in the proper court by going back to the convicting court. Therefore, the jury in the State, and in the Federal District Court, the Fifth Circuit, should be upheld.

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

Mr. Cabaniss, do you have anything further?

REBUTTAL ARGUMENT OF JOHN T. CABANISS, ESQ.,

ON BEHALF OF PETITIONER

MR. CABANISS: One thing, Mr. Chief Justice. I want to correct what may have been a misimpression or maybe I am not reading the Court correctly. We were talking about sending the matter back for re-sentencing which appears to me an indication of limiting the concept of Burgitt to one which in fact is restricted to a situation of enhanced or increased punishment.

I read Burgitt more broadly than that, and it appears to me re-sentencing would not be satisfactory in a circumstance where the invalid tainted evidence introduced might have affected not only the sentencing of Otis Loper but also his conviction of guilt on the primary offense. It seems to me in that posture, that the requirement is not re-sentencing but avoidance of the conviction and I simply wanted to bring that point forward in case I had not made myself clear.

Q On the retrial, do you have any idea where the complaining witness might be as of now?

MR. CABANISS: No, Mr. Justice, I do not. I'm not sure where Mr. Loper is now.

Q She was eight years old in 1947, right?

MR. CABANISS: That is correct.

Q Mr. Cabaniss, do I understand that Loper is now on parole?

MR. CABANISS: Yes, Mr. Justice, he was paroled and

it is my understanding he is now working in Galveston, Texas.

Q Have you anything to say about what the procedure might be on re-sentencing if that were the limitation upon which it was sent back?

MR. CABANISS: No, Mr. Justice, I don't. I'm not familiar with what would be used. I would believe that Texas does have procedures in a case like this, for re-sentencing without--

Q Without a new trial?

MR. CABANISS: Yes, for full consideration.

That's all I have, unless the Court has further questions.

MR. CHIEF JUSTICE BURGER: Mr. Cabaniss, you acted at the request of the Court in this case.

MR. CABANISS: Yes, your Honor.

MR. CHIEF JUSTICE BURGER: We want to thank you for your assistance to the Court and your assistance to the clients represented here.

The case is submitted.

(Whereupon, at 11:32 o'clock, a.m. the case was submitted.)